



# Current Developments in Municipal Law

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## Appellate Tax Board Cases Book 2A

**2015**

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**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**AIRFLYTE, INC.**

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

Docket Nos.: F311916  
F311917  
F311918

Promulgated:  
October 1, 2014

**ATB 2014-731**

These are appeals under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Westfield (“appellee” or “assessors”), to abate taxes assessed on certain property located in the City of Westfield and assessed to AirFlyte, Inc. (“appellant”), under G.L. c. 59, §§ 11 and 38, for fiscal year 2011. The question presented for consideration was whether the property at issue was subject to taxation under G.L. c. 59, § 2B.<sup>1</sup>

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

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.

*Lauren J. Elliot*, Esq. for the appellant.

*Brian J. Pearly*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

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

The appellant’s case was presented largely through Mr. Gary Potts, the appellant’s president and owner, whose testimony the Board found credible. The appellant was a for-profit corporation organized in Massachusetts that Mr. Potts testified had continuously served as a Fixed Base Operator (“FBO”)<sup>2</sup> at Westfield-Barnes Regional Airport (“Airport”) for

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<sup>1</sup> The appellant disputed both the property’s taxation under G.L. c. 59, § 2B and its valuation. The appeals were bifurcated and a hearing was held first to address the issue of taxability.

<sup>2</sup> The Federal Aviation Administration has defined an FBO as “a commercial business granted the right by [an] airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc.” *U.S. Department of Transportation Federal Aviation Administration Advisory Circular*; AC No: 150/5190-7, p.13.

approximately twenty-three years.<sup>3</sup> For several years preceding the hearing of these appeals, the appellant was responsible for approximately eighty-five percent of the FBO services at the Airport. In its capacity as an FBO, the appellant provided a variety of services including fueling, maintenance, repair, parking and storage of aircraft. The appellant also offered services to facilitate flight arrival and departure as well as embarkation and disembarkation of passengers and crew.

Mr. Potts testified that the appellant's services were available to anyone who wished to use them. There was no membership or other "pre-use" requirement for a prospective customer to purchase the appellant's services. Further, the appellant advertised its services via a website, brochures, and mailings, each of which encouraged interested persons to visit the appellant's operation, and to inquire about and purchase the appellant's services.

### **The Property at Issue**

On January 1, 2010, the relevant assessment date for fiscal year 2011, the appellant was the lessee of three parcels of real estate located within the Airport, a non-commercial airport owned by the City of Westfield (collectively, the "subject property"). Two of the parcels were located at 32 Airport Drive and one at 110 Airport Drive. The first parcel at 32 Airport Drive ("Parcel 1") consisted of 6.09 acres. It was improved with two airplane hangars, a storage building and a "fuel farm," a facility dedicated to fueling aircraft. The hangars, which were approximately 18,000 and 18,600 square feet in size, roughly twelve percent of which consisted of workshop and office space, were used to store, service, maintain and repair aircraft. The storage building contained personal property used in support of the appellant's operations. The second parcel at 32 Airport Drive ("Parcel 2") consisted of approximately one acre improved with a 9,500-square-foot hangar, which the appellant used for parking aircraft when the hangars on Parcel 1 were full.

The parcel located at 110 Airport Drive ("Parcel 3"), was within the Airport's administration building. The leased premises consisted of office space used by the appellant to facilitate flight arrival and departure, and provide security and other services for passengers and aircraft crew.

### **The Subject Property's Leases**

A lease for each of the parcels that comprised the subject property was entered into evidence during the hearing of the appeals. The appellant was identified as the lessee in each of the leases. The lessor was identified, variously, as the Westfield Airport Commission, the City of

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<sup>3</sup> The appellant had not been assessed real estate tax under G.L. c. 59, § 2B or otherwise prior to fiscal year 2011.

Westfield Airport Commission and the Westfield-Barnes Airport. The record does not reflect whether the named lessors were, in fact, different entities. There is no dispute, however, that in each instance, the lessor was an instrumentality of the City of Westfield.

Although the provisions of the leases were similar in most respects, the lease for Parcel 1, executed on December 22, 2006, and entitled “Fixed Base Operator Airport Lease and Agreement” (“Lease”), articulated in greatest detail the obligations of the appellant as they related to the operation of its business at the Airport. In particular, Article VI, Section 6.1 of the Lease required the appellant to “establish, maintain and operate a multi-service fixed base operation” on the leased premises and in that capacity to provide various services to its regular customers and the general aviation community including: aircraft maintenance and repairs; aircraft storage; aircraft charters and/or air taxi services; and a host of hospitality services.<sup>4</sup> Section 6.2 of Article VI required the appellant to make the referenced services and facilities “available to the public during daylight hours of each day of the week” and “to have an available on-call service for reasonable after hours requests for service from airport customers.” Failure to provide the required services would have constituted a default by the appellant, in which case the lessor was entitled to terminate the Lease immediately. Both Mr. Potts’ testimony and the record taken as a whole indicated that the appellant fully complied with its obligation to supply FBO and other required services at the subject property.

### **Jurisdiction**

For fiscal year 2011, the assessors valued the subject property and issued assessments as follows:

<b>Parcel</b>	<b>Assessed Value</b>	<b>Tax Rate/1000</b>	<b>Tax Assessed</b>
Parcel 1	\$2,614,900	\$29.13	\$76,172.04
Parcel 2	\$372,600	\$29.13	\$10,853.84
Parcel 3	\$159,700	\$29.13	\$4,698.58 <sup>5</sup>

Having timely paid the taxes due, the appellant filed an application for abatement with respect to each parcel on January 11, 2011. The abatement applications were deemed denied on April 11, 2011, and the appellant timely filed Petitions Under Formal Procedure with the Board on May 27, 2011. Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

For the reasons explained in the following Opinion, the Board found and ruled that the appellant was not subject to real estate tax under G.L. c. 59, § 2B because the appellant’s lease of

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<sup>4</sup> The leases for Parcels 2 and 3, executed on April 1 and May 1, 2007, respectively, also required provision of FBO services on the leased premises.

<sup>5</sup> This sum included a Community Preservation Act “CPA” surcharge of \$46.52.

the subject property and associated operation as the primary FBO at the Airport were “reasonably necessary to the public purpose of a public airport . . . which [was] available to the use of the general public.” *Id.*

Accordingly, the Board issued a decision for the appellant in these appeals and granted an abatement in the total amount of \$91,724.46.

### OPINION

General Laws chapter 59, section 2B (“§ 2B”), which addresses taxation of municipally owned land, provides:

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

Thus, municipally-owned property used in connection with a for-profit business, or leased or occupied for other than public purposes, is generally taxable to the user, lessee or occupant. *See, e.g., Smith v. Assessors of Fitchburg*, Mass. ATB Findings of Fact and Reports 2008-73, 77. However, under § 2B, real estate taxes do not apply to municipally-owned property if its use, lease or occupancy is “reasonably necessary to the public purpose of a public airport . . . which is available to the use of the general public.”

The appellant argued that it satisfied all of § 2B’s requirements for exemption from tax. Although the assessors did not dispute the issue of ownership of the subject property or whether the Airport constituted a public airport within the meaning of § 2B, they asserted that the appellant was not “reasonably necessary to the public purpose” of the Airport nor were its services “available to the use of the general public.”

The appellant has served as an FBO at the Airport for more than twenty-three years, and as of the relevant assessment date, was responsible for approximately eighty-five percent of the FBO services provided at the Airport. Services provided by the appellant included parking, storage, refueling, maintenance and repair of aircraft, as well as facilitation of flight arrival and departure and embarkation and disembarkation of passengers and crew. The assessors acknowledged that these services were essential to the operation of the Airport and “reasonably

necessary to [its] public purpose.”<sup>6</sup> They argued, however, that the appellant, as the provider of the services, was not. The assessors’ conclusion rested on two subsidiary arguments. The first was that as a for-profit corporation, the appellant’s sole purpose was to make a profit, *ipso facto*, it could not be reasonably necessary to the public purpose of a municipal airport. The assessors next argued that no single FBO “is integral or essential” to the operation of the Airport, as any FBO could be replaced by a new FBO at the behest of the Airport Commission. Thus, the successful operation of the Airport was in no way dependent on the services provided by the appellant or any single FBO. Finally, the assessors separately argued that the “appellant’s hangars and office space” did not serve a public purpose because they were not reasonably necessary to the public purpose of the Airport. The Board found the assessors’ arguments unpersuasive.

As support for their assertion that the operation of a for-profit corporation could not, by definition, be reasonably necessary to the public purpose of a municipal airport, the assessors cited *Willowdale LLC v. Assessors of Topsfield*, 78 Mass. App. Ct. 767 (2011). In *Willowdale*, the Appeals Court affirmed the Board’s decision that a mansion located in a public park and leased to a private company for restoration and operation “as a bed and breakfast and for other specified for-profit purposes” was not exempt from property tax under § 2B. *Id.* at 768. Neither the Appeals Court nor the Board, however, concluded that a for-profit entity could not qualify for exemption under § 2B. To the contrary, in its decision, the Board observed that “[p]roperty owned by a municipality may serve a public purpose even though it is managed or operated by a private, for-profit entity, and even though the private entity charges admission to the facility.” *Willowdale LLC v. Assessors of Topsfield*, Mass. ATB Findings of Fact and Reports 2010-239, 248, *aff’d*, 78 Mass. App. Ct. 767 (2011)(quoting *MCC Management Group, Inc. v. Assessors of New Bedford*, Mass. ATB Findings of Fact and Reports 2000-886, 903)(additional citation omitted).

The facts of *Willowdale* are also distinct from those of the present appeals. Operation of the mansion in *Willowdale* was entirely independent of the use of the surrounding park. *Id.* As the Appeals Court noted, “[t]he public is free to walk the park’s trails and meadows and admire its ponds and natural beauty without regard to the presence of the mansion.” *Willowdale*, 78 Mass. App. Ct. at 770, 771. In sharp contrast, the FBO services provided by the appellant were concededly essential to the operation of the Airport and reasonably necessary to its public

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<sup>6</sup> The assessors’ view is consistent with the minimum requirements for airports under Massachusetts law. For example, 702 C.M.R. 5.03(d) mandates the presence of servicing facilities at airports, which includes the presence of “a hangar for the housing of aircraft; aviation gasoline and oils must be available for sale; there must be facilities for minor aircraft and engine repairs and facilities for tying down aircraft.”

purpose. That the appellant operated as a for-profit corporation did nothing to undermine its role in fulfilling the public purpose of the Airport.

The Board found the assessors' argument regarding the fungibility of FBOs similarly unavailing. To accept the argument would necessarily mean that exemption from tax under § 2B would only be available if there was a single unique user, lessee or occupant to fulfill a role that otherwise fell within the purview of the exemption. "A statute or ordinance should not be construed in a way that produces absurd or unreasonable results when a sensible construction is readily available." *Manning v. Boston Redevelopment Authority*, 400 Mass. 444, 453 (1987). To adopt the assessors' view would produce just such a result. Moreover, existing precedent substantially undermines the assessors' argument. In *MCC Management Group*, the Board found that a skating rink located on property owned by the City of New Bedford and operated by a private for-profit management company was not taxable under § 2B. *MCC Management Group, Inc. v. Assessors of New Bedford*, Mass. ATB Findings of Fact and Reports at 2000-895. The facts as presented in *MCC Management Group* and common sense indicate that the management company operating the skating rink was not the sole entity able to fulfill its role. In sum, the Board found that the assessors' argument was at odds with the Board's prior construction of § 2B as well as a fundamental principle of statutory construction.

Finally, the Board found the assessors' focus on the "appellant's hangars and office space" as not reasonably necessary to the public purpose of the Airport misplaced. It is not property in and of itself that provides the basis for exemption under § 2B, but the lease, use or occupancy of property. In the present appeals, the subject property, which consisted primarily of land improved with hangars, as well as a fuel farm, a storage building, and a limited amount of office space, were leased and used by the appellant to provide essential FBO services that, as previously noted, were reasonably necessary to the public purpose of the Airport. Thus, the appellant's lease, use and occupancy of the subject property satisfied the necessity and public purpose requirements of § 2B.

The final requirement for exemption under § 2B is that the appellant's services were available to the use of the general public. Consistent with the terms of the Lease, the appellant's services were available to anyone who wished to purchase them. Indeed, the Lease explicitly required that the appellant's FBO services be "available to the public" for all daylight hours. Further, there was no prerequisite to use of the appellant's services such as a membership fee or other "pre-use" requirement, and the appellant advertised its services to the public at large via a

website, brochures, and mailings. Given these facts, the Board found and ruled that the appellant's services were available to the general public within the meaning of § 2B.

As stated above, the assessors argued the contrary. In particular, the assessors noted that the general public was not able to purchase a commercial airline ticket to fly to or from the Airport and, quoting the appellant's own promotional materials, that the appellant had served "private aviation since 1988." Citing *Home for Aged People in Fall River v. Assessors of Fall River*, Mass. ATB Findings of Fact and Reports 2011-370, the assessors also emphasized that the appellant, a for-profit corporation, provided no charitable services and that the purpose of its business was not charitable.

As a threshold issue, whether the appellant provided charitable services is not relevant to the question of whether its services were available to the general public or, for that matter, to these appeals. In *Home for Aged People*, the Board considered independent living and long term care facilities' qualification for exemption from property tax under G.L. c. 59, § 5, Clause Third ("Clause Third"). *Id.* Clause Third requires that a taxpayer claiming exemption must prove first that property is owned by a charitable organization and second, that a charitable organization occupies the property for charitable purposes. *Home for Aged People in Fall River*, Mass. ATB Findings of Fact and Reports at 2011-391, (citing *Jewish Geriatric Services, Inc. v. Longmeadow*, Mass. ATB Findings of Fact and Reports 2002-337, 351, *aff'd*, 61 Mass. App. Ct. 73 (2004)). The exemption under Clause Third is wholly separate from and has no bearing upon § 2B, which specifies its own distinct criteria for exemption.

The Board also found that the absence of a commercial airline at the Airport and the appellant's provision of services to those who use or own private aircraft were not dispositive. Of substantially greater import were the appellant's provision and marketing of various and essential services to any individual or entity in the public that may have sought the services.

On the basis of the foregoing, the Board found and ruled that the subject property was not subject to real estate tax under § 2B. There is no dispute that the appellant was the lessee of property owned by the City of Westfield and that the FBO services provided by the appellant at that property were reasonably necessary to the public purpose of the Airport. That the appellant operated as a for-profit entity and could have been replaced by another FBO did not affect the logical inference that the appellant's lease of and operations at the subject property were reasonably necessary to the requisite public purpose. Finally, the unrestricted availability and marketing of the appellant's services provided ample support for the conclusion that the appellant's services were available to the general public.

Accordingly, the Board issued a decision for the appellant in these appeals and granted an abatement in the total amount of \$91,724.46.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,  
Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**ANNA HARRIS SMITH  
CONSERVATION TRUST, INC.**

v. **BOARD OF ASSESSORS OF  
THE TOWN OF PEMBROKE**

Docket Nos.: F317393

Promulgated:  
April 1, 2015

**ATB 2015-123**

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 Pembroke (“appellee” or “assessors”) to abate a tax on certain real estate in Pembroke, owned by and assessed to Anna Harris Smith Conservation Trust, Inc. (“Trust” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2012 (“fiscal year at issue”).

Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose and Chmielinski joined her 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.

*Mark J. Lanza, Esq.* for the appellant.

*Catherine M. Salmon*, assessor for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of the evidence presented, including the testimony and documentary exhibits entered into the record, the Appellate Tax Board (“Board”) made the following findings of fact.

Introduction and jurisdiction

On January 1, 2011, the relevant assessment date for the fiscal year at issue, the Trust was the assessed owner of a 59.5-acre parcel of vacant land, identified on the assessors' Map E10 as Parcel 71A and located off of Washington Street in Pembroke ("subject property").

For the fiscal year at issue, the assessors valued the subject property at \$594,900 and assessed a tax thereon, at the rate of \$13.91 per thousand, in the total amount of \$8,275.06.<sup>1</sup> In accordance with G.L. c. 59, § 57A, the appellant paid the tax due for the fiscal year at issue without incurring interest. On February 1, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, seeking an abatement of the tax on the grounds that the subject property was exempt under G.L. c. 59, § 5, Clause Third ("Clause Third"), which provides an exemption for property owned and occupied by charitable organizations. The assessors denied the appellant's Application for Abatement on April 9, 2012. On July 6, 2012, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petition with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The subject property is a vacant parcel of wooded land, with wetlands in some areas. The subject property has no frontage but is backland located off of Washington Street. It is situated adjacent to an approximately 9-acre parcel that was owned by the Animal Rescue League of Boston ("ARL") for the operation of a shelter. By deed dated June 15, 2003, the appellant acquired the subject property from the ARL for nominal consideration. Pursuant to a confirmatory fiduciary deed dated June 21, 2005,<sup>2</sup> the appellant has the right and easement to use the abutting parcel of land owned by the ARL for access to the subject property from Washington Street by foot, horseback, and in motor vehicles.

The subject property is owned by the Trust, which was incorporated on January 22, 2003. According to its Articles of Organization, the purposes of the trust are:

To establish one or more refuges for the wild and domesticated animals, in addition to any other charitable or benevolent act for the welfare of animals in connection with and for the benefit of the Animal Rescue League of Boston;

To promote the conservation and protection of natural resources by utilizing real property in a manner consistent with environmentally sound practices (The term "natural resources" shall include but not be limited to agricultural land, woodlands, open space, wetlands, ponds, streams, unique land formations, wildlife, and habitats for wildlife);

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<sup>1</sup> This amount is exclusive of the Community Preservation Act surcharge of \$68.84.

<sup>2</sup> The confirmatory fiduciary deed was prepared to correct errors in the original deed, dated June 15, 2003, pertaining to the description of the subject property's property line.

To make wild, open, and unspoiled places accessible to the public in ways that are consistent with preserving and protecting the habitat of the creatures who live there;

To utilize any or all of such property for educational purposes, specifically, for inculcating in young and old respect for nature, and kindness towards all animals, wild and domestic;

To provide final resting places for deceased animals, in an environment that protects and preserves the natural features of such areas;

To use conservation easements, agricultural restrictions, environmentally sound subdivision methods, and other techniques to promote the conservation and protection of natural resources consistent with the protection of land in Pembroke, Massachusetts and elsewhere; and

To solicit, collect and otherwise raise funds for the protection of land in Pembroke, Massachusetts and elsewhere for the purpose of directly and indirectly preserving open space and protecting natural resources.

#### The appellant's case-in-chief

The Trust presented its case-in-chief through the testimony of its two witnesses, Robie White and Robert Williams.

Mr. White, the Chief Operating Officer for the ARL, was, during the period relevant to this appeal, serving as the Chief Financial Officer for the ARL. He testified to the relationship between the ARL and the Trust, explaining that the ARL formed the Trust with the purpose of donating the subject property to it. The ARL originally owned the subject property and the adjacent property that had previously housed the ARL's animal shelter before the shelter closed. The two parcels together totaled sixty-nine acres. Mr. White testified that the ARL decided to form the Trust and donate the subject property to it, because "we realized that we didn't need sixty-nine acres for a shelter." He explained that the Trust was named after Anna Harris Smith, who was the founder of the ARL, and that the ARL and the Trust share directors in common. Mr. White testified that, while ARL has a broad-based mission relating to animals, it wanted to create a separate organization, with a focus on providing a "wildlife sanctuary," to own and manage the subject property. However, he testified that he himself had never observed wildlife on the subject property. He also stated that one of the purposes of the Trust was to promote the conservation of the existing land. When asked by counsel what type of vegetation was present at the subject property, Mr. White responded that there was a combination of "trees and shrubs."

Mr. White next described some of the features of the subject property. He testified that a brook runs through the subject property, which he had never observed to be dry, and that the

Department of Fisheries and Wildlife had designated a portion of the subject property as a habitat or “potential habitat” for the Eastern Box Turtle. Mr. White further testified that the subject property had no structures other than an approximately 5-foot wide, 100-yard long wooden boardwalk which ended at a viewing platform near the brook. He testified that the Trust had engaged the Audubon Society to construct the walkway and that the Trust maintains the walkway.

As an example of this maintenance, Mr. White referred to equipping the trail with dog-litter stations and ensuring periodic removal of waste from them. Mr. White further stated that there are several trails throughout the subject property that the general public can use for hiking and walking dogs. The Trust additionally introduced into evidence a photograph to show that the subject property also contained a part of a memorial wall, dedicated to deceased pets, that was constructed of the bricks that had previously formed a walkway to the former ARL shelter. Mr. White testified that after the ARL shelter was closed, the bricks were excavated and formed into a wall, part of which was located on the subject property.

Mr. White next testified to the means by which the Trust made the subject property accessible to the public. He testified that the Trust built the walkway to enable the public to traverse part of the subject property, since it was mostly wetlands. To explain how the Trust notified the public that it was invited to use the subject property, it submitted into evidence a copy of an article, dated March 16, 2007, in a publication, “Wicked Local Pembroke,” entitled “ARL Pembroke facility extends hours prior to closure.” This one-page article includes two sentences explaining the availability of the subject property to the public: “The League will also continue preserving its 60-acre nature sanctuary to the rear of the Pembroke facility. This parcel, subdivided and split off from the original 69-acres purchased by the League in 1994, will continue to be available to the community for nature trails and dog walking.” On cross-examination, Mr. White admitted that “Wicked Local Pembroke” was the only publication he could pinpoint that had advertised or otherwise mentioned the availability to the public of the subject property’s grounds, but that he thought that this piece “was representative of the efforts of the Trust to inform the public.” The Trust advanced no other evidence on this matter of invitation to the public.

The Trust’s next witness was Robert Williams, the Director of Facilities for the ARL. When asked what duties he performs for the Trust relative to the subject property, Mr. Williams testified that he “swings by” the subject property on a “[m]onthly basis, for the most part. Plus or minus.” Mr. Williams testified to performing the following duties: clearing the pathways of

brush if needed; checking for vandalism; insuring that all signage remains intact; and tending to the dog waste stations, which he admitted were not heavily used and therefore did not need to be emptied frequently. Mr. Williams further testified that he had found evidence of hunting at the subject property, so he posted signs that prohibit hunting and trapping. In addition, Mr. Williams testified that the boulder at the beginning of the boardwalk path included a plaque indicating that the subject property was owned by the Trust. Finally, Mr. Williams stated that, as part of his duties, he traverses the boardwalk to its end about three times a year.

When asked about the wildlife that he had observed at the subject property, Mr. Williams responded: “Deer, squirrel ... I have seen some other small wildlife. I’m not sure, you know, scattering through the woods when I’ve walked the trail, not knowing if it could have [been] a rabbit or a small fox, but there is evidence of wildlife on the property.” He further testified that Little Pudding Brook runs through the subject property, that the boardwalk ended at a landing overlooking that brook, and that he had never observed it to be dry. When asked how many times he had traversed the boardwalk and observed the brook, Mr. Williams testified: “Well, I’ve been with the League for six years, I’d probably say three times a year, eighteen to twenty-four times over the last six years.”

In addition, Mr. Williams testified that the subject property does not “get a lot of activity,” and that activity, as well as his presence, at the subject property has declined since the adjacent ARL shelter shut down. Mr. Williams testified that he typically visits the subject property at midday, and when asked how often he encounters people at the subject property when he visits, he responded, “not often.” Upon cross-examination, Mr. Williams testified that he had no knowledge of any notice provided by the Trust to the public regarding the availability of the subject property for use by the public, other than the few lines in the “Wicked Local Pembroke” article. Upon questioning by the Presiding Commissioner, Mr. Williams testified that the Trust does not hold any activities or events at the subject property.

#### The assessors’ case-in-chief

The assessors presented their case-in-chief through the testimony of Assessor Catherine M. Salmon, who also submitted photographs of the subject property. Ms. Salmon testified that the subject property is located behind the former ARL property and did not have frontage of its own and therefore, it is not easily accessible to the public. She further testified that, as a resident of the town of Pembroke as well as an assessor, she had no knowledge of the existence of any trails on the subject property prior to her dealings with the subject property for the abatement appeal. She further testified that there were never any signs posted at the former ARL property to

inform the public that they were invited to enter the subject property and use its trails. Instead, she testified that, to access the subject property, one would have to first approach the abandoned ARL property and then traverse its long driveway. She stated that no one approaching through the ARL property would ever realize there was an easement enabling access from Washington Street to the subject property, as there was no sign announcing the easement.

In fact, Ms. Salmon further testified that there are actually signs posted at the subject property alerting the public that it was “private property,” which she opined created a further disincentive for the public to enter the property. Mr. Williams was allowed an opportunity to explain that the “private property” sign in the assessors’ exhibit was the same “no hunting” sign to which he had referred in his testimony. Mr. Williams described the sign as a generic “no hunting” sign, which simply included what he would characterize as stock “posted private property” language. However, a photocopy picture of the so-called “no hunting” sign, entered into evidence, showed the sign’s “posted private property” language emblazoned prominently in large capital letters, with the remaining text, including the language prohibiting hunting, in much smaller, less visible font below. In fact, this language was not even legible on the copy of the picture submitted to the Board. The Board found that a visitor to the subject property would notice the “private property” language immediately and from a much farther vantage point than the smaller “no hunting” language at the bottom of the sign.

The Board’s exemption findings.

On the basis of all of the evidence, the Board found that the Trust was created by the ARL, just a few months before the ARL transferred the property to it, for the express purpose of owning the subject property. The Trust did not own or manage any other property, nor did have its own employees. Rather, it shared directors in common with the ARL and employees of the ARL performed services for the Trust.

According to the testimony of Mr. White, the ARL wished to have the subject property managed by an entity that could specifically focus on providing a “wildlife sanctuary,” and it also wished to promote conservation and preservation of natural resources at the subject property. However, the record was essentially void of evidence showing any meaningful efforts on the part of the Trust to carry out those objectives.

As an initial matter, the Trust’s witnesses displayed only a limited knowledge, at best, of the types of flora and fauna it was allegedly trying to preserve. For example, Mr. White himself testified that he had never observed wildlife at the subject property. When asked by counsel what type of vegetation was present at the subject property, Mr. White was unable to give a more

specific answer than “trees and shrubs.” Likewise, Mr. Williams, the person charged most directly with maintaining the subject property, manifested only a very casual knowledge of the wildlife present at the subject property. Specifically, he testified that he had observed “deer, squirrel,” and other “small wildlife” - possibly foxes or rabbits - “scattering through the woods.”

In addition to this limited knowledge, the Board found that the conservation activities undertaken by the Trust at the subject property were minimal. Those efforts consisted of “swing[ing] by” to check signs and dog waste stations at the edge of the subject property approximately once a month, clearing brush from the pathways if necessary, and traversing into the subject property approximately three times a year.

Furthermore, no evidence was offered showing that the Trust held events or programs at the subject property, nor that it published promotional materials or maintained a website. Although the Trust alleged that the subject property was available to the public for hiking, dog walking, and the like, it was able to demonstrate only a single instance in which it informed the public of the availability of the subject property. That single instance was a one-time mention of the subject property in a local publication, and it occurred several years prior to the fiscal year at issue in this appeal. Moreover, there were no signs around the subject property inviting the public to make use of it.

On the contrary, the signs that were posted on the subject property stated, in prominent print, “posted private property,” and only in much smaller print did they contain language prohibiting hunting. Although Mr. Williams testified that he posted the signs because he had observed evidence of hunting on the subject property, and the Trust wished to discourage that practice, the Board found that the signs did not create a reasonable expectation that a visitor would feel welcomed so long as they refrained from hunting. Rather, a person venturing onto the subject property would most likely believe they were trespassing. The Board further found credible Ms. Salmon’s testimony that the entrance to the subject property through a long path winding past the shuttered ARL shelter, which lacked signage announcing the presence of the easement over the ARL property giving access to the subject property, together with the “private property” signs, strongly discouraged the public from making use of the subject property.

Therefore, based on the evidence of record and for the reasons explained more fully in the following Opinion, the Board found that the appellant did not demonstrate that it was a bona fide conservation organization or otherwise a charitable organization for purposes of Clause Third, or that it occupied the subject property in furtherance of its stated charitable purposes. Accordingly, the Board found that the appellant failed to meet its burden of establishing that the

subject property qualified for the charitable exemption found in Clause Third, and it thus issued a decision for the assessors in this appeal.

## OPINION

Pursuant to G.L. c. 59, § 2, all property, real and personal, situated within the commonwealth ... unless expressly *exempt*, shall be subject to taxation. Clause Third provides an exemption for “real estate owned by or held in trust for a charitable organization *and* occupied by it or its officers for the purposes for which it is organized.” (emphasis added). Thus, a taxpayer seeking exemption under Clause Third must satisfy both prongs of this two-pronged test. See *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009). “The burden of establishing entitlement to the charitable exemption lies with the taxpayer.” *Western Massachusetts Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 101 (2001). “Any doubt must operate against the one claiming a tax exemption.” *Boston Symphony Orchestra v. Assessors of Boston*, 294 Mass. 248, 257 (1936).

### I. Qualification as a Charitable Organization

An organization’s legal status as a charitable organization or its exemption from Federal taxation under § 501(c)(3) of the United States tax code is not sufficient to establish it as a “charitable organization” for purposes of Clause Third. *Western Massachusetts Lifecare Corp.*, 434 Mass. at 102. Nor are the stated purposes in its articles of organization sufficient to qualify it as a charity for purposes of Clause Third. Rather, it must prove that “it is in fact so conducted that in actual operation it is a public charity.” *Jacob’s Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313 (1946).

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

*Boston Symphony Orchestra*, 294 Mass. 254-55.

Historically, courts and this Board have considered a list of non-determinative factors in deciding whether an organization is charitable for purposes of Clause Third. Among those factors is whether the organization at issue offers its services or benefits “to a large and ‘fluid’ group of beneficiaries.” See *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732 (2008) (quoting *New England Legal Foundation*, 423 Mass. at 62). How much weight any particular factor will be given depends on how close an organization’s “dominant purposes and

methods are to traditionally charitable purposes and methods.” *New Habitat, Inc.*, 451 Mass. at 733. “The closer an organization’s dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be” in the determination of its charitable status for purposes of Clause Third. *Id.*

Recently, in *New England Forestry Foundation, Inc. v. Assessors of Hawley*, 468 Mass. 138 (2014), the Supreme Judicial Court considered whether land owned by a conservation-oriented organization qualified for the exemption in Clause Third. In that case, the Court held that conservation serves a “traditionally charitable” purpose and that the organization in question in that case conducted activities and provided benefits that “inure[d] to an indefinite number of people and lessene[d] the burdens of government.” *New England Forestry Foundation, Inc.*, 468 Mass. at 155.

In reaching that conclusion, the Court considered the organization’s long history, its extensive real estate holdings, and its many activities. Established in 1944, New England Forestry Foundation, Inc. (“NEFF”) is one of the largest land-conservation organizations in Massachusetts. *New England Forestry Foundation, Inc.*, 468 Mass. at 140. It owns outright over 23,000 acres of land in five states and holds conservation easements on over one million additional acres across seven states. In Massachusetts alone, NEFF owns 7,500 acres of conservation land, including the 120-acre parcel of land at issue in that case. *Id.* NEFF’s articles of organization state that its charitable purpose is to “create, foster, and support conservation, habitat, water resource, open space preservation, recreational, and other activities” by “promoting, supporting, and practicing forest management policies and techniques to increase the production of other natural resources,” and to “support and engage in and advance scientific understanding of environmental issues through research.” *Id.* NEFF’s staff includes licensed foresters, and it offered evidence showing that it “engaged in sustainable forestry practices [at the property at issue and that it used the property] to track the effects of its land management.” *Id.* at 158. Specifically:

Shortly after acquiring the parcel at issue ... NEFF hired an independent licensed forester to develop a “forest management plan” for the maintenance of the forest. The first round of activities recommended by the plan was carried out in 2000, and included such actions as removal of “mature and poor quality white pine and spruce saw logs” to “release good quality growing stock”; “[c]ombination strip cuts and patch cuts for wildlife and softwood regeneration,” and the layout of a “loop demonstration trail” near “old growth type hemlocks” taking into consideration “erosion on fragile soils.” In 2009, the plan was updated, and a tree inventory of the forest was conducted. The 2009 plan recommended that NEFF conduct a patch harvest of approximately sixty-five acres in 2010 and a harvest of a second patch in 2016.

*Id.* at 141. NEFF also offered evidence showing that “it produce[d] a range of awareness-raising materials and h[eld] conferences and continuing education programs for foresters regarding sustainable forestry practices[.]” *Id.* at 158.

In contrast, the Trust at issue in the present appeal provided no evidence that it engaged in activities similar to those of NEFF in furtherance of its stated charitable purposes. It was formed expressly to own – and it only owns – the subject property. Unlike NEFF, the Trust did not maintain a website or publish promotional materials of any kind. *See id.; New England Forestry Foundation, Inc. v. Assessors of Hawley*, Mass. ATB Findings of Fact and Reports 2013-63, 69. The Trust provided no evidence showing that it engaged in any sort of educational outreach or awareness-raising activities or programs, nor did it offer evidence showing that it conducted research or studies of the wildlife and vegetation present on the subject property. Rather than any sort of comprehensive study or research, the evidence offered by the Trust revealed, at best, a limited awareness of which wildlife and vegetation were even present at the subject property. Further, other than the occasional clearing of brush from walking paths and infrequent removal of waste from dog waste stations, the Trust offered no evidence that it engaged in meaningful conservation or preservation efforts at the subject property, such as creating an analysis of the wildlife and vegetation present at the subject property or any sort of long-term maintenance plan for them. *See New England Forestry Foundation, Inc.*, 468 Mass. at 141.

Further, while the Court in NEFF did not “propose a precise formula for determining whether an organization is a ‘bona fide’ conservation organization,” it did provide a list of factors that may be relevant in such a determination. Those factors include:

membership in regional, State or national coalitions of conservation organizations; recognition by government entities or the scientific or academic community as a trusted community resource; partnership with local municipalities in carrying out G. L. cc. 61, 61A, or 61B (such as being selected by a town or city to exercise its right of first refusal under G.L. c. 61, § 8); ownership of multiple parcels in various locations of a similar ecological sort or of a variety consistent with the organization's stated mission; expertise of staff members in land conservation and environmental initiatives; success in receiving competitive grants from Federal or State agencies; certifications or accreditations from government or other appropriate entities; invitations from policy makers or State agencies to participate in regional or Statewide strategic planning initiatives[.]

*Id.* at 151, fn. 10.

The Trust at issue in this appeal had none of the listed hallmarks of a bona-fide conservation organization and the Board found that the absence of these indicia militated against the conclusion that the Trust was a bona-fide conservation organization or an otherwise

charitable organization for purposes of Clause Third. To the contrary, the Board concluded that the Trust more closely resembled organizations which it has previously found did not qualify for the exemption in Clause Third. See *Wing's Neck Conservation Foundation, Inc. v. Assessors of Bourne*, Mass. ATB Findings of Fact and Reports 2003-329, 335-6 (finding that organization which acquired and held unimproved tracts of land abutting the private property of the organization's members did not demonstrate that it was in actual operation a public charity).

In sum, although "holding land in its natural pristine condition and thereby protecting wildlife habitats, filtering the air and water supply, and absorbing carbon emissions," *New England Forestry Foundation, Inc.*, 468 Mass. at 152, undoubtedly provides some benefit to the public in general, the Trust did not demonstrate a pattern of consistent or concerted conservation or preservation efforts sufficient to distinguish it from any other private landowner who simply holds several acres of land in an undeveloped state. See *Id.* at 156. Thus, the Board could not find on this record that the Trust proved that it provided benefits to a sufficiently large segment of the public or "lessen[ed] the burdens of government" to a degree that would qualify it as a charitable organization for purposes of Clause Third. See *Wing's Neck Conservation Foundation, Inc.*, Mass. ATB Findings of Fact and Reports at 2003-336 ("[A]lthough the conservation of open space for the benefit of the general public is a most laudable goal, [the evidence failed to establish that the organization in question] was in actual operation a charitable organization.").

## II. Occupation of the Property for Charitable Purposes

Even had the Board found that the Trust was a charitable organization for purposes of Clause Third, which it did not, it would still be necessary to examine whether the Trust occupied the subject property in furtherance of its charitable purposes. Occupancy is "something more than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized." *Assessors of Boston v. Vincent Club*, 351 Mass. 10, 14 (1966) (quoting *Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage*, 225 Mass. 418, 421 (1917)).

In the past, it had been held that:  
simply keeping the land open ... is not enough to satisfy the requirement of 'occupying' the property within the meaning of the statute. Rather, there must be an 'active appropriation to the immediate uses of the charitable cause for which the owner was organized.'

*Forges Farm, Inc. v. Assessors of Plymouth*, Mass. ATB Findings of Fact and Reports 2007-1197, 1207, (quoting *The Vincent Club*, 351 Mass. at 14 (other citations omitted)). In *New*

*England Forestry Foundation, Inc.*, the Court addressed the difficulty of this limitation for property owned by conservation-oriented organizations, where an overly active use or significant development of the property is inimical to the organization’s stated charitable purpose. *New England Forestry Foundation, Inc.*, 468 Mass. at 157 (noting that requiring an organization to promote and facilitate public access on the land it seeks to exempt could, in certain circumstances “thwart the very conservation objectives” it seeks to achieve.). The Court pronounced that “in a case such as NEFF’s where the entry of the public onto the land is not necessary for the organization to achieve its charitable purposes, the promotion and achievement of public access is not required to demonstrate occupancy of the land in order to qualify for a Clause Third exemption.” *Id.*

Instead, the Court stated, the inquiry must begin with “whether the entity takes affirmative steps to exclude the public from the land, such as through physical barriers, ‘no trespassing’ signs, or actively patrolling the land.” *Id.* For organizations that do engage in exclusion, the Court announced a “heightened burden to show that such exclusion of the public is necessary to enable it to achieve its charitable purposes.” *Id.*

Adding to the complexity of the inquiry, as the Court recognized, is that “both private and charitable landowners may have an incentive to hold land in an undeveloped state. As a result, even after an organization has demonstrated that it is a charitable organization, “it must also demonstrate that it occupies the parcel at issue in a manner less like a private landowner and more like an entity seeking to further the public good.” *Id.* at 156. The Court considered these factors, noting that NEFF does not exclude the public from its land and that it “offered evidence demonstrating how [it] uses the land as a site on which it carries out sustainable forestry practices,” before concluding that NEFF occupied the land at issue within the meaning of Clause Third. *Id.* at 158.

Applying these factors to the facts of the present appeal, the record showed that the Trust posted “private property” signs on the subject property, sufficient to trigger a “heightened burden.” *Id.* at 157. The record further showed that evidence of hunting at the subject property was what prompted the Trust to post the signs. Although hunting is inharmonious with the Trust’s stated goal of facilitating a refuge for wild animals, and posting signs that exclusively discouraged hunting could well meet the “heightened burden,” the signs posted by the appellant most prominently featured the words “private property,” and only in much smaller font contained additional language to discourage hunting. Based on the evidence presented, the Board found that members of the public viewing the signs would most likely conclude that they were not

welcome to use the subject property at all, even for uses consistent with the Trust's stated charitable purposes. The Board found and ruled that by posting the "private property" signs, the Trust "occupie[d] the parcel at issue in a manner" more like a "private landowner" and less "like an entity seeking to further the public good." *Id.* at 156.

More important, however, was the Trust's failure to demonstrate its use of the subject property in furtherance of its stated charitable purposes. Among the Trust's stated charitable purposes was "inculcating in young and old respect for nature, and kindness towards all animal, wild and domestic," however, it did not offer guided nature walks, lectures, or other educational activities at the subject property to advance these goals. *Contrast id.* at 158 (holding that conservation organization occupied the property at issue in furtherance of its charitable purposes where it offered conferences and other educational programs as well as pre- and post-harvest tours of the property). Although the Trust's stated purposes included providing "final resting places for deceased animals," it did not provide evidence that it undertook, or offered to the public, burials for deceased animals at the subject property. Similarly, although the Trust's stated purposes included making "wild, open, and unspoiled places accessible to the public," it made no efforts, save for a one-time announcement in a local publication, years prior to the period at issue in this appeal, to inform the public of the availability of the subject property.<sup>3</sup> In addition, although the Trust's stated charitable purposes included using "environmentally sound practices" and "other techniques to "promote the conservation and protection of natural resources," it offered no evidence that it undertook any studies or other assessments of the wildlife, trees, or any other natural resources present at the subject property, or that it formed any sort of short- or long-term plan aimed at advancing their well-being. *Contrast id.* at 159 (holding that conservation organization occupied the property at issue in furtherance of its charitable purposes where it hired an independent forestry consultant and created and carried out a comprehensive forest management plan). The Trust failed to offer evidence showing that it used the subject property in a way that promoted its stated charitable purposes, and the Board thus found and ruled that the Trust did not occupy the subject property as required by Clause Third.

In conclusion, after considering the evidence of record, and applying the analysis set forth by the Court in *New England Forestry Foundation, Inc.*, as well as other relevant precedent, the Board found and ruled that the Trust was not a charitable organization for purposes of Clause Third and that it did not occupy the subject property in furtherance of its

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<sup>3</sup> The Board is mindful that there is no "affirmative duty to promote and facilitate public access on conservation lands in order to satisfy [Clause Third's] occupancy requirement," *Id.* at 156, and it considered this factor as only one of many indicators that the Trust did not use the subject property in a manner which furthered its stated charitable purposes.

stated charitable purposes as contemplated by Clause Third. Accordingly, the Board found and ruled that the subject property was not exempt from tax under Clause Third, and it issued a decision for the assessors 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**

**WALLACE PAUL BOQUIST**

v. **BOARD OF ASSESSORS OF  
THE TOWN OF LINCOLN**

Docket Nos. F306906  
F314768

Promulgated:  
September 26, 2014

**ATB 2014-704**

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the Town of Lincoln (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of Lincoln owned by and assessed to Wallace Paul Boquist (“appellant”) under G.L. c. 59, §§ 11 and 38 for fiscal years 2010 and 2012 (“fiscal years at issue”).

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

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

*Wallace Paul Boquist, pro se*, for the appellant.

*Harald Scheid, Chief Assessor*, for the appellee.

**FINDINGS OF FACT AND REPORT**

**I. Introduction and Jurisdiction**

On January 1, 2009 and January 1, 2011, the relevant assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 5.79-acre parcel of land located at 241 Old

Concord Road in Lincoln, improved with a single-family residence and a separate building containing a studio apartment (collectively, the “subject property”). The parcel is divided into a 0.57-acre “prime” residential site, on which the improvements sit, and 5.22 acres of land that is classified as agricultural/horticultural land under G.L. c. 61A (“Chapter 61A”).<sup>1</sup>

For fiscal year 2010, the assessors valued the subject property at \$744,964, and assessed a tax thereon in the total amount of \$8,768.77.<sup>2</sup> More specifically, the residence and prime site were valued at \$744,400, and taxed at a rate of \$11.47 per thousand, while the Chapter 61A land was valued at \$564, and taxed at the rate of \$15.09 per thousand. The appellant paid the tax without incurring interest. On December 9, 2009, the appellant filed an abatement application with the assessors which was denied by vote of the assessors on March 8, 2010. The appellant seasonably filed his Petition Under Formal Procedure with the Appellate Tax Board (“Board”) on June 2, 2010.

For fiscal year 2012, the assessors valued the subject property at \$670,301, and assessed a tax thereon in the total amount of \$9,496.28.<sup>3</sup> More specifically, the residence and prime site were valued at \$669,600, and taxed at a rate of \$13.81 per thousand, while the Chapter 61A land was valued at \$701, and taxed at the rate of \$18.17 per thousand. The appellant paid the tax without incurring interest. On October 27, 2011, the appellant filed an abatement application with the assessors which was denied by vote of the assessors on November 4, 2011. The appellant seasonably filed a Petition Under Formal Procedure with the Board on January 31, 2012.

On the basis of the preceding facts, the Board found and ruled that it had jurisdiction over the instant appeals.

## **II. Property Description**

The subject property consists of 5.79 acres bordered by Fairhaven Bay Pond (“pond”) to the west and Old Concord Road (“OCR”) to the east. The pond is a wide portion of the Sudbury River and OCR is an unpaved, dead-end road running parallel to the pond. The subject property is located in the middle of a group of ten residential properties located between OCR and the pond. All properties along this heavily-wooded stretch enjoy pond frontage, making it a sought-

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<sup>1</sup> Chapter 61A was enacted by the Legislature in 1973 “for the purpose of developing and conserving agricultural or horticultural lands.” See St. 1973, c. 1118, s. 1. Pursuant to Chapter 61A, taxpayers with a minimum of five acres who make a commitment to agricultural or horticultural use of their land are rewarded with a reduction in property tax for that land.

<sup>2</sup> This amount includes a Community Preservation Act (“CPA”) surcharge of \$221.99.

<sup>3</sup> This amount includes a CPA surcharge of \$236.37.

after area. The assessors classified the subject property as an “R5” for assessment purposes, indicating that it was in a desirable location.<sup>4</sup>

The parcel is divided into a 5.22-acre portion which has been classified as agricultural/horticultural land under Chapter 61A since 2005, and a 0.57-acre, or 24,829-square-foot, prime site. The subject property is improved with a contemporary-style dwelling, built in 1951, which the assessors considered to be in “average” condition. The dwelling contains 1,775 square feet of living space, including three bedrooms, and it also features two full bathrooms and a fireplace. It has a wooden exterior, a tar and gravel flat roof, and a concrete block foundation. There is also a 792 square-foot, detached studio apartment.

### III. The Appellant’s Case-in-Chief

For fiscal year 2010, the appellant’s primary claim was that the subject property was overvalued. In particular, he disagreed with the assessors’ valuation of the subject’s 24,829 square-foot prime site. In support of this claim, the appellant entered into evidence a multi-sectioned binder containing assessment data for nine neighboring properties located on OCR, as well as the subject property, for fiscal years 2004 through 2010.

In making his presentation, the appellant emphasized the increase in value of his prime site between fiscal years 2009 and 2010. During that time period, the subject property’s prime site increased in value approximately 37.5%, from \$432,005 to \$593,880. The appellant presented a chart comparing the assessment data of the other nine OCR properties with the subject property’s assessments over the same time period. Relevant portions of the appellant’s comparative assessment data are summarized in the following chart.

#### Appellant’s Comparable Assessment Data

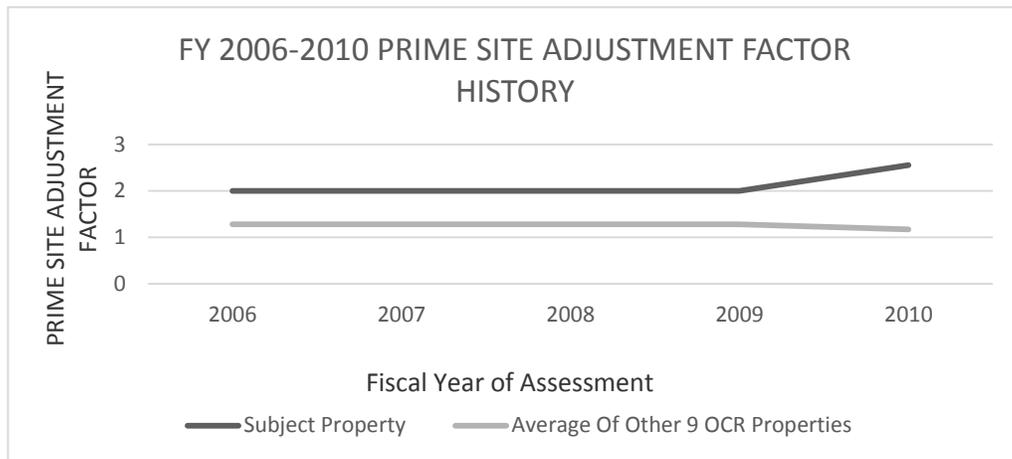
Address	Prime Site Size (sq. ft.)	2009 Prime Site Adj. Factor <sup>5</sup>	2009 Prime Site Value (\$)	2010 Prime Site Adj. Factor	2010 Prime Site Value (\$)	Total Change(\$)	% Change
219 OCR	80,000	1.0	696,000	1.0	748,800	52,800	7.6
225 OCR	80,000	1.0	696,000	1.0	748,800	52,800	7.6
231 OCR	80,000	1.7	1,183,200	1.3	973,440	(209,760)	(17.7)
233 OCR	80,000	1.45	1,009,200	1.3	973,440	(35,760)	(3.5)
237 OCR	80,000	1.35	939,600	1.3	973,440	33,840	3.6
247 OCR	80,000	1.0	696,000	1.0	748,800	52,800	7.6
253 OCR	80,000	1.15	800,400	1.0	748,800	(51,600)	(6.4)
259 OCR	80,000	1.4	974,400	1.3	973,440	(960)	(0.1)
263 OCR	80,000	1.45	1,009,200	1.3	973,440	(35,760)	(3.5)
<b>Subject</b>	<b>24,829</b>	<b>2.0</b>	<b>432,005</b>	<b>2.555</b>	<b>593,880</b>	<b>161,875</b>	<b>37.5</b>

<sup>4</sup> The rating scale goes from R1 to R7, with R7 being the most desirable.

<sup>5</sup> The prime site adjustment factors are a combination of a town-designated ratio based on the size of a prime site, with 1.0 being a full prime site of 80,000 square feet, which is the minimum size required by zoning, and additional adjustments made for notable differences in quality. The appellant previously had a full prime site of 80,000 square feet, but his prime site decreased to just 24,829 square feet after he converted the remaining 5.22 acres to Chapter 61A land.

As illustrated by this data, between fiscal years 2009 and 2010, the assessed value of the subject property's prime site increased at a higher rate than the prime sites of the nine comparison properties during the same time period. The appellant argued that this provided evidence that the subject property was overvalued.

In further support of his argument that the subject property was overvalued, the appellant presented a graph comparing the changes in the town's adjustment factors for the subject property and his selected comparison properties' prime sites from fiscal years 2001 to 2010. The data presented by the appellant for fiscal years 2006 to 2010 is represented in the following graph.



As illustrated by the graph, the adjustment factors were constant between fiscal years 2006 and 2009, whereafter the subject property's adjustment factor increased while the nine comparison properties' adjustment factors decreased.

The appellant concluded his comparison of the subject property to the nine other OCR properties by analyzing their respective prime sites' valuation per square foot. This information reflected the same trends evidenced by the graph shown above. Again, the appellant argued that the sharp increase in his prime site's per-square-foot assessment was evidence of overvaluation when compared to the assessments of the other nine OCR properties' prime sites.

Finally, the appellant stated that the subject property's assessment deprived him of the "significant local tax benefits" that the Legislature, in enacting Chapter 61A, intended to confer "to property owners willing to make a long term commitment to farming." According to the appellant, upon initially converting the bulk of his property to Chapter 61A land in 2005, he received a 53.9% property tax discount, which declined to 33.6% in 2009, and then to 12.2% in 2010. He argued that the spike in the subject property's prime site valuation in fiscal year 2010

prevented him from achieving the tax benefits intended by Chapter 61A, which he advanced as an additional argument in support of an abatement.

The appellant offered no evidence or arguments pertaining to his fiscal year 2012 appeal.

#### **IV. The Appellee’s Case-in-Chief**

The assessors presented their case-in-chief through the testimony of principal assessor, Harald M. Scheid, and the submission of several documents.

Mr. Scheid testified that the subject property was considered to be located in an “R5” neighborhood, which he explained is a designation given to those properties with privacy and water frontage. The assessors entered into evidence a copy of Lincoln’s residential land table for “R5” properties (“land table”). Mr. Scheid testified that the land table had been certified by the Massachusetts Department of Revenue (“DOR”) in conjunction with the town’s Fiscal Year 2010 property revaluation, and evidence of DOR’s certification was also entered into the record. He argued that the subject property’s prime site valuation was directly in line with the state-certified land table, which, he contended, provided an indication that it was not overvalued. A sample of the data contained in the land table, relevant to fiscal year 2010, is reproduced in the following chart.<sup>6</sup>

**Sample FY 2010 Data from Lincoln’s Residential Land Table**

<b>Prime Site Land Area (sf)</b>	<b>% of Full Prime Site (80,000 sf)</b>	<b>FY 2010 Size Adjust.</b>	<b>FY 2010 Value (\$)</b>	<b>FY 2010 Value (\$/psf)</b>
10,000	12.5	0.738	552,240	55.22
24,829*	31	0.79	593,900	23.92
40,000	50	0.85	636,480	15.91
60,000	75	0.925	692,640	11.54
80,000	100	1.000	748,800	9.36

\* Size of Subject Property’s Prime Site

Mr. Scheid explained that the land table is non-linear. According to the land table, a full prime site of 80,000 square feet, which was the prime site size of the nine OCR properties offered for comparison by the appellant, was assessed at a lower per-square-foot rate than were smaller prime sites, like the subject property’s prime site. The basis for this differential, he explained, is the well-established principle that unit prices generally decrease with increases in unit size.

In addition, Mr. Scheid testified that in order to create a more stable and uniform land schedule, DOR eliminated the use of “site influences,” beginning in fiscal year 2010.

<sup>6</sup> The land table was lengthy and could not readily be reproduced in its entirety here.

“Site influences” had previously been used to set values for properties, including those located on OCR, and this change in practice contributed in part to the increase in value from the preceding fiscal year emphasized by the appellant in his case-in-chief.

The assessors additionally introduced into evidence a copy of DOR’s Farmland Chapter Land Recommended Value chart along with the property record card for the subject property. These documents established that the portion of the subject property that had been converted to Chapter 61A land was valued in concert with the state-recommended rates.

Lastly, Mr. Scheid offered into evidence a number of vacant residential land sales in Lincoln, three from 2007; one from 2008; two from 2010; and one from 2011. Each of the sales had a prime site of 80,000 square feet, with varying amounts of additional acreage. They ranged in sale price from a low of \$175,000<sup>7</sup> to a high of \$1.3 million; however, those bookend prices represented extremes. The remaining five sales were more closely clustered, ranging in price from \$375,000 to \$600,000. Mr. Scheid did not perform a comparative analysis of the sales, nor did he make any adjustments to account for differences from the subject property, nor was any information offered to indicate whether the sales were arm’s-length transactions.

For fiscal year 2012, the assessors rested on the assessment as the appellant admittedly provided no evidence supporting his claim for abatement for that year.

#### **V. The Board’s Subsidiary Findings of Fact and Ultimate Conclusions**

On the basis of all of the evidence, the Board found that the appellant failed to meet his burden of establishing that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue.

The appellant offered no evidence of recent sales of similar properties in the subject’s vicinity that would indicate that the subject property was assessed for more than its fair cash value. Instead, he focused on a comparison of the assessed value of the subject property’s prime site and the prime sites of nine neighboring properties. However, the relevant question is whether the assessment for the parcel of real estate, including both the land and the structures thereon, is excessive, and thus the appellant’s comparisons were deficient.

The more probative inquiry is between the overall assessed value of the subject property and the overall assessed values of the comparison properties. Those values, along with other pertinent information regarding each property, are set forth in the following chart.

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<sup>7</sup> The information introduced by the assessors indicated that this parcel had extremely poor access, which may explain why its sale price was much lower than the other parcels.

### **FY 10 Assessed Values of Ten OCR Properties**

<b>Address</b>	<b>Parcel Size (ac)</b>	<b>Living Area (sf)</b>	<b>Beds/Baths</b>	<b>FY 10 Assessment(\$)</b>
219 OCR	2.8	2,633	3/2	1,049,900
225 OCR	3.18	3,608	3/2	1,112,200
231 OCR	5.6	6,142	5/5.5	3,241,800
233 OCR	3.75	3,328	2/2.5	1,670,800
237 OCR	4.89	3,540	6/3.5	1,298,400
247 OCR <sup>8</sup>	5.3	2,292	3/2	943,700
253 OCR	2.16	2,444	4/2	1,011,300
259 OCR	3.45	3,446	2/2	1,441,900
263 OCR	4.15	6,421	4/4	2,064,500
Subject	5.79	1,775 <sup>9</sup>	3/2	774,964

As is demonstrated by the chart above, the assessed value of the subject property was significantly lower than the assessed values of the properties offered for comparison by the appellant, and the Board could not conclude, based on this data, that the subject property was overvalued.

Further, in making his comparisons, the appellant failed to take into consideration the well-established principle of diminishing returns with increases in unit size. The subject property's prime site lot was significantly smaller than those of his comparison properties, and it was therefore logical that it would be valued at a higher value per square foot.

Lastly, the Board rejected the appellant's claim that the increase in the value of his prime site deprived him of the tax benefits intended by the Legislature in enacting Chapter 61A. The Board found that the assessors assessed the appellant's Chapter 61A land in compliance with DOR's guidelines, and as a result, the appellant enjoyed the benefit of dramatically reduced valuation of that land. For example, for fiscal year 2010, the appellant's 5.22 acres of Chapter 61A land were valued at just \$564. By contrast, the evidence showed that, for that same fiscal year, the 2.31 acres of excess land at 263 Old Concord Road, offered for comparison by the appellant, were valued at \$59,100, while the .96 acres of excess land at 219 Old Concord Road, also offered for comparison by the appellant, were valued at \$24,800. The appellant's claim that he did not derive the reduced tax benefits intended by Chapter 61A was squarely contradicted by the evidence, and the Board therefore rejected his argument.

In addition to the aforementioned shortcomings in the appellant's evidence, the Board found that the evidence presented by the assessors provided additional support for the subject

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<sup>8</sup> Although neither the appellant nor the assessors brought it to the Board's attention, it appeared from the property record card that the appellant was also the assessed owner of 247 OCR, and that he had likewise converted a large portion of that property to Chapter 61A land, which explained why it had the second-lowest overall assessed value – with the subject's being the lowest – among all ten of the OCR properties.

<sup>9</sup> This amount does not include the 792-square-foot studio apartment.

assessments.<sup>10</sup> Specifically, the Board found that the assessors demonstrated that they valued the subject property in accordance with the residential land tables and other guidelines approved by DOR. This information, coupled with the presumptive validity of the assessments, and in light of the deficiencies in the appellant's evidence, compelled the Board to conclude that he failed to meet his burden of proving that the subject property was overvalued for fiscal year 2010.

With respect to fiscal year 2012, the appellant presented no evidence showing that the subject property was overvalued as of the relevant date of valuation and he acknowledged as much in his testimony. The Board therefore found that he failed to meet his burden of proof for fiscal year 2012 as well.

In conclusion, on the basis of all of the evidence, the Board found that the appellant failed to meet his burden of establishing that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue, and it therefore issued decisions for the appellee in these appeals.

### OPINION

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 [his] 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 ... prov[e] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245)).

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)).

In the present appeals, the appellant relied on a comparison of the assessed value of the subject property's prime site and the assessed values of the prime sites of nine neighboring properties in making his claim for abatement. His evidence failed for a number of reasons.

First, a taxpayer does not conclusively establish a right to abatement merely by showing that his land or building is overvalued. In abatement proceedings, “the question is whether the assessment for the parcel of real estate, including both the land and the structures thereon, is

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<sup>10</sup> However, the Board did not place reliance on the residential land sales offered by the assessors, as no evidence was introduced to establish that they were arm's-length transactions, nor were adjustments made to account for differences from the subject property.

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, 49. Here, the appellant primarily disputed the valuation of his prime site, offering no evidence regarding the valuation of the parcel as a whole. Even assuming arguendo that the Board concluded that the subject’s land was overvalued, which it did not, that conclusion alone would not have entitled the appellant to an abatement, as he failed to demonstrate that the assessed value of the subject property as a whole exceeded its fair cash value.

Second, the appellant’s primary argument – that the subject property’s comparatively smaller prime site was assessed at a higher per-square-foot value than the much larger prime sites of several neighboring properties – failed to take into consideration the well-established principle that “[generally], as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase.” (APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 212 (13th ed. 2008); *see also Seto v. Assessors of Quincy*, Mass. ATB Findings of Fact and Reports 2006-585, 591. Accordingly, the Board was not persuaded by this argument, or by the evidence offered in support of it.

Lastly, the Board was not persuaded by the appellant’s claim that the assessment of the subject property deprived him of the tax benefits intended by the Legislature in enacting Chapter 61A. The record showed that the assessors valued the appellant’s Chapter 61A land in accordance with DOR’s guidelines, resulting in a significantly lower assessed value, and tax, for that land. Moreover, even if the Board found merit in this argument, it would not furnish grounds for an abatement in these appeals.

In conclusion, on the basis of all the evidence, the Board found and ruled that the appellant failed to meet his burden of proving that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue. Accordingly, the Board issued decisions for the appellee in these appeals.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**  
**Attest:** \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**COLLINGS FOUNDATION**

**v. BOARD OF ASSESSORS OF  
THE TOWN OF STOW**

Docket Nos.: F313207

Promulgated:  
January 14, 2015

**ATB 2015-1**

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 from the refusal of the appellee, Board of Assessors of the Town of Stow (“assessors” or “appellee”), to grant a charitable exemption for, and abate a tax on, certain real estate located in the Town of Stow owned by and assessed to Collings Foundation (“appellant” or “Foundation”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2012.<sup>1</sup>

Commissioner Chmielinski heard this appeal. Commissioners Scharaffa and Mulhern joined him in the decision for the appellee. Chairman Hammond dissented.

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

*Robert F. Dionisi, Jr., Esq.* for the appellant.

*Ellen M. Hutchinson, Esq., Dominick Pugliese*, Chairman of the Board of Assessors and *Dorothy K. Wilbur*, Principal Assessor, for the appellee.

**FINDINGS OF FACT AND REPORT**

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

The appellant presented its case through the testimony of Robert F. Collings, co-founder of the Collings Foundation, and the submission of several exhibits, including: the Foundation’s trust document; the Foundation’s 2009-2010 Winter Newsletter; a copy of the donation of the hangar facility to the Foundation; a letter dated April 28, 2009 from Mr. Collings to the assessors; and the quitclaim deed dated October 1, 2010 for the real estate at issue in this appeal. For their part, the assessors relied on the cross-examination of Mr. Collings and his introduction of several exhibits, including: the requisite jurisdictional documentation; aerial photographs of

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<sup>1</sup> The appellant’s petition filed with the Board recited fiscal year 2011 as the year at issue and contained jurisdiction facts concerning that year. Subsequently, the appellant determined that it had mistakenly listed fiscal year 2011 on the petition and, with the assessors assent and the Board’s approval, amended the petition to state the fiscal year at issue to be fiscal year 2012.

the subject property; a listing of Foundation events for calendar year 2009, as prepared by Mr. Collings; and a *Boston Globe* article dated August 18, 2011.

The Foundation is a private, non-profit organization established by declaration of trust in 1977, and is exempt from federal income taxes under Internal Revenue Code § 501(c)(3). On April 28, 2009, Mr. Collings and his wife, Caroline J. Collings (collectively, the “Collings”), donated a 45,000-square foot hangar facility (the “hangar”) to the Foundation. At the time of transfer, the hangar was situated on a 31.1-acre parcel owned by the Collings, identified for assessing purposes as parcel R-205-016. This parcel originally consisted of two smaller, separately acquired parcels of 16.35 acres and 14.75 acres. On the date of the transfer of the hangar, Mr. Collings sent a letter to the assessors, which notified them of the transfer and requested that the hangar be “removed from our taxable base.” Mr. Collings testified that the assessors later advised him that they could not be considered tax exempt because the Foundation did not own the land.

In February of 2010, in response to the assessors’ rejection, the Collings applied to the Stow Planning Board to carve out a 2.18-acre parcel, which included the land where the hangar was located and the immediate surrounding area, from the larger 31.1-acre parcel owned by the Collings. The Collings’ application was denied. The Collings then sought to divide the 31.1-acre parcel into the two original separate parcels and subsequently transfer to the Foundation the 16.35-acre parcel where they was located. Mr. Collings testified that he again faced resistance from the Planning Board but since the parcels had been previously recognized by the assessors as independent parcels, the Planning Board allowed the request. On October 1, 2010, the Collings transferred ownership of the 16.35-acre parcel of land, which included the hangar (collectively, the “subject property”), to the Foundation. Accordingly, on July 1, 2011 (the “determination date”), the relevant date of qualification for the claimed exemption under G.L. c. 59, § 5, Third (“Clause Third”) for fiscal year 2012, the Foundation was the assessed owner of the subject property. Beginning in fiscal year 2012, the newly created subject property was identified for assessing purposes as parcel R-205-016A. For fiscal year 2012, the assessors valued the subject property at \$1,249,300 and assessed a tax thereon in the total amount of \$30,509.55.

On December 28, 2010, after the Collings transferred the subject property to the Foundation, but approximately one year prior to receiving the fiscal year 2012 tax bill, the appellant filed an Application for Statutory Exemption along with a copy of its Form 3ABC, which expressly cited fiscal year 2012. The appellant’s fiscal year 2012 exemption application was denied on March 30, 2011, four months prior to the relevant qualification date of July 1,

2011.<sup>2</sup> The appellant appealed this denial by filing its Petition Under Formal Procedure with the Board, referencing fiscal year 2011, on June 28, 2011.<sup>3</sup> On the basis of these facts, and for the reasons explained in the following Opinion, the Board found and ruled that it had jurisdiction to hear and decide this appeal.<sup>4</sup>

The Foundation was established by trust in 1977 and, in February, 1979, the Foundation was granted tax-exempt status by the Internal Revenue Service. Pursuant to the Declaration of Trust, the Foundation was “created and shall be operated exclusively for the charitable, scientific and educational purposes of establishing and operating a museum for the study, preservation, and public exhibition of articles of cultural, scientific and historical importance and for the education of the public with respect to such articles.” Mr. Collings testified that he and his wife were both educators and that their goal in forming the Foundation was to facilitate “education thru [sic] participation in history by touching, riding, smelling and feeling the historical artifacts.” The Foundation’s motto is “Keeping history alive through direct participation.”

The Foundation’s 2009-2010 Winter Newsletter memorialized Mr. Collings’ educational philosophy, which is: “When you read history, you may remember a bit. When you experience history, you never forget.” According to the Newsletter, the Foundation’s mission is “to offer and support living history programs that enable people of all ages to better understand our history through direct participation.”

Mr. Collings testified that initially the Foundation focused on living history experiences such as carriage and sleigh rides, ice cutting festivals, and antique car rallies. In the 1980s, the Foundation’s activities were broadened to include aviation and related activities “to immerse people in history.” “The presentation and operation of historical aircraft was added to immerse people in history and honor our Veterans.” To that end, the Foundation has collected, restored and maintained a fleet of 23 historic aircraft. Ten aircraft were kept at the subject property, including vintage planes from the Wright Brothers’ and World War I eras, which require a runway of less than 2,200 feet. The Foundation’s remaining 13 aircraft, which include World

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<sup>2</sup> In their denial notice, the assessors noted that “since you applied for Chapter 61B on this parcel under the name of Robert Collings (prior to the transfer [of the land]), we will continue to classify [and value] this parcel as recreational. Pursuant to G.L. c. 61B, § 2, land that is classified as recreational shall be assessed at no more than twenty-five percent of its fair cash value.

<sup>3</sup> See footnote 1, *supra*.

<sup>4</sup> As more fully described in the Opinion section of these Findings of Fact and Report, the Board has jurisdiction under both G.L. c. 59, § 5B, which provides for a direct appeal to the Board from a “determination” of the assessors concerning a Clause 3 exemption, and G.L. c. 59, §§ 64 and 65 as a premature appeal of its fiscal year 2012 assessment. See *Becton, Dickinson and Company v. State Tax Commission*, 374 Mass. 230, 234 (1978) (holding that prematurity in filing is not fatal to jurisdiction).

War II era B-24, B-25, and P-51 Mustang, and also Korean and Vietnam era A-6 F4 jets and helicopters, were stored and flown outside of Massachusetts.

In addition to the vintage aircraft, Mr. Collings testified that the Foundation also stored at the subject property's hangar numerous antique vehicles, including carriages, automobiles, steam locomotives, fire engines, military vehicles, and race cars from the 1930s through 1996, as well as various types of historical memorabilia and costumes. Because the hangar is not heated, the Foundation's offices, where its five employees managed its affairs, were located in a "barn" that was situated adjacent to the subject property on the Collings' residential property. The barn was also used to store additional costumes and artifacts that were used in the Foundation's historical re-enactments. The Foundation did not seek a statutory exemption for the barn property.

Mr. Collings testified that to carry out its mission of "interactive participative history education," the subject property was typically open to the general public three times per year, for what the Foundation called, "open house" events, including "Wings and Wheels," "Race of the Century," and "Battle for the Airfield." According to Mr. Collings, these three annual events have consisted of historical re-enactments and races between carriages, planes, ponies, and automobiles. In addition to attending these outdoor events, the public was also allowed to tour the interior of the hangar and climb into various antique airplanes and cars. According to Mr. Collings, the fee for attending these events ranged from \$12 to \$15 for adults and \$6 to \$10 for children age twelve and under. Mr. Collings testified that these were "suggested donations" and that no attendee was turned away because of their inability to pay.

The events conducted at the subject property were located at the base of a narrow driveway, which traversed the Collings' residential property located at 137 Barton Road, past a "No Trespassing" sign. According to the assessors' map and a satellite photograph introduced into evidence, the subject property had no road frontage. A single sign fronting Barton Road read "Collings Foundation," but did not invite the public, state hours of operation, or even provide a telephone number or internet address. Mr. Collings testified that the Foundation never conducted any advertising but instead relied on newspaper articles such as the 2011 *Boston Globe* article, the Foundation's website, and word-of-mouth. None of these, however, provided any information as to when and how a member of the general public could gain access to the subject property.

Mr. Collings testified that in addition to the 3 annual open house events, the Foundation provided private tours to 19 civic and school groups that made arrangements in advance, including local school classes, veterans groups, Cub Scout troops, senior-citizens' groups, and

others. Some of these tour groups, which typically numbered between 20 to 40 persons, were permitted entry without charge, while others paid a fee of \$10 per person. The Foundation also allowed the hangar to be used by other non-profit organizations for fundraising purposes, some at no charge. According to Mr. Collings' self-prepared, partially handwritten listing of events entitled "Events in Stow, MA for Fiscal Year 2009," the subject property hosted 22 such events over 25 days,<sup>5</sup> including the three open house events, during the period April through November, 2009, with approximately 9,867 total attendees. Although Mr. Collings testified that the appellant's activities and use of the subject property were "about the same" from 2009 to the relevant period at issue, he failed to specify any activities or offer any supporting evidence or documentation as to the activities and use of the subject property on or reasonably proximate to the relevant fiscal year 2012 qualification date of July 1, 2011.

According to Mr. Collings, events and tours at the subject property's hangar occurred seasonally between April and November in years past because of the expense posed by heating the hangar. Portions of the unimproved 16.35 acres of the subject property were used for parking, historical re-enactments, and runway space. Mr. Collings testified that while there "probably" was some maintenance and restoration of the Wright Brothers and World War I vintage planes and motor vehicles performed at the subject property during 2010, he was not able to specify how often or to what extent these activities occurred during any particular time. According to Mr. Collings, all of the requisite FAA records and maintenance manuals were kept off-site at the barn located on the Collings' residential property. No such records were introduced into evidence.

According to the Foundation's 2009-2010 newsletter and Mr. Collings' testimony, the appellant's largest activity was the "Wings of Freedom Tour" (the "Tour"), in which the Foundation displayed, flew and provided air-born rides to paying passengers, in several of the Foundation's World War II era planes, including the B-17, B24 and B-25 aircraft. In 2009, the Tour had 109 stops in 37 states with millions of viewers; most of the Tour took place outside of Massachusetts, with only 5 stops in Massachusetts,<sup>6</sup> none of which occurred at the subject property because the runway was too short for the larger World War II era planes to land. None of these World War II vintage planes used in the Tour were stored, displayed or maintained at

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<sup>5</sup> Mr. Collings' testimony was at variance with his written listing of events. He testified that there were 25 events at the subject property, although the listing indicated in bold print that there were a total of 26 events. Moreover, a count of the individual events identified on the listing totaled only 22 events. No explanation was given for these discrepancies.

<sup>6</sup> Once again, Mr. Collings testimony was at variance with the documentary evidence. Mr. Collings testified that the Tour had 3 Massachusetts stops, while the Newsletter indicated 5 Massachusetts stops. Again, no explanation was given for the discrepancy.

the subject property. Although some “parts” may have been restored at the subject property, any maintenance and restoration of these World War II vintage airplanes themselves had always been performed in facilities located in Florida and Houston, Texas. Another event conducted by the Foundation was the “Bomber Fantasy Camp,” which consisted of a two-day training program where paying participants trained for and flew a simulated WWII bombing mission. According to Mr. Collings testimony, the camp in 2010 was held in Stockton, California.

Based on the foregoing, and to the extent it is a finding of fact, the Board found that the appellant failed to meet its burden of proving that it was a charitable organization occupying the subject property for charitable purposes under Clause Third for fiscal year 2012. The Board found that virtually all of the evidence the appellant offered pertaining to its activities and use of the subject property, was for activities that occurred in 2009 or earlier, prior to the relevant period for the fiscal year at issue. The Board found that the Foundation’s 2009-2010 Winter Newsletter, Mr. Collings’ recitation of events, and his partially handwritten listing of events at the subject property were all focused on time periods well prior to the fiscal year 2012 qualification date of July 1, 2011.

In this regard, the Board notes the apparent confusion on the part of the appellant as to what fiscal year it was challenging. Although its application for statutory exemption referenced fiscal year 2012, its petition to the Board appealing the assessors’ denial of the application referenced fiscal year 2011. In addition, the appellant filed its application for exemption reciting fiscal year 2012 just a day after the mailing of the fiscal year 2011 tax bills.<sup>7</sup>

Moreover, it is not clear which of the two statutory avenues of appeal the appellant chose to contest the assessors’ denial of its Clause Third exemption. G.L. c. 59, § 5B affords the appellant a right of appeal to the Board from a “determination” of the assessors concerning eligibility for the Clause Third exemption. The appellant did not, however, indicate on its petition filed with the Board that it was appealing under § 5B and it failed to take advantage of the “unique benefit” of appealing to the Board “without paying any portion of the assessed tax.” See *William B. Rice Eventide Home, Inc. v. Assessors of Quincy*, 69 Mass. App. Ct. 867, 874 (2007). Even assuming that the appellant was seeking a pre-assessment determination from the assessors under § 5B, its submission of evidence concerning activities in 2009 in conjunction with that application is far removed from the July 1, 2011 qualification date for fiscal year 2012.

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<sup>7</sup> The Board notes that paragraph 6 of the appellant’s petition references an additional written abatement application dated January 20, 2011. Neither party could locate an original or copy of this abatement application, and the appellant indicated that the reference to a January 20, 2011 application was erroneous.

The second statutory avenue of appeal available to the appellant is under G.L. c. 64, §§ 64 and 65. Assuming that the appellant intended to pursue a §§ 64 and 65 appeal, the appellant began this process approximately one year too early, by filing an “application for statutory exemption” for *fiscal year 2012*, just after the *fiscal year 2011* tax bill was issued to it, and more than one year prior to the issuance of the relevant fiscal year 2012 tax bill.

Under either statutory mechanism of appeal, the assessors’ denial of the application on March 30, 2011 occurred approximately four months prior to the relevant July 1, 2011 qualification date for fiscal year 2012. Put another way, the appellant was claiming in his December 28, 2010 exemption application that its activities as of the July 1, 2011 qualification date for fiscal year 2012 – some 7 months in the future -- qualified the subject property for the Clause Third exemption. Similarly, the assessors made their determination concerning the appellant’s activities and occupation on March 30, 2011, approximately 4 months in advance of the July 1, 2011 qualification date.

Adding to this confusion was the fact that the appellant’s original Petition to the Board listed fiscal year 2011 as the relevant fiscal year at issue. However, the appellant could not prevail in a fiscal year 2011 appeal because it did not yet own the subject property on the fiscal year 2011 qualification date of July 1, 2010. Accordingly, while the Board’s allowance of the amendment to the petition to change the originally plead fiscal year 2011 to fiscal year 2012 eliminated that jurisdictional challenge to the appellant’s appeal, it did nothing to ameliorate the evidentiary deficiencies in this fiscal year 2012 appeal.

For example, a partially handwritten listing of events for 2009, which the appellant submitted with its December 28, 2010 application for exemption, was introduced as an exhibit in the present appeal. While the appellant may have believed that a listing of its 2009 activities was supportive of its fiscal year 2012 application for exemption, 2009 activities are simply too remote from fiscal year 2012 to have a bearing on what was occurring at the subject property on July 1, 2011. Mr. Collings’ vague testimony that the appellant’s activities and use of the subject property in 2009 were “probably the same” during the relevant time period did not provide adequate detail to establish the subject property’s qualification for the exemption for fiscal year 2012 as of July 1, 2011, particularly given the inconsistencies between his testimony and the documentary evidence.

Further, the other scant documentary evidence the appellant proffered was similarly remote from the relevant July 1, 2011 qualification date. The Foundation’s 2009-2010 Winter Newsletter described activities that had already taken place in 2009 and did little to shed light on

the appellant's activities as of the July 1, 2011 qualification date. Moreover, the Boston Globe article was again a general description of the appellant's activities without a time reference. In the absence of a sufficient documentary record, the appellant's vague and overly generalized testimony concerning its activities as of the relevant qualification date of July 1, 2011 is unsupported and unpersuasive.

On the basis of these findings, the Board found and ruled that the appellant failed to meet its burden of proving that its activities and use of the subject property as of July 1, 2011 were charitable within the meaning of Clause Third. Accordingly, the Board issued a decision for the appellee in this appeal.

### OPINION

Pursuant to G.L. c. 59, § 2 all property, real and personal, situated within the commonwealth ... unless expressly *exempt*, shall be subject to taxation. G.L. c. 59, § 5, Clause Third provides an exemption for "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized." The date of determination as to qualification for an exemption is July first of each year. G.L. c. 59, § 5; *see also Church of Cambridge, Inc. v. Assessors of Cambridge*, Mass. ATB Findings of Fact and Reports 1998-960, 962-3.

As a trust, the appellant may qualify as a "charitable organization" under Clause Third if the trust was executed in Massachusetts or all of its trustees are appointed by a Massachusetts court and either: (1) its principal charitable purposes are solely carried out within Massachusetts; or (2) its charitable purposes are principally and usually carried out within Massachusetts. It is not disputed that the appellant met the first criteria because the trust at issue was executed in Massachusetts. Regarding the alternative tests based on the appellant's purposes, because its activities were not carried out solely within Massachusetts, the appellant could only qualify under the second alternative if it met its burden of proving that its charitable purposes were principally and usually carried out in Massachusetts.

"The burden of establishing entitlement to the charitable exemption lies with the taxpayer." *Western Massachusetts Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 101 (2001)(citing *New England Legal Foundation v. Assessors of Boston*, 423 Mass. 602, 609 (1996)). "Any doubt must operate against the one claiming a tax exemption." *Boston Symphony Orchestra v. Assessors of Boston*, 294 Mass. 248, 257 (1936). "Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." *Mass. Med. Soc'y v.*

*Assessors of Boston*, 340 Mass. 327, 331 (1960) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 718 (1944)).

A corporation or trust that seeks to challenge the assessors' denial of a Clause Third exemption may appeal to the Board in one of two ways: (1) by appealing to the Board under G.L. c. 59, § 5B; or (2) by appealing under G.L. c. 59, §§ 64 and 65 from the assessors' denial of an application for abatement or statutory exemption. See *Eventide*, 69 Mass. App. Ct. at 870. Although it is not clear under which statute the appellant is appealing, the Board has jurisdiction over this appeal under either.

G.L. c. 59, § 5B provides that any person, including a corporation or trust applying for a Clause Third exemption or a competitor of such corporation or trust, may appeal to the Board from the assessors' "determination" as to the eligibility or non-eligibility for the Clause Third exemption. An appeal under § 5B must be filed with the Board within three months of the assessors' determination; in the present case, the appellant timely filed its appeal on June 28, 2011, less than three months after the assessors' March 30, 2011 determination.

As detailed in the Board's findings, the appellant filed its application for statutory exemption with the assessors and its appeal to the Board prior to the issuance of the relevant fiscal year 2012 tax bill. The Board notes that, although in theory, an application for statutory exemption and § 5B appeal may be used as a pre-assessment remedy, all of the reported cases from both the Appeals Court and the Board concerning § 5B involve appeals to the Board after the issuance of the relevant tax bill. See, e.g., *Eventide, supra; Community Care Services, Inc. v. Assessors of Berkley*, Mass. ATB Findings of Fact and Reports, 2011-713; *Kings Daughters & Sons v. Assessors of Wrentham*, Mass. ATB Findings of Fact and Reports, 2007-1043; *Healthtrax International, Inc. et al. v. Assessors of Hanover*. Mass. ATB Findings of Fact and Reports, 2001-366. Nevertheless, there is no express language in § 5B or elsewhere that prohibits the filing of an application for statutory exemption<sup>8</sup> and a § 5B appeal prior to the issuance of the tax bill. Further, because the appellant complied with the § 5B appeal deadline by filing its appeal within three months of the assessors' Clause Third non-eligibility determination, the Board has jurisdiction over this appeal.

The Board also has jurisdiction over this appeal under the second statutory avenue, G.L. c. 59, §§ 64 and 65. As with an appeal under § 5B, an abatement proceeding under §§ 64 and 65

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<sup>8</sup> The Board notes that there is no mention of an "application for statutory exemption" in § 5B or any other statutory reference to such an application. The application for statutory exemption appears to have been a form created to allow assessors to differentiate between requests for abatement based on an exemption from those based on overvaluation. See *Children's Hospital Medical Center v. Board of Assessors of Boston*, 393 Mass. 266, 269 (1984).

is generally a post-assessment and post-tax bill remedy. *See, e.g.*, G.L. c. 59, § 59 (“[a] person upon whom a tax has been assessed ... if aggrieved by such tax, may... apply in writing to the assessors, on a form approved by the commissioner, for an abatement thereof.”). An application for statutory exemption and an application for abatement are each a “form approved by the commissioner” to institute an abatement proceeding after receipt of the tax bill. *See Children’s Hospital Medical Center v. Board of Assessors of Boston*, 393 Mass. 266 (1984) (ruling that either form may be used to seek an abatement on charitable exemption grounds).

In the present appeal, the Foundation filed its application for statutory exemption for fiscal year 2012 prior to the assessors' issuance of the fiscal year 2012 tax bills. However, in *Becton, Dickinson and Company v. State Tax Commission*, 374 Mass. 230 (1978), the Court held that a taxpayer's premature filing of an abatement application was not fatal to the Board's jurisdiction:

It is well settled in similar cases, where a statute required action within a certain time “after” an event, that the action may be taken before that event. Such statutes have been construed as fixing the latest, but not the earliest, time for the taking of the action. *Tanzilli v. Casassa*, 32 Mass. 113, 115 (1949) [citations omitted]. Moreover, it is a general policy of the law to prevent loss of valuable rights, not because something was done too late, but rather because it was done too soon.

*Becton, Dickinson*, 374 Mass. at 234. The Board has likewise ruled that a premature filing of a Petition does not deprive the Board of jurisdiction to hear and decide an appeal. *Liberty Marine, LLC Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2008-1, 9; *Stanley Home Products, Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1986-128, 136. The Board similarly found and ruled here that the appellant's early filing of its exemption application, and subsequent appeal to the Board, did not deprive the Board of jurisdiction over the instant appeal.

However, although the timing of the appellant’s application to the assessors and appeal to the Board is not fatal to the Board’s jurisdiction, it did affect the appellant’s ability to meet its burden of proof that the subject property qualified for charitable exemption.

The Foundation filed the application for a charitable exemption for fiscal year 2012 more than one year *prior* to the issuance of the fiscal year 2012 tax bills, in effect requesting an advance determination of qualification for the Clause Third exemption well before the relevant qualification date had occurred and in advance of the mailing of the relevant tax bill.

In support of its exemption claim for fiscal year 2012, the appellant offered evidence more consistent with a fiscal year 2011 claim. At the hearing of this appeal, the appellant

maintained that it provided “educational” activities to the public, by means of: annual “open houses,” which included historical re-enactments; the Tour; pre-scheduled private tour group events; and restoration of historic aircraft. The Board found, however, that virtually all of the evidence the appellant offered was for activities that occurred in 2009 or earlier, well prior to the relevant period of time for fiscal year 2012. The appellant's evidence, including the Foundation's 2009-2010 Winter Newsletter, Mr. Collings' recitation of activities and events, and his partially handwritten listing of 2009 events at the subject property were for or during periods well before the relevant qualification date of July 1, 2011 for fiscal year 2012.

Further, the documentary evidence submitted by the appellant was cursory and general. No payroll, attendance, maintenance or FAA records were offered. The few documents submitted into evidence, and Mr. Collings’ testimony, offered only a vague and overly generalized description of the appellant’s activities, and, in at least two instances, there were discrepancies between Mr. Collings’ testimony and his listing of events. Accordingly, the Board ruled that the appellant failed to provide sufficient persuasive, credible evidence to meet its burden of proof. "The credibility of witnesses, the weight of the 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 the basis of all of the evidence, the Board found and ruled that the appellant failed to meet its burden of proving that it was a charitable organization that occupied the subject property in furtherance of its charitable purpose within the meaning of Clause Third for fiscal year 2012.

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

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Richard G. Chmielinski, Commissioner**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**BARBARA J. DeLUCA, TRUSTEE  
HAWTHORNE STREET 30  
REALTY NOMINEE TRUST**

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

Docket Nos.: F322117

Promulgated:  
September 9, 2015

**ATB 2015-476**

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 City of Newton (“assessors” or “appellee”), to abate taxes on certain real estate located in the City of Newton owned by and assessed to the Hawthorne Street 30 Realty Nominee Trust, Barbara DeLuca, Trustee (“appellant”) under G.L. c. 59, §§ 11 and 38 for fiscal year 2014 (“fiscal year at issue”).

Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa and Rose joined her in the decision for the appellant.

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

*Barbara J. DeLuca, pro se*, for the appellant.

*Julie B. Ross, Esq.* 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, 2013, the relevant determination date for qualification for the exemption at issue in this appeal, the appellant resided at 30 Hawthorne Street, a parcel of land improved with a single-family residence identified on the appellee’s Exhibit A as Parcel ID 14015 0017 (“subject property”). The appellant timely paid the tax on the subject property without incurring interest. On August 6, 2013, the appellant filed an Application for Statutory Exemption (“Application for Exemption”) with the assessors, which the assessors denied on January 28, 2014. The appellant seasonably filed her Petition Under Formal Procedure with the Board on February 24, 2014. 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 was whether the appellant was entitled to the exemption granted by G.L. c. 59, § 5, Clause Forty-First (c) (“Clause Forty-First”), which

provides a partial exemption for the real property of seniors age 70 or older who meet certain other requirements. The appellant is an eighty-six year old woman who has lived at the subject property as her principal residence since 1950.

In 2004, the appellant and her husband, Frank J. DeLuca, placed the subject property into the Hawthorne Street 30 Realty Nominee Trust (“Nominee Trust”). The appellant and her husband were the settlors as well as the co-trustees of the Nominee Trust. The appellant and her husband also created individual revocable trusts bearing their names; the appellant and her husband were the trustees of their respective revocable trusts, and each of those revocable trusts in turn held an equal beneficial interest in the Nominee Trust. The terms of the revocable trusts called for the interests held by those trusts to transfer to a third trust, called the Family Trust (“Family Trust”), upon the death of the trustee of the trust, that is, the appellant or her husband. The surviving spouse would serve as co-trustee of the Family Trust, along with two of the DeLuca’s grown children, and become a lifetime beneficiary of the trust, with power of appointment at death.

Frank J. DeLuca died in 2012, and the 50% interest in the subject property that had been held by the Frank J. DeLuca 2004 Revocable Trust transferred to the Family Trust, with the appellant and two of her children as co-trustees and the appellant as a lifetime beneficiary. From 2004 until the time of Mr. DeLuca’s death, the assessors granted the Clause Forty-First exemption for the subject property. Following Mr. DeLuca’s death, the assessors denied the appellant’s Application for Exemption, contending that the appellant was not entitled to the exemption because the beneficial interest in the subject property was split between the two trusts, and the appellant did not hold the beneficial interest in the subject property in her own, individual capacity.

Based on the evidence presented, the Board found and ruled that the appellant held a sufficient legal and beneficial interest in the subject property to qualify for the Clause Forty-First exemption and that she satisfied the other requirements of Clause Forty-First. Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement of \$1,010.<sup>1</sup>

### **OPINION**

Clause Forty-First provides a partial exemption for “[r]eal property of” persons over the age of seventy who: (1) have been domiciled in the Commonwealth for the preceding ten years; (2) were domiciled at the property in question for the preceding five years, and (3) have “gross

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<sup>1</sup> This amount includes the Community Preservation Act (“CPA”) surcharge of \$10.00.

receipts from all sources of less than thirteen thousand dollars” and a “whole estate not in excess of twenty-eight thousand dollars.” G.L. c. 59, § 5, Clause Forty-First. There was no dispute between the parties that Mrs. DeLuca satisfied all of the age, income, and domicile requirements of Clause Forty-First. The only issue in dispute was whether the appellant held the requisite legal and beneficial interest in the subject property.

The Supreme Judicial Court has held that a taxpayer must have both a legal and a beneficial interest in the relevant property in order to receive the Clause Forty-First exemption. *Kirby v. Assessors of Medford*, 350 Mass. 386, 391 (1966). In *Kirby*, the Court held that the appellant had a sufficient beneficial interest in the property, as evidenced by his ability to amend and revoke the trust into which he had placed the property, but he lacked the requisite legal interest because he was not a trustee. *Kirby*, 350 Mass. at 387. The Court refused to extend the exemption to the taxpayer in that case, as he had “voluntarily chosen to hold his property in a form which separates the legal title and the beneficial ownership.” *Id.* at 390-91. In contrast, in *Board of Assessors v. Bellissimo*, 357 Mass. 198, 199 (1970), the Court found that the taxpayers “[held] legal title as well as the beneficial ownership” in the property at issue where they were trustees as well as beneficiaries of the trust, and thus, they qualified for the exemption. *Id.*

In the present appeal, Mrs. DeLuca was a trustee of the Nominee Trust, a co-trustee and beneficiary of the Family Trust, and trustee and beneficiary of her own revocable trust, the only entities that held interests in the subject property. The Board thus found and ruled that the facts of this appeal were more analogous to those in *Bellissimo* than *Kirby*, and the assessors’ reliance on *Kirby* was misplaced, as was their reliance on Department of Revenue (“DOR”) Informational Guideline Release No. 91-209. This publication is just that – a guideline – and the Board is not bound by DOR’s interpretation of the statute, where, as here, the interpretation is at variance with the language of the statute. See *Forrestall Enterprises, Inc. v. Assessors of Westborough*, Mass. ATB Findings of Fact and Reports, 2014-1025, 1033.

In conclusion, as the appellant held both a record legal and beneficial interest in the subject property, and satisfied the other requirements of Clause Forty-First, the Board found and ruled that she was entitled to the exemption. Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement of \$1,010.00.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,

Attest: \_\_\_\_\_

Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**DAVID J. DUQUETTE**

v. **BOARD OF ASSESSORS OF  
THE TOWN OF HINSDALE**

Docket Nos.: F319251

Promulgated:  
September 9, 2015

**ATB 2015-483**

This is an appeal under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the Town of Hinsdale (“assessors” or “appellee”) to abate a tax on certain real estate in the Town of Hinsdale assessed to David J. Duquette (“appellant”) under G.L. c. 59, §§ 11 and 38 for fiscal year 2013.

Chairman Hammond heard the appellee’s Motion to Dismiss this appeal due to the appellant’s failure to respond to a request for information under G.L. c. 59, § 38D. Commissioners Scharaffa, Rose, Chmielinski, and Good 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.

*David J. Duquette, pro se*, for the appellant.

*Rosemary Crowley, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

The Appellate Tax Board (“Board”) heard the assessors’ Motion to Dismiss this appeal due to the appellant’s failure to respond to a request for information under G.L. c. 59, § 38D (“§ 38D”). The salient facts are essentially undisputed.

On January 1, 2012, the relevant valuation date for fiscal year 2013 (“fiscal year at issue”),<sup>1</sup> the appellant was the assessed owner of a certain parcel of real estate located at

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<sup>1</sup> Fiscal year 2013 was a revaluation year in the Town of Hinsdale. Revaluation is a process mandated by G.L. c. 40, § 56 during which the assessors update and analyze all property records and assessed values to ensure that they are certified by the Commissioner of Revenue as assessing property at full and fair cash value. The Commissioner of Revenue’s certification is required in order for municipalities to set their tax rate.

0 Bullard's Crossing in the Town of Hinsdale ("subject property"). The subject property was improved with a building housing a commercial garage business. The assessors valued the subject property at \$499,700, and assessed a tax thereon, at a rate of \$12.22 per thousand, in the total amount of \$6,106.33, which the appellant timely paid without incurring interest.

On January 11, 2013, the appellant timely filed an Application for Abatement with the assessors, appealing the valuation of the subject property. The assessors denied the appellant's abatement application on February 19, 2013, and the appellant seasonably filed his appeal with this Board on May 10, 2013. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Prior to the appellant's filing of his abatement application, however, on or about February 9, 2012, the assessors sent to the appellant a request for certain income and expense information pursuant to § 38D, which allows boards of assessors to request from property owners and lessees "such information as may reasonably be required by [it] to determine the actual fair cash valuation of such property." The statute further provides that failure to respond to such a request "shall be automatic grounds for dismissal" of the taxpayer's appeal to the Board. The assessors had sent similar requests for information under § 38D to the appellant for both fiscal years 2011 and 2012 and the appellant did not respond to either request.

As in the previous two fiscal years, the appellant did not respond to the assessors' request for information under § 38D for the fiscal year at issue. As a result, the assessors valued the subject property without the benefit of the requested income and expense information.

On October 15, 2013, the Board heard the assessors' Motion to Dismiss. The appellant opposed the motion on the ground that the information sought was not "reasonably ... required" for a determination of the actual fair cash value of the subject property for fiscal year 2013 and, therefore, he was not required under § 38D to provide the requested information to the assessors. He did not contend that he had made a good faith effort to comply with the request, or that his failure to comply with the request was occasioned by reasons beyond his control, nor did he offer any other argument or evidence in support of his position.

On the basis of the evidence presented at the Motion hearing, the Board allowed the assessors' Motion to Dismiss this appeal due to the appellant's failure to respond to their request for information under § 38D. The Board found that the information requested was reasonably required by the assessors to determine the actual fair cash value of the subject property for the fiscal year at issue. The Board further found that the appellant made no good faith effort to

comply with the request, and that the appellant's failure to respond was not occasioned by reasons beyond his control. Accordingly, the Board decided this appeal for the assessors.

## OPINION

General Laws chapter 59, § 38D states in pertinent part:

A board of assessors may request the owner or lessee of any real property to make a written return under oath within sixty days containing such information as may reasonably be required by it to determine the actual fair cash valuation of such property. ***Failure of an owner or lessee of real property to comply with such request within 60 days after it has been made by the board of assessors shall be automatic grounds for dismissal of a filing at the appellate tax board.*** The ***appellate tax board*** and the county commissioners ***shall not grant extensions for the purposes of extending the filing requirements unless the applicant was unable to comply with such request for reasons beyond his control or unless he attempted to comply in good faith.*** (emphasis added).

Accordingly, when an owner or lessee ("taxpayer"), as the case may be, fails to respond under oath within sixty days to a written request from the assessors for information reasonably required by the assessors to determine the fair cash value of the property at issue, the taxpayer's right to appeal an assessment to this Board is foreclosed unless the taxpayer was unable to comply for reasons beyond his control or attempted to comply in good faith. See ***Marketplace Center II Limited v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2000-258, 276-77 ("***Marketplace Center II***"), *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002) (decision pursuant to Rule 1:28).

There was no dispute in the present appeal that the appellant failed to respond to the assessors' request for information pursuant to § 38D at all, let alone within sixty days. The appellant did not demonstrate that he made a good faith attempt to comply with the request, nor did he demonstrate that his failure to comply with the request was occasioned by reasons beyond his control. See ***Marketplace Center II***, Mass. ATB Findings of Fact and Reports at 276-77.

The appellant instead argued that the information sought by the assessors was not reasonably required to value the subject property. After examining the relevant evidence, the Board found that these allegations were without merit. The evidence revealed that the subject property housed a commercial garage business, and the appellant offered no explanation regarding why the income and expense information sought by the assessors was not reasonably required to value the subject property. Moreover, the evidence showed that the appellant had failed to respond to the assessors' requests for information in each of the two fiscal years preceding the fiscal year at issue, and thus it was reasonable to conclude that the assessors were

in need of more current income and expense information in order to accurately value the subject property.

Furthermore, fiscal year 2013 was a revaluation year for the Town of Hinsdale. Part of the revaluation process involves gathering and updating relevant information about each property, and thus it was reasonable for the assessors to request the information from the appellant. Based on these facts, the Board found that the information requested by the assessors pursuant to § 38D was reasonably required to determine the fair cash value of the subject property. Accordingly, the Board rejected the appellant's argument.

Based on the foregoing, the Board granted the assessors' Motion to Dismiss under G.L. c. 59, § 38D and decided this appeal for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**  
**Attest:** \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**FORRESTALL ENTERPRISES, INC.            v.            BOARD OF ASSESSORS OF  
THE TOWN OF WESTBOROUGH**

Docket Nos.: F317708  
F318861

Promulgated:  
December 4, 2014

**ATB 2014-1025**

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee, the Board of Assessors of the Town of Westborough ("appellee" or "assessors"), to abate tax on certain personal property in the Town of Westborough owned by and assessed to Forrestall Enterprises, Inc. ("Forrestall Enterprises" or "appellant") under G.L. c. 59, §§ 11 and 38 for fiscal years 2012 and 2013.

Chairman Hammond heard these appeals. Commissioners Scharaffa, Rose, Chmielinski, and Good joined him in the decisions 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 E. Tashjian, Esq. and Kenneth J. Mickiewicz, Esq. for the appellant.*

*Kenneth W. Gurge, Esq. for the appellee.*

## **FINDINGS OF FACT AND REPORT**

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

### **I. INTRODUCTION AND JURISDICTIONAL BACKGROUND**

The appellant, Forrestall Enterprises, is a Massachusetts corporation wholly owned by Bruce Forrestall. On January 1, 2011, Forrestall Enterprises was the assessed owner of an approximately 5-acre parcel located at 113 Milk Street in Westborough (“Milk Street Property”), on which a 240 kW solar photovoltaic system was installed, made up of approximately 856 panels (“Solar PV System”). For fiscal year 2012, the assessors valued the Solar PV System at \$1,316,550 and assessed a personal property tax thereon, at the rate of \$19.21 per thousand, in the amount of \$25,290.93. For the fiscal year 2013, the assessors valued the Solar PV System at \$748,370 and assessed a personal property tax thereon, at the rate of \$18.97 per thousand, in the amount of \$14,196.58. The appellant timely paid the taxes assessed for both fiscal years without incurring interest. Because the appellant timely paid the assessed personal property tax for each fiscal year at issue, it necessarily complied with the jurisdictional requirement that at least one-half of the tax be paid prior to the filing of an appeal. *See* G.L. c. 59, §§ 64 and 65.

The appellant filed an application for abatement for fiscal year 2012 on January 27, 2012, arguing that the Solar PV System was statutorily exempt from property tax. The assessors denied the application on April 24, 2012 and the appellant timely filed a petition for fiscal year 2012 with the Board on July 19, 2012 (Docket No. F317708). The appellant similarly filed an application for abatement with the assessors for the fiscal year 2013 on February 1, 2013. The assessors denied that application on February 26, 2013 and the appellant timely filed a petition for fiscal year 2013 with the Board on April 16, 2013 (Docket No. F318861). Based on the foregoing, the Board found that it had jurisdiction to decide these appeals.

### **II. FORRESTALL ENTERPRISES NET METERING AGREEMENT**

In addition to Forrestall Enterprises, Mr. Forrestall also wholly owns two other corporations which lease property in Westborough: Westborough Automotive Service, Inc., which leases property at 128 Turnpike Road, and Car Wash & Detailing of Westborough, Inc., which leases property at 126 Turnpike Road. Mr. Forrestall also directly owns a personal

residence at 11 Isaac Miller Road and eight condominium units at Westborough Suites Condo at 17 South Street in Westborough.<sup>1</sup>

In 2008, Mr. Forrestall contracted for the installation of an 18.81kW system of 99 solar panels which were placed at Car Wash & Detailing of Westborough, Inc.'s facility to generate solar energy for that property. As Mr. Forrestall wished to further expand his use of solar power, the appellant purchased the Milk Street Property on October 6, 2010, which at the time was a vacant property consisting mostly of wetlands, and contracted for the installation of the Solar PV System. By January 1, 2011, the Solar PV System was substantially installed and was then connected to the electric grid maintained by a subsidiary of National Grid USA, Inc. (referred to herein with its subsidiaries collectively as "National Grid") in March of 2011.

The appellant and National Grid entered into an "Interconnection Service Agreement," more commonly referred to as a "net metering" agreement, effective November 26, 2010. Net metering allows a customer which owns or leases solar panels to connect those panels to the electrical grid. The customer's meter is engineered to record each kilowatt hour of energy generated by the solar powered system and each kilowatt hour of energy actually used by the customer. Under a net metering agreement, the customer is only liable for payment of the net difference of the value of electricity he or she used from the grid, after crediting the value of electricity which he or she produced and made available to the electrical grid. The Milk Street Property did not contain any property other than the Solar PV System. Instead, the Board found that appellant intended for the credits received from the energy produced to be used to offset a substantial portion of the electricity usage of the Forrestall Westborough Properties. Accordingly, as part of its agreement with National Grid, the appellant allocated a specified percentage of its credits to each of the Forrestall Westborough Properties via Schedule Z to the Interconnection Service Agreement.

If the total electricity usage at each Forrestall Westborough Property exceeded its allocated amount of Solar PV System energy credits, it would only be billed for the net usage. Conversely, if the Solar PV System generated more energy than was needed, each of the Forrestall Westborough Properties' allocated excess would be carried forward to be offset against future use. Thus, the Board found that Forrestall Westborough Properties effectively used the equivalent of 100 percent of the energy produced by the Solar PV System, even if the actual electricity used to power the Forrestall Westborough Properties drawn from the electrical grid could have been generated from different originating sources and the electricity produced by the

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<sup>1</sup> Hereinafter all properties owned either directly by Mr. Forrestall or owned by corporations of which he is the sole owner are collectively referred to as the "Forrestall Westborough Properties."

Solar PV System could be directed to other customers. None of the Forrestall Westborough Properties compensated the appellant for the use of the credits or received cash value from National Grid for any excess allocated credits.

The appellant asserted that the Solar PV System was exempt from tax pursuant to G.L. c. 59, § 5, cl. 45 (“Clause Forty-Fifth”), which provides an exemption for certain solar powered systems. The appellee argued that Clause Forty-Fifth only applied to solar powered systems which were installed on the same parcel or a contiguous parcel to the property they powered. Based on the reasons set forth in the following Opinion, the Board found and ruled that Clause Forty-Fifth did not contain such a precondition. Therefore, the Board entered a decision for the appellant, granting an abatement of tax of \$25,290.93 for fiscal year 2012 and \$14,196.58 for fiscal year 2013.

### OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. Such an exemption is provided in Clause Forty-Fifth for a:

solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.

G. L. c. 59, § 5, cl. 45. A taxpayer seeking an exemption bears the burden of proving that the subject property qualifies “according to the express terms or the necessary implication of a statute providing the exemption.” *New England Forestry Foundation, Inc. v. Assessors of Hawley*, 468 Mass. 138, 148 (2014).

#### **I. THE SOLAR PV SYSTEM IS EXEMPT FROM TAX UNDER THE PLAIN MEANING OF CLAUSE FORTY-FIFTH**

Courts interpret a statute in accordance with the plain meaning of its text. *Reading Coop. Bank v. Suffolk Constr. Co.*, 464 Mass. 543, 547-548 (2013)(citing *Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n*, 402 Mass. 352, 354 (1988)). As the primary source of insight into the intent of the Legislature is the language of the statute, if the language of the statute is unambiguous, a court’s function is to enforce the statute according to its terms. *Id.* at 548; *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983). By the plain, literal meaning of the text, the exemption provided in Clause Forty-Fifth requires that the subject property be: (1) a solar or wind powered system or device; (2) utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying energy; and (3) utilized to supply the energy needs of property that is subject to Massachusetts property tax. The Board

found and ruled that the Solar PV System was at all material times: (1) a solar powered system or device within the meaning of Clause Forty-Fifth; (2) used as a primary or auxiliary power system to supply energy to the ForreSTALL Westborough Properties; and (3) the ForreSTALL Westborough Properties, which received 100 percent of the credit for the energy produced by the Solar PV System and thus effectively used all of its power, are all located in Massachusetts and subject to property tax. Therefore, the Board found and ruled that the Solar PV System conforms to all of the express requirements of Clause Forty-Fifth.

The assessors, in their denial of the appellant's application for abatement, cited to the policy position of the Department of Revenue ("Department"), the agency responsible for advising cities and towns regarding their obligations under the property tax laws. *See, e.g.*, G.L. c. 58, § 3. The Department has interpreted Clause Forty-Fifth so as to limit its application only to solar property that is located either on the same parcel or a contiguous parcel to the property it is intended to power and that is not connected to the grid. *See* Opinion Letter No. 2013-296 (May 14, 2013); Opinion Letter No. 99-753 (Dec. 6, 1999). While the Department of Revenue is charged with administering the tax laws of the Commonwealth, "principles of deference are not ... principles of abdication," and an incorrect interpretation of a statute by an administrative agency is entitled to no deference. *Town Fair Tire Centers, Inc. v. Commissioner of Revenue*, 454 Mass. 601, 605 (2009)(citations omitted). The duty of statutory interpretation rests ultimately with the courts. *Id.* The Board found and ruled the Department's limitation of the statutory exemption to solar property located on the same or a contiguous parcel to be an illusory distinction, which finds no basis in Clause Forty-Fifth.

"It is not the province of courts to add words to a statute that the Legislature did not choose to put there in the first instance." *Global NAPs, Inc. v. Awiszus*, 457 Mass. 489, 496 (2010)(citing *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 803 (1999)). Unlike other exemptions and tax credits granted to taxpayers related to their use of solar powered property, which the Legislature crafted to explicitly require that the solar system be used to power specific property, Clause Forty-Fifth has no such limitation. *See* G.L. c. 64H, § 6(dd) (sales tax exemption enacted in 1977 for "a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of an individual's principal residence in the commonwealth"); G.L. c. 62, § 6(d) (income tax credit originally enacted in 1979 for investment in a renewable energy source, including solar power, "when installed in connection with a dwelling"). Clause Forty-Fifth only requires that a solar system be used as a primary or auxiliary source of power for the "energy needs of *property taxable under [Chapter 59]*." G.L.c.

59, § 5, cl. 45 (emphasis added). Therefore, if the Legislature intended to limit the property tax exemption of Clause Forty-Fifth, it is clear that it knew how to do so.<sup>2</sup>

Furthermore, just as the Board ruled that there is no distinction within the statute to differentiate between solar panels which are connected directly to the taxpayer's electrical service and those connected to that service through the electrical grid, the Board found and ruled that there was also no relevant factual distinction. In either situation, the taxpayer has invested in solar property in the Commonwealth to produce cost-effective energy that he or she may benefit from. In either situation, the Commonwealth derives the benefit of a shift of a portion of the production of energy to greener, more renewable sources. A taxpayer in either case would draw electricity for its use from its electrical service and would only ultimately pay for the power produced by the utility company. Accordingly, there is no basis for making the distinction urged by the assessors where the Legislature has chosen not to make such a distinction.<sup>3</sup>

The appellee maintained that allowing the exemption to taxpayers practicing net metering will lead to unintended abuse as taxpayers could purchase solar property, enter into a net metering agreement, qualify for the exemption lasting for twenty years, and then sell the credits generated to third parties. While there may be potential instances where a net metering credit could be sold, the Board need not reach that issue, because the appellant is using its solar panels as a source of electricity for taxable property of its sole owner.

## **II. STATUTORY ALLOWANCE OF CLAUSE FORTY-FIFTH IN CONJUNCTION WITH PERSONAL EXEMPTIONS IS IRRELEVANT**

G.L. c. 59, § 5, which includes the exemption of Clause Forty-Fifth, also includes a number of "personal exemptions" that are specific to a type of property owner, such as property owned by a blind person or property used for charitable purposes. G.L. c. 59, § 5 generally limits these exemptions such that only one may apply per parcel of real estate. However, in enacting Clause Forty-Fifth, the Legislature amended the introductory paragraph of G.L. c. 59, § 5 to allow a Clause Forty-Fifth exemption in conjunction with other personal exemptions. The

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<sup>2</sup> Clause Forty-Fifth was amended in 1978 to extend the term of the exemption from ten to twenty years. 1978 Acts, c. 388. No narrow definition of the property to be powered was included akin to the definition in the sales tax exemption which had been passed by the Legislature the year before.

<sup>3</sup> The technology of solar power and its usage have advanced greatly since the original enactment of Clause Forty-Fifth in 1975. While the Board found and ruled that the Solar PV System was exempt according to the plain meaning of the statute, such a finding also comports with the Legislature's past support of solar energy use and net metering. The Legislature's aim in the enactment of an exemption from tax for solar powered systems was ostensibly to encourage the increased use of solar powered systems in the Commonwealth. Since the initial enactment of net metering in 1982, the Legislature has continued to expand the practice. *See* St. 2008, c. 169 (increasing the allowable capacity, increasing the value of credits, and allowing customers to allocate credits with express purpose of "provid[ing] forthwith for renewable and alternative energy and energy efficiency in the commonwealth"); *see also* St. 2014, c. 251; St. 2012, c. 209; St. 2010, c. 2010 (all expanding the use of net metering).

appellee argued that the Legislature would not have needed to amend the introductory paragraph if the exemption was not intended only for property to be placed on the same parcel of real estate where another personal exemption might be applicable, *e.g.*, residential property. However, this does not mean that the exemption *must* be used by a property owner for solar panels on his or her own property, only that it *may* be so used. Thus, the Board found and ruled that the fact that the Legislature amended the introductory paragraph to allow such use has no bearing on whether it is applicable to the appellant.

**CONCLUSION**

As the appellant’s Solar PV System falls under the express language of the exemption from property tax provided by G.L. c. 59, § 5, cl. 45, the Board decided these appeals for the appellant and granted an abatement of tax of \$25,290.93 for the fiscal year 2012 and \$14,196.58 for the fiscal year 2013.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**  
Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**FREDERICK D. LEWIS, ET UX**                      v.                      **BOARD OF ASSESSORS OF  
THE CITY OF LOWELL**

Docket Nos.: F318856

Promulgated:  
May 14, 2015

**ATB 2015-182**

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 City of Lowell (“appellee” or “assessors”) to abate a tax on certain real estate in Lowell, owned by and assessed to Frederick D. Lewis, Et Ux (“appellant” or “Mr. Lewis”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2013 (“fiscal year at issue”).

Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose and Chmielinski joined her 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.

*Frederick D. Lewis, pro se*, for the appellant.

*Karen Golden*, assessor for the appellee.

### **FINDINGS OF FACT AND REPORT**

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

On January 1, 2012, the relevant valuation date for the fiscal year at issue, the appellant was the assessed owner of a 0.76-acre parcel of land improved with a 5,148 square-foot Colonial-style residence located at 818 Andover Street in Lowell (“subject property”). For the fiscal year at issue, the assessors valued the subject property at \$582,600, and assessed a tax thereon, at the rate of \$15.01 per thousand, in the total amount of \$8,744.83, which the appellant timely paid without incurring interest.

On January 30, 2013, the appellant timely filed an Application for Abatement with the assessors, who voted to deny the abatement on February 5, 2013. On April 16, 2013, the appellant timely filed his appeal with the Board. On the basis of the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The subject property’s dwelling was built in 1870 and has ten rooms, including five bedrooms, along with three full bathrooms and one half bathroom, for a total of 5,148 square feet of living area. The subject property also features a two-car garage. The assessors considered it to be in overall good condition.

The appellant contended that the assessed value of the subject property exceeded its fair cash value for the fiscal year at issue. In support of his claim, he submitted a bank appraisal, conducted for financing purposes, dated June 8, 2012. Using a sales-comparison analysis, the appraiser, who did not testify at the hearing of this appeal, determined a fair cash value for the subject property of \$495,000 as of June 8, 2012.

In addition to the appraisal, the appellant introduced a real estate listing for a property located at 386 Andover Street in Lowell. The dwelling at 386 Andover Street was built in 1874 and had 7,304 square feet of finished living area, including seven bedrooms as well as three full bathrooms and one half bathroom. That property was put on the market in March of 2014 with a listing price of \$499,900, and it remained on the market as of the time of the hearing of this appeal in June of 2014.

Lastly, the appellant presented three sales of purportedly comparable properties. The following table includes relevant information about each of those properties.

Address	Living Area (sf)	Sale Date	Sale Price
53 Mansur St.	5,647	7/31/12	\$570,000
31 Waverly Ave.	4,400	5/17/13	\$419,000
70 Fairmount St.	4,419	3/29/13	\$335,000

The appellant's opinion of the subject property's fair market value for the fiscal year at issue was \$495,000, consistent with its appraised value.

In defense of the assessment, the assessors presented a sales-comparison analysis of three properties. Relevant information about each of those properties appears in the following table.

Address	Living Area (sf)	Sale Date	Sale Price	Sale Price/PSF
726 Andover St.	3,845	8/26/11	\$535,000	\$139.14
657 Andover St.	2,844	9/30/10	\$399,000	\$140.30
208 Fairmount St.	3,803	6/30/11	\$515,000	\$135.42

These properties, the assessors noted, had an average sale price of \$137.50 per square foot, which was significantly higher than the subject property's assessed value on a per-square-foot basis, which was \$113.17. Thus, in the assessors' opinion, these sales provided additional support for the subject property's assessed value.

#### The Board's Valuation Conclusions

There were shortcomings in the evidence presented by both parties.

The Board placed no weight on the appraisal offered by the appellant for a number of reasons. First, the appraiser was not present to testify at the hearing of this appeal and he therefore could not be questioned regarding his adjustments and conclusions by either the Presiding Commissioner or the assessors. Second, the appraisal did not include property record cards or deeds of sale for the purportedly comparable properties contained therein, and the Board could not verify the accuracy of the information presented nor confirm that the sales were arm's-length transactions. Third, the appraiser included in his appraisal and appeared to have relied in part on properties that were on the market at the time of the appraisal, but had not sold, and thus represented mere asking prices rather than consummated, arm's-length transactions. For all of these reasons, the Board found that the appraisal did not provide a reliable indication of the subject property's fair cash value, and it therefore placed no weight on the opinions contained therein.

The Board likewise declined to place weight on the listing for 386 Andover offered by the appellant. As an initial matter, that listing represented a mere asking price and not a consummated, arm's-length sale. Moreover, that property was listed in March of 2014, well after the relevant valuation date of January 1, 2012. The Board found that, without adjustment to account for this difference, the listing was too remote in time to provide a reliable indication of the subject property's fair cash value on that date. This same deficiency detracted from the probative worth of the appellant's comparable sales.

The appellant relied in part on the sales of 70 Fairmount Street and 31 Waverly Street, but those sales did not occur until March 29, 2013 and May 17, 2013, well after the relevant valuation date of January 1, 2012. The Board found that these sales, without adjustment to account for this difference, did not provide a reliable indication of the subject property's fair cash value on that date. That left just one sale, 53 Mansur Street, which sold in July of 2012 for \$570,000. However, the Board could not say that a single, unadjusted sale price represented persuasive evidence of fair cash value.

The evidence offered by the assessors suffered from many of the same shortcomings as the evidence offered by the appellant. For example, 657 Andover Street sold in 2010 and was nearly half the size of the subject property, with just 2,844 square feet of finished living area. Thus it was too remote in time and too different from the subject property to provide a reliable indication of its fair cash value on the relevant valuation date. In fact, all three of the properties relied upon by the assessors were smaller in size than the subject property, which made their reliance on per-square-foot sale prices for comparison particularly unavailing, as per-square-foot sale prices typically decline with increases in living area. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 212 (13th ed. 2008). ("Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase.") Finally, like the appellant, the assessors failed to make any adjustments to the sale prices of their sales-comparison properties, despite obvious differences from the subject property. For these reasons, the Board declined to place weight on the valuation evidence offered by the assessors, deferring instead to the presumptive validity of the assessment.

In conclusion, on the basis of all of the evidence and bearing in mind the presumptive validity of the assessment, the Board found that the appellant failed to meet his burden of proving that the subject property's assessed value exceeded its fair cash value for the fiscal year at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

## OPINION

Assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer 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 its assessed value. See *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974). “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Id.* (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)).

In appeals before the 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. v. Assessors of Lynn*, 393 Mass. 591, 600 (1984) (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

In the present appeal, the Board found that the evidence presented by the appellant was not reliable or persuasive enough to establish that the assessed value of the subject property exceeded its fair cash value. For example, the appellant offered into evidence an appraisal report valuing the subject property, but not the testimony of the appraiser who conducted the appraisal or other evidence, such as deeds or property records for the properties discussed in the appraisal, which could be used to verify or support the information and conclusions contained in the appraisal. The Board therefore gave the opinions contained therein no weight. See, e.g. *Papernik v. Assessors of Sharon*, Mass. ATB Findings of Fact and Reports 2011-600, 615 (ruling that hearsay opinion evidence, which, although not objected to by the assessors, was entitled to no weight because it was offered without proper foundation, qualification, or underlying factual support and without providing the assessors with an opportunity for cross-examination).

Similarly, the Board found that the current sale listing for a nearby property offered by the appellant lacked probative force because it was a mere asking price, rather than a consummated sale price, and therefore it did not provide a reliable indication of the subject property’s fair market value. See *Campanelli Westfield LLC v. Assessors of Quincy*, Mass. ATB Findings of Fact and Reports 2014-101, 122 (finding that mere asking prices do not furnish reliable evidence of market prices). Moreover, that listing was comparatively remote in time from the relevant date of valuation, as were some of the other comparable sale properties offered

by the appellant, and the appellant made no adjustment to account for this difference. Properties are “comparable” to the subject property when they share "fundamental similarities" with the subject property, including location, size, and date of sale. *Lattuca v. Robsham*, 442 Mass. 205, 216 (2004). When comparable sales are considered, adjustments must be made for various differences among the properties which would otherwise cause disparities in the properties’ sale prices. See *Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. As the appellant used properties that were remote in time from the relevant date of valuation, and made no adjustment to account for this difference, the Board found and ruled that this evidence did not provide a reliable indication of the subject property’s fair market value on that date. See *Trustees of the Charles Cotesworth Pinckney Trust v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2007-621, 628 (finding that sales too remote in time from the relevant date of valuation, with no adjustment for this difference, did not provide persuasive evidence of value for the property at issue).

The remaining evidence offered by the appellant was a single sale - 53 Mansur Street - which sold in July of 2012 for \$570,000. However, a “single sale does not necessarily reflect market value.” THE APPRAISAL OF REAL ESTATE at 317. Furthermore, as with the other comparison properties, the appellant made no adjustment to account for differences between 53 Mansur Street and the subject property, and the Board therefore declined to place weight on that sale price.

The Board was similarly unpersuaded by the evidence proffered by the assessors, and it placed no weight on the valuation evidence offered by them. Because neither party presented reliable evidence of the subject property’s fair cash value for fiscal year 2009, the Board relied on the presumptive validity of the assessment. See *The May Department Store Co. v. Assessors of Newton*, Mass. ATB Findings of Fact and Reports 2009-153, 195 (“[T]he taxpayer loses when the taxpayer and the assessors present the board with equally footless cases.”)(quoting *Hampton Assoc. v. Assessors of Northhampton*, 52 Mass. App. Ct. 110, 119 (2001)).

In conclusion, on the basis of all of the evidence, the Board found and ruled that the appellant failed to meet his burden of proving that the assessed value of the subject property exceeded its fair cash value for the fiscal year at issue. 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

**LIBERTY NORFOLK DEVELOPMENT II, LLC** v. **BOARD OF ASSESSORS OF THE TOWN OF NORFOLK**

Docket Nos.: F311620, F314940

Promulgated:  
June 4, 2015

**ATB 2015-207**

These are appeals originally filed under the informal procedure<sup>1</sup> pursuant to G.L. c. 58A, § 7A and G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the Town of Norfolk (“appellee” or “assessors”) to abate taxes on certain real estate in Norfolk owned by and assessed to Liberty Norfolk Development II, LLC (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2011 and 2012 (“fiscal years at issue”).

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

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

*Bruce J. Savitsky*, Esq. for the appellant.

*Jeffrey T. Blake*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

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

**I. Introduction and Jurisdiction**

On January 1, 2010 and January 1, 2011, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 1.37-acre parcel of real estate improved with a retail pharmacy building located at 3 Liberty Lane in Norfolk (“subject property”). For assessment purposes, the subject property is identified as Map 14, Block 41, Lot 57. The subject property is located in downtown Norfolk near the intersection of Main Street

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<sup>1</sup> The appellee, in accordance with G.L. c. 58A, § 7A and 831 CMR 1.09, elected to transfer these appeals to the formal procedure.

and North Street, also known as state route 115. More specifically, the subject property is located in the Norfolk Town Commons, a mixed-use, “smart-growth” development.

The subject building, which was constructed in 2009, is a one-story, single-tenanted, retail building with approximately 14,406 feet of leasable area. The subject building has a steel-frame structure with a concrete slab foundation, a flat roof with a tar and gravel covering, and a masonry exterior. The interior has a large open selling area, a cashier area, a pharmacy, a small office/employee area, and restrooms. The building is equipped with a drive-through for pharmacy customers. As of the relevant assessment dates, the subject property was occupied by Walgreens Eastern Co., Inc. (“Walgreens”), which opened a pharmacy at the subject building.

For fiscal year 2011, the assessors valued the subject property at \$3,584,600 and assessed a tax thereon, at the rate of \$15.10 per thousand, in the total amount of \$54,127.46. Although the appellant’s fourth quarter tax payment was late, the appellant had paid an amount in excess of the average of its assessed property taxes for the preceding three years by the May 1, 2011 due date; therefore, late payment of the fourth quarter tax was not an impediment to the Board’s jurisdiction in this appeal. G. L. c. 59, §§ 64 and 65.<sup>2</sup> On January 26, 2011, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which they denied on February 9, 2011. On April 19, 2011, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

For fiscal year 2012, the assessors valued the subject property at \$3,584,600 and assessed a tax thereon, at the rate of \$16.47 per thousand, in the total amount of \$59,038.36. In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 24, 2012, in accordance with G. L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on February 15, 2012. On March 6, 2012, in accordance with G. L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

## **II. Appellant’s Case-in-Chief**

The appellant presented its case-in-chief primarily through the testimony of two witnesses: Jonathon Shumrak, Senior Real Estate Manager for Walgreens; and Charles L. Clark, a general real estate appraiser, whom the Board qualified as an expert witness in the area of

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<sup>2</sup> Under G.L. c. 59, §§ 64 and 65, the accrual of interest for the fiscal year at issue is not a jurisdictional impediment where a taxpayer has timely paid an amount equal to or greater than the average of the taxes assessed for the three years preceding the fiscal year at issue.

commercial real estate valuation. Mr. Clark prepared an appraisal report, which the appellant offered as an exhibit. In addition, the appellant introduced a copy of the subject property's existing lease between the appellant and Walgreens, a typical rent-analysis pro forma used by Walgreens, and a space-plan diagram of the subject building.

The appellant's first witness, Mr. Shumrak, testified that Walgreens leases approximately 75% of its stores under long-term leases in a "build-to-suit" arrangement. He explained that the typical arrangement is for Walgreens to contact a developer, who then acquires the real property of the site of Walgreens' desired location and builds the pharmacy according to Walgreens' specifications. The developer and Walgreens then enter into a long-term lease, which allows the developer to recoup its construction costs as well as generate a reasonable profit from a stable tenant.

Mr. Shumrak further testified that the subject property was a build-to-suit property and that no broker was involved in the transaction. On December 23, 2008, the appellant entered into a 77-year lease with Walgreens that began on January 1, 2010 and runs through December 31, 2086. Pursuant to the terms of the lease, the rent is broken down into two components: a fixed rent, designed to recapture the building costs including financing; and a base rent, which is based on Walgreens business operation and is subject to escalation clauses. During the fiscal years at issue, the total rent payable to the appellant was \$45,250 per month, or \$29.44 per square foot.

Mr. Shumrak also testified that, currently, within a 30-mile radius of the subject property, Walgreens has approximately 100 pharmacies and that, with the exception of those located in the city of Boston, a majority have a drive-through.

The appellant's next witness was Charles Clark, a real estate valuation expert. After determining that the subject property's highest and best use was its continued use as a retail building, Mr. Clark considered the three usual methods for estimating the value of the subject property for the fiscal years at issue. Mr. Clark rejected the cost approach because of the difficulty in estimating functional obsolescence in a build-to-suit building such as the subject property. Although Mr. Clark did prepare a sales-comparison analysis for each of the fiscal years at issue, he acknowledged that a majority of his cited sales were retail buildings that involved leased-fee rights and, therefore, this method of valuation had limited merit. Consequently, Mr. Clark considered his direct income-capitalization approach to be the most viable methodology to use to estimate the fair cash value of the subject property for the fiscal years at issue.

The first step in Mr. Clark's income-capitalization analysis was to determine the subject property's potential gross revenue for each of the fiscal years at issue. Because of the structure of

the subject property's existing lease, which was designed to recoup construction costs, the length of the lease, and the lack of exposure to the market, Mr. Clark determined that the subject property's actual rent for the fiscal years at issue was not representative of the market. Instead, he theorized that build-to-suit properties such as the subject property should be valued as second-generation retail space; that is, space repurposed and rented to other retailers or businesses after the large, national chain drug store vacates it. He then relied on seven purportedly comparable retail leases to assist in estimating market rents for the subject property. Relevant information regarding Mr. Clark's purportedly comparable leases appears in the following table.

No.	Address	Tenant	Square Feet	Date	Term	Rent PSF	Terms
1	285 Washington St., North Easton	Listing	3,689	2010 Listing	5 Years	\$15.00	NNN
2	150 Highland Ave., Seekonk	Advanced Auto	4,000	2/1/2011	10 Years	\$15.75	NNN
3	1 Green St., Medfield	Takara	2,606	1/1/2010	5 Years	\$16.35	Gross + Util
4	15 Highland Ave., Attleboro	Various Tenants	8,346	1/1/2010	5 Years	\$17.01	NNN
5	115 Washington St., Attleboro	Goodwill	15,950	5/1/2009	10 Years	\$15.50	NNN
6	45 Pulaski Blvd., Bellingham	Advanced Auto	6,831	12/1/2008	15 Years	\$23.92	NN
7	390 Pleasant St., Brockton	Wash N Go	4,400	7/1/2008	7 Years	\$13.94	NNN

Mr. Clark determined that the best indication of the subject property's market rent was lease No. 5. He testified that the improvement was a build-to-suit building originally built by Lumber Liquidators and now leased to Goodwill. He further testified that this property, located on busy Route 1, has a superior location, but further noted that the subject property was of superior quality. Considering what he reported as all of the relevant factors, Mr. Clark determined that a fair market rent of \$16.00 per square foot on a triple net basis was appropriate for fiscal year 2011. Assuming some minor appreciation during 2010, he estimated the market rent at \$17.00 on a triple net basis per square foot for fiscal year 2012. Applying these rates to the subject property's 14,406 square feet, Mr. Clark obtained gross rental revenues of \$230,496 for fiscal year 2011 and \$244,902 for fiscal year 2012.

The next step in Mr. Clark's analysis was the determination of vacancy and collection loss allowances. Mr. Clark noted in his appraisal that according to industry data, vacancy rates in the subject property's Southwest market was 9.3% and CoStar reported a vacancy for Norfolk at the same period of 10.3%. After considering the market data as well as an inspection of the

neighborhood, Mr. Clark selected a vacancy rate of 9.25% for fiscal year 2011. With respect to fiscal year 2012, Mr. Clark noted that according to the 2011 Keypoint Report, a firm which focuses on retail real estate trends, vacancy in the subject property’s Southwest market was 7.6% and CoStar reported a vacancy rate of 9.9% for Norfolk in the same period. Mr. Clark selected a vacancy rate of 8.0% for fiscal year 2012.

In addition, Mr. Clark noted that collection losses range from 1% to 5% depending upon management practices, the location of the property, the number of tenants, and the quality of tenants. He estimated a collection loss of 2% for both fiscal years at issue. His combined vacancy and collection loss was 11.25% for fiscal year 2011 and 10.0% for fiscal year 2012.

For expenses, Mr. Clark reviewed 2010 and 2011 averages reported by the Institute of Real Estate Management (“IREM”) for shopping centers, operating expense data from similar use retail properties in the subject property’s market and RealtyRates.com National Surveys. He then accounted for the landlord’s share of expenses for the vacant space, by multiplying his operating expenses by the combined vacancy and collection loss rate. He also allowed the following expenses: 3.0% of effective gross income for management; replacement reserves calculated at \$0.20 per square foot; and general and administrative costs calculated at \$0.25 per square foot.

Next, Mr. Clark analyzed capitalization rates for the fiscal years at issue. He consulted the 1<sup>st</sup> Quarter 2010 and 2011 Price Waterhouse Coopers/Korpacz Real Estate Investor Survey (“PWC/Korpacz”) for Strip Shopping Centers. According to these surveys, rates generally ranged from 7.25% to 11.0%, with an average of 8.49% in 2010, and ranged from 5.50% to 9.50%, with an average of 7.40% in 2011. Mr. Clark also considered capitalization rates derived from retail property sales and the opinions of local market participants. Given the subject property’s location, age and condition, Mr. Clark selected a capitalization rate of 9.0% for fiscal year 2011 and 8.0% for fiscal year 2012. Mr. Clark’s analysis is reproduced in the following tables.

**Fiscal Year 2011**

		<b>Fiscal Year 2011</b>
<b>INCOME</b>		
Building area	14,406 sf	
Market Rent (psf)		\$16.00
<b>Potential Gross Income</b>		<b>\$230,496</b>
Less Vacancy	9.25%	(\$21,321)
Less Credit Loss	2.00%	(\$4,610)
<b>Effective Gross Income</b>		<b>\$204,565</b>

<b>OPERATING EXPENSE</b>			
Insurance	\$0.23/sf	\$3,313 * 11.25%	\$373
Common Area Maintenance	\$1.41/sf	\$20,312 * 11.25%	\$2,285
Utilities	\$0.57/sf	\$8,211 * 11.25%	\$924
General & Administrative		\$0.25 / SF	\$3,602
Management Fees		3% EGI	\$6,137
Replacement Reserves		\$0.20 / SF	\$2,881
Total Operating Expense			<b>\$16,201</b>
<b>Net-Operating Income:</b>			<b>\$188,364</b>
Base Rate			9.00%
Tax Factor (owner's share)		1.51% * 11.25%	0.17%
Overall Capitalization Rate			9.17%
<b>Capitalized Value</b>			<b>\$2,054,159</b>
<b>Rounded Fair Cash Value</b>			<b>\$2,050,000</b>

### Fiscal Year 2012

			<b>Fiscal Year 2012</b>
<b>INCOME</b>			
Building area		14,406 sf	
Market Rent (psf)			\$17.00
<b>Potential Gross Income</b>			<b>244,902</b>
Less Vacancy	8.00%		(\$19,592)
Less Credit Loss	2.00%		(\$4,898)
<b>Effective Gross Income</b>			<b>\$220,412</b>
<b>OPERATING EXPENSE</b>			
Insurance	\$0.23/sf	\$3,313 * 10.00%	\$331
Common Area Maintenance	\$1.41/sf	\$19,592 <sup>3</sup> * 10.00%	\$1,959
Utilities	\$0.57/sf	\$8,932 <sup>4</sup> * 10.00%	\$893
General & Administrative		\$0.25 / SF	\$3,602
Management Fees		3% EGI	\$6,612
Replacement Reserves		\$0.20 / SF	\$2,881
Total Operating Expense			<b>\$16,279</b>
<b>Net-Operating Income:</b>			<b>\$204,133</b>
Base Rate			8.00%
Tax Factor (owner's share)		1.51% * 11.25%	0.16%
Overall Capitalization Rate			8.16%

<sup>3</sup> Although Mr. Clark testified that he used the same expenses for both fiscal years, the figure reported in his income-capitalization analysis was different.

<sup>4</sup> Although Mr. Clark testified that he used the same expenses for both fiscal years, the figure used in his income-capitalization analysis was different.

<b>Capitalized Value</b>	<b>\$2,500,190</b>
<b>Rounded Fair Cash Value</b>	<b>\$2,500,000</b>

### III. Appellee’s Case-in-Chief

In support of their assessments, the assessors relied on the testimony of William J. Pastuszek, a licensed real estate appraiser whom the Board qualified as a real estate valuation expert without objection. The assessors also submitted into evidence the requisite jurisdictional documents and Mr. Pastuszek’s summary appraisal reports for the fiscal years at issue.

In preparation for his assignment to estimate the value of the subject property for the fiscal years at issue, Mr. Pastuszek testified that he completed an interior and exterior inspection of the subject property and the immediate neighborhood. He also researched: the general conditions of the economy; retail activity in the market; and, more specifically, he focused on drug store sales and rental activity. Based on his research, Mr. Pastuszek determined that the subject property’s highest-and-best use was in the general category of retail and more specifically as a drug store.

Mr. Pastuszek agreed with the appellant’s real estate valuation expert that the income-capitalization approach was the preferred valuation method to use under the circumstances.<sup>5</sup> Mr. Pastuszek began his analysis by reviewing leases of properties with similar sizes, configurations and locations to those of the subject property. Based on these factors, Mr. Pastuszek selected seven comparable leases which are reproduced in the following table.

<b>Rental</b>	<b>Location/Tenant</b>	<b>Rent/SF<sup>6</sup></b>	<b>SF Area</b>	<b>Date/Term</b>
A	Millis – CVS	\$33.50	13,013	2/11 25 years
B	Bellingham – Walgreens	\$34.00	14,550	9/09 N/A
C	Dartmouth – Walgreens	\$28.95	15,040	7/09 25 years 5-10 year options
D	Taunton – Walgreens	\$39.32	13,357	9/09 25 years 5-10 year options
E	Foxboro – Walgreens	\$28.05	14,828	
F	Allston – Walgreens	\$45.90	14,847	5/08 25 years
G	Braintree – RiteAid	\$25.00	12,044	7/08 25 years

Taking into account the differences in lease structures, location, and physical qualities, Mr. Pastuszek determined a fair market rent of \$27.50 per square foot, which yielded a potential gross income of \$396,165 for both fiscal years at issue. Relying on market surveys published in Keypoint Partners and CoStar, Mr. Pastuszek determined that a vacancy and collection loss rate

<sup>5</sup> While Mr. Pastuszek developed values using a sales-comparison approach, he only relied on those values as a check.

<sup>6</sup> All rents were on a triple-net basis.

of 10% was appropriate for both fiscal years at issue. This allowance resulted in an effective gross income of \$356,549 for the fiscal years at issue.

With respect to operating expenses, Mr. Pastuszek allowed deductions for insurance, miscellaneous, accounting and legal, management, and reserves. Mr. Pastuszek testified that with the exception of the management fee, which decreased in fiscal year 2012, the remaining expenses were the same for both fiscal years at issue. However, in his actual methodology, his allowance for reserves increased from \$0.30 per square foot in fiscal year 2011 to \$0.50 per square foot in fiscal year 2012. Ultimately, he determined that the total operating expenses for the fiscal years at issue, which indicate expense ratios of 12.13% for fiscal year 2011 and 11.94% for fiscal year 2012, were reflective of market expectations for the subject property.

For his capitalization rates, Mr. Pastuszek reviewed rates derived from sales of several single-tenanted retail properties, rates for Strip Shopping Centers published in the 1st Quarter 2010 and 2011 RealtyRates.com, and also performed band-of-investment analyses. Relying on this information, he selected base capitalization rates of 8.82% for fiscal year 2011 and 8.87% for fiscal year 2012. He then added the applicable pro-rated tax factor for the fiscal years at issue to derive an overall capitalization rate of 9.00% for both fiscal years at issue.

Finally, applying the corresponding overall capitalization rate to the net-operating income for each of the fiscal years at issue, Pastuszek derived an indicated value of \$3,552,947, rounded to \$3,500,000 for fiscal year 2011, and \$3,560,551, rounded to \$3,600,000 for fiscal year 2012.

Mr. Pastuszek's income-capitalization analyses are reproduced in the following table.<sup>7</sup>

		<b>Fiscal Year</b>		<b>Fiscal Year</b>	
		<b>2011</b>		<b>2012</b>	
<b>INCOME</b>					
Building area	14,406				
Market Rent (PSF)		\$27.50		<b>\$27.50</b>	
<b>Potential Gross Income</b>		<b>\$396,165</b>		<b>\$396,165</b>	
Less Vacancy	10%	(\$39,617)	10%	(\$39,617)	
<b>Effective Gross Income</b>		<b>\$356,549</b>		<b>\$356,549</b>	
<b>OPERATING EXPENSE</b>					
Insurance	\$0.50/psf	(\$7,203)	\$0.50/psf	(\$7,203)	
Misc.		(\$5,000)		(\$5,000)	
Mgmt.	5% EGI	(\$17,827)	4% EGI	(\$14,262)	
Acct., Legal, Admin., Etc	2.5% EGI	(\$8,914)	2.5% EGI	(\$8,914)	

<sup>7</sup> The Board noted that there were multiple mathematical errors in Mr. Pastuszek's analyses but reproduced them, as presented to the Board, in the following table.

Reserves	\$0.30	(4,322)	\$0.50/psf	(\$7,203)
Total Operating Expense		(\$43,266)		<b>(\$42,582)</b>
Expense Ratio		12.13%		11.94%
<b>Net-Operating Income:</b>		<b>\$319,765</b>		<b>\$320,450</b>
Base Rate		8.82%		8.87%
Tax Factor (owner's share)		0.1510%		0.1647%
Overall Capitalization Rate (rounded)		9.00%		9.00%
<b>Capitalized Value</b>		<b>\$3,552,947</b>		<b>\$3,560,551</b>
<b>Rounded Fair Cash Value</b>		<b>\$3,500,000</b>		<b>\$3,600,000</b>

#### IV. Board's Findings

Based on all of the evidence, as well as reasonable inferences drawn therefrom, the Board found that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. The Board determined that the subject property's high-and-best use was its existing use as a drug store and that the preferred method for ascertaining the fair cash value of the subject property for both fiscal years at issue was through an income-capitalization methodology.

The Board further found that the appellant's purportedly comparable rentals, which consisted of several smaller-sized, lower-level general retail space and one similarly sized second-generation retail space, were not reflective of the subject property's market of large investment-quality chain retail properties, like national name-brand drug stores such as Walgreens. The Board found that Mr. Pastuszek's market rental of \$27.50 per square foot, which was based on the market rents of other comparable drug store properties, was the appropriate fair market rent.

The appellant's real estate valuation expert suggested a vacancy and collection loss rate of 11.25% for fiscal year 2011 and 10% for fiscal year 2012, while the assessors' real estate valuation expert recommended a rate of 10% for both fiscal years at issue. Based on the evidence presented, the Board adopted a stabilized vacancy and collection loss rate of 10% for both fiscal years at issue. With respect to operating expenses, the Board found that the amounts recommended by the appellant's real estate valuation expert were well supported and reflective of the market, and, therefore, adopted these amounts in its income-capitalization analysis.

The appellant's real estate valuation expert recommended capitalization rates of 9.17% and 8.16%, including the applicable pro-rated tax factors for fiscal years 2011 and 2012, respectively. The assessors' real estate valuation expert recommended a capitalization rate of

9.00%, including the applicable pro-rated tax factors, for both fiscal years at issue. Based on the evidence presented, the Board adopted a stabilized overall capitalization rate of 9.00% for both fiscal years at issue.

The Board's income-capitalization analysis for each fiscal year at issue is presented below:

	<b>Fiscal Year 2011</b>	<b>Fiscal Year 2012</b>
<b>INCOME</b>		
Building area 14,406 sf @ market rent of \$27.50/sf		
<b>Potential Gross Income</b>	<b>\$396,165</b>	<b>\$396,165</b>
Less Vacancy/Credit Loss 10%	(\$39,617)	(\$39,617)
<b>Effective Gross Income</b>	<b>\$356,549</b>	<b>\$356,549</b>
<b>OPERATING EXPENSE</b>		
Insurance	\$373	\$331
Common Area Maintenance	\$2,285	\$1,959
Utilities	\$924	\$893
General & Administrative	\$3,602	\$3,602
Management Fees	\$6,137	\$6,612
Replacement Reserves	\$2,881	\$2,881
Total Operating Expense	<b>\$16,201</b>	<b>\$16,279</b>
<b>Net-Operating Income:</b>	<b>\$340,348</b>	<b>\$340,270</b>
Overall Capitalization Rate	9.00%	9.00%
<b>Capitalized Value</b>	<b>\$3,781,644</b>	<b>\$3,780,778</b>

On this basis, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. Accordingly, the Board issued decisions for the appellee in these appeals.

### OPINION

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

In determining fair cash value, all uses to which the property was or could reasonably be adapted on the relevant assessment dates should be considered. *Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum

value of the property for any legitimate and reasonable use. *Id.* If the property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of its fair market value. *Colonial Acres, Inc. v. Assessors of North Reading*, 3 Mass. App. Ct. 384, 386 (1975). “In determining the property’s highest and best use, consideration should be given to the purpose for which the property is adapted.” *Peterson v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2002-573, 617 (citing APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 315-316 (12<sup>th</sup> ed., 2001)), *aff’d*, 62 Mass. App. Ct. 428 (2004). On this basis, the Board found that the subject property’s highest-and-best-use was its continued use as a retail drug store.

Generally, real estate valuation experts, Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. *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). In the instant appeals, the real estate valuation experts determined that there were insufficient fee-simple market sales of reasonably comparable properties to meaningfully estimate the value of the subject property using a sales-comparison technique. The Board agreed. *See Olympia & York State Street Co. v. Assessors of Boston*, 428 Mass. 236, 247 (1988) (“The assessors must determine a fair cash value for the property as a fee simple estate, which is to say, they must value an ownership interest in the land and the building as if no leases were in effect.”). Furthermore, the “[i]ntroduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods.” *Correia*, 375 Mass. at 362. The Board found here that no such “special situations” existed. The use of the income-capitalization approach is appropriate when reliable market-sales data are not available. *Assessors of Weymouth v. Tammy Brook Co.*, 368 Mass. 810, 811 (1975); *Assessors of Lynnfield v. New England Oyster House*, 362 Mass. 696, 701-702 (1972); *Assessors of Quincy v. Boston Consolidated Gas Co.*, 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. *Taunton Redev. Assocs. v. Assessors of Taunton*, 393 Mass. 293, 295 (1984). In these appeals, the Board agreed with both parties’ real estate valuation experts that the income-capitalization approach was the most appropriate method to value the subject property.

“Direct capitalization is widely used when properties are already operating on a stabilized basis and there is an ample supply of comparable [rentals] with similar risk levels, income,

expenses, physical and locational characteristics, and future expectations.” APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 499 (13th ed., 2008). The Board found that there were an adequate number of comparable rentals to support the use of a direct income-capitalization methodology to estimate the value of the subject property for the fiscal years at issue. “The direct capitalization of income method analyzes the property’s capacity to generate income over a one-year period and converts the capacity into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved.” *Olympia & York State Street, Co.*, 428 Mass. at 239. “It is the net income that a property *should* be earning, not necessarily what it actually earns, that is the figure that should be capitalized.” *Peterson v. Assessors of Boston*, 62 Mass. App. Ct. 428, 436 (2008) (emphasis in original). Accordingly, the income stream used in the income-capitalization method must reflect the property’s earning capacity or economic rental value. *Pepsi-Cola Bottling Co.*, 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property’s earning capacity. See *Correia v. New Bedford Redevelopment Auth.*, 5 Mass. App. Ct. 289, 293-94 (1977), *rev’d on other grounds*, 375 Mass. 360 (1978); *Library Services, Inc. v. Malden Redevelopment Auth.*, 9 Mass. App. Ct. 877, 878 (1980)(rescript). Vacancy rates must also be market based when determining fair cash value. *Donovan v. City of Haverhill*, 247 Mass. 69, 71 (1923). After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the landlord’s appropriate expenses. *General Electric Co.*, 393 Mass. 591, 610 (1984). The expenses should also reflect the market. *Id.*; see *Olympia & York State Street Co.*, 428 Mass. at 239, 245.

In the instant appeals, the Board found that the appellee’s projected rental income, which was based on data from similarly sized drug stores, was more comparable to the subject property than the appellant’s rental data which consisted of smaller-sized, lower-level general retail properties. The Board thus adopted Mr. Pastuszek’s rental rate of \$27.50 per square foot for both fiscal years at issue. See *Fox Ridge Assoc. v. Assessors of Marshfield*, 393 Mass. 652, 654 (1984) (“Choosing an appropriate gross income figure for establishing an income stream was within the board’s discretion and expertise.”). The Board also found Mr. Pastuszek’s stabilized vacancy and collection loss rate of 10% to be more credible and therefore adopted that figure as well. This calculation yielded an effective gross income of \$356,549 for both fiscal years at issue.

With respect to operating expenses, the Board found that Mr. Clark's expenses, which were based on IREM averages for shopping centers as well as data obtained from similar use retail properties in the subject property's market, were more credible. See *Olympia & York State Street Co.*, 428 Mass. at 242 (acknowledging that it is appropriate for the Board to "exercise ... independent decision-making based on the evidence"). Finally, the Board adopted Mr. Pastuszek's capitalization rate of 9.00% for both fiscal years at issue. *Id.*

The Board's analysis yielded value estimates of \$3,781,644 and \$3,780,788, respectively, which it rounded to \$3,780,000 for both fiscal years at issue.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight, *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 683 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *New England Oyster House, Inc.*, 362 Mass. at 702, even if its determinations fall outside ranges suggested by the parties or their experts. *New Boston Garden Corp.*, 383 Mass. at 466 (quoting *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966)) (finding that the Board's determination "must be made 'upon consideration of the entire record'"). In evaluating the evidence before it, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. *General Electric Co.*, 393 Mass. at 605; *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984).

The fair cash value of property cannot be proven with "mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment." *Boston Consol. Gas Co.*, 309 Mass. at 72. "The credibility of witnesses, the weight of the 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).

"The burden of proof is upon the [appellant] to make out its right as a matter of law to abatement of the tax." *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974)(quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). The appellant must show that it has complied with the statutory prerequisites to its appeal, *Cohen v. Assessors of Boston*, 344 Mass. 268, 271 (1962), and that the assessed valuation of its property was improper. See *Foxboro Assoc.*, 385 Mass. at 691. The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. *Schlaiker*, 365 Mass. at 245.

Based on the evidence presented in this appeal, and the reasonable inferences drawn therefrom, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was overvalued.

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

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**CHERI McCASLAND a/k/a  
CHERI RODHOUSE**

v.

**BOARD OF ASSESSORS OF  
THE TOWN OF HINSDALE**

Docket Nos.: F320547

Promulgated:  
March 13, 2015

**ATB 2015-64**

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 Town of Hinsdale (the “appellee” or the “assessors”) to abate a tax on a certain improved parcel of real estate located at 811-813 Middlefield Road in the Town of Hinsdale (the “subject property”) owned by and assessed to Cheri McCasland (the “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2013 (the “fiscal year at issue”).

Commissioner Chmielinski (the “Presiding Commissioner”) heard this appeal under G.L. c. 58A, § 1A and 831 CMR 1.20 and issued a single-member 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.

*Cheri Rodhouse, pro se*, for the appellant.

*Rosemary Crowley, Esq.* for the appellee.

## **FINDINGS OF FACT AND REPORT**

### **Introduction**

The appellant's case-in-chief consisted of her testimony coupled with the introduction of one primary exhibit which contained a description of the subject property, a narrative of the appellant's contentions, a copy of the subject property's property record card, a copy of certain building permits pertaining to the subject property, copies of the requisite jurisdictional documents, an analysis of some purportedly comparable-sale properties, a September 10, 2012 bank appraisal of the subject property, copies of some lease agreements, and copies of certain receipts. In addition, and at the request of the Presiding Commissioner, the appellant submitted after the hearing an attested copy of Hinsdale's zoning by-laws. In support of the assessment, the assessors offered the testimony of Hinsdale's Assistant Assessor, Karen Tonelli, copies of the necessary jurisdictional documents, a copy of the subject property's property record card, and several photographs of the subject property.

On the basis of the testimony of the appellant and Ms. Tonelli and the exhibits that the parties offered, the Presiding Commissioner made the following findings of fact.

On January 1, 2012, the valuation and assessment date for the fiscal year at issue, the appellant was the assessed owner of the subject property. For assessment purposes, the subject property is identified as map 411, lot 15. At all relevant times, the subject property was comprised of an approximately 2.00-acre parcel which was improved with a one-hundred-year-old, 2,008-square-foot, two-story, eight-room, Colonial-style home that contained two dwelling units, each with a kitchen, living area, two bedrooms and a full bathroom. The 1,304-square-foot first level comprised the owner's unit while the 704-square-foot upper level was for a tenant.<sup>1</sup> The subject property also had a 704-square-foot unfinished basement and a large detached barn.

For the fiscal year at issue, the assessors valued the subject property at \$264,200 and assessed a tax thereon, at the rate of \$12.22 per thousand, in the amount of \$3,228.52.

### **Jurisdiction**

On or about December 18, 2012, Hinsdale's Collector of Taxes sent out the town's actual real estate tax notices for fiscal year 2013. In accordance with G.L. c. 59, § 57, the appellant paid the tax assessed on the subject property without incurring interest. On January 15, 2013, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with

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<sup>1</sup> The subject property's property record card lists the total living area at 2,048 square feet - 1,344 square feet for the first-floor unit and 704 square feet for the second-floor unit. The Presiding Commissioner found that the appellant's measurements were the most accurate representations of the subject property's living area for the fiscal year at issue. The Presiding Commissioner also found, however, that the effect of the 40-square-foot difference on the subject property's value was *de minimis*.

the assessors. On April 2, 2013, the assessors denied the appellant's application, and on May 10, 2013, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed a Statement Under Informal Procedure with the Appellate Tax Board (the "Board"). In accordance with G.L. c. 58A, § 7A, the assessors timely elected to transfer the appeal to the Board's formal procedure. On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

### **Merits**

The appellant argued that the subject property should have been assessed as a single-family residence with an in-law suite or apartment, just as it had been assessed historically for the past twenty-eight years. The assessors defended the assessed value as being an appropriate one for the subject property's actual use as a two-family residence, which they only discovered during their inspection of the subject property in July, 2011. Virtually all of the taxpayer's evidence was in support of the subject property's use as a single-family residence with an in-law suite or apartment, including purportedly comparable-sales data and a bank appraisal report prepared in 2012 for a refinance, which valued the subject property below its assessed value. A written one-year lease commencing October 1, 2011 rented the "in-law apartment" for \$900 per month, not including utilities, to third parties who were unrelated to the appellant. Hinsdale's zoning by-laws established that the subject property was located in an area zoned for multi-family residences. Ms. Tonelli's testimony, coupled with the appellant's own evidence, substantiated that the layouts and features of the subject property's units were suitable for, and in fact were being utilized as, two residences and that the subject property's assessment was commensurate with the fair market value for a two-family residence.

In consideration of all of the evidence, the Presiding Commissioner found that the appellant failed to demonstrate that the subject property was overvalued for the fiscal year at issue. In particular, the Presiding Commissioner found that the subject property constituted a two-family residence, and not merely a single-family residence with an in-law apartment or suite. He based this finding on the facts that both units were in fact legal residences, each one complete with multiple ingresses/egresses, kitchens, living space, bedrooms, and a full bathroom. Moreover, the supposed "in-law apartment" or "suite" was rented to third parties unrelated to the appellant, and a two-family residential use complied with the applicable zoning. The Presiding Commissioner further found that the appellant's purportedly comparable-sale properties were not comparable to the subject property because they were single-family residences. The Presiding Commissioner also found that the appraisal report, which was submitted into evidence by the

appellant without objection from the assessors, had been prepared for a bank refinance and was of little evidentiary value because it was hearsay - the appraiser who prepared the appraisal was not present at the hearing - and he, therefore, did not testify and was not available for cross-examination or for questions from the Presiding Commissioner. At any rate, the purportedly comparable-sale properties that the appraiser utilized and relied upon to formulate an opinion of the subject property's fair market value were also single-family residences and not two families.

In addition, the Presiding Commissioner credited the assessors' rationale for increasing the subject property's assessment after their inspection because they convincingly explained that the physical examination revealed to them for the first time that the subject property was being utilized as a two-family residence as opposed to a mere single-family residence with an in-law apartment or suite.

On this basis, the Presiding Commissioner found that the appellant failed to meet her burden of establishing that the subject property was overvalued for the fiscal year at issue and, therefore, decided this appeal for the appellee.

### OPINION

"All property, real and personal, situated within the commonwealth ... shall be subject to taxation." G.L. c. 59, § 2. The assessors are required to assess real estate at its fair cash value determined as of the first day of January preceding the start of the fiscal year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on 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 burden of proof is upon the taxpayer to make out her right as a matter of law to abatement of the tax. *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974). The taxpayer must show that the assessed valuation of the subject property was improper. See *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 691 (1982). The assessment is presumed valid until the taxpayer sustains her burden of proving otherwise. *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. v. Assessors of Lynn*, 393 Mass. 591, 600 (1984)(quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

In the present appeal, the appellant tried to show that the assessed value of the subject property exceeded its fair cash value by introducing an analysis of purportedly comparable-sale properties and an appraisal report prepared for a bank refinance by an appraiser who was not present and did not testify at the hearing of this appeal.

With respect to the appellant's affirmative evidence of value, the Presiding Commissioner found and ruled that the appellant did not show that her purportedly comparable-sale properties were comparable to the subject property. As a fundamental matter, her purportedly comparable-sale properties were single-family residences as opposed to two-family residences. Therefore, even a cursory review of the properties' characteristics placed their comparability to the subject property in issue. *See, e.g., Hinds v. Assessors of Manchester-By-The-Sea*, Mass. ATB Findings of Fact and Reports 2006-771, 780 (“[T]he appellants' purportedly comparable properties were ... so [dissimilar from] the appellants' property that their comparability was dubious.”)(citing *Narkiewich v. Assessors of Newbury*, Mass. ATB Findings of Fact and Reports 2006-354, 360-61).

Moreover, the Presiding Commissioner found and ruled that the appellant's analysis did not include any adjustments, assuming there could be any, to account for this fundamental use discrepancy between the subject property and the purportedly comparable-sale properties. While “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 (13<sup>th</sup> ed., 2008), allowances must be made for various factors, particularly the one so fundamental here, which would cause disparities in sale prices. *See Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082.

The Presiding Commissioner further found and ruled that the appraisal report prepared at the request of a bank in connection with a refinance of the mortgage on the subject property was unsubstantiated hearsay, and therefore, the Presiding Commissioner ruled that it was not reliable evidence of the fair market value of the subject property. *See, e.g., Ward Brothers Realty Trust v. Assessors of Hingham*, Mass. ATB Findings of Fact and Reports 2012-515, 525 (rejecting adjustments and an opinion of value contained in an appraisal report on the basis of hearsay where the author of the report did not testify at the hearing and therefore was not available for cross-examination by the opposing party or questioning by the Presiding Commissioner). Moreover, the appraiser here fell into the same trap into which the appellant had tumbled – he valued the subject property as a single-family residence instead of a two-family home. Finally, the Presiding Commissioner found and ruled that the assessors' evidence, based upon their

inspection of the subject property in July, 2011 and concomitant corrections to the subject property's property record card, credibly explained the increase in the subject property's assessment from the previous fiscal year.

On these bases, the Presiding Commissioner found and ruled that the appellant failed to meet her burden of proving that the subject property was overvalued for the fiscal year at issue and, therefore, decided this appeal for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Richard G. Chmielinski, Commissioner**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**PAUL F. RODHOUSE, Jr. and  
CHERI RODHOUSE**

**v. BOARD OF ASSESSORS OF  
THE TOWN OF HINSDALE**

Docket Nos.: F320548

Promulgated:  
May 14, 2015

**ATB 2015-193**

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 Town of Hinsdale (the "appellee" or the "assessors") to abate a tax on a certain improved parcel of real estate located at 481 Maple Street in the Town of Hinsdale (the "subject property") owned by and assessed to Paul F. Rodhouse, Jr. and Cheri Rodhouse (the "appellants") under G.L. c. 59, §§ 11 and 38, for fiscal year 2013 (the "fiscal year at issue").

Commissioner Chmielinski (the "Presiding Commissioner") heard this appeal under G.L. c. 58A, § 1A and 831 CMR 1.20 and issued a single-member decision for the appellee.

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

*Cheri Rodhouse, pro se*, for the appellants.

*Karen Tonelli*, Assistant Assessor, for the appellee.

## **FINDINGS OF FACT AND REPORT**

### **Introduction**

The appellants' case-in-chief consisted of Cheri Rodhouse's testimony coupled with the introduction of one primary exhibit which contained a description of the subject property and its recent improvements, a narrative of the appellants' contentions, a copy of the subject property's and certain purported comparable-sale properties' property record cards, an analysis of some purportedly comparable-sale properties, summaries of the actual rents from the subject property over several years, copies of some lease agreements, copies of certain receipts, and an appraisal for a credit union valuing the subject property as of April 21, 2011 for a refinance. In defense of the assessment, as abated, the assessors offered the testimony of Hinsdale's Assistant Assessor, Karen Tonelli, copies of the required jurisdictional documents, a copy of the subject property's property record card, and a comparable-sales analysis.

On the basis of the testimony of Ms. Rodhouse and Ms. Tonelli and the exhibits admitted into evidence, the Presiding Commissioner made the following findings of fact.

On January 1, 2012, the valuation and assessment date for the fiscal year at issue, the appellants were the assessed owners of the subject property. For assessment purposes, the subject property is identified on assessors' map 406 as lot 28. At all relevant times, the subject property was comprised of an approximately 0.590-acre parcel which was improved with a 2,656-square-foot, two-story, ten-room, brick, Colonial-style home, built in 1825. The dwelling, a converted church, contained two living units, each with a kitchen, living area, two or three bedrooms and a full bathroom. The subject property also had a 1,200-square-foot unfinished basement and a two-car detached garage.

For the fiscal year at issue, the assessors originally valued the subject property at \$267,800 and assessed a tax thereon, at the rate of \$12.22 per thousand, in the amount of \$3,272.52. In response to the appellants' Application for Abatement, the assessors lowered the value of the subject property by \$28,700 to \$239,100 and abated the real estate tax by \$350.71.

### **Jurisdiction**

On or about December 18, 2012, Hinsdale's Collector of Taxes sent out the town's actual real estate tax notices for fiscal year 2013. In accordance with G.L. c. 59, § 57, the appellants timely paid the tax assessed on the subject property without incurring interest. On January 15, 2013, in accordance with G.L. c. 59, § 59, the appellants timely filed an Application for Abatement with the assessors. On March 19, 2013, the assessors granted the appellants a partial abatement by lowering the value of the subject property by \$28,700 to \$239,100 and abating the

real estate tax by \$350.71. Not satisfied with this abatement, on May 10, 2013, in accordance with G.L. c. 59, §§ 64 and 65, the appellants seasonably filed a Statement Under Informal Procedure with the Appellate Tax Board (the “Board”). In accordance with G.L. c. 58A, § 7A, the assessors timely elected to transfer the appeal to the Board’s formal procedure. On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

### **Merits**

The appellants argued that the subject property was overvalued. On their abatement application, they valued the subject property at \$227,000. On their Statement Under Informal Procedure and at the hearing, the appellants estimated the value of the subject property at \$200,000. The appellants primarily relied on a comparable-sales approach but also offered some criticism of several items on the subject property’s property record card, including the grade of “AG” assigned to the subject property<sup>1</sup> and the number of kitchens. They also submitted, without objection from the assessors, an appraisal report, valuing the subject property at \$227,000, as of April 21, 2011, prepared for a refinance with a local credit union by an appraiser who was not present and did not testify at the hearing of this appeal. The assessors defended the assessed value, as abated, using a comparable-sales approach, addressing the criticisms raised by the appellants regarding items on the subject property’s property record card, and raising factual incongruities with two of the appellants’ three comparable-sale selections.

All of the appellants’ purportedly comparable-sale properties were located in the neighboring town of Dalton and were the same properties that the appraiser had used in his appraisal report for the local credit union. After applying the appraiser’s adjustments and then subtracting additional \$10,000 locational adjustments to these three properties’ sale prices to account for these properties’ perceived superior locations in Dalton as opposed to Hinsdale, the appellants’ indicated values ranged from \$181,210 to \$217,320. The assessors pointed out that one of the appellants’ three sales was a foreclosure transaction and another was a property that was not comparable to the subject property because, among other factors, it had minimal brick siding compared to the subject property’s entire brick façade.

The assessors’ two purportedly comparable-sale properties were also in Dalton, and they produced indicated values of \$246,150 and \$253,000, without any locational adjustment. Both the appellants and the assessors relied on the January 18, 2011 sale of 80-82 Carson Ave. in Dalton for \$233,500. The appellants, relying on the adjustments in the appraisal report including

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<sup>1</sup> According to the testimony, the grade “AG” represents that the subject property was in average to good condition as of the relevant valuation and assessment date.

its locational adjustment, reduced the sale price to \$217,320, while the assessors increased the comparable property's sale price upward to \$246,150. The appellants did not introduce any credible evidence to support their additional \$10,000 downward locational adjustment.

In consideration of all of the evidence, the Presiding Commissioner found that the appellants failed to demonstrate that the subject property was overvalued, as abated, for the fiscal year at issue. In particular, the Presiding Commissioner found that the assessors adequately addressed the concerns raised by the appellants about the possible existence of several discrepancies on the subject property's property record card, including the subject property's grade and the number of kitchens. The Presiding Commissioner found that the grade of "AG" was reasonable given the subject property's level of maintenance and that the number of kitchens on the subject property's property record card simply reflected the existence of two kitchens in the subject property's two-family dwelling. In addition, the Presiding Commissioner found that only one of the appellants' purportedly comparable-sale properties was probative for determining an indicated value for the subject property. As the assessors had noted, one of the other two comparable-sale properties was a foreclosure sale which indicated compulsion, and the other comparable-sale property was simply not comparable to the subject property. As for the third comparable-sale property, upon which both parties relied in their comparable-sales analyses, the Presiding Commissioner found that the appellants' \$10,000 downward locational adjustment was not adequately supported by the appellants with any objective data or reasonable explanation. After eliminating it, the Presiding Commissioner found that this comparable-sale property's adjusted value ranged from the appellants' value of \$227,320 to the assessors' value of \$246,150. The Presiding Commissioner found that the subject property's assessment, as abated, for the fiscal year at issue fell in the middle of this range.

In addition, the Presiding Commissioner found that the appraisal report, which was submitted into evidence by the appellants without objection from the assessors, had been prepared for a bank refinance and was of little evidentiary value because the adjustments to sale prices and the opinions of value contained within it were hearsay. The appraiser who prepared the appraisal was not present at the hearing, and he, therefore, did not testify and was not available for cross-examination or for questions from the Presiding Commissioner. The appellants, in their analysis, had essentially adopted the adjustments proposed by the appraiser without providing any rationale or explanation of their own. As for the single comparable sale offered by both parties, the Presiding Commissioner found that the assessors' adjustments were better explained and were the more credible of the two. Accordingly, the Presiding

Commissioner found that the assessors' evidence, and the evidence taken as a whole, supported the assessment, as abated.

On these bases, the Presiding Commissioner found that the appellants failed to meet their burden of establishing that the subject property was overvalued for the fiscal year at issue and, therefore, decided this appeal for the appellee.

### OPINION

“All property, real and personal, situated within the commonwealth ... shall be subject to taxation.” G.L. c. 59, § 2. The assessors are required to assess real estate at its fair cash value determined as of the first day of January preceding the start of the fiscal year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on 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 burden of proof is upon taxpayers to make out their right as a matter of law to abatement of the tax. *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974). The taxpayers must show that the assessed valuation of the subject property was improper. *See Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 691 (1982). The assessment is presumed valid until the taxpayers sustain their burden of proving otherwise. *Schlaiker*, 365 Mass at 245.

In appeals before this Board, taxpayers “may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation.” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 600 (1984)(quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

In the present appeal, the appellants tried to show that the assessed value of the subject property exceeded its fair cash value by disputing certain items on the property record card and by introducing an analysis of purportedly comparable-sale properties and an appraisal report prepared for a bank refinance by an appraiser who was not present and did not testify at the hearing of this appeal.

With respect to the appellants' dispute of the grade and number of kitchens assigned to the subject property on the subject property's property record card, the Presiding Commissioner found that the assessors adequately addressed and explained the disputed items. Accordingly, the Presiding Commissioner found and ruled that the appellants' did not sustain their burden of

proving that the assessors had erred on the subject property's property record card and, that, as a result, had over-valued the subject property.

With respect to affirmative evidence of value, the Presiding Commissioner found and ruled that the appellants' purportedly comparable-sale properties and analysis did not demonstrate that the subject property was over-valued. The Presiding Commissioner found that one of their purportedly comparable properties' sales resulted from an undisputed foreclosure transaction, which indicated compulsion, *DSM Realty, Inc. v. Assessors of Andover*, 391 Mass. 1014 (1984)(rescript opinion)("A foreclosure sale inherently suggests a compulsion to sell; a proponent of evidence of such sale must show circumstances rebutting the suggestion of compulsion."), while another of their purportedly comparable properties was not comparable to the subject property because of significant and fundamental differences with it. *See, e.g., Hinds v. Assessors of Manchester-By-The-Sea*, Mass. ATB Findings of Fact and Reports 2006-771, 780 ("[T]he appellants' purportedly comparable properties were ... so [dissimilar from] the appellants' property that their comparability was dubious.")(citing *Narkiewich v. Assessors of Newbury*, Mass. ATB Findings of Fact and Reports 2006-354, 360-61).

Moreover, the Presiding Commissioner found and ruled that the appellants' comparable-sale analysis was faulty because it not only relied on adjustments from an appraisal report prepared for a refinance with a local credit union by an appraiser who was not present at the hearing, but it also included substantial locational adjustments which were not supported by any objective evidence or reasonable explanation. The Presiding Commissioner found and ruled that the adjustments to sale prices and the opinions of value contained within the appraisal report prepared at the request of a local credit union in connection with a refinance of the mortgage on the subject property were unsubstantiated hearsay, and therefore, the Presiding Commissioner ruled that they were not reliable evidence of appropriate adjustments to make to account for differences between the purportedly comparable properties and the subject property or of the subject property's fair market value. *See, e.g., Ward Brothers Realty Trust v. Assessors of Hingham*, Mass. ATB Findings of Fact and Reports 2012-515, 525 (rejecting adjustments and an opinion of value contained in an appraisal report on the basis of hearsay where the author of the report did not testify at the hearing and therefore was not available for cross-examination by the opposing party or questioning by the Presiding Commissioner).

Finally, the Presiding Commissioner found and ruled that the assessors' testimony and exhibits, which credibly explained the concerns raised by the appellants about the grade and number of kitchens assigned to the subject property on the subject property's property record

card and also provided comparable-sales support for the assessed value, as abated, were the more credible and reliable evidence of record. “The board [is] not required to believe the testimony of any particular witness but [may] 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 credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board.” *Cumington School v. Assessors of Cumington*, 373 Mass. 597, 605 (1977). On these bases, the Presiding Commissioner found and ruled that the appellants failed to meet their burden of proving that the subject property was overvalued for the fiscal year at issue and, therefore, decided this appeal for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Richard G. Chmielinski, Commissioner**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**SHRINE OF OUR LADY  
OF LASALETTE**

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

Docket Nos.: F320598

Promulgated:  
September 9, 2015

**ATB 2015-454**

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 City of Attleboro (“appellee” or “assessors”) to abate a tax on certain real estate in Attleboro, owned by and assessed to Shrine of Our Lady of LaSalette (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2013 (“fiscal year at issue”).

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

*Richard L. Wulsin*, Esq. for the appellant.

*Michael R. Siddall*, Esq. for the appellee.

## **FINDINGS OF FACT AND REPORT**

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

On January 1, 2012, the appellant was the assessed owner of several parcels of land, totaling 199 acres, which were improved with a variety of structures and buildings, located at 947 Park Street in Attleboro (collectively, the “subject property” or “shrine”). For the fiscal year at issue, the assessors valued the subject property in its entirety at \$12,815,800. However, the assessors determined the taxable portions of the property to have a value of \$4,955,740, on which they assessed taxes in the total amount of \$92,292.98.

The appellant paid the taxes due, with interest in the amount of \$145.85.<sup>1</sup> The appellant filed an Application for Abatement with the assessors on January 27, 2013, which the assessors denied on April 4, 2013. On July 1, 2013, the appellant timely filed its appeal with the Board. Based on the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

In its petition, the appellant claimed that the subject property was exempt from tax under G.L. c. 59, § 5, Clause Third (“Clause Third”) and Clause Eleventh (“Clause Eleventh”). It additionally contested the valuation of the subject property. The appellant later waived its claim under Clause Third, after conceding that the appropriate jurisdictional forms for exemption under Clause Third had not been filed, and it likewise withdrew its claim contesting the valuation of the subject property. Accordingly, the only issue presented for the Board’s consideration was whether the subject property was exempt from taxation under Clause Eleventh.

### **I. The Subject Property**

The appellant presented its case through the submission of numerous documentary exhibits as well as the testimony of Father Cyriac Mattathilanickal (“Father Cyriac”), who is a priest affiliated with the Missionaries of Our Lady of LaSalette (“Missionaries”).

According to Father Cyriac, the Missionaries are an international Catholic religious community inspired by what was believed to be an apparition of the Virgin Mary (“Our Lady”)

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<sup>1</sup> Under G.L. c. 59, § 64, if the tax due for the full fiscal year is \$3,000 or less, or a taxpayer has timely paid at least the average of the tax assessed for the prior three fiscal years, or the average tax for the prior three years is \$3,000 or less, the incurring of interest does not deprive the Board of jurisdiction. The evidence showed that the appellant timely remitted payment of more than the average of the previous three fiscal years’ tax assessments for the subject property, and thus the Board found and ruled that the incurring of interest was not an impediment to its jurisdiction.

to two children in the small village of LaSalette, France, on September 19, 1846. Pilgrims have regularly flocked to that site since that time, and a shrine, which is erected to promote a particular devotion, was created there. In the many years since, additional shrines honoring Our Lady were erected worldwide, including the subject property. Father Cyriac testified that though there are many LaSalette shrines throughout the world, there can be only one national shrine in each country. The subject property opened to the public in 1953 and was designated as the national LaSalette shrine for the United States in 2009.

Photographs and diagrams of the subject property were entered into the record, in addition to testimony describing its improvements, which include: two large parking lots; a large church; two indoor chapels and an outdoor chapel; a retreat center; a monastery; a building which was formerly a convent; and storage and maintenance buildings. There is also a large welcome center, which houses: conference rooms; restrooms; a cafeteria; a bistro; a gift shop; and an area for the display of nativity sets - also known as crèches – gathered from all over the world.

In addition to these buildings, the subject property also features several discreet outdoor areas, including: the Garden of the Apparition; the Holy Stairs; the Stations of the Cross; St. Joseph's Garden; St. Francis' Garden; and the Rosary Pond and Rosary Walk.

Lastly, much of the subject property consists of unimproved land. One tract, of approximately 110 acres improved with only one residential building – the aforementioned former convent – is known as the Attleboro Springs Wildlife Sanctuary (“Sanctuary”). In 2009, the appellant created the Sanctuary and granted a conservation easement to the Massachusetts Audubon Society, which thereafter managed the Sanctuary, as an area containing open space and walking trails and available to the public for passive recreation.<sup>2</sup>

The appellant is a Massachusetts not-for-profit organization. According to its articles of organization, its purposes are:

To promote the devotion to Our Lady of LaSalette through the organization of public pilgrimages and through the administration of the Sacraments of the church; to provide guidance to the pilgrims visiting the Shrine; to provide food and housing, if necessary, for the proper care of the pilgrims; to offer to said pilgrims the opportunity of purchasing religious articles and books of all kinds; to seek contributions for the development and support of said Shrine; to use any or all of said funds for the religious education of young men training for religious and missionary priesthood; to provide funds to further foreign missions; and to do such further acts as are necessary and incidental to the carrying out of the purposes hereinbefore set forth.

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<sup>2</sup> Subsequent to the fiscal year at issue, the appellant transferred the fee interest in the Sanctuary to the Audubon Society, but the appellant was the owner of record for the fiscal year at issue.

There was ample description in the record of the services provided at the shrine and the activities taking place there. Documentary evidence, and the testimony of Father Cyriac, showed that masses are held daily at the shrine, in addition to specialized prayer services and prayer groups, including but not limited to, rosary prayer groups. The shrine also offers the sacrament of reconciliation, popularly known as confession, on a daily basis. The shrine is perhaps best known for its annual display of Christmas lights (“Festival of Lights”), which takes place every year from Thanksgiving Day to early January. For six decades, the shrine has erected a Christmas display on the shrine grounds featuring approximately 400,000 Christmas lights and decorations. It is a major seasonal attraction, drawing nearly 400,000 visitors annually.

In addition to the Festival of Lights and the aforementioned daily services, the shrine hosts a variety of other periodic activities, such as religious retreats, concerts, and various fundraising events, which are discussed in greater detail below.

According to Father Cyriac, pilgrims visiting the shrine can range from a single area resident making a brief visit to groups of thousands of international pilgrims who stay for as long as seven or eight hours. Father Cyriac described what a typical pilgrimage to the shrine looks like. He stated that they usually begin by ushering the pilgrims into the welcome center, where they are shown a video presentation about Our Lady of LaSalette. He testified that they then go to the shrine church to pray a rosary or perhaps to the chapel for confession, followed by a tour of the shrine grounds and gardens.

Father Cyriac testified that pilgrims then make their way to the cafeteria for lunch, which can either be a meal that they bring for themselves or a meal catered by the cafeteria. Father Cyriac testified that pilgrims are not charged for the lunches prepared by the shrine apart from the donation fee that is made in connection with the pilgrimage. In fact, the cafeteria is not generally open to the public for the purchase of meals. The only time that it is open for the public to purchase a meal is during the Festival of Lights, because of the excessive number of people visiting, and on Fridays during the season of Lent, which is the forty-day period leading up to Easter Sunday. During Lent, the cafeteria is open from 11:00 a.m. to 1:00 p.m. and again from 5:00 p.m. to 7:00 p.m. for what Father Cyriac described as a “Lenten meal” of fish and chips. Aside from these uses, the cafeteria functions as a soup kitchen serving free meals to the poor every Monday, and it is used on occasion as overflow space in which to host a lecture or workshop offered by the shrine.

While the cafeteria is not open to the public for the purchase of food every day, the shrine’s bistro is open daily from 12:00 p.m. to 5:00 p.m. However, it is a much smaller space

than the cafeteria and offers a much more limited menu, including muffins, chocolate, ice cream, sandwiches, soda, coffee, and water. The shrine's gift shop, where religious items such as books, statues, and rosary beads are sold, is also open daily from 10:00 a.m. to 5:00 p.m.

Father Cyriac testified to the uses of some of the other buildings on the subject property. The monastery serves as the residence for approximately three dozen clergy associated with the shrine. It also has its own chapel and an office for the shrine director and his secretary. The former convent located at the shrine is leased out to another entity called Abundant Hope, which operates a safe house for battered women on the premises. As for the maintenance building, Father Cyriac testified that it is used to store: display items for the Festival of Lights during the off season; inventory for the gift shop; and golf carts and other maintenance vehicles and equipment used on the subject property.

The evidence, including Father Cyriac's testimony as well as a lengthy schedule of events entered into the record, showed the shrine to be a virtual beehive of activity. In addition to the many daily religious offerings, events taking place at the subject property included: farmer's markets; yard sales; clambakes; car shows; carnivals; circuses, and other fundraising and seasonal festivities. The shrine frequently leases or makes available space for use by other entities, including, but not limited to, various Catholic youth groups and ethnic groups, along with other charitable and governmental entities. Some examples of these third-party users are: the City of Attleboro, for use as voting polls during elections; the Lions Club, a non-profit fraternal organization, for an antique car show fundraiser; a Native American group for a Pow Wow; Catholic organizations such as the Knights of Columbus and St. Vincent de Paul Society, for private events and fundraisers; and a non-profit business networking group for a networking presentation for Spanish speakers.

In addition, the evidence showed that the shrine occasionally leased space to private groups and individuals for private functions, such as: to a family for a baptismal party; to a family for a wedding rehearsal dinner; to a group of families for an RV camping weekend; and to a for-profit transportation company for a presentation on religious tours and travel. Fees, or donations, as they are called, for these groups and individuals varied. The Lions Club, for example, paid \$900 to have their antique car show at the shrine and the Native American group paid \$1,000, while the City of Attleboro paid \$450 to use the shrine as a polling place. The Knights of Columbus paid \$300 to host a private memorial gathering honoring a deceased priest, and the non-profit business networking group paid \$200 to have their networking event. The shrine was also used, at no charge, by the American Red Cross for a blood drive.

Lastly, the shrine operated its own fundraising events at the subject property. Examples of these events include: a “Touch a Truck” event, in which large trucks are made available to young children to climb in and tour, which raised \$2,000; a Christmas Bazaar, at which various vendors, artists, and bakers sell their wares, which raised \$7,500; a carnival, operated in connection with a for-profit entertainment company, which yielded approximately \$10,000 for the shrine; and three yard sales, which raised between \$3,000 and \$3,500 each.

## **II. The Taxation of the Subject Property**

Clause Eleventh exempts from taxation:

houses of religious worship owned by, or held in trust for the use of, any religious organization, and the pews and furniture and each parsonage so owned . . . . but such exemption shall not, except as herein provided, extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction[.]

Assessor Stanley Nacewicz testified regarding the methodology used by the assessors to tax the subject property. Mr. Nacewicz explained that the assessors recognized that many of the subject property’s improvements, such as its church, chapels, monastery, and retreat center, were exempt under Clause Eleventh, so the assessors did not consider as taxable those portions of the subject property. They also did not consider as taxable the parking areas and some of the surrounding land, as those were considered accessory to the aforementioned exempt buildings. The former convent and surrounding land was taxed at the lower residential rate, and the maintenance building was valued with a 44% depreciation factor.

Mr. Nacewicz explained that for the remainder of the subject property, the assessors used a pro-rated approach, in recognition of the fact that those areas were used in part for “religious worship or instruction” and in part for other purposes. Mr. Nacewicz testified that in total, the assessors considered approximately 40% of the remainder of the subject property to be taxable and approximately 60% exempt.

It was the appellant’s contention in this appeal that the subject property was exempt in its entirety under Clause Eleventh, as it consisted of “houses of religious worship” and/or “parsonage[s]” owned by a religious organization and its dominant use was for “religious worship or instruction,” or other activities consistent with the Missionaries’ religious purposes. The appellant further contended that any other uses of the subject property were merely incidental and did not constitute an appropriation for other purposes.

### **III. The Board's Conclusions**

Based on the evidence of record, the Board found that the subject property was owned by a religious organization for purposes of Clause Eleventh. The Board additionally found that the subject property's church and chapels were "houses of religious worship," and that its monastery was a "parsonage" for purposes of Clause Eleventh, and as such were exempt under Clause Eleventh. Further, the Board found that the subject property's retreat center was used solely for religious worship or instruction, and thus it was likewise exempt in its entirety under Clause Eleventh. The evidence indicated that the assessors properly treated these properties as exempt under Clause Eleventh, along with surrounding land and parking lots as accessory areas

With respect to the former convent and surrounding land, which was at the time relevant to this appeal being used as a women's shelter, as well as the maintenance building, the Board concluded that they were neither "houses of religious worship" or "parsonage[s]" nor being used for "religious worship or instruction" within the meaning of Clause Eleventh, as there was no evidence in the record to indicate that they were so used. Accordingly, the Board found that these properties were not exempt under Clause Eleventh.

With respect to the welcome center and other remaining areas of the subject property, the Board found that none of them were "houses of religious worship" or "parsonage[s]" as required by Clause Eleventh. Further, the evidence showed that they were used for a variety of purposes by a variety of organizations and individuals. The record showed that the appellant used these areas at times for "religious worship or instruction" in that religious lectures or programs were offered. The record also showed that the appellant permitted other tax-exempt organizations to make occasional use of these areas, which is expressly permitted by Clause Eleventh.

However, the record indicated that these areas were also regularly used by the appellant and others for purposes other than "religious worship or instruction." For example, the appellant's fundraising activities - which included yard sales, a carnival, a circus, a clambake, and a Christmas Bazaar - though useful to the appellant in general, could not be said to constitute "religious worship or instruction" within the meaning of Clause Eleventh. In addition, there was no indication in the record, nor was it logical to infer, that "religious worship or instruction" occurred in the bistro or gift shop, though they may have served to promote the appellant's religious purposes in general. Moreover, the record indicated that the appellant leased the subject property on occasion for use by private individuals and groups that were not tax-exempt organizations. Thus, based on the foregoing facts, the Board found that certain areas of the

subject property were “appropriated for purposes other than religious worship or instruction,” and thus were not exempt under Clause Eleventh.

The Board found that Clause Eleventh allows for properties owned by religious organizations to be taxed on an apportioned basis, in circumstances where the property is used in part for “religious worship or instruction” and in part for other purposes. In the present appeal, the assessors taxed the subject property on just such an apportioned basis, to reflect the amount that it consisted of “houses of religious worship” or a “parsonage,” or was used for “religious worship or instruction.” The appellant offered no persuasive or credible evidence to refute the methodology used by the assessors, and instead simply claimed that the entirety of the subject property was exempt under Clause Eleventh. As the Board did not agree with the appellant’s claim, and the appellant offered insufficient evidence to contradict the apportionment made by the assessors, the Board perceived no error in the methodology used by the assessors.

On the basis of these subsidiary findings of fact, and as discussed further in the Opinion below, the Board found and ruled that the assessors properly exempted so much of the subject property that qualified for the exemption under Clause Eleventh. Accordingly, the Board found that the assessment was proper, and it issued a decision for the appellee in this appeal.

### OPINION

Pursuant to G.L. c. 59, § 2 all property, real and personal, situated within the commonwealth ... unless expressly *exempt*, shall be subject to taxation. “The burden of establishing entitlement to the charitable exemption lies with the taxpayer.” *Western Massachusetts Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 101 (2001)(citing *New England Legal Foundation v. Assessors of Boston*, 423 Mass. 602, 609 (1996)). “Any doubt must operate against the one claiming a tax exemption.” *Boston Symphony Orchestra v. Assessors of Boston*, 294 Mass. 248, 257 (1936). “Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.” *Mass. Med. Soc’y v. Assessors of Boston*, 340 Mass. 327, 331 (1960) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 718 (1944)).

Massachusetts General Laws Chapter 59, § 5 provides a long list of exemptions for both real and personal property, with qualification for the exemption often dependent on the identity of the owner of the property or the property’s dominant use. The exemption at issue in the present appeal is set forth in Clause Eleventh, which exempts:

houses of religious worship owned by, or held in trust for the use of, any religious organization, and the pews and furniture and each parsonage so owned ... but such exemption shall not, except as herein provided, extend to any portion of any such house of religious worship appropriated for purposes other than religious worship or instruction[.]

Clause Eleventh further specifies that “the occasional or incidental use of such property by an organization exempt from taxation under the provisions of 26 USC Sec. 501(c)(3) of the Federal Internal Revenue Code shall not be deemed to be an appropriation for purposes other than religious worship or instruction.”

There was no dispute between the parties that the subject property was owned by a “religious organization” for purposes of Clause Eleventh, and the Board so found and ruled. The issue in dispute was whether the entirety of the subject property consisted of “houses of religious worship ... [or] parsonage[s]” or was used for “religious worship or instruction” for purposes of Clause Eleventh.

Unlike the broader exemption found in Clause Third, which exempts property owned by a charitable organization and “occupied by it or its officers for the purposes for which it is organized,” Clause Eleventh is much narrower in scope; it exempts the types of structures traditionally associated with religious organizations, i.e., “parsonage[s]” and “houses of religious worship,” along with other buildings, but only to the extent they are used for “religious worship or instruction.” In other words, Clause Eleventh does not exempt property owned by a religious organization and used to advance good works consistent with its religious mission in general. Rather, it provides a narrow exemption for specific types of properties, along with other buildings to the extent they are used for “religious worship or instruction.”

In the present appeal, the record showed that the subject property included several “houses of religious worship,” and a “parsonage,” and that the assessors properly treated those structures, along with surrounding areas, including parking lots, as exempt under Clause Eleventh.

The record showed that much of the rest of the subject property, which did not consist of “houses of religious worship” or a “parsonage,” was used in part for “religious worship or instruction,” and in part for other purposes, such as fundraising activities and private functions. It was the appellant’s contention that all uses of the subject property were typical for religious organizations like the appellant and consistent with the appellant’s stated charitable purposes. However, the appellant’s arguments, and the cases which it cited for support, were unavailing.

First, it is immaterial whether the many activities taking place at the subject property furthered the appellant's stated charitable purposes if they did not constitute "religious worship or instruction" within the meaning of Clause Eleventh. While those uses, if consistent with the appellant's stated purposes, may qualify the subject property for an exemption under Clause Third, they do not qualify the subject property in its entirety under the much narrower provisions of Clause Eleventh. Thus, the appellant's citation to *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530 (1956), was inapposite, as the issue in that appeal involved the exemption granted by Clause Third. The appellant in the present appeal did not file the requisite jurisdictional documents to claim the exemption under Clause Third for the fiscal year at issue, and it conceded as much at the hearing of this appeal. Accordingly, the Board rejected the appellant's argument.

Similarly unpersuasive was the appellant's citation to *Assessors of Framingham v. First Parish in Framingham*, 329 Mass. 212 (1952). At issue in that case was a building owned by a church and one adjacent to the church which housed several rooms constituting a parsonage for the parish's minister, and still other rooms which were used weekly for Sunday school classes. *Id.* at 213. In addition, there was a kitchen which was used for the preparation of church suppers, a coat room, and bathrooms. *Id.* The rooms that were used weekly for Sunday school classes were also used on a less frequent basis by church-affiliated groups such as the Women's Alliance and the Men's Club, as well as unrelated groups such as the Boy Scouts, Girl Scouts, the American Red Cross, the Framingham Garden Club, and the American Veteran's Committee, to name a few. *Id.* at 214.

In upholding the partial-exemption granted by the Board, the Court stated that "The Women's Alliance and the Men's Club are subsidiary organizations common to religious societies of all denominations, ordinarily established to promote and aid religious objectives." *Id.* at 215. Further, the Court stated that "[t]he occasional use of the rooms by various secular organizations which does not appear to interfere with their regular use for religious purposes does not, we think, constitute an appropriation for other purposes." *Id.*

As an initial matter, in citing *First Parish in Framingham*, the appellant failed to acknowledge that the abatement granted by the Board in that case reflected an apportioned assessment of the property at issue, as here. Thus, that case cannot be read, or cited, to support the conclusion that a property which is not in its entirety a house of religious worship, or a parsonage, or dedicated primarily to the purpose of religious worship or instruction, will be exempted in its entirety under Clause Eleventh.

Further, although the facts and issue presented in *First Parish in Framingham* were similar to those in the present appeal, it is distinguishable in one important sense. Apart from the rooms dedicated for use as a parsonage, and necessarily exempt as such under Clause Eleventh, the areas within the building at issue in that case were used primarily for teaching Sunday school classes, while their usage by other groups for other purposes was occasional and incidental. *Id.* at 213-15. The evidence in the present appeal established that the use of much of subject property for purposes other than “religious worship or instruction” was more than occasional and incidental, and in fact, was frequent and regular.

This case was much more similar to *Rudrananda Ashram of Boston v. Assessors of Cambridge*, Mass. ATB Findings of Fact and Reports 1981-299. In that case, which involved a 17-room building housing a chapel, meditation and classroom areas, a minister’s room, kitchen and dining areas, and at least six rooms occupied by residents in exchange for monthly rent, the Board found that “significant portions [of the property at issue] were in fact used for other than religious purposes.” *Id.* at 304. Although that case ultimately turned on a jurisdictional issue, the Board observed that the appellant would have lost on the merits also, as it had failed to present evidence “which could have been utilized by the Board in arriving at an” apportioned assessment. *Id.*

In the present appeal, the Board likewise found that much of the subject property was used for other than “religious worship or instruction.” The evidence showed that the assessors took the mixed usage of the subject property into consideration in arriving at the assessment at issue, and the appellant did not present evidence which meaningfully undercut the apportioned assessment made by the assessors. “The burden of proof is upon the petitioner to make out his 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).

On the basis of the record in its totality, the Board found and ruled that the appellant failed to prove its entitlement to an abatement, and accordingly, it 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**

**SUNSET REALTY GROUP  
OF THE BERKSHIRES, INC.**

**v. BOARD OF ASSESSORS OF  
THE TOWN OF PERU**

Docket Nos.: F315040, F318604

Promulgated:  
April 1, 2015

**ATB 2015-158**

These are appeals originally filed under the informal procedure, pursuant to G.L. c. 58A, § 7A and G.L. c. 59, §§ 64 and 65, from the refusal of the Assessors of the Town of Peru (“assessors” or “appellee”) to abate taxes on real estate located in the Town of Peru owned by and assessed to Sunset Realty Group of the Berkshires, Inc. (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2012 and 2013 (“fiscal years at issue”).<sup>1</sup>

Commissioner Chmielinski (“Presiding Commissioner”) heard these appeals under G.L. c. 58A, § 1A and 831 CMR 1.20 and issued a single-member 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.

*William A. Tatro*, President, and *Robin J. Wadsworth*, Director, *pro se*, for the appellant.  
*Karen Tonelli*, assessor for the appellee.

**FINDINGS OF FACT AND REPORT**

Based on the testimony and exhibits offered into evidence at the hearing of these appeals, the Presiding Commissioner made the following findings of fact.

On January 1, 2011 and January 1, 2012, the appellant was the assessed owner of a 2.66-acre parcel of unimproved, waterview land (“subject parcel”) located at the end of a cul-de-sac known as Lafayette Drive in the Town of Peru. For assessment purposes, the subject parcel is identified on map 26, as lot 57. For the fiscal years at issue, the assessors valued the subject parcel and assessed taxes as follows.

<b>Docket Number</b>	<b>Fiscal Year</b>	<b>Assessed Value</b>	<b>Tax Rate per \$1,000</b>	<b>Tax Assessed</b>
F315040	2012	\$66,000	\$15.40	\$1,016.40
F318604	2013	\$62,000	\$16.30	\$1,010.60

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<sup>1</sup> Pursuant to G.L. c. 58A, § 7A, the assessors elected to transfer these appeals to the formal procedure.

The other jurisdictional information, including relevant filing dates for the subject parcel for the fiscal years at issue are contained in the following table.

<b>Docket Number</b>	<b>Fiscal Year</b>	<b>Abatement Application</b>	<b>Assessors' Denial</b>	<b>Petition to Board</b>
F315040	2012	10/31/2011	11/21/2011	02/16/2012
F318604	2013	11/01/2012	11/05/2012	02/04/2013

On the basis of these facts the Presiding Commissioner found and ruled that the Appellate Tax Board (“Board”) had jurisdiction to hear and decide these appeals.

In support of its requests for abatement, the appellant offered the testimony of a member of its Board of Directors, Robin Wadsworth. The appellant also introduced a written narrative, which included: a 2009 hand-written agreement between the assessors and the taxpayers (“2009 Agreement”); a listing of the subject parcel’s assessments and abatements, where applicable, for fiscal years 2007 through 2011; and a listing of eighteen properties in Peru that sold during the period July 11, 2011 through October 18, 2013, and their respective assessment-to-sale ratios for fiscal years 2012, 2013 and 2014.

Pursuant to the 2009 Agreement, the parties agreed that the subject parcel, and also five other properties located on Lafayette Drive and owned by the appellant, would be valued prospectively at the agreed upon amounts until one of the referenced properties sold, at which point the parties agreed to “meet and discuss assessments.” The appellant’s primary argument in the present appeals was that none of the properties cited in the 2009 Agreement has sold and, therefore, the subject parcel’s fiscal year 2012 and 2013 assessments, which were greater than the value stated in the 2009 Agreement, were excessive. The appellant conceded that the mere listing of sales submitted into evidence, without more analysis, is not probative of the subject parcel’s fair cash values for either fiscal year 2012 or 2013. Further, Ms. Wadsworth testified that she did not have an opinion of the subject parcel’s fair market value for the fiscal years at issue.

In support of their assessment, the assessors presented several exhibits, including the requisite jurisdictional documentation and also a sales-comparison analysis of three waterview vacant lots located in Peru and the neighboring town of Hinsdale, which sold during the period June 23, 2008 through October 18, 2010, as well as copies of the corresponding deeds. These parcels ranged in size from 1.5 acres to 14.32 acres with sale prices that ranged from \$70,000 to \$80,000.

On the basis of the evidence of record, the Presiding Commissioner found and ruled that the appellant failed to demonstrate that the assessed value of the subject parcel exceeded its fair cash value for the fiscal years at issue. The Presiding Commissioner also found and ruled that the 2009 Agreement did not provide probative evidence of value for purposes of these appeals. Finally, the Presiding Commissioner found that the appellant failed to offer any credible evidence of value.

Accordingly, the Presiding Commissioner issued a single-member decision for the appellee in these appeals.

### OPINION

The assessors are required to assess real estate at its fair cash value determined as of the first day of January of each year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on 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 subject 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 [B]oard is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers ... prov[e] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245).

In appeals before this Board, 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)). Given the appellant’s concession that its sales listing did not provide probative valuation evidence and its failure to offer an opinion of value, the appellant solely relied on the 2009 Agreement to support its case. However, the 2009 Agreement did not provide probative, credible evidence of the subject property’s fair cash value as of January 1, 2011 and January 1, 2012, the relevant dates of assessment. The fair cash value standard for assessing real estate tax “cannot be varied by public officers or agreement of parties.” *Town of Saugus v. Refuse Energy Systems Company*, 388 Mass. 822, 826 (1983).

Based on all of the evidence, the Presiding Commissioner found and ruled that the appellant failed to meet its burden of proving that the subject parcel was overvalued for fiscal years 2012 and 2013. Accordingly, the Presiding Commissioner issued a single-member decision for the appellee in these appeals.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Richard G. Chmielinski, Commissioner**

A true copy,

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**VERIZON NEW ENGLAND, INC.** v. **BOARD OF ASSESSORS OF  
THE CITY OF BOSTON**

Docket No. F317003

**RCN BECOCOMM LLC** v. **BOARD OF ASSESSORS OF  
THE CITY OF BOSTON**

Docket No. F317239

Promulgated:  
June 26, 2015

**ATB 2015-335**

These are consolidated appeals filed under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7, G.L. c. 59, §§ 64 and 65, from the refusal of the appellee, the Board of Assessors of the City of Boston (the “assessors” or “appellee”), to abate taxes on certain personal property located in the City of Boston owned by and assessed to Verizon New England, Inc. (“Verizon NE”) and RCN Becocom LLC (“RCN LLC”) (together, the “appellants”) under G.L. c. 59, §§ 18 and 38, for fiscal year 2012.

Commissioner Scharaffa heard these appeals, and he was joined in the Corrected Decision for the appellee by Chairman Hammond and Commissioners Rose and Good. Commissioner Chmielinski did not participate in the deliberations of or decisions in these appeals.

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

*William A. Hazel*, Esq. and *James F. Ring*, Esq. for the appellants.

*Anthony M. Ambriano*, Esq. for the appellee.

*Daniel A. Shapiro*, Esq. and *Donald E. Gorton, III*, Esq. for the *Amicus Curiae*,  
Commissioner of Revenue.

## **FINDINGS OF FACT AND REPORT**

### **Introduction and Jurisdiction**

For fiscal year 2012, the City of Boston adopted a percentage shift in its tax levy on real and personal property in favor of the residential and open space real property classes, in accordance with G.L. c. 40, § 56 ("Section 56"), and assessed tax on personal property situated in Boston at a rate equal to that applied to commercial and industrial real property classes consistent with the statutory scheme in G.L. c. 40 and c. 59.<sup>1</sup> The appellants brought these appeals for fiscal year 2012 to contest the assessors' imposition of a \$31.92 tax rate on the appellants' personal property situated in Boston, which the Commissioner of Revenue (the "Commissioner") had centrally valued under G.L. c. 59, § 39 ("Section 39"). In these appeals' the appellants did not contest the values that the Commissioner ascribed to that personal property or the assessors' adoption of those values. Rather, the appellants argued that the assessors' imposition of the \$31.92 tax rate on their centrally valued personal property situated in Boston had resulted in that personal property being disproportionately taxed in violation of Mass. Const. Pt. II, ch. 1, § 1, art. 4 ("Article 4"); Pt. I, and the appellants being obligated to pay more than their "share" of property taxes under Mass. Const. Pt. I, art. 10 ("Article 10 of the Declaration of Rights").

On the basis of a Statement of Agreed Facts and the Exhibits incorporated therein, which the parties' agreed constitutes the complete evidentiary record for these appeals, the Appellate Tax Board (the "Board") made the following findings of fact.

Pursuant to G.L. c. 58, § 1A, the Commissioner is directed to determine, within each of the Commonwealth's cities and towns (the "municipalities"), whether locally assessed values represent the full and fair cash valuation for each class of real property, as defined in G.L. c. 59, § 2A, and personal property not exempt from local taxation. For each municipality which the Commissioner determines is taxing at full and fair cash valuation, the Commissioner also

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<sup>1</sup> The relevant sections of the statutes referenced in this part of the Findings of Fact and Report are set forth in the Opinion, *infra*.

ascertains a minimum residential factor (the “MRF”). On or before April first of each year in which there is to be a determination of the percentages of the local tax levy to be borne by each class of real property and by personal property in accordance with Section 56, the Commissioner sends the approved values and the MRF to the municipalities. Pursuant to Section 56, the Commissioner must certify triennially whether a board of assessors is assessing property at full and fair cash valuation. Once so certified, a municipality may classify property in the manner set forth in section 56 for not only the year of certification but also the succeeding two years.

On December 18, 2009, the Commissioner certified that the assessors were assessing the real and personal property situated in Boston at full and fair cash valuation for fiscal year 2010 and that certification remained in effect for fiscal year 2012. For fiscal year 2012, Boston elected to adopt a split tax rate based upon classification under Section 56. The assessors determined the percentages of local tax levy to be borne by each class of real property, as defined in G.L. c. 59, § 2A, and personal property. The percentages, as shown on Boston’s LA-5 Form for fiscal year 2012,<sup>2</sup> and the fiscal year 2012 tax rates resulting from Boston’s elections, were as follows:

<u>Classification</u>	<u>Percentage</u>	<u>Tax Rate per Thousand</u>
Residential	38.7353%	\$13.04
Open Space	0.0000%	\$ 0.00
Commercial	50.9987%	\$31.92
Industrial	1.3352%	\$31.92
Personal	8.9308%	\$31.92
Total	100%	

For fiscal year 2012, the assessors complied with all procedural requirements of Section 56 to adopt the percentages of the local tax levy to be borne by each class of real property and by personal property. On December 12, 2011, the Commissioner, taking into account the elections made by Boston under Section 56, the Boston expenditures for fiscal year 2012, the total values of each class of real property and personal property situated in Boston as of January 1, 2011, and other relevant data submitted to her by Boston or otherwise obtained, approved, and ultimately certified, Boston’s fiscal year 2012 tax rates.

The following table summarizes the salient information set forth in the Commissioner’s State Tax Form 31C entitled “Tax Rate Recapitulation of Boston” (“Form 31C”) for fiscal year 2012.

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<sup>2</sup> In accordance with IGR No. 10-401 “Guidelines for Annual Assessment and Allocation of Tax Levy,” Boston submitted Form LA-5 “Classification Tax Allocation” to the Commissioner’s Bureau of Accounts.

<u>Class</u>	<u>Levy Percentage</u>	<u>Valuation by Class</u>	<u>Tax Rates per Thousand</u>	<u>Levy by Class</u>
Residential	38.7353%	\$57,517,785,281		0.00
Net of Exempt		\$47,934,313,028	\$13.04	\$ 625,063,441.89
Open Space	0.0000%	0		0.00
Commercial	50.9987%	\$25,790,869,236	\$31.92	\$ 823,244,546.01
Net of Exempt				0.00
Industrial	1.3352%	\$ 675,290,093	\$31.92	\$ 21,555,259.77
SUBTOTAL	91.0692%	\$83,983,944,547		\$1,469,863,247.67
Personal	8.9308%	\$ 4,516,465,740	\$31.92	\$ 144,165,586.42
TOTAL	100.0000%	\$88,500,410,287		\$1,614,028,834.09

As determined by the assessors under G.L. c. 59, § 38, and as certified by the Commissioner in accordance with G.L. c. 58, § 1A, and as indicated on Form 31C for fiscal year 2012: the total fair cash value of all taxable real and personal property situated in Boston was \$88,500,410,287; the fair cash value of all taxable personal property situated in Boston was \$4,516,465,740; the fair cash value of all real property situated in Boston was \$83,983,944,547; the fair cash value of all real property situated in Boston and classified as commercial and industrial (the “CI classes”) was \$26,466,159,329; and the fair cash value of all real property situated in Boston and classified as commercial and industrial, plus all personal property (the “CIP classes”) was \$30,982,625,069.

As further indicated on Form 31C for fiscal year 2012: the total Boston tax levy to be raised through the assessment of all taxable real and personal property was \$1,614,028,834.09; the portion of the Boston tax levy that was to be raised through the assessment of personal property was \$144,165,586.42; the portion of the Boston tax levy that was to be raised through the assessment of real property was \$1,469,863,247.67; the portion of the Boston tax levy that was to be raised through the assessment of the CI classes was \$844,799,805.78; and the portion of the Boston tax levy that was to be raised through the assessment of the CIP classes was \$988,965,392.20.

Based on these underlying amounts, personal property constituted 8.9308% of the Boston tax levy for fiscal year 2012, but accounted for only 5.1033% of the total valuation of all real and personal property situated in Boston.<sup>3</sup> For fiscal year 2012, personal property made up approximately 14.577% of the portion of the Boston tax levy attributable to the CIP classes and accounted for that same percentage, approximately 14.577%, of the total valuation attributable to property in the CIP classes. Residential property made up 38.7353% of the Boston tax levy for

<sup>3</sup> The Board has rounded most of the percentages appearing in these findings.

fiscal year 2012, but accounted for 64.9915% of the total valuation of all real and personal property situated in Boston.

At all relevant times, Verizon NE was a New York corporation with a principal place of business in Massachusetts. RCN LLC was a Delaware limited liability company with a principal place of business in Massachusetts. Both Verizon NE and RCN LLC owned taxable personal property in Boston and were assessed personal property taxes by the assessors for fiscal year 2012 and paid those taxes based on the \$31.92 rate imposed by Boston on personal property.

As of January 1, 2011, Verizon NE was a “foreign corporation subject to taxation under section ... fifty two A ... of ... chapter 63,” G.L. c. 59, § 5 (16)(1)(d); was subject to property tax only upon its “real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water” *id.*; and owned no personal property which was required to be reported to the assessors on a Form of List. Accordingly, Verizon NE timely reported all of its taxable personal property to the Commissioner on a Form 5941. As a limited liability company, RCN LLC timely reported some of its taxable personal property to the assessors on a Form of List and some of its taxable personal property to the Commissioner on a Form 5941.<sup>4</sup> The appellants used or held the personal property for use for business purposes.

Pursuant to Section 39, the Commissioner must determine and certify the valuation at which the machinery, poles, wires, and underground conduits, wires and pipes of all telephone and telegraph companies shall be assessed by the respective municipalities where such property is subject to taxation. The Commissioner describes the property that she centrally values under Section 39 as personal property. On May 13, 2011, the Commissioner provided her certified valuations, as of January 1, 2011, of the property of the telephone and telegraph companies that she had centrally valued under Section 39 to affected Boards of Assessors, including the values of the appellants’ centrally valued personal property situated in Boston to the assessors. Consistent with the valuations provided to the assessors by the Commissioner for fiscal year 2012, the assessors assessed as personal property the property of the appellants situated in Boston that had been centrally valued by the Commissioner under Section 39.

For fiscal year 2012, the Commissioner centrally valued Verizon NE’s personal property situated in Boston at \$215,846,800. The assessors assessed a tax thereon, at the rate of \$31.92 per thousand, in the total amount of \$6,889,829.86. For fiscal Year 2012, the Commissioner centrally valued RCN LLC’s personal property that was situated in Boston and reported to her on

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<sup>4</sup> RCN LLC is not challenging here the valuation or assessment on its personal property reported to the assessors on the Form of List.

RCN LLC's fiscal year 2012 Form 5941 at \$48,444,900. The assessors assessed a tax thereon, at the rate of \$31.92 per thousand, in the total amount of \$1,546,361.21.

The appellants timely paid all personal property tax due on their centrally valued personal property situated in Boston without incurring interest. On January 30, 2012, the appellants timely filed with the assessors abatement applications which the assessors denied on March 27, 2012 for Verizon NE and on April 4, 2012 for RCN LLC. Verizon NE seasonably appealed the denial to this Board on June 25, 2012, and RCN LLC seasonably appealed its denial to this Board on July 2, 2012. On the basis of these facts and findings, the Board found that it had jurisdiction over these appeals.

### **The Appellants' Centrally Valued Personal Property**

The value ascribed to Verizon NE's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.2439% of the total valuation of all real and personal property situated in Boston. The personal property tax assessed against and paid by Verizon NE for its centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.4269% of the Boston tax levy for fiscal year 2012. The value ascribed to RCN LLC's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.0547% of the total valuation of all real and personal property situated in Boston. The personal property tax assessed against and paid by RCN LLC for its centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.0958% of the Boston tax levy for fiscal year 2012.

The appellants asserted that the respective percentages of their centrally valued personal property for fiscal year 2012 compared to the total valuation of all real and personal property situated in Boston for fiscal year 2012 should also be their respective percentages of the Boston tax levy for fiscal year 2012. Consequently, they contended that the assessors should have applied a tax rate of \$18.24 per thousand to the respective values of their centrally valued personal property situated in Boston for fiscal year 2012, resulting in a personal property tax of \$3,937,045.63 for Verizon NE and a personal property tax of \$883,634.98 for RCN LLC for their centrally valued personal property situated in Boston for fiscal year 2012. Accordingly, Verizon NE sought a tax abatement for fiscal year 2012 in the amount of \$2,952,784.23, while RCN LLC sought a tax abatement for fiscal year 2012 in the amount of \$662,726.23.

However, the value ascribed to Verizon NE's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.6966% of the total valuation of property in the CIP classes situated in Boston for fiscal year 2012. The personal property tax assessed

against and paid by Verizon NE for its centrally valued personal property situated in Boston for fiscal year 2012 was also approximately 0.6966% of the total taxes levied on the property in the CIP classes for fiscal year 2012. Therefore, Verizon NE's share of the Boston tax levy was proportional to that of all other CIP property situated in Boston.

In addition, the value ascribed to Verizon NE's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 4.78% of the total valuation of personal property situated in Boston for fiscal year 2012. The personal property tax assessed against and paid by Verizon NE for its centrally valued personal property situated in Boston for fiscal year 2012 was also approximately 4.78% of the total taxes levied on all the personal property situated in Boston for fiscal year 2012. Therefore, Verizon NE's share of the Boston tax levy was proportional to that of all other personal property situated in Boston.

Moreover, the value ascribed to RCN LLC's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 0.156% of the total valuation of property in the CIP classes situated in Boston for fiscal year 2012. The personal property tax assessed against and paid by RCN LLC for its centrally valued personal property situated in Boston for fiscal year 2012 was also approximately 0.156% of the total taxes levied on the property in the CIP classes for fiscal year 2012. Therefore, RCN LLC's share of the Boston tax levy was proportional to that of all other CIP property situated in Boston.

In addition, the value ascribed to RCN LLP's centrally valued personal property situated in Boston for fiscal year 2012 was approximately 1.07% of the total valuation of personal property situated in Boston for fiscal year 2012. The personal property tax assessed against and paid by RCN LLC for its centrally valued personal property situated in Boston for fiscal year 2012 was also approximately 1.07% of the total taxes levied on all the personal property situated in Boston for fiscal year 2012. Therefore, RCN LLC's share of the Boston tax levy was proportional to that of all other personal property situated in Boston.

In sum, even though the appellants' percentage share of the Boston tax levy for its centrally valued personal property situated in Boston exceeded that property's percentage share of the total value of all real and personal property situated in Boston, when compared to other real and personal property situated in Boston used for business purposes, namely commercial, industrial, and other personal property, the percentages are identical.

#### **The Board's Ultimate Findings**

On the basis of these facts and findings, and as explained more fully in its Opinion below, the Board found and ruled that the appellants failed to carry their burden of proving that for

fiscal year 2012 the tax assessments placed by the assessors on the appellants' centrally valued personal property situated in Boston were improper or erroneous. In conjunction with this determination, the Board also found and ruled that the appellants failed to prove that for fiscal year 2012 the statutory scheme employed by the Commissioner and the assessors for valuing and assessing property tax on centrally valued personal property situated in Boston did not pass Constitutional muster. Rather, the Board found that the statutory scheme devised by the Legislature and implemented by the Commissioner and municipalities furthered the legislative goal of favoring residential real estate and resulted in a rational and systematic way to achieve a real and personal property taxing regime at the local level using a split tax rate entirely consistent with applicable constitutional limitations. The Board also found that this statutory scheme was narrowly tailored to further the legitimate and compelling governmental interest of assuring that local property taxes are based on a full and fair cash valuation standard, are proportional within classes, treat all commercial property the same, and favor residential property.

Underlying these findings were the Board's determinations that the appellants' centrally valued personal property situated in Boston was not disproportionately taxed because the assessors had certifiably valued all real and personal property in Boston at its full and fair cash value, and the tax rate applied to the appellants' centrally valued personal property situated in Boston was identical to that of all commercial, industrial, and other personal property situated in Boston. Accordingly, the Board also determined that the appellants' share of the Boston tax levy attributable to its centrally valued personal property situated in Boston for fiscal year 2012 was proportional to that of all other personal and CIP property situated in Boston. The Board additionally found and ruled that it is permissible and proper under the Massachusetts Constitution to use a split tax rate to favor residential and open space property over commercial, industrial, and personal property and to apply the same higher tax rate to commercial, industrial, and personal property.

The Board therefore issued a Corrected Decision for the appellee in these appeals.

## **OPINION**

### **The Appellants' Claims**

The appellants' petitions make two associated claims in challenging the fiscal year 2012 property tax assessments placed on their centrally valued personal property situated in Boston. First, they contend that the tax rate imposed on their taxable personal property resulted in their "being assessed in a disproportionate manner ... in violation of [Article 4]." And second, this purported violation "has resulted in the [appellants] being assessed and required to pay ...

personal property tax[es] that exceed [their] share[s] of the total tax levy raised by Boston for fiscal year 2012 contrary to [Article 10 of the Declaration of Rights].” Consequently, they sought an abatement of “any such disproportionate portion” of the personal property taxes assessed against them.

More particularly, the appellants argued that because the 1979 property tax classification amendment, article 112 (“Article 112”), is silent as to personal property, such property is not subject to the differential tax rate scheme implemented by St. 1979, c. 797 (“Chapter 797”) amending, primarily, Section 56 and G.L. c. 59. Moreover, the appellants asserted that for any given fiscal year, the percentage of the tax levy that may be constitutionally assessed against taxable personal property by any municipality must be derived by dividing the fair cash value of all taxable personal property situated in a municipality by the total fair cash value of all the taxable real and personal property. Therefore, the appellants contended that their centrally valued personal property situated in Boston should have been taxed at a “factor of one,” or, what amounts to, an unclassified rate of \$18.24 per thousand.

### **The Appellants’ Burden of Proof**

The appellants challenged the classification scheme and taxation mechanism adopted by the Legislature through Chapter 797, to the extent that it applies the same tax rate to personal property that it applies to real estate classified as commercial or industrial. The appellants did not contest the amount of the Levy or the assessed values applied to their centrally values personal property situated in Boston, or maintain that they were victims of an intentional scheme. Rather, they claimed that the implementing legislation is unconstitutional because it exceeds the authority granted by the constitutional amendment, article 112, ratified by the people in 1978 (“Article 112”).

“It is a general principle of constitutional law that the provisions of a written constitution are not grants of power from the people to the government, but are limitations upon a power that would otherwise be absolute.” P.Nichols, *Taxation In Massachusetts*, at 111, (3<sup>rd</sup> Ed. 1938). “In addressing a constitutional challenge to a tax measure, we begin with the premise that the tax is endowed with a presumption of validity and is not to be found void unless its invalidity is established beyond a rational doubt.” *Andover Savings Bank v. Comm’r of Revenue*, 387 Mass. 229, 235 (1982). *See also Opinion of the Justices*, 425 Mass. 1201, 1203-04 (1997). “The burden is on the plaintiff to rebut the strong presumption that the statute is constitutional.” *Sylvester v. Comm’r of Revenue*, 445 Mass. 304, 308 (2005)(involving a constitutional challenge to real estate tax exemption under G.L. c. 59, § 5). Proving “beyond a rational doubt”

that a tax statute violates the Massachusetts Constitution is a “heavy burden.” *Peterson v. Comm’r of Revenue*, 441 Mass. 420, 430 and 442 (2004)(Marshall, C.J., and Cordy, J., dissenting)(challenging constitutionality of income tax provision under Art. 44).

In judicial review of legislative acts alleged to be unconstitutional, “statutes that do not collide with a fundamental [constitutional] right are subject to a ‘rational basis’ standard of judicial review.” See *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 330 (2003). The rational basis standard requires merely that a statute be reasonably related to the furtherance of a valid State interest to be constitutionally sound. See *Id.* “[W]here a statute unjustifiably burdens the exercise of a fundamental right ... , the standard of review appl[ied] is strict judicial scrutiny.” *Gillespie v. Northhampton*, 460 Mass. 148, 153 (2011). Under this standard, a statute must be “narrowly tailored to further a legitimate and compelling government interest.” *Id.* The appellants have not advanced the argument that there is a “fundamental right” to have their centrally valued personal property situated in Boston used for business purposes taxed differently from real estate classified as commercial and industrial.

In addition, the appellants have not fashioned or labelled their constitutional challenge as either a “facial” or an “as-applied” challenge. See, generally, *WB&T Mortgage Co., Inc. v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2006-379, 408-13, aff’d 451 Mass. 716 (2008). A statute is facially unconstitutional where “no set of circumstances exist under which the Act would be valid.” *Id.* at 2006-409 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)). An as-applied challenge presents a claim that the statute at issue “may be constitutional as applied to some states of facts and violative to rights secured by fundamental law as applied to other states of facts.” *Id.* (quoting *Magee v. Comm’r of Corporations & Taxation*, 256 Mass. 512, 518 (1926)). “Where a statute is unconstitutional ‘as applied’ to certain facts, the statute itself is not invalid; rather, it is ‘left for full force as to all subjects which it may constitutionally govern.’” *Id.* at 2006-409-410 (quoting *Thurman v. Chicago, M. & St. P. Ry. Co.*, 254 Mass. 569, 575 (1926)). “A statute survives scrutiny if it may reasonably be applied in ways that do not violate constitutional safeguards.” *WB&T Mortgage Company, Inc. v. Assessors of Boston*, 451 Mass. 716, 721 (2008)(quoting *Route One Liquors, Inc. v. Secretary of Admin & Fin.*, 439 Mass. 111, 117 (2003)).

The Board found and ruled that the appellants’ challenge in these appeals is a facial attack on the split tax rate percentage calculations authorized by Section 56. “A facial challenge to the constitutional validity of a statute is the ‘weakest form of challenge, and the one least likely to succeed.’” *WB&T Mortgage Co., Inc.*, Mass. ATB Findings of Fact and Reports at

2006-408-13 (quoting *Blixt v. Blixt*, 437 Mass. 649, 652 (2002)). “If the statute in question ‘may reasonably be applied in ways that do not violate constitutional safeguards, then ... the ... provisions escape a facial constitutional challenge.’” *Id.* at 2006-408-09 (quoting *Route One Liquors, Inc.* 439 Mass. at 118). “[T]he challenging party must demonstrate beyond a reasonable doubt that there are no ‘conceivable grounds’ which could support its validity.” *Leibovich v. Antonellis*, 410 Mass. 568, 576 (1991) (quoting *Zeller v. Cantu*, 395 Mass. 76, 84 (1985)).

When reviewing the constitutionality of a statute, the inquiry “is only to ... whether the Legislature had the power to enact the statute and not whether the statute is wise or efficient.” *Pielech v. Massasoit Greyhound, Inc.*, 441 Mass. 188, 193 (2004).

### Historical Perspective

Prior to its 1978 amendment, Article 4 of the Massachusetts Constitution empowered the Legislature “to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within said commonwealth ... .” With respect to taxes, Article 4 “forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation.” *Cheshire v. County Comm’rs of Berkshire*, 118 Mass. 386, 389 (1875). Article 10 of the Declaration of Rights states, “Each individual ... has a right to be protected ... in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute *his share* to the expense of this protection ... .” (Emphasis added). The phrase “his share” in Article 10 of the Declaration of Rights “forbids the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers.” *Bettigole v. Assessors of Springfield*, 343 Mass. 223, 230 (1961)(citing *Opinion of Justices*, 332 Mass. 769, 777 (1955)). Therefore, “[a]n intentionally made, widely disproportionate assessment would constitute a gross violation of ‘a fundamental constitutional limitation upon the power ... to impose property taxes.’” *Stone v. Springfield*, 341 Mass. 246, 248 (1960)(quoting *Opinion of the Justices*, 324 Mass. 724, 728 (1940)).

Notwithstanding these limitations on favoritism, in practice, boards of assessors routinely engaged in intentionally disproportionate assessment schemes employing varying percentages of fair cash values favoring residential properties at the expense of commercial and industrial properties. See *Bettigole*, 343 Mass. at 227-28. The Supreme Judicial Court declared the assessments illegal and voided them and enjoined their collection. *Id.* at 237. Subsequent Supreme Judicial Court decisions held that disproportion claims could be raised in abatement

proceedings before the Board which could then reduce assessments to the percentage at which others were taxed, *Shoppers World, Inc. v. Assessors of Framingham*, 348 Mass. 223 (1965), and discussed the nature and quantum of evidence necessary to demonstrate disproportionate assessment. *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554 (1971). The Supreme Judicial Court also declared in *Town of Sudbury v. Comm’r of Corporations and Taxation*, 366 Mass. 558 (1974), that the Commissioner had the statutory power to direct assessors to revalue and attain assessment uniformity on a statewide basis.

“[A]midst the accelerated judicial enforcement of the fair cash valuation requirement, there was public challenge to the concept of 100% valuation,” *Keniston v. Assessors of Boston*, 380 Mass. 888, 890 (1980)(citation omitted), culminating in the constitutional amendment, Article 112, ratified by the people in 1978. Article 112 added, after the words, “proportional and reasonable assessments, rates and taxes,” in Article 4:

except that, ... the general court may classify real property according to its use in no more than four classes and ... assess, rate and tax such property differently in the classes so established, but proportionately in the same class, and except that reasonable exemptions may be granted.

The Legislature went through several statutory iterations attempting to put flesh on the bones of the new constitutional standard. Initially, the Legislature enacted enabling legislation to implement this classification amendment, effective for fiscal year 1980, in the event that the amendment was approved. St. 1978, c. 580 (“Chapter 580”). This “shelf” legislation used different ratios of fair cash value to establish assessed values and taxes in each of four classes of real property for every municipality.<sup>5</sup> The primary rub with this approach was that it deprived municipalities of the power to decide how to allocate the tax burden among classes of property situated within their boundaries.

Chapter 580 was never implemented, as the Legislature postponed the effective date, St. 1979, c. 578, and ultimately repealed the law, St. 1979, c. 797, § 23. Before the repeal of Chapter 580, however, the Supreme Judicial Court sustained its constitutionality in *Associated Industries of Massachusetts v. Comm’r of Revenue*, 378 Mass. 657 (1979).

In 1979, in *Opinion of The Justices*, 378 Mass. 802, 811, 815 (1979)(“*Opinion*”), the Justices upheld the constitutionality of 1979 House Bill No. 6371 (“House Bill No. 6371”), which was adopted with only minor changes as Chapter 797.<sup>6</sup> Under Chapter 797, distribution of

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<sup>5</sup> The different, statutorily fixed, ratios of fair cash value were: 40% for residential; 25% for open space; 50% for commercial; and 55% for industrial.

<sup>6</sup> The only change made to House Bill No. 6371, as considered by the Justices, affecting the calculations of various tax rates, was to Section 56. Instead of the fixed 70% residential factor under Chapter 580, that factor is determined

the tax levy among various classes of real property is not accomplished by applying varying percentages to the valuations, as had been done under the repealed “shelf legislation,” but rather by adjustments to the tax rates to be applied. Section 56, as appearing in Chapter 797, § 1. Therefore, a “central feature” of the new approach is that it allows municipalities “a limited flexibility to allocate the tax burden among several classes.” *Opinion*, at 806.

The shift to a structure that validly taxed property by usage classification fashioned a system that emulated the pervasive *de facto* classification systems declared unconstitutional in *Bettigole*. The primary objective in both Article 112 and Chapter 797 was to continue in legitimate ways the favoritism in tax burdens historically afforded to residential properties over commercial real property and personal property.

### **Constitutionality of House Bill No. 6371**

As previously stated, House Bill No. 6371 allowed municipalities “limited flexibility” to allocate the tax burden among several classes.” *Opinion*, at 806. As part of the new system of taxation, the House Bill created four classes of real property – residential, open space, commercial and industrial – which are defined by their uses. House Bill No. 6371, § 19. Subsequent to Article 112, Article 4 specifically permits the classification of real property according to “use,” but does not mandate any particular use classification or mechanism for shifting the tax burden, such as different assessment rates, different tax rates, or both. “The Constitution of Massachusetts [and amendments thereto] ... declare[] only fundamental principles as to the form of government ... [They are] [] statement[s] of general principles and not a specification of details. [Their] words must be given a construction adapted to carry into effect [their] purpose.” *Trefry v. Putnam*, 227 Mass. 522, 523-24 (1917). “A constitutional amendment should be ‘interpreted in the light of the conditions under which it ... [was] framed [and] the ends which it was designed to accomplish.’” *Mazzone v. Attorney General*, 432 Mass. 515, 526 (2000)(quoting *Tax Comm’r v. Putnam*, 227 Mass. 522, 524 (1917)).

In the *Opinion*, the Justices upheld the constitutionality of House Bill No. 6371 in providing a detailed methodology for the determination of the tax rates for all property - real and personal - and as reflecting the Legislature’s judgment on how best to implement Article 112 so “the benefits which it was expected to confer and the evils which it hoped to remedy” could be accomplished. *Mazzone*, 432 Mass. at 526 (quoting *Tax Comm’r v. Putnam*, 227 Mass. at 524).

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by the Commissioner pursuant to G.L. c. 58, § 1A, presumably to better reflect the relative proportions of the real estate classes and personal property among municipalities. The minimum residential factor is now 65%, subject to important qualifications which may lower it to 50%.

The first question submitted by the Legislature to the Justices was whether it is constitutionally competent for House Bill No. 6371 to permit the municipalities, within the guidelines established by the bill, to set rates for each class of property within each municipality, and to vary those rates in accordance with the local determination as to how the tax burden should be allocated among the classes. The Justices specifically recognized that House Bill No. 6371 would develop and operate a system “similar in practical effect to those declared unlawful in the *Bettigole* and *Sudbury* cases.” *Opinion*, at 804. The classes of property for which the different tax “rates” were considered were not just the four classes of real estate established by § 19 of House Bill No. 6371, but rather the rates computed for all classes of real property and for personal property. Section 1 of House Bill No. 6371 specifically provides for the determination by municipalities of “the percentages of the local levy to be borne by each class of [real] property, as defined in section three of chapter fifty-nine, and personal property.” (Emphasis added.)

The process of setting the tax rates for the four classes of real property and for personal property, as provided in § 1 of House Bill No. 6371 (and as now codified in Section 56) and as considered by the Justices, starts with the requirement that the Commissioner certify that the board of assessors is assessing “each class of real property ... and personal property not exempt from local taxation” at full and fair cash valuation. G.L. c. 58, § 1A. It has been stipulated and the Board ruled that such a certification, which is a “foundation requirement” according to the Justices, *Opinion*, at 805, 806, was in effect for Boston for fiscal year 2012.

After valuing all the property, the assessors then divide the real property into the four classes established by § 19 of House Bill No. 6371. “This task would be carried out under rules, guidelines, and regulations promulgated by the Commissioner or Revenue.” *Opinion*, at 806. The Commissioner then transmits assessed values and classifications to municipalities for use in setting tax rates. *Opinion*, at 807.

Secondly, the municipality determines the portions of the local tax levy “to be borne by each class of property, as defined in section three of chapter fifty-nine [that is, the four classes of real estate established pursuant to § 19 of House Bill No. 6371], and personal property.” House Bill No. 6371, § 1.

Under House Bill No. 6371, each municipality chooses a “residential factor,” which under the House Bill could be as high as 100% but not less than 70%. The “class one,” or residential, percentage of the total tax levy is computed by multiplying the residential factor by a fraction representing the full and fair cash value of all residential real property in the

municipality divided by the full and fair cash value of all real *and personal property* located in the municipality. The “class two,” or open space, percentage is calculated by multiplying 62-1/2% of the residential factor by a fraction representing the full and fair cash value of the open space property divided by the full and fair cash value of all real *and personal property*. The “class three,” or commercial, percentage is determined by multiplying the difference between 100% and the sum of the class one and class two percentages by a fraction representing the full and fair cash value of the commercial property divided by the sum of the full and fair cash value of commercial, industrial, *and personal property*. The “class four,” or industrial, percentage is determined in the same manner as the class three percentage, except the numerator of the fraction is computed using the fair cash value of industrial rather than commercial property. Finally, the personal property percentage is determined by multiplying the difference between 100% and the sum of the class one and class two percentages by a fraction representing the full and fair cash value of the personal property divided by the sum of the full and fair cash value of the commercial, industrial, *and personal property*. *Opinion*, at 807. The Board ruled that this formula preserves the requirements that *all* property be valued at full and fair cash value, insures that *all* property is treated proportionately within its class, and includes personal property in the fully integrated calculations of percentages.

After determining the various percentages, the third step in the tax rate process requires the assessors to notify municipal officials of the amount to be raised by the tax on real and personal property. That amount is divided among the various classes of property by the use of the percentages. *Opinion*, at 807-08.

Finally, to determine the tax rate for the several classes, the total amount to be obtained from each class is divided by the total value of the property in that class. *Opinion*, at 808.

The Justices provided a detailed example of the computation of the tax rates for residential, open space, commercial, industrial, *and personal property*, and observe that as the residential factor is reduced below 100%, a higher share of the total tax burden is borne by commercial, industrial, *and personal property*. Under § 19 of House Bill No. 6371, the residential could not be less than 70%, and there are severe limits on the permissible extent of variations among classes.<sup>7</sup> “In all cases the rate on open space property will be ... less than that on commercial, industrial, and personal property, *all three of which will be identical.*” *Opinion*, at 808 (emphasis added). The Board ruled that the Justices clearly recognized the necessity of including personal property in the rate determination exercise for all classes of real property and

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<sup>7</sup> See the second and third sentences in footnote 6, *supra*.

personal property situated within the municipality and the equivalence of the personal property rate to that of commercial and industrial property.

The Justices also advised the Legislature that it could constitutionally delegate to the municipalities, under guidelines established in House Bill No. 6371, the authority to set tax rates on the different classes of property and in some degree to vary those rates in accordance with the local determination as to how the tax burden should be allocated among the classes. The Justices described in detail the method for computing the rate for each class, and considered the effect on each class of varying the residential factor, and found no constitutional infirmity. The Board ruled that the Justices were clear in their determination that the “classes” which they were considering were the classes for which tax rates were to be computed under the House Bill, namely the four classes of real property *and personal property*.

On these bases, the Board ruled that the appellants’ centrally valued personal property here was taxed in the same manner as was sanctioned by the Justices in the *Opinion*, and that taxation comports with the constitutional requirements. The assessors applied the CIP rate to the appellants’ centrally valued personal property situated in Boston, which equals the rate for real property classified as commercial and industrial. The appellants’ centrally valued personal property situated in Boston was not subject to a higher rate than the highest rate adopted by the community.

**The Appellants’ Failed to Demonstrate that the Legislature’s Implementation of Article 112 through Chapter 797 Was Unconstitutional**

“A facial challenge to the constitutional validity of a statute is the weakest form of challenge, and the one that is least likely to succeed.” *WB&T Mortgage*, Mass. ATB Findings of Fact and Reports at 2006-408. The Legislature has considerable discretion under the Massachusetts Constitution in matters of taxation. *Opinion of the Justices*, 425 Mass. at 1203. The Legislature’s exercise of this discretion “w[ill] not be declared illegal and void, as being unreasonable, unless . . . plainly and grossly oppressive and unequal, or contrary to common right; nor w[ill] it be held to be unproportional unless it violate[s] clearly and palpably the [applicable] rules of proportion.” *Oliver v. Washington Mills*, 11 Allen 268, 279 (Mass. 1865).

The appellants contended that the tax assessments on their centrally valued personal property situated in Boston resulted in a greater “share” of the Boston tax levy being shifted to them in violation of Article 10 of the Declaration of Rights. However, the Board ruled that Article 10 of the Declaration of Rights, “must be regarded as qualified by Article 112, as amended.” *Associated Indus. of Mass., Inc.*, 378 Mass. at 668 n.23 (1979). In other words, in this context, “his share” in Article 10 of the Declaration of Rights means the share of the total tax

levy borne by a taxpayer through a constitutionally sound, classification-based, system of local property taxation. Further the system installed by the Legislature through Chapter 797 has passed constitutional muster. *See Opinion.*

Moreover, the Board ruled that, under the rational basis standard requiring that a statute be merely “reasonably related to the furtherance of a valid state interest” to be constitutional, the appellants’ facial challenge failed. The Board found and ruled that the split tax rate property taxing system employed by the assessors here was a reasonable mechanism for furthering the valid state interest of favoring residential real property over commercial property. Furthermore, and assuming *arguendo* that a “fundamental right” has been implicated, which the appellants did not assert, the Board found and ruled that, even under the strict judicial scrutiny standard of review, the appellants’ challenge would fail. The Board determined that Chapter 797 was narrowly tailored to further a legitimate and compelling governmental interest to assure that local property taxes are proportional within each class of property, are based upon full fair market value assessments, and favor residential property while treating all commercial property the same. Accordingly, the Board ruled that the appellants were not unjustifiably burdened by the property taxes which the assessors levied upon their centrally valued personal property situated in Boston.

### **The Appellants’ Remedy Lacks Merit**

Article 112 empowered the Legislature “to impose different rates of taxation on different classes of real property, and thus to develop and operate a system which may be similar in practical effect to those declared unlawful in the *Bettigole* and *Sudbury* cases.” *Opinion*, at 804. Consequently, the Board ruled that the longstanding pre-amendment definition of constitutional proportionality under Article 4, and Article 10 of the Declaration of Rights – which precluded the imposition of taxes on one class of property at a different rate from which was applied to other classes – must now be examined in conjunction with the constitutional amendment, Article 112, allowing classification, according to use, of four classes of real property and authorizing the Legislature to “assess, rate and tax the property differently in the classes so established, but proportionately in the same class, . . . .”

The abatements sought by the appellants would require personal property to be taxed at a rate not equivalent to any class of real property; a rate calculated without any regard to the other property classes being taxed to meet the Boston tax levy. Thus, despite the adoption of a community-specific split tax rate, the appellants’ suggested personal property tax rates are established by what amounts to a statewide formula; one which requires the portion of the tax

levy borne by personal property to be equivalent to that property's share of the municipality's property tax base. This approach, however, ignores the construction of the constitutional amendment on personal property, which the Supreme Judicial Court adopted in the *Opinion*. For municipalities, like Boston, which elect a split tax rate, constitutional proportionality is modified – a class of real property or personal property's percentage share of the tax levy is no longer equal to that class of real property or personal property's percentage share of the total value of all classes of real property and personal property making up the tax levy. Moreover, there is no separate requirement that personal property be treated without regard to the tax levy burden borne by the CI classes. The Board ruled that it is therefore constitutionally acceptable to achieve equivalence between personal property and the split tax rate for the CI classes. *See Opinion*, at 806-08. The Board further ruled that the statutes enacted to implement taxation applying to real property classifications can “reasonably be applied in ways that do not violate” the constitution as amended. *WB&T Mortgage Co., Inc.*, 451 Mass. at 721. Appellants seek to overcome the necessary implications of the constitutional amendment and implementation legislation with a simple mathematical, “mechanistic” solution that segregates personal property. The Board ruled, however, that proportionality has never been viewed as “mechanistic.” *WB&T Mortgage Co., Inc.*, 451 Mass. at 722 (holding that the Legislature's discretionary power to establish exemptions mitigates proportionality); *Weinstock v. Hull*, 367 Mass. 66, 68 (Mass. 1975)(citing *Opinion of the Justices*, 195 Mass. 607, 609 (1908))(upholding exemptions which have a reasonable relationship to the constitutional purpose of equality and proportionality, although lacking mathematical precision); *Axelrod v. Board of Assessors*, 392 Mass. 460 (1984)(permitting the use of biennial equalized valuations as sufficient approximations even though not “precise proportionality”).

The Board also ruled that the appellants' reliance on *Keniston*, 380 Mass. at 895 n.10 (1980) to impose a determination of proportionality based on a strict application of so-called “precise fractions” was misplaced. The *Keniston* case evaluated proportionality without regard for proportionality under the new split rate tax system imposed following the constitutional amendment, Article 112, and dealt only with an interim remedy provision (Section 10 of Chapter 797) to abate disproportionate assessments to the municipal average. Moreover, *Keniston* used the term, “precise fractions,” only in dicta, and otherwise clearly recognizes that “[n]o tax system has been devised whereby a perfect equalization of its burdens' can be accomplished.” *Keniston*, 380 Mass. at 896 (quoting *County of Essex v. Newburyport*, 254 Mass. 232, 236 (1926)). Lastly, the Court in *Keniston* clearly confined its analysis of the nature of

proportionality to a set of circumstances that did not include the classification system. *See, Keniston*, 380 Mass. at 895, n.10 (“Section 10 must be judged apart from art. 112, the constitutional amendment authorizing the Legislature to classify property according to its use for the purpose of taxation, ...”).

In addition, the Board ruled that the taxation of all property at fair cash value under a split tax rate system has repercussions for personal property. Put simply - personal property can no longer be taxed at a rate equivalent to all other classes of property. The constitutional amendment creates a distinction between residentially classified real property and personal property, which does not mean that Section 56 unconstitutionally creates classifications for personal property. All personal property is treated the same; all personal property is taxed at a rate that is not greater than the highest rate for any non-residentially classified real property. There is no constitutional requirement for proportionality which demands that taxable property other than classified real property be taxed at the lowest rate, at an average rate, or at what would have been the single rate.

Furthermore, the Board ruled that it is inconsistent and anomalous to argue that, in accepting proportionality within each class of property, proportionality for real property necessitates proportionality for personal property being determined in isolation. Certainly all personal property must be taxed proportionately to all other personal property, and the appellants never suggested that did not occur under this statutory scheme. A taxpayer who objects merely to the level of taxation of personal property in a particular community, cannot successfully invoke a claim of disproportionate assessment when the tax rate is no greater than the rate applicable to other classes of non-residential property, particularly where, as here, the appellants are being taxed on assets utilized in their commercial businesses.

Moreover, the Board ruled that the appellants’ remedy would actually create disproportionality. To construe proportionality as requiring a calculation for personal property that is not rationally consistent with the real property categories would entitle commercial and industrial real property owners to argue that the classification system results in disproportionality for them since personal property owners would be assessed at a lower rate. The Board ruled that benefitting residential real property owners through the residential factor does not justify reducing the share of the tax levy attributable to personal property taxes.

Lastly, the Board found and ruled that by adopting the appellants’ argument, the percentage of the tax levy attributable to real property would increase (in the case of Boston from 91.1% to 94.9%), thereby decreasing the amount of the tax levy to be paid by personal property

owners. Applying the system advocated by the appellants would cause real property to bear a higher percentage of the tax levy and increase the tax rates for all real property classes – including residential real property – to the benefit of personal property, without any equivalence between the personal property rate and any real property class rate. Rather than interpreting the statutory scheme to harmonize proportional taxation of all real and personal property, the Board ruled that the appellants’ approach would disconnect personal property from a rational relationship to the overall tax levy. *See Opinion of the Justices*, 208 Mass. 616 (1911)(“It is not permissible to make an assessment at one rate upon real estate and at another rate upon personal property.”)<sup>8</sup>

For these as well as its other articulated reasons, the Board found and ruled that the comprehensive system of property valuation and classification embodied in the statutes at issue accomplishes the legislative goal of constitutionally favoring residential real estate and that system has been rationally and reasonably implemented in ways that do not offend the Massachusetts Constitution. The statutory scheme for taxation of personal property in municipalities electing split rate taxation also constitutionally furthers that legislative goal and results in a rational, proportional, and constitutional implementation of the split rate tax system.

### **Conclusion**

Based on the stipulated facts, its findings, and its analysis, the Board found and ruled that the appellants failed to carry their burden of proving that the assessors’ imposition of the \$31.92 tax rate on their centrally valued personal property situated in Boston resulted in that personal property being disproportionately taxed in violation of Article 4, and the appellants being obligated to pay more than their “share” of property taxes thereby offending Article 10 of the Declaration of Rights. To the contrary, the Board found and ruled that the comprehensive system of property valuation and classification embodied in the aforementioned statutes and employed by the assessors here constitutionally furthered the legislative goal of favoring residential real estate and have been narrowly, rationally and reasonably implemented in ways that do not offend the Massachusetts Constitution. Moreover, the Board found and ruled that the statutory scheme for taxation of personal property in municipalities electing split rate taxation, as Boston did here, also furthered that legislative goal and results in a narrow, rational, proportional, and constitutional implementation of the split tax rate system.

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<sup>8</sup> This Opinion rejected a statewide tax on personal property based on the average rate of taxation of real property throughout the Commonwealth. Since the rate of taxation on personal property would be “different” from the rate upon real estate, “[I]t is obvious that the assessments proposed ... would be disproportional taxation.” *Id.* at 618. Article 112, allowing classes of real estate, does not provide any support for the appellants’ suggestion that the tax rate for personal property could be different from that of every class of real property.

Accordingly, 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**

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**WEST BEIT OLAM CEMETERY  
CORPORATION**

v. **BOARD OF ASSESSORS OF  
THE TOWN OF WAYLAND**

Docket Nos.: F316811

Promulgated:  
November 10, 2014

**ATB 2014-857**

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 Wayland (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of Wayland owned by and assessed to West Beit Olam Cemetery Corporation under G.L. c. 59, §§ 11 and 38 for fiscal year 2012 (“fiscal year at issue”).

Commissioner Chmielinski heard this appeal. Chairman Hammond and Commissioners Scharaffa and Rose joined him in a decision 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.

*Sander A. Rikleen*, Esq. for the appellant.

*Mark J. Lanza*, Esq. 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”) found the following.

On July 1, 2011, the relevant qualification date for the fiscal year at issue, the appellant, West Beit Olam Cemetery Corporation (“appellant”), owned a parcel of land improved with a single-family residence (“subject home”), identified on the appellee’s Map 18 as Lot 34, with an

address of 59 Old Sudbury Road in Wayland (“subject property”). For the fiscal year at issue, the assessors valued the subject property at \$469,200 and assessed a tax thereon, at the rate of \$19.01 per thousand, in the total amount of \$8,919.49.<sup>1</sup> In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 30, 2012, the appellant timely filed an abatement application with the assessors, which the assessors denied on March 19, 2012. The appellant seasonably filed its Petition Under Formal Procedure with the Board on June 18, 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 appellant’s acquisition of the subject property**

The subject property is a 1.73-acre parcel of land, improved with a single-family, raised-ranch style residence, which is contiguous to a cemetery in Wayland named Beit Olam Cemetery (“Beit Olam”). The subject property, as well as the adjoining Beit Olam, is owned by the appellant, which is a nonprofit Jewish cemetery corporation organized by Jewish Cemetery Association of Massachusetts (“JCAM”). JCAM was formed in 1984 as a project of Combined Jewish Philanthropies, the Synagogue Council of Massachusetts, a number of Jewish Cemetery Associations, and a number of Synagogues in the Greater Boston area. JCAM’s founding purposes include:

To establish a religious organization in accordance with Jewish religious practices, traditions, and beliefs that functions as a Jewish cemetery association for the Jewish communities of Massachusetts; to function as a Jewish burial society and Jewish association for honoring the dead in accordance with Jewish religious practices, traditions and beliefs; ...

The appellant was established under G.L. c. 180 and its founding purposes include: “To develop, maintain, and operate a cemetery in accordance with the provisions of M.G.L. c. 114.”

The only issue in this appeal is whether the subject property qualifies for the exemption from taxation under G.L. c. 59, § 5, cl. Twelfth for “cemeteries ... dedicated to the burial of the dead, and buildings owned by religious nonprofit corporation and used exclusively in the administration of such cemeteries.” The appellant presented its case-in-chief through the testimony of: Michael Coutu, the President and owner of Sudbury Design Group, a landscape architectural firm that was involved in the creation, design and development of JCAM’s cemeteries in Wayland; Stanley Kaplan, the Executive Director of JCAM; and Janette Howland (“Mrs. Howland”), who resided at the subject home.

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<sup>1</sup> This amount is exclusive of the Community Preservation Act (“CPA”) surcharge of \$105.28.

Pertinent facts related to the appellant's acquisition of the subject property are as follows. In 1998, the appellant purchased a property then known as Lot 1B, which became the Beit Olam. Lot 1B was at that time owned by a Mr. Beckett, who also owned the adjoining subject property, then known as Lot 1A. When JCAM purchased Lot 1B, it also purchased a right of first refusal on the sale of the subject property. Sometime in 2000, JCAM became concerned that it would run out of available grave sites at the Beit Olam. JCAM created the appellant in July of 2007 with the purpose of purchasing the subject property. On July 26, 2007, the appellant purchased the subject property for \$1,300,000. Mr. Kaplan testified that, in his opinion, the \$1,300,000 purchase price exceeded the fair market value of the subject property, but the appellant was willing to expend that sum because the subject property was adjacent to the Beit Olam and the appellant was interested in expanding the cemetery to the abutting subject property.

Mr. Kaplan testified that, subsequent to its purchase of the subject property, the appellant began to take steps to prepare the subject property for use as a cemetery. The appellant drew up plans for cemetery plots. Then, on November 6, 2007, pursuant to G.L. c. 114, § 34, the Wayland Board of Health approved the use of the subject property for burial purposes, and on April 14, 2008, pursuant to G.L. c. 114, § 34, the Wayland Town Meeting voted to grant its permission for the same. However, at the time of the hearing of this appeal, there was pending before the Appeals Court a zoning suit seeking, *inter alia*, declaratory relief as to whether the appellant must obtain a special earth-moving permit to expand the adjoining Beit Olam cemetery onto the subject property. *Jewish Cemetery Association of Massachusetts, Inc., East Beit Olam Cemetery Corporation and West Beit Olam Cemetery Corporation v. Board of Appeals of the Town of Wayland, et al.*, Land Court, Misc. No. 386750, Mass. Appeals Court No. 2011-P-0091. Also, as of the relevant qualification date of this appeal, the subject property had not been dedicated as a Jewish cemetery for burial purposes in accordance with Jewish law and tradition.

#### **The Howland's occupation of the subject property**

Simultaneously with its search for additional cemetery land, the appellant was also seeking a second road access into another of its cemeteries in Wayland. At that time, the access into nearby East Beit Olam Cemetery was through a residential neighborhood, whose residents often voiced their disapproval of funeral processions traveling through the neighborhood's streets. The Howland family owned a residential property at 44 Concord Road, adjacent to the East Beit Olam Cemetery. By a purchase and sale agreement executed on October 14, 2010, the appellant purchased the Howland's property for a stated consideration of \$410,000. In conjunction with, and as partial consideration for this sale, the appellant granted the Howlands

the right to live at the subject home on the subject property, rent-free, as provided in a “Cemetery Caretaker Agreement” (“Caretaker Agreement”) signed by the appellant and Mrs. Howland. Sometime after purchasing the Howland’s property, the appellant demolished the Howland’s former residence and converted a portion of the land into an access road into the East Beit Olam Cemetery for funeral and visitation purposes.

The Caretaker Agreement, which expires on October 14, 2017, provides that, “[a]s an inducement to the sale by Howland of the Concord Road property,” the appellant will provide housing at the subject home to Mrs. Howland, at no cost to her,<sup>2</sup> for a period of seven years. The Caretaker Agreement also calls for Mrs. Howland’s performance of certain duties at the appellant’s cemeteries. The only duty specified in the Caretaker Agreement, at Paragraph 1, is “causing the gates at the Cemeteries to be opened and closed on a daily basis.”

Paragraph 9 of the Caretaker Agreement provides that the appellant has the right to subdivide the subject property in accordance with a subdivision plan, attached to the Caretaker Agreement, and to utilize the 11,466-square-foot area depicted as “Parcel A” for cemetery purposes.

Mrs. Howland testified that, shortly after she executed the Caretaker Agreement with the appellant, the Howland family — Mrs. Howland and her husband and their two adult daughters -- moved into the subject home and made it their primary residence. At all relevant times, the Howland family resided at the subject property pursuant to and in accordance with the Caretaker Agreement. Moreover, the family automobiles, including Mr. Howland’s food preparation truck, were parked at the subject property. Mr. Howland also stored a kayak at the subject property.

Upon moving into the subject home, Mrs. Howland began performing some duties for the appellant, but she also continued to work part-time as a receptionist at a nearby veterinary hospital. Mrs. Howland did not recall how long she continued her outside paid employment, but she testified that sometime within the first year of moving into the subject home, she discontinued her hospital duties and did not seek other employment. Mrs. Howland testified that, at times, her husband and one of her adult daughters assisted her with some cemetery duties.

Mrs. Howland testified that she performed the following duties at the cemetery properties: opening the gates each morning; closing the gates each evening; placing American flags at the gravesites prior to Memorial Day; removing the American flags after Veteran’s Day;

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<sup>2</sup> The Caretaker Agreement provides that Mrs. Howland is not responsible for any occupancy fees, water charges, or costs for insurance, including property, casualty and liability insurance; Mrs. Howland is responsible for only utilities and telecommunications charges.

Paragraph 14 of the Caretaker Agreement defines the “fair rental value” of the subject home to be \$2,500 per month; over the seven-year occupancy period, the value of the free occupancy exceeds \$200,000.

patrolling the cemeteries during the day, particularly East Beit Olam because, as she explained: “I have to go and drive around there rather than looking out my window” as she can to monitor Beit Olam cemetery; wiping down benches to remove leaf debris and goose droppings; relocating a hose to water areas that have not been irrigated; and contacting Animal Control when neighborhood dogs begin barking and threaten to disrupt a funeral taking place at the cemeteries. Mrs. Howland testified that she kept a daily log of her cemetery duties and she took pictures of anything out of the ordinary. She retained all of her notes and pictures in a folder that she submitted monthly to Barry Ostroff, the Director of Field Services for JCAM. Mrs. Howland cited examples of incidents that she has reported to Mr. Ostroff: a sunken grave; fallen trees; tree debris that her husband could not easily remove himself; and apparent issues with the irrigation system.

Although Mrs. Howland had some responsibility to address or report minor maintenance and landscaping issues, there was no evidence that she performed any administrative duties in connection with the operation of the appellant’s cemeteries; rather, the record indicates that the administration of the cemeteries was the responsibility of Mr. Kaplan and Mr. Ostroff, neither of whom worked at the subject home.

Mrs. Howland testified that her time spent performing her cemetery duties often varied from day to day. When pressed, she stated that she may spend somewhere in the vicinity of one to four hours daily on her duties, “depend[ing] on what is happening that day and what is going on.” This included time spent waiting at the cemetery for someone to respond to an issue that she had reported. She testified that she did not take vacations from her duties. Mrs. Howland admitted, however, that, on the town census forms that she had filled out since living at the subject property, she has never listed her occupation as “cemetery caretaker.” She testified that she most likely listed her occupation as a “homemaker,” as she spent much time at home tending to one of her daughters, who required care.

At all times relevant to this appeal, Mrs. Howland and her family did not perform extensive landscaping duties, such as mowing the cemeteries’ lawns or regularly removing large quantities of leaf debris. Mr. Howland and one of their daughters each held jobs outside of the home. Mrs. Howland did not dig or otherwise prepare the land for burials. The appellant contracted with an outside vendor to perform these cemetery preparation and maintenance tasks. Mrs. Howland testified that, aside from glancing out her window to observe Beit Olam cemetery and using her computer to maintain her cemetery log, she did not perform extensive cemetery caretaker work from her home, and she did not have a certain section of the subject home

exclusively dedicated to performing her cemetery duties. Mrs. Howland also admitted that she had no prior education or experience in cemetery maintenance, landscaping or administration.

In addition to housing the Howland family, the subject property also contained an irrigation pump and well, which was installed during the summer of 2011 and serviced the adjoining Beit Olam cemetery. Mr. Coutu testified that the irrigation system was installed with the capacity to provide water not only for the existing Beit Olam cemetery but also for a future cemetery at the subject property, which would be called West Beit Olam.

The appellant claimed that, at all relevant times, the subject property was being held for future cemetery expansion, contained the home of the cemetery caretaker, and contained an irrigation pump and well for the adjoining Beit Olam cemetery as well as for a future West Beit Olam at the subject property. For these reasons, the appellant contended that the subject property was exempt as land owned by a religious nonprofit corporation and dedicated to the burial of the dead. At the very least, the appellant contended, the subject property, including the subject home, was used exclusively in the administration of JCAM's cemeteries in Wayland, Beit Olam and East Beit Olam.

### **The Board's findings**

The Board found that Mrs. Howland had no prior education or experience in cemetery maintenance, landscaping or administration. Further, she did not perform any extensive maintenance or landscaping tasks and performed no administrative duties aside from notifying Mr. Ostroff of occasional discrete issues for him to resolve. Her duties, while referred to as "caretaking," consisted of a casual monitoring of the cemeteries and minor incidental duties, with the only duty actually reduced to writing in the Caretaker Agreement being the opening and closing of the cemetery gates. Moreover, while Mrs. Howland performed these duties routinely, she did not perform them extensively, nor did she use the subject property exclusively to perform these duties.

Further, as an inducement and in consideration for granting the appellant their former Concord Road property adjacent to East Beit Olam, the Howland family was entitled to use the subject home as its primary residence, rent-free, with no interference by the appellant until the expiration of the Caretaker Agreement in October of 2017. The Board thus found that, while the appellant was contractually obligated to provide the Howland family a residence at the subject property, and while they made the subject home their residence, the majority of the subject property, exclusive of Parcel A, was primarily used for residential purposes and not exclusively, or even primarily, for the burial of the dead or the administration of a cemetery. The rent-free use

of the subject home by the Howlands, at a substantial value over seven years' duration, was part of the consideration that the appellant paid for the purchase of the Howlands' Concord Road property. Accordingly, the Board found that the Howland's rent-free use of the subject residence was part of the consideration for a land-swap agreement between the Howlands and the appellant.

However, pursuant to Paragraph 9 of the Caretaker Agreement, the appellant has carved out the 11,466-square-foot Parcel A of the subject property's 75,359 square feet and has reserved the right to use it exclusively for cemetery purposes. The appellant has also sought and gained approval from the Wayland Board of Health and the Wayland Town Meeting to use the entire subject property for burial purposes and has placed an irrigation pump and well on the subject property that is currently serving Beit Olam and has the capacity to service a future cemetery at the subject property. While the earth-moving permit issue remained unresolved and the subject property had not been dedicated according to Jewish tradition during the fiscal year at issue, the Board found that the preparations made by the appellant for the expansion of its cemetery onto the subject property, including reserving Parcel A exclusively for cemetery purposes, gaining approval of the Wayland Board of Health and Wayland Town Meeting, and placing an irrigation pump and well on the subject property, were sufficient preparations to demonstrate that the appellant had dedicated Parcel A for use in the burial of the dead during the fiscal year at issue. The Board thus found that Parcel A qualified for the statutory exemption as land devoted to cemetery use and, therefore, was exempt from property tax.

The Board, therefore, issued a decision for the appellant granting an exemption of 15.2% of the assessed land value, representing the ratio of the 11,466 square-feet of Parcel A to the subject property's total area of 75,359 square feet. Accordingly, the Board reduced the assessed value by \$42,237.31, resulting in an abatement of \$812.38.<sup>3</sup>

### OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. The exemption applicable in this appeal is G.L. c. 59, § 5, Twelfth ("Clause Twelfth"), which exempts from taxation all "[c]emeteries, tombs and rights of burial, so long as dedicated to the burial of the dead, and buildings owned by religious nonprofit corporations and used *exclusively* in the administration of such cemeteries, tombs and rights of burial." (emphasis added). A taxpayer claiming exemption bears the burden of proving that its ownership and occupation of the subject property comes within the express words of the

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<sup>3</sup> This amount includes the appropriate CPA surcharge.

exemption statute. *See, e.g., New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 731 (2008); *Springfield Young Men’s Christian Ass’n v. Assessors of Springfield*, 284 Mass. 1, 5 (1933); *Lasell Village, Inc. v. Assessors of Newton*, 67 Mass. App. Ct. 414, 419 (2006) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 716 (1944)).

The appellant cites two cases, both decided after Clause Twelfth was enacted in its current form, which considered the applicability of the statute to land used for cemetery purposes but not for actual burials. In *Assessors of Sharon v. Knollwood Cemetery*, 355 Mass. 584 (1969), the Supreme Judicial Court distinguished the facts of that case with those of the then-seminal cemetery exemption case, *Woodlawn Cemetery v. Assessors of Everett*, 118 Mass. 354 (1875). In *Woodlawn Cemetery*, the Supreme Judicial Court held that land could not be deemed exempt from taxation as land dedicated to burial of the dead “which has not been devoted or set apart, and some active measures taken towards preparing the ground, for a burial place. A mere dedication or appropriation on paper is not enough.” *Id.* at 361. The *Knollwood Cemetery* Court, however, in finding that “[t]he *Woodlawn* case [wa]s not controlling,” held that:

Chapter 59, Section 5, Twelfth, cannot reasonably be interpreted as requiring that, to qualify for exemption, all land acquired (with municipal consent) for burial purposes must be developed at one time. It must be expected that a cemetery corporation, in making land purchases, will anticipate its future needs for a period of time and that it will prudently develop its property in an orderly fashion as the need for doing so arises. We think that the planning and substantial actual use of parts of a defined area of land for cemetery purposes may properly be found, within the meaning of c. 59, Section 5, Twelfth, to constitute a dedication of the whole of that land to cemetery use . . . .

*Knollwood Cemetery*, 355 Mass. at 589. The Court in *Knollwood Cemetery* found that the sale of 42,566 burial lots over a seventeen-year period constituted ample evidence of “active measures” to dedicate the entire land for burial purposes, and thus found the entire cemetery property to be exempt. *Id.* Relying on *Knollwood Cemetery*, the appellant here contended that there is no requirement that all cemetery land be developed at one time, and that “a cemetery corporation, in making land purchases, will anticipate its future needs for a period of time and that it will prudently develop its property in an orderly fashion as the need for doing so arises.” *Id.*

In the second cemetery-exemption case, *Blue Hill Cemetery, Inc. v. Assessors of Braintree*, 2 Mass. App. Ct. 602, 604 (1974), the Appeals Court ruled that a twenty-eight acre parcel of land, which was not itself prepared for burial but which housed an administration building, a pump house for cemetery irrigation water, two garages for cemetery vehicles and equipment, a caretaker’s house, and a nursery to provide shrubs and flowers for the nearby

cemetery, was a sufficient dedication of the land to the burial of the dead. The parties there stipulated that all but a few portions of the land and buildings “were used for cemetery purposes.” *Id.* at 603. Relying on *Knollwood Cemetery*, the Appeals Court found that, even though no burials would be taking place on the land, the land was nonetheless used “for the operation of the cemetery and to supply services closely connected therewith,” and therefore exempt under Clause Twelfth. *Id.* at 604, 606.

Expanding upon *Blue Hill Cemetery*, the appellant here contends that the subject property, which contained the subject home and the irrigation pump and well for Beit Olam, was supporting Beit Olam and East Beit Olam and therefore was sufficiently dedicated to the burial of the dead. The appellant further contended that the property in *Blue Hill Cemetery*, like the subject property, included a caretaker house and that the Appeals Court did not require that the cemetery caretaker live alone. The appellant thus concludes that the occupation of the subject home by the Howland family did not jeopardize the subject property’s tax-exempt status.

A key distinction, however, between the facts of *Blue Hill Cemetery* and the instant appeal is the stipulation in that case between the parties that the land and buildings “were used by the appellant for the operation of the cemetery and to supply services closely connected therewith.” By contrast, the parties to the instant appeal dispute the use of the subject property for cemetery use. The Board ruled that there was insufficient evidence to prove that the subject home was “used exclusively in the administration of” a cemetery, as required by Clause Twelfth. Rather, the primary use of the subject home was as a family residence, with only minimal cemetery-related activities performed by Mrs. Howland. Further, Mrs. Howland was not even an employee of the appellant. Rather, the subject property was an integral part of, indeed an “inducement to” and consideration for, a land-swap agreement between the Howland family and the appellant, the primary purpose of which was to settle a dispute with the appellant’s residential neighbors over funeral processions to East Beit Olam. The cemetery services performed by Mrs. Howland were minimal, as the bulk of the maintenance and administration of the cemeteries were contracted to an outside vendor or performed off the subject property by Mr. Kaplan or Mr. Ostroff. The Board thus found and ruled that the subject home was not entitled to the Clause Twelfth exemption because it was not used exclusively in the administration of the appellant’s cemeteries.

However, pursuant to Paragraph 9 of the Caretaker Agreement, the appellant carved out the 11,466-square-foot Parcel A of the subject property and explicitly reserved the right to use it exclusively for cemetery purposes prior to the expiration of the Caretaker Agreement.

Notwithstanding the lawsuit over the earth-moving permit and the fact that the subject property has not been dedicated for Jewish burials, the appellant sought and gained approval from the Wayland Board of Health and Wayland Town Meeting to use the subject property for burial purposes. The Board ruled that, in accordance with *Blue Hill Cemetery*, the preparations made by the appellant for the expansion of its cemetery onto the subject property, including reserving Parcel A exclusively for cemetery purposes, securing the necessary approvals of the Wayland Board of Health and Wayland Town Meeting, and placing the irrigation pump and well on the subject property, were sufficient preparations to demonstrate that the appellant had dedicated Parcel A for use in the burial of the dead during the fiscal year at issue. The Board thus ruled that Parcel A qualified as cemetery land exempt from real estate taxes for the fiscal year at issue. Accordingly, the Board issued a decision for the appellant granting an abatement of \$812.38<sup>4</sup> based upon the assessed value of the 11,466-square-foot Parcel A, which is equivalent to 15.2% of the subject property's total assessed land value.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr. Chairman**

A true copy,  
Attest: \_\_\_\_\_  
**Clerk of the Board**

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<sup>4</sup> This amount includes a prorated portion of the CPA surcharge.