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

**Current Developments  
in  
Municipal Law**



**2013**

**Appellate Tax Board Cases**

**Book 2A**

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

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# APPELLATE TAX BOARD CASES

## Book 2A

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**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**ELIZABETH L. ANDERSEN**      v.      **BOARD OF ASSESSORS OF  
THE TOWN OF FALMOUTH**

Docket Nos.    F314689 (FY 2011)  
                      F316333 (FY 2012)

Promulgated:  
August 27, 2013

**ATB 2013-808**

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 Falmouth (“assessors” or “appellee”) to abate taxes on certain real estate in Falmouth, owned by and assessed to Elizabeth L. Andersen (“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, Commissioners Scharaffa and Chmielinski, and former Commissioner Mulhern joined him in the decision for the appellee.

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

*Elizabeth L. Andersen and Neil Andersen, pro se*, for the appellant.

*James Jursak*, assistant 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 Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2010, and January 1, 2011, the appellant was the assessed owner of an improved 1.84-acre parcel of real estate located at 211 Blacksmith Shop Road in Falmouth (“subject property”), at which she resided with her husband, Neil Andersen. The subject property is improved with a two-story, contemporary-style dwelling, built around 1990, which has a finished living area of 3,839 square feet. The dwelling has four bedrooms, two bathrooms, two half-bathrooms, and a wood deck.

For fiscal year 2011, the assessors valued the subject property at \$587,200 and assessed a tax thereon in the total amount of \$4,354.68. For fiscal year 2012, the

assessors valued the subject property at \$553,300 and assessed a tax thereon in the total amount of \$4,433.83.

## **I. Jurisdiction**

### **A. Fiscal Year 2011 (Docket No. F314689)**

On March 11, 2011, Falmouth's Collector of Taxes sent out the town's actual real estate tax notices for fiscal year 2011. In accordance with G.L. c. 59, § 57C, the appellant paid the tax assessed without incurring interest. Also on March 11, the appellant timely filed an Application for Abatement with the assessors in accordance with G.L. c. 59, § 59. The two-page Application for Abatement form included the following language on page 2:

The assessors have 3 months from the date your application is filed to act unless you agree in writing before that period expires to extend it for a specific time. If the assessors do not act on your application within the original or extended period, it is deemed denied.

The assessors did not act on the application within three months, and it was deemed denied on June 11, 2011. This deemed denial set a deadline of September 12, 2011 for the appellant to file an appeal with the Board.<sup>1</sup> Because the assessors did not send notice of their inaction within ten days of the deemed denial of the appellant's application as required by G.L. c. 59, § 63, the appellant was entitled to file a Petition for Late Entry ("PLE"), under G.L. c. 59, § 65C, "within two months after the appeal should have been entered."

However, the appellant did not file her appeal with the Board until December 12, 2011, one month after the deadline for filing a PLE. Her tardiness may have been caused by reliance on a September 13, 2011 notice that she received from the assessors, which inexplicably cited a deemed denial date of September 13, 2011, over three months after the abatement application was deemed denied by operation of G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. It stated:

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<sup>1</sup> The deadline for filing an appeal with the Board is generally three months from the date of deemed denial, pursuant to G.L. c. 59, § 64. However, in 2011, September 11 fell on a Sunday. When the last day of a filing period falls on a Sunday or a legal holiday the filing is still considered timely if it is made on the following business day. See G.L. c. 4, § 9; *Barrett v. Assessors of Needham*, Mass. ATB Findings of Fact and Reports, 2004-614, 615, n.2. Accordingly, the Board found that the filing deadline under G.L. c. 59, § 64 was Monday, September 12, 2011.

Your application was deemed denied on September 13, 2011.

You may appeal this denial in the manner and under the conditions provided by Chapter 59, Sections 64-65B of the General Laws.

Under those sections, your appeal may be made to the Appellate Tax Board . . . .

The appeal must be filed within three months of the date your application was denied by vote of the assessors or within three months of the date your application was deemed denied, whichever is applicable.

The notice was not only inaccurate and therefore void, but also misleading in that it suggested the appellant had three months from September 13 to file her appeal.

Notwithstanding the misleading and inaccurate notice and that neither party raised this jurisdictional issue during the hearing of these appeals, the Board was compelled to find and rule that it did not have jurisdiction over the fiscal year 2011 appeal.

**B. Fiscal Year 2012 (Docket No. F316333)**

In accordance with G.L. c. 59, § 57C, the appellant paid the tax assessed on the subject property for fiscal year 2012 without incurring interest. On January 26, 2012, the appellant timely filed an Application for Abatement with the assessors in accordance with G.L. c. 59, § 59. The assessors denied the application on March 8, 2012. On June 6, 2012, the appellant seasonably filed a Petition Under Formal Procedure with the Board appealing the assessors' denial. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the fiscal year 2012 appeal.

**II. Valuation**

The appellant asserted that the assessors' valuation for fiscal year 2012 did not appropriately account for the subject property's proximity to a wind turbine owned by the Town of Falmouth. The 1.65-megawatt turbine, which became operational in March of 2010, is 400 feet tall and is located approximately one quarter mile from the subject property at Falmouth's Waste Water Treatment Facility, which is located at 154 Blacksmith Shop Road. As of the fiscal year 2012 assessment date of January 1, 2011, the turbine operated both night and day, whenever wind levels were sufficient to facilitate motion. According to the appellant, the turbine's rotation emits low frequency noise that has adversely affected her and her husband's enjoyment of the subject property and has caused them to suffer loss of sleep, headaches, vertigo, depression, and other physical and mental ailments. The appellant presented evidence to this effect, which detailed the

nature of the noise and sought to establish its impact on the couple's quality of life and general well-being. However, the Board found that the appellant did not present evidence which demonstrated that the subject property's proximity to the turbine had a quantifiable negative effect on its fair cash value. Moreover, the Board found that the appellant did not present any affirmative evidence, such as a comparable-sales analysis, to support a fair cash value for the subject property lower than its assessed value.

For their part, the assessors offered the requisite jurisdictional documentation and a valuation analysis that included three sales of purportedly comparable properties in Falmouth occurring between June, 2010, and February, 2011, as well as one real estate listing. However, the transactions included in the comparable-sales analysis each involved properties located more than twice as far from the wind turbine as the subject property. Consequently, the Board could not discern the effect, if any, that the turbine's operation had on the sale prices of the properties, or if the value of the subject property would have been similarly affected. Moreover, the assessors made no adjustments to account for differences between their chosen properties and the subject property. For these reasons, the Board gave no weight to the assessors' valuation analysis.

Based on the evidence submitted, the Board found and ruled that the appellant failed to meet her burden of proving that the subject property's assessed value exceeded its fair cash value for fiscal year 2012. Because the Board also found and ruled that it did not have jurisdiction over the fiscal year 2011 appeal, the Board issued a decision for the appellee in these appeals.

## OPINION

### I. Jurisdiction

The Board has only that jurisdiction conferred on it by statute. *Stilson v. Assessors of Gloucester*, 385 Mass. 724, 732 (1982). "Since the remedy of abatement is created by statute, the board lacks jurisdiction over the subject matter of proceedings that are commenced at a later time or prosecuted in a different manner from that prescribed by statute." *Nature Church v. Assessors of Belchertown*, 384 Mass. 811, 812 (1981) (citing *Assessors of Boston v. Suffolk Law School*, 295 Mass. 489, 495 (1936)). Furthermore, the Board cannot use principles of equitable estoppel to extend its authority beyond

statutory prescription. See *Stilson*, 385 Mass. at 732; *Comm’r of Revenue v. Marr Scaffolding*, 414 Mass. 489, 493 (1993) (“An administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent that it has express or implied statutory authority to do so.”); *Hillside Country Club Partnership, Inc. v. Comm’r of Revenue*, Mass. ATB Findings of Fact and Reports, 2011-191, 196 (“[T]he Board lacks the authority to grant an abatement based on principles of equitable estoppel.”).

The assessors' failure to raise an impediment to the Board's jurisdiction does not preclude the Board from raising the issue on its own motion. “Adjudicatory bodies have both the power and the obligation to resolve problems of subject matter jurisdiction whenever they become apparent.” *Sevenars Concert Trust v. Assessors of Worthington*, Mass. ATB Findings of Fact and Reports, 2008-534, 538-39 (citing *Nature Church*, 384 Mass. at 812).

G.L. c. 59, §§ 64 and 65, provide that a taxpayer who is aggrieved by the assessors' refusal to abate a tax on real estate may appeal to the Board “within three months after the date of the assessors' decision on an application for abatement ... or within three months after the time when the application for abatement is deemed to be denied.” See also *Berkshire Gas v. Assessors of Williamstown*, 361 Mass. 873 (1972); *Alan Ades v. Assessors of New Bedford*, Mass. ATB Findings of Fact and Reports, 1996-287, 289. “The time limit of three months provided for filing the petition by statute is jurisdictional and a failure to comply with it will result in dismissal of the appeal.” *Ades*, Mass. ATB Findings of Fact and Reports at 1996-290 (citing *Cheney v. Inhabitants of Dover*, 205 Mass. 501 (1910); *Berkshire Gas*, 361 Mass. at 873)).

An Application for Abatement is deemed denied at the expiration of three months from the date the application was filed if the assessors take no action on the application, unless the applicant provides written consent. G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. Once an application is deemed denied, the assessors “shall have no further authority to act” on the application other than to agree with the taxpayer on a final settlement. *Id.* “This board has consistently applied the rule that when the assessors fail to act within three months after the filing of an application, the period for appeal to the board begins to run on the expiration of the three months, and that any action taken on the application by

the assessors after that date is a nullity.” *Lenson v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports, 1984-337, 341, *aff’d*, 395 Mass. 178 (1985).

Pursuant to G.L. c. 59, § 63, the assessors are required to send written notice to a taxpayer applying for an abatement within ten days of the assessors' decision on an application or within ten days of the date the application is deemed denied by the assessors' inaction. G.L. c. 59, § 65C provides a remedy to taxpayers when the assessors fail to comply with the requirements of § 63. In such instances, § 65C allows an additional two months beyond the ordinary three-month period during which taxpayers may maintain appeal rights by filing a PLE with the Board.

In the instant case, the statutory framework of G.L. c. 59, §§ 64-65C compelled the Board to rule that it did not have jurisdiction over the appellant’s fiscal year 2011 appeal. The deadlines to appeal to the Board -- three months from a deemed denial generally and an additional two months with a PLE -- are respectively set by G.L. c. 59, § 64 and § 65C. Further, the Board has no authority to look to principles of equitable estoppel to extend jurisdiction beyond the scope allowed by statute. *See Stilson*, 385 Mass. at 732. As such, because the appellant failed to meet the statutory deadlines, the Board cannot exercise jurisdiction over her appeal. On this basis, the Board decided the fiscal year 2011 appeal for the appellee.

## II. Valuation

“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 of each year. 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 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 board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayer[] sustain[s] the burden of

proving the contrary.”” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245).

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

Here, the appellant argued that the assessors overvalued the subject property for fiscal year 2012. However, the Board found and ruled that the evidence offered by the appellant was insufficient to meet her burden of proof. In particular, the appellant presented insufficient evidence to support the claim that the subject property’s proximity to the wind turbine had a quantifiable effect on its fair cash value.

*Pistorio v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports, 2010-206, serves as a useful contrast to the instant appeal. *Pistorio* dealt with the opening of a dog daycare, grooming, and walking facility across the street from an apartment building. *Id.* at 2010-210. The owners of the apartment building appealed a property tax assessment to the Board on the grounds that the dog-care facility depressed their property’s fair cash value. *Id.* In addition to documenting the nature of the intrusion of the dog care facility, which produced noise and dog droppings, the taxpayers presented evidence demonstrating that the market for their rental units decreased after the facility opened. *Id.* The owners prevailed in their claim for an abatement because this evidence provided the Board with an objective indicator that the presence of the dog care facility had decreased the fair cash value of the taxpayers’ property. *See id.* at 2010-215-16. Unlike the taxpayers in *Pistorio*, the appellant here did not provide the Board with sufficient evidence, beyond her and her husband’s personal experience at the subject property, to indicate that the wind turbine decreased the fair cash value of the subject property. Accordingly, the Board found and ruled that the appellant neither ““expos[ed] flaws or errors in the assessors’ method of valuation,” nor ““introduc[ed] affirmative evidence of value which undermine[d] the assessors’ valuation.”” *General Electric Co.*, 393 Mass. at 600 (quoting *Donlon*, 389 Mass. at 855). The Board therefore found and

ruled that the appellant failed to meet her burden of proving that the subject property's fair cash value was lower than its assessed value for fiscal year 2012.

On the basis of the foregoing, 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**

**RICHARD ARONOVITZ**                      v.                      **BOARD OF ASSESSORS OF  
THE TOWN OF MILFORD**

Docket No. F311257

Promulgated:  
March 26, 2013

**ATB 2013-233**

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the Town of Milford owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal year 2011.

Chairman Hammond heard the appellee's Motion to Dismiss under G.L. c. 59, 38D. Commissioners Scharaffa, Rose, Mulhern and Chmielinski joined him in the decision for the appellee.

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

*Richard Aronovitz, pro se, for the appellant.*

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

## **FINDINGS OF FACT AND REPORT**

On January 1, 2010, the appellant, Richard Aronovitz (“appellant”) was the owner of a parcel of commercial real estate improved with a multi-tenanted retail building located at 161 East Main Street in the Town of Milford (“subject property”).

On January 4, 2010, the Milford Board of Assessors (“assessors” or “appellee”) sent to the appellant, by properly addressed first class mail, a request for income and expense information under G.L. c. 59, § 38D (the “first § 38D request”). The first § 38D request included a cover letter explaining the information sought and a reference to G.L. c. 59, § 38D, as well as an information request form approved by the Commissioner of Revenue. This request sought lease and expense information concerning the subject property during calendar year 2009, necessary to establish the fair cash value of the subject property as of January 1, 2010, the valuation date for fiscal year 2011. The assessors received no response to the first § 38D request.

On March 18, 2010, the assessors sent a second § 38D request (“second § 38D request”), which they titled “Final Request,” to the appellant at the same address. The second § 38D request contained a cover letter, a second copy of the information request form, and a recitation of relevant language from § 38D, including, “[f]ailure of an owner or lessee of real property to comply with such request within sixty (60) days after it has been made shall bar him from any statutory appeal.” The assessors received no response to the second § 38D request.

For fiscal year 2011, the assessors valued the subject property at \$1,563,000 and assessed a tax thereon, at the rate of \$26.05 per \$1,000, in the amount of \$40,716.15. The appellant timely paid the tax and filed an Application for Abatement with the assessors on January 31, 2011, which the assessors denied on March 30, 2011. The appellant seasonably filed a petition with the Appellate Tax Board (the “Board”) on April 4, 2011.

The assessors filed a Motion to Dismiss the appellant’s appeal for failure to comply with § 38D. The assessors maintained that the appellant failed to respond to either the first or the second § 38D request, and that, as a result of the appellant’s failure to provide the requested information, the assessors were prejudiced in their ability to determine the actual fair cash value of the subject property for fiscal year 2011. Based on the testimony of the appellant and Priscilla Hogan, Assessor and Administrator for the

Town of Milford, and the documentary evidence offered at the hearing of the assessors' Motion, the Board made the following findings of fact.

The appellant did not dispute that he received the § 38D requests nor did he argue that the income and expense information sought was "reasonably required" for the assessors to determine the actual fair cash value of the subject property for fiscal year 2011. Instead, the appellant maintained that he completed the § 38D forms and mailed them to the assessors as required. As evidence thereof, the appellant submitted copies of completed income and expense forms which he had purportedly mailed to the assessors. However, neither of the forms was dated and the appellant failed to provide any corroborating evidence to support his testimony that he returned the § 38D requests to the appellee. In contrast, Ms. Hogan testified that the assessors did not receive any responses from the appellant to either the first or the second § 38D request for fiscal year 2011.

Based on all the evidence, the Board found that the appellant's claim that he had timely completed and returned the § 38D requests for fiscal year 2011 to the assessors was unsubstantiated and not credible. The Board found that: the appellant received the § 38D requests; the appellant failed to respond to the § 38D requests; the requested information was reasonably required by the assessors to determine the actual fair cash value of the subject property for the fiscal year at issue; and the appellant's failure to respond to the § 38D requests was not due to reasons beyond his control. On this basis, the Board allowed the assessors' Motion to Dismiss this appeal for the appellant's unjustifiable failure to respond to either of the assessors' § 38D requests. Accordingly, the Board decided this appeal for the appellee.

### **OPINION**

At all times relevant to this appeal, § 38D provided 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 the owner or lessee to comply with such request within sixty days after it has been made shall bar him from statutory appeal under this chapter,

unless such owner or lessee was unable to comply with such request for reasons beyond his control.<sup>1</sup>

Accordingly, when a taxpayer fails to respond 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 the owner's control. *See, e.g., Marketplace Center II Limited Partnership v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2000-258, 276-77, *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002); *Forty-Four – 46 Winter Street, LLC v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2005-656, 661; and *Herman Banquer Trust v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2005-664, 671.

The subject property is a multi-tenanted retail building. The appellant did not dispute that he received the § 38D requests nor did he argue that the income and expense information sought was not "reasonably required" for the assessors to determine the actual fair cash value of the subject property for fiscal year 2011. Instead, the appellant maintained that he completed the § 38D forms and mailed them to the assessors' office. The appellant, however, failed to offer any credible corroborating evidence. In contrast, the assessors presented credible evidence that the assessors had not received any reply from the appellant for the fiscal year at issue.

Although the appellant testified that he completed and mailed the § 38D requests for fiscal year 2011, the Board ultimately found the appellant's unsubstantiated testimony was not credible. Matters of witness credibility are properly left to the Board. *See, e.g., Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977) ("The credibility of witnesses, the weight of the evidence, and inferences to be

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<sup>1</sup> Effective July 27, 2010, after both § 38D requests in this appeal were mailed, the Legislature amended § 38D. It now provides in pertinent part:

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.

St. 2010, c. 188, § 47.

drawn from the evidence are matters for the board.”); *Bayer Corp. v. Commissioner of Revenue*, 436 Mass. 302, 308 (2002)(“[W]e have consistently ruled that the assessment of the credibility of witnesses is a matter of the board.”)(citing *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 43 n. 6 (1997)). Given the lack of credible evidence substantiating the appellant’s claims coupled with the credible evidence submitted by the assessors, the Board was not persuaded by the appellant’s testimony.

The Board found in this appeal that the appellant received but did not respond to the § 38D requests, and that the information requested by the assessors on the § 38D requests was reasonably required by them to determine the actual fair cash value of the subject property for the fiscal year at issue. See, e.g., *Marketplace Center II*, Mass. ATB Findings of Fact and Reports at 2000-276-77; *Forty-Four-46 Winter Street*, Mass. ATB Findings of Fact and Reports at 2005-661-62; and *Herman Banquer Trust*, Mass. ATB Findings of Fact and Reports at 2005-671-72.

Accordingly, the Board granted the assessors’ Motion to Dismiss under § 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**

**AUTUMN GATES ESTATES, LLC v. BOARD OF ASSESSORS OF  
& FOX GATE, LLC THE TOWN OF MILLBURY**

Docket Nos. F300170-F300198  
& F311482

Promulgated:  
August 28, 2013

**ATB 2013-822**

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 Town of

Millbury (the “appellee” or the “assessors”) to abate taxes on certain real estate in Millbury owned by and assessed to Autumn Gates Estates, LLC (“AGE, LLC”) for fiscal year 2009 and owned by and assessed to Fox Gate, LLC (“Fox Gate, LLC”) for fiscal year 2011 under G.L. c. 59, §§ 11 and 38.

Commissioner Chmielinski heard these appeals. Chairman Hammond and Commissioners Scharaffa and Rose joined him in the decision for the appellant in Docket Nos. F311482, F300170 and F300172-F200198, and in the decision for the appellee in Docket No.F300171.

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.

*Paul F. Vozella*, Esq. for the appellant.

*Jeffrey T. Blake*, Esq., and *Thomas W. McEnaney*, Esq. for the appellee.

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

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

On January 1, 2008, the relevant date of assessment for fiscal year 2009, AGE, LLC was the assessed owner of a 32.87-acre parcel of land located at Autumn Gate Circle in Millbury. (“subject property”). The subject property was subdivided into 31 separate lots, with 27 lots designated for residential development and four lots set aside as open space. On the relevant date of assessment, the subject property was improved with a sewage pumping station, cleared roadways with an asphalt basecoat, and granite curbing. The residential lots were cleared and most of them were graded.

On October 10, 2008, Fox Hill Builders, Inc. acquired the subject property after making the winning bid of \$1,850,000 at a foreclosure sale, and on that same date, it transferred the subject property to Fox Gate, LLC. Fox Gate, LLC was therefore the assessed owner of the subject property on January 1, 2010, the relevant date of assessment for fiscal year 2011. Hereinafter, AGE, LLC and Fox Gate, LLC will be jointly referred to as “the appellant” and fiscal years 2009 and 2011 will be jointly referred to as “the fiscal years at issue.”

The following tables set forth the sizes, assessed values, and taxes assessed by the assessors for each of the subject property's 31 lots for both of the fiscal years at issue.

**FY 2009**

Map	Lot	Lot # on Plan	St. #	Lot Size (sq. ft.)	Assessed Value (\$)	Total Tax (\$)
48	78	1	2	22,267	118,900	1,393.51
48	79	2	4	23,202	119,200	1,397.02
48	80	3	6	23,204	119,200	1,397.02
56	4	4	8	20,001	118,100	1,384.13
56	5	5	10	20,002	118,100	1,384.13
56	6	6	12	20,002	118,100	1,384.13
56	7	7	14	39,168	125,400	1,469.69
56	8	8	16	1.92 ac.	135,200	1,584.54
56	10	9	18	1.86 ac.	135,600	1,589.23
56	11	10	20	1.12 ac.	128,100	1,501.33
56	12	11	22	41,485	126,200	1,479.06
56	13	12	24	1.28 ac.	130,800	1,532.98
48	86	13	26	1.26 ac.	130,300	1,527.12
48	85	14	28	22,720	119,100	1,395.85
48	84	15	1	20,000	118,100	1,384.13
48	83	16	3	20,218	118,200	1,385.30
48	82	17	5	20,001	118,100	1,384.13
48	81	18	7	20,002	118,100	1,384.13
56	22	19	9	20,002	118,100	1,384.13
56	21	20	11	20,001	118,100	1,384.13
56	20	21	13	20,001	118,100	1,384.13
56	19	22	15	20,001	118,100	1,384.13
56	18	23	17	20,002	118,100	1,384.13
56	17	24	19	20,001	118,100	1,384.13
56	16	25	21	20,002	118,100	1,384.13
56	15	26	23	20,002	118,100	1,384.13
56	14	27	25	20,002	118,100	1,384.13
56	9	Open Space	0	1,658	7,100	83.21
56	23	Open Space	0	8.5 ac.	16,800	196.90
56	24	Open Space	0	1.56 ac.	5,200	75.66
48	89	Open Space	0	14,141	113,700 <sup>1</sup>	1,332.56
				Total FY 2009	3,428,600	40,183.19

<sup>1</sup> As will be discussed *infra*, the relatively higher valuation of the open space parcel identified as Map 48, Lot 89 appears to have been the result of a clerical error on the part of the assessors.

**FY 2011**

<b>Map</b>	<b>Lot</b>	<b>Lot # on Plan</b>	<b>St. #</b>	<b>Lot Size (sq. ft.)</b>	<b>Assessed Value (\$)</b>	<b>Total Tax (\$)</b>
48	78	1	2	22,267	95,100	1,383.71
48	79	2	4	23,202	95,400	1,388.07
48	80	3	6	23,204	95,400	1,388.07
56	4	4	8	20,001	94,300	1,372.07
56	5	5	10	20,002	94,300	1,372.07
56	6	6	12	20,002	94,300	1,372.07
56	7	7	14	39,168	101,000	1,469.55
56	8	8	16	1.92 ac.	109,500	1,593.23
56	10	9	18	1.86 ac.	109,900	1,599.05
56	11	10	20	1.12 ac.	103,500	1,505.93
56	12	11	22	41,485	101,700	1,479.74
56	13	12	24	1.28 ac.	105,900	1,540.85
48	86	13	26	1.26 ac.	105,400	1,533.57
48	85	14	28	22,720	95,200	1,385.16
48	84	15	1	20,000	94,300	1,372.07
48	83	16	3	20,218	94,400	1,373.52
48	82	17	5	20,001	94,300	1,372.07
48	81	18	7	20,002	94,300	1,372.07
56	22	19	9	20,002	94,300	1,372.07
56	21	20	11	20,001	94,300	1,372.07
56	20	20	13	20,001	94,300	1,372.07
56	19	22	15	20,001	94,300	1,372.07
56	18	23	17	20,002	94,300	1,372.07
56	17	24	19	20,001	94,300	1,372.07
56	16	25	21	20,002	94,300	1,372.07
56	15	26	23	20,002	94,300	1,372.07
56	14	27	25	20,002	94,300	1,372.07
56	9	Open Space	0	1,658	10,800	157.14
56	23	Open Space	0	8.5 ac.	13,600	197.88
56	24	Open Space	0	1.56 ac.	5,200	75.66
48	89	Open Space	0	14,141	90,400 <sup>2</sup>	1,315.32
				Total FY 2011	2,746,900	39,967.40

The appellant timely paid the taxes due for fiscal year 2009 without incurring interest. On January 28, 2009, the appellant timely filed Applications for Abatement with the assessors, and those applications were denied on February 3, 2009. The appellant timely filed Petitions Under the Formal Procedure with the Board on April 17, 2009.

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<sup>2</sup> See footnote 1, *supra*.

The appellant timely paid the taxes due for fiscal year 2011 without incurring interest. On January 28, 2011, the appellant timely filed its Applications for Abatement with the assessors, and those applications were denied on March 15, 2011. The appellant timely filed a Petition Under the Formal Procedure with the Board on May 13, 2011.<sup>3</sup>

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

### **The Appellant's Case-in-Chief**

In support of its case, the appellant offered numerous documentary submissions into the record as well as the testimony of five witnesses. The first witness to testify for the appellant was Steven Gallo ("Steven"), an owner and officer of Fox Gate, LLC. Steven testified regarding Fox Gate, LLC's acquisition of the subject property at a foreclosure auction in the fall of 2008. He stated that prior to making a bid on the subject property, he contacted the Town Planner for the Town of Millbury to inquire whether a bond was in place for the subject property, as required by G.L. c. 41, § 81U. Steven testified that he was informed that a bond was in place for the development of the subject property, and documentary evidence entered into the record confirmed that a bond in the amount of \$474,000 was in place at that time.

Steven testified that after making the winning bid for the subject property, Fox Gate, LLC commenced its plans to proceed with building houses on each of the subject property's lots, starting with building a model home. He testified that, in further conversations with Town officials, the status of the bond for the subject property became unclear. He stated that he eventually asked the Town to pursue the release of the bond from the bond company, Bond SafeGuard, which refused to release the money for the completion of the subject property's infrastructure because it maintained that the bond was non-assignable and did not cover the obligations of subsequent owners of the subject property.

In November of 2008, Fox Gate, LLC applied to the Town for a building permit to construct a model home on the subject property. Robert Blackman, the building inspector for the Town of Millbury, testified that he was advised by the Town's Planning Board to deny the permit application because there was no bond in place for the

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<sup>3</sup> Unlike the fiscal year 2009 appeals, the appellant's appeals for fiscal year 2011 were consolidated into the single Docket No. F311482.

completion of the infrastructure on the subject property, and he denied the appellant's application for a permit for that reason. Mr. Blackman testified that, although he began his employment as building inspector in June of 2008, it was his understanding that a bond was in place for the subject property on January 1, 2008. Mr. Blackman testified that, other than the lack of a bond for the completion of the infrastructure, there were no other encumbrances of which he was aware that would preclude the issuance of building permits for any of the 27 lots on the subject property.

The appellant subsequently filed an appeal in Land Court, challenging the Town's denial of the building permit, and it also brought a mandamus action, in which it sought to compel the Town to enforce the bond against Bond SafeGuard. Attorney George Kiritsy, who represented the appellant in the Land Court proceedings, testified regarding those proceedings, which were still pending at the time of the hearing of these appeals. Steven's father, Robert Gallo ("Robert"), who was also a principal in Fox Gate, LLC, likewise testified. Robert stated that when he bid on the subject property, he understood that it was ready for building permits to be issued. Robert testified that if he had known that the Town would not issue building permits for the subject property until the posting of a bond for the completion of the infrastructure, he would have bid significantly less than \$1,850,000. Robert also stated that the cost to complete the infrastructure at the subject property, in his estimation, was approximately \$500,000.

The appellant presented its valuation evidence primarily through the testimony and summary appraisal report of its real estate appraisal witness, Joseph Flanagan. Mr. Flanagan is a licensed real estate appraiser with over 22 years of appraisal experience. Based on his credentials and experience, and in the absence of objection from the appellee, the Board qualified Mr. Flanagan as an expert in real estate valuation.

Mr. Flanagan inspected the subject property in April of 2010 in preparation for his valuation. Prior to beginning his valuation of the subject property, Mr. Flanagan offered his opinion of its highest and best use. He testified that even though it would be more profitable to sell the subject property's lots individually than in bulk, he considered having buyers for all 27 lots to be too extraordinary an assumption. Mr. Flanagan therefore considered the bulk sale of the lots for development as a subdivision to be the subject property's highest and best use for fiscal year 2009. For fiscal year 2011, because

of a decline in the real estate market, it was Mr. Flanagan's opinion that the highest and best use of the subject property was to hold it for development until the market improved.

Mr. Flanagan next selected a valuation methodology. He declined to use the cost approach because the subject property was mostly unimproved. Because of a lack of comparable sales of undeveloped land, and because Mr. Flanagan concluded that the most probable buyer of a property like the subject property would be a developer who would acquire the subject property for development and sale of the lots and/or homes, he considered the income approach to be the most reliable method with which to value the subject property.

Specifically, Mr. Flanagan selected the discounted cash flow technique, which is a valuation methodology that calculates net operating income from the present date forward, for a certain period of years, to identify a net present value. *See generally*, APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 539-41 (13th ed. 2008) (discounted cash flow method relies on "forecasting income, vacancy, operating and capital expenses, and equity dividend (if appropriate) over ownership periods of 5 to 15 years").

Mr. Flanagan began his discounted cash flow analysis by conducting a comparative sales analysis of bulk sales of comparable land development projects for the purpose of extracting retail lot values. His first comparable project ("Project One") was located in Millbury and was an 18-lot subdivision. Project One sold for \$1,400,000 on September 2, 2004. The development of Project One began in 2005 and was completed that year. Project One featured detached, single-family homes ranging in size from 1,638 to 2,813 square feet in living area, with the majority containing approximately 1,800 square feet of finished living area, while lot sizes were 13,000 square feet.

Seventeen of the lots/homes in Project One were sold over the 26-month period beginning in April of 2005 and ending in June of 2007, for an absorption rate of 7.85 units per year. The 18th home was reserved by the developer and later sold on July 22, 2011. Sale prices in Project One began at \$387,900, and the final property sold for \$364,900.

Mr. Flanagan's second comparable project ("Project Two") was a 31-lot subdivision, also located in Millbury. Project Two sold on August 29, 2002 for

\$1,450,000. The development of Project Two began in 2004, and featured detached, single-family homes ranging in size from 2,186 to 2,686 square feet of finished living area, with lot sizes of approximately 20,000 square feet. Sales of the homes in Project Two began in February of 2005 and the most recent sale prior to the hearing of these appeals occurred in November of 2009, for an overall absorption rate of 3.5 units per year. As of the time of the hearing of these appeals, eight lots remained unsold at Project Two.

Mr. Flanagan's third comparable project ("Project Three") was a 28-lot subdivision located in the neighboring town of Northbridge. The development of Project Three was completed in 2004, and featured detached, single-family homes ranging in size from 2,500 to 3,450 square feet of finished living area. Sales commenced in November of 2004, and the most recent sale prior to the hearing of these appeals occurred on June 18, 2010, for an overall absorption rate of 3.6 units per year. Sale prices ranged from \$470,000 to \$583,500. As of the time of the hearing of these appeals, four lots remained unsold at Project Three.

Based on his three comparable development projects, Mr. Flanagan concluded that four lot sales per year was a reasonable absorption rate. He further concluded that, as of January 1, 2008, the fair cash value for a single-family lot was \$115,000. Because of the steep decline in the real estate market following that date, Mr. Flanagan concluded that the fair cash value for a single-family house lot as of January 1, 2010 was \$50,000.

Having concluded that four lots per year would sell for either \$115,000 or \$50,000, the next step in Mr. Flanagan's discounted cash flow analysis was the determination of appropriate expenses. According to Mr. Flanagan, local marketing and commission costs averaged 5% of annual gross sales, so he adopted that figure to account for those costs. Based on his own experience with similar subdivisions, Mr. Flanagan opined that 0.5% of annual gross sales was a reliable estimate of administrative and overhead costs as well as miscellaneous costs, so he adopted that figure for those categories of expenses.

Based on the average assessed values of the individual lots in the subject property and the applicable tax rates, Mr. Flanagan determined a tax burden of \$1,449 per lot for fiscal year 2009 and \$1,539 per lot for fiscal year 2011.

To assist in the determination of engineering and architecture expenses and infrastructure completion costs – including a top coat of asphalt for streets and sidewalks, landscaping, and the installation of street lighting - Mr. Flanagan consulted the Marshall & Swift Valuation Service (“Marshall & Swift”). Based on data contained in Marshall & Swift, Mr. Flanagan estimated remaining costs to complete the roads, including a top coat of asphalt, lighting, and engineering expenses, to be \$449,803 for fiscal year 2009 and \$434,886 for fiscal year 2011.

Mr. Flanagan incorporated the developer’s expected profit into his discount rate, and to estimate that rate, he consulted the *Korpacz Real Estate Investor Survey* (“*Korpacz*”) and RealtyRate.com. Information contained in *Korpacz* indicated that the developer’s expected returns ranged from 10 to 25%, with an average of 17.72%, while the data contained on RealtyRate.com indicated rates ranging from 13.24 to 30.76%, with an average of 21.12%. Based on this data, Mr. Flanagan ultimately selected a discount rate of 17% for fiscal year 2009. According to Mr. Flanagan, the data contained on RealtyRate.com indicated a decline in the average discount rate for fiscal year 2011, and therefore, for that year, he used a discount rate of 11%.

After incorporating all of these figures into his discounted-cash flow analysis, Mr. Flanagan’s final opinion of fair cash value for the subject property for fiscal year 2009 was \$1,170,000, and his final opinion of its fair cash value for fiscal year 2011 was \$320,000.

Mr. Flanagan testified that, for both of the fiscal years at issue, his determination of the subject property’s highest and best use, and fair cash values, was predicated on the assumption that building permits could not have been issued for the subject property. He stated that if building permits could have been issued, his conclusions as to the fair cash value of the subject property would most likely have increased. Mr. Flanagan also testified that if building permits could have been issued, he would have used both sales-comparison and discounted cash flow analyses to value the subject property.

#### **The Assessors’ Case-in-Chief**

The assessors presented their case-in-chief through the testimony and summary appraisal report of their real estate valuation witness, Mark S. Reenstierna. Mr. Reenstierna is a licensed real estate appraiser with over 25 years of appraisal experience.

Based on his credentials and experience, and in the absence of objection from the appellant, the Board qualified Mr. Reenstierna as an expert in real estate valuation.

To begin his valuation analysis, Mr. Reenstierna first determined the highest and best use of the subject property. Mr. Reenstierna noted that properties located in the neighborhood of the subject property were primarily developed for single-family residential uses. He also considered the subject property as vacant and as improved, and concluded that its highest and best use was as a 27-lot residential subdivision.

He next considered which valuation approach to use in valuing the subject property. Mr. Reenstierna explained that because his goal in appraising the subject property was to determine the retail value of each lot, he did not believe that the cost or income-capitalization approaches were appropriate valuation methodologies. Mr. Reenstierna selected the sales-comparison approach to value because, he noted, it is particularly useful for valuing properties that are sold on a per-lot basis.

For fiscal year 2009, Mr. Reenstierna selected five properties that were sold in Millbury in arm's-length transactions between March and November of 2007. Relevant information about those five properties is contained in the following table:

<b>Address</b>	<b>Sale Date</b>	<b>Sale Price</b>	<b>Lot Size</b>
Lot 137 Curve St.	3/26/07	\$100,000	34,653
1 Elmwood Trce.	4/06/07	\$110,000	12,500
133 Elm St.	7/25/07	\$87,500	21,496
86 S. Main St.	10/31/07	\$110,000	15,038
Lot 137 Curve St.	11/15/07	\$140,000	34,653

Before adjustments, the sale prices of Mr. Reenstierna's five comparable properties ranged from \$87,500 to \$140,000. Mr. Reenstierna made adjustments to account for differences in location, and following those adjustments, the sale prices ranged from \$98,000 to \$115,000.

Based on his sales-comparison analysis, Mr. Reenstierna concluded that, for fiscal year 2009, the indicated value of the average 20,000-square foot lot contained within the subject property was \$110,000, with the larger lots having a slightly higher value. To determine the retail value of each lot, Mr. Reenstierna deducted the cost to complete the infrastructure within the subdivision, which he estimated at \$480,000, along with an

additional \$50,000 to account for miscellaneous expenses. Mr. Reenstierna then divided the total expense amount of \$530,000 by 27, and deducted the resulting amount - \$19,630 – from the indicated value of each lot to arrive at his final estimates of fair cash value. Mr. Reenstierna attributed no independent value to the subject property’s four open parcels, but instead included the value associated with those parcels within the values of the other 27 lots. The fair cash values determined by Mr. Reenstierna for each of the subject property’s individual lots for fiscal year 2009 are set forth in the following table.

**Mr. Reenstierna’s FY 09 Fair Cash Values**

Map	Lot	Lot # on Plan	St. #	Lot Size (sq. ft.)	Fair Cash Value (\$)
48	78	1	2	22,267	90,370
48	79	2	4	23,202	90,370
48	80	3	6	23,204	90,370
56	4	4	8	20,001	90,370
56	5	5	10	20,002	90,370
56	6	6	12	20,002	90,370
56	7	7	14	39,168	110,370
56	8	8	16	1.92 ac.	130,370
56	10	9	18	1.86 ac.	130,370
56	11	10	20	1.12 ac.	110,370
56	12	11	22	41,485	110,370
56	13	12	24	1.28 ac.	110,370
48	86	13	26	1.26 ac.	110,370
48	85	14	28	22,720	90,370
48	84	15	1	20,000	90,370
48	83	16	3	20,218	90,370
48	82	17	5	20,001	90,370
48	81	18	7	20,002	90,370
56	22	19	9	20,002	90,370
56	21	20	11	20,001	90,370
56	20	21	13	20,001	90,370
56	19	22	15	20,001	90,370
56	18	23	17	20,002	90,370
56	17	24	19	20,001	90,370
56	16	25	21	20,002	90,370
56	15	26	23	20,002	90,370
56	14	27	25	20,002	90,370
56	9	Open Space	0	1,658	0
56	23	Open Space	0	8.5 ac.	0
56	24	Open Space	0	1.56 ac.	0
48	89	Open Space	0	14,141	0
				Total FY 2009	2,620,000

Accordingly, based on his sales-comparison analysis, Mr. Reenstierna's final opinion of the subject property's fair cash value for fiscal year 2009 was \$2,620,000.

For fiscal year 2011, Mr. Reenstierna selected five properties that were sold in Millbury in arm's-length transactions between April of 2008 and August of 2010. Relevant information about those five properties is contained in the following table:

<b>Address</b>	<b>Sale Date</b>	<b>Sale Price</b>	<b>Lot Size</b>
2 Taft Circle	4/22/08	175,000	31,161
0 Bayberry Lane	6/26/09	60,000	65,663
Lot B Dwinell Road	7/10/09	120,000	61,472
Unidentified Lot West Main Street	8/3/09	68,500	116,810
Lot B Ackerman Road	8/13/10	70,000	12,567

Before adjustments, the sale prices of Mr. Reenstierna's five comparable properties ranged from \$60,000 to \$175,000. These five properties were sold between April of 2008 and August of 2010, during which period the local real estate market was in decline. Accordingly, Mr. Reenstierna made downward adjustments to their sale prices to account for the difference in market conditions. In addition, Mr. Reenstierna made adjustments to account for differences in location. Following these adjustments, Mr. Reenstierna's comparable-sale properties ranged in sale price from \$76,000 to \$95,000.

Based on his sales-comparison analyses, Mr. Reenstierna concluded that the indicated value of the average 20,000 square-foot lot in the subject property was \$85,000, with the larger lots having a slightly higher value. To determine the retail value of each lot, Mr. Reenstierna deducted the cost to complete the infrastructure within the subdivision, which he estimated at \$480,000, along with an additional \$50,000 to account for miscellaneous expenses. Mr. Reenstierna then divided the total expense amount of \$530,000 by 27, and deducted the resulting amount - \$19,630 - from the indicated value of each lot to arrive at his final estimates of fair cash value. Mr. Reenstierna attributed no independent value to the subject property's four open parcels, but instead included the value associated with those parcels within the values of the other 27 lots. The fair cash values determined by Mr. Reenstierna for each of the subject property's individual lots for fiscal year 2011 are set forth in the following table.

**Mr. Reenstierna's FY 2011 Fair Cash Values**

<b>Map</b>	<b>Lot</b>	<b>Lot # on Plan</b>	<b>St. #</b>	<b>Lot Size(sq. ft.)</b>	<b>Fair Cash Value (\$)</b>
48	78	1	2	22,267	85,000
48	79	2	4	23,202	85,000
48	80	3	6	23,204	85,000
56	4	4	8	20,001	85,000
56	5	5	10	20,002	85,000
56	6	6	12	20,002	85,000
56	7	7	14	39,168	115,000
56	8	8	16	1.92 ac.	115,000
56	10	9	18	1.86 ac.	115,000
56	11	10	20	1.12 ac.	100,000
56	12	11	22	41,485	100,000
56	13	12	24	1.28 ac.	100,000
48	86	13	26	1.26 ac.	100,000
48	85	14	28	22,720	85,000
48	84	15	1	20,000	85,000
48	83	16	3	20,218	85,000
48	82	17	5	20,001	85,000
48	81	18	7	20,002	85,000
56	22	19	9	20,002	85,000
56	21	20	11	20,001	85,000
56	20	21	13	20,001	85,000
56	19	22	15	20,001	85,000
56	18	23	17	20,002	85,000
56	17	24	19	20,001	85,000
56	16	25	21	20,002	85,000
56	15	26	23	20,002	85,000
56	14	27	25	20,002	85,000
56	9	Open Space	0	1,658	0
56	23	Open Space	0	8.5 ac.	0
56	24	Open Space	0	1.56 ac.	0
48	89	Open Space	0	14,141	0
<b>Total FY 2011</b>					<b>1,915,000</b>

Accordingly, based on his sales-comparison analysis, Mr. Reenstierna's final opinion of the subject property's fair cash value for fiscal year 2011 was \$1,915,000.

**The Board's Ultimate Findings of Fact**

Based on the evidence presented, the Board found that on January 1, 2008, a bond in the amount of \$474,000 was in place for the completion of road work and other infrastructure within the subject property. Accordingly, the Board found that there was no legal impediment precluding the issuance of building permits on that date. Similarly, the Board found that, on January 1, 2010, building permits could have been issued for the subject property if the appellant had completed the road work and other infrastructure

within the subject property, or posted a bond with the Town for its completion.

Therefore, the Board found that the only impediment to the issuance of building permits for the subject property on January 1, 2010 was the appellant's failure to perform the necessary work or post bond for the completion of the subject property's infrastructure with the Town. As will be discussed further in the Opinion, *infra*, the Board found that the appellant could not cite its own failure to act as an impediment to the issuance of building permits.

Having found that building permits could have been issued for the subject property on January 1, 2008 and, but for the appellant's failure to act, on January 1, 2010, the Board by and large adopted the approach used by Mr. Reenstierna, which was also the approach adopted by the Board in *GD Fox Meadow, LLC v. Assessors of Westwood, Mass.* ATB Findings of Fact and Reports 2011-501, 518 ("*GD Fox Meadow, LLC*"). Specifically, the Board found that the highest and best use of the subject property for both of the fiscal years at issue was as 27 residential lots within a subdivision, to be sold individually to multiple purchasers, rather than in bulk to a single, wholesale purchaser. The Board further found, like Mr. Reenstierna, that the sales-comparison approach was the most reliable method with which to value the subject property.

In addition, the Board agreed with Mr. Reenstierna's decision to subtract the costs to complete the subject property's infrastructure. However, rather than utilizing his estimate of \$530,000, the Board adopted the amount of the bond in place - \$474,000 – along with Mr. Reenstierna's estimate of \$50,000 for miscellaneous expenses, for a total of \$524,000, or a deduction of \$19,407 per lot for each of the 27 lots to be sold for both of the fiscal years at issue.

As for the four lots set aside as open land, the Board disagreed with Mr. Flanagan's and Mr. Reenstierna's opinions that they had no independent value. The Board found that each lot designated as open space in fact had independent value. Because neither party offered evidence of the fair cash values of these four lots, and recognizing the presumptive validity of the assessments, the Board found that the fair cash value of each of the open space lots was its assessed value for both of the fiscal years at issue, with the exception of the parcel identified as Map 48, Lot 89. The evidence regarding this lot, including the testimony and property record cards, indicated

that the assessors made a clerical error by using a “c” factor of 1.0 for that parcel, instead of a “c” factor of 0.10, as they had for the other three open lots, resulting in an overvaluation of this lot by a factor of ten. Accordingly, for fiscal year 2009, the Board found that the fair cash value of the parcel identified as Map 48, Lot 89 was \$11,370, as opposed to its assessed value of \$113,700. For fiscal year 2011, the Board found that the fair cash value of that parcel was \$9,040, as opposed to its assessed value of \$90,400.

After making these adjustments to the fair cash values determined by Mr. Reenstierna, the Board’s final findings of the subject property’s fair cash value was \$2,644,400 for fiscal year 2009 and \$1,928,570 for fiscal year 2011. The following tables contain the Board’s findings of fair cash value for each lot within the subject property for both of the fiscal years at issue.

**Board’s FY 2009 Fair Cash Values and Abatements**

<b>Map</b>	<b>Lot</b>	<b>Lot # on Plan</b>	<b>St. #</b>	<b>Lot Size (sq. ft.)</b>	<b>Assessed Value (\$)</b>	<b>Board’s Fair Cash Value (\$)</b>	<b>Value Abated (\$)</b>	<b>Abatement @ \$11.72/\$1,000</b>
48	78	1	2	22,267	118,900	90,590	28,310	331.79
48	79	2	4	23,202	119,200	90,590	28,610	335.31
48	80	3	6	23,204	119,200	90,590	28,610	335.31
56	4	4	8	20,001	118,100	90,590	27,510	322.42
56	5	5	10	20,002	118,100	90,590	27,510	322.42
56	6	6	12	20,002	118,100	90,590	27,510	322.42
56	7	7	14	39,168	125,400	110,590	14,810	173.57
56	8	8	16	1.92 ac.	135,200	130,590	4,610	54.03
56	10	9	18	1.86 ac.	135,600	130,590	5,010	58.72
56	11	10	20	1.12 ac.	128,100	110,590	17,510	205.22
56	12	11	22	41,485	126,200	110,590	15,610	182.95
56	13	12	24	1.28 ac.	130,800	110,590	20,210	236.86
48	86	13	26	1.26 ac.	130,300	110,590	19,710	231.00
48	85	14	28	22,720	119,100	90,590	28,510	334.14
48	84	15	1	20,000	118,100	90,590	27,510	322.42
48	83	16	3	20,218	118,200	90,590	27,610	323.59
48	82	17	5	20,001	118,100	90,590	27,510	322.42
48	81	18	7	20,002	118,100	90,590	27,510	322.42
56	22	19	9	20,002	118,100	90,590	27,510	322.42
56	21	20	11	20,001	118,100	90,590	27,510	322.42
56	20	21	13	20,001	118,100	90,590	27,510	322.42
56	19	22	15	20,001	118,100	90,590	27,510	322.42

56	18	23	17	20,002	118,100	90,590	27,510	322.42
56	17	24	19	20,001	118,100	90,590	27,510	322.42
56	16	25	21	20,002	118,100	90,590	27,510	322.42
56	15	26	23	20,002	118,100	90,590	27,510	322.42
56	14	27	25	20,002	118,100	90,590	27,510	322.42
56	9	Open Space	0	1,658	7,100	7,100	0	0
56	23	Open Space	0	8.5 ac.	16,800	not appealed	—	—
56	24	Open Space	0	1.56 ac.	13,300	not appealed	—	—
48	89	Open Space	0	14,141	113,700	11,370	102,330	1,199.31
				Total FY 2009	3,398,510	2,644,400	754,100	8,838.10

### Board's FY 2011 Fair Cash Values and Abatements

Map	Lot	Lot # on Plan	St. #	Lot Size (sq. ft.)	Assessed Value (\$)	Board's Fair Cash Value (\$)	Value Abated (\$)	Abatement (\$)
48	78	1	2	22,267	95,100	65,590	29,510	429.37
48	79	2	4	23,202	95,400	65,590	29,810	433.74
48	80	3	6	23,204	95,400	65,590	29,810	433.74
56	4	4	8	20,001	94,300	65,590	28,710	417.73
56	5	5	10	20,002	94,300	65,590	28,710	417.73
56	6	6	12	20,002	94,300	65,590	28,710	417.73
56	7	7	14	39,168	101,000	80,590	20,410	296.97
56	8	8	16	1.92 ac.	109,500	95,590	13,910	202.39
56	10	9	18	1.86 ac.	109,900	95,590	14,310	208.21
56	11	10	20	1.12 ac.	103,500	80,590	22,910	333.34
56	12	11	22	41,485	101,700	80,590	21,110	307.15
56	13	12	24	1.28 ac.	105,900	80,590	25,310	368.26
48	86	13	26	1.26 ac.	105,400	80,590	24,810	360.99
48	85	14	28	22,720	95,200	65,590	29,610	430.83
48	84	15	1	20,000	94,300	65,590	28,710	417.73
48	83	16	3	20,218	94,400	65,590	28,810	419.19
48	82	17	5	20,001	94,300	65,590	28,710	417.73
48	81	18	7	20,002	94,300	65,590	28,710	417.73
56	22	19	9	20,002	94,300	65,590	28,710	417.73
56	21	20	11	20,001	94,300	65,590	28,710	417.73
56	20	21	13	20,001	94,300	65,590	28,710	417.73
56	19	22	15	20,001	94,300	65,590	28,710	417.73

56	18	23	17	20,002	94,300	65,590	28,710	417.73
56	17	24	19	20,001	94,300	65,590	28,710	417.73
56	16	25	21	20,002	94,300	65,590	28,710	417.73
56	15	26	23	20,002	94,300	65,590	28,710	417.73
56	14	27	25	20,002	94,300	65,590	28,710	417.73
56	9	Open Space	0	1,658	13,600	13,600	0	0
56	23	Open Space	0	8.5 ac.	5,200	not appealed	—	—
56	24	Open Space	0	1.56 ac.	10,800	not appealed	—	—
48	89	Open Space	0	14,141	90,400	9,040	81,360	1,183.79
				Total FY 2011	2,746,900	1,928,570	802,330	11,673.92

The Board thus found that the appellant met its burden of proving that the subject property was overvalued for both of the fiscal years at issue. Accordingly, for fiscal year 2009, the Board issued decisions for the appellant, with the exception of Docket No. F300171, relating to the parcel identified as Map 56, Lot 9, in which the Board issued a decision for the appellee. For the fiscal year 2011 consolidated appeal, Docket No. F311482, the Board’s decision was for the appellant, except insofar as it related to the parcel identified as Map 56, Lot 9, in which its decision was for the appellee. The Board granted abatements totaling \$8,838.05 for fiscal year 2009 and \$11,673.92 for fiscal year 2011.

### OPINION

The assessors are required to assess real estate at its fair cash value 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 appellants have the burden of proving that the property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*,

242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245).

“Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most.” *Tennessee Gas Pipeline Co. v. Assessors of Agawam*, Mass. ATB Findings of Fact and Reports 2000-859, 875 (citing *Conness v. Commonwealth*, 184 Mass. 541, 542-43 (1903)); *Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 843 (1989)(and the cases cited therein). As defined in the authoritative valuation treatise, THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 277-78 (13<sup>th</sup> ed. 2008), highest and best use is “[t]he reasonably probable and legal use of vacant land . . . that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” *See also Skyline Homes, Inc. v. Commonwealth*, 362 Mass. 684, 687 (1972).

In the present appeals, the Board found and ruled that, for ad valorem tax purposes, the subject property’s highest and best use was as 27 residential building lots to be sold to multiple individual purchasers and not as a bulk sale of lots to a single, wholesale purchaser. *See GD Fox Meadow, LLC*, Mass. ATB Findings of Fact and Reports at 2011-515 (finding that, for ad valorem tax purposes, highest and best use of a 19-lot subdivision was the sale of each lot to multiple individual purchasers, and not the bulk sale of all 19 lots to one purchaser). The Board’s conclusion as to highest and best use was based on numerous factors, including the fact that the infrastructure associated with the subject property was substantially complete, lacking only a top coat of asphalt for the roadways and sidewalks, lighting improvements, and landscaping. The subject property was in no way a paper subdivision, but one that was well underway and substantially complete. *See id.*

The Board’s conclusion as to highest and best use was also based in part on its subsidiary findings that, subject to certain conditions precedent, building permits could have been issued for both of the fiscal years at issue. The evidence showed that, as of January 1, 2008, a bond was in place for the completion of the subject property’s

infrastructure, and there was no legal impediment to the issuance of building permits on that date. In addition, the evidence showed that on January 1, 2010, the only impediment to the issuance of building permits for the subject property was the lack of a bond to secure its completion. Had the appellant posted a bond, building permits could also have been issued for fiscal year 2011, and the Board found and ruled that the appellant could not cite its own failure to act as a legal impediment to the issuance of building permits. *See Mark Nelson, Trustee/P.O.A. for George Nelson v. Assessors of Wilmington*, Mass. ATB Findings of Fact and Reports 2013-320, 339 (rejecting taxpayer's argument that property at issue was nearly valueless because an occupancy permit could not be issued until the completion of approximately \$20,000 worth of work on the property where the taxpayer's failure to perform the work was the only impediment to the issuance of the permit).

The Board's findings with regard to highest and best use in these appeals, and its valuation approach in general, largely mirrored its conclusions in *GD Fox Meadow, LLC*, in which it found and ruled that, for ad valorem tax purposes, the highest and best use of a 19-lot subdivision was the sale of each individual lot to multiple purchasers rather than a bulk sale of the lots to one purchaser, and that a sales-comparison approach was the most reliable method with which to value the property at issue in that case. The appellant attempted to distinguish the present appeals from *GD Fox Meadow, LLC* on the grounds that the subdivision in that case was a "turn-key" subdivision, with lots being actively marketed and some lots having already sold. *See GD Fox Meadow, LLC*, Mass. ATB Findings of Fact and Reports at 2011-515. In contrast, the appellant argued that, here, no lots were being actively marketed, none had been sold, and additional infrastructure work was required to complete the subdivision.

However, the Board did not find the appellant's arguments persuasive. The relevant inquiry is not whether lots within the subdivision had sold or were listed for sale, but rather, whether the lots were saleable as residential lots ripe for building permits, and the Board found and ruled that they were. *See Cnossen v. Assessors of Uxbridge*, Mass. ATB Findings of Fact and Reports, 2002-675, 686 (finding that where eight lots out of an incomplete, 19-lot industrial subdivision bordered a completed road, they were individually saleable). Moreover, and as will be discussed in greater detail below, *infra*,

to the extent that the subject property's infrastructure was incomplete, the Board accounted for this fact by subtracting the costs to complete the infrastructure to arrive at the subject property's fair cash value. Accordingly, the Board rejected the appellant's arguments as well as its valuation analysis, which was premised upon a highest and best use that involved the bulk sale of the subject property's lots to a single wholesale purchaser.

After making a determination as to the highest and best use of the subject property, the Board next selected an appropriate valuation methodology. Generally, real estate valuation experts, the 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 Auth.*, 375 Mass. 360, 362 (1978). The cost approach is most appropriate for special purpose properties or other properties which are not bought and sold frequently enough to generate reliable market data. See *Oxford v. Oxford Water Co.*, 391 Mass. 581, 589 (1984); *Fairview Group Investments and Charles Geilich, G.P. v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 1997-93, 115.

The income-capitalization method is frequently applied to income-producing properties. See *Taunton Redevelopment Associates v. Assessors of Taunton*, 393 Mass. 293, 295 (1984). However, in cases involving multiple buildable lots or units within a substantially completed development, the Board has found that the sales-comparison approach is the most reliable method to determine fair cash value for ad valorem tax purposes. See *Cnossen*, Mass. ATB Findings of Fact and Reports at 2002-688 ("For unimproved lots within an existing subdivision, a comparable sales approach is an appropriate method for estimating their value.") (citing THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 419 (12<sup>th</sup> ed., 2001); *GD Fox Meadow, LLC*, Mass. ATB Findings of Fact and Reports at 2011-512 (finding that sales-comparison approach was the proper way to value multiple buildable lots within a subdivision and rejecting a valuation analysis which treated "the lots as inventory within a subdivision to one purchaser.").

Moreover, the majority of other courts which have considered this issue have rejected valuation approaches premised on bulk-sale scenarios where the property at issue

involves units or lots that have been carved out for tax purposes and are substantially marketable or market ready. See *JCO Properties v. Board of Review for Scott County, Iowa* 2010 Iowa App. Lexis 1162 (2010)(rejecting the application of an absorption discount in case at bar and distinguishing it from prior cases in which lots had not yet been subdivided or placed on the market); *Chesterfield Associates v. Edison Township*, 13 N.J. Tax 195, 211, n. 7 (1993) (rejecting argument by owner of a 95-townhouse development that the value of each townhouse should be reduced to reflect the cumulative effect of all 95 townhouses being offered for sale at once); *St. Leonard Shores Joint Venture v. Supervisor of Assessments of Calvert County*, 397 Md. 441, 446 (1986) (rejecting developer’s argument that a “sell out” period of its 105-lot subdivision should be considered for purposes of measuring fair cash value). These cases recognize that fair cash value, for tax purposes, is the amount that a hypothetical buyer will pay for a property. See *Board of Equalization v. Utah State Tax Comm’n ex rel. Benchmark, Inc.*, 864 P.2d 882, 888 (Utah 1993) (“[f]or tax purposes, it is irrelevant that a ‘willing buyer’ for each lot taxed does not in fact exist because the relevant taxing statute contemplates nothing more than a hypothetical sale to a hypothetical willing buyer during the tax year.”). These cases also recognize that a proper sales-comparison analysis will account for issues of “oversupply” in the market. See *St. Leonard Shores Joint Venture*, 397 Md. at 446 (“[T]he condition of the market is adequately reflected in the price that the hypothetical buyer would be willing to pay.”).

In addition, granting a discount to owners of multiple lots would likely result in disproportionate and unconstitutional taxation. The Supreme Judicial Court has held that the Massachusetts Constitution “forbid[s] the imposition of taxes upon one class of persons or property at a different rate from that which is applied to other classes,” *Bettigole, et. al v. Assessors of Springfield*, 343 Mass. 223, 230 (1961) (quoting *Opinion of the Justices*, 332 Mass. 769, 777 (1955)), and courts in states with similar constitutional provisions have ruled that those provisions require owners of multiple parcels to be taxed in the same manner as owners of single parcels. For example, in *Mathias v. Department of Revenue*, 312 Ore. 50, 66 (1991), the Supreme Court of Oregon ruled that a state statute which allowed for a “discount” in taxable value to owners of four or more residential lots violated state constitutional requirement of

uniform taxation. *See also JCO Properties*, 2010 Iowa App. Lexis 1162 (ruling that “a developer owning multiple lots should not be able to reap a benefit for taxation purposes that an individual owner of the same lot would not be able to realize.”). Accordingly, the Board rejected the valuation methodology espoused by the appellant in these appeals as it improperly incorporated an absorption discount.

Moreover, the cases cited by the appellant in support of its valuation methodology were inapposite. The appellant cited *Hall v. Assessors of Barnstable*, Mass. ATB Findings of Fact and Reports 1997-1, 18 for the proposition that Board has approved the “development” approach to appraising subdivisions in certain circumstances. However, in that case, the Board expressly relied on the sales-comparison approach to reach its determination of fair cash value, although the taxpayer in the case had offered a “development” valuation analysis featuring the discounted cash flow technique, much like the valuation analysis presented in this case by Mr. Flanagan. *Id.* at 1997-33. Similarly, there was no indication in *Meachen v. Assessors of Sudbury*, Mass. ATB Findings of Fact and Reports 2001-211 (“*Meachen*”), that a discounted cash flow analysis informed the Board’s findings of value. Rather, the Board accepted the assessors’ valuation, which was derived by adding the sum of the individual values of a number of parcels as set forth in a subdivision plan which had been filed for the property at issue. *Id.* at 2001-222.<sup>4</sup> In addition, the appellant cited *Clifford v. Algonquin Gas Transmission Co.*, 413 Mass. 809 (1992), which involved the valuation of undeveloped land taken by eminent domain for the purpose of determining damages. The question before the Court in that case was whether the trial judge had abused his discretion in allowing into evidence the testimony of the plaintiff’s valuation expert, who had valued the property using a “subdivision development” methodology which incorporated an absorption rate and a developer’s profit, like the approach used by Mr. Flanagan here. *Id.* at 813-14. The Court in that case did not endorse the methodology used by the plaintiff’s expert as the preferred method of valuing undeveloped property, but rather, merely ruled that the trial judge did not abuse his discretion in allowing the testimony because it was

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<sup>4</sup> Although this approach was referred to as a “development approach” by the Board in its findings in *Meachen*, that phrase did not reference a specific method of valuation, but rather was intended only to convey the Board’s adoption of the number and type of parcels set forth in the subdivision plan in its determination of fair cash value in that case. *Meachen*, Mass. ATB Findings of Fact and Reports at 2001-228.

not so speculative as to preclude its submission to a jury. *Id.* at 821. Even the expert whose testimony was at issue in that case admitted that he had only used the “subdivision development” methodology because of the lack of sales of comparable properties. *Id.* at 813. Accordingly, here, the Board rejected the arguments made by the appellant as well as the methodology used by Mr. Flanagan – a discounted cash flow analysis which incorporated an absorption rate – and found and ruled that the sales-comparison approach was the most appropriate method with which to value the subject property.

“[S]ales of property usually furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982). Actual sales of the subject property generally “furnish strong evidence of market value,” however, the sale price recited in the deed is not conclusive evidence of fair cash value. *Id.* at 682-83. The burden of proof that the price was fixed fairly rests with the proponent of the sale; but there is a rebuttable presumption that the price was freely established. *Epstein v. Boston Housing Authy.*, 317 Mass. 297, 300-01 (1944); *see also Thorndike Properties of Massachusetts II, LLC v. Assessors of Plymouth*, Mass. ATB Findings of Fact and Reports 2006-127, 135 (“[The evidence revealed that] the sale price recited in the deed was not indicative of [the subject lots’] fair cash value and . . . the appellant had not met its burden of showing [otherwise; accordingly, the Board did not rely on price in the deed].”).

The Board in this case did not rely on the actual bulk sale of the subject property to inform its opinion of fair cash value. The evidence indicated that the appellant purchased the subject property at a foreclosure auction in the fall of 2008, and thus the sale was not an arm’s-length transaction. *See DSM Realty Trust v. Assessors of Andover*, 391 Mass. 1014 (1984) (rescript opinion) (“A foreclosure sale inherently suggests compulsion to sell[.]”). Further, the sale of the subject property to the appellant was a bulk-sale of the lots, and as discussed above, because of its conclusions regarding highest and best use, the Board found that the actual sale price of the subject property did not provide a reliable indication of the fair cash values of each individual lot. *See GD Fox Meadow, LLC*, Mass. ATB Findings of Fact and Reports at 2011-511 (placing no weight on the actual sale price of the property at issue because it was a bulk sale of the

lots and infrastructure to one purchaser, which was contrary to the Board's conclusion that the highest and best use of the property was the retail sale of the lots to multiple individual purchasers).

Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929). When comparable sales are used, however, adjustments must be made for various factors which would otherwise cause disparities in the comparable prices. See *Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. "Adjustments for differences in the elements of comparison are made to the price of each comparable property." APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE at 322.

In the present appeals, the Board found and ruled that the sales-comparison properties selected by Mr. Reenstierna were sufficiently comparable to the subject property to provide reliable evidence of its fair cash value. Further, the Board found that he made appropriate adjustments to his selected properties' sale prices to account for differences between them and the subject property, such as differences in location. Accordingly, the Board adopted the fair cash values determined by Mr. Reenstierna for each of the subject property's 27 individual lots that were designated for construction.

However, the Board disagreed with both Mr. Flanagan's and Mr. Reenstierna's conclusions that the four lots designated as open space within the subject property had fair cash values of zero.

[T]he fact that land is not saleable does not mean it must have no 'fair cash value[.]' . . . If fair cash value cannot be ascertained by reference to sales of comparable property, it is proper to determine fair cash value from the intrinsic value of the property, including 'any and all the uses to which the property is adapted in the hands of any owner.'

*Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 370 Mass. 420, 421 (1980) (citing *Beale v. Boston*, 166 Mass. 53, 55 (1896)). See also *Cline v. Assessors of Canton*, Mass. ATB Findings of Fact and Reports 1996-677, 681 (rejecting taxpayer's contention that property surrounded by wetlands, and therefore impacted by regulations governing development on wetlands, was "virtually worthless."). On the

contrary, the Board found that these four lots contributed value as extra land within the subject property, even though they were not slated for sale, and accordingly, found that they had independent value.

Because neither party offered evidence of the fair cash values of the four open space lots, and recognizing the presumptive validity of the assessments, the Board found that the fair cash value of each of the lots was its assessed value for both fiscal years at issue, with the exception of the parcel identified as Map 48, Lot 89. The evidence regarding that lot, including the testimony and property record cards, indicated that the assessors made a clerical error by using a “c” factor of 1.0 for that parcel, instead of a “c” factor of 0.10, as they had for the other three open space lots. This error resulted in an overvaluation of that parcel by a factor of ten. Accordingly, for fiscal year 2009, the Board found that the fair cash value of the parcel identified as Map 48, Lot 89 was \$11,370, as opposed to its assessed value of \$113,700, and for fiscal year 2011, the Board found that its fair cash value was \$9,040, as opposed to its assessed value of \$90,400.

In addition, the Board agreed with Mr. Reenstierna’s conclusion that the costs to complete the subject property’s infrastructure should be subtracted from estimated values to arrive at the subject property’s fair cash value. However, rather than Mr. Reenstierna’s estimated amount of \$480,000, the Board found that the best evidence of the cost to complete was the amount of the bond that had been in place - \$474,000 – along with \$50,000 for miscellaneous expenses, for a total of \$524,000. After subtracting that amount from its preliminary fair cash values, the Board’s final findings of fair cash value for the subject property were \$2,644,400 for fiscal year 2009 and \$1,928,570 for fiscal year 2011.

In making its various findings and rulings in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation suggested. Rather, the Board could accept those portions of the evidence that it determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 682; *New Boston Garden Corp.*, 383 Mass. at 469. “The credibility of witnesses, the weight of evidence, the 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).

In conclusion, on the basis of all of the evidence, the Board found and ruled that the appellant met its burden of proving that the assessed value of the subject property exceeded its fair cash value for both of the fiscal years at issue. Accordingly, the Board issued decisions for the appellant in these appeals except for the appeals involving the parcel identified as Map 56, Lot 9, (Docket No. F300171 for fiscal year 2009 and Docket No. F311482, insofar as it related to that parcel, for fiscal year 2011), and it granted abatements totaling \$8,838.10 for fiscal year 2009 and \$11,673.92 for fiscal year 2011.

**THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**BEACON SO. STATION ASSOCS. LSE, v. BOARD OF ASSESSORS OF  
a/k/a EOP-SOUTH STATION, LLC THE CITY OF BOSTON**

Docket Nos.: F301750 & F307421

Promulgated:  
March 22, 2013

**ATB 2013-209**

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 Boston (“assessors” or “appellee”), to abate real estate taxes assessed on certain real property located in Boston and assessed to Beacon So. Station Associates, LSE, a/k/a EOP-South Station, LLC under G.L. c. 59, § 11 for fiscal years 2009 and 2010 (“fiscal years at issue”).

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

These findings of fact and report are made pursuant to a request by the appellee

under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Stephen H. Oleskey, Esq., and Seth B. Orkand, Esq.* for the appellant.

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

## **FINDINGS OF FACT AND REPORT**

Beacon South Station Associates, LP (“Beacon”) was a for-profit Delaware limited partnership. Beacon was acquired by Equity Office Properties and later became known as EOP-South Station, LLC, (“EOP” or “appellant”) which is a for-profit limited liability company.<sup>1</sup> During the fiscal years at issue, EOP leased the property in dispute in these appeals, which is located at 195 Summer Street in Boston and is identified for assessing purposes as Map/Parcel No. 03-0536410-100 (“subject property”). The subject property is owned by the Massachusetts Bay Transportation Authority (“MBTA”) and constitutes a portion of the property commonly known as South Station. The subject property consists of the “Headhouse,” which includes an enclosed concourse through which the public may pass to access MBTA and Amtrak train platforms and an underground subway connection; office and retail space; a service facility; a surface parking area; and portions of the surrounding sidewalks.

Two issues were raised in these appeals: first, whether the subject property was exempt from taxation; and second, if the subject property was not exempt, whether its assessed value exceeded its fair cash value. By its Order dated March 2, 2010, the Appellate Tax Board (“Board”) bifurcated the issues and ordered the parties to proceed on the exemption issue first.

The hearing of the exemption issue was held on April 26, 2011, and the parties entered into evidence a Statement of Agreed Facts with attached exhibits. Based on those submissions, the Board made the following findings of fact.

### **I. Jurisdictional Facts**

For fiscal year 2009, the assessors valued the subject property at \$53,116,000, and assessed taxes thereon, at the rate of \$27.11 per thousand, in the total amount of \$1,439,974.76, which the appellant timely paid without incurring interest. For fiscal year

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<sup>1</sup> Beacon was originally the appellant in Docket No. F301750, but the petition was later amended to replace Beacon with EOP so that EOP was the named appellant in both appeals, which were consolidated for hearing.

2010, the assessors valued the subject property at \$38,647,500, and assessed taxes thereon, at the rate of \$29.38 per thousand, in the total amount of \$1,135,463.55, which the appellant timely paid without incurring interest. The following table contains additional relevant jurisdictional information:

<b>Fiscal Year</b>	<b>Docket No.</b>	<b>Assessed Value</b>	<b>Tax Bills Mailed</b>	<b>Abatement Application Filed</b>	<b>Abatement Application Denied</b>	<b>Appeal Filed</b>
<b>2009</b>	<b>301750</b>	<b>\$53,116,000</b>	<b>12/31/08</b>	<b>01/29/09</b>	<b>03/13/09</b>	<b>06/12/09</b>
<b>2010</b>	<b>307421</b>	<b>\$38,647,500</b>	<b>12/31/09</b>	<b>01/29/10</b>	<b>03/19/10</b>	<b>06/14/10</b>

Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

## **II. Legislative History of the Taxation of Public and Transportation Properties**

In 1928, the Legislature enacted “An Act relative to the taxation of real estate of a municipality used or occupied for other than a public purpose.” 1928 Mass. Acts 73, Stat. 1928, ch. 111. That act added § 3A (“§ 3A”) of chapter 59 to the General Laws, which provided that:

Real estate owned or held in trust for the benefit of a city or town, if used or occupied for other than public purposes, shall be taxed to the lessee or lessees thereof, or their assigns, or to the occupant or person in possession thereof, in the same manner and to the same extent as if the said lessee or lessees or their assigns or the occupant or person in possession were the owners thereof in fee[.]

In 1947, the Legislature enacted Stat. 1947, c. 544, creating the Metropolitan Transit Authority (“MTA”), the predecessor to the MBTA. As enacted, § 14 of Chapter 544 (“§ 14”) provided that the real estate of the MTA, except for the portions used for transportation services, “shall be subject to taxation by the city or town in which it is located in the same manner and to the same extent as if privately owned.” However, according to documents entered into the record by the parties, after just one year of operation, the MTA was facing such a “staggering deficit” that then-Governor Paul Dever asked the Legislature to exempt the MTA from “all taxes, excises, and fees.” The Legislature responded by amending Chapter 544, replacing § 14 with a provision stating that the MTA and “all its real and personal property shall be exempt from taxation and from betterments and special assessments; and the authority shall not be required to pay

any tax, excise or assessment to or for the commonwealth or any of its political subdivisions[.]” In 1964, the MBTA was created to replace the MTA, and this same exemption language was included by the Legislature in § 18 (“§ 18” or “the MBTA exemption statute”) of the MBTA’s enabling act, 1964 Mass. Acts 450, Stat. 1964, ch. 563.

In 1973, the Legislature authorized the creation of regional transit authorities to operate in municipalities not served by the MBTA. *See* 1973 Mass. Acts 1323, St. 1973, ch. 1141. The following year, § 3A was modified in several respects. Among the changes was the inclusion of language excluding from taxation uses “reasonably necessary to the public purpose of a public airport, port facility, highway, turnpike, transportation system, park, or similar property which is available to the use of the general public or to easements, grants, licenses or rights of way of public utility companies[.]” 1974 Mass. Acts 265, Stat. 1974, ch. 383, § 1. The Legislature subsequently made additional minor modifications to § 3A before repealing it altogether in 1978, and then reenacting it in nearly identical form as G.L. c. 59, § 2B (“§ 2B”) in 1979. *See* 1978 Mass. Acts 999, Stat. 1978, ch. 580, § 16; 1979 Mass. Acts 874, Stat. 1979, ch. 797, § 11. As enacted, § 2B provided:

Except as otherwise provided in section three E, real estate owned in fee or otherwise or held in trust for the benefit of the United States, the commonwealth, or a county, city or town, or any instrumentality thereof, if used in connection with a business conducted for profit 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, whether or not there is any agreement by such user, lessee or occupant to pay taxes assessed under this section . . . .

This section shall not apply to a use, lease or occupancy which is reasonably necessary to the public purpose of a public airport, port facility, Massachusetts Turnpike, transit authority or park, which is available to the use of the general public or to easements, grants, licenses or rights of way of public utility companies.

Lastly, in 1999, the MBTA exemption statute was replaced by G.L. c. 161A, § 24 (“§ 24”), which stated “[n]otwithstanding any general or special law to the contrary, the [MBTA] and all its real and personal property shall be exempt from taxation and from

betterments and special assessments[.]” Stat. 1999 c. 127, § 151.

### **III. The History of South Station**

South Station opened to the public on January 1, 1899, combining four passenger rail terminals into one. According to the Statement of Agreed Facts, the number of rail passengers using South Station declined dramatically after World War II as air and highway travel increased in popularity. The departure of the New York, New Haven, and Hartford Railroad in 1959 prompted the closure of the station’s restaurant, drugstore, and lunch counter.

In 1965, South Station was sold to the Boston Redevelopment Authority (“BRA”) for \$6.9 million. The BRA had been created by the Boston City Council and the Legislature in 1957 as the city’s planning and redevelopment agency. According to various reports issued between 1967 and 1969, which were among the stipulated exhibits entered into the record, the BRA concluded that South Station was “underutilized” and had become “a blighting influence on the neighboring districts and properties.”

In 1970, the Penn Central Transportation Company, which provided service from South Station to New York, declared bankruptcy, thereby contributing to South Station’s bleak outlook. At or around this time, according to the stipulated exhibits, South Station had “only one working elevator and one open staircase.” One of its floors had been closed after a fire, and another floor was completely “abandoned.” It had become a “home to vagrants.” The BRA began the demolition of South Station, planning to replace it with other structures, including a 5,000-car parking garage, a trade center, an office tower, and hotels.

In 1974, the demolition of the South Station Headhouse was halted in the interest of historic preservation by the administration of then-Governor Michael Dukakis. South Station was listed on the National Register of Historic Places in 1975. Over the next few years, the BRA, along with other federal, state, and local agencies, re-envisioned South Station’s future as a “multi-use complex” and “intermodal transportation facility.” According to the stipulated exhibits, as envisioned, South Station would serve as a “public meeting place for all citizens of Boston” that “people feel good about using,” which would in turn enhance the surrounding shopping and financial districts. Its new uses would include office and retail space, parking, and most importantly, a “grand and

spacious concourse” to be used by intra-city and inter-city travelers and commuters, which would be “bustling with activity and filled with light” so as to dispel “the dreary image of transit stations.”

#### **IV. The Lease**

In 1979, the BRA conveyed South Station to the MBTA for \$4.4 million. In 1984, the MBTA commenced a \$195 million restoration of the Headhouse, the financing of which would be accomplished in part through public-private partnerships. To that end, on January 28, 1988, the appellant entered into a Lease Agreement (“Lease”) with the MBTA to lease the subject property. The Lease was meant to create a public-private partnership, whereby the appellant would expend a substantial amount of money to renovate and operate the subject property and in turn it would earn money by renting space to various sub-tenants. The Lease, which was amended in 1988, 1989, and 1998, expires on December 31, 2024, but by its terms, the appellant has the option to exercise two fifteen-year lease extensions.

The renovation of the subject property entailed interior improvements and the creation of retail and express food kiosks, as well as office space. The Lease specified that the appellant would have title to any and all tenant improvements - including fixtures, furniture, equipment, appurtenances, and other improvements – installed at South Station, but that any tenant improvements not removed at the end of the lease term would become the property of the MBTA. The renovation was completed in 1989, and the appellant then sublet the office and retail space to multiple tenants. The parties stipulated that during the periods relevant to these appeals, all of the appellant’s tenants were for-profit businesses, with the exception of Amtrak and the Commonwealth of Massachusetts.

With respect to operating expenses, the Lease divided South Station into three categories: private space, building space, and railroad-related space. Under the Lease, the appellant pays 100% of the operating expenses associated with the private space and 50% of the operating expenses associated with the building space, while the MBTA pays 50% of the operating expenses associated with the building space and a portion of the operating expenses associated with the railroad-related space. Capital expenditures are likewise allocated according to these categories, as follows:

	<u>Private</u>	<u>Building</u>	<u>Railroad</u>
<b>Appellant</b>	<b>100%</b>	<b>62.5%</b>	<b>25%</b>
<b>MBTA</b>	<b>0%</b>	<b>37.5%</b>	<b>75%</b>

Under the terms of the Lease as in effect during the fiscal years at issue, the appellant paid the MBTA the greater of: (a) a minimum guaranteed rent of \$330,000 per year; or (b) 50% of the difference between Net Available Income and the annual capital improvement contribution. The Lease included a formula for the calculation of Net Available Income, and according to that formula, real estate taxes were deducted from Net Available Income in calculating the potential annual rent payment to the MBTA. From 2007 through 2009, the appellant paid the minimum annual rent payment of \$330,000 to the MBTA, less any additional required capital reserve distributions. As part of the Statement of Agreed Facts, the parties stipulated to the rent payments that would have been made to the MBTA had the subject property not been taxed for each of those years. Those amounts are set forth below, along with the actual rent amounts paid in each year.

	<u>2007</u>	<u>2008</u>	<u>2009</u>
<b>Actual Rent Paid to MBTA</b>	<b>\$295,907.83</b>	<b>\$318,558.85</b>	<b>\$330,000.00</b>
<b>Rent That Would Have Been Paid to MBTA if No Real Estate Taxes Were Assessed</b>	<b>\$598,469.83</b>	<b>\$746,355.85</b>	<b>\$791,936.71</b>

Based on these facts, the Board found that in 2007, 2008, and 2009, under the formula set forth in the Lease, the appellant paid significantly less actual rent to the MBTA than it would have if taxes had not been assessed upon the subject property. As of the time of the hearing of these appeals, the rent payment for 2010 had not yet been made, and the actual rent amount was not available.

Although the Lease included a specific provision requiring the appellant to use its best efforts to negotiate a Payment-in-Lieu-of-Taxes agreement (“PILOT agreement”) with the City of Boston for the portions of the subject property leased for office use, no

such agreement had been reached as of the time of the hearing of these appeals.<sup>2</sup> On the contrary, the assessors have assessed taxes on the subject property continuously since 1990. However, the appellant was reimbursed in part for the real estate taxes which it paid by its sub-tenants, who, pursuant to their sublease agreements, paid to the appellant a pro rata share of the real estate taxes based on the amount of square feet leased. The parties stipulated that, for the fiscal years at issue, the appellant was reimbursed by its sub-tenants as follows:

**Fiscal Year 2009**

Total Real Estate Taxes	\$1,439,974.76
Reimbursement from Retail/Food tenants:	\$79,356.68
Reimbursement from Office Tenants:	\$66,184.32
Total Real Estate Tax Reimbursement:	\$145,541.00

**Fiscal Year 2010**

Total Real Estate Taxes	\$1,135,463.55
Reimbursement from Retail/Food tenants:	\$150,916.72
Reimbursement from Office Tenants:	\$44,122.28
Total Real Estate Tax Reimbursement:	\$195,039.00

**V. South Station Today and the Taxation of MBTA Property at Present**

With the interior renovations completed, South Station has been ushered into the future that was envisioned for it. Far from “abandoned” and “underutilized,” by the time of the hearing of these appeals, South Station had become the busiest commuter rail station in the MBTA system, receiving nearly 100,000 commuters on each weekday. In recent years, the MBTA expanded rail service to and from South Station, by extending existing lines like the Framingham, Old Colony, and Attleboro lines into more remote communities, and by adding the Greenbush line to Scituate in 2007. At the time of the hearing of these appeals, the MBTA had plans to add South Coast commuter service from

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<sup>2</sup> The provision in the Lease relating to the PILOT agreement stated that the parties to the Lease “contemplate that the City of Boston will be willing to enter into an In-Lieu Agreement, on the basis that the portions of the Building to be leased for retail use are ancillary to transportation services located at the Building and thus are part of the transportation uses being made of the Building by the public at large.”

South Station to cities like Fall River and New Bedford.

Similarly, South Station is the MBTA's busiest subway station, with nearly 22,000 riders embarking on the Red Line and 5,400 riders embarking on the Silver Line at South Station on the average weekday. Furthermore, the 27 bus bays at South Station's bus terminal provide busing service throughout New England and beyond, through such companies as Peter Pan Bus Lines, Fung Wah Bus, and Greyhound Lines. In addition, prior to and during the fiscal years at issue, South Station was a major hub for Amtrak interstate rail service. More than 1,367,000 passengers used Amtrak service to or from South Station in 2008 and more than 1,264,000 passengers used Amtrak service to or from South Station in 2009.

Despite the expansion of commuter rail services from South Station and robust ridership, the indebtedness of the MBTA today is no less "staggering" than it was in 1947. Among the stipulated exhibits was a 2009 independent report, created at the request of Governor Deval Patrick, which described the MBTA's financial outlook as "bleak," and concluded that a private sector firm faced with the same outlook "would likely fold or seek bankruptcy."

Notwithstanding the assessors' position in the present appeals, the evidence entered into the record showed that, during the fiscal years at issue, the subject property was one of just three MBTA-owned train, subway, or bus stations in Boston upon which the assessors assessed taxes. The evidence showed that the assessors did not assess taxes upon property located at the Ruggles MBTA Station in Roxbury which was leased for business purposes, or upon property located at the Back Bay MBTA station which was leased for business purposes, or upon property located at South Station's bus terminal which was leased for business purposes. The stipulated exhibits further showed that in 2009 and 2011, the Mayor of Boston asked the Legislature to repeal § 24 to allow the taxation of the MBTA's real property when it is "leased, used, or occupied in connection with a business conducted for profit." The Legislature, to date, has declined those requests.

## **VI. The Board's Conclusions on the Taxability of the Subject Property**

On the basis of the Statement of Agreed Facts and attached exhibits, and the plain wording of the operative statute, the Board found and ruled that the subject property was

exempt from taxation during the fiscal years at issue. The Board ruled that § 24 expressly exempted the property of the MBTA from taxation, whether or not leased for business purposes. Because the Board ruled that the subject property was exempt from taxation, it did not reach the issue of valuation. Accordingly, the Board issued decisions for the appellant in these appeals and granted a full abatement of \$1,439,974.76 in tax for fiscal year 2009 and a full abatement of \$1,135,463.55 in tax for fiscal year 2010.

### OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax unless expressly exempted. G.L. c. 59, § 2. Exemptions from taxation are a privilege, and statutes granting such exemptions are strictly and narrowly construed. *See e.g. Milton v. Ladd*, 348 Mass. 762, 765 (1965); *see also Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 717 (1944) (“Exemption from taxation is a matter of special favor or grace.”). Any doubt must operate against the one claiming tax exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption. *Boston Symphony Orchestra v. Assessors of Boston*, 294 Mass. 248, 257 (1936). Thus, in the present appeals, the burden of proof was on the appellant to establish that the subject property was exempt from taxation. The Board found and ruled that the appellant met that burden.

It is well settled that “[s]tatutes specifying the tax treatment of particular property supersede more general tax statutes.” *AMB Fund III v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2011-969, 982, *aff’d*, Mass. App. Ct. No. 11-P-2141, Memorandum and Order under Rule 1:28 (November 27, 2012) (citing *Cabot v. Assessors of Boston*, 335 Mass. 53, 63-65 (1956)). Here, § 2B was the more general statute, as it applies to “real estate owned in fee or otherwise or held in trust for the benefit of the United States, the commonwealth, or a county, city or town, or any instrumentality thereof,” and subjects such property to tax “if used in connection with a business conducted for profit or leased or occupied for other than public purposes.” G.L. c. 59, § 2B. In contrast, § 24 is the more specific statute, as it applies only to property owned by the MBTA.

By its plain terms, § 24 exempts property of the MBTA “from taxation and from betterments and special assessments,” without regard to whether or for what purposes that property is leased. G.L. c. 161A, § 24;<sup>3</sup> *see White v. Boston*, 428 Mass. 250, 253 (1998) (holding that courts are constrained to follow the plain language of a statute). It was undisputed in these appeals that the subject property was owned by the MBTA. Therefore, based on the plain language of § 24, and applying established principles of statutory construction, the Board found and ruled that the subject property was exempt from taxation. *Compare AMB Fund III*, Mass. ATB Findings of Fact and Reports at 2011-982-83 (finding that property owned by the Massachusetts Port Authority, or Massport, and leased for business purposes was subject to taxation because Massport’s enabling statute expressly subjected lessees of such property to taxation).

The assessors’ arguments to the contrary ignored established principles of statutory construction and the plain language of § 24, and therefore, their arguments failed. Specifically, the Board rejected the assessors’ arguments that § 2B governed the taxation of the subject property. For decades, the taxation of MBTA property has been addressed in statutory schemes separate and distinct from the general taxation statutes. It is logical to infer that, if the Legislature wished to address the taxation of MBTA property leased for business purposes, it would have done so within the confines of § 24, and not in a wholly separate statute. *See The Gillette Company. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2007-1064, 1090, *aff’d*, 454 Mass. 72 (2009) (“[I]f the Legislature . . . wanted to be so clear on this point, it follows that it would have included language to that effect within [the statute at issue] itself, rather than indicating its intent by implication in two other sections addressing entirely different credits.”). Moreover, § 24 explicitly states that the property of the MBTA shall be exempt “notwithstanding any general or special law to the contrary[.]” The Legislature was presumably aware of § 2B, enacted in 1979, when it enacted § 24 in 1999. Had the

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<sup>3</sup> The Board notes that the Legislature has inserted language carving out exceptions for business lessees in numerous other taxing statutes, and if it wished to include such an exception in § 24, it knew precisely how to do so. *See* G.L. c. 91 App., § 1-17; G.L. c. 59, § 2B; G.L. c. 59, § 5, Second; *see also Commissioner of Revenue v. Cargill, Inc.*, 429 Mass. 79, 82 (1999) (“Had the Legislature intended to [create] limit[s] . . . in the manner advocated by the [government], it easily could have done so.”). The Legislature inserted no such language into § 24, and the Board ruled that the Legislature’s silence on this matter indicated its intent to exempt all property of the MBTA, whether or not leased for business purposes.

Legislature intended for § 2B to control the taxation of the MBTA's property, it is doubtful that the Legislature would have included such language in the preamble to § 24. See *Selectmen of Topsfield v. State Racing Comm'n*, 324 Mass. 309, 313 (1949) ("The Legislature must be assumed to know the preexisting law [.]"); see also *The Gillette Company v. Commissioner of Revenue*, 425 Mass. 670, 677 (1997).

Furthermore, this precise issue has been addressed by the Supreme Judicial Court in *Assessors of Newton v. Pickwick, LTD., Inc.*, 351 Mass. 621 (1967) ("*Pickwick*"), a case in which the Court considered §§ 14 and 3A, the statutory predecessors to §§ 24 and 2B, respectively. In that case, the MTA – predecessor to the MBTA – leased real property located at the Newton Centre MTA station to a clothing company, which used the space to operate a clothing store. *Pickwick*, 351 Mass. at 622. The Newton assessors assessed taxes upon the property because it was being leased for business purposes. *Id.*

In ruling that the space leased to the clothing company was exempt, the Court held that the presence of the more specific statute exempting the property of the MTA from taxation, which did not carve out an exception to that exemption for property leased for business purposes, "render[ed] G.L. c. 59, § 3A inapplicable[.]" *Pickwick*, 351 Mass. at 625-26, n.7. The Court further noted that the Legislature's intent in enacting the exemption statute was to alleviate the "crushing financial burden" facing the MTA, while avoiding fare increases or similar measures. *Pickwick*, 351 Mass. at 624-26. The Court reasoned that, "by necessary implication," lessees of MTA property must also enjoy the exemption to prevent the possibility of reduced rental payments to the MTA, which would negate the Legislature's objective in enacting the exemption. *Pickwick*, 351 Mass. at 624.

The assessors' attempts to distinguish the present appeals from *Pickwick* were not persuasive. The alleged distinctions included the fact that § 3A, now § 2B, was amended following *Pickwick*, and language was inserted into § 3A to allay the concerns of the Court in *Pickwick*. *Pickwick*, 351 Mass. at 624-25. Although § 3A may have been amended following *Pickwick*, it was not the controlling statute in that case and its successor, § 2B, is not the controlling statute in these appeals. Rather, § 24 governs the result in these appeals and under that statute, the subject property was exempt from taxation.

Further, notwithstanding the amendments to § 3A, the stipulated facts in these appeals showed that the primary concern of the court in *Pickwick* – the specter of decreased revenue to an already-ailing transportation agency – remains an issue at present.<sup>4</sup> As stipulated by the parties, and as found by the Board, the assessment of taxes upon the subject property did in fact diminish the rent payments made by the appellant to the MBTA in 2007, 2008, and 2009. While the rent figures for 2010 were not available as of the time of the hearing of these appeals, under the formula contained in the Lease, any taxes assessed upon the subject property had the potential to reduce rent payments made by the appellant to the MBTA. For this reason, the Board found unpersuasive the assessors’ attempts to distinguish these appeals from *Pickwick* on the grounds that here, the appellant was the assessed party and the party responsible for the payment of the taxes, while in one of the years at issue in *Pickwick*, the taxes were directly assessed to the MTA, the party responsible for the payment of the taxes. *Pickwick*, 351 Mass. at 622. The Court in *Pickwick* was concerned not with the identity of the assessed party, but by the prospect of a decrease in revenue to the MTA resulting from the assessment of taxes on property which it leased for business purposes. *Pickwick*, 351 Mass. at 624-26. Accordingly, the Board in this case rejected the assessors’ attempts to distinguish the present appeals from *Pickwick* and subsequent cases that have followed the Court’s reasoning in *Pickwick*. See *Martha’s Vineyard Land Bank Comm’n v. Assessors of West Tisbury*, 62 Mass. App. Ct. 25 (2004) (reversing the Board’s denial of an abatement to a quasi-public entity whose enabling legislation provided that its property was exempt from taxation); *Nantucket Islands Land Bank Comm’n v. Assessors of Nantucket*, Mass. ATB Findings of Fact and Reports 2002-659, 674 (finding that a specific statute exempting the property of a quasi-public entity trumped more general taxing statutes). Under the precedent established by *Pickwick* and its progeny, the Board found and ruled that the subject property was exempt from taxation.

Lastly, the assessors attempted to assign significance to the fact that the terms of

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<sup>4</sup> As discussed in the Facts above, the stipulated exhibits included a recent independent report showing that the financial burden of the MBTA is no less “staggering” than was the MTA’s in 1947. That same report described the MBTA’s financial outlook as “bleak,” and concluded that a private sector firm faced with a similar outlook “would likely fold or seek bankruptcy.”

the Lease specifically called for the appellant to use its best efforts to negotiate a PILOT agreement with the City of Boston for the portions of the subject property leased for office use. The assessors pointed to this fact as evidence that both the MBTA and the appellant understood at least those portions of the subject property to be subject to taxation in the absence of a PILOT agreement. The assessors also pointed out that, despite this requirement in the Lease, the appellant did not attempt to negotiate a PILOT agreement with the City of Boston until 2009, and no such agreement had been entered into as of the time of the hearing of these appeals.

The Board was not persuaded by this argument. The presence or absence of a PILOT agreement relating to certain property is not determinative of whether such property is subject to or exempt from taxation, nor is a party's understanding of whether such property is subject to or exempt from taxation. *See AMB Fund III*, Mass. ATB Findings of Fact and Reports at 2011-991 (finding that property at issue was subject to taxation notwithstanding the fact that the taxpayer made payments under a PILOT agreement relating to the property). *Id.* Rather, the taxability of any property is determined by reference to the relevant statutes and case law, which, in this case, dictated that the subject property was exempt from taxation. *See* G.L. c. 161A, § 24; *Pickwick*, 351 Mass. at 624-26. The Board therefore placed little weight on the Lease provision relating to the PILOT agreement, as this evidence was no more probative of the taxability of the subject property than was the assessors' failure to assess all but three MBTA-owned properties in Boston that were leased for business purposes during the fiscal years at issue.

### CONCLUSION

The Board ruled that § 24 expressly exempted property of the MBTA from taxation, whether or not that property is leased for business purposes. Accordingly, the Board found and ruled that the subject property was exempt from taxation during the fiscal years at issue. The Board therefore issued decisions for the appellant in these appeals, and granted a full abatement of \$1,439,974.76 in tax for fiscal year 2009 and a full abatement of \$1,135,463.55 in tax for fiscal year 2010.



For the fiscal year at issue, CISA timely filed with the assessors its Form 3 ABC and a copy of its Form PC. CISA paid the tax due on the subject property without incurring interest. On September 15, 2010, CISA timely filed an Application for Statutory Exemption with the assessors, which they denied on October 5, 2010. The appellant seasonably filed an appeal with this Board on November 22, 2010. Based on the foregoing, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide the appeal.

CISA is a Massachusetts not-for-profit corporation established in 1998 under G.L. c. 180 and recognized for federal tax purposes as a 501(c)(3) non-profit corporation. CISA describes itself in an amendment to its Articles of Organization as a non-profit corporation organized for:

[C]haritable, educational and scientific purposes, including . . . the study, research, development and testing of agricultural, marketing and related business techniques, systems and models that will enhance the quality and sustainability of agricultural products . . . to support the advancement of understanding of farms and farming, and their benefits and relationship to the environmental, economic, nutritional and social well-being of surrounding communities; and . . . to educate farmers, consumers and the general public on issues related to farming.

At the hearing of this appeal, CISA presented its case principally through the testimony of its executive director, Philip Korman, and numerous exhibits providing information about the organization. The exhibits included annual reports, informational brochures, a locally grown farm products guide, CISA's by-laws, verification of its 501(c)(3) status, its Articles of Organization, and an amendment to its Articles of Organization. The assessors presented evidence that included the relevant jurisdictional documents as well as excerpts from CISA's website describing its mission and programs.

According to CISA's by-laws, anyone who paid an annual membership fee could join CISA. CISA's by-laws allowed the organization to waive the membership fee "if the individual's membership is otherwise in the best interest of the organization." The appellant did not submit any evidence showing that the membership fee had been waived for any of its members. CISA's annual report stated that during the fiscal year at issue, CISA's members included retailers, institutions, individuals, restaurants, farmers, and landscape and garden centers.

CISA's by-laws required a Board of Directors comprised completely of members

of CISA. The by-laws also divided the Board of Directors into farmer and non-farmer directors. The by-laws specified that at least one-third of the members of the Board of Directors must be farmers. If the number of farmer directors dropped below one-third of total board members, no new non-farmer director could be elected to the board until the one-third farmer requirement was satisfied.

Both parties submitted evidence touting the success of CISA's "Be a Local Hero, Buy Locally Grown" ("Local Hero") marketing program. According to the evidence, the Local Hero program was in place for at least a decade prior to the fiscal year at issue. The program promoted local farmers and their products to consumers using newspaper and radio advertising, direct mail, bus board signs, buttons, bumper stickers, and point of purchase materials in grocery stores. The materials placed in evidence highlighted that the slogan "Be a Local Hero, Buy Locally Grown" became a household phrase. Membership in the Local Hero program was available for an annual fee separate from the fee required to be a member of CISA. Benefits of joining the Local Hero program included the ability to use its logo for marketing products, admission to members-only networking events, access to members-only newsletters, and access to "CISA marketing expertise and technical assistance."

In conjunction with its Local Hero program, CISA published a locally grown farm products guide. An individual did not need to be a member of CISA to obtain a copy of the guide. The guide contained information about how to join both the Local Hero program and CISA and explained the benefits of joining each entity. It also contained listings of local food producers, landscape and garden centers, farm festivals, farmers' markets, specialty products, and restaurants and retailers that participated in the Local Hero program. There were also advertisements for organizations and businesses catering to readers of the guide.

In addition to the Local Hero program, both parties introduced evidence regarding CISA's "Senior FarmShare" program. A fact sheet explained that most senior citizens who were part of the Senior FarmShare program paid \$10 to participate.<sup>1</sup> In exchange for the payment, the senior citizens received fresh produce from local farms for ten weeks

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<sup>1</sup> According to the fact sheet, additional funding for the program was provided by "individual contributions, Local Hero farm members, The Executive Office for Elder Affairs, and by grants from church communities."

during the summer months. The fact sheet stated CISA “has been offering free shares . . . to low-income seniors,” but none of the evidence submitted indicated how many seniors, if any, were given these free shares. None of the evidence explained how eligibility for participation in the program was determined. The fact sheet did point out that between the program’s inception in 2004 and 2010, farmers who supplied the food received over \$205,000 in income from the program. Excerpts from CISA’s website explained that while the program provided access to local food and improved community ties, it also “offer[ed] farmers a reliable source of income.”

The CISA website included information about some of CISA’s other objectives. CISA listed among its goals: establishing new business markets for farmers; strengthening existing business markets for farmers; and increasing restaurant and institutional purchases of locally grown food. To achieve these goals, one website excerpt explained that CISA offered workshops, one-on-one training sessions, farm visits, and referrals “to help local farmers and other CISA members build their businesses.”

An additional website excerpt contained information about another one of CISA’s programs, “Farm to School.” The materials created by CISA stated that the Farm to School program “benefits farmers by opening new avenues through which they can sell their products locally and benefits the community by increasing access to fresh, local foods for school children.” The program expanded over time, so CISA collaborated with other organizations to “offer intensive, pragmatic training designed to prepare more community-based agricultural professionals and others to decide if and how to sell to schools.” The informational brochures and annual reports submitted by CISA also mentioned the program.

On the basis of all the evidence, the Presiding Commissioner found that the dominant purpose of the appellant was to create a business market for local farmers. Although the programs and services provided an ancillary benefit to the public, the appellant’s dominant purpose was commercial, not charitable. Accordingly, for reasons set out more fully in the Opinion below, the Presiding Commissioner found and ruled that CISA was not a charitable organization within the meaning of Clause Third and issued a decision for the appellee in this appeal.

## OPINION

Clause Third provides, in pertinent part, that “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” is exempt from property taxation. The burden of establishing entitlement to the charitable exemption lies with the taxpayer. *New England Legal Found. v. City of Boston*, 423 Mass. 602, 609 (1996). “The burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms.” *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 257 (1936).

“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)).

An organization may be considered a charitable organization for the purposes of Clause Third if:

[T]he dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose. But if the dominant purpose of its work is to benefit its members or a limited class of persons it will not be so classed, even though the public will derive an incidental benefit from such work.

*Harvard Cmty. Health Plan v. Assessors of Cambridge*, 384 Mass. 536, 544 (1981) (quoting *Mass. Med. Soc’y*, 340 Mass. at 332); see also *Western Mass. Lifecare Corp.*, 434 Mass. 96, 102-03 (2001).

In *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729 (2008), the Supreme Judicial Court offered a new “interpretive lens” through which to view Clause Third exemption claims. See *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009). Specifically, *New Habitat*

“conditions the importance of previously established factors<sup>2</sup> on the extent to which ‘the dominant purposes and methods of the organization’ are traditionally charitable.” *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 703 (quoting *New Habitat*, 415 Mass. at 733). In other words, “[t]he farther an organization’s dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be.” *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 705.

In determining whether an organization’s dominant purposes and methods are charitable, “more care” must be taken “where the alleged charity operates in the fields of trade and commerce.” *Boston Chamber of Commerce*, 315 Mass. at 718. In *Boston Chamber of Commerce*, although the objectives of the chamber of commerce included the promotion of trade and commerce, which the Court found to be “highly commendable and of great public benefit,” the Court held that no exemption was warranted because the primary benefit accrued to the business community and not to the public. *Id.* The Court also noted that of the “multitude” of trade organizations and associations in all branches of commerce “few” could qualify as charitable under Clause Third. *Id.*

Even where the public may derive a benefit from an organization’s activities, the Clause Third exemption has been consistently denied where the organization’s members derive a commercial benefit. *See, e.g., Massachusetts Medical Society*, 340 Mass. at 333 (upholding Board’s denial of exemption to professional association despite “most laudable” goal of improving medical profession); *American Institute for Economic Research v. Assessors of Great Barrington*, 324 Mass. 509, 513-14 (1949) (upholding Board’s denial of exemption to organization that analyzed and disseminated information to members concerning economic cycles and trends); *Sturdy Memorial Foundation, Inc. v. Assessors of North Attleborough*, Mass. ATB. Findings of Fact and Reports 2002-203, 216, *aff’d* 60 Mass. App. Ct. 573 (2004) (ruling that an association’s operation of a “turn-key” medical practice for employee physicians located adjacent to hospital was not entitled to the Clause Third exemption even though it served a need in the community);

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<sup>2</sup> “These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay[;] whether it charges fees for its services and how much those fees are[;] whether it offers its services to a large or ‘fluid’ group of beneficiaries and how large and fluid that group is[;] whether the organization provides its services to those from all segments of society and from all walks of life[;] and whether the organization limits its services to those who fulfill certain qualifications and how those limitations help advance the organization’s charitable purposes.” *New Habitat*, 451 Mass. at 732-33 (citations omitted).

*Harvard Student Agencies, Inc. v. Assessors of Cambridge*, Mass. ATB Findings of Fact and Reports 2000-925, 940-41 (ruling that a Harvard affiliate which organized and managed student-staffed businesses selling goods and services to the public at market prices was a commercial and not charitable organization).

The evidence in the present appeal supports a finding that the dominant purpose of CISA's work was to benefit its members by promoting the purchase of locally grown food, and any benefit derived by the public was incidental. The primary beneficiaries of CISA's activities were farmers and other purveyors of locally grown food and related products who were members of CISA. CISA itself stated in its brochures and annual report that its goal was to build a thriving local agriculture economy, particularly through its Local Hero program. The purpose of that program was to encourage consumers and businesses to purchase locally grown food and related products. Additionally, CISA listed among its goals establishing new business markets for farmers, strengthening existing business markets for farmers, and increasing restaurant and institutional purchases of locally grown food.

Further, the workshops and other technical support provided to local farmers, the locally grown farm products guide, and even the Senior FarmShare program were designed and implemented with these goals in mind. The website excerpts and fact sheets admitted into evidence showed that the Senior FarmShare and Farm to School programs created a steady source of income and new avenues for farmers to sell their products. CISA's extensive advertising and marketing efforts through the Local Hero program, including the bus boards, point of purchase materials in grocery stores, newspaper and radio advertising, direct mail, bumper stickers, and the locally grown farm products guide, were designed to encourage consumers to purchase locally grown food products, thereby principally benefitting the farmers and other businesses that were members of CISA.

CISA maintained that increasing the availability of locally grown food provided a benefit to the public. However, while there may have been some incidental benefits to the public at large from CISA's programs, the primary beneficiaries were the farmers and other producers of locally grown food whose products CISA sought to promote, and any public benefit from a more robust local agriculture economy was incidental. *See Mass.*

*Youth Soccer Ass'n v. Assessors of Lancaster*, Mass. ATB Findings of Fact and Reports 2012-660, 680 (ruling that if the dominant purpose of an organization is to benefit its members then an incidental benefit to the public will not make it charitable).

CISA also pointed to its provision of reduced-cost or free services to those unable to pay as an indication that it was a charitable organization. Although it appears that CISA may have provided some free or reduced-cost food, any such activities were ancillary to CISA dominant purpose of creating markets for its members to sell their products. Further, even if one or more of CISA's programs were providing enough reduced or no-cost food to qualify that program as a charitable organization if it were a stand-alone organization, the overall purposes and activities of CISA must be evaluated to determine whether its dominant purposes and methods were charitable. *See Boston Chamber of Commerce*, 315 Mass. at 718-19 (holding that an organization with a "dominant purpose" of bolstering business in Boston would not be charitable even if, considered individually, some of its programs were charitable).

In sum, the Presiding Commissioner found that CISA's dominant purpose was to benefit its members by promoting the purchase of locally grown food, with only an incidental benefit to the public. On the basis of all of the evidence and her findings and rulings, the Presiding Commissioner ultimately found and ruled that the appellant failed to meet its burden of proving that it was a charitable organization for the purposes of Clause Third.

Accordingly, the Presiding Commissioner issued a single-member decision for the appellee in this appeal.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Nancy T. Egan, Commissioner

A true copy,

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**GIVE THEM SANCTUARY, INC. v. BOARD OF ASSESSORS OF  
THE TOWN OF MONSON**

Docket Nos.: F310589  
F310590

Promulgated:  
March 11, 2013

**ATB 2013-157**

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 Monson (“assessors” or “appellee”) to abate taxes on certain real estate in Monson owned by and assessed to the appellant, Give Them Sanctuary, Inc. (“appellant” or “GTSI”), under G.L. c. 59, §§ 11 and 38 for fiscal year 2011 (“fiscal year at issue”).

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

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

*Raymond A. Blanchette*, Esq. for the appellant.

*Mark J. Beglane*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

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

On January 1, 2010, GTSI was the assessed owner of a 4.33-acre parcel of land located on Boston Road West in Monson, identified for assessing purposes as Parcel 001-002B (“Boston Road property”). Also on that date, GTSI was the assessed owner of a 15.8-acre parcel of land located on Stafford Road in Monson, identified for assessing purposes as Parcel 101-020 (“Stafford Road property”). For the fiscal year at issue, the assessors valued the Boston Road property at \$81,300, and assessed taxes thereon, at a

rate of \$14.43 per thousand, in the total amount of \$1,208.35.<sup>1</sup> The assessors valued the Stafford Road property at \$100,800, and assessed taxes thereon, at a rate of \$14.43 per thousand, in the total amount of \$1,454.89.<sup>2</sup> The appellant paid the assessed taxes, and although the payment incurred interest, it was not fatal to the Board’s jurisdiction because the amount of tax assessed was \$3,000 or less. *See* G.L. c. 59, § 64.

The issue presented in these appeals was whether the Boston Road property and the Stafford Road property (together, “subject properties”) qualified for exemption from taxation under G.L. c. 59, § 5, Third (“Clause Third”), either as “real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized,” or as “real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase.” *See* G.L. c. 59, § 5, Third. GTSI was organized on January 1, 2008, as a Massachusetts non-profit corporation with a principal office at 379 Silver Street in Wilbraham, Massachusetts (“379 Silver Street”). According to its Articles of Organization, GTSI’s purpose was to “[p]rovide shelter and healthy habitat for wild animals, foster health and welfare of domestic animals, [and] aid abused persons who are in need of sanctuary.” GTSI was exempt from federal income **taxes** under Internal Revenue Code § 501(c)(3).

In 2009, GTSI acquired the subject properties, and thereafter, sought to have them exempted from real estate taxes. The appellant timely filed Form 3 ABC, Form PC, and an Application for Statutory Exemption for the fiscal year at issue with the assessors. The appellant’s Application for Statutory Exemption was denied by vote of the assessors on December 16, 2011, and the assessors sent the appellant notice of their denial the following day. The appellant timely filed its petitions with the Board on March 16, 2011. On the basis of the foregoing, the Board found that it had jurisdiction to hear and decide these appeals.

At all times relevant to these appeals, Laura Allard was the President of GTSI, while her husband, Dr. Jeffrey Allard, was its Treasurer. Dr. Allard testified at the hearing of these appeals that GTSI was organized for the purpose of preserving habitats and providing shelter and other services to dogs and other domestic and wild animals,

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<sup>1</sup> This amount includes a Community Preservation Act (“CPA”) surcharge.

<sup>2</sup> This amount includes a CPA surcharge.

including bats suffering from “white nose” disease. To this end, Dr. Allard testified that GTSI maintained two dog kennels to provide shelter to dogs at 379 Silver Street, which was the location of its principal office and also the Allard’s personal residence. The Boston Road property abuts 379 Silver Street.

Dr. Allard further testified that GTSI also provided assistance to dogs by paying for dog food, kennel boarding, and veterinary care for dogs whose owners could not afford such expenses. The appellant entered into evidence its credit card receipts, which showed payment for these expenses. Dr. Allard also testified that the organization had a “people component,” although he did not elaborate.<sup>3</sup>

Dr. Allard described the following actions performed by GTSI in connection with the subject properties: GTSI engaged New England Environmental, Inc. to conduct a “wildlife habitat assessment” of the subject properties; it allowed a group of Boy Scouts to camp out on the Stafford Road property on at least one occasion; it removed garbage and some “invasive” plants such as Poison Ivy and Asian Bittersweet from the subject properties; it planted Elm trees and “wetland plants” such as witch hazel on the subject properties; and it cleared vines from existing trails on the subject properties.

Dr. Allard also testified that in the future, GTSI hoped to build dog kennels on the subject properties, and that he believed zoning would allow for such structures. However, the appellant offered no written plans, applications for permits, blueprints, estimates or quotes from builders or contractors, or other documentary evidence to show that actions had been taken to begin the removal of the appellant’s charitable activities to the subject properties, nor did the appellant offer evidence to establish that such removal would occur within two years of the appellant’s purchase of the subject properties.

Pictures of the subject properties were entered into evidence, including a picture which showed a “bat house” mounted in a tree. The pictures also showed various signs on the subject properties, some of which showed the name, logo, and address of GTSI, while others stated “Posted: Private Property,” and “Warning: No Trespassing. No Hunting, Fishing, or Trapping. Private Property of Laura and Jeffrey Allard. Will Prosecute Offenders.” Dr. Allard testified that some of the signs had been posted by the

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<sup>3</sup> In his post-trial brief, the attorney for the appellant indicated that the appellant had cleared campsites for homeless people on the subject properties. However, the Board found no evidence in the record to support that assertion.

previous owners of the subject properties, though obviously not the ones bearing the names of GTSI or Laura and Jeffrey Allard.

Principal Assessor Ann Murphy testified for the assessors. She testified that the assessors conducted periodic drive-by inspections of the subject properties. Based on those inspections, she testified that the subject properties were vacant, left in a completely natural state with no improvements, and that there was no evidence of dogs or other animals being provided services on the subject properties. She also testified that there were no parking improvements on the subject properties; parking was limited to dirt shoulders on the side of the road along the perimeter of the subject properties.

Based on the foregoing testimony and the documentary evidence presented at the hearing of these appeals, the Board found that the subject properties were maintained by GTSI primarily as conservation land, and that GTSI did not actively occupy the subject properties in furtherance of its charitable purposes. There was virtually no evidence that activities aiding the health or welfare of either animals or people took place on the subject properties. Moreover, the Board found that allowing the Boy Scouts to make a limited use of the subject properties was incidental and ancillary to GTSI's stated charitable purposes.

Further, although Dr. Allard testified that GTSI intended to build kennels on the subject properties, the Board found that his bare statements of intent were insufficient to qualify the subject properties for exemption under Clause Third's two-year removal provision. The appellant offered no evidence whatsoever showing that it had taken affirmative steps to commence the transfer of its animal-care operations to the subject properties, let alone evidence to establish that it would do so within two years from the date of its purchase of the subject properties. Accordingly, the Board found that there was insufficient evidence in the record to show that GTSI purchased the subject properties with the intent to move its charitable operations onto them within two years.

For the above reasons, and as explained more fully in the following Opinion, the Board found that the appellant did not occupy the subject properties for the charitable purposes for which GTSI was organized, nor did the appellant purchase the subject properties "with the purpose of removal thereto." *See* G.L. c. 59, § 5, Third.

Accordingly, the Board found that the subject properties were not exempt from taxation

under Clause Third, and it issued decisions for the appellee. Because the Board found that the appellant did not occupy the subject properties for its charitable purposes or manifest sufficient intent to do so within two years of the dates of purchase of the subject properties, the Board made no findings as to whether GTSI constituted a “charitable organization” for purposes of Clause Third.

### OPINION

All property, real and personal, situated within the Commonwealth is subject to local property tax, unless expressly exempt. G.L. c. 59, § 2. General Laws c. 59, § 5, lists the classes of property that are exempt from taxation, and 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[.]” G.L. c. 59, § 5, Third. It also provides an exemption for “real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase.” *Id.*

It is well established that a taxpayer claiming that its property is exempt under Clause Third has the burden of proving that it comes within the terms of exemption. *See Town of Norwood v. Norwood Civic Assn.*, 340 Mass. 518, 525 (1960) (citing *American Inst. for Economic Research v. Assessors of Great Barrington*, 324 Mass. 509, 512-14 (1949)). “Any doubt must operate against the one claiming tax exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption.” *Boston Symphony Orchestra v. Assessors of Boston*, 294 Mass. 248, 257 (1936).

Though the appellant was a Massachusetts non-profit corporation and was recognized as a tax-exempt charitable organization by the Internal Revenue Service, organization as a charitable entity is not dispositive in determining eligibility for exemption under Clause Third. *See Forges Farm, Inc. v. Assessors of Plymouth*, Mass. ATB Findings of Fact and Reports 2007-1197, 1204. The exemption embodied in Clause Third applies only if the real estate at issue is “occupied by [the charity] or its officers for the purposes for which it is organized.” G.L. c. 59, § 5, Third. The Board has noted that “occupancy” under Clause Third means

something more than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized . . . . [T]he nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficent objects.

*Rockridge Lake Shores Property Owners' Association v. Assessors of Monterey*, Mass. ATB Findings of Fact and Reports 2001-581, 587 (citing *Assessors of Boston v. The Vincent Club*, 351 Mass. 10, 14 (1966)) (other citations omitted).

In the present appeals, the Board found and ruled that the appellant failed to show that it had used the subject properties to carry out its stated charitable mission of providing shelter and other services to animals and people. The subject properties were kept in a natural state, with few, if any improvements thereon. Further, virtually no evidence was presented that people or animals had been cared for or offered services by the appellant on the subject properties. In short, the appellant did not demonstrate any nexus between its stated charitable activities and the subject properties.

Although there was testimony that the appellant had allowed a group of Boy Scouts to make minimal use of the Stafford Road property, for purposes of Clause Third, “[i]t is the dominant use of the property that is controlling.” *Brockton Knights of Columbus v. Assessors of Brockton*, 321 Mass. 110, 114 (1947). The Board found that allowing the Boy Scouts to make very limited use of one of the subject properties was incidental and ancillary to the appellant’s stated charitable purposes, and it therefore found and ruled that such use was insufficient to qualify as a charitable occupation of the subject properties for purposes of Clause Third.

GTSI contended that by taking steps to preserve the land as a shelter for wildlife, it advanced its charitable mission of “[providing] shelter and healthy habitat for wild animals.” However, the Board has found in past appeals that maintaining land in its natural state and allowing its natural habitat to flourish will not qualify the property for the Clause Third exemption. “[S]imply keeping the land open . . . is not enough to satisfy the requirement of 'occupying' the property within the meaning of the statute.” *Forges Farm, Inc.*, Mass. ATB Findings of Fact and Reports at 2007-1207 (quoting *Nature Preserve, Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 2000-796, 808). Rather, there must be a more active use of the property in

furtherance of a charitable organization's charitable purposes to qualify for the exemption provided by Clause Third. See *Vincent Club*, 351 Mass. at 14.

The facts of these appeals were substantially similar to those in *Animal Rescue League of Boston, Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 2000-96, 98. At issue in that case was a large, heavily-wooded parcel of land owned by charitable organization whose mission was to provide refuge and "relief of suffering of homeless animals," and other activities promoting the welfare of animals. *Id.* The only improvement on the parcel was a single-family residence which was occupied by the director of the charitable organization, but neither he, nor the organization, conducted activities relating to the organization's mission or provided services to animals on the property at issue. As in the present appeals, the organization in that case "asserted an intent to build a shelter at the subject property, [but had] taken no steps to do so." *Id.* The Board found in that case that the property at issue had been maintained in its "natural state . . . [with] no established animal shelter," and that the taxpayer had offered no evidence showing that "services [were] provided to animals located on the property." *Id.* at 102. It therefore ruled that the taxpayer failed to establish that the property was occupied in furtherance of its charitable purposes as required by Clause Third.

These appeals are distinguishable from cases such as *Emerson v. Trustees of Milton Academy*, 185 Mass. 414, 418 (1904) and *Trustees of Boston College v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2010-96, 125, which involved undeveloped land owned by educational institutions and used by students for informal recreational sports and other social and leisure activities. It has long been recognized that it is within the charitable purpose of an educational institution to "provide liberally for the physical training, and the social, moral and aesthetic advancement of the pupils who are entrusted to its charge." *Emerson*, 185 Mass. at 418; see also *Wheaton College v. Town of Norton*, 232 Mass. 141, 148-9 (1919); *Trustees of Boston College*, Mass. ATB Findings of Fact and Reports at 2010-113. Thus, "[i]n the context of educational institutions . . . the range of uses which has qualified the property at issue for exemption is broad." *Trustees of Boston College*, Mass. ATB Findings of Fact and Reports at 2010-118. By contrast, here, the subject properties were not undeveloped land

situated within a campus setting, but instead were more akin to conservation land, and the Board found and ruled that they were not occupied by the appellant in furtherance of its charitable purposes. See *Forges Farm*, Mass. ATB Findings of Fact and Reports at 2007-1208; *Brookline Conservation Land Trust v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports 2008-679, 706.

Additionally, Clause Third contains an additional exemption for “real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase.” G.L. c. 59, § 5, Third. The relevant date for determining whether property is entitled to a charitable exemption under Clause Third is July first of the taxable year. Therefore, the relocation provision does not create an automatic grace period for a charitable corporation that purchases property without material plans for its usage; instead, the corporation must establish that as of July first of the relevant tax year, it had the requisite intent for removal to the property within two years of its purchase. See *Mt. Auburn Hospital v. Assessors of Watertown*, Mass. ATB Findings of Fact and Reports 2000-441, 462, *aff’d*, 55 Mass. App. Ct. 611 (2002).

In *Mt. Auburn Hospital*, the Board found that the taxpayer had the requisite intent for removal under Clause Third’s relocation provision. *Id.* at 450-53. The taxpayer in that case took affirmative steps which demonstrated the requisite intent to relocate its charitable activities to the property in question. *Id.* It formed a task force to evaluate its needs for physical facilities and later purchased the property at issue in response to the task force’s recommendation to acquire additional facilities. *Id.* The taxpayer then took specific, concrete steps to implement usage of the property such as forming a “Project Coordinating Committee” and spending over \$550,000 to plan the property’s development.

Unlike the taxpayer in *Mt. Auburn Hospital*, GTSI failed to demonstrate that it had taken affirmative steps to relocate its charitable operations to the subject properties. GTSI proffered no estimates or quotes from builders or contractors, blueprints, applications for building permits or any other documentary evidence to suggest that it had commenced efforts to relocate its charitable operations to the subject properties, nor did it offer evidence establishing that it would do so within two years from the dates that it

purchased the subject properties. The Board thus found and ruled that the subject properties were not exempt from taxation under Clause Third's two-year removal provision.

Lastly, the Legislature has addressed the taxation of unimproved land like the subject properties in statutes such as G.L. c. 184, §§ 31 and 32, which provide mechanisms for conservation land to be assessed at a reduced rate, and G.L. c. 61B, which provides that "recreational land," which includes land "retained in substantially a natural, wild, or open condition," may be assessed at a reduced rate. G.L. c. 184, §§ 31, 32; G.L. c. 61B. Because the Legislature has provided for the taxation of conservation land in statutory schemes outside of Clause Third, the Board found and ruled that land such as the subject properties that has been maintained in an essentially natural state, and which has not been actively "appropriated" towards a charitable organization's charitable purposes, does not come within the terms of the exemption provided in Clause Third. *Vincent Club*, 351 Mass. at 14. See *Brookline Conservation Land Trust*, Mass. ATB Findings of Fact and Reports at 2008-705-6 ("[T]he Legislature has determined that, while conservation land should be afforded beneficial tax treatment, it nonetheless should be subject to tax and not exempt as a charitable organization property under [Clause Third]."); see also *Forges Farm*, Mass. ATB Findings of Fact and Reports at 2007-1208 ("Private owners who wish to conserve land in its natural state are afforded property tax relief under statutes other than [Clause Third].").

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 occupied the subject properties in furtherance of its charitable purpose, and it further found and ruled that the appellant failed to prove that it purchased the subject properties for the purpose of moving its charitable operations to them within two years.

Accordingly, the Board found and ruled that the subject properties were not exempt from taxation under Clause Third, and issued decisions for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**ELISA KOPPELMAN** v. **BOARD OF ASSESSORS  
OF THE CITY OF AMESBURY**

Docket No. F314355

Promulgated:  
October 2, 2012

**ATB 2012-950**

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Amesbury (the “appellee” or the “assessors”) to abate taxes on condominium unit number four, which is located at 206 Main Street in Amesbury (the “subject unit”) and is owned by and assessed to Elisa Koppelman (the “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2011.

Commissioner Mulhern heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Chmielinski joined him in the revised decision for the appellant. The revised decision is promulgated simultaneously herewith.

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

*Elisa Koppelman and Nicholas Cracknell, pro se*, for the appellant.

*Mary T. Marino*, Chief Assessor, for the appellee.

**FINDINGS OF FACT AND REPORT**

The essential facts in this appeal are not in dispute. The parties do contest, however, the effects and extent of certain affordable housing restrictions and concomitant mortgage-interest benefits on the fair cash value of the subject unit. The appellant asserts

that the assessed value attributed to the subject unit is excessive because it does not account for the negative impact on value caused by the affordable housing restrictions. The assessors maintain that the subject unit's assessed value is appropriate because the restrictions do not specifically establish a maximum sale price.

At the hearing of this appeal, both the appellant and her spouse, Nicholas Cracknell, testified and introduced seven exhibits. The exhibits include: (1) a chart entitled – “an affordable housing unit”; (2) a chart entitled - “determining fair market value for an affordable housing unit”; (3) a letter from the Department of Revenue (“DOR”), Division of Local Services; (4) a DOR publication; (5) a comparison of “restricted fair market rate value and assessed value”; (6) 70% Annual Median Family Income (“AMI”) purchase price limits; and (7) 80% AMI purchase price limits.

Mary Marino, Amesbury's Chief Assessor, testified for the assessors. The assessors introduced into evidence: (1) the requisite jurisdictional documents; (2) the subject unit's property record card; (3) a letter dated January 12, 2012, addressed to Ms. Marino, from the Director of Amesbury's Housing Rehabilitation Program; and (4) a chart depicting a “total assessed value savings of \$171,360” over a twenty-year period assuming the “[initial] value of the [subject unit's] deed restriction” equates with the \$22,400 principal amount of the appellant's no-interest loan (the “subject loan”) and then decreases by 5% each year. This chart also contains an “example home loan” which shows a hypothetical interest savings of \$13,079 for the subject loan amortized over its twenty-year loan term at five-percent simple interest. Copies of the Rent Regulatory Agreement and the Affordable Housing Restriction instrument with the registry recording stamp affixed were included in the attachments to the Application for Abatement and Petition, which are part of the jurisdictional documents.

Based on this record, the Appellate Tax Board (the “Board”) made the following findings of fact.

On January 1, 2010, the valuation and assessment date for fiscal year 2011, the fiscal year at issue in this appeal, the appellant was the assessed owner of the subject unit. For assessing purposes, the subject unit is identified on map 65 as unit 30B. The subject unit is part of a four-unit condominium-conversion project that includes two parcels and two buildings and was completed in 2006.

For fiscal year 2011, the assessors valued the subject unit at \$227,300 and assessed a tax thereon, at the rate of \$18.46 per thousand, in the amount of \$4,195.96. Amesbury's Treasurer/Collector mailed the fiscal year 2011 real estate tax bills on December 31, 2010. The appellant timely paid the tax without incurring interest.

In accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement on February 1, 2011. In her application, the appellant sought an abatement claiming that the subject unit was overvalued because the assessors had valued it as a market-rate unit instead of as an affordable-housing unit. On April 14, 2011, the assessors denied the appellant's request for abatement, and on July 14, 2011, the appellant seasonably appealed the denial to the Board. On this basis, the Board found and ruled that it had jurisdiction over this appeal.

The three-story subject unit contains 1,397 square feet of living space along with a total of five rooms, including two bedrooms, as well as one full bathroom and one half bathroom. According to the subject unit's property record card, the kitchen is "above standard," and the bathrooms are "modern." The floors are either hardwood or ceramic tile. The subject unit is heated by a forced-hot-air system fueled by gas and is cooled by a central air-conditioning system. For amenities, the subject unit has a 380-square-foot garage, two additional parking spaces, a deck, and access to and use of a large fenced-in yard.

When the appellant purchased the subject unit in 2006 for \$130,000, it consisted of approximately 800 square feet of living space that included only one bedroom. In 2007, the appellant obtained no-interest financing, in the principal amount of \$22,400, through the Amesbury Housing Rehabilitation Program and converted the subject unit into a two-bedroom apartment by finishing the attic. As a condition for the favorable financing, the appellant executed with Amesbury a Rent Regulatory Agreement and an Affordable Housing Restriction instrument. The Rent Regulatory Agreement requires an income-eligible renter and restricts the initial "maximum allowable rent" after a \$180.00 utility allowance to \$1,028.00 per month with highly regulated and limited rent increases. While the Affordable Housing Restriction instrument does not contain an actual monetary limit on the sale price of the subject unit during the restricted period or a right-of-first-refusal constraint, it nonetheless provides that "the [subject unit] shall be

marketed as Affordable Housing for purchase exclusively by Families . . . whose annual incomes are eighty percent (80%) or less of the median income for the Area (“Low Income Families”) based on family size as determined by HUD.”<sup>1</sup> These restrictions and limitations as well as others contained in the Affordable Housing Restriction instrument are duly recorded deed restrictions that run with the subject unit, thereby binding the appellant and any subsequent purchasers until March 20, 2027 regardless of whether the financing through Amesbury is prepaid.

The January 17, 2012 letter from the Director of the Amesbury Housing Rehabilitation Program to Ms. Marino contains the Director’s understanding of the gist of the Affordable Housing Restriction instrument. Her letter provides, in pertinent part, that:

The Affordable Housing Restriction insures that a property receiving housing rehabilitation assistance will be retained as affordable rental housing for occupancy by low and very low-income families by restricting the amount of rent charged for the rental unit, and the income of the tenants who will rent the unit. The Affordability Restriction encumbers the property and not the property owner, and continues in force for its stated term regardless of repayment of the Housing Program Assistance Loan.

The letter, however, goes on to provide that:

The recorded Affordable Housing Restriction does not require the property to be sold as an affordable Housing Ownership Unit, however, the affordable rental restriction would continue at point of property transfer until the stated term has been satisfied. There is no established maximum sales price restriction set by the DHCD.<sup>2</sup>

As explained in greater detail, *infra*, the Board found that this latter interpretation, which forms the basis of the assessors’ assertion that the subject unit could be sold at a market-based value without regard to any affordable housing restrictions, is a distinction without a practical difference from restrictions which literally contain a maximum-sale-price provision. Moreover, the Board found that the Director’s interpretation was faulty. Furthermore, because the Director of Amesbury’s Rehabilitation Program did not appear and testify at the hearing of this appeal and was therefore not available for cross-

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<sup>1</sup> “HUD” is an acronym for United States Department of Housing and Urban Development.

<sup>2</sup> DHCD is apparently an acronym for Massachusetts Department of Housing and Community Development.

examination by the appellant or for questioning by the Board and because the provisions of the Affordable Housing Restriction instrument which the Director interpreted in her letter were part of the record before the Board, the Board gave no weight to the Director's interpretations.<sup>3</sup>

The Board found that the Rent Regulatory Agreement not only limits the initial maximum allowable rent to \$1,028.00 with highly regulated and limited rental increases but it also requires the subject unit to be rented to "tenants holding Section 8 Existing Housing Certificates, Chapter 707 Certificates, or other recognized housing voucher certificate[s]." These rent limitations or restrictions run "for a period of twenty years" – until March 20, 2027.

The Affordable Housing Restriction instrument specifically states that "[it] regulat[es] and restrict[s] the use, occupancy and transfer of the [subject unit]; and that "the [subject unit] shall be used as the location for an affordable housing unit" and "shall be marketed as Affordable Housing for purchase exclusively by [income-eligible] Families." Furthermore, the covenants, restrictions and limitations in the Affordable Housing Restriction instrument "shall be and are covenants that run with the [subject unit]" and "shall bind [the appellant] and [her] successors and assigns [until March 20, 2027]." This instrument is recorded at the appropriate registry of deeds. On this basis, the Board found that the plain language in the provisions contained in the Rent Regulatory Agreement and Affordable Housing Restriction instrument serve to limit the universe of both potential renters and buyers of the subject unit, for the remaining term of the subject loan regardless of prepayment, to those who are income-eligible.

The Board further found that, even if it adopted the Director of Amesbury's Housing Rehabilitation Program's more limited interpretations of the provisions of the Affordable Housing Restriction instrument – those interpretations being that the subject unit does not have to be sold as an affordable housing unit and does not have a maximum sales price -- they would not change the effect of the Board's finding here. The Board concluded that because of the rent restrictions alone there are essentially only two classes

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<sup>3</sup> See *Trinidad v. Assessors of Attleboro*, Mass. ATB Findings of Fact and Reports 2012-900, 907 ("the Presiding Commissioner did not give the letter any weight because [the author] did not appear at the hearing of this appeal and was not available for *voir dire* or cross-examination . . . or for questioning by the Presiding Commissioner")(and the cases cited therein).

of potential buyers for the subject unit: (1) a buyer/landlord who would only pay an amount that was largely financially consistent with the subject unit’s long-term restricted earning capacity and (2) a buyer/occupant who would have to be an income-eligible occupant. Therefore, assuming, *arguendo*, that the Affordable Housing Restriction instrument only limits the rent but not the sale price, the Board still found that, under the circumstances here, the effect of the long-term limited rental income alone served to similarly limit the sale price for the fiscal year at issue.

Moreover, the Board found that the appellant’s evidence amply demonstrated, by using Massachusetts Department of Housing and Community Development Purchase Price Limits Schedules coupled with reasonable assumptions regarding mortgage-interest and tax rates, a mortgage term, certain expenses, and target household size, that the indicated maximum sales price for the subject unit as of the relevant valuation and assessment date was approximately \$180,000. The assessors did not directly contest this methodology. The following tables essentially reproduce the appellant’s exhibit 7 -- the “80% AMI – 3 Person Household” schedule.

**Purchase Price Limits**  
**Housing Costs:**

Maximum Sales Price	\$180,000
Down Payment (5%)	\$9,000
Mortgage	\$171,000
Interest Rate	4.50%
Amortization	30 years
Monthly P&I Payments	\$866.43
Tax Rate	\$17.77
Monthly Property Tax	\$267
Hazard Insurance	\$60
PMI	\$111
Condo/HOA fees (if applicable)	\$150
Monthly Housing Cost	\$1,454
Necessary Income	\$58,165

**Household Income:**

Number of Bedrooms	2
Sample Household Size	3
80% AMI/"Low-Income" Limit	\$58,000
Target Housing Cost (80% AMI)	\$1,450
10% Window	\$50,750
Target Housing Cost (70%) AMI	\$1,269

The Board found, however, that this indicated maximum sales price, while relevant, underestimated the subject unit's fair cash value for the fiscal year at issue because it ignored certain benefits accruing to the appellant, such as mortgage-interest savings, and those benefits accruing to any owner, such as the steadily declining term of the restrictions. In making this finding, the Board recognized, however, that while the mortgage-interest savings might well be intangible in nature,<sup>4</sup> their inclusion in the valuation determination was necessary to provide a more complete financial picture of the affordable-housing property. Accordingly, and as explained more fully in the Opinion below, the Board determined that \$185,000 more accurately reflected the fair cash value of the subject unit for assessment purposes for the fiscal year at issue after taking into consideration not only the restrictions and limitations but also the benefits associated with the subject loan, the Rent Regulatory Agreement, and the Affordable Housing Restriction instrument.

The Board, therefore, reduced the assessment by \$42,300, decided this appeal for the appellant, and granted a tax abatement in the amount of \$780.86.

**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

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<sup>4</sup> According to APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL 148 (4<sup>th</sup> ed. 2002), "intangible property" is defined as "[n]onphysical assets, including but not limited to franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities, and contracts, as distinguished from physical assets such as facilities and equipment." "Intangible value" is defined as [a] value that cannot be imputed to any part of the physical property, e.g., the excess value attributable to a favorable lease or mortgage, the value attributable to goodwill."

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 ‘fair cash value’ standard established by G.L. c. 59, § 38 cannot be varied by public officers or by agreement of the parties, but must be adhered to rigidly.” *Hampton Associates v. Assessors of Northhampton*, Mass. ATB Findings of Fact and Reports 1998-770, 787 (citing *Carr v. Assessors of Springfield*, 339 Mass. 89, 91 (1959) and *Waltham Watch and Clock Co.*, 272 Mass. 396, 412 (1930)), *aff’d*, 52 Mass. App. Ct. 110 (2001). In determining the fair cash value of a property, the purposes for which it is adapted are relevant considerations. *Boston Gas Co.*, 334 Mass. at 566.

While neither the General Court, in the form of legislation, nor the Department of Revenue, in the form of regulations or other official pronouncements, have addressed how to value real estate encumbered with deed, lease, or other contractual restrictions for assessment purposes, the case law has provided some guidance in this regard.

Essentially, restrictions affecting the use of the property should be considered when valuing real estate for assessment purposes. *See, e.g., Lodge v. Swampscott*, 216 Mass. 260, 263 (1913)(holding that a deed restriction prohibiting building any structure on the land reduced its fair cash value); *Parkinson v. Assessors of Medfield*, 398 Mass. 112, 115-16 (1986)(holding that the effect of a conservation restriction must be taken into account in determining the fair cash value of property); *Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 379 Mass. 420, 422 (1980)(holding that “the existence of restrictions on the use of property may reduce its value below that which would be appropriate in the absence of such restrictions.”). Conversely, private contracts affecting the income or return that a particular owner may derive from real estate should not be considered. *See, e.g., Donovan v. Haverhill*, 247 Mass. 69, 72 (1923)(holding that a long-term, disadvantageous lease does not constitute an encumbrance that diminishes the property’s value for tax-assessment purposes); *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 450 (1986)(holding that property should be valued as though it were not “encumbered by an uneconomic lease”). *Cf. Sisk v. Assessors of Essex*, 426 Mass. 651, 654-55 (1998)(holding that “a proper valuation of the taxpayers’ real property requires the assessors to consider the value of the entire estate unencumbered by [town-imposed restrictions] in the lease”).

An exception to this latter rule — the exception being that governmental policies or actions that regulate the return a property can produce and also promote an important public interest must be taken into account in valuing real estate. *See, e.g., Assessors of Weymouth v. Tammy Brook Co.*, 368 Mass. 810 (1975)(rescript opinion)(holding that in valuing real estate for assessment purposes, it was appropriate to consider Federal restrictions on the income that could be realized from a project); *Community Development Co. of Gardner v. Assessors of Gardner*, 377 Mass. 351, 356 (1979)(holding that the rent restrictions placed by federal regulations on the rent the company could receive from the housing project had to be taken into account in valuing the property). Accordingly, this Board has ruled in several relatively recent appeals that when determining fair cash value, the unique status of governmentally regulated affordable-housing units, and the restrictions and benefits attendant thereto, must be considered. *See Hampton Associates*, Mass. ATB Findings of Fact and Reports at 1998-790 (“Thus, Massachusetts considers contributions of rental subsidies, accelerated depreciation and special financing as well as restrictions imposed on properties as affecting the overall values of such properties.”). *See also Trueheart v. Assessors of Montague*, Mass. ATB Findings of Fact and Reports 1999-158, 170 (ruling that “deed restrictions must be considered in arriving at the fair cash value of the subject properties” because “[a] willing, informed buyer . . . is presumed to know that . . . he or she will be limited to a maximum resale price based on the discount rate applicable to the property”).<sup>5</sup>

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<sup>5</sup> The majority of other jurisdictions that have examined similar issues appear to agree with the Board in this regard. *See, e.g., Cottonwood Affordable Hous. v. Yavapai Cnty.*, 205 Ariz. 427, 430 (Ariz. Tax Ct. 2003)(finding that because long-term restrictions imposed upon rental property by federal regulations have a significant impact on the value of the property, a valuation that fails to take the deed restrictions into account will not result in a determination of fair market value for that property); *Deerfield 95 Investor Assoc. v. Town of E. Lyme*, No. CV96-0538367, 1999 Conn. Super. LEXIS 1747 (Sup. Ct. of Conn, New London, May 26, 1999)(finding that low-income housing tax credits do have an effect on real estate value and should be considered in the determination of the value of the subject property); *Pine Pointe Hous., L.P. v. Lowndes Cnty. Bd. of Tax Assessors*, 254 GA. App. 197, 198-99 (2002)(holding that taxing authorities are required to consider low-income housing restrictions); *Brandon Bay, Ltd. P’ship v. Payette Cnty.*, 142 Idaho 681, 684 (2006)(concluding that when assessing low-income housing, it would be inequitable to assess the property based upon full market-rental value); *Greenfield Vill. Apartments, L.P. v. Ada Cnty.*, 130 Idaho 207, 210-11 (1997)(holding that property valuation should consider the restricted use of the property as low-income and rent-restricted); *Kankakee Cnty. Bd. of Review v. Prop. Tax Appeal Bd.*, 131 Ill. 2d 1, 17 (1989)(holding that when valuing a government subsidized apartment building, the

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taxing authority must weigh both the positive and negative elements and adjust the actual income figure to accurately reflect the property's true earning capacity); *Rainbow Apartments v. Ill. Prop. Tax Appeal Bd.*, 326 Ill. App. 3d 1105, 1109 (2001)(holding that the Property Tax Appeal Board appropriately considered low-income housing tax credits when determining the fair cash value of property); *Vill. Hous. Partners II, L.P. v. Wayne Twp. Assessor*, Cause No. 49T10-0208-TA-103, 2005 Ind. Tax LEXIS 92 (Ind. Tax Ct. December 22, 2005)(concluding that low-income housing rental restrictions may cause economic obsolescence); *Pedcor Invs. v. State Bd. of Tax Comm'rs*, 715 N.E.2d 432, 436-37 (Ind. T.C. 1999)(concluding that deed restrictions may constitute economic obsolescence depending on the effect of the tax incentives); *In re Ottawa House. Assn.*, 27 Kan. App. 2d 1008, 1011 (2000)(holding that taxing authority should have considered the effects of low-income housing contract when it valued the property for *ad valorem* tax purposes); *Glenridge Dev. v. City of Augusta*, 662 A.2d 928, 931 (Me. 1995)(concluding that the taxing authority should consider the effect of HUD regulations restricting selling, raising or lowering rents, or making improvements or major repairs without HUD's approval, among other restrictions governing the housing complex); *Huron Ridge LP v. Ypsilanti Twp.*, 275 Mich. App. 23, 32 (2007)(holding that property tax appraisal methods may take into account the value of benefits accruing to owners of properties regulated under federal subsidized housing programs); *Meadowlanes v. Holland*, 437 Mich. 473, 495 (1991)(holding that interest subsidy payments made by the government in return for the rent restrictions affect the selling price of the property and should have been considered in the property's valuation); *Rebelwood Ltd. v. Hinds Cnty.*, 544 So. 2d 1356, 1364-65 (Miss. 1989)(holding that because the benefits of participating in a federal low-income housing program affect the value of the property in the open market, they must sensibly be considered in assessing the value); *Kalispell Assocs. Ltd. P'ship v. Mont. Dep't of Revenue*, Cause No. ADV 96-747, 1997 Mont. Dist. LEXIS 118 (Mont. 1st Jud. Dist. Ct. July 22, 1997)(concluding that consideration of low-income housing use restrictions when determining market value would be consistent with Montana precedent); *Steele v. Town of Allentown*, 124 N.H. 487, 491-92 (1984)(holding that federally subsidized housing should be valued as such and not as non-subsidized housing); *Penns Grove Garden Ltd. v. Penns Grove Borough*, 18 N.J. Tax 253, 263-65 (1999)(concluding that governmental contract rent and actual management fee should be used in determining valuation); *Bayridge Assocs. Ltd. P'ship v. Dep't of Revenue*, 321 Or. 21, 31-32 (1995)(concluding that participation in a federal low-income housing tax-credit program is a governmental restriction as to use and must be considered in valuing property); *In re Appeal of Johnstown Assocs.*, 494 Pa. 433, 439 (1981)(finding that rent and sale restrictions are factors unique to subsidized property and clearly relevant to the question of value); *Church St. Assocs. v. Cnty. of Clinton*, 959 A.2d 490, 494 (Pa. Commw. Ct. 2008)(holding that sale restrictions and rent restrictions, in the context of federally subsidized low-income apartment buildings, were factors for which taxing authorities must account when appraising property); *Parkside Townhomes Assocs. v. Bd. of Assessment Appeals*, 711 A.2d 607, 611 (Pa. Commw. Ct. 1998)(holding that the fair market value of property is a function of the economic reality which includes the effects of tax credits for low-income housing); *Town Square Ltd. P'ship v. Clay Cnty. Bd. of Equalization*, 2005 SD 99, ¶22(concluding that both the restrictive rents and the tax credits had to be considered when assessing property operating under federal low-income housing tax credit program); *Spring Hill, L.P. v. Tenn. State Bd. of Equalization*, No. M2001-02683-COA-R3-CV, 2003 Tenn. App. LEXIS 952 (Tenn. Ct. App. Dec. 31, 2003)(holding that valuation of low-income housing should consider both restricted rents and tax credits); *Cascade Court Ltd. P'ship v. Noble*, 105 Wash. App. 563, 570 (2001)(holding that the assessor should have taken into account the restricted rents of a low-income housing development); *Metro. Holding Co. v. Bd. of Review of Milwaukee*, 173 Wis. 2d 626, 634 (1993)(holding that property assessment for low-income housing should be based on actual rents and expenses). *But see, New Walnut Square Ltd. P'Ship v. La. Tax Comm'n*, 626 So. 2d 430, 432 (La. Ct. App. 4th Cir. 1993)(concluding that assessor did not have to consider separately the existence of a rent ceiling and a limit on distributions from income); *Maryville Props., L.P. v. Nelson*, 83 S.W.3d 608, 617

The Board found in this appeal that the provisions contained in the Rent Regulatory Agreement and the Affordable Housing Restriction instrument serve to limit the universe of potential renters and buyers of the subject unit to those who are income-eligible. The Board also found and ruled that the appellant's voluntary participation in the government-sponsored affordable housing program is not controlling here. *See generally Hampton Associates*, Mass. ATB Findings of Fact and Reports at 1998-770; *cf. Parkinson*, 398 Mass. 112 (holding that the effect of a voluntary conservation restriction must be taken into account in determining the fair cash value of property). As a result, the Board further found that by using Massachusetts Department of Housing and Community Development Purchase Price Limits Schedules coupled with reasonable assumptions regarding mortgage-interest and tax rates, the mortgage term, certain expenses, and target household size, an indicated maximum sales price for the subject unit as of the relevant valuation and assessment date was approximately \$180,000. The Board additionally found, however, that this indicated price, while relevant, underestimated the subject unit's fair cash value for the fiscal year at issue because it ignored certain benefits accruing to the appellant, such as mortgage-interest savings, and those benefits accruing to any owner, such as the steadily declining term of the restrictions. In making this finding, the Board recognized that while the mortgage-interest savings might well be intangible in nature, their inclusion in the valuation determination was necessary to provide a more complete financial picture of the affordable-housing property. The Board therefore ruled that the fair-cash-value determination for the subject property for the fiscal year at issue must account for all of these factors. *See Hampton Associates*, Mass. ATB Findings of Fact and Reports at 1998-791 (finding and ruling that special favorable financing as well as restrictions imposed on properties affect their overall value). The "unique status" of affordable

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(Mo. Ct. App. 2002)(holding that low-income housing tax credits should not be considered in real estate tax appraisals); *In re Appeal of Greens of Pine Glen Ltd. P'Ship*, 356 N.C. 642, 651 (2003)(finding that because the federal low-income tax housing credit program's restrictions were freely entered contractual covenants, not governmental regulations, the taxpayer was not allowed to artificially alter the value of its property below fair market value); *Alliance Towers, Ltd. v. Stark Cnty. Bd. of Revision*, 37 Ohio St. 3d 16, 24 (1988)(holding that the artificial effects of government housing assistance programs are not indicative of real estate value); *Piedmont Plaza Invs. v. Dep't of Revenue*, 331 Or. 585, 592-93 (2001)(finding that assessed values are best calculated without making adjustment for the federal interest subsidy).

housing property should not be overlooked when determining its fair cash value for assessment purposes. *Community Development Co.*, 377 Mass. at 354.

In an appeal 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, 598 (1984) (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)). Here, the appellant did both. She not only demonstrated that the assessors failed to account for applicable affordable housing limitations and restrictions in the subject unit’s assessed value for the fiscal year at issue, but she also provided the Board with a reasonable mechanism, under the circumstances, for appropriately valuing the subject unit.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost. *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 362 (1978). “A proper valuation depends on a consideration of the myriad factors that should influence a seller and buyer in reaching a fair price.” *Montaup Electric Co. v. Assessors of Whitman*, 390 Mass. 847, 849-50 (1984). All the factors that contribute to a property’s fair cash value must be considered, no matter whether they increase or diminish the value. See *Massachusetts General Hospital v. Belmont*, 233 Mass. 190, 208 (1919); *Lodge*, 216 Mass. at 263. When valuing property with unusual characteristics or subject to special circumstances, variations of the three usual valuation methods or even other valuation techniques are often useful in determining the fair cash value of the property. See, e.g., *Boston Edison Co. v. Assessors of Boston*, 402 Mass. 1, 17 (1988)(using a “unit cost per kilowatt hour method[] of valuation” as a check); *Tennessee Gas Pipeline Co. v. Assessors of Agawam*, 428 Mass. 261, 263 (1998)(“Assessors also may use the unit principal to value property of a utility.”); *Woburn Services, Inc. v. Assessors of Woburn*, Mass. ATB Findings of Fact and Reports 1996-565, 574 (modifying the traditional income-capitalization methodology to appropriately account for contamination and stigma); see also *Wayland Business Center Holdings, Inc. v. Assessors of Wayland*, Mass. ATB Findings of Fact and Reports 2005-557, 595-97.

In past analogous appeals, the Board has used modified income-capitalization approaches to ascertain the value of the property at issue. *See, e.g., Hampton Associates*, Mass. ATB Findings of Fact and Reports at 1998-789-91; *Cummins Towers Co. v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 1984-291, 305, 308-09; cf. *Woburn Services, Inc.*, Mass. ATB Findings of Fact and Reports at 1996-574-75. However, given the record here, the Board adopted and then adapted the methodology proposed by the appellant, which was based on Massachusetts Department of Housing and Community Development affordable housing criteria and several reasonable assumptions. The Board found that this approach was a realistic methodology to use to value the subject unit for the fiscal year at issue under the circumstances. The Board found that the universe of potential buyers was limited by the affordable-housing restrictions and that this methodology accounted for those restrictions. The Board found, however, that the value derived from this methodology, while relevant, underestimated the subject unit's fair cash value for the fiscal year at issue because it ignored certain benefits accruing to the appellant, such as mortgage-interest savings and those benefits accruing to any owner, such as the steadily declining term of the restrictions. Accordingly, the Board determined that \$185,000 more accurately reflected the fair cash value of the subject unit for assessment purposes for the fiscal year at issue after taking into consideration not only the restrictions and limitations but also the benefits associated with the subject loan, the Rent Regulatory Agreement, and the Affordable Housing Restriction instrument.

The burden of proof is upon the appellant 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). The appellant must show that the assessed valuation of her property was improper. *See Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 691 (1982). The assessment is presumed valid until the taxpayer sustains his burden of proving otherwise. *Schlaiker*, 365 Mass. at 245.

In reaching its opinion of fair cash value, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation suggested. Rather, the Board can accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 683; *New*

*Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *Assessors of Lynnfield v. New England Oyster House, Inc.*, 363 Mass. 696, 701-702 (1972). “The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the [B]oard.” *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 605 (1977).

The Board need not specify the exact manner in which it arrived at its valuation. *Jordan Marsh v. Assessors of Malden*, 359 Mass. 196, (1971). The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass 60, 72 (1941). An opinion of value “should be rounded to reflect the degree of precision . . . associate[d] with [it].” APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (13<sup>th</sup> ed. 2008) 564. “[I]f the final value estimate is a six-digit number, the figure will likely be rounded to the nearest thousand or ten thousand dollars.” *Id.*

The Board applied these principles in reaching its determination that the appellant met her burden of proving that the assessors overvalued the subject unit for the fiscal year at issue. After determining that the fair cash value of the subject unit was \$185,000, the Board reduced the assessment by \$42,300 and granted the appellant a tax abatement in the amount of \$780.86.

In concluding, the Board suggests that affordable-housing valuation might be better suited to a legislative analysis and response rather than a case-by-case determination by this Board. As the Supreme Judicial Court observed in *Community Development Co.*, 377 Mass. at 354-55: “The great dilemma in assessing [affordable housing] projects is that the ‘value’ of these projects is inherently ambiguous.” (Citation omitted).<sup>6</sup>

The revised decision is promulgated simultaneously with this Findings of Fact and Report.

**THE APPELLATE TAX BOARD**

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

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<sup>6</sup> At least twenty-two other states have attempted to address, statutorily, the affordable-housing-valuation conundrum including: Georgia, Illinois, Indiana, Montana, Oregon, Pennsylvania, and Rhode Island.

**A true copy,**

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**MARK NELSON, TRUSTEE/P.O.A. v. BOARD OF ASSESSORS OF  
FOR GEORGE NELSON THE TOWN OF WILMINGTON**

Docket Nos. F310076, F310892

Promulgated:  
May 20, 2013

**ATB 2013-320**

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 by the appellant, Mark Nelson, Trustee/ Power of Attorney for George Nelson (“trustee” or “appellant”) from the refusal of the appellee, the Board of Assessors of the Town of Wilmington (“assessors” or “appellee”), to grant an abatement of tax on real estate owned or occupied for the fiscal years 2010 and 2011 (“fiscal years at issue”).

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

The 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 Nelson, pro se*, for the appellant.

*John Richard Hucksman, Jr.*, 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.

On January 1, 2009 and on January 1, 2010, the assessment dates for the fiscal years at issue, George Nelson was the assessed owner of a 36,000 square-foot (0.83-acre) parcel of land improved with a Colonial-style, single-family dwelling (“subject dwelling”) located at 4 Poplar Street in Wilmington (“subject property”).

For fiscal year 2010, the assessors valued the subject property at \$968,800 and assessed a tax thereon, at the rate of \$11.53 per thousand, in the total amount of \$11,170,26. Pursuant to G.L. c. 59, § 57C, the appellant paid the tax due in four timely quarterly payments. On February 1, 2010, the appellant filed a timely Application for Abatement under G.L. c. 59, § 59 with the assessors. The abatement application was deemed denied on May 1, 2010; however, the assessors did not send a notice of the deemed denial to the appellant as required by G.L. c. 59, § 63. Instead, they purported to deny the application on June 14, 2010. Because the assessors failed to notify the appellant under G.L. c. 59, § 63, the appellant had two additional months -- until October 1, 2012 -- to file an appeal, pursuant to G.L. c. 59, § 65C. On September 13, 2010, 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 the appeal for fiscal year 2010.

For fiscal year 2011, the appellee valued the subject property at \$968,800 and assessed a tax thereon, at the rate of \$11.88 per \$1,000, in the total amount of \$11,509.34. Pursuant to G.L. c. 59, § 57C, the appellant paid the tax due in four timely quarterly payments. On January 21, 2011, the appellant filed a timely Application for Abatement under G.L. c. 59, § 59 with the assessors, who denied the application on March 7, 2011. On April 25, 2011, the appellant timely 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 the appeal for fiscal year 2011.

The subject property is located in Wilmington, in a residential neighborhood that is improved with homes that are in well-maintained condition and is located a short driving distance from shopping and other amenities.

The subject home, built in 2004, is actually comprised of two separate detached dwellings. The first dwelling is a two and one-half story Colonial-style dwelling, which is comprised of ten rooms, including four bedrooms as well as three full and one half bathrooms. In addition to the above-grade living area, the dwelling includes a partially finished basement with a media room that was not on the property record card. The second dwelling is a one and one-half story, Cape Cod-style dwelling that functions as a detached garage with an "au pair" suite above it. This dwelling is comprised of seven

rooms, including three bedrooms, as well as two full and one half bathrooms. In total, including the above-grade, below-grade and au pair suite for both dwellings, the subject home contains approximately 6,546 square feet of gross living area.

The subject home is equipped with forced hot water heating fueled by oil and with central air conditioning. The exterior is cedar or redwood clapboard and it has an asphalt gable/hip style roof. Other amenities include one fireplace, hardwood flooring in the Colonial-style dwelling, a covered porch in front, a large rear deck off the au pair suite, a shed, and a fenced-in yard. The property record card lists the Cape Cod-style dwelling as in “below average” condition and the Colonial-style dwelling in “good” condition; the property record cards for both dwellings reference the subject home’s “modern” bathrooms and “luxurious” kitchens.

The subject property is located on Poplar Street, which is a private way and is serviced by private water and septic systems. The subject property abuts 53 acres of conservation land, which the subject dwelling overlooks. As of the relevant assessment dates, no occupancy permit had been issued.

The appellant presented his case in chief through the testimony of Mr. Nelson and Humphrey Moynihan, the Chairman of the appellee and through the submission of documentary evidence.

The appellant submitted his own appraisal of the subject property, completed by David Johnson. The cover sheet to his appraisal report was missing, and on the signature sheet, Mr. Johnson noted that the “effective date” of his appraisal was June 2, 2011. Mr. Johnson was not presented as a witness at the hearing. The appellee, however, did not object to the admission of the appraisal report.

Mr. Johnson used the comparable-sales method for appraising the subject property. He selected three purportedly comparable properties: 33 Mill Road; 24 Mill Road; and Lot 6 Lt. Buck Drive. Only Comparables One and Three were comparable sales; Comparable Two was merely a real estate listing. Mr. Johnson’s report indicated that he made \$20-per-square-foot adjustments for differences in above-grade gross living areas over 100 square feet, a flat \$25,000 adjustment for the subject property’s finished basement, and a flat \$50,000 square-foot adjustment for the subject property’s above-garage living area. He did not make any adjustment for the subject property’s location

adjacent to 53 acres of conservation property. On the basis of his comparable-sales analysis, Mr. Johnson concluded that the subject property had a fair market value of \$900,000 as of June 2, 2011.

The appraisal contains an addendum, in which the appraiser related that, through conversations with the property owner, he had learned that Wilmington had refused to issue an occupancy permit for the subject home. The addendum stated Mr. Johnson's opinion that "[t]he property owner has in the past and will in the future have problems transferring title without this occupancy permit." The addendum concluded that the lack of an occupancy permit would potentially reduce the subject property's value to "zero."

The appellant also submitted evidence of nuisance activity on Poplar Street in front of and adjacent to the subject property. The evidence included his testimony, photographs depicting all-terrain vehicle ("ATV") activity on Poplar Street, and copies of his numerous e-mail correspondences to Wilmington law enforcement officers complaining of his neighbor's ATV activity.<sup>1</sup> The appellant also submitted evidence of winter conditions on Poplar Street in an attempt to demonstrate that the subject property should be devalued for its location on a private way devoid of town services for snow removal.

Mr. Moynihan, whom the appellant called as a witness, testified that he did not agree with Mr. Johnson's opinion that the lack of an occupancy permit would result in a considerable decrease in fair market value. Mr. Moynihan also testified that, in his opinion, the subject property's location on a private way versus a public way did not decrease its fair market value.

The appellee presented its case-in-chief through the testimony of Phyllis DeChristophoro, an independent real estate appraiser whom the Board qualified as a residential real estate appraisal expert, and the submission of documentary evidence. Ms. DeChristophoro presented her real estate appraisal, which she had prepared for the hearing of these appeals. Her appraisal gave her opinion of the subject property's value as of both relevant assessment dates. Ms. DeChristophoro testified that, in her opinion, the relevant real estate market was very stable during the fiscal years at issue, so she gave the same opinion of value for both valuation dates.

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<sup>1</sup> Although he did not mention in his testimony before the Board, the e-mail correspondence submitted as documentary evidence also refers to the neighbor's stockcar activity.

Ms. DeChristophoro noted that the subject property has a private water and private septic system but, in her opinion, those features did not affect market value or marketability of the subject property. The Board found Ms. DeChristophoro's opinion on this to be credible. Ms. DeChristophoro also testified that the subject property was an attractive and well-maintained property.

Ms. DeChristophoro used the comparable-sales method as her primary method for appraising the subject property. Ms. DeChristophoro selected five purportedly comparable properties: 59 Lexington Street in the abutting town of Burlington; 40 Mill Road in Wilmington; 33 Mill Road in Wilmington; 132 Marion Street in Wilmington; and 42 Florenza Drive in Wilmington. Ms. DeChristophoro explained that, while she found four comparable-sale properties in Wilmington in the "high-end range," she did venture into neighboring Burlington in order to find her Comparable Sale One, a property with a dwelling that contained over 3,400 square feet of gross living area, which she found to be very comparable to the subject. Ms. DeChristophoro testified that, in preparing her appraisal report, she relied on property record cards, spoke with the real estate brokers involved in the comparable sales and viewed the comparable-sale properties from the exterior.

Ms. DeChristophoro next explained her adjustments. She stated that she gave a \$60-per-square-foot adjustment for gross living area, but only a \$30-per-square-foot adjustment for the gross living area over the subject property's garage because she considered this space to be an accessory unit and thus only worth half the value of the regular living space. She also applied a \$10,000 adjustment per room of below-grade living area, and a \$10,000 adjustment for each additional bathroom. Finally, she applied a 10% adjustment for superior location to her comparable property located in Burlington. The Board found these adjustments to be reasonable.

Comparable One, 59 Lexington Street in Burlington, was a 47,906 square-foot site improved with a single-family Cape-style dwelling, in good condition and of comparable age to the subject dwelling, with 5,399 square feet of above-grade living area comprised of eleven rooms, including three bedrooms, as well as four full and one half bathrooms, and a full finished basement with an office and game room. Amenities included a six-car garage without a finished portion above, a sprinkler system, one

fireplace, and central air conditioning. Comparable One sold on May 20, 2010 for \$1,159,000. Ms. DeChristophoro made an upward adjustment for the subject's above-garage living space, and downward adjustments for the comparable property's superior location, site size, above-grade living space and room count, and larger garage, for a total net adjustment of -\$87,080, resulting in an adjusted sale price of \$1,071,920.

Comparable Two, 40 Mill Road in Wilmington, was a 25,992 square-foot site improved with a single-family Colonial-style dwelling, in good condition and the same age as the subject dwelling, with 3,794 square feet of above-grade living area comprised of ten rooms, including four bedrooms, as well as two full and one half bathrooms, and a full finished basement with a great room and an additional bathroom. Amenities included a three-car garage without a finished portion above, a sprinkler system, three fireplaces, and central air conditioning. Comparable Two sold on October 31, 2008 for \$829,750. Ms. DeChristophoro made an upward adjustment for the subject's above-grade living space and room count, porch, and above-garage living space, and downward adjustments for the comparable's larger garage and additional fireplaces, for a total net adjustment of \$190,120, resulting in an adjusted sale price of \$1,019,870.

Ms. DeChristophoro's Comparable Three, 33 Mill Road in Wilmington, was the same property that Mr. Johnson had used as his Comparable One. According to Ms. DeChristophoro, this was a 32,324 square-foot site<sup>2</sup> improved with a single-family Colonial-style dwelling, in good condition and of comparable age to the subject dwelling. Mr. Johnson and Ms. DeChristophoro agreed that the above-grade living area was 3,454 square feet, but Ms. DeChristophoro counted a total of ten rooms, versus Mr. Johnson's eleven-room count. Both agreed that the dwelling had four bedrooms, as well as two full and one half bathrooms. Mr. Johnson characterized the basement as full and partially finished. Ms. DeChristophoro characterized it as having a full finished basement and further described it as containing a game room and an additional bedroom. Amenities included a three-car garage without an above finished portion, a sprinkler system and three fireplaces. Unlike Mr. Johnson, Ms. DeChristophoro further found that Comparable Three had central air conditioning. Ms. DeChristophoro found that

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<sup>2</sup> Mr. Johnson reported that he measured the site at 32,234 square feet.

Comparable Three sold on December 4, 2000<sup>3</sup> for \$750,000. Ms. DeChristophoro made an upward adjustment for the subject's above-grade living area and room count, porch, and above-garage living space, and downward adjustments for the comparable's larger garage and additional fireplaces, for a total net adjustment of \$212,520, versus Mr. Johnson's adjustments of \$146,220, which included an adjustment for the comparable's supposed lack of central air conditioning. Ms. DeChristophoro arrived at an adjusted sale price of \$962,520, as compared with Mr. Johnson's adjusted sale price of \$896,220.

Comparable Four, 132 Marion Street in Wilmington was a 54,414 square-foot site improved with a single-family Colonial-style dwelling, in good condition and of comparable age to the subject dwelling, with 3,346 square feet of above-grade living area comprised of ten rooms, including four bedrooms, as well as two full and one half bathrooms and a full unfinished basement. Amenities included a two-car garage without a finished portion above, one fireplace, and central air conditioning. Comparable Four sold on May 15, 2008 for \$725,000. Ms. DeChristophoro made upward adjustments for the subject's above-grade living area and room count, finished basement, deck, porch, above-garage living space, and fence and shed, for a total net adjustment of \$263,000, resulting in an adjusted sale price of \$988,000. Ms. DeChristophoro testified that, while the lot size of Comparable Four was larger than the subject property, she did not make an adjustment for lot size because, in her opinion, the usable portion of the Comparable Four's lot was equivalent to the subject property's lot.

Comparable Five, 42 Fiorenza Drive in Wilmington, was a 27,118 square-foot site improved with a single-family Colonial-style dwelling, in good condition and about seven years older than the subject dwelling, with 3,520 square feet of above-grade living area comprised of nine rooms, including three bedrooms, as well as two full and one half bathrooms, and a full finished basement with two additional rooms. Amenities included a two-car garage without a finished portion above, two fireplaces, and central air conditioning. Comparable Five sold on July 30, 2009 for \$758,500. Ms. DeChristophoro made upward adjustments for the subject's above-grade living space and room count and the above-garage living space, and downward adjustments for the comparable's fenced

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<sup>3</sup> Mr. Johnson's report indicated that 33 Mill Road sold on December 12, 2009.

gazebo and pool and its additional fireplace, for a total net adjustment of \$206,560, resulting in an adjusted sale price of \$965,060.

Ms. DeChristophoro analyzed and weighed her various comparable-sale prices and determined a fair market value of \$1,000,000 for the subject property for both fiscal years at issue.

The appellee also submitted into evidence a real estate listing of the subject property by the appellant's real estate agent, last updated on January 14, 2010, characterizing the subject dwelling as an "exceptional home" and with an asking price of \$1,080,000. The attached pictures of the interior show the subject dwelling to be a very modern residence with ample light and in good condition.

Ms. DeChristophoro testified that, in preparing her appraisal report, she had not considered the subject property's lack of an occupancy permit. She explained that, in general, a great many properties lack an occupancy permit when they are on the market. She further testified that, after completing her appraisal, she then spoke with the building inspector for Wilmington, Al Spaulding, to determine the extent of work needed to be done to secure an occupancy permit for the subject property. On the basis of this investigation, Ms. DeChristophoro determined that further work and the submission of a certified plot plan, a building permit for the above-garage living space, a structural engineer review, and architectural plans for the dwelling and the garage – all at a cost of approximately \$20,000 -- were necessary to obtain a building permit. Ms. DeChristophoro thus testified that, in her opinion, the subject property's fair market value should be reduced to \$980,000 for both fiscal years at issue to account for the approximately \$20,000 of expenses. Ms. DeChristophoro admitted that she did not verify whether \$20,000 was a reasonable cost for the above items, stating that architectural, certification and engineering plans were beyond the scope of her expertise, so she relied upon the opinion of the building inspector for this information.

On cross-examination, Ms. DeChristophoro admitted that she did not enter the subject property in conducting her appraisal. Ms. DeChristophoro also admitted that she did not check any police reports for a history of police activity in the subject property's general vicinity, explaining that, in her opinion, the neighborhood appeared quiet, as it was a private road and abutted conservation property. Because she did not observe any

problems with the neighborhood, she stated that researching police reports would have been beyond the ordinary scope of appraisal work.

On the basis of the evidence presented, the Board made the following ultimate findings of fact. First, the Board found that the appellant failed to meet his burden of proving whether, and the extent to which, the lack of an occupancy permit affected the fair market value of the subject property. The appellant further failed to show that the subject assessment did not already account for the lack of an occupancy permit for the subject property. The property record card specifies the assessors' opinion that the Cape Cod-style home was in "below average" condition as of the relevant assessment dates, indicating that the assessors valued the property recognizing that further work was required. Moreover, as the real estate listing for the subject property revealed, the appellant believed that the subject property, with its "exceptional home," would justify an asking price of \$1,080,000 once it was able to be occupied; the appellant offered no evidence of the cost necessary to complete the subject dwelling to a condition where an occupancy permit could issue. Because the only evidence indicated that there remained about \$20,000 worth of items to repair before the occupancy permit could be issued, the appellant failed to show that the lack of an occupancy permit rendered the subject assessment excessive.

Second, the Board found that Mr. Johnson's appraisal report was not persuasive in proving a value for the subject property that was lower than its assessed value for the fiscal years at issue. Mr. Johnson was not presented as a witness at the hearing and thus not available for cross-examination by the assessors or questioning by the hearing officer. The Board therefore found that the portions of the report containing Mr. Johnson's opinions of value, as well as the adjustments upon which those opinions were based, lacked adequate foundation and were unsubstantiated hearsay. Accordingly, the Board considered only the undisputed factual descriptions contained in his appraisal report, and gave no weight to the opinions of value expressed in Mr. Johnson's appraisal report.

Finally, the Board found that the appellant failed to meet his burden of proving that conditions on Poplar Street -- either the fact that it was a private way without connection to the public water and sewer system, or the activity on the street -- devalued the subject property. The Board found credible the testimony of Mr. Moynihan, who

explained that, based on his experience of valuing residential real estate, the subject property's location on a private road did not in any way decrease its fair market value. The Board also found credible Ms. DeChristophoro's testimony that she found Poplar Street to be a safe street and, based on her observation and her expertise, she did not feel that investigation into police reports was warranted in connection with a fair-market analysis of the subject property. Further, the appellant in no way quantified the impact of these alleged deficiencies on the subject's fair market value.

Therefore, the Board determined that the appellant failed to meet his burden of proving that the assessed value was higher than the subject property's fair market value. 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 in a free and open market will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The appellant has the burden of proving that the property has a lower value than that assessed. "The burden of proof is upon the petitioner to make out its right as [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).

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

The appellant argued that the lack of an occupancy permit diminished the fair cash value of the property. However, the appellant offered no testimony or reasoned analysis regarding how the value was affected. He merely asserted that the subject home lacked an occupancy permit as of the valuation date and therefore the subject property was worthless. However, the mere existence of some sort of restriction, by itself, does not merit an abatement of tax. To establish the effect of the restriction on value, “the appellant must show how the restriction ‘would affect the value of the property to a potential buyer.’” See, *Ross v. Board of Assessors of the Town of Ipswich*, Mass. ATB Findings of Fact and Reports 2000-952, 959 (citing *Reliable Electronic Finishing Co. v. Assessors of Canton*, 410 Mass. 381, 382 (1991); and *Parkinson v. Assessors of Medfield*, 398 Mass. 112 (1986)).

The appellant offered no opinion and did not present credible expert testimony to quantify how the lack of an occupancy permit would affect the subject property’s valuation. Instead, the appellant presented an appraisal report by Mr. Johnson that contained an unsubstantiated statement that the lack of an occupancy permit would potentially reduce the subject property’s value to “zero.” “However, the fact that land is not saleable does not mean it must have no ‘fair cash value.’” *Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 379 Mass. 420, 421 (Mass. 1980) (quoting *Beale v. Boston*, 166 Mass. 53, 55 (1896)). Rather, “it is proper to determine fair cash value from the intrinsic value of the property, including ‘any and all the uses to which the property is adapted in the hands of any owner.’” *Id.* at 421 (quoting *Tremont & Suffolk Mills v. Lowell*, 163 Mass. 283, 285 (1895)). Here, the Board found credible the testimony of Ms. DeChristophoro that only about \$20,000 worth of work was all that was required to obtain the occupancy permit.

The appellant next offered a comparable-sale analysis completed by Mr. Johnson in an attempt to undermine the subject assessment. Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date generally contain probative evidence for determining the value of the property at issue. *Graham v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2007-321, 400 (citing *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929)), *aff’d*, 73 Mass. App. Ct. 1107 (2008).

However, the Board did not rely on the comparable-sales analysis prepared by the appellant's appraiser, Mr. Johnson, because Mr. Johnson did not testify at the hearing and was not available for *voir dire* or cross-examination. The Board considered only the undisputed factual descriptions contained in Mr. Johnson's appraisal report, and excluded his opinions of value as well as the adjustments upon which those opinions were based. The Board rejected these elements of the appraisal report because they lacked adequate foundation, were unsubstantiated hearsay, and Mr. Johnson was not present at the hearing or available for cross-examination by the assessors or questioning by the hearing officer. Accordingly, the Board gave no weight to the opinions expressed in the hearsay appraisal report. *See, e.g., Lian & Chan v. Assessors of Lexington*, Mass. ATB Findings of Fact and Reports 2012-1098, 1103-1104; *Turner v. Assessors of Lunenburg*, Mass. ATB Findings of Fact and Reports 2012-912, 917-918; *Florio, Trustee v. Assessors of Newbury*, Mass. ATB Findings of Fact and Reports 2011-725, 757; *Walachy v. Assessors of Holyoke*, Mass. ATB Findings of Fact and Reports 2009-620, 626.

Finally, the appellant attempted to show that the subject property had a value lower than that assessed by demonstrating that the subject's location on a private way with no public water or sewer service and with recreational-vehicle activity negatively impacted its value. The Board, however, found that the appellant failed to quantify any diminution in the subject property's value associated with any of these issues. *See, e.g., Abuzahra v. Assessors of Rowley*, Mass. ATB Findings of Fact and Reports 2008-1514, 1522 (citing *Braintree Real Estate Management Co., LLC v. Assessors of Braintree*, Mass. ATB Findings of Fact and Reports 2005-432, 446-447, *aff'd*, 66 Mass. App. Ct. 1112 (2006)). The Board also credited the testimony of Mr. Moynihan, who explained that, based on his valuation experience, a property's location on a private road does not decrease its fair market value. The Board also found credible Ms. DeChristophoro's statement that Poplar Street appeared to be a reasonably safe street. Not every nuisance resulting from living near neighbors must result in a reduction in fair market value; in the instant appeal, the Board found that the appellant failed to quantify any diminution in value resulting from activity on Poplar Street. *Id.* The Board thus ruled that no adjustment for such activity was warranted.

On the basis of the foregoing, the Board ultimately found that the appellant failed to prove a value lower than the subject assessments for the subject property.

Accordingly, the Board issued decisions 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**

**NEW ENGLAND FORESTRY FOUNDATION, INC.** v. **BOARD OF ASSESSORS OF THE TOWN OF HAWLEY**

Docket No. F306063

Promulgated:  
January 28, 2013

**ATB 2013-63**

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee, Board of Assessors of the Town of Hawley (“assessors” or “appellee”), to abate a tax on certain real estate located in the Town of Hawley owned by and assessed to New England Forestry Foundation, Inc. (“NEFF” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2010.

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

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.

*Ray Lyons*, Esq. for the appellant.

*Richard Desmarais*, 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 (“Board”) made the following findings of fact.

On January 1, 2009, the relevant assessment date for fiscal year 2010 (“fiscal year at issue”), NEFF was the assessed owner of a single lot of land located in the Town of Hawley (“subject property”). For the fiscal year at issue, NEFF timely filed a Form 3ABC with the assessors on February 25, 2009. The appellee nonetheless valued the subject property at \$11,800 and assessed a tax thereon, at the rate of \$14.65 per \$1,000, in the total amount of \$172.87. The appellant timely paid the tax due. On November 18, 2009, the appellant applied in writing for abatement to the appellee. On February 18, 2010, the appellant’s abatement request was deemed denied. On May 18, 2010, the appellant seasonably filed a Petition Under Formal Procedure with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over the instant appeal.

The subject property is a 120-acre parcel of forest land, located at the end of Stetson Road, a dead-end road, identified on the assessors Map 10 as Lot 3 and known as the Stetson-Phelps Memorial Forest. The subject property is primarily forested and bordered on two sides by the Commonwealth of Massachusetts Department of Conservation and Recreation’s Kenneth Dubuque State Forest. The subject property was originally part of a larger 134-acre tract of property. In 1999, the prior owners, Muriel Shippee and Edward Phelps, sold the subject property to NEFF and sold the remaining portion of the 134-acre tract, consisting of a house, barns and approximately 20 acres of vacant land, to private owners. NEFF has a conservation restriction on the vacant land, currently owned by Stephen and Susan Kimball, to prevent future development of the property.

There are two points of access to the subject property: from the east by Stetson Road, a paved single-lane, public way; and from the west by a gated, wooded road that runs from the Kenneth Dubuque State Forest. NEFF maintains a 10-year Forest Management Plan for the subject property, through to the year 2016, which states that the public access to the subject property is by Stetson Road. The appellant initially applied for and received classification of the subject property under G.L. c. 61 as forest land.

Starting with the fiscal year at issue, NEFF claimed that it owned and managed the subject property in furtherance of its charitable purpose and thus applied for tax-exempt status for the subject property.

NEFF presented its case-in-chief through the testimony of Christopher Pryor, its Conservation Monitor and Forester, and of Whitney Beals, its Director of Land Protection, and through the submission of exhibits. The appellee presented its case-in-chief through the testimony of Richard Desmarais, its chairman, and of Virginia Gabert, its administrative assistant, and through the submission of exhibits.

NEFF of Littleton, Massachusetts is a nonprofit corporation organized pursuant to G.L. c. 180. NEFF is a member of the Massachusetts Land Trust Coalition, Inc., a nonprofit organization that provides support services to nonprofit conservation land organizations across Massachusetts. Founded in 1944, NEFF has a corporate and charitable purpose and mission that centers upon the protection of forest lands, providing information to private forest owners about managing their forest responsibly and to the general public about forestry and forest science. According to its Restated Articles of Organization, NEFF's purposes are as follows:

- promoting, supporting and practicing forest management policies and techniques to increase the production of timber in an ecologically and economically prudent manner;
- providing educational services and programs to woodland owners;
- supporting and advancing scientific understanding of environmental issues;
- educating the public about forest management, including providing practical demonstrations to enhance, protect, develop, and market forest resources and forest products and habitat and water resources protection; and
- protecting, managing, and conserving open space and forest lands.

At all relevant times, NEFF held and enforced conservation restrictions on 41 properties in Massachusetts, covering about 3,000 acres in 30 towns. NEFF also raised and maintained an endowment fund for the funding of its monitoring and enforcement of its conservation restrictions. NEFF claimed that it owned and managed the subject property for the same purposes that the Commonwealth of Massachusetts Department of

Fish and Game and Department of Conservation and Recreation held its properties, and in this manner, NEFF maintained that it reduced the burden on government.

Mr. Pryor testified to NEFF's charitable purposes, which he described as: to demonstrate sustainable forestry practices to other private landowners, what he termed "forest stewardship"; to protect wildlife habitat; to protect water quality; to educate the public about sustainable forestry practices; and to provide scientific research about sustainable forestry practices. He testified that the public receives a benefit from sustainably managed forests through the wood products that are produced, as well as the protection of wildlife habitat, recreational opportunities and the protection of scenic areas.

Mr. Pryor next testified to NEFF's management of the subject property. He explained that NEFF purchased the subject property in 1999 and that NEFF included it in its booklet of foundation forests, the so-called NEFF Community Forest booklet, which it updated in 2008. He testified that this booklet is distributed to all NEFF members "as well as any member of the public that may ask for one." Mr. Pryor then explained that the subject property was under a management plan, and NEFF's primary goal in this plan was to demonstrate sustainable forestry practices to other private landowners in the area. In furtherance of this goal, Mr. Pryor stated that NEFF managed timber and collected some income from the harvesting of the timber from the subject property, which it added to its endowment. Mr. Pryor testified that, between calendar years 2000 and 2009, NEFF collected about \$24,000 from the sale of timber products from the subject property.

Mr. Pryor further testified that, starting in 2005, NEFF began to hold a so-called "precut educational walk" through some of its properties before it harvested its timber. It was unclear from his testimony how many walks occurred at the subject property, but he mentioned only one scheduled walk. He stated that notice of this walk was expected to be mailed to all abutters of the subject property, as well as members of NEFF "in the immediate area" of the subject property, and that notice of the walk would be posted on NEFF's website and in a local newspaper. Mr. Pryor testified that between zero to twenty people typically attended an NEFF precut educational walk on one of NEFF's properties, and that they usually lasted between one and two hours, depending on questions posed by attendees and how far they wanted to walk.

Mr. Pryor next testified to the public's usage of the subject property. He testified that the subject property was open for public recreation. He stated that a group called the Canary Kats maintained an active snowmobile trail through the subject property. He further testified that members of the public also used the subject property for hiking and hunting. A photograph was entered as an exhibit, which Mr. Pryor testified depicted a sign posted on a tree at the Stetson Road entrance of the subject property. The sign in the photograph identified the subject property as the Stetson-Phelps Pine Ridge Farm and specified that it was owned and managed by NEFF for the following purposes: "Forest Products; Wildlife Habitat; Biological Diversity; [and] Educational Opportunities." Another sign, which Mr. Pryor testified was located at the entrance to the subject property, identified NEFF as the owner of the property and stated: "We invite respectful public visits."

Mr. Pryor contended that NEFF's ownership and management of the subject property brought many benefits to the general public. He maintained that these benefits included recreational and scenic opportunities, as well as improved water quality. When asked about scenic opportunities, Mr. Pryor admitted that those would be limited to hikers on the trails through the subject property. Another benefit Mr. Pryor cited was the public's education on sustainable forestry practices. He further testified that NEFF's use and management of the subject property supported numerous wildlife species, because the various forest types, including hardwood and softwood, provided a diversity of habitats to one area. He also testified that the subject property served as a buffer to the abutting Dubuque Forest, because some wildlife species required larger forested blocks for their habitat.

Mr. Pryor further testified that another of NEFF's goals was the protection of water and air quality, wildlife habitat, and scenic and recreation values. NEFF contended that maintaining the subject property in its "natural" condition was an important part of NEFF's charitable purposes, because it protected the water resources and land for the public's enjoyment, including recreational opportunities for hunters and hikers.

Photographs were entered into evidence depicting the entrance to the subject property from Stetson Road. These photographs showed the end of the paved portion of Stetson Road and its continuation into what Mr. Pryor called "a dirt or gravel road,"

covered in leaves, which lead into the subject property. Another picture depicted Stetson Road as it passed through the Ken Dubuque State Forest; there was a gate across the road. Mr. Pryor testified that the gate was installed to limit vehicular access along the subject property's roads, so as to prevent rutting and erosion and the consequent negative impacts to water quality. Another picture showed a grassy parking area with one parked car. Mr. Pryor testified that NEFF did not maintain a larger paved or groomed parking area because, first, a larger parking area was already maintained at nearby Ken Dubuque State Forest and NEFF "didn't feel that [the subject] property had enough public use to warrant improving our parking area here," and second, NEFF had encountered problems with public access: "A lot of our remote properties with parking areas invite dumping of trash, kids going in and partying and leaving trash behind, and other vandalism, in terms of – you know, cutting down trees and other things like that."

Mr. Pryor testified that the subject property was closed to the public during a timber harvesting, which typically occurred at NEFF's properties "maybe on[c]e every ten to twenty years; sometimes more often, sometimes less, depending on the condition of the property." He testified that a timbering operation could last three to six months.

Finally, Mr. Pryor testified to the information on the subject property disseminated by NEFF. In addition to the NEFF Community Forest booklet, the appellant submitted into evidence a printout of an NEFF website page that showed information on the subject property, including directions to the property and a map. Mr. Pryor addressed a pamphlet entered into evidence concerning a property owned by NEFF in Vermont. The pamphlet described the "interpretive points" along the trail, installed by NEFF, to educate visitors about the forest and sustainable forestry practices. He testified that NEFF had not prepared a similar report for the subject property, explaining that, when NEFF receives a grant for this type of project, it chooses properties that receive a lot of public usage "so we could reach more people and get more bang from our buck in terms of education."

On cross-examination, Mr. Pryor explained that membership into NEFF is a minimum of \$40, and that there were approximately a thousand members total in NEFF; he did not have information as to how many of those members were from Massachusetts. Mr. Pryor also admitted that NEFF's webpage conveying information about NEFF's

properties, including the subject property, was not functioning as of the time of the hearing, explaining that the webpage was experiencing “one big glitch” that NEFF staff was trying to fix. The missing information included maps depicting hiking trails through the subject property. Mr. Pryor testified that a map of the subject property depicting trails was on display at the Town Hall offices. Finally, Mr. Pryor admitted that “active forest management” often appears to be inactive: “We do not manage or have an activity on the property every year or maybe even every ten years. You know, the realities of forest management are so that you may go long periods of time with perceived inactivity, but that is actually just all part of our forest management plan and our intent of managing the property.”

Next, NEFF presented the testimony of Mr. Beals, its Director of Land Protection. Mr. Beals testified to NEFF’s charitable purposes. He first described the educational programs engaged in by NEFF. Mr. Beals identified newsletters previously published by NEFF that listed stewardship activities engaged in by NEFF, including public talks, Community Forest Discovery Days, and the establishment of a network of volunteer forest stewards. He further testified to some of NEFF’s educational publications that NEFF made with funds obtained through grants, including a pamphlet on invasive exotic plants that was funded through the U.S. Department of Agriculture. Mr. Beals further testified to NEFF’s involvement in initiatives with other charitable foundations, including the Aggregation Project, which he explained was a partnership with seven other Massachusetts land trusts whereby they pooled various conservation restrictions on private properties that private landowners had either donated or sold for no more than 75% of the appraised value. Another initiative mentioned was the North Quabbin Woods project funded by the Ford Foundation, whereby the organizations promoted sustainable forestry in local economically depressed areas. Mr. Beals testified that foresters, as well as the University of Massachusetts and other state agencies, turned to NEFF as a resource for conservation projects throughout the state.

Mr. Beals stated that NEFF realized a total of \$281,436 from the sale of timber during 2008 from all of its properties, which was a typical amount of yearly timber income for NEFF. Mr. Beals testified that this income funded approximately 20 to 30 percent of NEFF’s operating budget.

Next, the assessors presented their case-in-chief. Virginia Gabert, an administrative assistant with the assessors, first presented a statement on behalf of the appellee. She testified that no evidence had been provided to the assessors from the appellant indicating that NEFF occupied and used the subject property in an active and ongoing basis in order to fulfill its mission to educate, through practical demonstration, conservation and sound management of forest lands. She also testified that no evidence had been provided to the assessors to indicate that NEFF's use of the subject property benefited a large and indefinite class of beneficiaries. She cited the lack of signage on the property and the lack of active links on NEFF's website indicating how the public could access the property.

Ms. Gabert then offered several items of correspondence between her office and NEFF regarding the assessors' requests for further information as to the purportedly charitable occupation and use of the subject property by NEFF. By a letter dated November 4, 2009, Ms. Gabert explained to NEFF that no application for exemption for NEFF was on file. Ms. Gabert enclosed a copy of an application with the letter, and requested that NEFF "specifically provide information showing that the property is actively being used for your stated charitable purposes." NEFF responded by remitting a copy of an application for exemption, which the assessors received on November 24, 2009, in which NEFF described its corporate purposes, generally, as being to increase the production of timber through its practices of forest management; to educate the public, through practical demonstration, on forestland use and management; and to promote better methods in the protection, development and marketing of forest resources and products. By letter dated December 1, 2009, the assessors explained to NEFF that the information contained in its application for exemption was not sufficient to demonstrate its entitlement to an exemption. In particular, NEFF needed to provide them with Forms 3 ABC, 990 and PC, its articles of incorporation and its charter or organization by-laws, as well as information proving that an ongoing, charitable use was the principal use of the subject property: "the organization can not just passively own the land." By a third letter, dated February 26, 2010, the assessors acknowledged receipt of NEFF's Forms 3ABC, 990 and PC for the subject property, but reminded NEFF that it still had not received the other information requested by its December 1, 2009 letter, including

NEFF's articles of organization, charter or organization by-laws, as well as a description of the charitable activities and NEFF's regular, active use of the property.

Finally, by letter dated March 31, 2010, NEFF responded to the assessors' requests for additional documentation. NEFF classified its charitable purposes as (1) to educate the public about the benefits of providing clean water, wildlife habitats, and recreational opportunities through its conservation activities; (2) to educate the public about the benefits of sustainable forest management by demonstrating its harvesting methods; and (3) protecting forest lands for the purposes of saving open space "and advancing the science of silviculture." The letter noted that the next timber harvest at the subject property was "planned for some time between 2010 and 2012." Before the harvest, NEFF would invite town officials, abutters and the public for a pre-harvest tour to explain the operation and why it is being performed, then "[i]f there is sufficient interest, we also conduct post-harvest tours to discuss the results."

Ms. Gabert testified that the assessors had requested information regarding how NEFF was publicizing that the subject property was open to the public. Ms. Gabert explained that the subject property is located at the end of a dead end road, "just beyond a privately owned parcel that occupies both sides of the road and gives the appearance that the road is their driveway" as Stetson Road approaches and passes between the Kimball's house and garage. Ms. Gabert testified that there were no signs along the road indicating a public access to the subject property.

On the basis of its subsidiary findings, the Board ultimately found little evidence to support a charitable exemption for the subject property. As will be explained in the Opinion, the Board found that forest management was not a traditionally charitable endeavor; therefore, the Board was required to examine whether NEFF's ownership and occupation of the subject property served a sufficiently large or fluid class of beneficiaries and did not merely benefit a limited class of beneficiaries.

The Board first looked to whether NEFF occupied the subject property for its stated charitable purposes. While Mr. Beal testified to large initiatives occurring across the country involving other charitable foundations, he offered little detail as to NEFF's particular work in those areas. NEFF presented at best vague testimony of what it deemed "active management" of the subject property, with evidence of only one public

activity, a precut educational walk, which would be publicized merely to abutters of the subject property and NEFF members “in the immediate area.” The Board thus found that NEFF did not occupy the subject property in furtherance of its stated charitable purpose.

The Board next looked to how available the subject property was to the public. The appellant failed to prove that it had made sufficient effort to inform the public that the subject property was open for public recreation. The subject property’s entrance was at the end of a dirt road passing between private buildings, which appeared to be an extension of a private driveway. Moreover, the subject property’s public availability was not well marked with signs; in fact, the gate across its access along Stetson Road and the lack of a paved driveway specifically discouraged public usage. The Board found that inclusion in NEFF’s narrowly distributed Community Forest booklet did not sufficiently publicize the subject property’s availability for public usage, and as admitted by NEFF, there was no information on NEFF’s website on the subject property’s existence and its availability for usage by the community. The Board thus found that the subject property did not appear to be open for public usage, it was not easily accessible to the public, and NEFF failed to sufficiently inform the public that the subject property was available for general usage.

On the basis of these findings of fact, the Board found that the subject property was not owned and occupied by a charitable organization in furtherance of a charitable purpose under the exemption at issue. As a result, the Board found and ruled that the subject property was not exempt from real estate tax. The Board therefore issued a decision for the appellee in this appeal.

## **OPINION**

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. General Laws c. 59, § 5 lists the classes of property which shall be exempt from taxation. Specifically, § 5, Clause Third, exempts from taxation all “personal property of a charitable organization, . . . and real estate owned by . . . and occupied by it or its officers for the purposes for which it is organized . . . .” G.L. c. 59, § 5, Clause Third (hereinafter “Clause Third”). While public policy permits reasonable tax exemptions, “taxation is the general rule” and therefore

“statutes granting exemptions from taxation are strictly construed.” *Animal Rescue League of Boston v. Assessors of Bourne*, 310 Mass. 330, 332 (1941).

In the instant appeal, the appellant is recognized as a charitable corporation pursuant to G.L. c. 180. However, the Board has repeatedly found that an organization’s charitable-exemption status “is not dispositive in determining whether its property qualifies for the Massachusetts property tax exemption.” *Jewish Geriatric Services, Inc. v. Assessors of Longmeadow*, Mass. ATB Findings of Fact and Reports 2002-337, 358-9, *aff’d*, 61 Mass. App. Ct. 73 (2004) (citing *H-C Health Services v. Assessors of South Hadley*, 42 Mass. App. Ct. 596, *rev. denied*, 425 Mass. 1104 (1997)). “The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization ‘must prove that it is in fact so conducted that in actual operation it is a public charity.’” *Western Massachusetts Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 102 (2001) (quoting *Jacob’s Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313 (1946)). “The burden of establishing entitlement to the charitable exemption lies with the taxpayer.” *Western Massachusetts Lifecare Corp.*, 434 Mass. at 101 (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).

Traditionally, in determining whether a charitable organization’s occupation of a parcel of property qualified for the Clause Third exemption, Massachusetts courts and the Board have focused on several factors, which include, but are not limited to: “whether the organization provides low-cost or free services to those unable to pay[;] whether it charges fees for its services and how much those fees are[;] whether it offers its services to a large or ‘fluid’ group of beneficiaries and how large and fluid that group is[;] whether the organization provides its services to those from all segments of society and from all walks of life[;] and whether the organization limits its services to those who fulfill certain qualifications and how those limitations help advance the organization’s charitable purposes.” *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729,

732-33 (2008) (citing *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009)).

In *New Habitat, Inc.*, the Supreme Judicial Court offered a new “interpretive lens” through which to view Clause Third exemption claims. *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 703. Specifically, *New Habitat, Inc.* “conditions the importance of [the above] previously established factors on the extent to which ‘the dominant purposes and methods of the organization’ are traditionally charitable.” *Id.* (quoting *New Habitat, Inc.*, 415 Mass. at 733). In other words, “[t]he closer an organization’s dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in [the] interpretation of the organization’s charitable status . . . [t]he farther an organization’s dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be.” *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 705.

The court in *New Habitat, Inc.*, quoting a long-standing charitable-exemption precedent, characterized the “traditional objects and methods” of a Clause 3 charity as follows:

“A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either *by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.*”

*New Habitat, Inc.*, 451 Mass. at 732 (quoting *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867) (emphasis added)).

NEFF maintained that it provided “educational” activities to the public, by means of distributing information and inviting the public to come and learn about sustainable forestry at the subject property. “[A]n educational institution of a public charitable nature falls within” the exemption provided by Clause Third. *Lasell Village, Inc. v. Assessors of Newton*, 67 Mass. App. Ct. 414, 419 (2006) (quoting *Cumington Sch. of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 602 (1977)). In order to be exempt under Clause Third as an educational institution, the organization: (1) must “make a contribution to education;” and (2) education or the advancement of education

must be the institution's "dominant activity." *Cumington Sch. of the Arts, Inc.*, 373 Mass. at 603. A contribution to education may include providing a general benefit to society. See, e.g., *Boston Symphony Orchestra*, 294 Mass. at 255 (recognizing that fulfilling a general purpose to educate the public in the knowledge of music might well be charitable by advancing the culture); *Molly Varnum Chapter, D.A.R. v. Lowell*, 204 Mass. 487, 493 (1910) (recognizing preservation of historical data concerning Revolutionary War for education of the public is a charitable purpose); *Massachusetts Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24, 27 (1886) (recognizing education of public on issues of animal cruelty as charitable).

A contribution to education may also include providing education to a relatively small class of individuals, so long as those receiving the benefit are drawn from an indefinite class of persons. *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 539 (1956) (recognizing that seminary for training of priests that provided study of theology, Scripture and Latin, although not a specific benefit to the public at large, was charitable because education provided to an indefinite class of persons who change from year to year); *Assessors of Boston v. Garland School of Home Making*, 296 Mass. 378, 386-89 (1936) (ruling that providing education in the principles of home making -- including courses on psychology, home nursing, literature, drama and current events -- "is clearly educational" and, although not of benefit to the public at large, benefitted an indefinite class of persons).

Under the facts of the instant appeal, NEFF's purportedly educational endeavor consisted of promoting sustainable forestry practices to a limited class of beneficiaries -- owners of forest lands and nearby property owners. The means by which NEFF purported to accomplish this education at the subject property was by hosting a one-time pre-cut walk, notice of which was reportedly to be disseminated to a very limited class of NEFF members "in the immediate area" and abutters of the subject property. The Board found that this education endeavor, offered on such a limited basis to such a limited class of beneficiaries, was not sufficient in scope such that it could reasonably be considered to be of benefit to the public and not sufficiently akin to the activities specifically recognized as "education" in the above-cited cases.

Moreover, because the harvesting of timber occurred so infrequently at the subject property, the Board found that educating about sustainable forestry practices was not the dominant purpose of NEFF. Rather, the Board found that NEFF's dominant purpose was to maintain forest land, and any "educational" activities it provided were "minimal and at best ancillary to its primary purpose." *Massachusetts Youth Soccer Ass'n, Inc. v. Assessors of Lancaster*, Mass. ATB Findings of Fact and Reports 2012-660, 678 (citing *Lasell Village, Inc.*, 67 Mass. App. Ct. at 421-22; *Harvard Community Health Plan, Inc. v. Assessors of Cambridge*, 384 Mass. 536, 544 (1981)). Accordingly, for all of the above reasons, the Board ruled that the activities of NEFF at the subject property did not qualify as a "contribution to education" and thus were not traditionally charitable under the relevant Massachusetts case law.

The Board therefore ruled that, while promoting sustainable forestry practices may provide some public benefit, the activities of NEFF did not "bring the minds or hearts [of persons] under the influence of education or religion," "reliev[e] their bodies from disease, suffering or constraint," "assist[] them to establish themselves in life," or "erect[] or maintain[] public buildings or works." *Id.* Therefore, NEFF's purposes and activities, though laudable, did not fit into the established realm of traditional charities according to Massachusetts case law.

"The more remote the objects and methods are from traditionally charitable purposes and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government." *New Habitat, Inc.*, 451 Mass. at 733 (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 718 (1944)); *see also Massachusetts Medical Society v. Assessors of Boston*, 340 Mass. 327, 331-2 (1960). Therefore, in determining whether NEFF's activities at the subject property were in fact charitable for Clause Third purposes, the Board considered other factors, including whether NEFF's benefits were readily available to a sufficiently inclusive segment of the population, *Jewish Geriatric Services, Inc.*, Mass. ATB Findings of Fact and Reports at 2002-359 (citing *Western Massachusetts Lifecare Corp.*, 434 Mass. at 105), and whether NEFF's ownership and occupation of the subject property "perform[s] activities which advance the public good, thereby relieving the burdens of government to do so." *Home for Aged People in Fall River v. Assessors*

*of Fall River*, Mass. ATB Findings of Fact and Reports 2011-370, 400 (quoting *Sturdy Memorial Foundation v. Assessors of North Attleborough*, Mass. ATB Findings of Fact and Reports 2002-203, 224, *aff'd*, 60 Mass. App. Ct. 573 (2004)).

The facts of this appeal are similar to those of *Brookline Conservation Land Trust v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports 2008-679. In that appeal, the Brookline Conservation Land Trust, a recognized § 501(c)(3) organization, held three tracts of land, purportedly on behalf of the town for conservation purposes, namely the preservation of open space, which was reported to be an issue of high priority for the citizens. *Id.* at 682. The facts revealed, however, that the Brookline Conservation Land Trust was holding the properties in a very closed manner:

Contrary to appellant's contention, the subject properties do not appear to be open to the general public. The parcels are, in large part, barricaded with walls, fences, and chains, and "private" and "no trespassing" signs appear along the periphery of the subject properties. While portions of the property may not be completely barricaded, they are still not easily accessible by the public.

*Id.* at 692-93. Based on the closed manner in which the taxpayer maintained the property, the Board found that it held the properties "for the primary benefit of the immediate neighborhood in which the three parcels are located," as opposed to the public good. *Id.* at 692-93. Therefore, "[d]espite the fact that appellant was recognized as a supporting organization of the Town, and that the preservation of open space may have been recognized by the Brookline Conservation Commission as an important goal for the citizens of the Town," the Board ruled that the properties did not qualify for the Clause Third exemption. *Id.* at 695.

In the instant appeal, while there may be no "Private" or "No Trespassing" signs as there were in *Brookline Conservation Land Trust*, the subject property nonetheless did not appear to be open to the general public. The subject property lacked sufficient signage alerting the public to its availability for public usage. Information was not disseminated to the public on any wide scale; its inclusion on a very narrowly distributed Community Forest booklet and a broken link on a website did not constitute sufficient dissemination to the public of the subject property's availability.

Moreover, the subject property was not easily accessible. It was situated at the end of a dirt road that passed between a private house and barn, and thus its entry had the

appearance of being a driveway within a private property. The gate across an access along Stetson Road prohibiting vehicular access, coupled with the lack of a paved driveway, which, as testified to by Mr. Beals, were specifically to discourage public usage, contributed to the subject property's perceived inaccessibility. "[T]he absence of public access to land has consistently proven fatal to a landowner's claim of charitable exemption." *Wing's Neck Conservation Foundation, Inc. v. Assessors of Bourne*, Mass. ATB Findings of Fact and Reports 2003-329, 343 (citing *Animal Rescue League v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 2000-96, *aff'd*, 54 Mass. App. Ct. 1113 (2002) and *Nature Preserve, Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 2000-796).

Finally, while the appellant contended that it publicized the public availability of the subject property and its pre-cut educational walk, the Board found that its efforts fell short of the publication necessary for a Clause Third property. "Merely listing the subject properties on a map as conservation land owned by appellant is not an open invitation to the public to enter the properties," nor are invitations to a one-time event, targeted to immediate abutters and nearby members of NEFF as opposed to the community at large. *Brookline Conservation Land Trust*, Mass. ATB Findings of Fact and Reports at 2008-694.

NEFF countered that its involvement in the subject property promoted an environmental benefit, namely, the preservation of a habitat for diverse species. However, while the preservation of nature may be a laudable goal, "simply keeping land open and allowing its natural habitat to flourish is not sufficiently charitable. Appellant must demonstrate 'an *active appropriation* to the immediate uses of the charitable cause for which the owner was organized.'" (quoting *Assessors of Boston v. The Vincent Club*, 351 Mass. 10, 14 (1966) (emphasis added) (also citing *Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage*, 225 Mass. 418, 421 (1917))). Here, the evidence established that NEFF held the subject property in a seemingly closed manner and failed to demonstrate a sufficiently active appropriation of the subject property to achieve a public benefit.

The instant appeal is also akin to *Forges Farm, Inc. v. Assessors of Plymouth*, Mass. ATB Findings of Fact and Reports 2007-1197. That appeal pertained to land

purported to be held for conservation purposes, specifically to reduce “use pressure” on a river watershed, which the taxpayer believed to be threatened by a nearby sewer treatment plant. As in the instant appeal, the assessors there maintained that the ownership of the property at issue did not benefit a sufficiently large and indefinite class of beneficiaries but merely benefitted the taxpayer and other surrounding landowners.

The Board there made key findings similar to those made in the instant appeal:

[B]y Forges’ own admission . . . the subject property was not accessible to the public. Rather, . . . [members of the public] would have to contact the officers of Forges Farm, Inc. in order to gain access. Although Forges claimed that it would allow access to those who contacted its officers, the land is not marked with any sort of sign indicating that access can be attained in this manner, and Forges has not made any other attempt to inform the public that the subject property is accessible.

*Forges Farm, Inc.*, Mass. ATB Findings of Fact and Reports at 2007-1201, 1202.

The Board here similarly found that there was a lack of signage along Stetson Road, the public entry to the subject property, notifying the public that the subject property was open to public access, and its website also lacked information about the subject property. Further, the taxpayer in Forges Farm offered no evidence of active appropriations at the subject property that furthered its organization’s charitable purpose, including educational classes, the maintenance of trails or research conducted at that property. *Forges Farm, Inc.*, Mass. ATB Findings of Fact and Reports at 2007-1202. Here, NEFF offered minimal evidence of active appropriations, including testimony regarding just one precut educational walk, which was reportedly advertised very minimally to abutters and neighboring NEFF members. As in *Forges Farm, Inc.*, NEFF’s lack of publicity and active appropriations of the subject property were fatal to the appellant’s claim to a Clause Third exemption.

A factor to be considered in determining if an organization is operating as a public charity is “whether it perform[s] activities which advance the public good, thereby relieving the burdens of government to do so.” *Home for Aged People in Fall River*, Mass. ATB Findings of Fact and Reports at 2011-400 (quoting *Sturdy Memorial Foundation*, Mass. ATB Findings of Fact and Reports at 2002-224). “The fact that an organization provides some service that would, in its absence, have to be provided by the government, ‘is frequently put forward as the fundamental reason for exempting charities

from taxation.” *Western Massachusetts Lifecare Corp.*, 434 Mass. at 102 (quoting *Cunningham Foundation*, 305 Mass. at 418). In the instant appeal, however, the Board found that NEFF failed to prove how its actions “advance[d] the public good, thereby relieving the burdens of government to do so.” *Home for Aged People*, Mass. ATB Findings of Fact and Reports at 2011-403. While there may be some laudable benefits to educating landowners on sustainable forestry practices, no burden of government was alleviated and no other charitable purpose was achieved by means of NEFF’s occupation of the subject property. “Thus, although many activities and services are commendable, laudable and socially useful, they do not necessarily come within the definition of ‘charitable’ for purposes of the exemption.” *Western Massachusetts Lifecare Corp.*, 434 Mass. at 103. *See also Skating Club of Boston v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2007-193, 211 (ruling that the property of a figure skating club with a mission “to foster good feeling among its members and promote interest in the art of skating” and whose activities focused on developing elite skaters was not entitled to the Clause Third exemption).

Finally, G.L. c. 61A provides for favorable tax treatment for forest land that is maintained in accordance with a forest management plan. The fact that Chapter 61A offers a reduction in real estate tax, as opposed to a full exemption, indicates that the Legislature did not intend to exempt forest land completely from tax, but only to provide a reduced tax burden.

### Conclusion

“[A]lthough many activities and services are commendable, laudable and socially useful, they do not necessarily come within the definition of ‘charitable’ for purposes of the exemption.” *Western Massachusetts Lifecare Corp.*, 434 Mass. at 103. Particularly when an organization holds real estate for purposes that are more “remote” from the more traditionally charitable purposes, the Board must “avoid unwarranted exemptions from the burdens of government.” *New Habitat, Inc.*, 451 Mass. at 733 (quoting *Boston Chamber of Commerce*, 315 Mass. at 718); *see also Skating Club of Boston*, Mass. ATB Findings of Fact and Reports at 2007-211 (ruling that the property of a figure skating club with a mission “to foster good feeling among its members and promote

interest in the art of skating” and whose activities focused on developing elite skaters was not entitled to the Clause Third exemption).

On the basis of all of the evidence and its findings of fact, the Board ultimately found and ruled that the appellant failed to meet its burden of proving that it occupied and used the subject property in furtherance of a traditional or an otherwise accepted charitable purpose within the meaning of Clause Third.

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

**THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**SISTERS OF PROVIDENCE      v.      BOARD OF ASSESSORS  
a/k/a SISTERS OF                      OF THE TOWN OF PROVIDENCE,  
INC.    WEST SPRINGFIELD**

Docket No. F310872

Promulgated:  
July 17, 2013

**ATB 2013-769**

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee, Board of Assessors of the Town of West Springfield (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of West Springfield owned by and assessed to the Sisters of Providence (a/k/a Sisters of Providence, Inc.) (“Sisters of Providence” or “appellant”) for the fiscal year 2011 (“fiscal year at issue”).

Commissioner Rose heard the appeal. Chairman Hammond and Commissioners Scharaffa and Chmielinski joined him in a Revised Decision for the appellant, promulgated simultaneously with Findings of Fact and Report.

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.

*Robert L. Quinn*, Esq. for the appellant.

*Christopher Keefe*, assessor for the appellee.

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

On the basis of the Joint Stipulation of Facts and evidence entered into the record,<sup>1</sup> the Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2010, the appellant was the assessed owner of a 13,067 square-foot parcel of land, identified on the assessors’ Map 86 as Block 8, Lot 2 and located at 686 Elm Street, West Springfield (“subject property”). For the fiscal year at issue, the assessors valued the subject property at \$186,700 and assessed a tax thereon, at the residential real estate rate of \$16.72 per thousand, in the total amount of \$3,121.62, plus a Community Preservation Act surcharge of \$14.50. The appellant timely paid the tax due without any interest. On January 21, 2011, the appellant timely filed an Application for Abatement with the assessors along with a copy of its Form 3-ABC<sup>2</sup> for the tax year at issue. On February 8, 2011, the assessors denied the appellant’s abatement application. On April 20, 2011, 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 this appeal.

The subject property is improved with a single-family, one-and-three-quarter-story, Cape Cod-style dwelling with wood shingles that was built in 1955 (“subject dwelling”). The subject dwelling has a living area of 1,836 square feet, including three bedrooms, as well as one full bathroom. The subject property is owned by the Sisters of Providence, a religious order of vocational sisters (“Sisters”) of the Roman Catholic religion. The Sisters of Providence is a charitable religious organization incorporated under the laws of the Commonwealth of Massachusetts pursuant to G.L. c. 180, and it has been granted Internal Revenue Code Section 501(c)(3) status by the Internal Revenue Service. The appellant purchased the subject property in 1980 and has used it as a convent to house its Sisters. The appellant has also designated it as a Formation House

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<sup>1</sup> The parties agreed to waive the hearing and instead presented these appeals on documentary submissions.

<sup>2</sup> Property held for religious purposes is exempt from the requirement to file a Form PC. G.L. c. 12, § 8F.

for women interested in becoming members of the Sisters of Providence. At all relevant times, there were four Sisters, members of the appellant, residing at the subject property. Prior to the fiscal year at issue, the appellee had never assessed real estate taxes on the subject property.

According to its Restated Articles of Organization, the purposes of the Sisters of Providence include, in relevant part:

(a) To establish and maintain an apostolic religious order of women, to teach and prepare women for religious life, and to care for and support the members of the religious order of the Sisters of Providence, so as to serve as an integral part of the Roman Catholic Church to carry out the charism and mission of the religious order of the Sisters of Providence to communicate hope to those in need through ministries of healing attending particularly to the cry of the poor and the oppressed.

(b) In furtherance of its mission and charism to encourage, promote, support, sponsor, establish, maintain, organize, conduct, control, protect, preserve, plan, and/or own religious, educational, scientific and charitable ministries, institutions, and/or programs devoted to improving the health and welfare of all persons and providing access to resources aimed at promoting life and health, including, but not limited to . . . wellness programs, health and human service programs of all kinds, and other facilities or programs, incidental thereto.

The appellant also submitted a historical fact sheet, explaining that the Sisters of Providence sponsor or cosponsor a variety of ministries to carry out their stated mission, including: a long-term skilled nursing care facility called Mary's Meadow at Providence Place; an expansive healthcare system called Catholic Health East; Providence Ministries for the Needy; and a retreat center called Genesis Spiritual Life Center.

The appellant submitted affidavits from Sr. Kathleen Popko, SP, President; Sister Ann Horgan, SP; and Sr. Madeleine Joy, SP, who are members of the Sisters of Providence. Sr. Popko's affidavit explains that Canon Law requires that a woman interested in becoming a member of a religious order must make her Novitiate in "a house properly designated for this purpose, called a Formation House," because Canon Law requires that the novice be guided by a designated director. According to Sr. Popko, the subject property has served as the appellant's designated Formation House since 1999, with Sr. Ann Horgan living there as the designated Formation Director since that

time. Sr. Popko also attested that since the subject property was purchased in 1980, it has housed only members of the appellant.

The affidavits from Sr. Joy and Sr. Horan explained their individual ministries. Sr. Joy's affidavit stated that she ministers from within the subject property in her role as full-time Chaplain at Mercy Medical Center. Duties that she performs at the subject property include: providing cancer support for individuals and families approximately 15-20 hours a week; providing 24/7 over-the-phone spiritual care to individuals; and receiving individuals and families who come to the Sisters at the subject property for grief counseling. Sr. Joy is also a sponsor for a group of recovering alcoholics, from whom she receives periodic telephone calls and for whom she is "on call 24 hours a day, seven days a week." Sr. Horgan's affidavit stated that she performs administrative duties related to the operation of the Genesis Center from within the subject property, where she is on call "24 hours a day, seven days a week." She also attested that she works approximately ten hours a week at the subject property on the duties specifically related to the appellant.

The appellee did not dispute any of the facts stated in the Sisters' affidavits. The Board found the content of these affidavits to be consistent with the expectations and duties of the Sisters as stated in the Restated Articles of Organization of the Sisters of Providence and credible.

On the basis of its subsidiary findings, the Board ultimately found and ruled that the Sisters of Providence, not merely the individual Sisters, occupied the subject property. The service ministries of the Sisters of Providence were performed by the Sisters at the subject property. The subject property was actively appropriated for the performance of ministry-related work, including space in which to receive visitors for in-person counseling and for over-the-phone counseling, both on a 24-hours-a-day, seven-days-a-week basis. Sr. Horan additionally used the subject property to conduct her administrative duties related to the appellant. As will be further explained in the Opinion, the Board thus found that, because the Sisters conducted work consistent with and in furtherance of the mission of the appellant at the subject property, the subject property was occupied by the appellant.

The Board further found that the appellant's occupation of the subject was for its charitable purposes. The Sisters' ministries performed at the subject property included: assisting people with gaining and maintaining sobriety; providing comfort and support for individuals and families affected by cancer; grief counseling; spiritual counseling; and administrative tasks related to the operation and maintenance of a spiritual retreat home available for public use. The Board found that these ministries were specifically designed to bring the hearts and minds of the beneficiaries under the influence of religion and to relieve their minds and bodies from illness, addiction and suffering. The Board, therefore, found that these ministries were the kinds of activities that are recognized as traditionally charitable endeavors.

The Board thus found and ruled that the appellant occupied the subject property in furtherance of traditionally recognized charitable purposes. Accordingly, the Board issued a revised decision for the appellant in the instant appeal and granted an abatement in the amount of \$3,136.12.

### 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, Third ("Clause Third"), which exempts from taxation all "real estate owned by . . . a charitable organization and occupied by it or its officers for the purposes for which it is organized." A taxpayer claiming exemption under Clause Third must prove that the property is owned by a charitable organization, and that the organization occupies it for its charitable purposes. *See Jewish Geriatric Services, Inc. v. Assessors of Longmeadow*, Mass. ATB Findings of Fact and Reports 2002-337, 351, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing *Assessors of Hamilton v. Iron Rail Fund of Girls Club of America*, 367 Mass. 301, 306 (1975)). The taxpayer bears the burden of proving that its ownership and occupation of the subject property comes within the express words of the exemption from taxation. *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)).

**1. The services provided by the appellant at the subject property were traditionally charitable in nature.**

For several decades, courts have been using several “nondeterminative” factors in analyzing whether an organization is operating as a public charity. These include: whether the entity provides free or low-cost services to those unable to pay (*New England Legal Found. v. Assessors of Boston*, 423 Mass. 602, 610 (1996)); whether, and how much, it charges fees for its services (*Assessors of Boston v. Garland Sch. of Home Making*, 296 Mass. 378, 390, (1937)); whether it provides services to a large and “fluid” group of individuals (*New England Legal Found.*, 423 Mass. at 612; *Cumington Sch. of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 601, (1977)); whether its services are available to those from all walks of life (*Harvard Community Health Plan, Inc. v. Assessors of Cambridge*, 384 Mass. 536, 541 (1981)); and whether its services are limited to those who fulfill certain qualifications and, if so, how those limitations help advance the organization’s charitable purposes (*Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 103-104 (2001); *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 256 (1936)).

In 2008, the Supreme Judicial Court clarified the weight to be given to the above factors in *New Habitat*, in which it considered whether a non-profit organization providing long-term housing for persons with acquired brain injury was a charitable organization for the purposes of Clause Third. The court in *New Habitat*, quoting a long-standing charitable-exemption precedent, characterized the “traditional objects and methods” of a Clause Third charity as follows:

“A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either *by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life*, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.”

*New Habitat*, 451 Mass. at 732 (quoting *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867)) (emphasis added). *New Habitat*'s dominant purpose was the provision of housing and services to persons with acquired brain injury who could not care for themselves, and the Court ruled that this purpose was traditionally charitable. *Id.* at 734 (internal citations omitted).

*New Habitat* made clear that, when an organization's purposes and methods were determined to be traditionally charitable, less significance should be placed on the factors traditionally employed in concluding that it qualified for the exemption. *Id.* at 732. For example, although *New Habitat* served only a small number of individuals and charged considerable fees,<sup>3</sup> the Court held that those factors could not prevent it from being considered a charitable organization for purposes of Clause Third. Compare *Boston Symphony Orchestra*, 294 Mass. at 256 (finding that organization which charged significant fees for admission to concerts that were not accessible to a large segment of the public was not a charitable organization for purposes of Clause Third).

Viewing the instant appeal through this "interpretive lens,"<sup>4</sup> the Board found that the dominant purpose of the Sisters of Providence was "[t]o establish and maintain an apostolic religious order of women," the ultimate goal of which was "to serve as an integral part of the Roman Catholic Church" specifically by "communicat[ing] hope to those in need through ministries of healing attending particularly to the cry of the poor and the oppressed" and by "improving the health and welfare of all persons." The Board found that the individual Sisters residing at the subject property consistently carried out the charitable purpose of the Sisters of Providence at the subject property by performing their several ministries from there. Through their duties to the appellant and their individual ministries that included counseling recovering alcoholics, grieving families, people affected by cancer, and the profoundly mentally ill, and operating a spiritual retreat center and otherwise tending to the ministries of the appellant, the Sisters' activities comported with the purposes listed in the appellant's Articles of Organization.

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<sup>3</sup> The facility at issue in *New Habitat* had a maximum capacity of four residents. Since the time *New Habitat* began providing services, three individuals had applied to enter the program, and all three had been accepted. At the time relevant to the appeal, *New Habitat* housed only two residents. Further, the record reflected that *New Habitat* charged a \$150,000 entrance fee and monthly fees of \$17,000 to \$18,000. *New Habitat*, 451 Mass. at 730.

<sup>4</sup> *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009).

The Board further found that these ministries were specifically designed to “reliev[e] . . . bodies from disease, suffering, or constraint,” to “bring[] their minds or hearts under the influence of . . . religion,” and to “assist[] [those they minister to] to establish themselves in life.” *New Habitat*, 451 Mass. at 732; see also *Straight Ahead Ministries, Inc. v. Assessors of Hubbardston*, Mass. ATB Findings of Fact and Reports 2009-1, 13 (finding charitable purpose where organization worked with “wayward” juveniles to help assimilate them back into society).

The Board found and ruled that the services provided by the appellant were traditionally charitable in nature. Therefore, the Board found and ruled that the appellant met its burden of proving that it was a charitable organization for purposes of Clause Third.

**2. The subject property was occupied by the appellant through the Sisters who resided there.**

The Sisters did not live at the subject home merely for their own convenience. Their presence at the subject property was consistent with the service mission and purposes of the appellant, the charitable organization that owned the property. The Board found credible the affidavits of the individual Sisters, which stated that they performed their various ministries at the subject property, on a 24-hours-a-day, seven-days-a-week basis. The Board thus found that, because the subject property was appropriated by the Sisters for the conduct of the appellant’s work, the subject property was occupied by the appellant. See *Bridgewater State University Foundation v. Assessors of Bridgewater*, 463 Mass. 154, 158-9 (finding that appropriation of parcels at issue for the purpose for which the charitable organization was incorporated amounted to occupation by the charitable organization itself). Contrast *Jewish Geriatric Services*, Mass. ATB Findings of Fact and Reports at 2002-352 (finding individual residents of assisted living facility to be occupants of the property because, among other reasons, “G.L. c. 19D affords elderly residents of assisted living residences the rights and protections enjoyed by traditional tenants”), *aff’d*, 61 Mass. App. Ct. 73 (2004).



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

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

*David E. Wickles, Sr. and Lenora F. Wickles, pro se*, for the appellants.

*David J. Martel, Esq.* 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 ("Board") made the following findings of fact.

On January 1, 2010, the valuation and assessment date for the fiscal year at issue in this appeal, the appellants were the assessed owners of a parcel of real estate located at 157 Prospect Street in the Town of Hatfield ("subject property"). The parcel is improved with a wood-framed, split-level style house that was built in 1974. The main living level of the dwelling contains a finished living area of 3,498 square feet and a total of eight rooms, including four bedrooms as well as two full bathrooms and one half bathroom. The lower level is finished with a large "great room" with fireplace and built-in entertainment center, a game room, a den, a bathroom, and a utility room. Interior finishes include drywall and ceramic tile and hardwood floors. The exterior of the dwelling is vinyl siding, and it has an asphalt-shingled roof. The dwelling is heated by a forced-hot-water heating system which is fueled by oil, and there is also a central air-conditioning system. Additional features of the dwelling include an open porch and a three-car attached garage.

Also located on the subject property are three other garage-type structures. First, is a 5,670-square-foot, prefabricated, "Morton building" that is used to store Mr. Wickles' automobile collection. The structure is heated, has good lighting and is well maintained. Second, is a 3,600-square-foot "Tobacco barn" that was originally built in the 1940s and now has ribbed metal panels bolted to the roof and walls. This structure

is used to store the appellants' lawn and garden equipment and recreational vehicles, and is in average or typical condition.

Finally, located at the rear of the subject property is a 4,860-square-foot, high-bay prefabricated Morton building used for the appellants' trucking business, Dave Wickles Truck Leasing. The appellants' business provides roll-off dumpsters to various sites and then transports and empties the dumpsters at landfills. The appellants also use a portion of the subject dwelling, including two bedrooms and a half bathroom, as a home office for their trucking business.

The subject property is situated in a rural residential area. However, the appellants have been granted a special permit for the storage and repair of vehicles and equipment used in their trucking business. Therefore, the subject property is a non-conforming legal use.

For the fiscal year at issue, the assessors valued the subject property at \$851,400 and assessed a tax thereon, at the rate of \$10.84, in the total amount of \$9,473.54.<sup>1</sup> On January 20, 2011, in accordance with G.L. c. 59, § 59, the appellants timely filed an abatement application with the assessors. The appellants' abatement application was denied by the assessors on March 30, 2011.

On April 4, 2011, the assessors committed to the Collector of Taxes for Hatfield a warrant for the collection of a revised assessment against the appellants of an additional tax of \$1,208.66 on an additional value of \$111,500. On the same day, the assessors sent a letter to the appellants explaining that as part of the abatement process, a "comprehensive inspection" of the subject property was completed at the assessors' request by Patriot Properties. As a result of the inspection, the assessors determined that the subject property was mixed-use (residential/commercial) as opposed to primarily residential. Also, the assessors updated their records, removing items that no longer existed, and "revised where needed, grades and conditions."

Subsequently, the assessors issued a revised tax bill, pursuant to G.L. c. 59, § 76, increasing the total taxable valuation of the subject property to \$962,900 and assessed a revised tax of \$10,474.10<sup>2</sup> for the fiscal year at issue. The appellants timely paid the tax due without incurring interest and, on June 14, 2011, the appellants seasonably filed an

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<sup>1</sup> The tax assessed includes a Community Preservation Act ("CPA") surcharge of three percent.

<sup>2</sup> This amount includes the additional CPA surcharge.

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

In support of their claim that the subject property was overvalued for the fiscal year at issue, the appellants submitted a self-prepared report, including a written statement, a description and map of the subject property, and the subject property's initial and revised property record cards. The appellants also included the property record cards for six Morton buildings located in Hatfield that were built during the period of 1987 to 2004. These buildings varied in size from 1,800 square feet to 6,000 square feet with assessed values that ranged from \$15,400 to \$109,500, with an average assessed value of \$41,150, or \$13.09 per square foot. In contrast, the Morton buildings located on the subject property were valued at \$112,100 and \$118,200, or \$20.85 and \$23.07 per square foot, respectively.

Additionally, the appellants submitted the property record cards for eight Tobacco barns that were constructed between 1910 and 1940. These building varied in size from 600 square feet to 4,200 square feet with assessed values that ranged from \$4,800 to \$12,000 with an average assessed value of \$8,225, or \$4.00 per square foot; in contrast, the subject property's Tobacco barn was valued at \$54,200, or \$15.05 per square foot. Finally, the appellants included in their report a copy of the original fiscal year 2011 property record card with notations and recommendations garnered from Patriot Properties' March 2011 inspection of the subject property ("notated property record card"), which reflects the removal of certain items that no longer existed, including a pool, a shed, and a whirlpool. The notated property record card also includes a suggested decrease in value for the subject property's Tobacco Barn and Morton buildings.

The assessors presented their case-in-chief through the testimony of the assessor, Christopher Smith, and the introduction of several exhibits, including the requisite jurisdictional documentation and the subject property's initial and revised property record cards.<sup>3</sup> The assessors offered no evidence regarding the submission of a statement to the Commissioner listing the additional amounts assessed pursuant to G.L. c. 59, § 76.

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<sup>3</sup> Subsequent to Patriot Properties' inspection of the subject property, the assessors issued separate property record cards for the commercial and residential portions of the subject property. The property record card for the commercial portion indicated that the Morton building and the home-office were valued using the income-capitalization approach.

On the basis of all the evidence, the Board found that the assessors failed to return to the Commissioner a statement showing the amount of additional taxes assessed by means of the revised assessment, as required by G.L. c. 59, §§ 75 and 76. For the reasons stated in the following Opinion, the Board found that this requirement was a condition precedent to the validity of a revised assessment. Therefore, the Board found and ruled that the assessors' failure to meet this requirement rendered the revised assessment invalid.<sup>4</sup> Further, relying on the decreased value recommendations shown on the notated property record card and also the appellants' Tobacco barn and Morton building comparable assessment data, the Board found and ruled that the appellants met their burden of proving that the **subject property was overvalued** for the fiscal year at issue. After taking into consideration all of the evidence, the Board concluded that the fair cash value for the subject property for the fiscal year at issue was \$729,500.

Accordingly, the Board issued a decision for the appellants and granted an abatement in the amount of \$2,361.61, including the CPA surcharge.

## OPINION

### Revised Assessment

G. L. c. 59, § 76 provides that,

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

Revised assessments are not a part of the normal process of taxation but rather, they are a special right conferred by the Legislature to allow the assessors to make corrections in certain circumstances. *See United Orthodox Services, Inc. v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports 2004-515, 522. “Therefore, taxing

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<sup>4</sup> Because the Board found that the assessors failed to comply with the filing requirement of §§ 75 and 76, the Board made no findings or rulings as to whether the original assessment resulted from the assessors “unintentionally” valuing and classifying the subject property in an “incorrect manner” due to the reasons provided in §§ 75 and 76.

authorities must adhere to the specific requirements of the statutes granting the right to make these additional assessments.” *Id.* (quoting *Sithe New Boston LLC & Boston Edison Co. v. Boston*, Mass. ATB Findings of Fact and Reports 2001-931, 938-39). Accordingly, for the assessors to validly proceed with the revised assessment, it is “incumbent upon them to strictly adhere to the statutory requirements of § 75.” *Id.* at 523

One of the statutory requirements under § 75, also applicable to revised assessments under § 76, is that the assessors must “not later than June thirtieth of the taxable year . . . return to the commissioner a statement showing the amounts of additional taxes so assessed.” In *United Orthodox, supra*, the Board ruled that the statutory language of § 75 is “clear and unambiguous” regarding the requirement that the taxing authority submit a statement to the Commissioner. *United Orthodox*, Mass. ATB Findings of Fact and Reports at 2004-530-31 (citing *Sithe, supra*). The Department of Revenue’s Property Tax Bureau released Informational Guideline Release No. 90-215, makes clear that this submission is not perfunctory but is meant to “ensure that the additional amount assessed is not excessive.” *Id.* at 531. Failure to comply with this statutory requirement renders a revised assessment invalid. *Id.*

In the present appeal, the Board found that the assessors failed to file the required statement with the Commissioner prior to the June 30, 2010 deadline. Accordingly, the assessors failed to comply with the procedural requirement of § 75 and, the Board therefore found and ruled that the revised assessment was invalid.

### **Overvaluation**

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 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 fair market value than the value assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers . . .

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

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

In the present appeal, the appellants submitted a notated property record card that was prepared on behalf of the assessors in connection with the appellants’ abatement application process, which showed suggested valuation decreases in the subject property’s Tobacco barn and Morton buildings. The appellants also offered the property record cards of several properties that were improved with Tobacco barns and Morton buildings. The evidence showed that the Tobacco barns were assessed, on average, at \$4.00 per square foot compared to the subject property’s Tobacco barn that was assessed at \$15.05 per square foot. Further, the property record cards showed that the Morton buildings were assessed at \$13.09 per square foot compared to the subject property’s Morton buildings that were assessed at \$20.85 and \$23.07 per square foot.

The Board need not specify the exact manner in which it arrived at its valuation. *Jordan Marsh v. Assessors of Malden*, 359 Mass. 196, 110 (1971). The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 72 (1941). “The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the [B]oard.” *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

On the basis of all the evidence of record, the Board found and ruled that the appellants met their burden of proving a fair market value lower than both the initial and revised assessed values for the fiscal year at issue. After considering the evidence and relying primarily on the notated property record card and the appellants’ comparable assessment data, the Board found that the subject property’s fair market value was \$729,500 for the fiscal year at issue and the subject property was, therefore, overvalued.

Accordingly, the Board decided this appeal for the appellants and granted an abatement in the amount of \$2,361.61.

**THE APPELLATE TAX BOARD**

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

**A true copy,**

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