

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

128 UNION STREET, LLC

v. BOARD OF ASSESSORS OF
THE CITY OF NEW BEDFORD

Docket Nos. F333629, F334704

Promulgated:
March 5, 2019

These are appeals heard 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 New Bedford ("appellee" or "assessors") to abate taxes on a certain parcel of real estate located in New Bedford, owned by and assessed to 128 Union Street, LLC ("appellant") for fiscal years 2017 and 2018 ("fiscal years at issue").

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Good, and Elliott joined him in the decision for the appellant for both fiscal years at issue.

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.

Stephen Politi, Esq. for the appellant.

Burton Peltz, 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.

As of January 1, 2016 and January 1, 2017, the appellant was the assessed owner of a five-story retail and office building known as the DeMello International Center ("Center" or "subject property"). Relevant jurisdictional facts are summarized in the following table:

| Fiscal Year | Assessed Value | Tax Rate | Tax Amount | Taxes Timely Paid (Y/N) | Abatement Application Filed | Date of Denial | Date Petition Filed With Board |
|-------------|----------------|---------------------|---------------------------|-------------------------|-----------------------------|----------------|--------------------------------|
| 2017 | \$8,578,200 | \$36.03 per \$1,000 | \$313,654.59 ¹ | Y | 01/18/2017 | 04/10/2017 | 06/29/2017 |
| 2018 | \$8,677,800 | \$35.65 per \$1,000 | \$313,950.55 ² | Y | 01/05/2018 | 01/19/2018 | 01/24/2018 |

Based on these facts, the Board found and ruled that it had jurisdiction over the instant appeals.

The subject property was constructed in 2000 and has a gross building area of 128,320 square feet and a rentable area of 97,956 square feet. The Center also contains 3,183 square feet of rentable basement space. The Center is situated on a 1.987-acre lot, which includes 126 open, paved parking spaces.

¹ The tax amount includes a Community Preservation Act ("CPA") surcharge of \$4,582.04.

² The tax amount includes a CPA surcharge of \$4,586.98.

The appellant presented its case through the testimony of Jeffrey Pontiff, the broker for the sale of the subject property to the appellant, and the testimony and appraisal report of Robert L. Coleman, whom the Board qualified as an expert witness in the area of commercial real estate valuation ("appellant's appraiser").

First, Mr. Pontiff testified regarding the occupancy history of the Center. The Center was constructed as a single-occupant facility for Compass Bank, with a branch bank on the first floor and its operations on the upper floors. However, almost immediately, the fifth floor was leased out to multiple tenants. Compass Bank was subsequently acquired by Santander Bank, which then occupied the Center. Santander Bank consolidated its operations to Rhode Island and ultimately determined that the Center was no longer necessary for its operations.

The subject property was placed on the market in 2015 and sold to the appellant on March 4, 2016 for \$3,100,000. Mr. Pontiff testified that five offers were received ranging from \$1,750,000 to \$3,100,000. When Santander Bank vacated, the subject property was left with substantial vacancies, and the appellant undertook an aggressive leasing campaign. The actual vacancy rates for the Center were 52.18 percent for fiscal year 2017 and 36.72 percent for fiscal year 2018.

Next, the appellant's appraiser testified and presented his appraisal report regarding his opinion of value for the subject property. He relied solely on an income-capitalization approach to value the subject property. After determining that the subject property's highest and best use was its current use as a branch bank with owner-occupied or leased office spaces, he developed a gross income estimate utilizing the Center's existing leases as well as purportedly comparable leases from the market. He opined that the office space and the bank space would be leased at different rates. Based on his analysis, he determined fair rental values as follows: (1) for the office space: \$18.00 per square foot for fiscal year 2017 and \$18.30 per square foot for fiscal year 2018; (2) for the bank space: \$23.80 per square foot for fiscal year 2017 and \$24.00 per square foot for fiscal year 2018; and (3) for the basement space: \$5.00 per square foot for fiscal year 2017 and \$5.25 per square foot for fiscal year 2018.

The appellant's appraiser next reviewed expenses. Based on his review of market conditions and the occupancy history of the Center, he selected an overall 20 percent vacancy and collection-loss rate for both fiscal years at issue. For the majority of his expense estimates, he considered the Center's actual expenses as well as reviewed industry standards for similar properties in the Center's market. Based on this research, he found the subject property's actual expenses to be reasonable and in line with

industry standards. He adopted the majority of the Center's actual expenses in his operating-expense analysis.

However, with respect to one deduction in particular, the tenant improvement allowance, the appellant's appraiser relied less on actual expenses and more on his market research. He explained that tenant improvement expenses represent the cost of construction to suit the needs of a particular tenant, and that they are a common allowance in a lease. After his review of market conditions, the appellant's appraiser selected what he deemed a "conservative" estimate of \$1.75 per square foot. Yet according to the actual lease documents for the Center's tenants for leases that were entered into during the relevant time period, almost 90 percent of the space was leased on an "as-is" basis.

Next, the appellant's appraiser developed his capitalization rates by using a mortgage-to-equity ratio and a band-of-investment analysis, which yielded base capitalization rates of 8.00 percent for fiscal year 2017 and 7.75 percent for fiscal year 2018, to which he added the appropriate portions of the respective tax factors to arrive at overall capitalization rates of 11.603 percent for fiscal year 2017 and 11.315 percent for fiscal year 2018.

Based on his analyses, the appellant's appraiser arrived at his final opinions of value as follows: \$3,532,000 for fiscal year 2017; and \$3,743,000 for fiscal year 2018.

The appellee presented its case through the testimony of assistant assessor Carlos Amado ("assessors' witness"). The assessors' witness testified that he reviewed sales of other properties to analyze the subject assessment. He outlined four sales in particular. These purportedly comparable properties were built between 1860 and 1920, as compared with the Center's building date of 2000. Three of the properties had rentable areas ranging from 20,123 to 69,291 square feet, as compared with the Center's 97,956 square feet. The properties yielded a very wide range of sale prices between \$1,200,000 and \$9,650,000, or between \$32.21 and \$99.39 per square foot.

The assessors' witness also submitted an income-capitalization analysis. His gross potential income and capitalization rates were very similar to those of the appellant's appraiser. The biggest difference was the parties' expense estimates. Based on his research of the marketplace, the assessors' witness opined that the expense estimates of the appellant's appraiser were "somewhat excessive."

On the basis of the evidence, the Board found that overall the appellant's appraiser presented detailed, credible evidence of the Center's gross potential income, vacancy, most of its

expenses, and the capitalization rates for both fiscal years at issue. In contrast, the Board found that the assessors' witness provided purportedly comparable properties that were significantly older than the subject property and widely divergent from each other in size and thus were not sufficiently comparable to the Center to provide meaningful evidence of the Center's fair market value. The Board thus adopted the gross income, vacancy rates, most expenses, and the capitalization rates of the appellant's appraiser for both fiscal years at issue.

However, the Board found that a study of the Center's leases revealed little justification for the tenant-improvement allowance of \$1.75 per square foot used by the appellant's appraiser. Noting that almost 90 percent of the square footage that was leased during the relevant time period was "as is," the Board found that tenant allowances were by no means necessary given the Center's competitive market. The Board instead selected \$0.75 per square foot as a more reasonable tenant-improvement allowance based on the subject property's history and market conditions.

The basis of the Board's decision is summarized in the following chart:

| | Fiscal year 2017 | Fiscal year 2018 |
|------------------------------------|--------------------|--------------------|
| Gross potential income | \$1,840,087 | \$1,869,218 |
| - office space | - \$1,574,010 | - \$1,600,243 |
| - bank space | - \$ 250,162 | - \$ 252,264 |
| - basement | - \$ 15,915 | - \$ 16,711 |
| Vacancy @ 20% of above-grade space | (\$ 364,834) | (\$ 370,501) |
| Effective gross income | \$1,475,253 | \$1,498,717 |
| Operating expenses | (\$ 761,722) | (\$ 761,790) |
| Total allowances | (\$ 207,104) | (\$ 215,503) |
| Net operating income | \$ 506,427 | \$ 521,424 |
| /overall cap. rate | /11.603% | /11.315% |
| Indicated value | \$4,364,621 | \$4,608,255 |
| Rounded | \$4,360,000 | \$4,600,000 |

The Board thus found that the appellant met its burden of proving that the subject property was overvalued for both fiscal years at issue.

Accordingly, the Board issued abatements as follows:

| | Fiscal year 2017 | Fiscal year 2018 |
|-----------------|---------------------------|---------------------------|
| Assessment | \$8,578,200 | \$8,677,800 |
| Fair cash value | \$4,360,000 | \$4,600,000 |
| Overvaluation | \$4,218,200 | \$4,077,800 |
| Abatement | \$154,261.47 ³ | \$147,554.17 ⁴ |

³ Abatement includes CPA of \$2,279.73.

⁴ Abatement includes CPA of \$2,180.60.

OPINION

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

"The burden of proof is upon the [taxpayer] to make out its right as a matter of law to abatement of the tax." **Schlaiker v. Assessors of Great Barrington**, 365 Mass. 243, 245 (1974) (quoting **Judson Freight Forwarding Co. v. Commonwealth**, 242 Mass. 47, 55 (1922)). The appellant must show that it has complied with the statutory prerequisites to its appeal, **Cohen v. Assessors of Boston**, 344 Mass. 268, 271 (1962), and that the assessed valuation of its property was improper. See **Foxboro Assocs. v. Assessors of Foxborough**, 385 Mass. 679, 691 (1982). The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. **Schlaiker**, 365 Mass. at 245.

In determining fair cash value, all uses to which the property was or could reasonably be adapted on the relevant assessment dates should be considered. **Irving Saunders Trust v. Assessors of Boston**, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. **Id.** "In determining the property's highest and best use, consideration should be given to the

purpose for which the property is adapted." **Peterson v. Assessors of Boston**, Mass. ATB Findings of Fact and Reports 2002-573, 617 (citing APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 315-316 (12th ed., 2001)), *aff'd*, 62 Mass. App. Ct. 428 (2004). The Board agreed with the parties that the subject property's highest and best use was its continued use as a branch bank with leased office spaces.

Generally, real estate valuation experts, Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. **Correia v. New Bedford Redevelopment Auth.**, 375 Mass. 360, 362 (1978). "The board is not required to adopt any particular method of valuation." **Pepsi-Cola Bottling Co. v. Assessors of Boston**, 397 Mass. 447, 449 (1986). The use of the income-capitalization approach is appropriate when reliable market-sales data are not available. **Assessors of Weymouth v. Tammy Brook Co.**, 368 Mass. 810, 811 (1975); **Assessors of Lynnfield v. New England Oyster House, Inc.**, 362 Mass. 696, 701-02 (1972); **Assessors of Quincy v. Boston Consolidated Gas Co.**, 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. **Taunton Redevelopment Assocs. v. Assessors of Taunton**, 393 Mass. 293, 295 (1984). In these appeals, the Board agreed with the appellant's appraiser that the income-capitalization

approach was the most appropriate method to value the subject property.

"The direct capitalization of income method analyzes the property's capacity to generate income over a one-year period and converts the capacity into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved." *Olympia & York State St. Co. v. Assessors of Boston*, 428 Mass. 236, 239 (1998). "It is the net income that a property should be earning, not necessarily what it actually earns, that is the figure that should be capitalized." *Peterson v. Assessors of Boston*, 62 Mass. App. Ct. 428, 436 (2008) (emphasis in original). Accordingly, the income stream used in the income-capitalization method must reflect the property's earning capacity or economic rental value. *Pepsi-Cola Bottling Co.*, 397 Mass. at 451.

Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property's earning capacity. See *Correia v. New Bedford Redevelopment Auth.*, 5 Mass. App. Ct. 289, 293-94 (1977), *rev'd on other grounds*, 375 Mass. 360 (1978); *Library Services, Inc. v. Malden Redevelopment Auth.*, 9 Mass. App. Ct. 877, 878 (1980) (rescript). Vacancy rates must also be market based when determining fair cash value. *Donovan v. City of Haverhill*, 247 Mass. 69, 71 (1923). After

accounting for vacancy and rent losses, the net operating income is obtained by deducting the landlord's appropriate expenses. **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 610 (1984). The expenses should also reflect the market. *Id.*; see **Olympia & York State St. Co.**, 428 Mass. at 239, 245.

In the present appeals, the Board found that the projected rental income, vacancy, and the majority of the expenses of the appellant's appraiser were well supported and indicative of the Center's market and therefore credible evidence to be used in determining the Center's fair market value. However, the Board agreed with the assessors' witness that the overall expense figure of the appellant's appraiser was somewhat excessive. In particular, the Board found that his tenant-improvement expense was not justified by the subject property's market as reflected by the actual leases at the Center. Instead, the Board adopted a more reasonable tenant-improvement expense of \$0.75 per square foot.

Lastly, the capitalization rate selected should consider the return necessary to attract investment capital. **Taunton Redevelopment Assocs.**, 393 Mass. at 295. The Board found that the capitalization rates of the appellant's appraiser, which were very similar to the rates used by the assessors' witness, were reasonable and well supported.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Assocs. v. Assessors of Foxborough*, 385 Mass. 679, 683 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *New England Oyster House*, 362 Mass. at 702. In evaluating the evidence before it, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. *General Electric Co.*, 393 Mass. at 605; *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984).

Based on all the evidence presented in these appeals, and reasonable inferences drawn therefrom, the Board found and ruled that the appellant met its burden of proving that the subject property was overvalued for the fiscal years at issue.


Accordingly, the Board issued a decision for the appellant granting abatements in the amounts of \$154,261.47 for fiscal year 2017 and \$147,554.17 for fiscal year 2018.⁵

THE APPELLATE TAX BOARD

⁵ These amounts include the applicable portions of the CPA charges for each fiscal year at issue.

By: 
Thomas W. Hammond, Jr. Chairman

A true copy,

Attest: 
Clerk of the Board