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Current Developments in Municipal Law

Appellate Tax Board Cases

Book 2A

2016

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Appellate Tax Board Cases

Book 2A

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

96 ROCKPORT RD., LLC **ANDREW D'AVANZO, MANAGER**	**v.**	**BOARD OF ASSESSORS OF** **THE TOWN OF WESTON**

Docket No. F325301

Promulgated:
August 11, 2016

ATB 2016-375

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 Weston (the "assessors" or the "appellee"), to abate a tax on certain real estate located in Weston owned by and assessed to 96 Rockport Road, LLC (the "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2014 (the "fiscal year at issue").

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

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

Andrew D'Avanzo, pro se, for the appellant.

Eric Josephson, assessor, for the appellee.

FINDINGS OF FACT AND REPORT

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

On January 1, 2013, the appellant was the assessed owner of a 113,256-square-foot parcel of vacant real estate located in Weston at 96 Rockport Road (the "subject property").

For the fiscal year at issue, the assessors valued the subject property at $1,082,600 and assessed a tax thereon, at the rate of $12.73 per $1,000, in the total amount of $14,156.76, inclusive of a Community Preservation Act surcharge. Although the appellant's third and fourth quarter tax payments were paid late, the appellant paid an amount in excess of 75% of the average of its assessed property taxes for the preceding three fiscal years at issue by Monday, February 3, 2014[1] as well as 100% of the average of its assessed property taxes for the preceding

[1] The due date for payment of third quarter taxes is typically February 1st, but in 2014, that date fell on a Saturday. General Laws, c. 4, § 9 and G.L. c. 41, § 110A, provide, in pertinent part, that "when the day, or last day, for the performance of any act . . . required by statute" falls on a Saturday, Sunday, or legal holiday, it may be performed on the next succeeding business day.

three fiscal years at issue by the May 1, 2014 due date. Therefore, late payment of the appellant's third and fourth quarter tax bill was not an impediment to the Board's jurisdiction. G.L. c. 59, §§ 64 and 65.[2]

On Monday, February 3, 2014, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors. On April 29, 2014, the assessors granted a partial abatement, reducing the assessed value of the subject property to $829,600. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board on July 29, 2014. On the basis of these facts, the Board found and ruled that it had jurisdiction over the instant appeal.

Mr. D'Avanzo acquired the subject property in 1992. At that time, he commenced efforts to procure the proper permits and approvals necessary to build a home on the subject property. Although the evidence showed that he received at least some of these approvals, he did not build a home on the subject property at any time prior to the relevant date of valuation in this appeal.

The evidence indicated that the appellant also made efforts to sell the subject property, but was unable to do so. According to the Mr. D'Avanzo, his inability to attract a buyer was due to topographical and environmental issues – specifically, significant amounts of ledge and proximity to wetlands - which made the prospect of building on the subject property complicated and costly. Documents entered into the record, including the subject property's record card and other documents from the Town of Weston as well as documents from the Massachusetts Department of Environmental Protection, confirmed the existence of these topographical and environmental concerns. Notwithstanding these issues, the appellant applied for, and received, a building permit for the subject property from the Town of Weston on June 7, 2013.

It was the appellant's contention that the assessors erroneously valued the subject property as a buildable lot when, in his opinion, it was not a buildable lot on the relevant valuation date of January 1, 2013. The appellant contended that the assessors impermissibly took into consideration the building permit issued in June of 2013 in valuing the subject property as a buildable lot as of January of 2013. The appellant's opinion of value for the subject property was $260,000, which had been its assessed value in the year preceding the fiscal year at issue.

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

The assessors for their part introduced the testimony of Assessor Eric Josephson along with a substantial amount of documentary evidence, including the relevant jurisdictional documents and other historical documents pertaining to the subject property.

The documents offered by the assessors showed that a building permit was issued for the subject property in 1988, and approval ("Order of Conditions") was given for construction on the subject property by the Department of Environmental Protection in August of 2011. In addition, the assessors introduced a letter from the Town of Weston's Board of Public Health, dated March 20, 2012, stating that Mr. D'Avanzo had been given approval for the installation of a septic system on the subject property with a six-bedroom capacity.

On the basis of all of the evidence, the Board found that the appellant failed to meet his burden of proving that the assessed value of the subject property exceeded its fair cash value as of January 1, 2013. In reaching this determination, the Board rejected the appellant's argument that the subject property was not a buildable lot as of that date as the documentary evidence squarely refuted that assertion.

In making his claim, Mr. D'Avanzo placed considerable emphasis on a letter dated March 22, 2012 from the Town of Weston's building inspector, Robert Morra. In that letter, Mr. Morra responded to Mr. D'Avanzo's request to "confirm that 96 Rockport Road is a buildable lot." The letter stated that the subject property has "the necessary frontage and area" to be considered a lot according to zoning by-laws, and also states that "approvals have been issued by the Conservation Commission and the Board of Health for this property," but further notes that approval of a building permit is "subject to the applicant receiving all other necessary approvals[.]" It was Mr. D'Avanzo's position that Mr. Morra's failure to unequivocally state in this letter that the subject property was a buildable lot somehow proved that the town did not consider it to be a buildable lot at any time during 2012. The Board rejected this argument, and based on the evidence in its totality, concluded that the assessors did not err in valuing the subject property as a buildable lot for the fiscal year at issue.

The evidence showed that a building permit could, and did, issue for the subject property decades prior to the period relevant to this appeal. Moreover, the evidence showed that during 2011 and 2012, the appellant received the necessary approvals from the Department of Environmental Protection as well as Weston's Board of Public Health for the construction of a home on the subject property. The fact that no building was commenced on the subject property prior to January 1, 2013, or that it might have been costly to proceed with building thereon, did not alter the subject property's status as a buildable lot as of January 1, 2013.

Because the Board concluded that the assessors did not err in valuing the subject property as a buildable lot for fiscal year 2014, and the appellant offered no other evidence to establish that the assessed value of the subject property, as partially abated, exceeded its fair cash value, the Board found that the appellant failed to demonstrate his entitlement to an abatement. Accordingly, the Board issued a decision for the appellee in this appeal.

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 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). The 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).

In the present appeal, the appellant's primary argument was that the assessors erred in valuing the subject property as a buildable lot for the fiscal year at issue because, according to him, it was not a buildable lot on the relevant date of valuation. However, the Board rejected this argument as it was contradicted by the record. That evidence included documentation showing that the subject property had the necessary dimensional requirements to be considered a buildable lot by the town, and it also showed that a building permit had in fact been issued decades prior to the fiscal year at issue in this appeal.

Moreover, during the period leading up to the relevant date of valuation, the appellant had received several of the necessary approvals to commence building on the subject property. The fact that the appellant did not apply for, or receive, an actual building permit until after the relevant date of valuation does not mean that it was not a buildable lot as of that date. *See* ***Autumn Gates Estates, LLC & Fox Gate, LLC v. Assessors of Millbury,*** Mass. ATB Findings of Fact and Reports 2013-822, 850-51 (finding that where there was no legal impediment to procuring building permits, taxpayer's own failure to procure such permits did not mean the lots at issue were not buildable); *see also* ***Nelson v. Assessors of Wilmington***, Mass. ATB Findings of Fact and Reports, 2013-320, 329. Although the evidence supported the conclusion that the

subject property was impacted by various environmental and topographical issues, the existence of these issues did not compel the conclusion that the subject property was unbuildable. *See* ***Said and Jehad Abuzahra, Trustees v. Assessors of Rowley***, Mass. ATB Findings of Fact and Reports 2008-1514, 1519 (finding that property at issue was buildable land despite credible evidence of wetlands and topographical issues).

For the reasons stated above, the Board found and ruled that the appellant failed to meet its burden of proving that the assessed value of the subject property exceeded its fair cash value for the fiscal year at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

APPELLATE TAX BOARD

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

A true copy,
Attest:_____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

PAUL C. BERGMAN, TRUSTEE OF BERGMAN FAMILY TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF WILMINGTON**

Docket No. F322860

Promulgated:
September 28, 2015

ATB 2015-537

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the Town of Wilmington ("assessors" or "appellee"), to grant an application for property tax deferral relating to certain real estate located in Wilmington owned by Paul C. Bergman, trustee of the Bergman Family Trust ("appellant" and "Trust," respectively) for fiscal year 2014.

Chairman Hammond heard the appellee's Motion to Dismiss the appeal for lack of jurisdiction. Commissioners Scharaffa, Rose, Chmielinski and Good joined him in the decision for the appellee. These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Brian T. Corrigan, Esq. for the appellant.

John Richard Hucksam, Jr., Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits offered into evidence at the hearing of the appellee's Motion to Dismiss, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2013, the relevant assessment date for fiscal year 2014, the appellant was the owner of 21 Shady Lane Drive in Wilmington, a parcel of land improved with a single-family residence ("subject property"). The assessors valued the subject property at $310,700 for fiscal year 2014 and assessed a tax in the amount of $4,424.37. The appellant did not timely pay the tax and consequently incurred interest.

The appellant has resided at the subject property since 1958 and his mother, Helen Bergman, resided there with him until 2010, when she moved into a nursing home. In 1995, Ms. Bergman conveyed the subject property by deed to the Trust, of which Ms. Bergman was the sole trustee and in which Ms. Bergman and the appellant held equal fifty percent beneficial interests. During June of 2010, Mrs. Bergman resigned as trustee of the Trust and appointed the appellant sole successor trustee.

During March of 2012, the appellant, as trustee of the Trust, executed a Tax Deferral and Recovery Agreement with respect to the subject property under G.L. c. 59, § 5, Clause Forty-first A ("Clause Forty-first A"). Pursuant to the terms of Clause Forty-first A, the appellant filed an application for property tax deferral for fiscal year 2013, which the assessors granted. The assessors, however, denied the fiscal year 2014 application on February 14, 2014, having concluded that the appellant had not owned the subject property for five years as required by Clause Forty-first A. The appellant timely appealed the denial to the Board.

Based on the preceding facts, and for the reasons stated in the following Opinion, the Board found and ruled that it did not have jurisdiction to hear and decide this appeal. Accordingly, the Board issued a decision for the appellee.

OPINION

The principal issue presented for consideration in this appeal is whether the Board has jurisdiction to hear and decide the appeal where there is no dispute that the appellant failed to pay his tax bill timely and incurred interest.

Generally, a taxpayer aggrieved by assessors' refusal to abate a tax on real property may file an appeal with the Board, provided that:

> [I]f the tax due for the full fiscal year on a parcel of real estate is more than $3,000, said ***tax shall not be abated unless the full amount of said tax due has been paid without the incurring of any interest charges on any part of said tax*** pursuant to section fifty-seven of chapter fifty-nine of the General Laws.

G.L. c. 59, § 64 (emphasis added). The tax on the subject property exceeded the $3,000 threshold and, as noted, the tax due was not paid without incurring interest. Alternatively, a taxpayer may appeal to the Board if he has made a timely payment of tax which is at least equal to the average tax for the three preceding years. ***Assessors of New Braintree v. Pioneer Valley Academy, Inc***., 355 Mass. 610, 617 (1969); *see also* G.L. c. 59, § 64. The appellant did not dispute that he failed to satisfy the three year average payment requirement.

"The Board is a creature of statute and, therefore has no jurisdiction to entertain any proceeding for relief other than in a manner prescribed by statute." ***Pepperell Power Assoc. v. Assessors of Pepperell***, Mass. ATB Findings of Fact and Reports 1996-503, 507. "Adherence to the statutory prerequisites is essential 'to prosecution of appeal from refusals to abate taxes.'" ***Id.*** (quoting ***New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth***, 368 Mass. 745, 747 (1975)). Given that the appellant failed to satisfy the statutory prerequisites to filing an appeal, the Board is deprived of jurisdiction to hear and decide his appeal. *See also* ***Columbia Pontiac Co. v. Assessors of Boston***, 395 Mass. 1010, 1011 (1985); ***Fillipone v. Assessors of Newton***, Mass. ATB Findings of Fact and Reports 1995-216.

Finally, even assuming for the sake of argument that the Board were to have had jurisdiction in the present appeal, the appellant would not have prevailed on the merits of the case. Specifically, the appellant became trustee of the Trust during June of 2010, prior to which he held only a beneficial interest in the subject property. Clause Forty-first A, in pertinent part, requires that a person seeking to defer taxes on real property "has so owned and occupied as his domicile such real property . . . for five years." ***Id.*** There is ample precedent to support the conclusion that a mere beneficial interest in property will not satisfy ownership requirements for purposes of Clause Forty-first A. In ***Kirby v. Assessors of Medford***, 350 Mass. 386 (1966), an individual unsuccessfully sought a property exemption under G.L. c. 59, § 5, Clause Forty-first, which affords tax benefits to individuals over 70 years of age and imposes domicile and ownership constraints similar to those of Clause Forty-first A. The Supreme Judicial Court held that the taxpayer's beneficial ownership interest in the property at issue, which he had placed in a trust for which another individual served as trustee, did not satisfy the statute's five-year ownership requirement. ***Id.*** at 391.

In particular, the Court stated that Clause Forty-first mandated "not only ownership of a sufficient beneficial property interest, but also ownership of a record legal interest, as a condition of obtaining the exemption." ***Id.***

The Board also recently held that a veteran's exemption under G.L. c. 59, § 5 Clause Twenty-second had been properly denied where a veteran who otherwise qualified for the exemption failed to meet the exemption's ownership requirement because he held only a beneficial interest in the property for which the exemption was sought while his mother, as trustee, held legal title to the property. *See* ***Rheault v. Assessors of Oxford***, Mass. ATB Findings of Fact and Reports 2014-245 247,248. In reaching its conclusion in ***Rheault***, the Board relied, in large measure, on the holding in ***Kirby.*** Given the cited precedent and that the appellant held only a beneficial interest in the subject property until June of 2010, the Board was compelled to conclude that the appellant would not satisfy the five-year property ownership requirement provided by Clause Forty-first A.

In sum, the Board found and ruled that it did not have jurisdiction to hear and decide the present appeal and regardless, the appellant would not have qualified for tax deferral under Clause Forty-first A. Accordingly, the Board issued a decision for the appellee.

APPELLATE TAX BOARD

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

A true copy,
Attest:_____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

Docket No. X306850

BOXFORD FRIENDSHIP FOUNDATION, INC. Appellant.
BOARD OF ASSESSORS OF THE TOWN OF BOXFORD Appellee.
DECISION WITH FINDINGS

G.L. c. 44B, § 3(e)(3) provides an exemption from the CPA "for $100,000 of the value of ***each taxable parcel*** of residential real property." The subject property is a single taxable parcel; the units in which the residents live are not separate taxable parcels. Accordingly, appellant's argument is contrary to the plain meaning of § 3(e)(3).

Appellant further argues that the residents should be treated like members of a cooperative corporation for purposes of computing the resident's share of the CPA exemption. G.L. c. 44B, § 3(i) provides that:

With respect to real property owned by a cooperative corporation, as defined in section 4 of chapter 157B, that portion which is occupied by a member under a proprietary lease as the member's domicile shall be considered real property owned by that member for the purposes of exemptions provided under this section. The member's portion of the real estate shall be represented by the member's share or shares of stock in the cooperative corporation, and the percentage of that portion to the whole shall be determined by the percentage of the member's shares to the total outstanding stock of the corporation, including shares owned by the corporation.

Although appellant argues that it should be afforded the same treatment as a cooperative corporation, it is clear that it does not qualify for the treatment provided in § 3(i). First, to qualify under § 3(i), real estate must be owned by a "cooperative corporation, as defined in section 4 of chapter 157B." G.L. c. 157B, § 4 defines a cooperative corporation as a "corporation organized under" Chapter 157B. The appellant is, however, organized under Chapter 180, not Chapter 157B. Under G.L. c. 157B, § 7, the name of a cooperative corporation must also include the word "cooperative," which appellant's name does not. Further, as the language of § 3(i) makes clear, members of cooperative corporations own shares in the corporation; there is no indication that the residents of the subject property have any ownership interest in appellant.

While there may be similarities between appellant and a cooperative corporation, including the use of proprietary leases and ownership of property in the name of an entity other than the residents, mere similarity does not qualify appellant's residents for treatment equivalent to shareholders of a housing cooperative. See, ***e.g., Born v. Assessors of Cambridge***, 427 Mass. 790 (1998) (rejecting argument by shareholders of a cooperative corporation that they should be treated the same as condominium owners for purposes of residential exemption).

APPELLATE TAX BOARD

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

A true copy,
Attest:_____
Clerk of the Board
Date: Nov. 16, 2015

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

JOHN CAVE, EXECUTOR OF THE ESTATE OF ANN KROCHMAL	**v.**	**BOARD OF ASSESSORS OF THE TOWN OFWILMINGTON**

Docket Nos.: F314665
F314927[1]

Promulgated:
December 14, 2015

ATB 2015-594

These are appeals under the formal procedure pursuant to G.L. c. 61A, § 19 from the refusal of the Board of Assessors of the Town of Wilmington ("assessors" or "appellee") to accept or allow G.L. c. 61A ("Chapter 61A") applications for agricultural land classification for certain real estate in the Town of Wilmington assessed to John Cave, Executor of the Estate of Ann Krochmal ("appellant") for fiscal year 2013.

Chairman Hammond heard these appeals and was joined in the revised decision for the appellant by Commissioners Scharaffa, Rose, Chmielinski and Good. The revised decision is issued simultaneously with these findings of fact and report which are made pursuant to requests by the appellant and the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Rosemary Crowley, Esq. for the appellant.

John R. Hucksam, Jr., Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The appellant presented his case largely through the testimony of three individuals including himself, Mr. Gerard Kennedy, Director of the Division of Agriculture Conservation and Technical Services ("ACTS") for the Massachusetts Department of Agricultural Resources ("MDAR"), and Mr. Richard Corsetti, President of BMC Corporation. The assessors presented no witnesses.

Based on the testimony presented by the appellant, which was unrebutted and which the Appellate Tax Board ("Board") found credible in its entirety, as well as exhibits entered into evidence by both parties at the hearing of these appeals, the Board made the following findings of fact.

[1] The Board consolidated the appeals, both of which, as discussed below, relate to the same issues and the same fiscal year.

Factual Background

The property at issue in these appeals (the "Farm") is a modestly improved 69.36-acre parcel of land located in Wilmington. The Farm, which is part of a larger farm that includes land in adjacent Tewksbury, has been actively farmed since the 1800s. The Wilmington and Tewksbury land together are known as Krochmal Farms. The appellant has worked on Krochmal Farms since the age of ten, assuming increasing responsibility for its operations with the passing years. Eventually, the appellant built a home for himself and his family on the Tewksbury portion of Krochmal Farms and he oversees and participates in all of the farm's operations, assisted by his sons who also work the farm.

The Farm is used to produce crops, including corn and pumpkins, and to raise cattle. The Tewksbury portion of Krochmal Farms also produces crops and is used to raise pigs.[2] The Farm has various fenced perimeters constructed to contain the cattle. The innermost fenced area forms a pen that contains a shelter in which the cattle sleep. There is a second fence around the pen that allows the cattle additional freedom of movement. Finally, there is a perimeter fence that encompasses approximately 35 acres and extends to the woods. This fence prevents the escape of cattle that have broken free of the inner fenced areas and surrounds the acreage on which the Farm's crops are grown and its composting operation is located. The appellant maintains the perimeter fence with the exception of small sections that have repeatedly been breached by neighborhood youths. The Farm's contiguous acreage outside the perimeter fence is not productive.

The Farm, as is typical for farms on which cattle are raised, generates a significant amount of manure, which is composted rather than removed for disposal. Agricultural composting is time and labor intensive, and the appellant does not have the labor, equipment or knowledge to manage the Farm's composting operation. Consequently, Krochmal Farms engaged BMC Corporation ("BMC") approximately nineteen years prior to the hearing of these appeals, and BMC has served as the Farm's compost manager since that time.[3]

The Farm is certified for agricultural composting by the MDAR. This certification, which Krochmal Farms has held every year for almost two decades, requires annual filings with and inspection by the MDAR.[4] Mr. Kennedy testified that agricultural composting, as practiced on the Farm and throughout the Commonwealth, transforms manure into fertilizer, in the process

[2] The Tewksbury acreage has been afforded agricultural land classification under G.L. c. 61A.
[3] BMC has never leased any portion of Krochmal Farms, nor has it had any rights in the land.
[4] The individual responsible for inspection of the Farm's composting operations and issuance of its agricultural composting certificate is Mr. William Blanchard, who reports directly to Mr. Kennedy.

stabilizing nutrients and reducing odor problems, pathogens, and weed seeds. Mr. Kennedy stated that the MDAR encourages agricultural composting because it is environmentally beneficial and because it can make small-scale farming more feasible. He noted that given the time and labor requirements of composting, farmers often enter into agreements with outside entities for compost management, and that the appellant's arrangement with BMC was typical of such agreements, which are useful and at times critical to farming operations. Indeed, the testimony was clear that the appellant could not have continued to farm without BMC's composting and removal of the Farm's manure.

Mr. Kennedy was quite familiar with the Farm's agricultural composting operation, having visited and inspected Krochmal Farms on numerous occasions since 2008 when there were reports of objectionable odors emanating from Krochmal Farms. He and the appellant described the composting activities on the Farm in great detail. Manure piles from the Farm's cattle shelter and surrounding areas are brought to the 4.5-acre composting area and are mixed with soiled cattle bedding that has been removed from the cattle shelter. The cattle bedding is made up of leaves and wood chips. Leaves and tree stumps are brought from off premises and BMC grinds the tree stumps into the wood chips that are used for cattle bedding. The amount of leaves and tree stumps brought to the Farm are proportionate to the Farm's bedding needs and the manure generated by the Farm.

The manure and used cattle bedding are combined in windrows. These windrows are approximately 20 feet wide, 100 feet long and 12 feet high. There are several windrows in the Farm's composting area, the composition of which varies primarily in the degree to which the composting materials have decomposed. BMC must use heavy machinery to turn and shift the materials in and among the windrows throughout the composting process to facilitate the materials' decomposition. When the manure and bedding materials have been fully composted, they are mechanically screened, yielding compost and loam, which BMC sells on its own behalf. As part of its arrangement with Krochmal Farms, BMC also receives a tipping fee for leaves and tree stumps brought to the Farm and pays a monthly fee to Krochmal Farms for the right to remove and sell the compost and loam.[5]

[5] BMC, whose office is located in Billerica, engages in a variety of commercial activities unrelated to agricultural composting, including brush mowing and snow plowing for various municipalities. However, BMC only engages in activities related to agricultural composting on the Farm.

Based on the foregoing, the Board found and ruled that the appellant's activities on the Farm, including growing crops, raising cattle, and agricultural composting, qualified as agricultural and horticultural activities within the meaning of Chapter 61A, §§ 1 and 2.

Procedural Background

Krochmal Farms first applied for Chapter 61A agricultural land classification of the Farm for fiscal year 1988. The application was approved and the assessors recorded a lien against the property on May 20, 1987. The lien remained in place as of the date of the hearing of these appeals.

On May 2, 2011, the appellant timely submitted an Application for Agricultural or Horticultural Land Classification pursuant to Chapter 61A ("Agricultural Application") for fiscal year 2013. The appellant provided responses in all relevant sections of the Agricultural Application.[6] By letter dated July 27, 2011, the assessors notified the appellant that they had refused to accept the Agricultural Application for filing based on their assertion that the Agricultural Application was not complete. The letter also stated that the Agricultural Application was denied "to the extent, if any, that [it was] deemed to have been effectively filed." On August 25, 2011, the appellant timely submitted an Application to Modify a Decision ("Modification Application"), seeking reconsideration of the assessors' determinations. The assessors did not act on or respond to the Modification Application. On November 25, 2011, the appellant timely filed a Petition Under Formal Procedure with the Board, which was assigned Docket number F314665.

On the same day he submitted the Modification Application, the appellant timely submitted a second Agricultural Application, seeking to clarify any misunderstanding that may have been associated with the first Agricultural Application.[7] By letter dated November 22, 2011, the assessors notified the appellant that they had refused to accept the second Agricultural Application for filing because, like the first application, they had concluded that the second was not complete. Also like the first Agricultural Application, the assessors alternatively denied the second to the extent it was deemed complete. On December 15, 2011, the appellant timely

[6] These responses included a detailed breakdown of the Farm's acreage and the uses to which the acreage was put. The appellant also indicated estimated gross sales of $100,000 from agricultural and horticultural activities. The section of the application entitled "Lessee Certification" was left blank, as no portion of the Farm had been leased to a third party.

[7] The second Agricultural Application differed from the first in two respects. First, appellant listed an additional $5000 of gross receipts, which were attributable to sales of pumpkins. Mr. Corsetti, as president of BMC, signed the application's lessee certification section to indicate that BMC served as the "compost operator" on the 4.5-acre composting area of the Farm. Mr. Corsetti credibly testified that by signing the Agricultural Application, he did not intend to convey the impression that BMC had leased any portion of the Farm.

submitted a second Modification Application, seeking reconsideration of the assessors' more recent determinations. The assessors did not act on or respond to the second Modification Application. On March 14, 2012, the appellant timely filed a second Petition Under Formal Procedure with the Board, which was assigned Docket number F314927.

The appellant was assessed $19,592.57 in real estate tax for fiscal year 2013, all of which was allocated to the Farm's land except for $190.96, which was associated with the cattle shelter. The appellant paid the tax in full without incurring interest.

Throughout the appellant's agricultural application process, the assessors knew of the longstanding and extensive operations on the Farm, which included growing crops, raising cattle, and agricultural composting. Regardless, the assessors chose to assert that the appellant's Agricultural Applications were so deficient as to warrant their outright denial. In a Motion to Dismiss considered and denied by the Board, the assessors renewed their assertion that the Agricultural Applications were incomplete and fatally flawed, thereby depriving the Board of jurisdiction over the appeals. In particular, the assessors asserted that the Agricultural Applications lacked a complete statement of sales from agricultural or horticultural activities and a full statement of sales made by BMC. The assessors also asserted that the appellant did not identify the land in agricultural use and improperly failed to complete the lessee certification section of the first Agricultural Application, notwithstanding the fact that no part of the Farm was leased. The Board found the assessors' assertions that the Agricultural Applications were incomplete and fatally flawed without foundation in law or fact. Therefore, and based on the record before it, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

Valuation

Having concluded that land on the Farm qualified for agricultural land classification, the Board applied Farm Valuation Advisory Commission ("FVAC") recommended values for fiscal year 2013 to derive the value of the land for agricultural or horticultural purposes. In particular, based on the appellant's credible description of the land and its use, the Board employed FVAC "Above Average" values to the Farm's acreage.[8] Thus, the Board valued the Farm's land as follows for fiscal year 2013:

[8] The Board did not disturb the assessors' $14,000 valuation of the cattle shelter located in the cattle pen, which was not in dispute.

Land Category	Acres	FVAC Value Per Acre	FVAC Value
Cropland Harvested, Veg:	13	$963	$12,519
Cropland Harvested, Beef:	10	$216	$ 2,160
Nonproductive:	28.86	$ 40	$ 1,154
Necessary and Related Land:[9]	17.5	$160	$ 2,800
Total:	**69.36**		**$18,633**

Summary

Based on the evidence presented and the reasonable inferences drawn therefrom, the Board found and ruled that: it had jurisdiction to hear and decide these appeals; the appellant's activities on the Farm, including growing crops, raising cattle, and agricultural composting, qualified as agricultural or horticultural activities within the meaning of Chapter 61A, §§ 1 and 2; the appellant was entitled to agricultural land classification for the Farm pursuant to Chapter 61A for fiscal year 2013; and the Farm's agricultural and horticultural land value for fiscal year 2013 was $18,633.

Accordingly, the Board ordered an abatement in the amount of $18,804.29.

OPINION

Agricultural Land Classification

Chapter 61A, generally, provides for valuation, assessment and taxation of agricultural and horticultural land. Chapter 61A, § 4 specifies minimum acreage and use criteria as follows:

> For general property tax purposes, the value of land, not less than five acres in area, which is actively devoted to agricultural, horticultural or agricultural and horticultural uses during the tax year in issue and has been so devoted for at least the two immediately preceding tax years, shall, upon application of the owner of such land and approval thereof, be that value which such land has for agricultural or horticultural purposes. For the said tax purposes, land so devoted shall be deemed to include such contiguous land under the same ownership as is not committed to residential, industrial or commercial use...

Pursuant to Chapter 61A, § 1, land is in agricultural use:

> when primarily and directly used in raising … beef cattle for the purpose of selling such animals or a product derived from such animals in the regular course

[9] This sum includes the 4.5 acres used for agricultural composting.

> of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market.

With regard to "horticultural use," Chapter 61A, § 2 provides, in pertinent part:

> Land shall be considered to be in horticultural use when primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business.

As it applies to properties larger than 5 acres, Chapter 61A requires gross sales from agricultural or horticultural products in excess of $500 increased by "five dollars per acre except in the case of woodland or wetland for which such increase shall be at the rate of fifty cents per acre." G.L. c. 61A, § 3.

There is no dispute that well in excess of five acres of the Farm were used to grow crops and to raise cattle and that this land was therefore actively devoted to agricultural and horticultural use for many years prior to and during the fiscal year at issue. Pursuant to Chapter 61A, § 4, this land should be deemed to include the Farm's contiguous acreage, which is not developed or used for industrial or commercial purposes. Further, there is no dispute that agricultural composting qualifies as an agricultural use as contemplated by Chapter 61A, § 1. Finally, the appellant's reported gross receipts of $105,000 vastly exceeded the gross sales requirement of Chapter 61A, § 3. In sum, the Farm qualified for agricultural land classification under Chapter 61A.

The assessors knew of the Farm's longstanding agricultural activities before, during and after the appellant's compliance with Chapter 61A's annual application requirement for agricultural land valuation for fiscal year 2013. *See* G.L. c. 61A, §6. In particular, the appellant filed two Agricultural Applications, each of which was responsive to the assessors' inquiries, as well as two Modification Applications. Nonetheless, the assessors chose simply to reject the appellant's filings in their entirety based on their cursory assertion that the Agricultural Applications were so incomplete as to render them unsuitable for consideration. This assertion forms the core of the assessors' primary argument in these appeals, which is that the Agricultural Applications were fatally flawed and that the appeals should therefore be dismissed for lack of jurisdiction. The assessors claimed deficiencies in the first Agricultural Application including: lack of a complete statement of sales from agricultural or horticultural activities; lack of a full statement of sales made by BMC, the appellant's "lessee"; the appellant's failure to identify land

in agricultural use; and the absence of a signature in the lessee certification section of the Agricultural Application. The assessors took similar issue with the second Agricultural Application, except with respect to provision of a signature in its lessee certification section.

The Board found that the assessors' claims regarding the Agricultural Applications' flaws were specious and either factually inaccurate or of no legal consequence. As previously noted, the appellant provided substantive responses in relevant sections of the Agricultural Applications. These responses, contrary to the assessors' assertions, included a detailed breakdown of the Farm's acreage and the uses to which the land was put. The appellant also stated gross sales of $100,000 in the first Agricultural Application and $105,000 in the second. While these figures may not have been precise, the sales easily exceeded the minimum gross sales requirement provided by Chapter 61A, § 3.

The assessors' complaint that the Agricultural Applications lacked a full statement of BMC's sales was based on their assertion that such a statement was required by statute and necessary to a determination of whether land purportedly leased to BMC was not committed to industrial or commercial use. The Board found this argument unavailing. Whether the appellant should have reported BMC's gross sales of compost and loam generated by the Farm's agricultural composting operation was not dispositive. These sales would have had no effect on an agricultural land determination because the Farm's gross sales requirement had already been met. Moreover, given the Board's finding that BMC's activities on the Farm were limited to agricultural composting, BMC's other sales were irrelevant. Finally, there is no requirement, in the Agricultural Applications or elsewhere, that all of BMC's sales be reported to the assessors.

The appellant left the lessee certification section of the first Agricultural Application blank because there was no lessee. The assessors' assertions to the contrary were just that, and were not supported by probative evidence. Further, the appellant and Mr. Corsetti gave credible and unrebutted testimony regarding the relationship between BMC and Krochmal Farms as that between a farm and its composting manager, a relationship Mr. Kennedy described as typical and supportive of agricultural composting in the Commonwealth. The appellant and Mr. Corsetti also credibly testified that no portion of the Farm was leased to BMC.

For purposes of the Board's jurisdiction, the Supreme Judicial Court has held that, in the context of an application for abatement of real estate taxes, an abatement application will be considered incomplete only if it lacks information required by statute. *See* ***MacDonald v. Board of Assessors***, 381 Mass. 724, 726 (1980). Assuming that this standard applies to Agricultural Applications, the assessors can identify no such omissions. Indeed, as the preceding discussion

illustrates, the appellant on more than one occasion provided ample responses to inquiries posed in the Agricultural Applications. Thus, the Board found the assessors' argument that the Agricultural Applications were fatally flawed entirely without merit.

The assessors also made specific allegations regarding the use of the 4.5 acres of the Farm that the appellant stated were dedicated to agricultural composting. In particular, the assessors asserted that this area served as a commercial facility leased to and used by BMC as a base for operation of its business, which was dedicated primarily to brush mowing, land clearing, and heavy equipment storage and sales. Once again, the assessors failed to offer probative evidence in support of their assertions. Moreover, the appellant and Mr. Kennedy, who was quite familiar with the Farm's composting operation and agricultural composting in general, described in detail the extensive agricultural composting operation at the Farm. This operation involved use of heavy machinery to move massive quantities of manure and soiled cattle bedding to and among a series of windrows, piles of materials some 20 feet wide, 100 feet long and 12 feet high. Ultimately, fully-composted materials were screened with machinery to yield saleable compost and loam. Only the assessors' bald assertions were offered to demonstrate that the composting area was used for any other purpose. The Board therefore rejected these assertions.

Valuation

Pursuant to Chapter 61A, § 11, before January 1st of each year, the FVAC determines "a range of values on a per acre basis for each of the several classifications of land in agricultural or horticultural [use]," which is applied during the following tax year. These values are used for land that qualifies for agricultural or horticultural classification under Chapter 61A. Having considered the appellant's detailed and credible description of the manner in which the Farm's acreage was used, the Board applied relevant fiscal year 2013 FVAC values to the various categories of the Farm's land. In this manner, the Board found and ruled that the land's agricultural land valuation was $18,633 for fiscal year 2013.

Having recognized the rapid decrease in the number of farms in the Commonwealth, the Legislature granted benefits to taxpayers under Chapter 61A that serve the important public policy interest of "preserv[ing] and protecting the Commonwealth's remaining farmland." ***Town of Sudbury v. Scott***, 439 Mass. 288, 299-300 (2003). Further, "'[r]emedial statutes such as G.L. c. 61A are to be liberally construed to effectuate their goals.'" ***Adams v. Assessors of Westport***, 76 Mass. App. Ct. 180, 185 (2010)(quoting ***Franklin v. Wyllie***, 443 Mass. 187, 196 (2005)). Mindful of these principles and given facts that were clearly established in these appeals, the Board found and ruled that the Farm qualified for Chapter 61A agricultural or horticultural land

classification for fiscal year 2013. Accordingly, the Board ordered an abatement in the amount of $18,804.29.

APPELLATE TAX BOARD

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

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

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

GLW KIDS LLC
KW KIDS LLC
SAW KIDS LLC
WILKINS HILL REALTY LLC

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

Docket Nos.: X301716-737 (FY 2009)
F308220 (FY 2010)
F310968 (FY 2011)
F315242 (FY 2012)

Promulgated:
March 9, 2016

ATB 2016-53

These are appeals under both the formal and informal procedures, pursuant to G.L. c. 59, §§ 64 and 65 and c. 58A, §§ 7 and 7A, from the refusal of the appellee to abate taxes on certain real estate in the Town of Carlisle assessed under G.L. c. 59, §§ 11 and 38 for fiscal years 2009 through 2012.

Then-Commissioner Mulhern heard these appeals and materially participated in the deliberations which led to Chairman Hammond and Commissioners Scharaffa, Rose, and Chmielinski joining in a decision for the appellee.

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

Richard L. Wulsin, Esq. for the appellant.

John Richard Hucksam, Jr., Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2008, January 1, 2009, January 1, 2010, and January 1, 2011, the valuation and assessment dates for fiscal years 2009 through 2012, respectively, the appellants were the

assessed owners of approximately 170 acres of land in the Town of Carlisle, known as the Wilkins Hill or Hanover Hill subdivision (the "subject property"). The subject property is composed of an assemblage of various contiguous tracts of land purchased in 2006 and 2007 for a total expenditure of $6,450,010. These tracts include: 546 Westford Street for $850,000, which consisted of a single-family home and 7.5 acres of land; 566 Westford Street for $2,500,000, which consisted of 3.5 acres plus an additional 15 acres; 672 Westford Street for $3,100,000, which consisted of a house and 11 acres; and a non-arm's-length transfer of more than 122 acres of land, called Consolidated Lot 1, for $10.00.

Prior to January 1, 2008, in 2006, a subdivision plan for the subject property was created and endorsed by the Carlisle Planning Board totaling 21 single-family house lots which required no further approval (the "21-lot ANR plan"). Thirteen of the lots in the 21-lot ANR plan contained longer or shared driveways (the "pork chop lots") while the remaining 8 lots had greater road frontage and shorter, private driveways (the "standard lots"). According to the developer, the 21-lot ANR plan required the actual expenditure of approximately $20,897 for road work and landscaping, $750 for utility work, and $405,014 for engineering fees and permitting expenses for a total of $426,661 in costs; all of these expenditures were incurred prior to January 1, 2008. In 2007, a third party presented an offer to purchase in its entirety the 21-lot ANR subdivision for $8,100,000. It was refused.

On June 9, 2008, a new subdivision plan named Hanover Hill for 35 single-family house lots was approved for the subject property and substituted for the 21-lot ANR plan.[1] The 35-lot subdivision plan required various infrastructure and site improvements, including the creation of two new roads, Hanover Road and Johnson Road, all of which was estimated by an engineering firm to cost $4,739,553. Of this total, $1,072,222 of the work was completed in calendar year 2008 with the $3,667,331 balance being completed in 2009.

The relevant assessment information for the subject property's 21-lot ANR subdivision for fiscal year 2009 and the subject property's 35-lot subdivision for fiscal years 2010 through 2012 are contained in the following tables.

[1] This new plan was later amended and approved as amended on July 3, 2008.

Fiscal Year 2009

Address	Parcel	Area in Acres	Assessed Value $	Tax Rate $/$1,000	Tax $[2]
Westford St.	19-40-1	4.24	447,300	14.04	5,738.86
Westford St.	19-40-2	2.01	435,700	14.04	5,590.03
Westford St.	19-40-3	4.10	446,600	14.04	5,729.88
Westford St.	19-40-4	4.23	447,200	14.04	5,737.58
Westford St.	19-40-5	5.06	451,400	14.04	5,791.46
Westford St.	19-40-6	2.61	438,900	14.04	5,631.08
Westford St.	19-40-7	2.52	438,400	14.04	5,624.67
Westford St.	19-40-8	2.52	438,400	14.04	5,624.67
Westford St.	19-40-9	4.57	448,900	14.04	5,759.39
Westford St.	19-40-10	5.38	453,000	14.04	8,811.99
Westford St.	19-40-11	2.11	436,200	14.04	5,596.45
Westford St.	19-40-12	4.13	446,700	14.04	5,731.16
Westford St.	19-40-13	4.12	446,700	14.04	5,731.16
Westford St.	19-40-14	2.16	436,500	14.04	5,600.30
Westford St.	19-40-15	7.57	464,000	14.04	5,953.12
Westford St.	19-40-16	5.71	454,700	14.04	5,833.80
Westford St.	19-40-17	3.41	443,000	14.04	5,683.69
Westford St.	19-40-18	4.05	446,300	14.04	5,726.03
Westford St.	19-40-19	4.08	446,500	14.04	5,728.60
Westford St.	19-40-20	10.72	1,131,800	14.04	14,520.99
Westford St.	19-40-21	7.21	462,200	14.04	5,930.03
Curve St.	19-39-X	14.50	498,400	14.04	6,394.47
Westford St.	19-40-Y	59.40	293,900	14.04	3,770.74
On Appeal		**107.01**	**10,558,800**		
All Parcels		**166.41**	**10,852,700**		

Fiscal Year 2010

Address	Parcel	Area in Acres	Assessed Value $	Tax Rate $/$1,000	Tax $
32 Johnson Rd.	19-40-1	2.56	460,500	14.62	6,732.51
58 Johnson Rd.	19-40-2	2.01	457,500	14.62	6,688.65
82 Johnson Rd.	19-40-3	2.02	457,500	14.62	6,688.65
112 Johnson Rd.	19-40-4	2.50	460,200	14.62	6,728.12
180 Hanover Rd.	19-40-5	2.31	459,100	14.62	6,712.04
220 Hanover Rd.	19-40-6	2.42	459,700	14.62	6,720.81
240 Hanover Rd.	19-40-7	2.13	457,400	14.62	6,687.19
301 Hanover Rd.	19-40-8	3.47	465,500	14.62	6,805.61
295 Hanover Rd.	19-40-9	4.00	468,400	14.62	6,848.01
285 Hanover Rd.	19-40-10	4.26	469,800	14.62	6,868.48
201 Hanover Rd.	19-40-11	3.58	466,100	14.62	6,814.38
171 Hanover Rd.	19-40-12	3.32	464,700	14.62	6,793.91
20 Gormley Way	19-40-13	2.21	458,600	14.62	6,704.73
40 Gormley Way	19-40-14	4.69	472,200	14.62	6,903.56
60 Gormley Way	19-40-15	4.51	471,200	14.62	6,888.94

[2] For all fiscal years, the tax does not include the Community Preservation Act ("CPA") surcharge. For the fiscal years at issue, the CPA surcharge was equal to the assessed value less $100,000 times the tax rate time two percent.

101 Hanover Rd.	19-40-16	2.11	458,000	14.62	6,695.96
97 Hanover Rd.	19-40-17	4.01	468,500	14.62	6,849.47
95 Hanover Rd.	19-40-18	4.14	469,200	14.62	6,859.70
81 Hanover Rd.	19-40-19	2.05	457,700	14.62	6,691.57
67 Hanover Rd.	19-40-20	4.09	468,900	14.62	6,855.32
41 Hanover Rd.	19-40-21	2.45	459,900	14.62	6,723.74
78 Hanover Rd.	19-40-22	2.00	457,400	14.62	6,687.19
90 Hanover Rd.	19-40-23	2.08	457,800	14.62	6,693.04
150 Hanover Rd.	19-40-24	2.00	457,400	14.62	6,687.19
99 Johnson Rd.	19-40-25	2.00	457,400	14.62	6,687.19
67 Johnson Rd.	19-40-26	2.02	457,500	14.62	6,688.65
35 Johnson Rd.	19-40-27	2.00	457,400	14.62	6,687.19
15 Johnson Rd.	19-40-28	2.01	457,500	14.62	6,688.65
24 Sorli Way	19-40-29	2.00	457,400	14.62	6,687.19
63 Hanover Rd.	19-40-A	2.36	459,400	14.62	6,716.43
11 Hanover Rd.	19-40-B	2.00	457,400	14.62	6,687.19
48 Sorli Way	19-40-C	2.00	457,400	14.62	6,687.19
64 Sorli Way	19-40-D	2.00	457,400	14.62	6,687.19
74 Sorli Way	19-40-E	2.00	457,400	14.62	6,687.19
Curve St.	19-39-X	14.50	79,800	14.62	1,166.68
Westford St.	19-40-Y	59.40	338,600	14.62	4,950.33
On Appeal		**163.21**	**15,640,400**		
All Parcels		**165.21**	**16,097,800**		

Fiscal Years 2011 & 2012[3]

Address	Parcel	Area in Acres	Assessed Value ($)	FY 2011 Tax Rate $/$1,000	FY 2011 Tax $	FY 2011 Tax Rate $/$1,000	FY 2012 Tax $
32 Johnson Rd.	19-40-1	2.56	416,900	16.13	6,724.60	17.14	7,145.67
58 Johnson Rd.	19-40-2	2.15	414,600	16.13	6,687.50	17.14	7,106.24
82 Johnson Rd.	19-40-3	2.02	413,900	16.13	6,676.21	17.14	7,094.25
112 Johnson Rd.	19-40-4	2.50	416,600	16.13	6,719.76	17.14	7,140.52
180 Hanover Rd.	19-40-5	2.31	415,500	16.13	6,702.02	17.14	7,121.67
220 Hanover Rd.	19-40-6	2.42	416,100	16.13	6,711.69	17.14	7,131.95
240 Hanover Rd.	19-40-7	2.13	414,500	16.13	6,685.89	17.14	7,104.53
301 Hanover Rd.	19-40-8	4.08	425,200	16.13	6,858.48	17.14	7,287.93
295 Hanover Rd.	19-40-9	6.00	435,800	16.13	7,029.45	17.14	7,469.61
285 Hanover Rd.	19-40-10	4.26	426,200	16.13	6,874.61	17.14	7,305.07
201 Hanover Rd.	19-40-11	3.58	422,500	16.13	6,814.93	17.14	7,241.65
171 Hanover Rd.	19-40-12	3.32	421,100	16.13	6,792.34	17.14	7,217.65
20 Gormley Way	19-40-13	2.21	415,000	16.13	6,693.95	17.14	7,113.10
40 Gormley Way	19-40-14	4.69	428,600	16.13	6,913.32	17.14	7,346.20
60 Gormley Way	19-40-15	4.51	427,600	16.13	6,897.19	17.14	7,329.06
101 Hanover Rd.	19-40-16	2.11	414,400	16.13	6,684.27	17.14	7,102.82
97 Hanover Rd.	19-40-17	4.01	424,900	16.13	6,853.64	17.14	7,282.79
95 Hanover Rd.	19-40-18	4.02	424,900	16.13	6,853.64	17.14	7,282.79
81 Hanover Rd.	19-40-19	2.00	413,800	16.13	6,674.59	17.14	7,092.53

[3] From fiscal year 2011 to fiscal year 2012, the assessors' estimation of the acreage and assessed value for 285 Hanover Street (Parcel 19-40-10) increased by 6.00 acres, from 4.26 acres to 10.26 acres, and by $33,000, from $426,200 to $459,200, respectively. The total areas and assessed values for all parcels and for all parcels on appeal also increased commensurately from fiscal year 2011 to fiscal year 2012.

67 Hanover Rd.	19-40-20	4.33	426,600	16.13	6,881.06	17.14	7,311.92
41 Hanover Rd.	19-40-21	2.00	413,800	16.13	6,674.59	17.14	7,092.53
78 Hanover Rd.	19-40-22	2.00	413,800	16.13	6,674.59	17.14	7,092.53
90 Hanover Rd.	19-40-23	2.08	414,200	16.13	6,681.05	17.14	7,099.39
150 Hanover Rd.	19-40-24	2.00	413,800	16.13	6,674.59	17.14	7,092.53
99 Johnson Rd.	19-40-25	2.00	413,800	16.13	6,674.59	17.14	7,092.53
67 Johnson Rd.	19-40-26	2.02	413,900	16.13	6,676.21	17.14	7,094.25
35 Johnson Rd.	19-40-27	2.00	413,800	16.13	6,674.59	17.14	7,092.53
15 Johnson Rd.	19-40-28	2.01	413,900	16.13	6,676.21	17.14	7,094.25
24 Sorli Way	19-40-29	2.00	413,800	16.13	6,674.59	17.14	7,092.53
63 Hanover Rd.	19-40-A	2.36	415,800	16.13	6,706.85	17.14	7,126.81
11 Hanover Rd.	19-40-B	2.00	413,800	16.13	6,674.59	17.14	7,092.53
48 Sorli Way	19-40-C	2.00	413,800	16.13	6,674.59	17.14	7,092.53
64 Sorli Way	19-40-D	2.00	413,800	16.13	6,674.59	17.14	7,092.53
74 Sorli Way	19-40-E	2.00	413,800	16.13	6,674.59	17.14	7,092.53
Curve St.	19-39-X	84.10	462,600	16.13	7,461.74	17.14	7,922.11
Westford St.	19-40-Y	59.40		16.13		17.14	
On Appeal (FY 2011)		**166.99**	**13,002,600**				
On Appeal (FY 2012)		**172.99**	**13,035,600**				
All Parcels (FY 2011)		**177.78**	**14,673,100**				
All Parcels (FY 2012)		**183.78**	**14,706,100**				

For fiscal year 2009, the appellants appealed all of the parcels in the 21-lot ANR subdivision. For fiscal year 2010, the appellants appealed all of the parcels in the 35-lot subdivision except for Lot F which was under agreement and Lot 22. For fiscal year 2011, the appellants appealed all of the parcels in the 35-lot subdivision except for Lots F, 22, and 23, all of which sold in 2009, as well as Lots 14 and 26. For fiscal year 2012, the appellants again appealed all of the parcels in the 35-lot subdivision except for Lots F, 22, and 23, as well as Lots 14 and 26 which sold in 2010.

In accordance with G.L. c. 59, § 57C, the appellants timely paid the real estate taxes for all fiscal years at issue without incurring interest. In accordance with G.L. c. 59, § 59, the appellants timely filed their applications for abatement for each of the lots or tax parcels contained within the subject property for all fiscal years at issue. With one exception, the assessors denied the abatement applications or they were deemed denied for all of the tax parcels for all of the fiscal years at issue.[4] In accordance with G.L. c. 59, §§ 64 and 65, the appellants seasonably filed their appeals from these denials or deemed denials with the Appellate Tax Board (the "Board"). For fiscal years 2010, 2011, and 2012, in accordance with G.L. c. 58A, § 7 and the Board's order approving joinder, the appellants joined the tax parcels on one Petition

[4] For fiscal year 2009, the assessors abated the value of the Curve Street parcel, identified for assessing purposes as parcel identification number 19-39X, down to $72,900.

Under Formal Procedure. The essential jurisdictional dates for the fiscal years at issue are summarized in the following table.[5]

	Tax Bill Mailed	Abatement Apps. Filed	Abatement Apps. Denied or Deemed Denied	Petition Filed with Board
FY 2009	12/29/2008	01/27/2009	03/17/2009	06/24/2009
FY 2010	12/29/2009	01/21/2010	04/21/2010	06/29/2010
FY 2011	12/30/2010	01/20/2011	04/20/2011	04/28/2011
FY 2012	12/28/2011	01/12/2012	04/12/2012	04/20/2012

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

The appellants presented their case-in-chief through the testimony of: John Kenny, a cost engineer; James Marchant, a member of the assessors; David Kirk, whom the Board qualified as a real estate valuation expert; and Ronald Goglia, an accountant and partner in appellant Wilkins Hill Realty LLC, the developer of Hanover Hill. The appellants also entered numerous exhibits into evidence, including plans, permits, various cost and expense documentation, and Mr. Kirk's *Self Contained Appraisal Report* along with his substitute pages containing corrections to the report.

Mr. Kenny testified that the estimated total cost of the infrastructure for the 35-lot subdivision was $4,472,458, with $3,400,236 remaining to be incurred as of January 1, 2009. His cost report was admitted into evidence. The appellants subpoenaed Mr. Marchant to testify. He testified to the number of building permits issued for single-family dwellings during the relevant time period, the number of single-family house lots that sold during the relevant time

[5] For fiscal year 2009, the assessors erroneously listed the denial date on their notices of decision under G.L. c. 59, § 63 as March 26, 2009 instead of March 17, 2009. They then sent the notices of decision on March 30, 2009, more than ten days after their actual vote to deny the abatement applications, in contravention of the statutory time limitation within which the assessors must send the notice under § 63. Consequently, the Board found and ruled that the notices of decision were defective and that the appellants were entitled to an additional reasonable length of time to file their appeals. *See* ***Stagg Chevrolet v. Board of Water Commission of Harwich***, 68 Mass. App. Ct. 120, 126 (2007); see also ***Boston Communications Group, Inc. v. Assessors of Woburn,*** Mass. ATB Findings of Facts and Reports 2011-780, 788-89 (finding and ruling that when a notice of decision under § 63 is lacking, the Board will use a reasonableness standard in evaluating the appropriate time for appeal). Moreover, the Board refused "to attribute to [the assessors] the intention of misleading taxpayers," ***General Dynamics Corp. v. Assessors of Quincy***, 388 Mass. 24, 31 (1983), and it therefore found and ruled that the appellants were entitled to rely on the March 26, 2009 date for purposes of computing the three-month period within which they must have filed their appeals with this Board. ***Id.*** at 41. On this basis, the Board found and ruled that the appellants seasonably filed their appeals. In addition for fiscal year 2009, one of the abatement applications was deemed denied on April 27, 2009, which the assessors mistakenly listed on their notice of inaction as April 10, 2009. Regardless, the appellants seasonably filed that appeal with the Board on June 24, 2009, within three months of either date. For fiscal years 2010, 2011, and 2012, the assessors erroneously listed the deemed denial dates on their notices of inaction as April 9, 2010, February 18, 2011, and February 10, 2012, respectively. Notwithstanding these errors, the appellants seasonably filed the corresponding appeals with the Board within three months of either of the dates for each of those fiscal years.

period, the amount of time that other developments in Carlisle had taken to sell lots during the relevant time period, and the state of the real estate market during the relevant time period. Mr. Goglia testified to the actual expense payments incurred by the developer of the 35-lot subdivision, which were $3.4 million before January 1, 2009, an additional $2.1 million prior to January 1, 2010, and an added $0.9 million during calendar year 2010. He did not clarify exactly what these expenditures were other than to testify that they likely included road work, utility work, engineering and permitting fees, and real estate taxes. He also testified to the sales of lots within the 35-lot subdivision, which totaled two arm's-length sales in 2009, three in 2010, none in 2011, and eight in 2012. In 2009 and 2010, what he termed "effective sale prices," that is, sale prices after accounting for concessions granted buyers, ranged from $450,000 down to $360,000.

The appellants' real estate valuation expert, Mr. Kirk, determined that the highest and best use of the subject property was "as a site for residential subdivision development." Accordingly, he valued the subdivisions using a discounted-cash-flow analysis relying on the Appraisal Institute's treatise, THE APPRAISAL OF REAL ESTATE (13th ed. 2008), in which "the subdivision development method, using discounted cash flow analysis, [is offered as a method to] be used to value vacant land that has the potential for subdivision development." ***Ibid*** at 370. For fiscal year 2009, he valued the 21-lot ANR plan as "vacant land that has the potential for subdivision development." For fiscal years 2010 through 2012, he valued the 35-lot subdivision plan, which had been approved in 2008, as "vacant land that has the potential for subdivision development." In valuing the 21-lot ANR subdivision for fiscal year 2009, Mr. Kirk first ascribed retail values to the 21 lots. He based his retail values on his survey of and purported adjustments to sales of local single-family residential housing lots from 2005 to 2010 and the actual brokerage agreement with a term from September 8, 2008 through September, 2010, and with listing prices for the 35-lot subdivision ranging between $545,000 and $595,000. Inexplicably, Mr. Kirk omitted in his survey of local single-family housing lot sales the 2007 sales of 4 local housing lots with selling prices of $250,000, $482,000, $600,000, and $675,000. Mr. Kirk valued the 8 standard lots within the 21-lot ANR subdivision at $545,000 and the 13 pork chop lots at $436,000 -- a 20% discounted rate to ostensibly account for their "lack of marketability" because of their shape. This pricing resulted in a total retail value for the 21-lot ANR subdivision of $10,028,000. However, Mr. Kirk's subdivision-development methodology also required the inclusion of an absorption (or sale) rate and a discount factor for present-value determinations.

Based on his review of what he considered to be relevant market sales, which did not include the aforementioned 4 sales in 2007, Mr. Kirk assumed an absorption rate of 4 or 5 lots per year for a total sellout time of five years. He further assumed that the 8 standard lots would sell in the first two years, while the thirteen pork chop lots would sell in the latter three years. While Mr. Kirk originally assigned all of the purported $426,661 costs for utility, road work, landscaping, permitting, and engineering costs to the first year, he submitted corrections to his report and analysis when he realized that those costs had actually been incurred and paid prior to the January 1, 2008 valuation and assessment date. As a result of his corrections, the expenses that he included in his methodology for all five years consisted of a 5% broker's commission and a 15% entrepreneurial profit.

Lastly, Mr. Kirk applied a discount rate to convert the future income from sales, that is, the future benefits, into an indication of present value. He reported that he evaluated high-yield corporate equity rates, triple-C rated bonds, and government-issued bonds in selecting an annual discount factor of 10.00% which he raised to 11.40% to account for the applicable tax factor. His discounted-cash-flow methodology, valuing the 21-lot ANR subdivision at $5,900,000 for fiscal year 2009 (as of January 1, 2008), is summarized in the following table.

Mr. Kirk's Discounted-Cash-Flow Methodology
Fiscal Year 2009

Income	**2008**	**2009**	**2010**	**2011**	**2012**	**Totals**
Standard Lots	$545,000	$545,000				
Pork-Chop Lots			$436,000	$436,000	$436,000	
Annual Lot Sales	4	4	4	4	5	21
Gross Pot. Inc.	**$2,180,000**	**$2,180,000**	**$1,744,000**	**$1,744,000**	**$2,180,000**	**$10,028,000**
Expenses						
Roadwork, etc.	$0	$0	$0	$0	$0	$0
Broker's Fee 5%	$109,000	$109,000	$ 87,200	$ 87,200	$ 87,200	$ 501,400
Entre. Prof. 15%	$327,000	$327,000	$261,600	$261,600	$327,000	$1,504,200
Total Expenses	**$436,000**	**$436,000**	**$348,800**	**$348,800**	**$436,000**	**$2,005,600**
Net-Oper. Income	**$1,744,000**	**$1,744,000**	**$1,395,200**	**$1,395,200**	**$1,744,000**	**$8,022,400**
Disc. Fact. 11.40%	$0.90	$0.81	$0.72	$0.65	$0.58	
Present Value	$1,565,473	$1,405,222	$1,009,100	$ 905,802	$1,016,348	$5,901,945
Indicated Present Value		**$5,900,000**				

In valuing the 35-lot subdivision for fiscal years 2010, 2011, and 2012,[6] Mr. Kirk ascribed retail values to the 35 or remaining lots of $545,000 for fiscal year 2010 and $450,000 for fiscal years 2011 and 2012. He based these retail values on: his survey of and purported adjustments to single-family residential housing lot sales from 2005 to 2010; the actual brokerage agreement with a term from September 8, 2008 through September, 2010,[7] with listing prices for the 35-lot subdivision ranging between $545,000 and $595,000;[8] a subsequent brokerage agreement running from January 1, 2011 through December 12, 2012 with listing prices ranging from $350,000 to $450,000; and three sales in the subdivision in 2009 for $450,000 and two sales in the subdivision in 2010 for $450,000 and $400,000. Mr. Kirk's pricing for the lots resulted in a total retail value for those remaining in the 35-lot subdivision of $19,075,000 for fiscal year 2010, $14,400,000 for fiscal year 2011, and $13,500,000 for fiscal year 2012. However, as in fiscal year 2009, Mr. Kirk's methodology also required the inclusion of an absorption rate and discount factors for present-value determinations.

Based on his review of market sales, Mr. Kirk assumed an absorption rate of 3 lots per year from 2009 to 2013 and 4 lots per year from 2014 through 2018 for a total sellout time of ten years.[9] Mr. Kirk, believing that all of the purported $3,667,331 remaining expenses for utility, road work, landscaping, permitting, and engineering costs were incurred during 2009, applied those costs to his methodology for fiscal year 2010. In addition, he applied as expenses in his methodology for all years a 5% broker's commission and a 15% entrepreneurial profit.

Lastly, and consistent with his methodology for fiscal year 2009, Mr. Kirk utilized an annual discount factor of 10.00% which he raised to 11.46% for fiscal year 2010, 11.61% for fiscal year 2011, and 11.71% for fiscal year 2012 to account for real estate taxes in the form of a tax factor. His discounted-cash-flow methodologies, valuing the remaining lots in the 35-lot subdivision at $5,200,000, $6,700,000 and $6,400,000 for fiscal years 2010 through 2012, respectively, are summarized in the following tables.

[6] That is, the lots remaining in the subdivision as of the relevant valuation and assessment dates: 35 for fiscal year 2010; 32 for fiscal year 2011; and 30 in fiscal year 2012.
[7] This term was later extended to November 17, 2010.
[8] On November 12, 2010, the brokerage agreement was amended to reduce the listing price range to $325,000 to $450,000.
[9] Except in his methodology for fiscal year 2012, where he applied an absorption rate of 3 lots per year through 2014, 4 lots per year in 2015 and 2016, and 5 lots per year in 2017 and 2018.

Mr. Kirk's Discounted-Cash-Flow Methodology
Fiscal Year 2010

Income	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
Market Price/Lot	$545,000	$545,000	$545,000	$545,000	$545,000	$545,000
Annual Lot Sales	3	3	3	3	3	4
Gross Pot. Inc.	**$1,635,000**	**$1,635,000**	**$1,635,000**	**$1,635,000**	**$1,635,000**	**$2,180,000**
Expenses						
Roadwork, etc.	$3,667,331	$0	$0	$0	$0	$0
Broker's Fee 5%	$ 81,750	$ 81,750	$ 81,750	$ 81,750	$ 81,750	$ 109,000
Entre. Prof. 15%	$ 245,250	$ 245,250	$ 245,250	$ 245,250	$ 245,250	$ 327,000
Total Expenses	**$3,994,331**	**$ 327,000**	**$ 327,000**	**$ 327,000**	**$ 327,000**	**$ 436,000**
Net-Oper. Income	**($2,359,331)**	**$1,308,000**	**$1,308,000**	**$1,308,000**	**$1,308,000**	**$1,744,000**
Disc. Fact. 11.46%	$0.90	$0.80	$0.72	$0.65	$0.58	$0.52
Present Value	($2,116,713)	$1,052,820	$ 944,555	$ 847,423	$ 760,280	$ 909,464

Mr. Kirk's Discounted-Cash-Flow Methodology
Fiscal Year 2010
(continued)

Income	**2015**	**2016**	**2017**	**2018**	**Totals**
Market Price/Lot	$545,000	$545,000	$545,000	$545,000	$545,000
Annual Lot Sales	4	4	4	4	35
Gross Pot. Inc.	**$2,180,000**	**$2,180,000**	**$2,180,000**	**$2,180,000**	**$19,075,000**
Expenses					
Roadwork, etc.	$0	$0	$0	$0	$0
Broker's Fee 5%	$ 109,000	$ 109,000	$ 109,000	$ 109,000	$ 953,750
Entre. Prof. 15%	$ 327,000	$ 327,000	$ 327,000	$ 327,000	$ 2,861,250
Total Expenses	**$ 436,000**	**$ 436,000**	**$ 436,000**	**$ 436,000**	**$ 7,482,331**
Net-Oper. Income	**$1,744,000**	**$1,744,000**	**$1,744,000**	**$1,744,000**	**$11,592,669**
Disc. Fact. 11.46%	$0.47	$0.42	$0.38	$0.34	
Present Value	$ 815,941	$ 732,035	$ 656,757	$ 589,221	$ 5,191,783
Indicated Present Value		**$5,200,000**			

Mr. Kirk's Discounted-Cash-Flow Methodology
Fiscal Year 2011

Income	**2010**	**2011**	**2012**	**2013**	**2014**
Market Price/Lot	$450,000	$450,000	$450,000	$450,000	$450,000
Annual Lot Sales	3	3	3	3	4
Gross Pot. Inc.	**$1,350,000**	**$1,350,000**	**$1,350,000**	**$1,350,000**	**$1,800,000**
Expenses					
Roadwork, etc.	$0	$0	$0	$0	$0
Broker's Fee 5%	$ 67,500	$ 67,500	$ 67,500	$ 67,500	$ 90,000
Entre. Prof. 15%	$ 202,500	$ 202,500	$ 202,500	$ 202,500	$ 270,000
Total Expenses	**$ 270,000**	**$ 270,000**	**$ 270,000**	**$ 270,000**	**$ 360,000**

Net-Oper. Income	**$1,080,000**	**$1,080,000**	**$1,080,000**	**$1,080,000**	**$1,440,000**
Disc. Fact. 11.61%	$0.90	$0.80	$0.72	$0.64	$0.58
Present Value	$ 967,629	$ 866,950	$ 776,747	$ 695,929	$ 831,359

Income	**2015**	**2016**	**2017**	**2018**	**Totals**
Market Price/Lot	$450,000	$450,000	$450,000	$450,000	$450,000
Annual Lot Sales	4	4	4	4	32
Gross Pot. Inc.	**$1,800,000**	**$1,800,000**	**$1,800,000**	**$1,800,000**	**$14,400,000**
Expenses					
Roadwork, etc.	$0	$0	$0	$0	$0
Broker's Fee 5%	$ 90,000	$ 90,000	$ 90,000	$ 90,000	$ 720,000
Entre. Prof. 15%	$ 270,000	$ 270,000	$ 270,000	$ 270,000	$ 2,160,000
Total Expenses	**$ 360,000**	**$ 360,000**	**$ 360,000**	**$ 360,000**	**$ 2,880,000**
Net-Oper. Income	**$1,440,000**	**$1,440,000**	**$1,440,000**	**$1,440,000**	**$11,520,000**
Disc. Fact. 11.61%	$0.52	$0.46	$0.42	$0.37	
Present Value	$ 744,859	$ 667,358	$ 597,922	$ 535,710	$ 6,684,463
Indicated Present Value		**$6,700,000**			

Mr. Kirk's Discounted-Cash-Flow Methodology
Fiscal Year 2012

Income	**2011**	**2012**	**2013**	**2014**
Market Price/Lot	$450,000	$450,000	$450,000	$450,000
Annual Lot Sales	3	3	3	3
Gross Pot. Inc.	**$1,350,000**	**$1,350,000**	**$1,350,000**	**$1,350,000**
Expenses				
Roadwork, etc.	$0	$0	$0	$0
Broker's Fee 5%	$ 67,500	$ 67,500	$ 67,500	$ 67,500
Entre. Prof. 15%	$ 202,500	$ 202,500	$ 202,500	$ 202,500
Total Expenses	**$ 270,000**	**$ 270,000**	**$ 270,000**	**$ 270,000**
Net-Oper. Income	**$1,080,000**	**$1,080,000**	**$1,080,000**	**$1,080,000**
Disc. Fact. 11.71%	$0.90	$0.80	$0.72	$0.64
Present Value	$ 966,754	$ 865,383	$ 774,642	$ 693,415

Income	**2015**	**2016**	**2017**	**2018**	**Totals**
Market Price/Lot	$450,000	$450,000	$450,000	$450,000	$450,000
Annual Lot Sales	4	4	5	5	30
Gross Pot. Inc.	**$1,800,000**	**$1,800,000**	**$2,250,000**	**$2,250,000**	**$13,500,000**
Expenses					
Roadwork, etc.	$0	$0	$0	$0	$0
Broker's Fee 5%	$ 90,000	$ 90,000	$ 112,500	$ 112,500	$ 675,000
Entre. Prof. 15%	$ 270,000	$ 270,000	$ 337,500	$ 337,500	$ 2,025,000
Total Expenses	**$ 360,000**	**$ 360,000**	**$ 450,000**	**$ 450,000**	**$ 2,700,000**
Net-Oper. Income	**$1,440,000**	**$1,440,000**	**$1,800,000**	**$1,800,000**	**$10,800,000**
Disc. Fact. 11.71%	$0.57	$0.51	$0.46	$0.41	
Present Value	$ 827,608	$ 740,827	$ 828,933	$ 742,013	**$ 6,439,575**
Indicated Present Value		**$6,400,000**			

The assessments compared to Mr. Kirk's estimates of value for the subdivisions for the fiscal years at issue are summarized in the following table.[10]

	FY 2009	**FY 2010**	**FY 2011**	**FY 2012**
Assessments	$10,558,800	$15,640,400	$13,002,600	$13,035,600
Mr. Kirk's Values	$ 5,900,000	$ 5,200,000	$ 6,700,000	$ 6,400,000

For their part, the assessors submitted into evidence the requisite jurisdictional documents, as well as property record cards for the subject property, assessors' maps depicting the subject property during the fiscal years at issue, zoning by-laws for Carlisle, and several excerpts from the General Laws. They also called to testify Mr. Marchant, a certified appraiser and a member of the assessors who had testified under subpoena in the appellants' case-in-chief.

Mr. Marchant discussed, among other things: the assemblage of the subject property; the highest-and-best use of the lots in the subject property as individual single-family retail building lots for the fiscal years at issue; relevant sales of single-family building lots in Carlisle, including those in the subject property and other local subdivisions; and his understanding that the binder coat for the 35-lot subdivision had been completed in December, 2008. He further opined that: the use of an absorption rate is not appropriate for valuing lots ready for sale in a completed or nearly complete subdivision for assessment purposes; deductions for broker's fees are inappropriate considerations for valuing real estate for assessment purposes; and the assessors valued the subject property for the fiscal years at issue in accordance with the Department of Revenue's guidelines and requirements for certification.

Based on all of the evidence, and as explained more fully in its Opinion below, the Board found that the appellants failed to prove that the subject property was overvalued for fiscal year 2009, 2010, 2011, or 2012. The Board found that for *ad valorem* tax purposes, the subject property's highest and best use, as of the relevant valuation assessment dates for the fiscal years at issue, January 1, 2008, January 1, 2009, January 1, 2010, and January 1, 2011, respectively, was as separate retail building lots that were ready to be sold to and utilized by multiple purchasers at retail prices. The Board based its highest-and-best-use determination on numerous factors including: the creation and approval of the 21-lot ANR plan before the valuation and assessment date for fiscal year 2009; the creation and approval of the 35-lot subdivision plan prior to the valuation and assessment date for fiscal year 2010; the completion of the binder

[10] For fiscal years 2009 through 2012, the appeals include one additional acreage lot assessed at 498,400, two additional acreage lots assessed at $418,400, one additional acreage lot assessed at $462,600, and one additional acreage lot assessed at $462,600, respectively, increasing Mr. Kirk's values correspondingly.

roadway for the 35-lot subdivision prior to the valuation and assessment date for fiscal year 2010; and the marketing, availability, and sale of the lots within the subject property at retail prices to others beginning in June, 2009; as well as the assessors' rationale for their highest-and-best-use determination. The Board also recognized that, for the fiscal years at issue, the retail use of the subject property, that is the sale of the lots to and the utilization of them by multiple purchasers, best corresponded to the criteria for determining highest and best use.

The Board found that its highest-and-best-use finding for the subject property best met all of the well-settled criteria for determining highest and best use. "A property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive." ***Iantosca v. Assessors of Weymouth,*** Mass. ATB Findings of Fact and Reports, 2008-929, 947-48 (citations omitted). The timing of the subdivisions' creations and approvals, the ANR nature of the 21-lot subdivision, the completion of the binder roadway in December 2008 with respect to the 35-lot subdivision, and the timely marketing of and sale to retail customers of some of the lots within the subject property shows that the Board's highest and best use was legally permissible. The actual physical embodiment of the 21-lot ANR subdivision with all of the buildable lots having the required frontage on Westford Street and the 35-lot subdivision with its binder and later asphalt roadway creating access to all 35 buildable lots, coupled with the sale of some of the buildable lots during the relevant time period demonstrate that the Board's highest and best use was physically possible. The combined value of the individual buildable lots compared to the costs incurred to develop them shows that the Board's highest and best use was financially feasible. And, lastly, the sale prices and values associated with individual buildable lots, particularly when compared to the acquisition and development costs or even the wholesale value of subject property espoused by the appellants' real estate valuation expert -- as land for residential development -– confirms that the Board's highest and best use was maximally productive.

Consequently, the Board did not regard the highest and best use proffered by the appellants' real estate valuation expert to be persuasive. The Board found that his discounted-cash-flow methodology reflected a value based on a different highest and best use than the Board's - the bulk sale value of the subject property's lots and infrastructure to one purchaser – as opposed to the total retail value of the separate building lots that were presently being marketed and were currently ready to be sold to and utilized by multiple purchasers at retail prices, which the Board found to be the subject property's highest and best use for *ad valorem* tax purposes.

As discussed in an earlier case involving this same issue, ***GD Fox Meadow, LLC v. Assessors of Westwood***, Mass. ATB Findings of Fact and Reports 2011-501, 511-12, another authoritative treatise on real estate valuation, D. EMERSON, APPRAISAL INSTITUTE, SUBDIVISION VALUATION (2008), distinguishes between the bulk sale value of lots when sold to or owned by a single individual or entity and the retail value of lots marketed and sold to multiple purchasers:

> Subdivision valuation considers the value of the entire group of lots to one purchaser… . Accordingly, bulk sale value really is the *market value* for a group of lots… . In subdivision valuation, the retail value is the *market value* of one lot… . [T]he bulk sale value is not a separate type of value; rather it is a *market value* for a group of lots, which reflects a bulk sale scenario.

Ibid. at 15 (emphasis in original). Because the Board determined that, as of January 1, 2008, the highest and best use of the subject property for *ad valorem* tax purposes was as 21 separate buildable but as yet unimproved parcels, and that, as of January 1, 2009, January 1, 2010, and January 1, 2012, the highest and best use of the subject property was as 35 separate buildable but as yet unimproved parcels,[11] all of which were presently being marketed and currently being offered for sale to and for utilization by multiple purchasers at retail prices, and that they were not merely a subdivision of multiple lots to be sold in bulk along with infrastructure to just one purchaser, the Board also found that the proper way to value the parcels in the subdivision was as retail lots using a comparable-sales analysis. Accordingly, the Board rejected the discounted-cash-flow valuation methodology developed by the appellants' real estate valuation expert because it placed a wholesale value on the subject property essentially treating the lots as bulk inventory within a subdivision to be sold in bulk to one purchaser.

With respect to the remaining valuation evidence, the Board found that Mr. Kirk's 20% devaluation of the 13 pork-chop lots in the 21-lot ANR subdivision lacked a factual predicate and was unpersuasive. The vast majority of those lots were approximately twice the size of the standard lots, and they had greater setbacks from Westford Road. Indeed, it is arguable that they should have been priced higher than standard lots. If the Board were to value all of lots in the 21-lot ANR subdivision at Mr. Kirk's suggested $545,000 value for the standard lots, the total value of the lots in the subdivision for fiscal year 2009 would be $11,445,000, which is more than $500,000 higher than the assessed value for that fiscal year.

As for the later three fiscal years at issue, if the Board were to value the remaining lots in the 35-lot subdivision at Mr. Kirk's suggested $545,000 per lot for fiscal year 2010 and at his

[11] See footnote 6.

$450,000 per lot for fiscal years 2011 and 2012, the total value of the lots would also exceed or nearly approximate the assessed values for the applicable fiscal years even when $3 million in costs is absorbed in fiscal year 2010. The Board found, however, that the values selected by Mr. Kirk for the fiscal years at issue were based on listings, brokerage agreements, undocumented and unexplained adjustments to his list of comparable-sale properties, and unintentionally but still improperly omitted sales. The Board therefore found that his suggested values were not well-grounded. On the other hand, the Board found that the five sales of lots within the subdivision in 2009 and 2010 supported the assessed values for fiscal years 2011 and 2012.

Furthermore, with respect to expenses, the Board was not able to reconcile the testimony from the appellants' witnesses regarding exactly what expenses were incurred when. Mr. Kenny estimated that out of $4,472,458 in expenses for infrastructure for the 35-lot subdivision, $3,400,236 remained to be incurred after January 1, 2009; Mr. Kirk attributed $3,667,331 in expenses for infrastructure for the 35-lot subdivision to calendar year 2009; and Mr. Goglia testified that approximately $3.4 million in expenses for the 35-lot subdivision was expended prior to January 1, 2009 plus an additional $2.1 million prior to January 1, 2010 and an additional $0.9 million during calendar year 2010. Mr. Goglia acknowledged that these actual costs included expenses for items not directly connected with the 35-lot subdivision's infrastructure, such as, by way of example, real estate taxes.

Assuming, *arguendo*, that Mr. Kirk's highest-and-best-use determination was correct and that a discounted-cash-flow approach was an appropriate technique to use under the circumstances, the Board found that his methodology and its components were flawed and speculative, in particular his data, analysis, suppositions, projections, and conclusions regarding the retail price of lots, the number of lot sales per year, the sell-off periods, and the amounts and types of expenses. The Board was not persuaded that Mr. Kirk's rates, periods, and amounts were adequately supported with reliable data or that his projections for future years were reasonable.

Consequently, the Board found that Mr. Kirk's estimates of the subject property's fair cash value for the fiscal years at issue were simply not credible.

On this basis, and particularly in light of the Board's highest-and-best-use determination, the Board decided these appeals for the assessors.

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 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).

In determining fair market value, all uses to which the property was or could reasonably be adapted on the relevant assessment date should be considered. ***Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authy.***, 335 Mass. 189, 193 (1956); ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. ***Id.*** If the property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of its fair market value. ***Colonial Acres, Inc. v. North Reading***, 3 Mass. App. Ct. 384, 386 (1975). "In determining the property's highest and best use, consideration should be given to the purpose for which the property is adapted." ***Peterson v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2002-573, 617 (citing APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed., 2001) 315-316), *aff'd*, 62 Mass. App. Ct. 428 (2004).

In the present appeals, the Board found that for *ad valorem* tax purposes, the subject property's highest and best use was as 21 retail single-family building lots for fiscal year 2009 and 35 such lots for fiscal years 2010, 2011, and 2012,[12] ready to be sold to and utilized by multiple purchasers, and not as a subdivision composed of infrastructure and a bulk inventory of lots to be sold to a single purchaser. The Board found that, at all relevant times, the lots were ready to be sold separately to individuals for the construction of single-family homes at retail prices.

The Board found that its highest-and-best-use determination was consistent with the factors contained in the long-settled definition of highest and best use: "[a] property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally

[12] See footnote 6.

productive." ***Iantosca v. Assessors of Weymouth,*** Mass. ATB Findings of Fact and Reports, 2008-929, 947-48 (citations omitted). The fact that the 21, 35, or the remaining lots were commonly owned did not alter the Board's determination – at all relevant times the lots were, notwithstanding ownership, ready to be sold to and utilized by multiple purchasers as single-family building lots and purchased at retail prices. The Board concluded that the lots could not be valued in bulk for *ad valorem* tax purposes because a bulk sale was not the subject property's highest and best use. The Board found that its highest-and-best-use finding for the subject property met all of the criteria for determining highest and best use and rendered the subject property maximally productive.

On this basis, the Board found and ruled that the highest and best use for the subject property was as a 21-lot ANR subdivision for fiscal year 2009 and as a 35-lot subdivision for fiscal years 2010, 2011, and 2012, with separate building lots that were developed but unimproved and were ready to be sold to and utilized by multiple purchasers at retail prices.

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). However, "[t]he [B]oard is not required to adopt any particular method of valuation." ***Pepsi-Cola Bottling Co. v. Assessors of Boston,*** 397 Mass. 447, 449 (1986).

Actual sales of the subject property generally "furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller." ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 682 (1982); ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 469 (1981); ***First National Stores, Inc. v. Assessors of Somerville***, 358 Mass. 554, 560 (1971).

For buildable but as yet unimproved lots within an existing subdivision, a comparable-sales approach is an appropriate method for estimating their value. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 300 (13th ed. 2008) ("The sales comparison approach is applicable to all types of real property interests when there are sufficient recent, reliable transactions to indicate value patterns or trends in the market."). In ***Cnossen v. Assessors of Uxbridge***, Mass. ATB Findings of Fact and Reports 2002-675, the Board found that a sales-comparison analysis was the appropriate methodology to use to value the lots in a subdivision that were ready to be separately sold to and utilized by multiple purchasers:

> [T]he Board found that eight of the lots contained in the Park were adjacent to Road A, which was in existence and finished as of the relevant assessment dates. Accordingly, these eight lots were essentially salable and ready for improvements without any further development of the Park's infrastructure. Because of this, the Board found that a sales comparison approach might have been the most appropriate technique to use to value these eight lots. Using the [retail] value for the lots that the appellants' valuation expert developed for use in step one of his development approach, the Board found that the total value of these eight lots [was the sum of their retail values].

Id. at 2002-686. *See generally* ***Thorndike Properties of Massachusetts II, LLC***, Mass. ATB Findings of Fact and Reports 2006-127 (using appropriately adjusted comparable sales to determine the fair case value of lots in a fully completed area of a subdivision). Furthermore, a sales-comparison approach was used by the appellants' real estate valuation expert in his discounted-cash-flow methodology to estimate the retail value of the lots in both the 21-lot ANR subdivision and the 35-lot subdivision.

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). The Board found that the sales of lots within the subject property in evidence supported the assessments for fiscal years 2011 and 2012, and even Mr. Kirk's selection of retail values for the lots that he used in his discounted-cash-flow analysis (before applying brokerage and entrepreneurial costs and his absorption and discount rates) supported the assessments for several of the fiscal years at issue. The Board found, however, that it could not rely on his values because they were based on listings, brokerage agreements, undocumented and unexplained adjustments to his list of comparable properties, and his omission of certain relevant sales. Consequently, the Board further found and ruled that the appellants did not introduce substantial valuation evidence consistent with the Board's finding of highest and best use which could challenge the individual assessments that the assessors had placed on the lots in the subject property for all of the fiscal years at issue.

The Board also found and ruled that the development approach described in the appraisal report by the appellants' real estate valuation expert was not a suitable methodology to use to value the lots within the 21-lot ANR subdivision or the 35-lot subdivision because of the Board's highest-and-best-use determination. "The subdivision development method . . . uses what is known as a bulk sale scenario to develop the value of all lots to one purchaser." THE APPRAISAL OF REAL ESTATE at 370. However, "[w]here as here, the highest-and-best-use determination is as

building lots ready to be sold separately to and utilized by multiple purchasers at retail prices, a valuation methodology that relies on a development approach for valuing a group of lots to be sold to a single purchaser is improper." ***GD Fox Meadow, LLC v. Assessors of Westwood,*** Mass ATB Findings of Fact and Reports 2011-501, 521. *Cf.* ***Khan v. Assessors of Brookline***, Mass. ATB Findings of Fact and Reports 2004-403, 444-45 ("[T]he development approach . . . was not appropriate for determining the value of the property's real estate considering the Board's finding regarding the subject's highest and best use."). *See also* ***Autumn Gates Estates, LLC & Fox Gate LLC v. Assessors of Millbury***, Mass. ATB Findings of Fact and Reports 2013-822, 851-55 (and the cases cited therein).

Moreover, even assuming, *arguendo*, that Mr. Kirk's highest-and-best-use determination was correct and that a discounted-cash-flow approach was an appropriate technique to use under the circumstances, the Board found that his methodology and its components were flawed and speculative, in particular his data, analysis, suppositions, projections, and conclusions regarding the retail price of lots, the number of lot sales per year, the sell-off periods, and the amounts and types of expenses. The Board was not persuaded that Mr. Kirk's rates, periods, and amounts were adequately supported with reliable data or that his projections for future years were reasonable. Consequently, the Board found and ruled that Mr. Kirk's estimates of the subject property's fair cash value for the fiscal years at issue were not reliable. *See* ***Mayflower Emerald Square, LLC v. Assessors of North Attleborough,*** Mass. ATB Findings of Fact and Reports, 2007-421, 523-24 (ruling that the discounted cash flow analysis was not appropriate for determining fee simple interests for *ad valorem* tax purposes).

Lastly, the Board noted, as it did in ***Autumn Gates Estate, LLC & Fox Gates, LLC***, *supra*, that "granting a discount to owners of multiple lots would likely result in disproportionate and unconstitutional assessment." ***Id.*** At 2013-855. In ***Bettigole v. Assessors of Springfield***, 343 Mass. 223 (1961), the Supreme Judicial Court 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.'" ***Id.*** at 230 (quoting ***Opinion of Justices***, 332 Mass. 769, 777 (1955)). "[C]ourts 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." ***Autumn Gates Estate, LLC & Fox Gates, LLC*** at 2013-855 (and the cases cited and discussed therein). The Board therefore found and ruled that Mr. Kirk's use of an absorption rate in his valuation methodology was not appropriate under the circumstances presented here.

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 the Board 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." ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977). The Board applied these principles in reaching its ultimate finding and ruling that the appellants failed to prove that the subject property was overvalued for *ad valorem* tax purposes for any of the fiscal years at issue. On this basis, the Board decided these appeals for the appellee.

APPELLATE TAX BOARD

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

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

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

GARDEN LANGLEY, LLC **VICTORY LANGLEY, LLC**	**v.**	**BOARD OF ASSESSORS OF** **THE CITY OF QUINCY**

Docket Nos.: F316946-F316955
F318565-F318574

Promulgated:
August 11, 2016

ATB 2016-354

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 City of Quincy ("appellee" or "assessors") to abate taxes on certain real estate in Quincy, owned by and assessed to Garden Langley LLC and Victory Langley LLC ("appellants") under G.L. c. 59, §§ 11 and 38, for fiscal years 2012 and 2013 ("fiscal years at issue").

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

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

David G. Saliba, Esq. for the appellants.

Peter Moran, Chairman and *Marion Fantucchio, Assistant Assessor* for the appellee.

FINDINGS OF FACT AND REPORT

Introduction and Jurisdiction

On the basis of all of the evidence, including the testimony and documentary exhibits entered into the record, the Appellate Tax Board ("Board") found the following facts.

On January 1, 2011 and January 1, 2012, the relevant assessment dates for the fiscal years at issue, the appellants were the assessed owners of ten separately assessed parcels of land, which collectively comprise 2.04 acres, improved with multifamily structures. The ten parcels are separately identified by the appellee as Parcel Numbers 5075H/28/10, 5075/27/9, 5075/25/8A, 5075/23/7A, 5075H/21/6A, 5075H/13/1, 5075/14/2, 5075H/15/3A, 5075/17/4A and 5075/19/5A, and are located at 191 and 201 Fenno Street and 7-30 Langley Circle in the City of Quincy (collectively the "subject property").

For fiscal year 2012, the assessors separately valued the ten parcels that comprise the subject property in the collective amount of $5,848,800 and assessed a tax thereon, at the rate of $13.75 per thousand, in the total amount of $80,421.00.[1] The appellants paid the tax assessed without incurring interest. On January 5, 2012, in accordance with G.L. c. 59, § 59, the appellants timely filed an abatement application for each individual parcel with the assessors, which they denied on April 5, 2012. In accordance with G.L. c. 59, §§ 64 and 65, the appellants seasonably filed a separate Petition with the Board for each of the subject parcels on June 21, 2012. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeals for fiscal year 2012.

For fiscal year 2013, the assessors separately valued the subject property's ten parcels in the collective amount of $5,668,000 and assessed a tax thereon, at the rate of $14.50 per thousand, in the total amount of $82,186.00.[2] The appellants paid the tax due without incurring interest. On January 7, 2013, in accordance with G.L. c. 59, § 59, the appellants timely filed an abatement application for each individual parcel with the assessors, which they denied on January 8, 2013. In accordance with G.L. c. 59, §§ 64 and 65, the appellants seasonably filed a separate Petition with the Board for each of the subject parcels on February 13, 2013. On the

[1] This amount does not include the Community Preservation Act ("CPA") surcharge of $666.71.
[2] This amount does not include the CPA surcharge of $676.87.

basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeals for fiscal year 2013.

The subject property is situated in the northeasterly section of Quincy and is part of the South Shore/Route 128 apartment submarket. Primary access to the area is provided by Interstate 93 (the Southeast Expressway), a major route that crosses the Boston metro area in a north/south direction. Logan International Airport is located about 11 miles from the subject property. Public transportation is provided to the area by way of commuter rail, rapid transit, bus service and commuter boat service to Boston and surrounding communities.

The subject property's neighborhood is urban and the land uses include a mix of residential, institutional and open space. The subject property abuts the Beachwood Knoll Elementary School to the north, the Black Creek Salt Marsh to the east, and one- and two-family residential units to the south and west. Eastern Nazarene College is about a half mile away, as is access to the MBTA subway. The subject property is within walking distance to the Quincy Shore Drive beaches.

The subject property is improved with 10 three-story, four-plex buildings, each containing 4 dwelling units, for a total of 40 units that are collectively known as the Langley Circle Apartments. Each building is a wood-frame structure that was built in 1945 and is of average construction quality and condition. The buildings' exteriors are brick and vinyl clapboard and the roofs are composed of asphalt shingles over wood sheathing. The buildings are situated around Langley Circle, a paper-street, pedestrian walkway with a centrally located courtyard.

The buildings together contain a gross living area of 35,129 square feet and a rentable floor area of 28,528 square feet. All of the units have two bedrooms and one bathroom. Sixteen units contain 784 square feet of gross living area and the remaining twenty-four units contain 666 square feet. Each building has a common entry hallway, plaster interior walls and hardwood flooring. The kitchens are all furnished with a gas stove, dishwasher (but no garbage disposal), Formica countertops and backsplashes, and old-style cabinets. There is one shared laundry facility in the basement of 201 Fenno Street. For all of the large units and for three of the smaller units, the landlord includes the cost of heat in the tenants' rent; the remaining twenty-one small units require the tenants to pay directly for the cost of the oil heat. The units also include either a shared or a private balcony. The units' amenities are basic, typical of older buildings. Each unit also has one parking space in a parking garage plus unlimited unassigned outdoor parking along the rear street.

The appellants presented its case-in-chief through the testimony and appraisal report of Edward K. Wadsworth, whom the Board qualified as an expert in the area of real estate valuation, and the testimony of Alan Slawsby, the property manager for the subject property.

Mr. Wadsworth began with an analysis of the highest and best use for the subject property. Mr. Wadsworth testified that "although there are ten separate sites each improved with a four-unit apartment structure the property has always been operated as a single entity apartment complex" and that this 40-unit arrangement "forms the basis of our valuation." Mr. Wadsworth testified that in forming his opinion, he had relied on ***Mason v. Assessors of Winchester***, Mass. ATB Findings of Fact and Reports 2004-110, 111, an appeal "involving fifty-one contiguous, but separately assessed and taxed, parcels," each improved with a two-story duplex apartment building, for a total of 100 rental units. In that appeal, the buildings at issue sat on smaller lots than other two-family properties in their vicinity, and substantial retrofitting would have been required to renovate the property so as to compete with other two-families in its area. ***Id***. at 2004-119. Approximately ten-percent of the units were rented to low-income tenants. ***Id***. at 2004-115. Moreover, the property there was located in a "relatively undesirable location" and thus would have a diminished market appeal to prospective buyers. ***Id***. at 2004-119. Finally, conversion to independently owned two-family housing would have required a "lengthy and costly" conversion process. ***Id***. at 2004-128. The Board in ***Mason*** therefore agreed that the property's highest and best use was its continued collective use as a rental garden-style apartment complex. ***Id***.

In the instant appeal, while Mr. Wadsworth made mention of the traditional highest-and-best-use factors of physically possible, legally permissible, financially feasible, and maximally productive, he did not analyze those factors and instead relied on the subject property's supposed similarity to the property in ***Mason*** and simply assumed that the highest and best use of the subject property was what he deemed to be its current use as a single 40-unit structure. Mr. Wadsworth never considered analyzing a highest-and-best use as ten separate four-unit complexes.

Mr. Wadsworth next selected the income-capitalization approach for valuing the subject property. He first selected rental properties from Quincy that he found to be comparable to the subject property, as valued as a collective 40-unit apartment complex. For fiscal year 2012, Mr. Wadsworth selected thirteen properties, with eight of these properties considered to be more comparable. Mr. Wadsworth testified that he looked only for apartment complexes with greater than 25 rental units. All of the properties had apartments consisting of four rooms with two

bedrooms and one full bathroom. The first eight comparable rentals ranged in monthly rentals from $925 to $1,250 with an average rent per month of $1,250. For fiscal year 2013, Mr. Wadsworth selected twelve rental properties from Quincy that he found to be comparable to the subject property as valued as a 40-unit apartment complex, with eight of these properties considered to be more comparable. All of the properties had four rooms with two bedrooms and one full bathroom. The first eight comparable rentals ranged in monthly rentals from $925 to $1,250 with an average rent per month of $1,250.

In analyzing these comparables, Mr. Wadsworth opined that they needed no adjustments for features including, but not limited to, unit size or amenities. He calculated a gross potential rent for both fiscal years, deducted a vacancy and collection allowance (3% for both fiscal years at issue), added in laundry and other income, and arrived at an effective gross income of $566,756, or $14,169 per unit, for each fiscal year.

Mr. Wadsworth then used the subject property's actual expenses to project expenses for the fiscal years at issue, which he deducted from effective gross income to calculate a net operating income for each fiscal year at issue.

Finally, Mr. Wadsworth developed his capitalization rates by reviewing national investor surveys and performing a band-of-investment analysis. Mr. Wadsworth reconciled his analyses and settled on a capitalization rate of 7.80% for fiscal year 2012 and 7.40% for fiscal year 2013. After applying his capitalization rates to the respective effective gross incomes, Mr. Wadsworth's final opinions of value for the subject property, assessed as a 40-unit apartment complex, were $3,900,000 for fiscal year 2012 and $4,100,000 for fiscal year 2013.

The appellants' second witness was Alan Slawsby, the property manager of the subject property. Mr. Slawsby testified that he has served as the property manager since 1992. He admitted that the subject property's owners do not charge as high of a rental price as, in Mr. Slawsby's opinion, they could obtain on the market because the owners "[don't] like vacancies." In Mr. Slawsby's opinion, the subject property is "tired" and in need of updating, particularly its 60-amp service, which he testified has been a source of many problems, particularly when tenants brought in air conditioning units. Other issues he cited were the buildings' lack of insulation and the very outdated kitchens.

Mr. Slawsby next testified that he has managed the subject property as a unified rental entity. He testified to the many facts that, in his opinion, supported its historical function as a unified rental complex, including: a common laundry area; a single building superintendent who responds to emergencies and performs repairs and maintenance; a common courtyard; and one

master insurance policy. On cross-examination, however, Mr. Slawsby admitted that the subject property's insurance coverage is on a per-building basis with separate policies for each of the ten buildings, as opposed to a single policy offering blanket coverage of the subject property. He also admitted that there are separate water and sewer service and bills for each building.

The appellee then presented its case-in-chief through the testimony of three witnesses – Paul Hines, the Assistant City Attorney; Kevin Spellman, an appraiser; and Marion Fantucchio, a member of the Board of Assessors of Quincy.

The Board qualified Mr. Hines to be an expert in local real estate law. Mr. Hines stated that, according to property plans registered with the Land Court since the 1940s, the subject property consists of 10 separate parcels with separate deeds that could legally be sold individually and independently of each other. He further testified that the subject property's use as a collective apartment complex consisting of ten separate duplexes is actually a non-conforming use under the current zoning restrictions, as the subject property is located in an area that has been zoned for multifamily houses.

Next, the Board qualified Mr. Spellman as an expert in the area of residential appraising, but with the understanding that Mr. Spellman's license restricts him to appraising one-to-four-family residences and land uses. Mr. Spellman appraised two of the subject structures, 191 Fenno Street and 25 Langley Circle, as representative of the other eight buildings. Mr. Spellman performed a sales-comparison analysis for both structures for fiscal year 2012.[3] For 191 Fenno Street, he used three sales of purportedly comparable four-family properties located in Quincy less than a mile away from the subject property. His analysis is summarized below:

Property	**132 Green Street**	**Adj.**	**70 Champan Street**	**Adj.**	**18 Newport Avenue**	**Adj.**
Sale price	$475,000		$517,000		$575,000	
Sale date	05/09/2010	-$ 8,300	08/20/2010	-$ 5,200	12/23/2010	
Property size	9,018 sf		4,000 sf	$10,000	5,752 sf	$10,000
Location	Average, Dead end		Inferior, Commercial	$25,000	Average, dead end	
Construction quality	Average, Masonry		Average, Frame	$25,000	Average, frame	$25,000
Gross living area rooms/bed/bath	3,172 sf 18/8/4	$ 28,400	3,392 sf 16/8/4	$17,400	3,696 sf 16/8/4	
Below-grade finished area	Crawl, exposed earth	$ 75,000	Full, unfinished		Full, unfinished	

[3] Mr. Spellman had completed a second appraisal report for fiscal year 2011, but that fiscal year is not before the Board as part of this appeal. He did not complete an appraisal for fiscal year 2013.

Heating/cooling	4-unit FWA gas/1 meter		4-unit, steam oil; no cooling	-$15,000	1-unit, steam oil; no cooling	
Garage/carport	None	$ 10,000	None	$10,000	2-car detached	$ 5,000
Net adjustments		$105,100		$67,200		$ 40,000
Adjusted sales price	**$580,100**		**$584,200**		**$615,000**	

Mr. Spellman's comparables yielded an adjusted sales range from $580,100 to $615,000. Mr. Spellman concluded that $590,000 was the fair market value of 191 Fenno Street for fiscal year 2012. The 191 Fenno Street parcel was assessed at $593,600 for fiscal year 2012.

Mr. Spellman next performed a sales-comparison analysis for 25 Langley Circle, which was just under 200 square feet smaller than the 191 Fenno Street property. Mr. Spellman's analysis utilized the same three purportedly comparable properties in Quincy. His analysis is summarized below:

Property	**132 Green Street**	**Adj.**	**70 Champan Street**	**Adj.**	**18 Newport Avenue**	**Adj.**
Sale price	$475,000		$517,000		$575,000	
Sale date	05/09/2010	-$ 8,300	08/20/2010	-$ 5,200	12/23/2010	
Property size	9,018 sf		4,000 sf	$10,000	5,752 sf	$10,000
Location	Average, Dead end		Inferior, Commercial	$25,000	Average, dead end	
Construction quality	Average, Masonry		Average, Frame	$25,000	Average, frame	$25,000
Gross living area rooms/bed/bath	3,172 sf 18/8/4	$20,200	3,392 sf 16/8/4	$ 9,200	3,696 sf 16/8/4	-$ 6,100
Below-grade finished area	Crawl, exposed earth	$75,000	Full, unfinished		Full, unfinished	
Heating/cooling	4-unit FWA gas/1 meter		4-unit, steam oil; no cooling	-$15,000	1-unit, steam oil; no cooling	
Garage/carport	None	$10,000	None	$10,000	2-car detached	$ 5,000
Net adjustments		$96,900		$59,000		$33,900
Adjusted sales price	**$571,900**		**$576,000**		**$608,900**	

Mr. Spellman's comparables yielded an adjusted sales range from $571,900 to $608,900. Mr. Spellman concluded that $580,000 was the fair market value of 25 Langley Circle for fiscal year 2012. The 25 Langley Street parcel was assessed at $585,500 for fiscal year 2012.

Mr. Spellman then addressed his opinion of the highest and best use of the subject property. In his opinion, the subject's highest and best use was consistent with its assessment as

10 separate 4-family structures, because in this way the property was maximally productive. He further opined it likely that a buyer would want to buy all 10 structures together. On cross-examination, Mr. Spellman admitted that he did not perform a highest-and-best use analysis based on the four factors of physically possible, legally permissible, financially feasible, and maximally productive. Rather, he assumed that the subject assessment accurately reflected the subject property's highest and best use.

The appellee's final witness was Ms. Fantucchio, an assessor with the appellee. Ms. Fantucchio submitted property record cards produced and maintained by the appellee reflecting the sales of distinct four-family brick buildings. First, she presented sales evidence for 43 and 51 Newton Avenue, two separate adjacent properties improved with four-family residences each with one bedroom. These purportedly comparable properties were separately assessed and sold by separate deeds but reportedly as part of a package sale to the same buyer on March 31, 2011, each for $525,000. Ms. Fantucchio next presented sales evidence for 371 and 365 Beale Street. These were also two separate four-family, one-bedroom residences that sold by separate deed but as part of a package sale to the same buyer. These properties sold on February 28, 2012, each for $612,500. Finally, she presented evidence for 902 Furnace Brook Parkway and 5 Common Street, two separate adjacent properties improved with four-family residences, each with two bedrooms, which sold by separate deeds but as part of a package sale to the same buyer on October 31, 2012, each for $692,500.

On the basis of the evidence submitted, the Board ultimately found that the appellants did not meet their burden of proving values for the subject property that were less than its assessed values for both fiscal years at issue. First, the appellants failed to establish a highest and best use that was different from the highest and best use on which the assessment and taxation of the subject property had been based since its construction. Mr. Wadsworth never conducted an analysis of the subject property's highest and best use, relying instead on the subject property's supposed similarity with the property in ***Mason***. However, there exist significant differences between the subject property and the property at issue in ***Mason***. Unlike the subject property, the ***Mason*** property functioned as a typical apartment complex, including several low-income units that added to the general semblance of an apartment complex. Moreover, unlike the ***Mason*** property, which would have required lengthy and costly conversion costs, the subject property was located in a district zoned for multifamily purposes and it was already functioning as separate multifamily units, with separate deeds registered in Land Court as well as separate insurance policies and utility services and billings for each building.

The Board also found fatal shortcomings in Mr. Wadsworth's valuation evidence. Mr. Wadsworth did not provide any adjustments to his market-survey rents to account for differences between his purportedly comparable properties and the subject property that would affect rental income, nor did he present any market data on his expenses. Absent adjustments to his comparable properties' rents and market data supporting his expenses, the Board found that the appellants' valuation evidence did not provide a reliable indicator of the subject property's fair cash value for the fiscal year at issue.

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

OPINION

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer 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). "[T]he phrase 'highest and best use' implies the selection of a single use . . . and . . . the Board is required to make its best judgment as to what that use is likely to be, considering all the evidence presented." ***New England Telephone and Telegraph Co. v. Assessors of Framingham***, Mass. ATB Findings of Fact and Reports 1988-95, 150. In determining the property's highest and best use, consideration should be given to the purpose for which the property is adapted. *See* ***Leen v. Assessors of Boston***, 345 Mass. 494, 504 (1963); ***Boston Gas Co.***, 334 Mass. at 566. A property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive. Appraisal Institute, THE APPRAISAL OF REAL ESTATE 277-

81 (13th ed., 2008); *see also* ***Skyline Homes, Inc. v. Commonwealth***, 362 Mass. 684, 687 (1972); ***DiBaise v. Town of Rowley***, 33 Mass. App. Ct. 928 (1992). Property cannot be valued on the basis of hypothetical or future uses that are remote or speculative. *See* ***Skyline Homes***, 362 Mass. at 687; ***Tigar v. Mystic River Bridge Authority***, 329 Mass. 514, 518 (1952); ***Salem Country Club, Inc. v. Peabody Redevelopment Authority***, 21 Mass. App. Ct. 433, 435 (1986).

In the instant appeals, the appellants' expert witness, relying primarily on the subject property's supposed similarity to the property in ***Mason***, assumed that the subject property's highest and best use was as a single apartment complex with 40 units. However, the appellants failed to establish a highest and best use that was different from the use on which the assessment and taxation of the subject property had been based since its construction, particularly where Mr. Wadsworth never conducted an actual highest-and-best-use analysis. Mr. Wadsworth offered no analysis of any of the highest-and-best-use factors: physically possible, legally permissible, financially feasible, and maximally productive. *See* Appraisal Institute, THE APPRAISAL OF REAL ESTATE at 277-81.

Furthermore, the Board noted crucial differences between the subject property and the property at issue in ***Mason***, relied upon by the appellants as its principal support. The evidence in that appeal established that the property there would require substantial, expensive retrofitting as well as a lengthy and costly conversion to be sold as separate multi-family residences. ***Mason,*** Mass. ATB Findings of Fact and Reports 2004-119. Moreover, the property in ***Mason*** involved the presence of several low-income housing units, further bestowing on that property the general semblance of an apartment complex. Also unlike in ***Mason***, the subject property the subject property is already functioning as separate multifamily units, with separate deeds registered in Land Court as well as separate insurance policies and utility services and billings for each building. Finally, the subject property is located in a district zoned for multifamily purposes and therefore, its use as a unified 40-unit apartment complex would actually be a nonconforming use.

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 Authority,*** 375 Mass. 360, 362 (1978). "The board is not required to adopt any particular method of valuation," ***Pepsi-Cola Bottling Co. v. Assessors of Boston***, 397 Mass. 447, 449 (1986), but the income capitalization method "is frequently applied with respect to income-producing property." ***Taunton Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984).

The income-capitalization method is appropriate for valuing a commercial income-producing property. ***Taunton Redev. Assocs.,*** 393 Mass. at 295. Under the income-capitalization approach, valuation is determined by dividing net operating income by a capitalization rate. *See* ***Assessors of Brookline v. Buehler,*** 396 Mass. 520, 522-23 (1986). After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the appropriate expenses. ***Pepsi-Cola Bottling Co.,*** 397 Mass. at 452-453. The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redev. Assocs.,*** 393 Mass. at 295.

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). In the instant appeals, however, Mr. Wadsworth offered no adjustments to his market survey rental incomes that would compensate for differences between his purportedly comparable rental properties and the subject property. The Board thus found that his unadjusted rental figures lacked probative value.

Under the income-capitalization approach, the expenses should also reflect the market. ***General Electric Co.,*** 393 Mass. at 610***; see Olympia & York State Street Co.***, 428 Mass. at 239, 245. However, Mr. Wadsworth did not present any market data on expenses. He failed to offer any concrete explanations or market-source data, and he thus failed to corroborate the subject property's actual expenses with market data. Therefore, the Board found that Mr. Wadsworth's vacancy and other operating expenses were unsupported and thus unpersuasive.

Absent an analysis of the subject property's highest and best use, adjustments to his purportedly comparable rental properties' rents, and any market data to support the subject property's actual expenses, the Board found that Mr. Wadsworth's appraisal report did not provide a reliable indicator of the subject property's fair cash value for the fiscal year at issue.

The burden of proving a value that is lower than the assessed value is firmly on the appellants. *See* ***Schlaiker***, 365 Mass. at 245. The Board thus found and ruled that the appellants failed to meet their burden of proving a value for the subject property that was less than its assessed value for both fiscal years at issue.

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

APPELLATE TAX BOARD

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

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

R.I. SEEKONK HOLDINGS, LLC	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF SEEKONK**
Docket Nos. F320846, F320847 F320848, F320849		Promulgated: October 27, 2015

ATB 2015-568

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 Seekonk (the "assessors" or "appellee") to abate taxes on certain condominium buildings (the "subject buildings") in Seekonk owned by and assessed to R.I. Seekonk Holdings, LLC (the "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2013 (sometimes referred to as the "fiscal year at issue").

The parties brought cross motions for summary judgment to determine whether, as the appellant asserted, the subject buildings were exempt from taxation under G.L. c. 183A, § 14,[1] as common area, or whether, as the assessors contended, the subject buildings were taxable to the appellant as separate parcels. Chairman Hammond denied the appellant's motion in part and allowed the assessor's motion in part, ruling that the subject buildings were taxable as separate parcels but the overvaluation claims remained. After the appellant withdrew its overvaluation claims, Commissioners Scharaffa, Rose, Chmielinski, and Good joined Chairman Hammond 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.

Edmund A. Allcock, Esq. and *David M. Rogers,* Esq. for the appellants.

[1] G.L. c. 183A, § 14 provides in pertinent part that: "Each unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of taxes, but common areas and facilities . . . shall not be deemed to be a taxable parcel."

Theodora Gabriel, Town Assessor, for the appellee.

FINDINGS OF FACT AND REPORT

Based on the parties' submissions during the summary judgment hearing and their acknowledgement and agreement that there is no dispute as to the material facts, the Appellate Tax Board (the "Board") made the following findings of fact.

On January 1, 2012 and at all relevant times, the appellant was the assessed owner of the four subject buildings known as Unit 15, Unit 16, Unit 19, and Unit 6000 of the Greenbrier Village Primary Condominium (the "Condominium") in Seekonk (collectively referred to as the "Subject Units"). Unit 15 is comprised of four living units located at 184, 186, 188, and 190 Greenbrier Drive, and, for assessment purposes, is described on Map 10A as Lot 15. Unit 16 is comprised of four living units located at 192, 194, 196, and 198 Greenbrier Drive, and, for assessment purposes, is described on Map 10A as Lot 16. Unit 19 is comprised of four living units located at 200, 202, 205, and 206 Greenbrier Drive, and for assessment purposes, is described on Map 10A as Lot 19. Unit 6000 is comprised of 24 living units located at 9 Springhouse Trail, and, for assessment purposes, is described on Map 10B as Lot 6000. As of June 30, 2012, Units 15 and 16 were 100% complete, Unit 19 was 90% complete, and Unit 6000 was 30% complete. Prior to January 1, 2012, the Town of Seekonk had accepted the provisions of G.L. c. 59, § 2A(a)[2] which allows municipalities to tax in the current fiscal year all new construction built in the six months following the January first valuation and assessment date for that fiscal year.

For fiscal year 2013, the assessors valued and assessed real estate taxes, including a Community Preservation Act ("CPA") addition, on the Subject Units as follows:

	Unit 15	**Unit 16**	**Unit 19**	**Unit 6000**
Assessed Value	$ 637,700	$ 637,700	$ 590,500	$ 352,000
Tax Rate/$1,000	$12.75	$12.75	$12.75	$12.75
Tax Assessed	$8,216.38	$8,216.38	$7,607.05	$4,528.16

Seekonk's Collector of Taxes mailed the actual real estate tax bills on December 31, 2012. In accordance with G.L. c. 59, § 57A, the appellant timely paid the taxes due without incurring interest. In accordance with G.L. c. 59, § 59, the appellant timely filed its abatement applications on January 29, 2013, which the assessors denied on April 25, 2013. On July 1, 2013, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petitions with this

[2] That provision is set forth in the Opinion portion of this Findings of Fact and Report.

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

The Condominium is a condominium established under G.L. c. 183A by a master deed dated August 12, 2008 and recorded, along with a site plan, on August 14, 2008 (the "Master Deed"), with the Bristol County North District Registry of Deeds. The Master Deed, Section 13.1, provides in pertinent part that:

> The Land described in Schedule A, together with Units 2 through 9, shall initially comprise the Condominium. The Condominium may consist of additional Phases constructed and to be constructed on the Land described in Schedule A. Until such time as additional Phases are added to the Condominium by the recording of "Phasing Amendments" . . . any buildings or portions thereof existing on the Land . . . (other than Phase 1) shall not be part of the Condominium or subject to the Act [c. 183A], and shall be exclusively owned by the [appellant].

Pursuant to Section 13 of the Master Deed, there are eleven added phases to the Condominium.

On February 9, 2012, the appellant recorded the Seventh Phasing Amendment to the Condominium's Master Deed, which consists of subject Units 15 and 16. On July 11, 2012, the appellant recorded the Eighth Phasing Amendment to the Condominium's Master Deed, which consists of subject Unit 19. On March 26, 2013, the appellant recorded the Ninth Phasing Amendment to the Master Deed which consists of subject Unit 6000, along with that Unit's "as-built" plans. On March 26, 2013, the appellant also recorded the Site Plan for Phase X.

The Master Deed, Section 13.4, provides in pertinent part that: "[The appellant] reserves for the benefit of itself . . . exclusive ownership of [] Buildings or portions of Buildings [not part of Phase 1 or included in a Phasing Amendment], as well as the right to fully construct, develop and finish same." In addition, the Master Deed provides in Section 6 that: "The Common Areas and Facilities of the Condominium . . . consist of the entire Land exclusive of the Units . . . (and exclusive of any and all rights, interests and/or easements reserved by the [appellant]." (Emphasis in the original).

Relying on the plain language of these sections in the Master Deed, the Board found that the Subject Units were not part of Phase 1 and the Master Deed excluded them from the Condominium and the application of c. 183A until the recording of the Phasing Amendments naming them. The Board further found that the appellant reserved exclusive ownership of the Subject Units at least until the recording of the Phasing Amendments naming them. Once named, they became "Units" of the Condominium. As "Units," they were not, by definition, part of the Condominium's common area. Accordingly, the Board found that the Subject Units were

not common area before being named in a Phasing Amendment because their ownership was reserved to the appellant, and they were not part of the Condominium or subject to c. 183A.

More specifically, the Board found that subject Units 19 and 6000 could not be part of the Condominium's common area because they were not part of the Condominium and had not been placed under the provisions of c. 183A during the relevant time period. Instead, they had been retained by the appellant and, as a result, were subject to assessment to the appellant as separate parcels to the extent of their completion as of June 30, 2012. The Board similarly found that subject Units 15 and 16 had been retained by the appellant and were not part of the Condominium until they were placed under the provisions of c. 183A on February 9, 2012. However, even as of that date, they were not part of the Condominium's common area because they were "Units."

Based on the parties' agreed upon facts and the Board's findings, and for the reasons set forth in the Opinion below, the Board ultimately found and ruled that the Subject Units were not common area of the Condominium and were properly taxable to the appellant as separate parcels. Upon the appellant's withdrawal of its overvaluation claims, the Board decided these appeals for the appellee.

OPINION

Pursuant to G.L. c. 59, § 2A (a):

> Real property for the purpose of taxation shall include all land within the commonwealth and all buildings and other things thereon or affixed thereto, unless otherwise exempted from taxation under other provisions of law. The assessors of each city and town shall determine the fair cash value of such property for the purpose of taxation on the first day of January of each year. Notwithstanding the foregoing, in any city or town which accepts the provisions of this sentence, buildings and other things erected on or affixed to land during the period beginning on January second and ending on June thirtieth of the fiscal year preceding that to which the tax relates shall be deemed part of such real property as of January first.

As of June 30, 2012, Units 15 and 16 were 100% complete, Unit 19 was 90% complete, and Unit 6000 was 30% complete. As of January 1, 2012, Seekonk had accepted the provisions of G.L. c. 59, § 2A(a) which allow municipalities to tax in the current fiscal year all new construction built in the six months following the valuation and assessment date for that fiscal year. Accordingly, it follows that the subject buildings should be taxed to the appellant to the extent of their degree of completion.

Nevertheless, the appellant contended that, under G.L. c. 183A, the Subject Units could only be taxed as "common areas and facilities to unit owners based on their percentage of ownership" and not as taxable parcels on their own because the Master Deed had not been amended as of January 1, 2012 to change the subject properties from future as opposed to present interests. The Board found, however, that several sections in the Master Deed excluded the Subject Units from the Condominium and from the provisions of G.L. c. 183A until "the recording of the 'Phasing Amendments'" while also reserving for the appellant exclusive ownership of the Subject Units. The Board further found that the Master Deed excluded "Units" from the definition of "common area and facilities."

Section 13.1 of the Master Deed states in pertinent part that: "Until such time as additional Phases are added to the Condominium by the recording of 'Phasing Amendments' . . . any buildings or portions thereof existing on the Land . . . (other than Phase 1) shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by the [appellant]." The parties agreed and the Board found that the Subject Units were not part of Phase 1. In addition, section 13.4 of the Master Deed provides in pertinent part that: "[The appellant] reserves for the benefit of itself . . . exclusive ownership of [] Buildings or portions of Buildings [not part of Phase 1 or included in a Phasing Amendment], as well as the right to fully construct, develop and finish same." In addition, the Master Deed provides in Section 6 that: "The Common Areas and Facilities of the Condominium . . . consist of the entire Land exclusive of the Units . . . (and <u>exclusive</u> of any and all rights, interests and/or easements reserved by the [appellant]." (Emphasis in the original).

Relying on the plain language of these sections in the Master Deed, the Board found that: the appellant reserved exclusive ownership of the Subject Units; the Subject Units were not part of Phase 1; and the Master Deed excluded the Subject Units from the Condominium and the application of c. 183A until the recording of the Phasing Amendments naming them. The Board further found that, once named, the Subject Units became "Units" of the Condominium. As "Units," they were not, by definition, part of the Condominium's common areas and facilities. *See* Master Deed, Section 6. Accordingly, the Board determined that the Subject Units were not part of the Condominium's common areas and facilities before being named in a Phasing Amendment because their ownership was reserved to the appellant and they were not part of the Condominium or subject to c. 183A, and they were not part of the Condominium's common areas and facilities after being named in a Phasing Amendment because as Units, they were, by definition, not part of the Condominium's common areas and facilities.

Therefore, the Board found and ruled that the Subject Units could not be part of the Condominium's common area either before or after being named on a Phasing Amendment and they were instead subject to assessment to the appellant as separate parcels to the extent of their completion as of June 30, 2012.

Furthermore, c. 183A specifically allows an owner to retain and exclude from its application other interests in real property not expressly declared to be subject to it. "The provisions of this chapter shall not be deemed to preclude or regulate the creation or maintenance of other interests in real property not expressly declared by the owner . . . ." G.L. c. 183A, § 2. In addition, c. 183A defines a "Condominium" as "the land . . . which is submitted to the provisions of this chapter, the building or buildings . . . thereon . . . which have been submitted to the provisions of this chapter," and defines the "Master deed" as "the instrument by which the condominium is submitted to the provisions of this chapter." Notably, neither buildings nor units are included in c. 183A's definition of "Common areas and facilities." G.L. c. 183A, § 1. Further, c. 183A, § 1 specifically recognizes that a master deed may provide or stipulate its own definition for common area and facilities, which was done here. *See* G.L. c. 183A, § 1 ("'Common area and facilities' shall, except as otherwise provided or stipulated in the master deed, mean and include . . . ."). The Board found and ruled here that, in accordance and consistent with c. 183A, the Master Deed excluded the Subject Units from the Condominium and the application of c. 183A until the recording of the Phasing Amendments naming them, and, once named, the Subject Units were not part of the Condominium's common area and facilities by definition. Accordingly, the Subject Units were subject to assessment to the appellant as separate parcels.

The appellant's exemption theory primarily relied on G.L. c. 183A, § 14, which mandates the taxation of "common areas and facilities . . . to unit owners based on their percentage of ownership," and two Massachusetts Appeals Court cases from 2000 – ***First Main Street Development Corp. v. Assessors of Acton***, 49 Mass. App. Ct. 20 (2000) and ***Spinnaker Island Yacht Club Holding Trust v. Assessors of Hull***, 49 Mass. App. Ct. 20 (2000) – holding that unexercised condominium development rights are future, not present interests, and are therefore

part of the common areas and facilities of the condominium and not separately taxable under G.L. c. 59, § 11.[3]

Here, however, the Board not only found that the subject properties were not part of the Condominium or subject to the provisions of c. 183A, but that they had been either completed or partially constructed as of the relevant valuation and assessment date - June 30, 2012. *See* G.L. c. 59, § 2A(a). In discussing the distinction between present and future interests, the Appeals Court observed that an unexercised development right could be converted into a present interest by initiating affirmative actions, such as, "build[ing] the additional buildings and facilities and amend[ing] the master deed." ***First Main Street***, 49 Mass. App. Ct. at 28. Conspicuously, the Court did not hold that an exercise of development rights requires an amendment to the master deed to be recorded – likely because such an interpretation would allow an owner to escape taxation indefinitely despite the property being fully developed. Consequently, even if the subject properties could be considered part of the Condominium and subject to the provisions of c. 183A, under the facts and circumstances here - where actual construction has taken place and the appellant has taken full possession of the property - the Board ruled that the appellant had a present interest in the subject buildings and the assessors were warranted in assessing the subject properties to the appellant. On the basis of the parties' agreed upon facts and the Board's findings and rulings, the Board ultimately found and ruled that the subject buildings were not part of the common area and facilities of the Condominium and were properly taxable to the appellant as separate parcels. Therefore, upon the appellant's withdrawal of its overvaluation claims, the Board decided these appeals for the appellee.

APPELLATE TAX BOARD

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

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

[3] Section 11 provides in pertinent part that: "[w]henever the commissioner deems it proper, he may, authorize the assessment of taxes upon any present interest in real estate to the owner of such interest on January first, and taxes on such interest may thereupon be assessed to such person."

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

THE STERLING AND FRANCINE CLARK ART INSTITUTE, INC.	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF WILLIAMSTOWN**

Docket Nos. F318912, F322056

Promulgated:
October 28, 2015

ATB 2015-581

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 Williamstown ("appellee" or "assessors") to abate a tax on certain real estate in Williamstown, owned by and assessed to The Sterling and Francine Clark Art Institute, Inc. ("The Clark" or "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal years 2013 and 2014.

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

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

James B. Art, Esq. for the appellant.

Jeffrey T. Blake, Esq. for the appellee.

This case was submitted on an agreed statement of facts and attached exhibits. Based on those submissions, the Appellate Tax Board ("Board") made the following findings of fact.

As of July 1, 2012 and July 1, 2013, the relevant dates for the determination of exemption for the fiscal years at issue, The Clark was the assessed owner of a 2.17-acre parcel of land improved with a single-family residential dwelling located at 166 South Street in Williamstown ("subject property" or "Scholars' Residence"). For assessment purposes, the subject property is identified as "Map 131 Block 0082."

For fiscal year 2013, in accordance with G.L. c. 59, § 29, The Clark timely filed a Form 3ABC with the assessors on February 29, 2012. The assessors nonetheless valued the subject property at $1,709,800, and assessed a tax thereon, at the rate of $14.37 per $1,000, in the total amount of $26,160.96.[1] In accordance with G.L. c. 59, § 57, the appellant timely paid the tax due. On November 1, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, seeking an abatement of the tax on the grounds

[1] This amount includes a Community Preservation Act ("CPA") surcharge as well as a Fire District surcharge.

that the subject property was exempt under G.L. c. 59, § 5, Clause Third ("Clause Third"), which provides an exemption for property owned and occupied by charitable organizations. The assessors denied the appellant's abatement application on January 24, 2013. On April 17, 2013, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed a Petition Under Formal Procedure with the Board.

For fiscal year 2013, in accordance with G.L. c. 59, § 29, The Clark timely filed a Form 3ABC with the assessors on February 28, 2013. The assessors nonetheless valued the subject property at $1,709,800, and assessed a tax thereon, at the rate of $15.28 per $1,000, in the total amount of $27,540.98.96.[2] In accordance with G.L. c. 59, § 57, the appellant timely paid the tax due. On October 29, 2013, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement, seeking an abatement of the tax on the grounds that the subject property was exempt under Clause Third. The assessors denied the appellant's abatement application on November 5, 2013. On February 3, 2014, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petition with the Board.

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

The Clark, formed in 1950 as a Massachusetts non-profit corporation, is exempt from taxation in accordance with Internal Revenue Code ("IRC") § 509(a)(3) as a supporting organization in support of The President and Trustees of Williams College, a Massachusetts charitable corporation ("Williams College"). According to its Restated Articles of Organization, the purposes of The Clark include the following: (a) to maintain one or more museums of fine arts and art institutions in Williamstown, Massachusetts in support of Williams College; (b) to provide facilities for study and research in the fine arts, art history and literary matters; (c) to establish and maintain collections of art for the use of students, teachers and other qualified members of the public in support of Williams College; (d) to engage in or assist with the educational activities, teaching and research of Williams College, in any one or more of the fine arts or any related fields; and, (e) to assist promising and deserving students and teachers of fine arts, art history and related subjects.

As part of its charitable mission, The Clark operates a visiting scholars program that invites scholars from around the world, who must have a Ph.D. or equivalent professional experience, to use the resources of The Clark to complete projects that are of primary importance

[2] This amount includes a CPA surcharge as well as a Fire District surcharge.

to the study of the visual arts. These visiting scholars, called Clark Fellows, contribute to the educational activities of The Clark through special lectures given to the learning community, as well as regularly scheduled conferences, symposia, and workshops. In addition, the visiting scholars regularly interact with students and faculty of Williams College in informal settings such as weekly luncheons, and are available to advise students on a variety of topics including career alternatives and research projects. The Clark's visiting scholars program has been recognized by the United States Department of State as an "Exchange Visitor Program" under the Fulbright-Hayes Act.

The Clark offers between 10 and 18 fellowships to visiting scholars each year, ranging in duration from six weeks to nine months. The visiting scholars are not faculty or employees of The Clark and are not paid a salary, although some may receive a need-based stipend. The visiting scholars are given office space in The Clark library. Visiting scholars are also provided housing, free of charge, at the subject property, known as the Scholars' Residence, which is located directly across the street from The Clark's museum galleries and libraries.

The subject property, the Scholars' Residence, is a three-story Colonial-style dwelling built circa 1880. The subject dwelling consists of five one-bedroom apartments and one two-bedroom apartment, each of which is fully furnished by The Clark. All of these units have a kitchen, shower, living room, and dining room, and also a television, washer and dryer. There are also two "swing room units" that include only a bedroom and a bathroom, and are typically used for shorter stays, or to host The Clark's guest lecturers. The subject property also includes a large communal kitchen, library, living room, dining room, pantry, and an ADA-complaint elevator, all located on the first floor, which are available for use by all Clark fellows and visiting lecturers. All units in the subject property share the same heating system, security system and electric meter, all of which are paid for by The Clark.

The Clark furnishes all of the units and common areas, cleans the common areas regularly, maintains the building and grounds, and cleans the individual living units during the transition from one visiting fellow to the next. While respecting the privacy of the residents, The Clark reserves the right to access the entirety of the subject property, including living units, and to re-locate residents within the building as may be necessary to accommodate visiting scholars during their stay. There are no, and have never been, any written leases, licenses, or other occupancy agreements that confer any legal rights to the visiting scholars or preserve or even document any legal right of the scholars to reside in the Scholars' Residence.

The assessors did not dispute, and the Board found, that The Clark is a charitable organization within the meaning of Clause Third. Based on its subsidiary findings, and for the reasons more fully explained in the following Opinion, the Board found and ruled that The Clark occupied the subject property in furtherance of its charitable purposes.

Accordingly, the Board issued a decision for the appellant in the present appeals and granted abatements in the amount of $26,160.96 for fiscal year 2013 and $27,540.98 for fiscal year 2014.

OPINION

Clause Third provides in pertinent part that "real estate owned by ... a charitable organization *and* occupied by it or its officers for the purposes for which it is organized" is exempt from taxation. A taxpayer claiming exemption under Clause Third therefore must demonstrate that (1) the property is owned by a charitable organization and (2) occupied by a charitable organization to further its charitable purpose. *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)).

For the purposes of Clause Third, a "charitable organization" is "(1) a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth, and (2) a trust for literary, benevolent, charitable scientific or temperance purposes." G.L. c. 59, § 5, Third. The parties agreed, and the Board found, that the appellant qualified as a charitable organization for purposes of Clause Third. The issues in these appeals, therefore, are whether the appellant occupied the subject property and whether it did so in furtherance of its charitable purpose.

Occupancy is "'something more than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized.'" ***Assessors of Boston v. Vincent Club***, 351 Mass. 10, 14 (1966) (quoting ***Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage***, 225 Mass. 418, 421-422 (1917). To qualify for exemption, the property must be occupied "directly for the fulfillment of [the organization's] charitable purposes." ***Boston Symphony v. Assessors of Boston,*** 294 Mass. 248, 255 (1935) (citing ***Burr v. Boston,*** 208 Mass. 537, 543 (1911)).

When the property at issue involves a residential facility owned by a charitable organization, a threshold determination must be made as to whether the property is occupied by the residents in their individual capacities or by the organization itself. The rights maintained by

the residents in connection with the property, particularly the degree of exclusivity and control, are a controlling factor in making this determination. Cases dealing with shared possession have held that in the "absence of exclusive possession by tenants, the owner is considered the 'occupant.'" ***Mary Ann Morse Healthcare Corp. v. Assessors of Framingham***, 74 Mass. App. Ct. 701, 706 fn. 7. (2009)**.**

In ***M.I.T. Student House, Inc. v. Assessors of Boston***, 350 Mass. 539 (1966), the appellant sought a tax exemption for a "student house" that was occupied by needy students who paid a small rental fee to the taxpayer. The Court found that "the character of the premise is that of a 'dormitory or boarding house'" and that the occupation of such is by the corporation itself and not the residents, "just as the occupation of a college dormitory [] is that of the institution of learning." ***Id.*** at 542 (citing ***Springfield Young Men's Christian Assn v. Assessors of Springfield***, 284 Mass. 1, 5 (1932)); *see also*, ***Franklin Square House v. Boston,*** 188 Mass. 409, 411 (finding that the charitable organization occupied the subject property because housing working girls was similar to housing students in a dormitory). Applying these principles, the Court found and ruled in ***M.I.T. Student House*** that the property at issue was occupied by the charitable organization and therefore exempt from taxation under Clause Third.

In contrast, "where residents are afforded legal protections under landlord/tenant law, the Court ruled that the residents, and not the charitable organization, occupy the property." ***John Bertram House of Swampscott, Inc. v. Assessors of Swampscott,*** Mass. ATB Findings of Fact and Reports 2006-306, 332 (citing ***Charlesbank Homes v. City of Boston,*** 218 Mass. 14 (1914)). In ***Charlesbank Homes,*** the appellant, a charitable organization, maintained an apartment house containing some general rooms and 103 apartments, which were leased to tenants for small fees. ***Id.*** at 15. The Court found that the objective of the corporation was to rent the apartments, which it did. As such, the residents were "strictly tenants . . . [with] an interest in the respective apartments let to them and they themselves are the occupants." ***Id.***

In the present appeals, The Clark used the subject property to provide housing for participants in their visiting scholars program. The visiting scholars did not sign any type of lease or occupancy agreement nor did they pay rent during their stay at The Clark. The Clark paid all utilities, furnished the individual units and common areas, and cleaned and maintained the common areas. Moreover, while respecting the privacy of the residents, The Clark reserved the right to access the entirety of the subject property, including living units, and to re-locate visiting scholars within the building. On the basis of these facts, the Board found and ruled that the subject property was occupied by the Clark itself, rather than the visiting scholars in their

individual capacities. Accordingly, the Board found and ruled that the subject property was both owned and occupied by a charitable organization for purposes of Clause Third.

The remaining issue to be determined is whether this occupancy of the subject property furthered the Clark's stated charitable purposes. "Real estate which is both owned and occupied by a charitable organization is 'not entitled to tax exemption if the property is occupied by it for a purpose other than that for which it is organized.'" ***Acushnet River Safe Boating Club v. Assessors of Fairhaven,*** Mass. ATB Findings of Fact and Reports 2002-372, 383 (citing ***Lynn Hospital v. Board of Assessors of Lynn,*** 383 Mass. 14, 18 (1981); ***Milton Hospital & Convalescent Home v. Assessors of Milton,*** 360 Mass. 63, 69 (1971)). *See also* ***Mary Ann Morse Healthcare Corp. v. Assessors of Framingham***, 74 Mass. App. Ct. 701, 706 (2009) (ruling that the provision of housing to elderly residents was consistent with organization's charitable purpose).

Those purposes, as contained in the Clark's Restated Articles of Organization, included the provision of "facilities for study and research in the fine arts, art history and literary matters," and assisting with "the educational activities, teaching and research of Williams College, in any one or more of the fine arts or any related fields." On the basis of the evidence presented, the Board found and ruled that the use of the subject property to house the visiting scholars was consistent with and in furtherance of the Clark's charitable purposes. The record indicated that national and international arts scholars were invited to participate in the visiting scholars program, and that as part of the program, the scholars contributed to the promotion of the visual arts and arts education at Williams College by conducting research, giving lectures, and taking part in workshops and symposia. Although the actual research and other activities conducted by the scholars may have taken place, in part, at buildings other than the Scholars' Residence, the Board concluded that the subject property was necessary for the operation of the visiting scholars program. Given the small stipend, if any, awarded to the visiting scholars, along with the comparatively short duration of the scholarships, the Board concluded that it would have been extremely difficult to entice prominent arts scholars from around the world to come to Williamstown in the absence of guaranteed free housing. The Board thus found and ruled that the Clark occupied the subject property in furtherance of its stated charitable purpose. *See* ***Mary Ann Morse Healthcare Corp.***, 74 Mass. App. Ct. at 706.

After considering the evidence of record, and based on its subsidiary findings, the Board found and ruled that the appellant was a charitable organization for purposes of Clause Third and that it occupied the subject property in furtherance of its stated charitable purposes as

contemplated by Clause Third. Therefore, the Board found and ruled that the subject property was exempt from tax under Clause Third.

Accordingly, the Board issued a decision for the appellant in the present appeals and granted abatements in the amount of $26,160.96 for fiscal year 2013, and $27,540.98 for fiscal year 2014.

APPELLATE TAX BOARD

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

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