COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

BEETING PLACE LLC C/O FULLER PLACE LLC	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF WEST BRIDGEWATER**
Docket No. F332304 F335079		Promulgated: August 19, 2021

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 West Bridgewater ("assessors" or "appellee"), to abate taxes on certain real estate owned by and assessed to Beeting Place LLC ("appellant") for fiscal years 2017 and 2018 ("fiscal years at issue").

Commissioner Elliott heard these appeals. Chairman Hammond and Commissioners Rose, Good, and Metzer joined him in dismissing the appeal for fiscal year 2017 for lack of jurisdiction and issuing a Decision for the appellant for fiscal year 2018.[1]

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.

George A. McLaughlin, III, Esq. *and Matthew E. Burke,* Esq. for the appellant.

Thomas P. Gay Jr., Esq. for the appellee.

[1] The Decision failed to indicate that the abatement amount excluded the Community Preservation Act surcharge.

FINDINGS OF FACT AND REPORT

Based on Stipulations submitted by the parties, as well as testimony and evidence submitted at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2016, and January 1, 2017, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of seven parcels of land, which were assessed as a single 88-acre parcel, located at 560 Walnut Street in the Town of West Bridgewater ("subject property"). The property record cards indicate that the subject property, for assessment purposes, was comprised of five components: improvements, consisting of a 5,000-square-foot, one-story, industrial building that is used for storage ("storage building") and surrounding paving; 49.58 acres of wetlands; 30.08 acres of undeveloped industrial land; two one-acre pad sites that previously housed radio towers; and the remaining 6.6 acres of land that provide access to and surround the storage warehouse.

For fiscal year 2017, the assessors valued the subject property at $2,904,200, and assessed a tax thereon, at the rate of $28.68 per thousand, in the total amount of $83,292.46, exclusive of a Community Preservation Act ("CPA") surcharge. The timeliness of the appellant's payment of the taxes is at issue in the appeal and is discussed further, *infra.* On January 30, 2017, within the

timeframe prescribed by G.L. c. 59, § 59, the appellant filed an abatement application with the assessors, which the assessors denied on February 1, 2017. On April 14, 2017, within the timeframe prescribed by G.L. c. 59, §§ 64 and 65, the appellant filed an appeal with the Board.

For fiscal year 2018, the assessors valued the subject property at $2,904,200, and assessed a tax thereon, at the rate of $28.58 per thousand, in the amount of $83,002.04, exclusive of a CPA surcharge. The timeliness of the appellant's payment of the taxes is at issue in the appeal and is discussed further, *infra*. On January 22, 2018, within the timeframe prescribed by G.L. c. 59, § 59, the appellant filed an abatement application with the assessors, which the assessors denied on April 18, 2018. On May 10, 2018, within the timeframe prescribed by G.L. c. 59, §§ 64 and 65, the appellant filed an appeal with the Board.

I. Jurisdiction

The appellant presented as a witness, and also submitted an affidavit of, its manager, Myron Fuller. Mr. Fuller testified to his usual procedure for the payment of the appellant's real estate taxes. According to Mr. Fuller, upon his request, the appellant's bookkeeper creates a check with Mr. Fuller's stamped signature for the full amount of the quarterly taxes, which she hands to Mr. Fuller in an envelope on the same day. Mr. Fuller then sends the check by first class mail, personally bringing the envelope to the

post office located on Liberty Street in Brockton, about a mile and a half from the appellant's office. Mr. Fuller testified that his routine was to place the envelope in the exterior box outside the post office before the 4:00 p.m. mail pickup. Mr. Fuller's affidavit indicated that in early March 2019, he spoke with a post office employee, whom he could not name, and he was advised that mail dropped at the facility is postmarked on the same day that it is received. The envelopes containing the tax payments for the fiscal years at issue were not entered into evidence.

The appellee submitted an affidavit of Scott Golder, the Treasurer/Collector for West Bridgewater. In the affidavit, Mr. Golder detailed the daily procedure for receiving and recording tax payments. He explained that, during the days leading up to and beyond the tax due dates, when "the tax collector's office typically receives more mail and paperwork than the office can reasonably handle in one business day," the mailed and in-person tax payments are each separately sorted into batches of about 100 bills and labeled with a batch number. Mr. Golder stated that, generally, the date of receipt corresponds to the payment date recorded in the tax collector's system, but some batches are entered into the payment system on the following business day.

The following charts summarize the payment histories for the fiscal years at issue, according to the tax collector's records:

Fiscal year 2017

Due Date	Payment Date	Day	Check Date	Cashed Date
08/01/2016	***08/04/2016***	Thursday	08/01/2016	08/08/2016
11/01/2016	***11/02/2016***	Wednesday	10/31/2016	11/02/2016
02/01/2017	01/30/2017	Monday	01/16/2017	01/31/2017
05/01/2017	***05/04/2017***	Thursday	05/01/2017	05/05/2017

Fiscal year 2018

Due Date	Payment Date	Day	Check Date	Cashed Date
08/01/2017	***08/02/2017***	Wednesday	07/31/2017	08/03/2017
11/01/2017	11/01/2017	Wednesday	10/30/2017	11/07/2017
02/01/2018	01/23/2018	Tuesday	01/22/2018	01/24/2018
05/01/2018	05/01/2018	Tuesday	04/30/2018	05/04/2018

Mr. Golder conceded that the appellant's payments due on November 1, 2016 and August 1, 2017, which were processed one day after their respective due dates, could have been received by the office on their due dates but not recorded until the following days. However, according to Mr. Golder's affidavit, the payments due on August 1, 2016 and May 1, 2017, which were not recorded until three days after their respective due dates, would have been received by the office at least two days after their respective due dates.[2]

Based on the evidence of record, including the recording of the tax payment for November 1, 2016 and August 1, 2017 just one day after their due dates, the Board inferred the appellant mailed these tax payments no later than the day before their recording, and therefore the payments were timely mailed by the appellant.

[2] None of the dates on the checks were Fridays; in fact, they were all Mondays.

All other tax payments for fiscal year 2018 were timely paid. The Board therefore found and ruled that it had jurisdiction to hear and decide the appeal for fiscal year 2018.

However, with respect to the tax payments due on August 1, 2016 and May 1, 2017, which were recorded three days after their due dates, the appellant had no record of timely mailing of the tax payments other than Mr. Fuller's uncorroborated statements. Mr. Fuller did not mail the payments through certified mail with return receipts, nor did he present any evidence of tracking information. Moreover, the appellant's unsubstantiated assertions were not even consistent. While Mr. Fuller claimed that he received checks from the bookkeeper and then mailed them on the same day that they were generated, there is one instance during the two fiscal years at issue that this was not true: the check dated January 16, 2017 was not processed and cashed until a full two weeks after it was generated. This discrepancy undermined Mr. Fuller's assertion that he adhered to a consistent and reliable routine for payment of the appellant's taxes. Therefore, based on the facts on record, and as will be explained further in the Opinion below, the Board did not infer timely mailing of the payments for August 1, 2016 and May 1, 2017. Accordingly, the Board found and ruled that the Board lacked jurisdiction to hear and decide the appeal for fiscal year 2017.

II. Valuation

The following chart reflects the subject property's five components and their contributions to the subject property's assessed value for fiscal year 2018:

Component	**Value**
Storage building, yard items, and surrounding paving	$219,500
Wetlands 49.58 acres	$148,700 $3,000/acre (rounded)
Undeveloped industrial land 30.08 acres	$962,600 $32,000/acre (rounded)
Radio tower pad sites (2 acres)	$365,900 $182,952/acre (rounded)
Access to storage building (6.6 acres)	$1,207,500 $182,952/acre (rounded)
Total assessment	$2,904,200

A. The Appellant's Case

The appellant presented two valuation witness: Lawrence P. Silva, a professional engineer licensed in the Commonwealth; and Shaun Fitzgerald, an appraiser licensed in the Commonwealth.

The Board qualified Mr. Silva as an expert in engineering, including engineering cost estimates. Mr. Silva testified to the feasibility and potential costs of developing the subject property. In Mr. Silva's opinion, there existed many limitations and obstacles to developing the subject property, primarily because of the underlying natural soil and the presence of significant wetlands.

Mr. Silva testified that extensive wetlands greatly limit the subject property's ability to be developed, because local conservation commission rules prohibit development within the wetlands and a 50-foot buffer zone. Mr. Silva also described a trench located along the majority of the subject property's frontage on Walnut Street as well as culverts that cross under Walnut Street and under Beeting Place Way that allow drainage to flow. Mr. Silva testified that, while the subject property has sufficient frontage for up to six lots, the trench and culverts impact the accessibility of the frontage. He opined that the most that could be developed in the residential zone was a single house lot.

Mr. Silva further testified that the existing infrastructure – which includes a roadway, the excavated trench and culverts, fire hydrants, water and sewer lines, underground electric cables, and a water well - is more than 25 years old and has never been used, so it is significantly deteriorated. He opined that the infrastructure is essentially useless and would have to be excavated, thus adding to the cost to develop the subject property. However, Mr. Silva conceded on cross-examination that, when he visited the subject property, he did not perform any in-depth examination beyond a visual check of the existing infrastructure.

Mr. Silva proposed installation of a septic system instead of sewer lines at the subject property, explaining that West

Bridgewater does not have a municipal sewer system, and the town has no official agreement with neighboring Brockton to connect to its sewer system. Mr. Silva conceded that installing a septic system would be more expensive than connecting to a neighboring sewer system, and he further conceded that the existing water and sewer lines at the subject property ran along an easement towards Brockton. However, to his knowledge, only a few specific developments have made sewer-connection agreements with Brockton. Mr. Silva did not investigate connecting the subject property to Brockton.

Mr. Silva further testified that the quality of soil in the area would limit the capacity of the septic system that could be installed and, therefore, reduce the potential number of buildings that could be constructed at the subject property, unless the subject property could tie into Brockton's sewer system. Mr. Silva did not conduct his own percolation tests, relying instead on United States Department of Agriculture records from locations near the site that indicated very slow percolation rates. Available soil studies also indicated a very shallow water table, which would also increase costs. Mr. Silva opined that the development of an industrial warehouse at the subject property would have the least negative impact on the proposed septic system.

Considering local conservation regulations, which preclude development within the 50-foot buffer area of wetlands, and the

low-capacity septic system that would be necessitated because of its poor soil, Mr. Silva concluded that the most feasible potential use for the subject property would be an industrial campus setting consisting of the existing storage building plus three additional warehouse buildings, with the two existing pad sites being used for drainage to support the development. He further stated that it was possible to have one residential building in the residentially zoned area with its own septic system. Therefore, Mr. Silva concluded, the subject property could be developed, but only for a low-density use at a high cost.

The appellant submitted into evidence Mr. Silva's economic feasibility analysis outlining the potential costs of developing the subject property. Mr. Silva's plan assumed the following: an upgrade to the existing storage building to add a bathroom and water supply; the construction of one residential building on 1.44 acres of the subject property that is in a residentially zoned area ("Form A residential lot"); and the construction of four additional warehouse buildings within the undeveloped industrial area. Mr. Silva testified that, to develop the subject property, a developer would need to import a considerable amount of fill to develop the site, as well as install appropriate water lines or wells and raise the surrounding sites to meet requirements of the drainage and septic systems for development. Mr. Silva estimated the following costs:

Existing storage building upgrade	
Addition of bathroom	$ 7,000
Total cost	**$ 7,000**
Form A residential lot upgrade	
Filling area	$ 30,000
Total cost	**$ 30,000**
Industrial lot with 4 warehouses	
Water main extension	$ 600,000
Subdivision of water main and hydrants	$ 690,000
Installation of septic systems	$ 200,000
Reclamation and paving	$ 313,200
Fill and stormwater management	$1,785,000
Total cost	**$3,588,200**

For its next witness, the appellant called Mr. Fitzgerald, whom the Board qualified as an expert in the valuation of real estate. Mr. Fitzgerald also submitted his appraisal report.

Mr. Fitzgerald first determined the highest and best use for the subject property. He considered that the subject property was a mix of industrially and residentially zoned land, and he further considered Mr. Silva's opinions on the costs and other issues associated with potential development of the subject property. Mr. Fitzgerald determined that the highest and best use of the subject property was mixed use: (1) carving out the street-front Form A residential lot along Walnut Street; (2) upgrading the current industrial storage building with a water source, septic system, and bathroom; and (3) characterizing the remaining pad sites, access land, and undeveloped industrial land as unbuildable land. As will be discussed further, Mr. Fitzgerald had considered the possibility of carving out space for the potential development of a 92,500-square-foot industrial building outside the wetland buffer area, but he dismissed this because of the problems and

costs associated to cure the subject property as identified by Mr. Silva.

Mr. Fitzgerald next considered the three generally accepted appraisal approaches to valuing real estate – the cost approach, the income-capitalization approach, and the sales-comparison approach. Mr. Fitzgerald rejected the cost approach because the subject property is only marginally improved, and he rejected the income-capitalization approach because the subject property typically would not generate income. Relying solely on the sales-comparison approach, Mr. Fitzgerald applied that valuation method to his opinion of value of three segments of the subject property as summarized below.

1. Form A residential lot (1.44 acres)

The Form A residential lot has approximately 2,085 linear feet of street frontage on Walnut Street, which is interrupted by the Beeting Place Way access way and stretches of vegetated wetlands. Mr. Fitzgerald's report indicates that, without concern for wetlands and soil conditions, the 2,085 linear feet of frontage could be turned into 13 lots. However, considering that the frontage is interrupted by land required to allow access to Beeting Place Way, and further considering the significant sections of vegetated wetlands, Mr. Fitzgerald, in consultation with Mr. Silva, determined that only the Form A residential lot could be

located on the portion of the subject property that is zoned for residential use.

To value the residential portion of the subject property, Mr. Fitzgerald applied the comparable-sales valuation approach. He selected six purportedly comparable vacant, residential parcels. These ranged in size from 0.69 acres to 2.02 acres and sold in transactions dating from July 5, 2017 through November 21, 2018, for prices ranging from $125,000 to $200,000 with an average of $162,500. Mr. Fitzgerald applied adjustments for dates of sale, ranging from -4% to -10%, and for view and traffic conditions, ranging from 5% to -10%. After these adjustments, the purportedly comparable properties yielded adjusted sale prices ranging from $123,125 to $160,000 with an average of $139,604. Mr. Fitzgerald selected a rounded value of $140,000 as the appropriate value for the Form A residential lot.

Relying on information provided to him by Mr. Silva, Mr. Fitzgerald then subtracted from this value the estimated costs to prepare the subject property for residential development. He estimated the cost to fill the subject property to be $30,000, and the cost of adding a water pump required to increase pressure necessary for domestic water use to be $2,000.

After subtracting these costs, Mr. Fitzgerald arrived at $108,000 for his opinion of value for the Form A residential lot.

2. Existing storage building

Mr. Fitzgerald searched for comparable sales of small industrial warehouse buildings occurring in the subject property's Plymouth County as well as in the surrounding Bristol and Norfolk Counties. He selected three sales, ranging in building areas from 5,500 square feet to 6,500 square feet. The sale prices ranged from $415,000 to $502,500 with an average of $464,167, which equated to a price per square foot of building space of $76.77. Mr. Fitzgerald selected a rounded $80.00 per square foot as the most appropriate for the subject storage building. At 5,000 square feet of building space, the storage building would have an indicated value of $400,000. Unlike his comparable properties, the existing storage building has no public water, no sewer or plumbing system, and no heating or cooling system, and is surrounded by vegetated wetlands. Therefore, Mr. Fitzgerald deducted for costs to cure as provided by Mr. Silva: upgrade and connection to the existing well ($7,500); install Title V compliant septic system ($40,000); install basic plumbing and toilet facilities ($7,000); and improve access to the property, including cost to pave ($100,000). Mr. Fitzgerald thus arrived at an indicated value for the storage building of $245,500.

The property record card for the subject property indicated a value of $219,500 for the existing storage warehouse. Because Mr. Fitzgerald's value was slightly higher than the assessed value,

the Board concluded that this portion of the assessment was not in contention.

3. Wetlands, undeveloped industrial land, access lands, and pad sites

The appellant agreed with the assessment of the subject property's wetlands at $3,000 per acre. Mr. Fitzgerald, however, disputed the valuation of the following: the two one-acre pad sites that formerly housed the radio towers; the 6.6 acres of access land; and the remaining 30.08 acres of undeveloped industrial land.[3]

After determining that distribution warehouses were in reasonably high demand in the subject property's area, Mr. Fitzgerald determined the portion of the subject property that was available for industrial development. He researched recent industrial warehouse sales and found seven properties that he believed to be comparable to what could be developed at the subject property. These sales had occurred from January 17, 2013 to March 10, 2015, with warehouses built in calendar years 2014 through 2016 and ranging in building area from 104,160 square feet to 1,226,340 square feet with an average of 462,319 square feet. After

[3] The Board noted the slight discrepancy between the size of the subject property as noted on the assessors' property record card (88.26 acres) and as reflected in Mr. Fitzgerald's appraisal report (87.10 acres). Mr. Fitzgerald acknowledged the discrepancy and indicated that he found the 87.10-acre measurement, as reported by a Collins Engineering study of the subject property dated June 24, 1990 to be more reliable. This discrepancy is not material to the Board's findings or rulings in this appeal.

adjustments, Mr. Fitzgerald opined that these purportedly comparable properties yielded a land-price-per-square-foot-of-building metric of $7.00, meaning that $7.00 of gross potential value would be gained by each square foot of building space. In other words, a 92,500-square-foot building, as Mr. Silva concluded could be placed on this portion of the subject property, would yield a gross potential value of $647,500.

However, Mr. Fitzgerald then considered the many impediments to developing the subject property, and the costs to cure those impediments as determined by Mr. Silva. These costs included extending the water main system, adding hydrants, extending the septic system, removing and repaving the roadways, and filling significant portions of the subject property to be sufficiently above the water table. Based on his consultation with Mr. Silva, Mr. Fitzgerald estimated costs to cure at $3,531,350, which is significantly higher than the $647,500 potential value that could be added with the proposed industrial building. Mr. Fitzgerald thus concluded that the two one-acre pad sites, the 6.6 acres of access land, the 30.08 acres of undeveloped industrial land, and the 49.58 acres of wetlands should be categorized together as the undevelopable remainder of the subject property.

To ascertain the valuation of this component of the subject property, Mr. Fitzgerald reviewed six purportedly comparable sales of undevelopable land from Bristol and Plymouth Counties occurring

from November 3, 2015 to July 20, 2017 and ranging in size from 3.76 acres to 74.78 acres. These sales yielded an average price per acre of $2,763. Mr. Fitzgerald selected $3,000 per acre as an appropriate value for the subject property's pad sites, access land, undeveloped industrial land, and wetlands. Mr. Fitzgerald thus determined a fair market value of $234,856 for the remainder of the subject property.

4. Final calculations

Mr. Fitzgerald's final determination of the fair market value for the subject property is summarized as follows:

Existing storage building	$245,500
Form A residential lot	$108,000
Undevelopable land	$234,856
Total fair market value (rounded)	**$588,000**

B. The Appellee's Case

The appellee presented its case-in-chief through the testimony of three witnesses - John W. Delano, a conservation agent for the Town; William J. Pastuszek, Jr., a licensed appraiser; and John G. Donahue, the principal assessor for the Town.

Mr. Delano's position as a conservation agent consists of reviewing plans submitted by engineering firms. Mr. Delano is a licensed professional land surveyor, certified soil evaluator, and licensed sanitarian, as well as a wetlands scientist with forty years of experience with design plans and development primarily in Plymouth County and the abutting counties. While he completed many

college engineering courses and employed and supervised engineers as the owner of his wetlands consulting service, he is not a licensed engineer. The Board qualified Mr. Delano as an expert in engineering matters.

Mr. Delano testified that he had reviewed the soil mapping of the subject property and surrounding areas and determined that the soil type at the subject property was the same as for areas nearby that had been developed. While the first few layers are not suitable for development, he opined that the strata below the upper layers could support a storm water basin. Mr. Delano concluded that soil quality is not an impediment to development.

Mr. Delano further testified that he visited the subject property and studied its existing infrastructure, which includes hydrants, drainage, a sewer line, and a water line. He testified that, after his inspection, he prepared a conceptual plan for industrial development, which he clarified was not intended to be a design but was prepared for the purpose of locating wetlands lines. Based on his observations of wetlands conditions, Mr. Delano opined that the portion of the subject property that was zoned for residential use would not actually be suitable for residential development because of the presence of extensive wetlands. However, he further concluded that with respect to industrial development of other components within the subject property, there were no significant barriers posed by wetlands.

The appellee's second witness was Mr. Pastuszek, whom the Board qualified as an expert in real estate appraisal. Mr. Pastuszek testified and presented an appraisal report of the subject property.

Mr. Pastuszek determined that the area surrounding the subject property is a good location for industrial use, because it has good access to a highway network, an adequately skilled workforce, and adequate housing. Mr. Pastuszek further relied on the wetlands plan provided by town conservation officials, like Mr. Delano, which noted no unusual soil conditions that would preclude industrial development on portions of the subject property. Mr. Pastuszek recognized that a portion of the subject property is located in a residential zone. However, he testified that he gave that use no weight because only a small portion of the land could be developed around the wetlands to create a substandard lot. Mr. Pastuszek thus opined that industrial development is the single highest and best use for the subject property. He concluded that a 400,000 square foot industrial/commercial building could be constructed on the subject property as a replacement for the current storage building.

Mr. Pastuszek developed and relied solely on the sales-comparison approach to value the subject property, finding the income-producing and cost approaches to be inapplicable.

Mr. Pastuszek relied on four purportedly comparable sales of industrial property, located in Bristol and Norfolk Counties, which occurred from March 10, 2015 to April 1, 2017. These purportedly comparable properties ranged in size from 6.8 acres to 71.2 acres, as compared with the subject property's 88.26 acres, and were improved with buildings that ranged in size from 55,000 square feet to 263,403 square feet, as compared with the subject property's proposed 400,000-square-foot building. After applying his adjustments for location and building size, these purportedly comparable properties yielded adjusted sale prices ranging from $7.36 to $12.67 per square foot of gross building area. Mr. Pastuszek's adjustments ranged from -35% to -20%. He gave the greatest weight to the sales at the lower end of his range, and thus determined a unit price of $7.75 per square foot of proposed building for the subject property.

Applying this value to the proposed 400,000 square feet of building space that he opined could be constructed at the subject property, Mr. Pastuszek arrived at a rounded indicated value of $3,100,000 for the subject property for fiscal year 2018.

Finally, the appellee presented Mr. Donahue, the principal assessor for the Town. He stated that, to his knowledge, only one Town property had successfully connected to Brockton sewer, and three other properties were attempting to connect as of the time of the hearing.

The appellee noted that the subject property's assessment at $2,904,200 was less than Mr. Pastuszek's opinion of value of $3,100,000. Therefore, the appellee contended that the subject property was not overvalued for fiscal year 2018.

C. The Board's Findings

The appellant's opinion of value for the subject property was consistent with the assessment in some respects. As previously mentioned, the Board found that the value of the existing storage building was not in contention. The appellant and the appellee further agreed that the 49.58 acres of the subject property's wetlands should be assessed at $3,000 per acre, and the Board so agreed as well.

The Board, however, disagreed with other portions of the appellant's opinion. First, the Board found that the appellant failed to establish that the subject property's assessment should include a Form A residential lot. Mr. Silva acknowledged that the extensive expanse of wetlands and the trench along the majority of the subject property's frontage on Walnut Street compromised the ability to develop the residentially zoned portion of the subject property. The Board further found persuasive Mr. Pastuszek's opinion that it would not be worth a developer's effort to attempt to carve out a substandard lot among the wetlands. Accordingly, the Board found and ruled that the appellant failed to establish

that any portion of the subject property had a highest and best use of residential development.

The Board further disagreed with the appellant's opinion that the two one-acre pad sites, the 6.6 acres of access land, and the 30.08 acres of undeveloped industrial land should be classified as undevelopable as opposed to undeveloped land. Relying on cost estimates provided by Mr. Silva, Mr. Fitzgerald opined that industrial development would be cost prohibitive. The Board, however, noted crucial omissions in Mr. Silva's evaluation of the subject property. When he visited, Mr. Silva did not perform any inspections of the existing infrastructure, which included a roadway, an excavated drainage trench, fire hydrants, water lines, and a sewer line for connection to neighboring Brockton. By contrast, Mr. Delano did study the existing infrastructure, and he moreover studied lower strata of soil below the surface to determine that the subject property could be developed. The Board further noted that the appellant did not establish that the subject property could not be developed for alternative uses that require minimal infrastructure, water, and sewer.

To support its opinion of value of the subject property, the appellant offered sales of undevelopable land. However, the Board found that the appellant failed to establish that the land is undevelopable as opposed to simply undeveloped. Therefore, the

appellant's sales were not sufficiently comparable to the subject property to provide meaningful evidence of its fair market value.

While failing to establish that the subject property's access lands, pad sites, and undeveloped industrial land should be assessed as undevelopable land akin to wetlands, the appellant nevertheless presented evidence establishing noteworthy challenges to the subject property's development. Mr. Silva detailed that the soil composition of the subject property is greatly compromised by the wetlands. The Board found that the appellant established that development of the subject property would be hindered by the complications of having to design an adequate septic system or negotiating a hookup to Brockton.

Weighing all the evidence, the Board found that the appellant did not meet its burden of proving that the contested assessment at $32,000 per acre for the 30.08 acres of undeveloped land was too high. The Board further found, however, that the appellant met its burden of proving that the assessment at $182,952 per acre for the remaining portions of the subject property – the two one-acre pad sites and the 6.6 acres of access land - was excessive. Based on the totality of the evidence, the Board instead found that these remaining, undeveloped components of the subject property should all be valued consistently at $32,000 per acre.

The following chart indicates the Board's valuation conclusions:

Component	Value
Storage building, yard items, and surrounding paving	$219,500
Wetlands 49.58 acres	$148,700 (rounded) $3,000/acre
Undeveloped industrial land 30.08 acres	$962,600 (rounded) $32,000/acre
Radio tower pad sites (2 acres)	$ 64,000 $32,000/acre
Access to storage building (6.6 acres)	$211,200 $32,000/acre
Total valuation	$1,606,000
Total assessment	$2,904,200
Overvaluation	$1,298,200

The Board thus issued a Decision for the appellant, ordering abatement of $37,102.56, exclusive of the CPA surcharge.

OPINION

I. Jurisdiction

The appellee challenged the Board's jurisdiction to hear and decide the appeals for both fiscal years at issue, because four quarterly tax payments – three for fiscal year 2017 and one for fiscal year 2018 – were recorded by the tax collector as late payments. *See* G.L. c. 59, §§ 57, 64, 65; *see also* ***Columbia Pontiac Co. v. Assessors of Boston***, 395 Mass. 1010, 1011 (1985) ("[P]ayment of the full amount of the tax due without incurring interest charges is a condition precedent to the board's having jurisdiction over an abatement appeal."). The abatement remedy is created by statute and, therefore, the Board has only that jurisdiction

conferred on it by statute, which prescribes requirements for timely tax payments. ***Assessors of Boston v. Suffolk Law School***, 295 Mass. 489, 492 (1936) ("Since the remedy by abatement is created by statute the board . . . has no jurisdiction to entertain proceedings for relief by abatement begun at a later time or prosecuted in a different manner than is prescribed by the statute.").

However, G.L. c. 59, § 57C provides that "to determine jurisdictional interest requirements," if a payment is received after the due date, the date of mailing, as indicated by a United States mail postmark, is considered the date of payment. The party who would have access to the tax payment's envelope with postmark would be the appellee, and the appellee did not offer it. *See*, G.L. c. 59, § 57C. Pursuant to its Rules of Procedure at 831 CMR 1.13, in the absence of a legible postmark, the Board may make inferences with regards to timely mailing. The Board found sufficient evidence to infer that the tax payment for August 1, 2017, which was recorded the next day, was mailed timely. *See, e.g.*, ***Florio, Trustee v Assessors of Newbury***, Mass. ATB Findings of Fact and Reports 2011-725, 729 (inferring that a Petition received by the Board was mailed no later than the prior day and therefore mailed timely). All other tax payments for fiscal year 2018 were made timely. Accordingly, the Board found and ruled that it had jurisdiction over the appeal for fiscal year 2018.

However, the Board did not find sufficient evidence to infer that the tax payments due August 1, 2016 and May 1, 2017 were mailed timely. The appellant did not send any of the payments by certified mail with return receipt requested or with mail tracking. The appellant offered nothing but the unsubstantiated statements of Mr. Fuller, which failed to establish when the tax payments in question were postmarked, only when he believes that he brought the mail to the mailbox outside the post office. Even that claimed fact is not clear, as indicated by the lack of uniformity in the appellant's check dates and processing dates, particularly the two-week gap between the check dated January 16, 2017 and its payment record date of January 30, 2017. Weighing the appellant's testimonial evidence against the tax collector's more regimented system of binding and stamping batches of mail as they enter the office, the Board found that the appellant did not meet its burden of proving that the tax payments for August 1, 2016 and May 1, 2017 were mailed timely. Accordingly, the Board dismissed the appeal for fiscal year 2017 for lack of jurisdiction.

II. Valuation

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 are fully informed and under no

compulsion. ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549, 566 (1956).

The appellant has the burden of proving that the property has a lower value than that assessed. "The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax." ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). "[T]he board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.'" ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting ***Schlaiker***, 365 Mass. at 245).

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

The parties essentially agreed on the valuation of the subject property's storage building and on the 49.58 acres of wetlands. Where the parties primarily differed was with respect to their valuation of the balance of the subject property, including their opinions of the highest and best use.

The ascertainment of a property's highest and best use is a prerequisite to valuation analysis. *See* ***Peterson v. Assessors of Boston***, 62 Mass. App. Ct. 428, 429 (2004); ***Irving Saunders Trust v. Board of Assessors of Boston,*** 26 Mass. App. Ct. 838, 843 (1989). "A property's highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive." ***Northshore Mall Limited Partnership v. Assessors of Peabody***, Mass. ATB Findings of Fact and Report 2004-195, 246, *aff'd,* 63 Mass. App. Ct. 1116 (2005).

In the instant appeal, the appellants' evidence failed to establish that the subject property should have been assessed as including a Form A residential lot. Considering the formidable impediments to residential development, including that the frontage is interrupted by land required to allow access to Beeting Place Way and the significant sections of vegetated wetlands, the Board found persuasive Mr. Pastuszek's opinion that most developers would not deem it worthwhile to develop one substandard residential lot at the subject property.

With respect to the remaining portions of the subject property, the appellant attempted to prove that all these areas were undevelopable and thus should be valued like similar lots of undevelopable land. The appellant then offered sales of purportedly comparable undevelopable parcels to support its valuation. Sales of comparable 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). The appellant must demonstrate "fundamental similarities" between the comparison properties and the property at issue for the comparison properties to offer meaningful valuation evidence. ***Lattuca v. Robsham,*** 442 Mass. 216, 216 (2004). In particular, the appellant bears the burden of "establishing the comparability of . . . properties [used for comparison] to the subject propert[ies]." ***Fleet Bank of Mass. v. Assessors of Manchester***, Mass. ATB Findings of Fact and Reports 1998-546, 554. *Accord* ***New Boston Garden Corp.,*** 383 Mass. at 470.

Here, the Board found that the evidence presented failed to establish that the highest and best use of the two one-acre pad sites, 6.6 acres of access land and 30.08 acres of undeveloped industrial land was as undevelopable land. The Board thus found the appellant's sales of undevelopable land were not sufficiently comparable to provide meaningful comparison with the subject property. Therefore, the appellant failed to support its asserted valuation of $3,000 per acre for the pad sites, access land, and 30.08 acres of undeveloped industrial land.

However, while it rejected the appellant's opinion of value, the Board nevertheless found that the appellant met its burden of proving that the assessment at $182,952 per acre for the two one-acre pad sites and the 6.6 acres of access land was too high. The Board found that these elements of the assessment did not adequately account for the costs to cure the impediments to development, particularly the costs involved in filling extensive portions of the subject property and installing a sewer system sufficient to accommodate the subject property's poor soil quality or negotiating a hookup to Brockton sewer. An assessment's failure to account for impediments to development will warrant a reduction in assessed value to account for the costs to cure the defects. *See, e.g.,* ***Hughes v. Assessors of the City of Quincy***, Mass. ATB Findings of Fact and Reports 2005-420, 424-25, 428 (finding that assessment was excessive because the assessors failed to consider documented deficiencies in the subject property).

Based on its evaluation and weighing of the evidence, the Board found that the appellant did not meet its burden of proving that the $32,000-per-acre valuation of the 30.08 acres of undeveloped land was too high. The Board further found, however, that the appellant met its burden of proving that the remaining portions of the subject property – the two one-acre pad sites and the 6.6 acres of access land - were valued too high. The Board instead found that these portions of undeveloped industrial land

should all be valued consistently with the assessment of the 30.08 acre of undeveloped industrial land.

The Board is not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggests. Rather, the Board can accept those portions of the evidence that the Board determines to have more convincing weight and then form its own independent judgment of fair market value. ***Foxboro Associates***, 385 Mass. at 683; ***New Boston Garden Corp. v. Board of Assessors of Boston***, 383 Mass. 456, 473 (1981); ***Board of Assessors of Lynnfield v. New England Oyster House, Inc.,*** 362 Mass. 696, 701-702 (1972); ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984). In evaluating the evidence before it, the Board may select among the various elements of value and appropriately form its own independent judgment of fair cash value. ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp.,*** 392 Mass. at 300.

On the basis of these principles and the totality of the evidence, the Board arrived at the following fair cash value for the subject property:

Component	Value
Storage building, yard items, and surrounding paving	$219,500
Wetlands 49.58 acres	$148,700 (rounded) $3,000/acre
Undeveloped industrial land 30.08 acres	$962,600 (rounded) $32,000/acre
Radio tower pad sites (2 acres)	$ 64,000 $32,000/acre
Access to storage building (6.6 acres)	$211,200 $32,000/acre
Total valuation	$1,606,000
Total assessment	$2,904,200
Overvaluation	$1,298,200

Conclusion

The Board dismissed the appeal for fiscal year 2017 for lack of jurisdiction and issued a Decision for the appellant in the appeal for fiscal year 2018. Accordingly, the Board ordered an abatement in the amount of $37,102.56 for fiscal year 2018, exclusive of the CPA surcharge.

THE APPELLATE TAX BOARD

By: */S/ Thomas W. Hammond*
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: */S/ William J. Doherty*
Clerk of the Board