**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**GEORGE BIRMBAS, TRUSTEE    v. BOARD OF ASSESSORS OF**

**THE TOWN OF CONCORD**

Docket Nos. F329626, F332576 Promulgated: July 17, 2018

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 Concord (“appellee” or “assessors”) to abate taxes on certain real estate in Concord owned by and assessed to George Birmbas, Trustee (“appellant” or “Mr. Birmbas”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2016 and 2017 (the “fiscal years at issue”).

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

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

*Mark F. Murphy,* Esq.for the appellant.

*R. Lane Partridge,* Assessor*,* for the appellee.

**FINDINGS OF FACT AND REPORT**

On January 1, 2015 and January 1, 2016, the relevant dates of valuation for the fiscal years at issue, the appellant was the assessed owner of a 2.92-acre parcel of land improved with a commercial office building located at 676 Elm Street in Concord (the “subject property”).

For fiscal year 2016, the assessors valued the subject property at $1,031,800, and assessed a tax thereon, at the rate of $13.92 per thousand, in the total amount of $14,578.10, inclusive of a Community Preservation Act surcharge. For fiscal year 2017, the assessors valued the subject property at $1,039,700, and assessed a tax thereon, at the rate of $14.07 per thousand, in the total amount of $14,848.01, inclusive of a Community Preservation Act surcharge. The following table contains the jurisdictional information relevant to these appeals.

|  |  |  |  |
| --- | --- | --- | --- |
| **Fiscal Year** | **Abatement Application filed** | **Abatement Application denied** | **Petition filed at Board** |
| **2016** | **2/1/16** | **2/18/16** | **5/11/16** |
| **2017** | **1/12/17** | **2/16/17** | **5/4/17** |

Based on the foregoing facts, the Appellate Tax Board (“Board”) found and ruled that it had jurisdiction to hear and decide these appeals.

The subject property’s building was built in 1984. It is a two-story building with a total finished area of 6,540 square feet, which, during the periods relevant to these appeals, consisted of common areas along with four separate office suites. There is also a paved parking lot, approximately 10,000 square feet in size. The subject property is located on Route 2, which is a heavily trafficked road. Several maps of the subject property were entered into the record, and those maps showed wetlands covering much of it, such that expansion or further development is substantially limited.

Mr. Birmbas testified at the hearing of these appeals and the Board found him to be credible. He stated, and the documentary evidence showed, that he purchased the subject property in November of 2013 for $850,000. The subject property had been openly and actively marketed at that time, and the seller was unrelated to Mr. Birmbas. Listing materials for the subject property at the time of the purchase were entered into the record, showing that the asking price was $995,000. At that time, its assessed value was $1,092,300.

Mr. Birmbas testified that he is a real estate investor, but the acquisition of the subject property marked the first time he purchased a commercial building. He stated that his other holdings were residential properties in Florida. He testified that he believed the subject property was worth at least as much, or more than, what he paid for it because it was assessed for more at that time.

Mr. Birmbas stated that the subject property had been partially owner-occupied, and that the individual selling it wished to retain her office suite for an additional six months following the sale, primarily for storage. The other three office suites in the subject property were occupied at the time of his purchase, but that soon changed.

Mr. Birmbas stated that, as anticipated, the previous owner vacated her suite within six months after his purchase. Around the same time, another tenant stopped paying rent and had to be evicted. Later, a third tenant departed, such that by January 1, 2016, only one of the four office suites was leased. Mr. Birmbas testified that he actively marketed the suites for rent, but without success.

Mr. Birmbas testified that his opinion of the subject property’s fair cash value for the fiscal years at issue was “about what he paid for it.” He estimated that he had expended approximately $45,000 to $50,000 in improvements to the subject property since he purchased it, including for items such as carpeting, painting, lighting, and door replacement.

The assessors for their part offered limited testimony by R. Lane Partridge, assessor, and they also engaged in a brief cross-examination of Mr. Birmbas. Mr. Partridge testified that the subject property’s assessed values for both of the fiscal years at issue were determined using the cost-reproduction approach. They otherwise rested on the assessments, after offering into the record the requisite jurisdictional information along with property record cards for the subject property, including the income-valuation record cards.

The assessors’ income-valuation approach utilized market information gathered from responses from commercial property owners in Concord to requests for income and expense information pursuant to G.L. c. 59, § 38D. For fiscal year 2016, the value for the subject property yielded through the assessors’ income-valuation approach was $894,400, while the value yielded through that approach for fiscal year 2017 was $903,300.

On the basis of all of the evidence, the Board found and ruled that the appellant met his burden of proving that the assessed value of the subject property for both of the fiscal years at issue exceeded their fair cash value. In making this determination, the Board concluded that the highest and best use of the subject property was its continued use as a commercial office building. However, the Board found that the cost-reproduction approach, relied on by the assessors in setting the assessments at issue, was not the most reliable methodology with which to value the subject property, as it was neither a special-purpose nor a newer property.

As the subject property was an income-producing property, the Board found that the most reliable methodology with which to determine its value was the income approach, rather than the cost approach relied on by the assessors. Further, the Board found that the most reliable income and expense information in the record was the information contained on the income-valuation record cards. That information is indicative of the overall commercial market in Concord, as it was determined largely through the responses of Concord commercial property owners regarding their income and expense information.

Moreover, much of the information on the income-valuation record cards was consistent with the subject property’s historical operating experience, as reflected by income and expense information entered into the record by the appellant. However, there was one significant difference from the subject property’s actual experience, and that was for vacancy.

The assessors used a vacancy rate of 8% for the subject property for both of the fiscal years at issue in their income-valuation approach. That rate was significantly lower than the subject property’s actual vacancy rate, which increased steadily throughout the relevant time periods, to as high as 75% by January of 2016. The testimony of Mr. Partridge and the testimony elicited from the appellant on cross-examination revealed that the subject property’s vacancy rate was much higher during the relevant time periods than the vacancy rates at other office properties throughout Concord. Although Mr. Birmbas had multiple real estate holdings, his experience appears to have been limited to residential property in other geographic markets. Mr. Birmbas admitted that this was his first commercial real estate venture, and the Board found that, based on the evidence as a whole, the subject property’s high vacancy rate may have been attributable to inexperienced management, as it was anomalous to the rest of the Concord office market. Accordingly, the Board concluded that the lower vacancy rate used by the assessors was more appropriate. The Board likewise gave more weight to the information contained on the income-valuation record cards in reaching its ultimate determination of fair cash value for the subject property, which was $900,000 for both of the fiscal years at issue.

In addition, the Board found that the values determined by the assessors using the income-valuation approach were supported by other information in the record, including the actual sale of the subject property. The appellant purchased the subject property in an arm’s-length transaction in November of 2013 for $850,000. He testified that he expended approximately $45,000 to $50,000 on improvements to the subject property since then. The assessment information in the record was indicative of a relatively stable commercial real estate market in Concord during the relevant time periods, and the Board therefore found that the fair cash values determined with primary reliance on the income-valuation approach were supported by the subject property’s actual sale price.

Accordingly, on the basis of all of the evidence, the Board found that the appellant met his burden of demonstrating that the assessed value of the subject property exceeded its fair cash value for both of the fiscal years at issue. The Board determined a fair cash value for the subject property of $900,000 for both of the fiscal years at issue. The Board therefore decided these appeals for the appellant, and granted abatements in the amounts of $1,862.18 for fiscal year 2016 and $1,995.06 for fiscal year 2017, including the Community Preservation Act surcharge, plus any associated interest.

**OPINION**

Assessors are required to assess real estate at its “fair cash value.” G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer 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).

Generally, the burden of proof is upon the taxpayer to prove that the subject property has a lower value than that assessed. ***Schlaiker v. Assessors of Great Barrington,*** 365 Mass. 243, 245 (1974) (citing ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting***Schlaiker***, 365 Mass. at 245).

In order to determine a property’s fair cash value, its highest and best use must first be ascertained. *See* ***Peterson v. Assessors of Boston***, 62 Mass. App. Ct. 428, 429 (2004). In the present appeals, the subject property’s actual use was as a commercial office building. The parties did not dispute that the subject property’s current use was its highest and best use, nor was there any evidence to the contrary in the record. Accordingly, the Board concluded that the subject property’s continued use as a commercial office building was its highest and best use.

Real estate valuation experts, the Massachusetts courts, and this Board generally 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). However, “[t]he introduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods,” ***Correia,*** 375 Mass. at 362, and those situations may include when the property in question is a newer building or a special-purpose property. *See* ***Digital 55 Middlesex, LLC v. Assessors of Billerica***, Mass. ATB Findings of Fact and Reports 2017-415, 449. Neither of those special situations was present here, as the subject property was not a special-purpose property and it was more than 30 years old as of the relevant dates of valuation. Accordingly, the Board determined that the cost-reproduction approach was not a reliable methodology with which to value the subject property, and it therefore placed no weight on the cost approach relied on by the assessors in setting the assessed values at issue.

The use of the income-capitalization approach is appropriate when reliable market-sales data are not available. ***Assessors of Weymouth v. Tammy Brook Co.,*** 368 Mass. 810, 811 (1975); ***Assessors of Lynnfield v. New England Oyster House,*** 362 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.,*** 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redevelopment Associates v. Assessors of Taunton,*** 393 Mass. 293, 295 (1984). Because the subject property was an income-producing property, the Board found and ruled that the income-capitalization approach was the most reliable methodology with which to determine its fair cash value.

The Board by and large adopted the income-valuation information and approach used by the assessors, as reflected on the subject property’s income-valuation record cards for the fiscal years at issue, which values were $894,400 for fiscal year 2016 and $903,300 for fiscal year 2017, but it rounded those values to $900,000 for both years.

The Board found that these values were also supported by the subject property’s actual sale price of $850,000 in November of 2013, which was sufficiently proximate to the relevant valuation dates as to warrant consideration. Usually, the actual sale of the subject property itself is “ʽvery strong evidence of fair market value, for [it] represent[s] what a buyer has been willing to pay to a seller for [the property under appeal].’” ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 469 (1981) (quoting ***First Nat’l Stores, Inc. v. Assessors of Somerville,*** 358 Mass. 554, 560 (1971)). *See also* ***Kane v. Assessors of Topsfield***, Mass. ATB Findings of Fact and Reports 2000-409, 411. The Board therefore found that the subject property’s sale price of $850,000, along with the improvements put into the subject property as testified to by Mr. Birmbas, was consonant with the Board’s conclusions as to fair cash value under the income-capitalization approach.

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 have more convincing weight, and form its own independent judgment of fair market value. ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 683 (1982); ***New Boston Garden Corp.,*** 383 Mass. at 473; ***New England Oyster House,*** 362 Mass. at 701-02; ***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 in these appeals, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp.,*** 392 Mass. at 300. “The credibility of witnesses, the weight of the evidence, and 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).

After considering the record in its totality, and exercising its own independent judgment, the Board found and ruled that the appellant met his burden of proving that the subject property’s assessed value exceeded its fair cash value for both of the fiscal years at issue, and it therefore decided these appeals for the appellant. Having determined that the fair cash value of the subject property was $900,000 for both of the fiscal years at issue, the Board granted abatements in the amounts of $1,862.18 for fiscal year 2016 and $1,995.06 for fiscal year 2017, which amounts include the Community Preservation Act surcharge, plus any associated interest.

**THE** **APPELLATE TAX BOARD**

**By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

# Thomas W. Hammond, Jr., Chairman

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

**Clerk of the Board**