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Appellate Tax Board Cases

Book 2A

2018

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Book 2A

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

AMERICAN YOUTH HOSTELS, INC. v. BOARD OF ASSESSORS OF WEST TISBURY

Docket No. F328768 Promulgated:
May 29, 2018

ATB 2018-178

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of West Tisbury ("appellee" or "assessors") to abate taxes on certain real estate located in West Tisbury owned by and assessed to the appellant, American Youth Hostels, Inc. ("AYH" or "appellant"), under G.L. c. 59, §§ 11 and 38, for fiscal year 2015 ("fiscal year at issue").

Chairman Hammond heard this appeal. Commissioners Rose and Good joined him in a decision for the appellant. Commissioners Scharaffa and Chmielinski dissented.

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

Christopher Minue, Esq. and *Robert Brooks*, Esq. for the appellant.

Ellen M. Hutchinson, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

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

On January 1, 2014, the relevant assessment date for the fiscal year at issue, the appellant was the assessed owner of a 2.51-acre parcel of land improved with a building that was operated as a hostel, located at 525 Edgartown Road in West Tisbury ("subject property"). The hostel was open for operation from late May to mid-October.

The appellant timely filed with the assessors its Form 3ABC and a copy of its Form PC on February 28, 2014. Nevertheless, the assessors valued the subject property at $811,300 and assessed a tax thereon, at a rate of $5.71 per $1,000, in the total amount of $4,771.25, including the Community Preservation Act surcharge. In accordance with G.L. c. 59, § 57, the appellant timely paid the tax due without incurring interest. On April 30, 2015, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors prior to the

due date of the first installment of the semi-annual actual tax bill for the subject property. On July 14, 2015, the assessors denied the appellant's Application for Abatement. On October 5, 2015, in accordance with G.L. c. 58A, § 7 and c.59, §§ 64 and 65, the appellant seasonably filed a petition with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeal for the fiscal year at issue.

The appellant presented its case in chief through the testimony of its witness, AYH Chief Executive Officer Russell Hedge, as well as the submission of documents.

AYH is a nonprofit entity granted federal tax-exempt status under Internal Revenue Code § 501(c)(3). AYH was founded in 1934, and its stated charitable purpose, as described in its by-laws, is as follows:

> Section 2.1 Purpose. … to help all, especially the young, gain a greater understanding of the world and its people through hostelling. The Corporation seeks to be a leading hostel provider in the world, a valued source of experiential learning, a widely recognized champion for intercultural understanding, a vibrant presence in communities across the United States, and an effective advocate for youth travel.
>
> Section 2.2 Hostelling Defined. Hostelling is educational travel, local and global, using programs and hostels to facilitate interaction between travelers and community members, and to promote discovery of ourselves, local culture, and the world.

In furtherance of this mission, AYH directly owns and operates 34 hostels in the United States, including the subject property. A hostel offers accommodations to its members that are more affordable than a traditional hotel. Mr. Hedge testified that, during the relevant time period, a night's stay at the subject property cost approximately $37 per night, plus the cost of a membership card if the guest was not already a member of AYH; annual membership fees were $28 for 18 to 55 year olds, $18 for those over 55, and free for anyone under 18. AYH also sold nightly membership cards at the subject property for $3. Mr. Hedge stated that the subject property's rate was significantly below the standard lodging rate on Martha's Vineyard and thus enabled a greater number of guests to experience the area.

While a hostel provides lodging accommodations, the appellant maintains that the subject property was not simply a low-cost hotel. Mr. Hedge described hostelling as an "experiential learning experience." He testified that youth hostelling began in the early 1900s, when a German schoolteacher, Richard Sherman, set up a chain of schoolhouses to be used for overnight stays by young people on school outings. He testified that Mr. Sherman had previously served in World War I along the Maginot Line, a site of hostility between German and French troops.

During Christmas one year, the otherwise hostile troops reportedly came together to celebrate and to play soccer in a moment of peaceful truce.

As Mr. Hedge testified, Mr. Sherman was apparently inspired by this experience: "[H]is take-away from that was that if you bring people together and they can talk, that the world can be a better place." Mr. Hedge testified that the appellant's mission is based upon the principal of "cross-cultural understanding," which he described as recognizing that there are "various cultures around the world [and] if we can bring people together and they can talk, we can eliminate misunderstanding, and that we can defeat destructive stereotypes."

The subject property, like all AYH properties, was set up to further AYH's mission of promoting cross-cultural understanding by encouraging communal living. During the relevant time period, the subject property offered the following accommodations: a 20-bed dormitory; a 16-bed dormitory; a 10-bed dormitory; and an 8-bed dormitory. The hostel did offer limited accommodations for those wishing to have more privacy, such as a family traveling together: 1 private room with 5 single beds; 1 private room with 4 single beds; 1 private room with 2 single beds; and 1 private room with 1 double bed and 2 single beds. However, Mr. Hedge testified that the vast majority of travelers slept in the dormitory-style rooms, and that all guests agreed to participate in a shared living experience that included the use of communal bathrooms,[1] communal living-room areas, a communal self-serve kitchen, and a communal dining area. As Mr. Hedge explained, the building's design was "all about entering the building and taking the effort to respect the other person that's sharing your room and sitting down next to you when you're eating lunch, who you're cooking next to when you're cooking your dinner."

Mr. Hedge further testified that the subject property limited the length of stay of its guests to no more than 7 days, because "what we found was the longer that people stayed in the hostel, the more they felt ownership of the hostel ... and their territory, and it got in the way of the shared living experience." Mr. Hedge testified that, when day limitations first went into effect, "occupancy suffered ... [b]ut it was the way that we were able to maintain the collegial atmosphere," and therefore worth the cost.[2]

Mr. Hedge testified to the differences between a hostel and a hotel, particularly the more stringent rules required of the hostel guests. Hostellers are asked to make their beds and to clean up after themselves, particularly after meal preparations and by stripping their beds at the end of

[1] The subject property does contain an individual bathroom attached to a bedroom, for the use by guests who have difficulties with mobility.

[2] Mr. Hedge testified that AYH began instituting day limitations at the subject property in 2007 with a 21-day limit, which AYH then shortened to 14 days in 2011 and further shortened to 7 days in 2012.

their stay. There are also quiet hours and rules prohibiting food or beverages other than water in the sleeping rooms, as well as rules prohibiting alcohol consumption, public intoxication and drug use at the property.

Mr. Hedge testified that AYH furthered its charitable mission primarily by operating its hostels. As he explained, "the building is our program." Mr. Hedge testified that AYH's operation of a hostel must comply with standards set by the American Association of Colleges and Universities, specifically the standards for intercultural knowledge, civil engagement, and global learning. At the subject property, AYH employed managers with educational backgrounds, not just degrees in hospitality, to further the experiential learning experience. For example, the hostel provided free pancake breakfasts that include staff-facilitated discussions to encourage group interaction and learning on a particular topic related to AYH's mission.

In addition to operating its hostels on a daily basis, AYH further promoted its mission through its national organized programs. Mr. Hedge testified to examples of AYH's various educational programs, which centered upon intercultural knowledge, civic engagement, and global learning. First, the "Great Hostel Giveback" provided free use of a hostel to groups that traveled to a destination to engage in a community project. Second, through the "IOU Respect" program, AYH partnered with hostelling programs in Germany, France, Lebanon, Egypt, and Tunisia to provide a cross-cultural exchange opportunity. Third, through the "Community Hostelling Fund," AYH provided scholarships for international travel for young people with a financial need. Fourth, AYH participated in "Sleep for Peace" with the United Nations on International Peace Day, with each AYH hostel sponsoring an activity on this day. Examples have included a "bike-in movie," yoga on the beach, a peace-themed discussion over a pizza dinner, and "encouraging peaceful selfies" to social media. At the subject property, AYH promoted "Sleep for Peace" by asking guests to sign a set of bed sheets and by offering guests pancakes in a communal meal organized to celebrate the day. Finally, an AYH program offered in partnership with the Girl Scouts USA, another nonprofit organization, offered scouts the opportunity to earn a badge by participating in hostel activities and recording their experience.

The appellant is a member of the International Youth Hostel Federation ("IYHF"), a worldwide consortium of nonprofit hostelling organizations, including AYH as the sole affiliate in the United States. IYHF requires its affiliates to be non-political and a nonprofit organization whose main purpose is the operation of youth hostels, particularly to "promote the education of all young people of all nations, but especially young people of limited means, by encouraging

them in a greater knowledge, love and care of the countryside and an appreciation of the cultural values of towns and cities in all parts of the world."

The subject property in West Tisbury offered programs designed to encourage youth use of the hostel. For example, the "Youth Opportunities Through Hostelling" ("YOUTH") program offered community youth groups the opportunity to experience hostelling virtually free of charge. AYH provided them a donated overnight stay, transportation and most meals, asking them only to provide their own lunch, which Mr. Hedge explained was part of the "self-reliance piece" to the program. To be eligible for YOUTH, a community group had to meet certain requirements, including being a community-based organization, demonstrating how its participation in YOUTH would support the organization's educational goals, and creating a plan for the shared travel experience and how to describe its impact to the community.

However, while founded as an organization specifically aimed at encouraging youth travel and engagement, AYH membership did not discriminate based on age. Membership was open to all and had three categories based on age: youth (under 18); adult (18-54); and senior (55 and older). In the early 1990s, AYH rebranded itself as Hostelling International USA, in order to reinforce the notion that AYH was open to all ages, not simply youth. Mr. Hedge testified that the appellant's express purpose in the rebranding was to "encourage greater intergenerational interaction" at its hostels.

The appellee did not present a case but did submit documents, including jurisdictional documents as well as other documents, in an attempt to discredit Mr. Hedge on cross-examination. The appellee contended that the majority of AYH's programming was the provision of lodging facilities in exchange for a fee, including a membership to AYH, and thus it merely operated like a hotel. The appellee further argued that there was a lack of organized programming at the subject property sufficient to meet the criteria for the charitable exemption, pointing out that, based on AYH's 1.1 million overnight lodgings across the country in calendar year 2014, only 130,000 people reportedly participated in a facilitated program, a mere 11.8% of AYH's guests.

The appellee next criticized each of the 4 signature programs offered by AYH. First, the appellee pointed out that the "Great Hostel Giveback" was available only at 7 of the appellant's properties, not including the subject property. Second, the appellee critiqued the "IOU Respect" program and "Community Hostelling Fund" as similarly limited programs, which prescribed age, income, and residency requirements and thus had minimal participation. Finally, the appellee

criticized the "Sleep for Peace" program as being like any other day at the subject property with the mere addition of the signing of bed sheets.

The appellee ultimately concluded that the appellant's use of the subject property was primarily to provide inexpensive lodging to its members, and that any education it provided was merely incidental, and therefore not in furtherance of a charitable purpose.

On the basis of the evidence, the Board found that, at all relevant times, AYH provided an experiential educational experience for guests of the subject property. By providing a communal environment that encouraged guests of all ages and different walks of life to engage with one another through everyday interactions, as well as through discussions lead by licensed educators over shared meals, AYH educated its guests in understanding and respect for people across cultural lines. AYH further enhanced this educational experience through its national programming, including exchange programs to encourage socialization and camaraderie amongst hostellers from diverse cultures, as well as through recognition of the United Nations' International Peace Day.

While the appellee criticized certain of AYH's programming for not benefitting a broad selection of recipients, the Board nonetheless found credible Mr. Hedge's testimony that AYH's formal programs and informal interactions met the standards set by the American Association of Colleges and Universities for intercultural knowledge, civic engagement, and global learning, and therefore found the programs to be educational. As will be further explained in the Opinion, because education is a traditionally charitable purpose, factors such as the number of people that are benefitted by the appellant's programs are less significant in determining the appellant's charitable status.

Moreover, membership was open to anyone at any time, including at the time someone wanted to stay at the subject property. The minimal fees charged for membership and stays at the subject property afforded a wide cross-section of individuals the opportunity to experience the benefits provided by the appellant. The Board thus found and ruled that AYH's provision of an educational experience at the subject property constituted a charitable endeavor.

Finally, the Board found that AYH, not the individual hostel guests, occupied the subject property in furtherance of its charitable purpose. AYH employees, as representatives of AYH, provided an educational experience at the subject property that was consistent with the mission of AYH, and the delivery of that experience was through its guests living in a communal environment. As Mr. Hedge explained, "the building is our program." Moreover, the communal atmosphere and accommodations at the hostel, complete with limits on the length of stay, made

it clear that guests did not have ownership or privacy rights over the hostel to the exclusion of AYH. The Board thus found that AYH occupied the subject property in furtherance of its charitable purpose during the fiscal year at issue.

Accordingly, the Board issued a decision in favor of the appellant and ordered an abatement in the full amount of the tax assessed, $4,771.25.

OPINION

General Laws c. 59, § 5, cl. Third ("Clause Third"), provides 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. Clause Third defines a charitable organization as "a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth." "For purposes of the local property tax exemption, the term 'charity' includes more than almsgiving and assistance to the needy." ***New England Legal Found. v. Boston***, 423 Mass. 602, 609 (1996). "A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 254-55 (1936) (quoting ***Jackson v. Phillips***, 14 Allen 539, 556 (1867)).

As observed by the Appeals Court, the Supreme Judicial Court in ***New Habitat, Inc. v. Tax Collector of Cambridge***, 451 Mass. 729 (2008) provided "an interpretive lens through which we now view" charitable exemption cases. ***Mary Ann Morse Healthcare Corp. v. Board of Assessors of Framingham***, 74 Mass. App. Ct. 701, 703 (2009). As the Appeals Court explained,

> [t]he number of individuals receiving services, whether they are from diverse walks of life, the fees charged to those individuals, and the relationship between the service fees and the cost of those services to the provider -- all these are factors that inform a decision under the community benefit test; where however an organization is found to be traditionally charitable in nature, these factors play "a less significant role in our determination of its charitable status" for purposes of property tax exemption.

Id. at 704 (quoting ***New Habitat***, 451 Mass. at 737).

The Supreme Judicial Court has long recognized that "bringing [recipients'] minds or hearts under the influence of education" is a traditionally charitable purpose. ***Boston Symphony***

Orchestra, 294 Mass. at 254-55. The Supreme Judicial Court has further recognized that education accomplished through the promotion of cross cultural understanding and enlightenment is a charitable purpose. *See* ***Assessors of Boston v. World Wide Broadcasting Foundation***, 317 Mass. 598, 599 (1945) (ruling that fostering "international understanding and co-operation" through the broadcast of radio programs "of a cultural, educational, artistic or spiritual nature" was a charitable purpose).

Because education is a traditionally charitable purpose, factors like fees and the number of people benefitted by AYH's national programs are less important in determining the appellant's charitable status. *See* ***New Habitat***, 451 Mass. at 736-37 (ruling organization to be charitable where it had small number of beneficiaries but traditionally charitable purposes and methods) (citing ***Dover v. Dominican Fathers Province of St. Joseph***, 334 Mass. 530, 539 (1956)). Instead, "we consider whether the number of an organization's beneficiaries helps to advance the organization's charitable purpose." ***New Habitat***, 451 Mass. at 737 (citing ***New England Legal Found. v. Boston***, 423 Mass. 602, 612 (1996) ("at any given moment an organization may serve only a relatively small number of persons" but still be found to be charitable if operating according to its stated charitable purpose)).

Moreover, the Board found that the educational experiences provided by the appellant were open to a wide cross-section of individuals. Membership in AYH was open to all, and the minimal fees charged for nightly stays – which were reserved for the subject property's basic upkeep – allowed individuals of modest means to enjoy the educational experience provided by AYH.

The Board found that the hostel's communal environment, by its very nature and set up, encouraged guests of all ages and walks of life to engage with one another on a daily basis, both through routine interactions and through educational discussions over shared meals. The Board also found credible Mr. Hedge's testimony that AYH's curriculum met the standards set by the American Association of Colleges and Universities for intercultural knowledge, civil engagement, and global learning. By its routine operation, AYH educated its guests in understanding and respect for each other across societal lines that traditionally divide, like geography, age, and culture. For those who did participate, AYH further enhanced its guests' educational experiences through its formal educational programming, like exchange programs and recognition of International Peace Day.

The facts of the instant appeal are readily distinguishable from those at issue in the recent appeal of ***Thomas Jefferson Memorial Center at Coolidge Point, Inc. v. Assessors of***

Manchester-By-The-Sea, Mass. ATB Findings of Fact and Reports 2018-89. In that appeal, the Board ruled that a remote property -- marked by "no trespassing" signs, used to store the owner's personal property, and which hosted only sporadic events with no connection to the taxpayer's stated charitable goals of promoting history, education, or the arts -- was more akin to a buffer zone around personal property rather than charitable property under the standards of exemption set by Clause Third. ***Id***. at 2018-113. The factors crucial in denying exemption there were not present at the subject property, which was open to all guests, including those who needed to purchase an instant AYH membership, and which furthered its mission of promoting cross-cultural understanding from the moment a guest entered the communal environment.

Finally, Clause Third requires that the property be "occupied" by the charitable organization. In cases where individuals reside at the property owned by the charity, Massachusetts courts have ruled that the occupancy requirement is satisfied so long as the residents' use is not to the exclusion of the organization, and such use enables the organization to achieve its charitable mission at the property. *See* ***Mary Ann Morse Healthcare Corp. v. Bd. Of Assessors***, 74 Mass. App. Ct. 701, 707 (2009) (vacating the Board's ruling that individual residents, not the charitable organization, occupied certain areas of an assisted-living facility, where "the residents' privacy here is far from absolute").

In this appeal, AYH employees conducted and fostered the educational activities at the subject property by operating the hostel. *See e.g.*, ***New England Forestry Foundation, Inc. v. Bd. of Assessors of Hawley***, 468 Mass. 138, 158-59 (2014) (overturning the Board's denial of exemption where taxpayer presented evidence that it engaged in sustainable forestry practices and education of those practices at the subject property). AYH achieved an experiential learning experience for its guests by having them live in a communal atmosphere, where they shared meals, living space, and conversation with one another. Moreover, unlike tenancies where an occupant enjoys exclusive occupation of a property to the exclusion of the organization, such as in the low-rent apartments owned by the charitable corporation in ***Charlesbank Homes v. Boston***, 218 Mass. 14, 16-17 (1914), the subject property was a communal space with rules and limits on length of stay, where guests did not have such rights to ownership or privacy. The Board thus found and ruled that AYH occupied the subject property in furtherance of its charitable endeavor.

Conclusion.

AYH occupied the subject property in furtherance of the education of its hostel guests, a traditionally charitable purpose. Therefore, the Board found and ruled that AYH met its burden

of proving that the subject property met the standard for property tax exemption under Clause Third. Accordingly, the Board issued a decision for the appellant and ordered an abatement in the full amount of $4,771.25 for the fiscal year at issue.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

DIGITAL 55 MIDDLESEX, LLC **v.** **BOARD OF ASSESSORS OF THE TOWN OF BILLERICA**

Docket Nos.: F317868 (FY 12)
F319264 (FY 13)

Promulgated:
September 21, 2017

ATB 2017-415

These are appeals filed under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the Board of Assessors of the Town of Billerica (the "assessors" or "appellee") to abate taxes on certain parcels of real estate in the Town of Billerica assessed to Digital 55 Middlesex, LLC ("Digital" or the "appellant") under G.L. c. 59, §§ 11 and 38 for fiscal years 2012 and 2013 (together, the "fiscal years at issue").

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 a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

David J. Rasnick, Esq., for the appellant.

Patrick J. Costello, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

Based on the testimony and documentary evidence entered into the record in these appeals, the Appellate Tax Board (the "Board") made the following findings of fact.

On January 1, 2011 and January 1, 2012, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 14.53-acre parcel of land,

approximately 90% of which was located in Billerica and approximately 10% of which was located in the neighboring community of Bedford. The Billerica portion of the parcel, which is the only portion in dispute in these appeals, has an address of 55 Middlesex Turnpike and is improved with a one-story building, constructed in the 1970s, containing approximately 106,000 square feet of gross leasable area ("subject property").

For fiscal year 2012, the assessors valued the subject property at $59,036,200, and assessed a tax thereon, at the rate of $31.93 per thousand, in the total amount of $1,885,025.87. The appellant paid the tax due in full without incurring interest. On February 1, 2012, the appellant timely filed its Application for Abatement with the assessors, which was deemed denied on May 1, 2012.[1] The appellant timely filed its appeal for fiscal year 2012 with the Board on July 23, 2012, and on the basis of the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide the fiscal year 2012 appeal.

For fiscal year 2013, the assessors valued the subject property at $59,036,200, and assessed a tax thereon, at the rate of $32.89 per thousand, in the total amount of $1,941,700.62. The appellant paid the tax due in full without incurring interest. On January 22, 2013, the appellant timely filed an Application for Abatement with the assessors, which was deemed denied on April 22, 2013.[2] The appellant timely filed its appeal for fiscal year 2013 with the Board on May 13, 2013, and on the basis of the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide the fiscal year 2013 appeal.

The hearing of these appeals took place over the course of five days and featured the testimony of numerous witnesses, including: Dianna Maddocks, the Director of Asset Management for the appellant's parent company, Digital Realty Trust ("DRT"); William Frick, the Data Center Manager for the subject property; John J. Leary, a certified real estate appraiser whom the Board qualified as a valuation expert and who testified on behalf of the appellant; and George E. Sansoucy, a certified real estate appraiser whom the Board qualified as a valuation expert and who testified on behalf of the assessors.

I. The Subject Property and Its Current Use as a Data Center

The subject property's building is a brick-and-masonry, single-story building that was built in 1970 and contains approximately 106,000 square feet of leasable area. Originally built

[1] The assessors' denial notice incorrectly indicated that the abatement application was deemed denied on April 30, 2012. The assessors could have acted on the application at any time through April 30, 2012; the application was deemed denied the following day, May 1, 2012. *See* G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65.

[2] The assessors' fiscal year 2013 denial notice also listed an incorrect denial date. Although the denial notice indicated a deemed denial date of April 5, 2013, the application was deemed denied on April 22, 2013, three months after the January 22, 2013 filing of the application. *See* footnote 1, *supra.*

as a manufacturing building, it was converted for use as an office building in the 1980s. In 2000, it was converted once again for use as a data center, which was an emerging use at that time.

Data centers are facilities used to house computer data servers and related equipment. Sometimes referred to as "server farms," data centers lease space to other entities, typically large institutions or organizations that have significant data storage needs. In addition to the physical space, the most critical offering provided by data centers is guaranteed continuous power supply. Data centers generally have redundant power sources so as to ensure continuous power supply. Accordingly, data centers require significant dedicated space for battery back-up equipment areas as well as uninterrupted power source ("UPS") rooms, with almost half of the space in any such data center dedicated to these areas.

Other important features of data centers include building security and protections from environmental forces, such as water or fire damage. The pod space, as it is called, leased by data center tenants usually features raised flooring and air conditioning units to keep the equipment safe and at an optimal temperature.

There are two types of data centers, wholesale and colocation facilities. Wholesale data centers, including the subject property, involve the leasing of an empty data center pod along with the provision of power, with the tenants supplying their own rack and server equipment. In colocation centers, the provider owns the servers and racks, and leases those along with the space. Leases at colocation facilities also sometimes include support services, whereas in wholesale centers, servicing of the equipment is usually performed by the tenant, who accesses the building and pod space with a secured access card.

Because power supply is paramount in the data center industry, utility costs represent a significant share of operating expenses, and they in turn influence asking rents. Therefore, those market areas in the United States with lower utility costs, particularly in the South, are very desirable in the data center industry. In addition, California has become a very popular market for data centers due to the abundance of high technology companies located there.

II. DRT and Its Purchase of the Subject Property

Prior to 2000, most data centers were owner occupied or net leased by a single, large tenant. At and into the turn of the millennium, the concept of multi-tenant data centers began to emerge. DRT was formed in 2004 as a real estate investment trust[3] to take advantage of and

[3] Under § 856(a) of the Internal Revenue code, real estate investment trusts, or REITs, are special types of investment vehicles that are required to have a majority of their assets consist of real estate. As long as the REIT meets this and certain other technical requirements, it is afforded favorable tax treatment.

invest in this emerging niche market. Within just a few years of its formation, DRT had amassed a large portfolio of data centers across the country.

In January of 2010, DRT purchased the assets of Sentinel Properties, which was another data center operator. This purchase was an off-market transaction, initiated by DRT with an eye toward entering the New England market. The purchase was also a portfolio transaction, involving the subject property, a data center in Needham, Massachusetts, and another data center in Connecticut. The total purchase price was $375 million, and it included several non-realty components, including personal property and a non-compete agreement, along with the leases in place.

III. The Appellant's Valuation Evidence

The appellant presented its case-in-chief through the testimony and appraisal report of John J. Leary, whom the Board qualified as a real estate valuation expert. To prepare for his appraisal, Mr. Leary visited and inspected the subject property several times, and also spoke with building personnel.

To begin the appraisal process, Mr. Leary first determined the subject property's highest and best use, and he considered those uses both as vacant and as improved. Mr. Leary noted that, given the economic recession in effect during the relevant dates of valuation in these appeals, the highest and best use of the subject property as vacant would likely be to hold for development. Mr. Leary concluded that the subject property's highest and best use as improved was its current use as a data center, and that was his ultimate conclusion of highest and best use.

Mr. Leary next considered appropriate valuation methodologies. Given the building's age of over 40 years, Mr. Leary concluded that the cost approach was not a useful valuation approach. Mr. Leary likewise declined to utilize the sales-comparison methodology, after noting that there were not a reliable number of local, comparable sales of data centers, and that most investors in data centers are motivated by the income stream. He therefore relied exclusively on the capitalization of income approach to value the subject property.

The first step in Mr. Leary's income-capitalization analysis for fiscal year 2012 was the selection of appropriate market rents. Mr. Leary first analyzed the subject property's actual rents.[4] He noted that the average annual rent at the subject property was $122.01 per square foot.

[4] Rents at data centers can be quantified in several different ways, including dollars per kilowatt of energy capacity, dollars per square foot of raised floor space, or dollars per square foot of rentable area, which includes the space dedicated to the necessary back-up energy equipment. For consistency and ease of reference when talking about both actual and comparable rents, the Board will refer to rents as measured by dollars per square foot of total rentable area.

Mr. Leary also reviewed leases of other wholesale data center spaces in Massachusetts. Relevant information regarding those spaces and rents is summarized in the following table:

Location	Lease Date	Square Ft. Leased	First Year Rent Per Sq. Ft.	Average Rent Per Sq. Ft.
200 Quannapowitt Pkwy., Wakefield	6/2011	5,037	$104.83	$104.83
35 McGrath Hghwy., Somerville	5/2011	38,638	$75.00	$75.00
One Summer St., Boston	3/2010	1,653	$83.00	100.00
One Summer St., Boston	2/2010	6,833	$83.00	$100.00
One Summer St., Boston	3/2009	56,585	$62.50	$75.00

Based on the subject property's actual rents, as well as the comparable area data center rents, Mr. Leary concluded a market rent for the subject property of between $110.00 and $115.00 per square foot. Applying these rates to the subject property's 106,000 square feet of rentable area resulted in a range of $11,600,000 to $12,190,000 in potential gross rent.

In addition to rent, data center tenants also pay reimbursements for utility expenses. Mr. Leary therefore considered appropriate reimbursement rates, and he began by analyzing the subject property's operating statements. Those statements showed that in calendar years 2011 and 2012, holdover tenants at the subject property were paying at a fixed rate, with an average reimbursement of metered utilities of about $35.85 per rentable square foot. He also reviewed the actual electricity expenses for the subject property during those years, which were approximately $45.50 per rentable square foot. Based on these figures, Mr. Leary estimated that an appropriate reimbursement rate was between $40.00 and $42.50 per rentable square foot. Applying these rates to the subject property's 106,000 square feet of rentable area resulted in a range of $4,240,000 to $4,505,000 in reimbursements.

After adding the reimbursements to the potential gross rent, Mr. Leary determined a range of potential gross income for the subject property of $15,900,000 to $16,695,000. He next considered appropriate rates of vacancy and collection loss.

Mr. Leary began by noting that the subject property had an actual vacancy rate of approximately 10% during the periods relevant to these appeals. He also gave consideration to occupancy rates at other area data centers and nationwide trends as reflected in data center industry publications, including newsletters published by Grubb & Ellis and Avison Young. Those publications showed that in 2009, data center occupancy rates were approximately 90%,

but by the second quarter of 2012, they had declined to 81%. Mr. Leary opined that this decrease was partly due to the increase in the development of data centers and entities investing in them. For example, he noted that in November of 2010, there were only five national wholesale data center developers, but by the second quarter of 2012, there were 14 such developers in operation. The overall effect of the trend, according to Mr. Leary, was an increase in availability of space and corresponding increase in vacancy rates.

As an example of the "soft market conditions," Mr. Leary pointed out that the data center at 200 Quannapowitt Parkway in Wakefield, which was also owned by DRT, was purchased with a goal of converting just under half of the building's 218,956 square feet of space into wholesale data center space. However, as of 2011, only one data center pod of 14,097 square feet had been created, and only 5,357 square feet of that space was leased, for an occupancy rate of 38.7%. After taking all of this data into consideration, Mr. Leary concluded that a stabilized rate of vacancy and credit loss ranging from 12.5% to 15% was appropriate.

The next step in Mr. Leary's income-capitalization approach was the determination of appropriate operating expenses. To do this, he reviewed the subject property's historical operating expenses for calendar years 2011 and 2012. For calendar year 2011, he noted that operating expenses, exclusive of real estate taxes, totaled $65.13 per rentable square foot, and for calendar year 2012, they totaled $71.62 per rentable square foot. Mr. Leary also analyzed the operating expenses of a 132,600-square-foot corporate data center in central Massachusetts, and found this property's actual operating expenses to be fairly consistent with those of the subject property. Accordingly, he concluded that appropriate operating expenses for the subject property ranged from $65.00 to $70.00 per rentable square foot.

After applying all of these factors – gross rent, reimbursements, vacancy and credit loss percentage, and operating expenses per square foot – to the subject property's 106,000 square feet of rentable area, Mr. Leary determined a net operating income for the subject property ranging from $6,770,750 to $7,022,500 for fiscal year 2012.

The final step in Mr. Leary's income-capitalization analysis was the determination of an appropriate capitalization rate. To begin that process, he first reviewed seven sales of data centers that took place nationwide during calendar years 2011 and 2012, and extrapolated the capitalization rates from those transactions. Those rates ranged from 6.2% to 10.2%. Mr. Leary noted that the two lowest rates - 6.2% and 7.5% - involved sales in Virginia and California, which are both very favorable locations for data centers. He further noted that they involved the same buyer, and those rates likely reflected that particular buyer's investment criteria. He

therefore considered them not to be reflective of market rates. The remaining transactions had capitalization rates that fell within the tighter range of 8.1% to 10.2%, with an average rate of 8.8%. Mr. Leary noted that the lower end of the rates involved sales in Georgia, which has lower utility costs than Massachusetts and is therefore a more favorable location for data centers, while the highest of the rates involved a sale in Michigan, which has higher utility costs than Massachusetts and is therefore a less favorable location for data centers.

Mr. Leary also consulted industry publications, including the aforementioned newsletters as well as Real Estate Research Corporation's quarterly *Real Estate Report* ("RER"). The information contained within the RER is not specific to data centers. However, Mr. Leary determined that the property category most similar to the subject property that is discussed in the RER is the industrial/R & D category. For the first quarter of 2011, capitalization rates in the Eastern United States market in that category ranged from 6.0% to 11.0%, with an average of 9.0%. It was Mr. Leary's opinion that this broad range of rates was indicative of continued volatility in the market, a lingering effect of the economic recession that commenced in 2008. He also opined that the general risks inherent in investing in data centers, coupled with the fact that Massachusetts is a somewhat less desirable location for them, warranted a slightly higher premium over the average of the indicated industrial/R & D rates. Mr. Leary therefore determined that an appropriate capitalization rate for the subject property for fiscal year 2012 was between 9.5% and 9.75%.

Because real estate taxes had not been included in the calculation of net operating income, Mr. Leary added to these base rates a tax factor of 3.19%, to reflect Billerica's commercial tax rate of $31.90 per thousand, resulting in loaded capitalization rates ranging from 12.69% to 12.94%. Applying these rates to his range of net operating incomes resulted in the following range of indicated values:

NOI ($)	**Rate (%)**	**Rounded Value ($)**	**Rounded Value/ psf ($)**
6,770,750	12.94	52,300,000	493.40
6,770,750	12.69	53,400,000	503.77
7,022,500	12.94	54,300,000	512.26
7,022,500	12.69	55,300,000	521.70

Mr. Leary ultimately concluded from this range a fair cash value of $54,000,000 for the subject property for fiscal year 2012. He then multiplied that amount by 90% to determine the amount of value properly attributable to the Billerica portion of the subject property, which resulted in a final opinion of fair cash value of $48,600,000 for fiscal year 2012.

Much of Mr. Leary's income-capitalization analysis for fiscal year 2013 was premised on the same data and assumptions as his analysis for fiscal year 2012, including his rents and reimbursements, and for efficiency only those portions of his 2013 analysis that departed from his 2012 analysis will be discussed.

One of the factors that differed was Mr. Leary's conclusion as to vacancy rate and credit loss. For fiscal year 2013, he determined that an appropriate rate ranged from 15% to 17.5%, an increase from his estimate for vacancy and credit loss for fiscal year 2012. It was his opinion that a slight increase was warranted given the continued increase in new data center development and corresponding availability of space, including a direct competitor in Billerica with the advent of the Verizon-Terremark data center in January of 2012. Similarly, Mr. Leary concluded that a slight increase in operating expenses over his figures for fiscal year 2012 was warranted, and he therefore utilized an operating expense ranging from $67.50 to $72.50 per square foot.

After applying all of these factors – gross rent, reimbursements, vacancy and credit loss percentage, and operating expenses per square foot – to the subject property's 106,000 square feet of rentable area, Mr. Leary determined a net operating income for the subject property ranging from $6,088,375 to $6,360,000 for fiscal year 2013.

Mr. Leary then considered appropriate capitalization rates. He looked at many of the same industry sources and sales from which to derive capitalization rates as he had for his fiscal year 2012 analysis, and those sources yielded much of the same information. However, he noted that for the first quarter of 2012, the average reported industrial/R & D rate had slightly improved, decreasing to 8.8% from 9.0% the previous year, which Mr. Leary opined was a reflection of the very beginning of the gradual economic recovery from recession. Accordingly, he selected a slightly lower range of capitalization rates, from 9.25% to 9.50%, than he had for the previous fiscal year. To those base rates he added the tax factor of 3.29% to reflect Billerica's commercial tax rate of $32.90 per thousand, to arrive at loaded capitalization rates ranging from 12.54% to 12.79%. Applying these rates to his range of net operating incomes resulted in the following range of indicated values:

NOI ($)	**Rate (%)**	**Rounded Value ($)**	**Rounded Value/ psf ($)**
6,088,375	12.79	47,600,000	449.06
6,088,375	12.54	48,600,000	458.49
6,360,000	12.79	49,700,000	468.87
6,360,000	12.54	50,700,000	478.30

Mr. Leary ultimately concluded from this range a fair cash value of $49,000,000 for the subject property for fiscal year 2013. He then multiplied that amount by 90% to determine the amount of value properly attributable to the Billerica portion of the subject property, which totaled $44,100,000.

IV. The Assessors' Valuation Evidence

The assessors presented their case-in-chief through the testimony and appraisal report of George E. Sansoucy, whom the Board qualified as a real estate valuation expert. To prepare for his appraisal, Mr. Sansoucy personally inspected the subject property on more than one occasion. He also began by making a determination of the subject property's highest and best use. Like Mr. Leary, Mr. Sansoucy concluded that the highest and best use of the subject property was its continued use as a wholesale data center.

Mr. Sansoucy next considered appropriate valuation methodologies. He ultimately used four different approaches to value the subject property, including the cost approach, the sales-comparison approach, and the income-capitalization approach, both with a direct-capitalization methodology and the discounted-cash-flow technique. Each of his valuation approaches and conclusions are discussed below.

A. Mr. Sansoucy's Sales-Comparison Analysis

To begin his sales-comparison analysis, Mr. Sansoucy researched several sources for timely, comparable data center sales. Although there had been activity in the market nationally, he concluded that none of the transactions was timely or comparable enough to the subject property to provide a reliable indication of its fair market value for the fiscal years at issue. Accordingly, he opined that only the January 2010 sale of the subject property provided a reliable indication of its fair market value.

Although the subject property was sold along with two other data centers as part of a portfolio transaction, an allocated purchase price for it was reported in three different sources. First, DRT's 2010 Form 10-K, which was filed with the U.S. Securities and Exchange Commission, listed a total allocated price of $79,913,000 for the subject property. Second, insurance documents filed with the Commonwealth Land Title Company in January of 2010 indicated a total consideration paid for the subject property of $88,490,000, rounded. And finally, documents prepared by an accounting firm retained by DRT to perform a purchase price allocation allocated approximately $78,000,000 of the total purchase price for the tangible property acquired by DRT related to the subject property.

It was Mr. Sansoucy's opinion that the average of these three allocations provided a reliable indication of the subject property's fair market value. Accordingly, his opinion of value as derived through the sales-comparison analysis was $85,501,000 for both of the fiscal years at issue.

B. Mr. Sansoucy's Cost Approach

The cost approach is a valuation methodology that calculates the value of property by estimating the current cost to construct the existing improvements, deducting for depreciation, and then adding a land value. It is a useful approach for estimating the value of newer properties or special-purpose properties, which are properties not bought or sold with frequency in the market and having so singular or unusual a use that their value cannot be reliably ascertained by reference to market data. It was Mr. Sansoucy's opinion that the cost approach was a useful approach for valuing the subject property, as data centers are, in his opinion, special-purpose properties.

Mr. Sansoucy consulted several sources to gather information for his cost approach. His primary source of information was an industry publication, *RS Means*, which provides direct and indirect costs at the subcontractor level for different property types. *RS Means* also provides an index for making adjustments by region. As a check on the information provided by *RS Means*, Mr. Sansoucy consulted additional industry publications, including *Marshall & Swift*, *Craftsman*, and other publicly available information.

For fiscal year 2012, Mr. Sansoucy concluded a replacement-cost new for the subject property, as of January 1, 2014, of $104,653,500. After trending the information back to January 1, 2011, and accounting for depreciation, he arrived at an indicated value of $82,289,200 as determined through the cost approach. For fiscal year 2013, he concluded a replacement-cost new for the subject property, as of January 1, 2014, of $104,374,700. After trending the information back to January 1, 2012, and accounting for depreciation, Mr. Sansoucy arrived at an indicated value of $81,965,600 as determined through the cost approach.

C. Mr. Sansoucy's Direct Income-Capitalization Analysis

Like Mr. Leary, Mr. Sansoucy performed a direct income-capitalization analysis. Rather than referring to market data to determine appropriate rents, vacancies, and expenses, Mr. Sansoucy instead used the subject property's actual reported net operating incomes. For fiscal year 2012, he used the subject property's reported stabilized operating cash flow of $10,147,570. For fiscal year 2013, he used the subject property's reported stabilized operating cash flow of $10,074,406.

To determine an appropriate capitalization rate, Mr. Sansoucy consulted a range of sources, including industry publications such as *The Korpacz Survey* ("*Korpacz*"). For the Boston region, *Korpacz* reported average capitalization rates of 8.46% for the fourth quarter of 2011 and 8.31% for the fourth quarter of 2012.

Mr. Sansoucy also extracted capitalization rates from four recent sales of data centers, including the sale of the subject property. Those rates ranged from 6.56% to 9.0%. He also referenced the capitalization rates arrived at through his discounted-cash-flow analysis, as discussed below in sub-section D. Those rates were 10.99% for fiscal year 2012 and 11.05% for fiscal year 2013, although Mr. Sansoucy noted that those rates represented the high end of the range, because discounted-cash-flow analyses assume a negative growth rate. After noting that these rates had a mean of 8.88% and a median of 8.48%, and taking into account increasing competition in the data center industry, Mr. Sansoucy concluded that a capitalization rate of 10.0% was appropriate for both of the fiscal years at issue.

After applying his selected capitalization rate to the subject property's reported stabilized operating cash flow, Mr. Sansoucy arrived at an opinion of fair market value for the subject property of $101,147,570 for fiscal year 2012 and $100,744,060 for fiscal year 2013.

D. Mr. Sansoucy's Discounted-Cash-Flow Analysis

Mr. Sansoucy also performed a capitalization-of-income analysis using the discounted-cash-flow technique, which forecasts net operating income from the present date forward, for a period of years, and then adjusts that income by applying an appropriate discount rate, to arrive at a present value. *See generally* APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 539-41 (13th ed. 2008).

For his discounted-cash-flow analysis, Mr. Sansoucy selected a period of 20 years. He began by using the subject property's actual reported operating revenues as well as its reported expenses. Mr. Sansoucy also accounted for such factors as vacancy, management fees, and replacement reserves, for which he used rates of 5.0%, 3.0%, and 1.0%, respectively, to arrive at an operating cash flow.

The next step is the application of a discount factor, which reflects the cost of capital and is determined through the calculation of a weighted average cost of capital using the band-of-investment technique. The weighted average cost of capital includes debt and equity components, to which are added the appropriate tax factors, for a total weighted average cost of capital. The calculated operating cash flow is then multiplied by the discount factor to arrive at an annual discounted cash flow.

Final indicated values are determined in discounted-cash-flow analyses by adding the total of the annual calculated discounted cash flows to the present value of the final year cash flow, in this case, year 20. After these final calculations, Mr. Sansoucy's discounted-cash-flow analysis resulted in indicated values for the subject property of $92,300,000 for fiscal year 2012 and $91,200,100 for fiscal year 2013.

E. Mr. Sansoucy's Reconciled Cash Values

After giving weight to the fair cash values indicated by each of the valuation methodologies he employed, Mr. Sansoucy ultimately concluded an overall indicated value for the subject property of $90,000,000 for both of the fiscal years at issue. For reasons that were not clear from the record, Mr. Sansoucy considered the subject property as being 95% in Billerica and 5% in Bedford, although it is taxed, by agreement of both municipalities, on a 90%/10% allocation. Therefore, to determine the value of the subject property located in Billerica, Mr. Sansoucy deducted 5% from his overall indicated value, to arrive at a final fair market value of $85,500,000 for both of the fiscal years at issue.

V. The Board's Ultimate Findings

On the basis of the record in its totality, the Board first found and ruled that the subject property's highest and best use was its continued use as a data center, which was the opinion of both parties' expert appraisers. The Board next considered the appropriate methodology for valuing the subject property.

The Board ruled out the cost approach, which is primarily useful when valuing newer buildings or special-purpose properties. In determining that the cost approach was not a reliable method to value the subject property, the Board expressly rejected Mr. Sansoucy's conclusion that the subject property was a special-purpose property. Special-purpose properties are those properties having so singular or unusual a use and that are not bought or sold with frequency in the market, such that their value cannot be reliably ascertained by reference to market data. The evidence here showed that the subject building is a fairly typical single-story brick building, which began life as a manufacturing building in 1970 and was briefly used as an office building before being re-purposed as a data center in 2000. The Board concluded that the many different uses of the subject property in a 40-year time period militated against the finding that it was a special- purpose property, and its conversion into a data center did not make it one.

On the contrary, evidence regarding other data centers entered into the record showed that a wide variety of properties were finding new lives as data centers, including former warehouse buildings and mixed-use retail and office properties. For example, evidence

regarding a data center located at One Summer Street in downtown Boston was entered into the record. That building is popularly known as the Macy's building, and has long housed both retail and office space, and only more recently on its fourth floor, a data center. The evidence showed that data centers can and do exist in all different building types, oftentimes alongside other, more traditional uses. Accordingly, based on its subsidiary finding that the subject property was not a special-purpose property, along with the fact that it was more than 40 years old as of the relevant dates of valuation, the Board concluded that the cost approach was not a reliable method with which to value the subject property.[5]

In addition, the Board ruled out the sales-comparison methodology as there was an insufficient number of timely, comparable market sales. Most of the sales included in the record were located out of state and thus were not highly comparable to the subject property, and moreover, some of them involved portfolio sales or sales involving non-realty components, including the sale of the subject property.

To that end, the Board gave no weight to the sale of the subject property. The evidence showed that the sale was an off-market transaction, and was undertaken as part of DRT's business-expansion strategy. The record also showed that the sale was part of a portfolio transaction, involving two other data centers besides the subject property, as well as personal and intangible property. Accordingly, the Board concluded that the sale price did not provide probative evidence of the fee-simple value of the subject property.

The Board likewise gave no weight to Mr. Sansoucy's sales-comparison analysis, which consisted entirely of an analysis of three different allocations of the subject property's sale price. As stated previously, the Board found that the sale of the subject property did not provide a reliable indication of value to begin with, and none of these allocations, which were undertaken for various accounting, reporting, and insurance purposes, involved valuations of the fee-simple interest of the subject property. Accordingly, the Board declined to use the sales-comparison analysis or to give weight to the estimates of value derived by Mr. Sansoucy in his sales-comparison analysis.

[5] Even had the Board concluded that the cost approach was an appropriate methodology for valuing the subject property, it still would not have adopted the values derived by Mr. Sansoucy through this approach. Substantial, credible evidence in the record demonstrated that many of the assumptions he used in his cost approach were incorrect, including the testimony of William Frick, Data Center Manager for the subject property. Mr. Frick provided credible testimony regarding the cost and useful lives of various building components, among other things, and the Board found that his testimony substantially undermined the probative worth of Mr. Sansoucy's cost approach.

Having ruled out the sales-comparison and cost approaches, the Board concluded that the income-capitalization approach was the most reliable methodology with which to value the subject property. The Board reached this conclusion as the income-capitalization approach is often the favored approach for valuing income-producing properties, and moreover, it was an approach used by both of the parties' valuation experts.

However, the Board used only the direct-capitalization analysis and declined to give weight to Mr. Sansoucy's discounted-cash-flow analysis. The Board routinely rejects this methodology as inappropriate for *ad-valorem* tax purposes, and Mr. Sansoucy's analysis was no exception. As an initial matter, the Board noted that typical forecast periods for discounted-cash-flow analyses range from five to 15 years, with 10 years being considered standard. *See generally* APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 541 (13th ed., 2008). The 20-year period used by Mr. Sansoucy far exceeded these typical forecast periods, rendering it all the more speculative and less reliable.

In addition, the Board found that the discounted-cash-flow technique was particularly unsuitable for valuing a data center, which involves computer technology. The Board credited the testimony in the record, including some from Mr. Sansoucy himself, that because computer technology changes at such a rapid pace, it is difficult to predict trends for real estate in that industry. As such, the Board concluded that estimates predicated on a decades-long projected income stream would not provide a reliable indication of the subject property's fair market value for the fiscal years at issue.

Having concluded that the direct income-capitalization approach was the most reliable method to value the subject property, the Board next considered the appropriate factors for use in that analysis, including rents, expenses, vacancy factors, and a capitalization rate.

As between the analyses offered by both valuation experts, the Board found that the income and expense information proffered by Mr. Leary was more reliable and supported by market data. In contrast, Mr. Sansoucy made no meaningful comparison to market data and relied exclusively on the subject property's actual reported income and expense figures. The Board therefore adopted Mr. Leary's estimates for rent at $115.00 per square foot, reimbursement at $42.50 per square foot, and expenses of $70.00 per square foot.

For vacancy and credit loss, the Board found that Mr. Sansoucy's estimate of 5% was understated, while it found Mr. Leary's rates, which ranged from 12% to 15% for fiscal year 2012 and 15% to 17.5% for fiscal year 2013, to be overstated. The record showed that the subject property's actual 2011 occupancy rate was 90.6%, increasing to 96.2% the following

year. In addition, Exhibit L entered into the record showed the occupancy rates of five Boston-area data centers owned by DRT. The 2011 occupancy rates of the five buildings, including the subject property, ranged from 90.6% to 100%, with an average of 96.15%. Similarly, Exhibit M was a document showing the occupancy rates of a competitor, Coresite, by region and year. That document showed occupancy rates of 87.3% for the Boston region for 2011, increasing to 92.5% the following year. Accordingly, on the basis of all of the evidence, the Board concluded a vacancy and credit loss rate of 10% for both of the fiscal years at issue.

With respect to capitalization rates, both parties' experts cited a number of sources, including rates published in industry publications as well as capitalization rates extracted from sales of data centers. Those sources showed a wide range of rates, which, for the most part, reflected a very gradual improvement of the economy from the economic recession that began in 2008. For example, quarterly rates reported in *Korpacz* were as follows:

Category	**Fourth Q 2010**	**Fourth Q 2011**	**Fourth Q 2012**
Boston Office	8.21%	8.11%	7.84%
Suburban Office	8.17%	8.04%	7.43%
Flex R & D	9.15%	8.9%	8.71%

Mr. Leary ultimately concluded rates ranging from 9.5% to 9.75% for fiscal year 2012 and 9.25% to 9.5% for fiscal year 2013, to which he added appropriate tax factors. Although these rates were slightly higher than those cited by *Korpacz* and other sources, Mr. Leary opined that a marginally higher rate was warranted in order to reflect the growth of the data center industry and increasing competition. Mr. Sansoucy, for his part, used a capitalization rate of 10% for both fiscal years, and he was non-committal as to whether that figure included a tax factor.

The Board found fault with the assumptions made by both parties' experts. Of particular importance was the industry information regarding data centers that was entered into the record. That information, including 2010 articles published in business and data center industry publications such as *The Charlotte Business Journal*, *Five 9s Digital*, and *Co-Star*, showed that data centers are generally appealing to investors because they offer a relatively quick return on investment. These publications also indicated that data centers did not suffer as drastically as other types of properties during the recession. One CB Richard Ellis employee said of data centers: "Money [is] no longer on the sidelines, it's very much in the game."

Accordingly, the Board concluded that Mr. Leary's selected base capitalization rates were too high. His selected rates exceeded the average fourth quarter rates for each property type

as published in *Korpacz*, and moreover, they failed to adequately take into consideration the desirability of data centers as investments.

Conversely, the Board found that Mr. Sansoucy's capitalization rate was too low. In his direct income-capitalization approach, Mr. Sansoucy used a capitalization rate of 10.0%. He initially testified that this figure did not include a tax factor, because he believed the leases at the subject property were triple-net leases, under which the tenant is responsible for the payment of real estate taxes. The record showed that this was not the case. He later stated that the 10.0% capitalization rate did in fact take into consideration the tax factors because they were premised, in part, on the capitalization rates determined through his discounted-cash-flow analysis, which had included the tax factor for each of the fiscal years at issue. Given Billerica's commercial tax rates, which exceeded $30.00 per thousand for both of the fiscal years at issue, it follows that Mr. Sansoucy's base capitalization rates would have been less than 7.0% for both of the fiscal years at issue. The Board found that the record did not support such low base capitalization rates, and the Board therefore rejected Mr.Sansoucy's suggested capitalization rate.

As it had with the vacancy and credit loss rate, the Board exercised its own judgment and selected from among the evidence in the record to determine appropriate capitalization rates. Based on the record in its totality, the Board determined that base capitalization rates of 9.0% for fiscal year 2012 and 8.5% for fiscal year 2013 were appropriate. To these base capitalization rates the Board added split tax factors, which took into account the fact that the subject property is taxed by both Billerica and Bedford.

After applying these capitalization rates to its calculated net operating income, the Board determined final, rounded fair cash values for the subject property of $56,100,000 for fiscal year 2012 and $58,000,000 for fiscal year 2013. The Board's income-capitalization methodology is reproduced below.

The Board's Income Capitalization Analysis for Fiscal Year 2012

Income:

Rent 106,000 sf @ $115.00/psf	$12,190,000
Reimbursements @ $42.50/sf=	$4,505,000
Potential Gross Income ("PGI")	$16,695,000
Vacancy @ 10%	($1,669,500)
Effective Gross Income ("EGI")	$15,025,500

Expenses @ $70.00/psf=			($7,420,000)
Net Operating Income ("NOI")			$7,605,500
Base Capitalization Rate of 9.0%			9.0
Billerica tax factor of $31.90 @ 90%			2.87
Bedford tax factor of $33.21 @ 10%			0.32
Overall Capitalization Rate			12.20
Total Indicated Value of Subject Property	$7,605,500/.122	$62,340,163	
Value of Billerica Portion @ 90%, Rounded		**$56,100,000**	

The Board's Income Capitalization Analysis for Fiscal Year 2013

Income:			
Rent 106,000 sf @ $115.00/sf			$12,190,000
Reimbursement @ $42.50/sf			$4,505,000
PGI			$16,695,000
Vacancy at 10%			($1,669,500)
EGI			$15,025,500
Expenses at $70/ psf			($7,420,000)
NOI			$7,605,500
Base Capitalization Rate of 8.5%			8.50
Billerica tax factor of $32.9 @ 90%			2.96
Bedford tax factor of 33.8 @ 10%			0.34
			11.80
Total Indicated Value of Subject Property	$7,605,500/.118	$64,453,389	
Value of Billerica Portion @ 90%, Rounded		**$58,000,000**	

Based on the evidence of record, the Board found and ruled that the appellant met its burden of demonstrating that the subject property was overvalued for both of the fiscal years at issue and determined fair cash values for the subject property of $56,100,000 for fiscal year 2012 and $58,000,000 for fiscal year 2013. Accordingly, the Board issued decisions for the appellant in these appeals, and granted abatements of $93,752.87 for fiscal year 2012 and $34,080.62 for fiscal year 2013.

OPINION

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston,*** 334 Mass. 549, 566 (1956). In determining fair cash value, all uses to which the property was or could reasonably be adapted on the relevant assessment dates should be considered. ***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 idea is to ascertain the maximum value of the property for any legitimate and reasonable use. ***Id.*** Based on the record, the Board found and ruled that the highest-and-best use for the subject property was its existing use as a wholesale data center. Both parties' valuation experts considered this to be the subject property's highest and best use as well.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost. ***Correia v. New Bedford Redevelopment Authority,*** 375 Mass. 360, 362 (1978). "The [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).

In these appeals, the Board found and ruled that the sales-comparison approach was not an appropriate methodology to use to estimate the value of the subject property because there were not enough local market sales of comparable property to provide a reliable basis for comparison. The Board further found and ruled that "[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. The Board found and ruled that no such "special situations" existed here.

The subject property was over 40 years old as of the relevant dates of valuation, and the Board concluded that the subject property was not a special-purpose property. This conclusion was supported by the record evidence in this case, which showed the flexible nature of the subject building and of data centers in general, and also comports with how other courts have treated data centers. *See* ***Fisher Media v. Noble,*** 2006 Wash. Tax Lexis 890 at *6 (Wash. Bd. Tax Appeals, May 24, 2006) (finding that the cost approach to value was not a reliable method for valuing an office building with data center and instead using the income-capitalization method because the "property is not of a complex nature; it is an office building with a parking

garage"). Accordingly, the Board found and ruled that the cost approach was not appropriate for valuing the subject property for the fiscal years at issue.

The income-capitalization approach is an appropriate technique to use for valuing income-producing property, particularly when the other valuation methodologies are not suitable. *See, e.g.,* ***Georgetown Shopping Ctr., LLC v. Assessors of Georgetown***, Mass. ATB Findings of Fact and Reports 2015-612, 638-39. In the present appeals, both parties' valuation experts used the direct income-capitalization approach to value the subject property, while Mr. Sansoucy also performed another variation of this methodology, the discounted-cash flow analysis. As stated above, the Board routinely rejects the discounted-cash-flow technique as an appropriate valuation methodology for *ad valorem* tax purposes, and it did so again here. *See* ***Joseph Iantosca, et. al. v. Assessors of Weymouth,*** Mass. ATB Findings of Fact and Reports 2008-929, 952 ("The discounted-cash-flow analysis has never been relied upon by the Board as a primary valuation methodology."); ***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); ***GLW Kids LLC v. Assessors of Carlisle,*** Mass. ATB Findings of Fact and Reports 2016-53, 73, *aff'd,* Mass. App. Ct. No. 16-P-729, Memorandum and Order under Rule 1:28 (July 12, 2017). The Board therefore adopted the direct income-capitalization approach as the most reliable method to use to value the subject property.

Under this approach, a property's capacity to generate income over a one-year period is analyzed and converted into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved. ***Olympia & York State Street Co. v. Assessors of Boston,*** 428 Mass. 236, 239 (1998). Net operating income is obtained by subtracting expenses from gross income. ***Assessors of Brookline v. Buehler,*** 396 Mass. 520, 523 (1986). The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Associates v. Assessors of Taunton,*** 393 Mass. 293, 295 (1984).

The income stream used in the income-capitalization method must reflect the property's earning capacity or economic rental value. ***Pepsi-Cola Bottling Co.,*** 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property's earning capacity. *See* ***Correia v. New Bedford Redevelopment Auth.***, 5 Mass. App. Ct. 289, 293-94 (1977), *rev'd on other grounds,* 375 Mass. 360 (1978); ***Library Services, Inc. v. Malden Redevelopment***

Auth., 9 Mass. App. Ct. 877, 878 (1980)(rescript); ***Avco Manufacturing Corp. v. Assessors of Wilmington***, Mass. ATB Findings of Fact and Reports 1990-142, 166. After accounting for vacancy and rent losses, the net-operating income is obtained by deducting appropriate expenses. ***Pepsi-Cola Bottling Co.***, 397 Mass. at 452-53. "The issue of what expenses may be considered in any particular piece of property is for the board." ***Alstores Realty Corp. v. Assessors of Peabody***, 391 Mass. 60, 65 (1984).

In the present appeals, the Board found that the income and expense information – specifically the rents, reimbursements, and expenses - suggested by Mr. Leary were more supported by the market data in evidence than those offered by Mr. Sansoucy, which were premised almost entirely on the subject property's actual income and expense information. "Without sufficient consideration of market data, actual rents and expenses cannot be presumed to accurately reflect the property's fair market value earning capacity." ***45 Rice Street Realty Trust v. Assessors of Cambridge,*** Mass. ATB Findings of Facts and Reports 2007-1269, 1326. Accordingly, the Board gave primary weight to the range of market rents selected by Mr. Leary, albeit at the higher end of his range.

With respect to the estimates for vacancy and credit loss, as well as the capitalization rates, the Board found and ruled that neither of the valuation experts selected rates that were reflective of the data center market during the fiscal years at issue. In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Further, the mere qualification of a person as an expert does not endow his testimony with any magic qualities. ***Boston Gas Co.,*** 334 Mass. at 579. "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). The Board can accept those portions of the evidence that it determined had more convincing weight. ***Foxboro Associates v. Assessors of Foxborough,*** 385 Mass. 679, 683 (1982); ***Board of Assessors of Lynn v. New England Oyster House, Inc.,*** 362 Mass. 696, 702 (1972). In evaluating the evidence before it in these appeals, the Board selected among the various elements of value and formed its own independent judgment of fair cash value. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 605 (1984); ***North American Philips Lighting Corp. v. Assessors of Lynn,*** 392 Mass. 296, 300 (1984).

"'The burden of proof is upon the [appellant] to make out its right as a matter of law to abatement of the tax.'" ***Schlaiker v. Assessors of Great Barrington,*** 365 Mass. 243, 245

(1974)(quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). In the present appeals, the Board found and ruled that the appellant met its burden of proving that the subject property was overvalued for both fiscal years at issue in these appeals. On the basis of the record in its entirety, the Board found and ruled that the fair cash value of the subject property was $56,100,000 for fiscal year 2012 and $58,000,000 for fiscal year 2013.

The Board therefore issued decisions in favor of the appellant and granted abatements in the amount of $93,752.87 for fiscal year 2012 and $34,080.62 for fiscal year 2013.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

KELECHI LINARDON **v.** **BOARD OF ASSESSORS OF THE TOWN OF STONEHAM**

Docket No. F331987

Promulgated:
October 27, 2017

ATB 2017-475

This is an appeal under the formal procedure pursuant to G.L. c. 60A, § 2 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Stoneham ("assessors" or "appellee") to abate an excise on a certain motor vehicle in Stoneham owned by and assessed to Kelechi Linardon ("appellant") under G.L. c. 60A, § 1 for calendar year 2016.

Commissioner Good ("Presiding Commissioner") heard this appeal under G.L. c. 58A, § 1A and 831 CMR 1.20 and issued a single-member 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.

Kelechi Linardon, pro se, for the appellant.

Brian McDonald, Principal 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 Presiding Commissioner made the following findings of fact.

On or about January 1, 2016, Stoneham's Collector of Taxes mailed to the appellant the 2016 motor vehicle excise bill for a 2007 Chrysler ("subject property") that was registered, as of January 1, 2016, in the appellant's name with a listed address of 117 Hill Street, Stoneham. On September 30, 2016, in accordance with G.L. c. 60A, § 2, the appellant filed an application for abatement with the assessors, which they denied on October 12, 2016. On October 31, 2016, in accordance with G.L. c. 59, §§ 64 and 65, the appellant timely filed an appeal with the Appellate Tax Board ("Board"). On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

At the hearing of this appeal, the appellant testified that she was a resident of Stoneham until December of 2015 when, due to a dispute with her landlord, she moved to Boston. The appellant further testified that she has a spinal disability and other medical issues that prevent her from driving, but she maintains ownership of the vehicle so as to have hope and motivation, and also so that family and friends can drive her places.

The appellant argued that since she did not live in Stoneham during 2016, she is not liable for the 2016 motor vehicle excise assessed by the town of Stoneham. The appellant did not, however, change the vehicle's registration at the time of her move but in fact left it registered at the Stoneham address until the registration expired in September of 2016. Furthermore, the appellant failed to provide any credible evidence to prove that the vehicle was kept anywhere other than Stoneham or that she paid an excise to any other municipality. Regarding her exemption claim, there is no evidence that her spinal disability and other medical issues affected the appellant's vision or the use of her legs or arms, as required to qualify for an exemption under G. L. c. 60A, § 1. Accordingly, the Presiding Commissioner found and ruled that no exception to the excise was available to the appellant.

On the basis of the evidence presented, and for the reasons explained in the following Opinion, the Presiding Commissioner found and ruled that the appellant was liable for the 2016 motor vehicle excise. Accordingly, the Presiding Commissioner issued a single-member decision for the appellee.

OPINION

General Laws c. 60A, § 1 provides that, in each calendar year, an excise shall be assessed and levied on every motor vehicle registered in the Commonwealth under G.L. c. 90, "for the

privilege of such registration." The excise "shall be laid and collected at the residential address of the owner ... as determined by the owner's registration." G.L. c. 60A, § 6. Any person who has "suffered loss, or permanent loss of use of, both legs or both arms" is exempt from the excise. G. L. c. 60A, § 1.

For calendar year 2016, Stoneham assessed an excise on the appellant's motor vehicle based on the address listed on the appellant's registration issued by the Massachusetts Registry of Motor Vehicles ("RMV"). The appellant, however, maintained that she moved out of Stoneham, to Boston, in December of 2015 and, therefore, was not liable for the 2016 excise assessed by Stoneham. Although the appellant demonstrated to the Presiding Commissioner that she changed her residence prior to calendar year 2016, she admittedly did not change the vehicle's registration with the RMV as required under G. L. c. 60A, § 6 and did not establish that the vehicle was kept in a municipality other than Stoneham in 2016.

Moreover, although the appellant testified that she has a spinal disability and other medical issues that prevent her from driving, she did not provide sufficient evidence to suggest that the medical conditions affected her vision, use of extremities or otherwise qualified her for the exemption provided in G.L. c. 60A, § 1. A taxpayer claiming exemption from taxation must show clearly and unequivocally that she comes within the terms of the exemption. ***Town of Milton v. Ladd***, 348 Mass. 762, 765 (1965).

On this basis, the Presiding Commissioner found and ruled that the owner's registration for the subject property listed the residential address of the owner as Stoneham and the appellant did not establish that the subject property was kept anywhere other than Stoneham or was exempt from the excise imposed by G.L. c. 60A, § 1. The Board therefore found and ruled that the appellant did not meet her burden of proving her right to an abatement of the excise. Accordingly, the Presiding Commissioner issued a single-member decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: _____

Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____

Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

LOWE'S HOME CENTERS, INC. **v.** **BOARD OF ASSESSORS OF THE CITY OF QUINCY**

Docket Nos. F317851 (FY 2012)
F321484 (FY 2013)
F324962 (FY 2014)

Promulgated:
March 23, 2018

ATB 2018-41

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 Lowe's Home Centers, Inc. ("appellant" or "Lowe's") under G.L. c. 59, §§ 11 and 38, for fiscal years 2012, 2013, and 2014 ("fiscal years at issue").

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

Alan R. Hoffman, Esq. and *Ryan J. Gibbs,* Esq. for the appellant.

Peter Moran, chair of the assessors, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits offered into evidence at the hearing of these appeals, as well as its view of the subject property, the surrounding area, and several of the purportedly comparable properties, the Appellate Tax Board ("Board") made the following findings of fact.

I. Introduction and Jurisdiction

On January 1, 2011, January 1, 2012, and January 1, 2013, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 12.81-acre improved parcel of real estate located at 599 Thomas Burgin Parkway in Quincy ("subject property"). For assessment purposes, the subject property is identified as Map 3089, Block 18, Lot A. The subject property is situated in South Quincy just outside of downtown Quincy and near the intersection of Interstate 93. More specifically the subject property is located within a planned unit development zoning district, which allows for many uses with city council approval

for a special permit. Within the immediate area, there are varying property uses, including two- and four-family residential dwellings, small mixed-use properties with retail or office spaces on the first floor and apartments on the upper floors, and also large apartment complexes. In addition to the subject property, Home Depot and BJ's big-box retail stores are within the immediate area. Also located nearby is the Quincy Adams MBTA station and parking facility.

The subject property is improved with a one-story, plus mezzanine, big-box retail building with approximately 124,825 feet of net leasable area, which was constructed in 2010 ("subject building"). The subject building has a steel-frame structure with a concrete slab foundation, a flat membrane roof, and a concrete block exterior. The first floor is primarily retail and receiving with ceiling heights of 20-25 feet. The mezzanine level consists of offices, an employee break room, an employee training room, and 4 lavatories. The subject building also has 3 loading docks and 1 truck-height bay. In addition, there is a 26,769-square-foot, fenced-in, outdoor garden center that is not included in the leasable area due to its exposure to the elements. The subject property is subject to a renewable 20-year ground lease at an annual rent of $1,662,500 for the first 5 years. Pursuant to the lease, the appellant is responsible for all costs associated with construction of the subject building, which according to the subject property's building permits totaled $16,753,635.

For fiscal year 2012, the assessors valued the subject property at $14,454,800 and assessed a tax thereon, at the rate of $28.66 per thousand, in the total amount of $418,667.32.[1] In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 26, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on February 9, 2012. On April 19, 2012, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

For fiscal year 2013, the assessors valued the subject property at $14,753,000 and assessed a tax thereon, at the rate of $30.61 per thousand, in the total amount of $456,105.22.[2] In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 25, 2013, in accordance with G. L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on February 8, 2013. Because the

[1] This amount includes a Community Preservation Act ("CPA") assessment of $4,142.75 and also a special assessment in the amount of $250.00.
[2] This amount includes a CPA assessment of $4,515.89.

appellant alleged that it did not receive notice of the denial, the appellant filed its appeal with the Board on July 23, 2013, within three months of the deemed denial of its abatement application.

For fiscal year 2014, the assessors valued the subject property at $14,865,300 and assessed a tax thereon, at the rate of $31.23 per thousand, in the total amount of $469,135.75.[3] In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 17, 2014, in accordance with G. L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which was deemed denied on April 17, 2014. On July 16, 2014, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

At the hearing of these appeals, the assessors made an oral motion to dismiss the appellant's fiscal year 2013 appeal, arguing that it was not timely filed with the Board. In support of their motion, the assessors submitted the affidavit of Jacquelyn Reid, the head clerk for the assessors. Ms. Reid stated in her affidavit that her job with the assessors' office is to process the abatement applications by logging them into the computer system, preparing them for the assessors' review, and then sending notice of the assessors' decision to the taxpayers. Ms. Reid further stated in her affidavit that with respect to the appellant's fiscal year 2013 abatement application, the assessors denied the application by vote on February 8, 2013 and, on February 11, 2013, she processed and mailed the denial notice to the appellant's then counsel, as identified on and pursuant to the appellant's abatement application.

The appellant, however, maintained that it did not receive the assessors' fiscal year 2013 denial notice. In support of its position, the appellant presented the affidavit of Justine T. Mahoney, a paralegal with the law firm of the appellant's then counsel since 2004. Ms. Mahoney stated in her affidavit that since 2011 her main responsibilities include tracking deadlines for and preparation and filing of real estate tax abatement applications with the local boards of assessors and subsequent appeals with the Board. As part of her daily responsibilities, she received and opened all mail delivered to the office and docketed receipts of abatement denials.

According to Ms. Mahoney, on or about January 29, 2013, she received from the assessors a date-stamped copy of the appellant's abatement application, which indicated that it was received by the assessors on January 25, 2013. She further stated that she did not receive any other documentation as it related to the appellant's fiscal year 2013 abatement application.

[3] This amount includes a CPA assessment of $4,642.43 and also a special assessment in the amount of $250.00.

Accordingly, on or about July 23, 2013, Ms. Mahoney arranged for the appellant's signed appeal to be filed with the Board within 3 months of the deemed denial date. Lastly, Ms. Mahoney stated that upon further review of the law firm's abatement filings for other properties located in Quincy for fiscal year 2013 - 30 in total - she received only 7 denials from the assessors.

Based on the evidence presented, the Board found that the appellant did not receive the assessors' denial notice dated February 8, 2013 and, for the reasons more fully explained in the following Opinion, the Board found that the appellant's appeal, filed on July 23, 2013, within 3 months of the deemed denial date of April 25, 2013, was timely.

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

II. The Appellant's Case-in-Chief

The appellant presented its case-in-chief primarily through the testimony and appraisal report of John A. Shuka, a certified general real estate appraiser, whom the Board qualified as an expert witness in the area of commercial real estate valuation. After determining that the subject property's highest-and-best use was its continued use as a retail building, Mr. Shuka considered the 3 usual methods for estimating the value of the subject property for the fiscal years at issue. Mr. Shuka considered his direct income-capitalization approach to be the most viable methodology to use to estimate the fair cash value of the subject property for the fiscal years at issue.[4]

The first step in Mr. Shuka's income-capitalization analyses was to determine the subject property's potential gross revenue for each of the fiscal years at issue. To accomplish this step, Mr. Shuka researched and relied on 8 purportedly comparable retail leases, which included 3 build-to-suit leases, to assist in estimating market rents for the subject property. Relevant information regarding Mr. Shuka's purportedly comparable leases appears in the following table.

No.	Address	Tenant	Square Feet	Date	Term	Avg Rent PSF	Comments
1	238-310 Grove St., Braintree, MA	TJ Maxx/Home Goods	72,300	7/2009	5 years	$ 7.22	Pre-existing space
2	140 Main St., Weymouth, MA	Nat'l Wholesale Liquidators	89,000	11/2014	20 years	$ 7.00	Pre-existing space
3	90 Providence Hgwy., Walpole, MA	Kohl's	102,445	7/2009	20 years	$ 9.60	Pre-existing space
4	180 Pearl St., Braintree, MA	Cardi's Furniture	113,000	6/2008	5.5 years	$12.00	Sub-lease Pre-existing space
5	175 Highland Ave., Seekonk, MA	BJ's Wholesale	109,338	8/2012	20 years	$ 9.00	Pre-existing space

[4] Although Mr. Shuka included in his appraisal report a sales-comparison analysis for each of the fiscal years at issue, he ultimately concluded that this methodology required excessive adjustments rendering the derived values unreliable. Therefore, Mr. Shuka placed no weight on the values derived from his sales-comparison analyses.

6	200 Stonehill Dr. Johnston, RI	BJ's Wholesale	121,324	6/2010	20 years	$14.00	Build to suit
7	200 Crown Colony, Quincy, MA	BJ's Wholesale	84,360	5/2010	20 years	$21.93	Build to suit
8	Highland Commons, Hudson, MA	BJ's Wholesale	117,924	12/2010	20 years	$12.00	Build to suit

Mr. Shuka testified that comparable numbers 1 and 2, which represented the low end of the range, are inferior to the subject property in terms of size and physical characteristics. He also maintained that comparable number 7, which is at the high end of the range at $21.93 per square foot, was an outlier. The remaining comparables, he noted, indicated a much tighter rental range of $9.00 to $14.00 per square foot. Considering what he reported as all of the relevant factors, Mr. Shuka determined that a stabilized fair market rent of $13.00 per square foot on a triple net basis was an appropriate rent for the subject property for the fiscal years at issue. Applying this rate to the subject property's 124,825 square feet, Mr. Shuka obtained a forecasted rental income of $1,622,725 for the fiscal years at issue.

Next, Mr. Shuka considered reimbursement income, noting that under the terms of a typical lease in properties similar to the subject property, the tenant is responsible for its share of operating expenses and insurance. Based on the 2010, 2011, and 2012 surveys conducted by the Institute of Real Estate Management ("IREM"), Mr. Shuka included reimbursement income for operating expenses and insurance, of $376,972, $456,860, and $298,332 for fiscal years 2012, 2013, and 2014, respectively. Adding these figures to his projected rental figure produced potential gross income amounts of $1,999,697 for fiscal year 2012, $2,079,585 for fiscal year 2013, and $1,921,057 for fiscal year 2014.

The next step in Mr. Shhuka's analysis was the determination of vacancy and collection loss allowances. Mr. Shuka noted in his appraisal report that according to the Keypoint Partners reports, the regional vacancy rate in Eastern Massachusetts decreased from 9.7% to 7.9% during the fiscal years at issue. Further, the vacancy rate for the south market, which included Quincy, decreased from 9.2% to 8.1% during the same time period. Based on the reported market vacancy rates, as well as the limited market for large big-box buildings similar to the subject property, Mr. Shuka determined that a stabilized vacancy and collection loss rate of 15% was reasonable for the fiscal years at issue.

Next, Mr. Shuka determined the subject property's net-operating incomes by deducting expenses, which he divided into two categories - reimbursable expenses and unreimbursed expenses. For reimbursable expenses, Mr. Shuka used the same figures that he reported for

reimbursement income. For unreimbursed expenses, Mr. Shuka allowed the following expenses: property management calculated at 3.0% of effective gross income; replacement reserves calculated at $0.25 per square foot; administrative costs of $10,000; leasing commissions calculated at 2.8% of forecasted rental income; and tenant improvements calculated at $0.20 per square foot. The total expenses amounted to $539,571 for fiscal year 2012, $621,496 for fiscal year 2013, and $458,926 for fiscal year 2014, resulting in net-operating incomes of $1,160,171, $1,146,150, and $1,173,972, for fiscal years 2012, 2013, and 2014, respectively.

Mr. Shuka derived his capitalization rates from a combination of factors. First, he extracted rates from sales of 18 single-tenant properties that occurred between February 2009 and July 2014. Second, Mr. Shuka considered the information published by RealtyRates.com for free-standing retail properties for the period 2011 through 2014, which reported average capitalization rates between 10.31% and 10.69% during this period. Lastly, Mr. Shuka employed a band-of-investment technique, which resulted in suggested capitalization rates of 9.83% for fiscal year 2012, 9.63% for fiscal year 2013, and 9.46% for fiscal year 2014.

Relying on this information, Mr. Shuka selected a stabilized base capitalization rate of 10% for the fiscal years at issue. Because Mr. Shuka did not include any tax payments from tenants in his reimbursements, he only added a prorated tax factor based on his vacancy rate to arrive at his overall capitalization rates of 10.4299% for fiscal year 2012, 10.4592% for fiscal year 2013, and 10.4685% for fiscal year 2014.

Mr. Shuka's income-capitalization analyses are reproduced in the following tables.[5]

Fiscal Year 2012

INCOME		
Building area	124,825 sf	
Market Rent (psf)	$13.00 psf	$1,622,725
Reimbursement Income		$376,972
Potential Gross Income		**$1,999,697**
Less Vacancy	15%	($299,954)
Effective Gross Income ("EGI")		**$1,699,742**
EXPENSES		
Reimbursable Expenses		
Operating Expenses	$2.82 psf	$ 352,007
Insurance	$0.20 psf	$ 24,965
Non-Reimbursable Expenses		
Management	3% of EGI	$ 50,992

[5] The Board noted that there were several minor mathematical errors in Mr. Shuka's income-capitalization analyses but found that these errors did not impact his overall estimates of value for the fiscal years at issue.

Reserves for Replacement	$0.25 psf	$ 31,206
Administrative		$ 10,000
Lease Commissions	2.8% of market rent	$ 45,436
Tenant Improvements	$0.20 psf	$ 24,965
Total Operating Expense		**$ 539,571**
Net-Operating Income:		**$1,160,171**
Base Rate		10.00%
Tax Factor (owner's share)	2.866% * 15%	0.4299%
Overall Capitalization Rate		10.4299%
Capitalized Value		**$11,123.508**
Rounded Fair Cash Value		**$11,125,000**

Fiscal Year 2013

INCOME		
Building area	124,825 sf	
Market Rent (psf)	$13.00 psf	$1,622,725
Reimbursement Income		$ 456,860
Potential Gross Income		**$2,079,585**
Less Vacancy	15%	($311,938)
Effective Gross Income ("EGI")		**$1,767,647**
EXPENSES		
Reimbursable expenses		
Operating expenses	$3.45 psf	$ 430,646
Insurance	$0.21 psf	$ 26,213
Non-Reimbursable expenses		
Management	3% of EGI	$ 53,029
Reserves for Replacement	$0.25 psf	$ 31,206
Administrative		$ 10,000
Lease Commissions	2.8% of market rent	$ 45,436
Tenant Improvements	$0.20 psf	$ 24,965
Total Operating Expense		**$ 621,496**
Net-Operating Income:		**$1,146,150**
Base Rate		10.00%
Tax Factor (owner's share)	3.061% * 15%	0.4592%
Overall Capitalization Rate		10.4592%
Capitalized Value		**$10,958,351**
Rounded Fair Cash Value		**$10,950,000**

Fiscal Year 2014

INCOME		
Building area	124,825 sf	
Market Rent (psf)	$13.00 psf	$1,622,725
Reimbursement Income		$ 298,332
Potential Gross Income		**$1,921,057**
Less Vacancy	15%	($288,159)
Effective Gross Income ("EGI")		**$1,632,898**
EXPENSES		
Reimbursable expenses		
Operating expenses	$2.17 psf	$ 270,870
Insurance	$0.22 psf	$ 27,462
Non-Reimbursable expenses		
Management	3% of EGI	$ 48,987
Reserves for Replacement	$0.25 psf	$ 31,206
Administrative		$ 10,000
Lease Commissions	2.8% of market rent	$ 45,436
Tenant Improvements	$0.20 psf	$ 24,965
Total Operating Expense		**$ 458,926**
Net-Operating Income:		**$1,173,972**
Base Rate		10.00%
Tax Factor (owner's share)	3.123% * 15%	0.4685%
Overall Capitalization Rate		10.4685%
Capitalized Value		**$11,123.508**
Rounded Fair Cash Value		**$11,125,000**

III. The Appellee's Case-in-Chief

In support of their assessments, the assessors relied on the testimony of James R. Johnston, a licensed real estate appraiser, whom the Board qualified without objection as an expert in the area of commercial real estate valuation, and his summary appraisal report for the fiscal years at issue.

Mr. Johnston agreed with the appellant's real estate valuation expert that the subject property's highest-and-best use was its continued use as a retail building and that the income-capitalization approach was the preferred method of valuation to use under the circumstances.[6] Mr. Johnston began his analysis by reviewing leases of properties with similar sizes,

[6] Although Mr. Johnston included in his appraisal report the sales information for 6 big-box retail stores that sold between October 2009 and February 2014, he did not complete a full sales-comparison analysis.

configurations, and locations to those of the subject property. Based on these factors, Mr. Johnston selected 10 purportedly comparable leases which are reproduced in the following table.

	Tenant	Address	Bldg Area	Rent PSF	Date Term	Comments
1	Home Depot	1453 Pleasant St., Bridgewater, MA	132,984	$ 6.20	2/08 25 yrs	Ground Lease Land
2	Lowe's	635 Huse Rd., Manchester, NH	157,626	$ 8.25	1/09 20 yrs	Ground Lease Land
3	BJ's Wholesale	5 Ward St., Revere, MA	120,224	$ 8.90	2009 15 yrs	Ground Lease Land
4	Kohl's	Walpole Mall, Walpole, MA	102,445	$ 9.50	1/09 20 yrs	Renewal
5	Home Depot	500 Spaulding Tpke., Portsmouth, NH	145,193	$ 9.64	7/07 30 yrs	Ground Lease Land
6	BJ's Wholesale	25 Shelley Rd., Haverhill, MA	119,598	$10.75	8/07 20 yrs	Land & Bldg
7	BJ's Wholesale	20 Seyon St., Waltham, MA	122,142	$11.54	6/10 25 yrs	Ground Lease only
8	Kohl's	Orchard Hill Pk., Leominster, MA	89,925	$13.18	10/05 20 yrs	Land & Bldg
9	BJ's Wholesale	Northboro Crossing, Northboro, MA	124,303	$19.87	9/11 20 yrs	Land & Bldg
10	BJ's Wholesale	200 Crown Colony, Quincy, MA	84,680	$21.85	6/09 20 yrs	Land & Bldg

Taking into account the differences, including: the lease structure; rents at the low end of the range being ground leases only; the physical qualities of the properties, such as Kohl's stores having more finished space, which generally commands a higher rent; and the age and location of the purportedly comparable leases, Mr. Johnston determined that the subject property's fair market rent would be in the upper half of his purportedly comparable properties' rents. Mr. Johnston also noted that rents were increasing during the fiscal years at issue and that the subject property had "head-to-head" competition with the Home Depot located just across the street. On this basis, Mr. Johnston selected market rents of $10.50 per square foot for fiscal year 2012, $11.00 per square foot for fiscal year 2013, and $11.50 per square foot for fiscal year 2014. Applied to a net building area of 124,597 square feet,[7] these rents yielded potential gross incomes of $1,308,269 for fiscal year 2012, $1,370,567 for fiscal year 2013, and $1,432,866 for fiscal year 2014.

Relying on the appellant's good credit rating, the market vacancy, and also the subject property's actual occupancy of 100%, Mr. Johnston determined that a vacancy rate of 5% was appropriate for all fiscal years at issue. This allowance resulted in an effective gross income of $1,242,855 for fiscal year 2012, $1,302,039 for fiscal year 2013, and $1,361,222 for fiscal year 2014.

[7] This figure differed only slightly from Mr. Shuka's building area of 124,825 square feet.

Next, Mr. Johnston determined the subject property's net-operating income by deducting the subject property's estimated market expenses. Agreeing with the appellant's real estate valuation expert that under a triple-net leasing scenario the landlord's expenses are those limited to the management and structural maintenance of the building, Mr. Johnston allowed a management fee equal to 2% of the effective gross income and a replacement reserve allowance equal to $ 0.20 per square foot, which he testified were typical in the market. Mr. Johnston deducted these expenses from his effective gross income amounts to derive net-operating incomes of $1,193,079 for fiscal year 2012, $1,251,078 for fiscal year 2013, and $1,309,078 for fiscal year 2014.

For his capitalization rates, Mr. Johnston reviewed rates published by *PwC Real Estate Investor Survey – First* Quarters 2011, 2012, and 2013. He testified that the reports reflected declining rates during the fiscal years at issue. He also performed a band-of-investment analysis for each of the fiscal years at issue. Relying on this information, he then selected capitalization rates of 7.75% for fiscal year 2012, 7.25% for fiscal year 2013, and 7.00% for fiscal year 2014.[8]

Finally, applying the corresponding capitalization rate to the net-operating income for each of the fiscal years at issue, Mr. Johnston derived an indicated value of $15,394,562, rounded to $15,390,000 for fiscal year 2012, $17,256,255, rounded to $17,260,000 for fiscal year 2013, and $18,701,120, rounded to $18,700,000 for fiscal year 2014.

Mr. Johnston's income-capitalization analyses are summarized in the following table.[9]

	Fiscal Year 2011	Fiscal Year 2012	Fiscal Year 2014
INCOME			
Net Rentable Area 124,597			
Market Rent (PSF)	$10.50	$11.00	$11.50
Potential Gross Income	**$1,308,269**	**$1,370,567**	**$1,432,866**
Less Vacancy – 5%	($65,413)	($68,528)	($71,643)
Effective Gross Income	**$1,242,855**	**$1,302,039**	**$1,361,222**
OPERATING EXPENSE			
Management	2% of EGI $24,857	$26,041	$27,224
Reserve for Replacement	$0.20 psf $24,919	$24,919	$24,919
Total Operating Expense	($49,777)	($50,960)	($52,144)
Net-Operating Income:	**$1,193,079**	**$1,251,078**	**$1,309,078**

[8] Mr. Johnston reported that he did not add a tax factor to reflect his 5% vacancy to "keep the capitalization process simple."

[9] The Board noted that while there was a slight difference in the net leasable areas used by the parties' real estate valuation experts, the impact on the subject property's overall values was negligible.

Overall Capitalization Rate	7.75%	7.25%	7.00%
Capitalized Value	**$15,394,562**	**$17,256,255**	**$18,701,120**
Rounded Fair Cash Value	**$15,390,000**	**$17,260,000**	**$18,700,000**

IV. The Board's Findings

Based on all of the evidence, the Board found that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. The Board agreed with the parties' valuation witnesses and determined that the subject property's highest-and-best use was its existing use as a retail building and that the preferred method for ascertaining the fair cash value of the subject property for the fiscal years at issue was through an income-capitalization methodology.

With respect to the subject property's rental income, the Board found that Mr. Shuka's market rental of $13.00 per square foot, which was derived from large investment-quality chain retail properties like the subject property, best reflected the subject property's market rent. For vacancy and credit loss, the appellant's valuation witness adopted a rate of 15%, compared to the 5% adopted by the assessors' valuation witness. Based on the valuation witnesses' recommendations as well as the subject property's actual 100% vacancy during the fiscal years at issue, the Board adopted a stabilized vacancy and credit loss rate of 7.5% for the fiscal years at issue.

For expenses, the Board agreed with Mr. Shuka that under a triple-net leasing scenario the tenant pays for most operating expenses and the landlord is responsible for only that portion attributable to vacancy. The Board also found that Mr. Shuka's expenses for common area maintenance and insurance, which were based on market data published in IREM, were reasonable. The Board then applied its vacancy rate of 7.5% to these amounts. The Board further found that Mr. Shuka's reserves for replacement calculated at $0.25 per square foot, leasing commissions calculated at 2.8% of potential gross income, and tenant improvements calculated at $0.20 per square foot were market based and therefore appropriate. With respect to the management expense, the Board found that Mr. Shuka's expense calculated at 3% of effective gross income was excessive given the nature of the tenancy and instead found that Mr. Johnston's allowance of 2% of effective gross income was more reasonable.

Mr. Shuka recommended a stabilized base capitalization rate of 10% for the fiscal years at issue, plus applicable pro-rata tax factors. In comparison, Mr. Johnston recommended

capitalization rates of 7.75%, 7.25% and 7.00%, respectively, for fiscal years 2012, 2013, and 2014, and did not include pro-rata tax factors. In the present appeals, the Board found that Mr. Johnston's capitalization rates more closely reflected the market and, consequently, adopted base capitalization rates of 8.75% for fiscal year 2012, 8.50% for fiscal year 2013, and 8.25% for fiscal year 2014, plus applicable pro-rata tax factors.

The Board's income-capitalization analyses for the fiscal years at issue are presented below:

Board's Income-Capitalization Analyses

		Fiscal Year 2012	Fiscal Year 2013	Fiscal Year 2014
INCOME				
Building area 124,825 sf				
@ market rent of $13/sf				
Potential Gross Income		$1,622,725	$1,622,725	$1,622,725
Less Vacancy/Credit Loss 7.5%		($121,704)	($121,704)	($121,704)
Effective Gross Income		**$ 1,501,021**	**$ 1,501,021**	**$ 1,501,021**
OPERATING EXPENSE				
Landlord's Expenses Attributable to Vacancy				
Operating Expenses		$ 26,401	$ 32,298	$ 20,315
Insurance		$ 1,872	$ 1,966	$ 2,060
Management Fees	2% of EGI	$ 30,020	$ 30,020	$ 30,020
Replacement Reserves	$0.25 psf	$ 31,206	$ 31,206	$ 31,206
Leasing Commission	2.8% of PGI	$ 45,436	$ 45,436	$ 45,436
Tenant Improvement	$0.20 psf	$ 24,965	$ 24,956	$ 24,956
Total Operating Expense		$ 159,900	$ 165,882	$ 153,993
Net-Operating Income:		**$ 1,341,121**	**$ 1,335,139**	**$ 1,347,019**
Base Capitalization Rate		8.750%	8.500%	8.250%
Tax Factor		.258%	.275%	.281%
Overall Capitalization Rate		9.008%	8.775%	8.531%
Capitalized Value		**$14,888,111**	**$15,215,259**	**$15,789,802**

On this basis, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property's assessments of $14,454,800, $14,753,00, and $14,865,300 for fiscal years 2012, 2013, and 2014, respectively, exceeded the subject property's fair cash values

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

OPINION

Jurisdiction Regarding Fiscal Year 2013 Appeal

At the hearing of these appeals, the assessors made an oral motion to dismiss the appellant's fiscal year 2013 appeal, arguing that it was not timely filed with the Board.

General Laws c. 59, §§ 64 and 65 provide that a taxpayer may file an appeal with the Board, within three months of the assessors' decision on an abatement application or, if the assessors fail to timely act on an abatement application, within three months of the date of deemed denial. Assessors are required under G.L. c. 59, § 63 to give written notice of their decision on an abatement application, or their deemed denial, to the taxpayer within 10 days of the decision or deemed denial date.

In the fiscal year 2013 appeal, the appellant filed its abatement application on January 25, 2013, which was denied by the assessors on February 8, 2013. However, based on credible evidence, the Board found that the appellant did not receive the assessors' fiscal year 2013 denial letter.

"[S]tatutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary**."** ***Becton, Dickinson & Co. v. State Tax Commission,*** 374 Mass. 230, 233 (1978). In ***SCA Disposal Services of New England v. State Tax Commission***, the Supreme Judicial Court ruled "where it has been found that notice was never received, the Legislature did not intend that proof of mere mailing of the notice ... is sufficient to trigger [] the time period." 375 Mass. 338, 341 (1978). *See* ***Boston Gas Company v. Assessors of Boston***, 402 Mass. 346, 348 (1988)(holding that the taxpayer is notified within the meaning of § 63 upon receipt of the notice, not upon the sending of such notice); ***Stagg Chevrolet, Inc. v. Bd. of Water Comm'rs***, 68 Mass. App. Ct. 120, 125 (2007)(holding that the assessors non-compliance with § 63 may be cured by allowing a reasonable time for appeal and that the "deemed to be denied" time frame provides a reasonable time period with dates easily ascertainable by both parties).

The Board thus found here that the appellant's appeal, which was filed on July 23, 2013, more than 3 months after the assessors' denial but within 3 months of the deemed denial date of April 25, 2013, was timely. Accordingly, the Board found that it had jurisdiction to hear and decide the appellant's fiscal year 2013 appeal.

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 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).

In determining fair cash value, all uses to which the property was or could reasonably be adapted on the relevant assessment dates should be considered. ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. ***Id.*** 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. Assessors of 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 315-316 (12th ed., 2001)), *aff'd*, 62 Mass. App. Ct. 428 (2004). Both valuation witnesses in this matter recommended that the subject property's highest-and-best use was its existing use. On this basis, the Board found that the subject property's highest and best use was its continued use as a retail building.

Generally, real estate valuation experts, Massachusetts courts, and this Board rely upon 3 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). In the instant appeals, the valuation witnesses determined that there were insufficient fee-simple market sales of reasonably comparable properties to meaningfully estimate the value of the subject property using a sales-comparison technique. The Board agreed. *See* ***Olympia & York State Street Co. v. Assessors of Boston,*** 428 Mass. 236, 247 (1988) (**"**The assessors must determine a fair cash value for the property as a fee simple estate, which is to say, they must value an ownership interest in the land and the building as if no leases were in effect"). Furthermore, the "[i]ntroduction 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. The Board found here that no such "special situations" existed. 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, 701-702 (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 Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). In these appeals, the Board agreed with both parties' valuation witnesses that the income-capitalization approach was the most appropriate method to value the subject property.

"The direct capitalization of income method analyzes the property's capacity to generate income over a one-year period and converts the capacity into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved." ***Olympia & York State Street, Co.,*** 428 Mass. at 239. "It is the net income that a property *should* be earning, not necessarily what it actually earns, that is the figure that should be capitalized." ***Peterson v. Assessors of Boston***, 62 Mass. App. Ct. 428, 436 (2004) (emphasis in original). Accordingly, the income stream used in the income-capitalization method must reflect the property's earning capacity or economic rental value. ***Pepsi-Cola Bottling Co.,*** 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property's earning capacity. *See* ***Correia v. New Bedford Redevelopment Auth.***, 5 Mass. App. Ct. 289, 293-94 (1977), *rev'd on other grounds*, 375 Mass. 360 (1978); ***Library Services, Inc. v. Malden Redevelopment Auth.***, 9 Mass. App. Ct. 877, 878 (1980)(rescript). Vacancy rates must also be market based when determining fair cash value. ***Donovan v. City of Haverhill,*** 247 Mass. 69, 71 (1923). After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the landlord's appropriate expenses. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 610 (1984). The expenses should also reflect the market. ***Id.;*** *see* ***Olympia & York State Street Co.***, 428 Mass. at 239, 245.

In these appeals, the Board found that Mr. Shuka's projected rental of $13.00 per square foot, which was derived from large investment-quality chain retail properties like the subject property and was higher than the rent suggested by Mr. Johnston, was appropriate. *See* ***Fox Ridge Assoc. v. Assessors of Marshfield***, 393 Mass. 652, 654 (1984) ("Choosing an appropriate gross income figure for establishing an income stream was within the board's discretion and expertise."). The Board found that Mr. Shuka's vacancy and collection loss rate of 15% was excessive and instead, based on the underlying statistical data contained in his appraisal report, as well as Mr. Johnston's recommendation to use a lower rate, adopted a stabilized rate of 7.5%

for the fiscal years at issue. *See* ***Olympia & York State Street Co.***, 428 Mass. at 242 (acknowledging that it is appropriate for the Board to "exercise ... independent decision-making based on the evidence"). This calculation yielded a stabilized effective gross income of $1,501,021 for the fiscal years at issue.

For expenses, the Board found that Mr. Shuka's operating expense figures for common area maintenance and insurance, which were based on market data, were appropriate. However, the Board adjusted this computation to reflect its lower vacancy rate. The Board also determined that Mr. Shuka's expenses for reserves for replacement calculated at $0.25 per square foot, leasing commission calculated at 2.8% of potential gross income, and tenant improvements calculated at $0.20 per square foot, were market based and appropriate. With respect to the management expense, the Board found that Mr. Shuka's expense calculated at 3% of EGI was excessive given the nature of the tenancy and instead found Mr. Johnston's expense of 2% of EGI more reasonable. "The issue of what expenses may be considered in any particular piece of property is for the board." ***Alstores Realty Corp. v. Assessors of Peabody***, 391 Mass. 60, 65 (1984); *see also* ***Olympia & York State Street Co.***, 428 Mass. at 242.

The capitalization rate selected should consider the return necessary to attract investment capital. ***Taunton Redev. Assocs.,*** 393 Mass. at 295. Based on the evidence presented in the instant appeals, the Board found that base capitalization rates were within the range offered by the parties' valuation witnesses: 8.75% for fiscal year 2012, 8.5% for fiscal year 2013, and 8.25% for fiscal year 2014, were appropriate. The Board then added the applicable prorated tax factor to account for vacancy for each of the fiscal years at issue. The "tax factor" is a percentage added to the capitalization rate "to reflect the tax which will be payable on the assessed valuation produced by the [capitalization] formula." ***Assessors of Lynn v. Shop-Lease Co.,*** 364 Mass. 569, 573 (1974).

On this basis the Board found and ruled that the assessments did not exceed the subject property's fair cash values for the fiscal years at issue, which the Board determined to be $14,888,111 for fiscal year 2012, $15,215,259 for fiscal year 2013, and $15,789,801 for fiscal year 2014.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight, ***Foxboro Associates v. Assessors of Foxborough,*** 385 Mass. 679, 683 (1982); ***New Boston Garden Corp. v. Assessors of Boston,***

383 Mass. 456, 473 (1981); ***New England Oyster House, Inc.,*** 362 Mass. at 702. In evaluating the evidence before it, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp. v. Assessors of Lynn,*** 392 Mass. 296, 300 (1984).

The fair cash value of property cannot be proven with "mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment." ***Boston Consolidated Gas Co.,*** 309 Mass. at 72. "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).

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

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

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

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

QUABBIN SOLAR, LLC et al. **v.** **BOARD OF ASSESSORS OF THE TOWN OF BARRE**

Docket Nos.
F329741
F329742
F329743

Promulgated
November 2, 2017

ATB 2017-480

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 appellee, the Board of Assessors of the Town of Barre ("appellee" or "assessors"), to abate taxes on certain personal property in the Town of Barre owned by and assessed to, respectively, Quabbin Solar, LLC, Quabbin Wind, LLC, and Barre Wool Solar, LLC (collectively, the "appellants") under G.L. c.59, §§ 11 and 38 for fiscal year 2016 ("fiscal year at issue").

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

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.

Nicholas D. Bernier, Esq. for the appellants.

Ellen M. Hutchinson, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

These appeals, which were consolidated for hearing, involve three separate but commonly owned entities and present the same primary issue: whether personal property in the form of solar arrays owned by the appellants was exempt from taxation under G. L. c. 59, § 5, cl. 45 ("Clause Forty-Fifth"). Clause Forty-Fifth provides an exemption for any:

> solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.

Here the assessors conceded that the solar arrays[1] at issue constituted "solar… powered system[s]" for purposes of Clause Forty-Fifth, and the parties did not dispute that the twenty-year period had yet to expire. The issues remaining in dispute focused on the other requirements set forth within Clause Forty-Fifth, and the adequacy of the evidence offered by the appellants. Based on the testimony and documentary evidence entered into the record at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

[1] The solar arrays at issue had a generating capacity of between one and two megawatts.

On January 1, 2015, each of the appellants was the assessed owner of personal property in the form of solar arrays located in Barre (collectively, the "subject property"). The relevant valuation and tax information for each appellant is set forth in the following table.

Appellant	**Assessed Value**	**Tax Rate Per $1,000**	**Total Tax Assessed**
Quabbin Solar, LLC	$1,013,860	$17.80	$18,046.71
Quabbin Wind, LLC	$1,013,860	$17.80	$18,046.71
Barre Wool Solar, LLC	$1,634,100	$17.80	$29,086.98

Each of the appellants timely paid at least one-half of the total tax assessed in accordance with G.L. c. 59, § 64. The appellants each timely filed Applications for Abatement with the assessors on February 1, 2016. The abatement applications were deemed denied on May 1, 2016, and the assessors sent notice to the appellants of their deemed denial on May 3, 2016. The appellants timely filed petitions with the Board on May 16, 2016, and on the basis of the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

The appellants offered into the record documentary evidence as well as the testimony of the owner and manager of all three of the appellants, Michael Staiti. Mr. Staiti testified about the formation of the appellants as well as their day-to-day operations, and the Board found him to be credible.

Mr. Staiti explained that he established the appellants in 2010 but they did not become fully operational until 2012. He testified that the appellants entered into an interconnectivity agreement, also referred to as a net-metering agreement, with National Grid that permitted the appellants to connect their solar arrays to the electrical grid and to receive credits for the value of electricity produced and made available to the electrical grid. Net-metering agreements allow parties to allocate the credits among various recipients, and those allocations are reported on Schedule Z of the net-metering agreement.

Mr. Staiti testified that the appellants entered into a purchase agreement with Honey Farms, Inc. ("Honey Farms"), a for-profit, family-owned enterprise that operates a chain of convenience stores in Massachusetts. Under the purchase agreement, Honey Farms paid the appellants for the net-metering credits generated by the subject property to offset their own electricity expenses. Mr. Staiti testified that Honey Farms is the sole customer of the appellants.

Schedule Z of each of the appellants' net-metering agreements with National Grid was entered into evidence as part of appellants' Exhibit 1, and the schedules set forth the percentages of net-metering credits to be allocated to each Honey Farms location. The Schedule Z for appellant Barre Wool Solar, LLC allocated the net-metering credits among eleven Honey Farms locations, while the Schedules Z for the other two appellants allocated the credits among a total of sixteen Honey Farms locations.

Also contained within Exhibit 1 were property record cards that the appellants asserted, and the Board found, corresponded to each of the Honey Farms locations referenced on the Schedules Z.[2] Honey Farms was the owner of certain of the properties, but it leased rather than owned the majority of the parcels. In either case, the property records demonstrated that each of the Honey Farms locations at issue was situated on an improved parcel that was taxable under Chapter 59 for purposes of Clause Forty-Fifth.

Based on the foregoing, the Board found and ruled that the appellants established that the subject property constituted "solar … powered systems[s]… being utilized as a primary or auxiliary power system[s] for the purpose of heating or otherwise supplying the energy needs of property taxable" under Chapter 59, and it therefore qualified for the exemption.

The assessors advanced a number of arguments in support of their position that the subject property was not entitled to the exemption under Clause Forty-Fifth. Among their arguments was the contention that in order to qualify for the exemption, the appellants were required to show that Honey Farms was responsible for the payment of electricity under the terms of the leases for those properties that it did not own, and that they failed to make such a showing. The Board rejected this argument for a number of reasons. First, it disagreed with the assessors' contention as a factual matter. The evidence in its totality in fact showed that Honey Farms was responsible for the payment of electricity in each of the relevant locations, and the Board so found. Second, and as will be discussed further in the Opinion below, the Board found that there is no such requirement in the plain language of Clause Forty-Fifth. Therefore, this argument was without merit.

The assessors additionally argued, for the first time in their post-hearing brief, that the appellants are "generation companies" under G.L. c. 164, which regulates net-metering

[2] The assessors challenged the sufficiency of the evidence proffered by the appellants on numerous fronts. One of the assessors' contentions was that the appellants failed to establish that the property record cards contained within Exhibit 1 corresponded to the Honey Farms locations listed on the Schedules Z. As will be discussed further below, the Board found that the evidence offered by the appellants, in its totality, was both credible and sufficient and it therefore rejected the assessors' arguments.

arrangements, and are therefore not eligible to participate in the net-metering process. The Board rejected this eleventh-hour argument for several reasons. First, it was inappropriately raised for the first time by the assessors in their post-hearing brief, rather than prior to or during the hearing, which would have afforded the appellants an opportunity to respond. The Board specifically found and ruled that equity and good conscience did not require consideration of this argument. *See* G.L. c. 58A, § 7**.** *See* ***Massachusetts Bay Lines, Inc. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2007-723, 743-47, *aff'd,* 72 Mass. App. Ct. 321 (2008) (finding and ruling that the Board was not bound by equity and good conscience to consider an argument that was raised late). Moreover, the question of whether the appellants are eligible to participate in the net-metering process is misdirected to the Board. The appellants did in fact receive net-metering credits at all times material to these appeals. Whether they should have received or should continue to receive net-metering credits is an issue appropriately directed to another forum. Accordingly, the Board declined to consider this argument.

The assessors' remaining arguments were essentially a laundry list of alleged deficiencies in the evidence offered by the appellants. The Board was not persuaded by these arguments, which were primarily directed at the sufficiency of the documentary evidence.

To begin with, the Board did not consider the record to be deficient in the manner alleged by the assessors. Many of their complaints were directed at the purported lack of clarity on the property record cards offered into evidence. These property record cards were drawn from on-line databases maintained by assessors in the ordinary course of business, and are of the type frequently offered into evidence before the Board. While it is true that property record cards culled from on-line databases do not provide as much information as other versions, that does not render the information unreliable.[3] The Board found the appellee's complaints about these documents to be disingenuous.

Moreover, many of the evidentiary deficiencies pointed to by the assessors related to the appellants' supposed failure to establish that Honey Farms was the party responsible for the payment of electricity at each of the locations referenced in the Schedules Z. As stated above, the Board found that the appellants had no obligation to establish this fact in order to claim the exemption under Clause Forty-Fifth, and the Board therefore rejected this argument.

[3] The property record cards were offered solely for the purpose of demonstrating that the parcels to which they relate were subject to tax under Chapter 59. Assuming, *arguendo,* that these record cards were somehow deficient, as suggested by the assessors, there was no evidence in the record suggesting that any of the parcels was exempt from tax under chapter 59, nor was it logical to so infer, as the parcels were either owned or leased by Honey Farms, a for-profit business.

Most troubling, however, was the repeated refrain in the assessors' post-hearing brief that there was simply "no evidence" to support a number of claims made by the appellants. In each case, the assessors failed to acknowledge the extensive and detailed testimony of Michael Staiti, the founder and Manager of the appellants, whom the Board found to be credible.

The Board found that Mr. Staiti had detailed knowledge of the day-to-day operations of the appellants as well as their sole customer, Honey Farms. He testified that he is in "almost daily, certainly weekly" contact with Honey Farms and visits the locations referenced within Exhibit 1. Mr. Staiti was able to confirm that Honey Farms is operating a business at each of the locations; that the electric meter at each location is in Honey Farms' name; and that Honey Farms is still receiving the net-metering credits in those locations.

Mr. Staiti's uncontroverted testimony, which was given under oath and reported by an official stenographer, is as much a part of the record in these appeals as any document. The assessors' assertions that there was "no evidence" to support the appellants' claims was therefore without merit, and the Board rejected these arguments.

In conclusion, on the basis of the evidence in its totality, the Board found that the appellants met their burden of proving that the subject property was entitled to the exemption provided by Clause Forty-Fifth, and it therefore issued decisions for the appellants in these appeals. The Board granted abatements of tax in the following amounts: $18,046.71 to Quabbin Solar, LLC; $18,046.71 to Quabbin Wind, LLC; and $29,086.98 to Barre Wool Solar, LLC, along with applicable interest.

OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax, unless expressly exempt. G.L. c. 59, § 2. As previously noted, such an exemption is provided in Clause Forty-Fifth for a:

> solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.

G. L. c. 59, § 5, cl. 45. A taxpayer seeking an exemption bears the burden of proving that the subject property qualifies "according to the express terms or the necessary implication of a statute providing the exemption." ***New England Forestry Foundation, Inc. v. Assessors of Hawley***, 468 Mass. 138, 148 (2014).

Courts interpret a statute in accordance with the plain meaning of its text. ***Reading Coop. Bank v. Suffolk Constr. Co.***, 464 Mass. 543, 547-48 (2013)(citing ***Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n,*** 402 Mass. 352, 354 (1988)). As the primary source of insight into the intent of the Legislature is the language of the statute, if the language of the statute is unambiguous, a court's function is to enforce the statute according to its terms. ***Id.*** at 548; ***International Fid. Ins. Co. v. Wilson***, 387 Mass. 841, 853 (1983).

There is nothing ambiguous in the language of Clause Forty-Fifth, and the plain meaning of its words requires only that the subject property be: (1) a solar or wind powered system or device; (2) utilized as a primary or auxiliary power system for the purpose of heating or otherwise supplying energy; and (3) utilized to supply the energy needs of property that is subject to Massachusetts property tax. Based on the evidence presented, the Board found and ruled that the solar arrays at issue here were solar powered systems within the meaning of Clause Forty-Fifth and used as a primary or auxiliary power system supplying the energy needs of taxable property in Massachusetts. Therefore, the Board found and ruled that the subject property fulfills all of the express requirements of Clause Forty-Fifth.

The facts of the present appeals are similar to those in ***Forrestall Enterprises, Inc. v. Assessors of Westborough***, Mass. ATB Findings of Fact and Reports 2014-1025 ("***Forrestall***") and ***KTT, LLC v. Assessors of Swansea***, Mass. ATB Findings of Fact and Reports 2016-426 ("***KTT***"), in which the Board also ruled in favor of the taxpayers. In ***Forrestall***, the solar array at issue was used to generate power for several residential and business properties located on taxable parcels that were different than the parcel on which the solar array was located.[4] As here, the taxpayer in ***Forrestall*** had entered into a net-metering agreement under which the credits for the power generated by the solar array were allocated among the various properties. ***Id.*** at 2014-1028.

The assessors in ***Forrestall*** urged the Board to construe Clause Forty-Fifth in a way that limited its application to solar arrays that supply power to property located on the same, or a contiguous, parcel as the solar array. ***Id.*** at 2014-1030. The basis for the assessors' argument in that case was that Clause Forty-Fifth should be construed as a personal exemption, like many of the other exemptions found within G.L. c. 59, § 5, such as clauses 37, 42, and 43, each of which are limited to a single residential property that is occupied as the domicile of the person eligible for the exemption. G.L. c. 59, § 5, cls. 37, 42, and 43. However, each of those clauses contains

[4] The properties receiving the energy credits in ***Forrestall*** were all owned directly by or through entities controlled by the same person, Bruce Forrestall.

express language limiting the scope of the exemption to specific property, while Clause Forty-Fifth does not. The Board therefore rejected the assessors' argument in that case as it was without support in the statute. ***Forrestall*** at 2014-1030.

The facts in ***KTT*** were similar to those in ***Forrestall***, with the key distinction being that the energy generated by the solar arrays at issue was credited to an unrelated third party - a local bank - and allocated among the bank's branch locations, in exchange for cash payments, as here. The assessors in that case argued that this type of commercial use was not what the Legislature intended to favor with an exemption in enacting Clause Forty-Fifth. The Board likewise rejected this argument as being without support in the language of Clause Forty-Fifth. ***KTT, LLC*** at 2016-433.

In the present appeals, the assessors advanced a different twist on the arguments made by the assessors in ***Forrestall*** and ***KTT***. Most of the properties referenced in the net-metering agreements were leased rather than owned by Honey Farms. The assessors argued that in order to qualify for the exemption, the appellant was required to show that Honey Farms was responsible for payment of the electricity under the terms of the lease at the properties being supplied with energy via the net-metering agreements. Once again the Board rejected this argument as lacking support in the statutory language.

As the Board observed in ***KTT*** and ***Forrestall***, unlike other statutes granting exemption, there is no limiting language in Clause Forty-Fifth relating to individuals. *See* G.L. c. 64H, § 6(dd) (sales tax exemption enacted in 1977 for "a primary or auxiliary power system for the purpose of heating or otherwise supplying the energy needs of an individual's principal residence in the commonwealth"); *see also* G.L. c. 59, § 5, cls. 37, 42, and 43. Rather, the limiting language in Clause Forty-Fifth is directed toward property, specifically, "property that is taxable," under chapter 59. The statutory language requires no unity of ownership between the "property that is taxable" under chapter 59 and the personal property for which the exemption is being sought, nor does it address the identity of the individual responsible for payment of the "energy needs" being supplied by such property. Where the Legislature has not included language in the statute expressing the limitation advocated by the assessors, the Board will not interpret the statute to impose such a limitation. *See* ***Anderson Street Associates v. City of Boston & another,*** 442 Mass. 812, 817 (2004) ("Had the Legislature intended G.L. c. 121A to guarantee tax concessions to be permanent, it could have included statutory language to that effect. It has done so elsewhere."); ***Commissioner of Revenue v. Cargill, Inc.***, 429 Mass. 79, 82

(1999) ("Had the Legislature intended to limit the credit in the manner advocated by the commissioner, it easily could have done so.").

The assessors additionally challenged the sufficiency of the evidence offered by the appellants. The Board was not persuaded by their arguments. The Board's evidentiary standard, with few exceptions not applicable here, is proof by a preponderance of the evidence. *See* ***Assessors of New Braintree v. Pioneer Valley Academy,*** 355 Mass. 610, 612 (1969)**;** ***Space Building Corporation v. Commissioner of Revenue***, 413 Mass. 445, 450 (1992). As the Board has observed before, the preponderance standard does not require certitude, but instead means that the party with the burden of proof must show that the facts necessary to prevail in its claim were more likely true than not. *See* ***Dental Service of Massachusetts, Inc. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2017-45, 63*;* ***Gates v. Boston and Maine Railroad,*** 255 Mass. 297, 301 (1926)**;** ***Black v. Boston Consol. Gas Co.,*** 325 Mass. 505, 508 (1950)**;** ***Sullivan v. Hammacher,*** 339 Mass. 190, 194 (1959). In deciding whether a party has met this burden, the Board must be mindful that the "'[e]vidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason.'" ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 470-71 (1981) (quoting L.L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 607-608 (1965)).

In the present appeals, the appellants offered extensive documentary and testimonial evidence to demonstrate that the subject property met the requirements for exemption under Clause Forty-Fifth. The assessors for their part called no witnesses, and their documentary evidence consisted of only the requisite jurisdictional documents and copies of the appellants' annual reports, which were filed with the Massachusetts Secretary of State. The evidence offered by the assessors did nothing to undercut the evidence offered by the appellants. Accordingly, the Board rejected the assessors' arguments, and instead concluded that the appellants met their burden of proving that the subject property was exempt under Clause Forty-Fifth.

In conclusion, on the basis of all of the evidence, the Board found and ruled that the subject property was exempt under Clause Forty-Fifth, and therefore issued decisions for the appellants in these appeals. The Board granted abatements of tax in the following amounts: $18,046.71 to Quabbin Solar, LLC; $18,046.71 to Quabbin Wind, LLC; and $29,086.98 to Barre Wool Solar, LLC, along with applicable interest.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

SWISSPORT FUELING, INC. **v.** **BOARD OF ASSESSORS OF THE CITY OF WORCESTER**

Docket No. F321360

Promulgated:
August 10, 2018

ATB 2018-381

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee, the Board of Assessors of the City of Worcester ("assessors"), to abate taxes assessed on certain property located in the City of Worcester and assessed to Swissport Fueling, Inc. ("appellant"), under G.L. c. 59, § 2B ("§ 2B"),[1] for fiscal year 2013 ("fiscal year at issue").

Chairman Hammond heard the appeal and was joined in the decision for the appellant by Commissioners Scharaffa, Rose, Chmielinski, and Good. These findings of fact and report are made at the request of the assessors pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Kathryn A. O'Leary, Esq. for the appellant.

John F. O'Day, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the testimony of Mr. Frank Grolimund, the appellant's vice president of operations, and exhibits introduced at the hearing of this appeal, the Board made the following findings of fact.

[1] In their post-trial memorandum, the assessors stated their view that only valuation of the property was at issue in this appeal. The appellant, however, disputed both the property's valuation and taxation under § 2B in its petition, the evidence submitted, and its post-trial memorandum. Further, during the hearing of the appeal, counsel for the appellant confirmed that the appellant was contesting taxability under § 2B. Consequently, the Appellate Tax Board ("Board") decided the appeal based on application of § 2B, thereby obviating the need for consideration of valuation.

Jurisdiction

The assessors valued the property at issue in this appeal at $915,400.00 for the fiscal year at issue, and issued an assessment in the amount of $28,240.09. The appellant timely paid the taxes due and filed an application for abatement on January 30, 2013. The abatement application was deemed denied on April 30, 2013 and the appellant filed a Petition Under Formal Procedure with the Board on July 16, 2013. Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Factual Background

Mr. Grolimund, whose testimony the Board found credible, explained that the appellant had continuously served as the exclusive Fixed Base Operator ("FBO")[2] at Worcester Regional Airport ("Airport") for approximately twenty-five years, including during the fiscal year at issue. The appellant became the exclusive FBO at the Airport pursuant to a lease entered into during 1987 by the appellant[3] and the City of Worcester, then the owner of the Airport ("Lease"). During June of 2010, the City of Worcester conveyed the Airport to the Massachusetts Port Authority ("Massport"), which then became the lessor. As the exclusive FBO for the Airport, the appellant was responsible for a variety of general aviation services including fueling, storage, repair, and maintenance of aircrafts.

The property at issue in this appeal ("subject property"), all of which was located within the Airport, included: a hangar; a parcel of approximately 16,600 square feet located approximately twelve feet west of the hangar; a second parcel of approximately 3,600 square feet located approximately 100 feet south of the hangar; a fuel farm; and a second hangar and a general aviation terminal that were constructed by the appellant on the referenced parcels according to the terms of the Lease.

The Lease identified its central purpose as the appellant's use of the leased property to provide FBO services at the Airport and required the appellant at all times to afford the general public accessibility and the "highest consideration" in its operations and use of the property. The appellant fully complied with these obligations.

Based on the record in its entirety, and for the reasons stated in the following Opinion, the Board found and ruled that the appellant, as lessee of the subject property and exclusive FBO

[2] The Federal Aviation Administration has defined an FBO as "a commercial business granted the right by [an] airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc." ***U.S. Department of Transportation Federal Aviation Administration Advisory Circular; AC No: 150/5190-7, p.13.***

[3] The appellant executed the lease under its former corporate name, Dynair Fueling, Inc.

at the Airport, was not subject to real estate tax under § 2B because the appellant's operations were "reasonably necessary to the public purpose of a public airport ... which [were] available to the use of the general public."

Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement in the amount of $28,240.09.

OPINION

Section 2B, which addresses taxation of government-owned real estate, provides, in pertinent part:

> Real estate owned in fee or otherwise or held in trust for the benefit of ... the commonwealth, or a county, city or town, or any instrumentality thereof, if used in connection with a business conducted for profit or leased or occupied for other than public purposes, shall for the privilege of such use, lease or occupancy, be valued, assessed and taxed annually as of January first to the user, lessee or occupant in the same manner and to the same extent as if such user, lessee or occupant were the owner thereof in fee ... **This section shall not apply to a use, lease or occupancy which is reasonably necessary to the public purpose of a public airport** ... **which is available to the use of the general public.**

(emphasis added).

Pursuant to § 2B, publicly-owned property or property owned by a public instrumentality is generally taxable to the user, lessee, or occupant when it is used in connection with a for-profit business, or leased for non-public purposes. *See* ***Airflyte, Inc. v. Assessors of Westfield***, Mass. ATB Findings of Fact and Reports 2014-731 (citing ***Smith v. Assessors of Fitchburg***, Mass. ATB Findings of Fact and Reports 2008-73, 77). Under the exception in § 2B, a leaseholder is not taxed on the property when the lease is "reasonably necessary to the public purpose of a public airport ... which is available to the use of the general public."

In ***Airflyte***, the Board considered whether an FBO responsible for approximately eighty-five percent of FBO services at the Westfield-Barnes Regional Airport qualified for exception from taxation under § 2B. In reaching its conclusion that the taxpayer so qualified, the Board focused on the taxpayer's fulfillment of applicable criteria for the exception, namely that: the leased premises at issue were located within a government-owned public airport; the taxpayer provided a variety of FBO services that were concededly essential to the operation of the airport and necessary to its public purpose; and the services were available to the use of the general public. ***Airflyte***, Mass. ATB Findings of Fact and Reports at 2014-732, 743-44.

The dispositive facts of the present appeal are strikingly similar to those in ***Airflyte,*** and any distinctions are without legal consequence. In particular, the uncontested facts of this appeal

include the following: the Airport is a public airport; the subject property, which was leased by the appellant from Massport during the fiscal year at issue, was located within the Airport; Massport is an "instrumentality" of the Commonwealth of Massachusetts, pursuant to St. 1956, c. 465, § 2; the appellant, as the Airport's exclusive FBO, provided services including fueling, storage, repair, and maintenance of aircrafts; and the appellant's FBO services were available to the use of the general public. Arguably, the only factual distinction of note between ***Airflyte*** and this appeal is that the appellant was the exclusive FBO at the Airport, while the taxpayer in ***Airflyte*** provided only eighty-five percent of FBO services at Westfield-Barnes Regional Airport.

Consistent with the relevant provisions of § 2B and the Board's analysis in ***Airflyte***, the cited facts of the present appeal compel the conclusion that as lessee of the subject property and the exclusive FBO at the Airport, the appellant's operations were "reasonably necessary to the public purpose of a public airport ... which [were] available to the use of the general public." § 2B. Thus, the Board found and ruled that the appellant was not subject to real estate tax pursuant to § 2B and issued a decision for the appellant, granting an abatement in the amount of $28,240.09.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

THOMAS JEFFERSON MEMORIAL CENTER AT COOLIDGE POINT, INC. **v.** **BOARD OF ASSESSORS OF THE TOWN OF MANCHESTER-BY-THE-SEA**

Docket Nos.: F325113, F325602

Promulgated:
March 29, 2018

ATB 2018-89

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 Manchester-By-The-Sea ("appellee") to abate a tax on certain real estate, located in the Town of Manchester-By-The-Sea, owned by and assessed to Thomas Jefferson Memorial Center at Coolidge Point, Inc.

("TJMC" or "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal years 2014 and 2015 ("fiscal years at issue").

Commissioner Chmielinski heard the appeals. He was joined by Chairman Hammond and Commissioners Scharaffa, Rose and Good in allowing the Post-Trial Motion to Dismiss for Lack of Jurisdiction in the appeal for fiscal year 2014 and in the decision for the appellee for fiscal year 2015.

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.

Jillian B. Hirsch, Esq., Darian M. Butcher, Esq., William E. Halmkin, Esq., Richard L. Jones, Esq. and Judith G. Edington Esq. for the appellant.

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

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, as well as testimony and exhibits entered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2013 and January 1, 2014, the relevant assessment dates for the fiscal years at issue, the appellant was the owner of two contiguous parcels of real property, one identified by the assessors as Book 32998, Page 298, Parcel Identification number 0004-00000-00012 and located at 9 Coolidge Point ("improved parcel") and the other identified by the assessors as Book 32998, Page 298, Parcel Identification number 0003-00000-00001 ("vacant parcel") in Manchester-By-The-Sea (collectively "subject properties").

The improved parcel is a 10.7-acre parcel of land with a Gregorian-style brick house that was built in 1968 ("Brick House") and an adjacent detached three-car garage that has been converted into a conference center ("Conference Center"). The landscape is comprised of lawn, garden, woods, coastal waterfront access, and a tidal stream lined by stone walls and stone riprap that is designed to contain the outflow and inflow from the Clarke Pond watershed. The Brick House was designed to resemble, in part, President Jefferson's residence in Williamsburg, Virginia, with wooden shutters and a fireplace in each room. However, Dr. Catherine Coolidge Lastavica ("Dr. Lastavica"), who together with her late husband, John Lastavica, founded TJMC, had the Brick House built to serve as her personal residence. As such, the interior of the Brick House is modern, with a kitchen and bathrooms, and it complied with the relevant code requirements that were in effect at the time of its construction, including electrical service

requirements. The Brick House contains a library and it is furnished with period furniture and displays various pieces of Jefferson memorabilia and portraits by 18th century artists Robert Feke, George Chalmers and Gilbert Stuart. The Brick House is not registered as a historic building.

The vacant parcel is an abutting 4.5-acre parcel of unimproved land comprised mainly of wooded hill and coastal waterfront access.

1. Facts related to jurisdiction

a. Fiscal year 2014

On December 27, 2013, the appellee mailed out the actual tax bill for fiscal year 2014. The assessors valued the improved parcel at $4,622,100 and assessed a tax thereon, at the rate of $10.45 per thousand, in the total amount of $49,025.46.[1] That same fiscal year, the assessors valued the vacant parcel at $2,489,000 and assessed a tax thereon, also at the rate of $10.45 per thousand, in the total amount of $26,400.20.[2] The appellant paid the taxes late and incurred interest in the amount of $159.82 plus a demand fee of $5.00 for the 4th Quarter taxes for the improved parcel, and it paid interest in the amount of $86.07 and a demand fee of $5.00 for the 4th Quarter taxes for the vacant parcel. On January 30, 2014, the appellant filed Applications for Abatement for both properties as well as Statutory Exemption Forms 1B-3 for both subject properties with the appellee.[3] On April 29, 2014, the appellee denied the appellant's Applications for Abatement. On July 23, 2014, the appellant filed Petitions Under Formal Procedure with the Board for both subject properties.

On September 5, 2014, the appellee filed a Motion to Dismiss for Lack of Jurisdiction. The appellant subsequently filed a Motion to Amend Petition to add, in the alternative, that the appeal was being filed under G.L. c. 59, § 5B. On the basis of the record then before it, the Board initially denied the appellee's Motion to Dismiss for Lack of Jurisdiction and granted the appellant's Motion to Amend Petition on October 6, 2014. The Board held a hearing on December 14 and 15, 2015 and January 26, 2016. On March 18, 2016, the appellee filed a Post-Trial Motion to Dismiss for Lack of Jurisdiction.

On the basis of these facts, and as will be further explained in the Opinion, the Board found and ruled that it did not have jurisdiction to hear and decide the appeal for fiscal year

[1] This amount includes a Community Property Act ("CPA") surcharge of $724.51.
[2] This amount includes a CPA surcharge of $390.15.
[3] It is uncontested that TJMC timely filed Forms 3ABC and a copy of its Form PC with the assessors for each fiscal year at issue.

2014. Accordingly, the Board allowed the appellee's motion and issued a decision for the appellee for fiscal year 2014.

b. Fiscal year 2015

For fiscal year 2015, the assessors valued the improved parcel at $4,701,700 and assessed a tax thereon, at the rate of $10.84 per thousand, in the total amount of $52,495.42.[4] That same fiscal year, the assessors valued the vacant parcel at $2,489,000 and assessed a tax thereon, also at the rate of $10.84 per thousand, in the total amount of $27,790.18.[5] The appellant timely paid the taxes due on the subject properties without incurring interest. On January 8, 2015, the appellant filed a Petition Under Formal Procedure with the Board pursuant to G.L. c. 59, § 5B. On January 29, 2015, in accordance with G.L. c. 59, § 59, the appellant timely filed Applications for Abatement as well as Statutory Exemption Forms 1B-3 for the subject properties with the appellee, which the appellee denied by vote on February 12, 2015. On March 31, 2015, the appellant filed a Motion to Consolidate the appeals for fiscal year 2014 and fiscal year 2015, which the Board allowed.

On the basis of these facts, the Board found that it had jurisdiction to hear and decide the appeal for fiscal year 2015.

2. Facts relating to TJMC's claim of exemption

The subject properties are owned by TJMC, an entity recognized as a "private foundation" and thus exempt from Federal income tax under Internal Revenue Code § 501(c)(3) ("Code 501(c)(3) organization"). TJMC does not have employees but instead retains the services of independent contractors when needed, including a housekeeper and a property caretaker.

Dr. Lastavica and her late husband, John Lastavica, founded TJMC on September 29, 2011. TJMC was organized under Massachusetts law as a so-called "member charitable organization," with its sole member being Vingo Trust III, another private foundation, which was established by Dr, Lastavica, John Lastavica, and John Hughes. Dr. Lastavica served as the chairman of TJMC.

Pursuant to its Articles of Organization, TJMC was organized to "promote on-going research and collaboration to advance knowledge of our nation's history, its polity and the economic system which derived therefrom, while fostering an understanding and appreciation of the scholars, artists, philosophers and others who helped shape the Early Republic." According to these same Articles of Organization, the methods by which TJMC achieves its charitable

[4] This amount includes a CPA surcharge of $1,528.99.
[5] This amount includes a CPA surcharge of $809.42.

purposes are by "sponsoring programs of independent study, exhibits, lectures and receptions, as well as collaboration with other like-minded organizations."

In its first mission statement (the "Original Mission Statement"), approved by TJMC's Board of Directors on February 2, 2012, TJMC further articulated its purpose, stating in pertinent part:

> [TJMC] will make these facilities available to other organizations for use in ways which are consistent with the Vision of [TJMC], thereby providing a conducive environment for these organizations to foster educational programs and discussions between and among (1) scholars, (2) teachers in the fields of history, philosophy, government and other related disciplines and (3) the general public.

On June 19, 2014, TJMC's Board of Directors voted to approve a revised mission statement (the "Revised Mission Statement"), which stated TJMC's commitment to (1) environmental conservation efforts, including preserving historically significant open spaces; (2) operating a public house museum and conference center; and (3) promoting the ideas of the scholars, teachers and organizations that make use of its facilities.

Attorney David Fitts, who was involved in the early discussions of the development of the TJMC Conference Center and serves as the President and member of the Board of Directors of TJMC, testified at the hearing of these appeals. Attorney Fitts testified that TJMC was formed as an alter ego of Vingo Trust III, and Vingo Trust III contributed the subject properties to TJMC. Attorney Fitts testified that, while TJMC received some small gifts from other donors, Vingo Trust III was, in essence, the "sole contributor" to TJMC.

The subject properties are subject to conservation restrictions held by the Essex County Greenbelt Association, Inc. ("Essex County Greenbelt Association"), dated May 28, 1999 and recorded with the Southern Essex District Registry of Deeds. Dr. Lastavica voluntarily conveyed the conservation restrictions to the Essex County Greenbelt Association in October, 1999, prior to the incorporation of TJMC. However, for calendar years 2012, 2013 and 2014, TJMC's federal tax returns do not list conservation efforts as a charitable activity, nor do its Applications for Statutory Exemption for calendar years 2013 or 2014 make any mention of conservation as a charitable activity. Further, although watershed restoration work was performed to preserve the sea wall and to protect the shore line at the subject properties, an invoice for this work entered into the record indicated that the work was performed in June through September, 2011 and billed directly to "John and Kitty Lastavica." Because the work was completed prior to the incorporation of TJMC, the Lastavicas directed the bill to Vingo Trust III, not the appellant, for payment.

The subject properties are contiguous with certain property owned and preserved for public use by the Trustees of Reservations, a Massachusetts land trust. They are also contiguous with a property owned by Dr. Lastavica, on which her current personal residence is located. Access to the subject properties is by a private road that is marked by two signs, one stating "NO TRESPASSING RECORDED VIDEO SURVEILLANCE IN USE" and the other stating "VISITORS BY APPOINTMENT." Another sign at the subject properties announces, "Private property, No trespassing."

Dr. Lastavica testified that she and her husband had resided at the Brick House when it was first constructed in 1968 and that many of the Brick House's furnishings, including the period pieces and artwork, are actually her personal property, which are currently "on loan" to the appellant. However, the appellant offered no formal documents to reflect any loan arrangements. Dr. Lastavica also testified that TJMC paid the insurance premiums for insuring her furnishings. The second floor of the Brick House is used to store some of Dr. Lastavica's personal effects, and a portion of the Conference Center is used to store Dr. Lastavica's personal snow removal equipment.

In a document provided to the appellee, dated April 17, 2014, Attorney Fitts indicated that "the Property also recently became open to the public on Mondays from 2 p.m. to 4 p.m. by appointment" for tours of the Brick House. While there is no charge for visiting the subject properties, the tours of the Brick House are restricted to the first floor, as the second floor comprises the residence of a person who, with Dr. Lastavica's permission, lives there rent-free. There are no records of the daily operations of the subject properties, including its tours, and Dr. Lastavica is not generally at the subject properties during the hours when tours are available to be scheduled. When there are no tours or events taking place, the Brick House is closed. The Brick House had not been renovated or reconfigured from when it was used as the personal residence of Dr. Lastavica and, as of the date of the hearing of these appeals, the Brick House was not in compliance with American Disability Association ("ADA") standards.

The evidence showed that a limited number of events took place at the subject properties during the time periods relevant to these appeals. During fiscal year 2014 (spanning July 1, 2013 through June 30, 2014), 6 events were booked, but ultimately only 4 events occurred at the subject properties.[6] Of these 4 events, 2 were sponsored by TJMC and the remaining 2 were hosted by outside groups that TJMC allowed to rent space at the subject properties:

[6] On January 23, 2014, TJMC sponsored a lecture on "The Makings of a Craftsman: An Inside Glimpse of a Furniture Maker's World," which was held at Dr. Lastavica's personal residence because an interior flood caused by

- July 11, 2013: TJMC sponsors the first Jefferson Annual Lecture at 9 Coolidge Point, with tickets at $75 per person and approximately 80 attendees;
- July 28, 2013: TJMC allows the Massachusetts Society for the Grandchildren of the American Revolution to hold its retreat at the subject properties, with approximately 50 attendees;
- August 13-14, 2013: TJMC allows the Massachusetts Historical Society to hold its conference called "Old Towns, New Country: The First Years of a New Nation" at 9 Coolidge Point, with approximately 10 secondary-school teachers and educators in attendance; and
- May 8, 2014: TJMC sponsors a lecture entitled "Reducing the Risk for Tick Borne Infections" at 9 Coolidge Point, with tickets at $100 per person and 28 attendees.

During fiscal year 2015 (spanning July 1, 2014 through June 30, 2015), TJMC hosted the following 8 events at the subject properties, 4 of which were sponsored by TJMC with the remaining 4 being hosted by outside groups that TJMC allowed to rent space at the subject properties:

- July 14, 2014: TJMC allows painter Adele Ervin to lead a retreat for about 10 local artists, who visited the subject properties to paint the landscape;
- July 17, 2014: TJMC sponsors the second Jefferson Annual Lecture at 9 Coolidge Point, with tickets at $100 and approximately 80 attendees. Guests attending the lecture were allowed to tour the first floor of the Brick House;
- August 2, 2014: TJMC allows the Linzee Family's Foundation to hold a retreat at the subject properties, with 45 attendees;
- August 21, 2014: TJMC allows a Manchester Summer Chamber Music concert at the subject properties;
- March 26, 2014: TJMC hosts a rescheduled lecture by Theodore Stebbins entitled "Discovering Meaning in the American Portrait" at 9 Coolidge Point, with 19 attendees;
- April 23, 2015: TJMC hosts an event to play the video from Theodore Stebbins' lecture at the Brick House, with 12 attendees;
- June 8, 2015: TJMC organized educational tours of the subject properties for a group of homeschooled children, with 20 attendees; and
- June 18, 2015: TJMC allows Gold Coast Mortgage Services, Inc. to utilize the subject properties for its annual outing, with 40 attendees.

TJMC has advertised certain TJMC-hosted events online via its website at http://jeffersonmemorialcenter.org. The website, which was launched on June 24, 2013, invites proposals for events to be mailed or made via telephone. Visitors to the website can sign up to receive news from TJMC. TJMC also maintains a Facebook page, which it launched on April

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a burst pipe had prevented the event from being hosted at the Brick House. Also, in February 2014, Theodore Stebbins, curator of American Paintings at the Harvard University Art Museums, was scheduled to give a lecture at the Brick House, but the event was cancelled because of the flood damage to the Brick House.

12, 2015. TJMC has maintained an e-mail list since October, 2013, and as of December 3, 2015, there were approximately 330 contacts on that list.

Many of the events that took place at the subject properties during the fiscal years at issue, particularly those hosted by third parties, were not open to the public. Six of the 7 events that TJMC hosted were advertised as "reservations limited," and TJMC charged attendees upwards of $100 for admission. For events hosted by outside parties, TJMC usually charged a fee to the host organization, which, according to its Petition, was typically "in the range of a few hundred dollars, based on the size of the organization and the support required by contractors retained by [TJMC]." Elizabeth Brown Mulholland, a member of the Board of Directors of TJMC, in an e-mail dated October 15, 2014 to Attorney Fitts, voiced her concerns that TJMC had produced "very little programming and only to a very small part of the public" and "I just don't think it is sustainable over time with TJMC in its current iteration."

On the basis of the evidence, the Board found and ruled that the appellant failed to meet its burden of proving that its activities at the subject properties qualified it as a "charitable organization" for purposes of G.L. c. 59, § 5, Third ("Clause Third"). First, the various "no trespassing" signs underscore that the subject properties are essentially private, unless guests are specifically invited by the appellant.

With respect to the Brick House, its tours are available only for its ground floor, as its second floor is used as a private residence by a person unrelated to TJMC. The second floor is also utilized as storage space for Dr. Lastavica's personal effects. Moreover, only 1 event occurred at the Brick House during the fiscal years at issue.

With respect to the Jefferson memorabilia located at the Brick House -- period furniture and artwork that were purportedly "on loan" to the appellant from Dr. Lastavica -- there are no documents to memorialize this arrangement and no credible evidence that the appellant, as opposed to Dr. Lastavica, had rights to them. Further, TJMC failed to demonstrate that it engaged in historic preservation given that it failed to show that the Brick House had any historic significance. The Brick House was constructed in 1968 to serve as Dr. Lastavica's personal residence and has a modern interior; it is neither a replica of Jefferson's home nor is it even registered as a historic building. Accordingly, the Board found that the Brick House did not further the appellant's charitable purpose of educating the public on the life and times of Thomas Jefferson; rather, the Brick House is essentially private property with limited historic significance, to which a small number of people are invited to enter on a sporadic basis.

Regarding the Conference Center, as recognized by Ms. Mulholland, its programming was extremely limited. There were just 12 events held between July 1, 2013 and June 30, 2015, and only 6 of those events were sponsored by TJMC; the remainder were conducted by third parties in exchange for a rental fee. Furthermore, the events were available only to a small sector of the public and many events had no connection to TJMC's stated charitable goals of promoting history, education or the arts.[7] On the basis of the Conference Center's limited use and availability for charitable purposes and its use in part to store Dr. Lastavica's personal property, the Board found and ruled that the dominant use of the Conference Center was not for charitable purposes.

With respect to the appellant's argument that it engaged in conservation activities as the subject property, the Board noted several flaws. First, the Articles of Organization of TJMC make no mention whatsoever of any conservation purposes, nor have they been amended to include conservation as a corporate purpose. Similarly, none of TJMC's Returns of Private Foundation for calendar years 2012, 2013 or 2014, or its Applications for Statutory Exemption for fiscal year 2014, make any mention of conservation purposes. Moreover, while the revised mission statement does make a nondescript reference to conservation and historic preservation, TJMC nonetheless failed to demonstrate any specific conservation activities that took place on the subject properties, such as active trail maintenance or wildlife preservation. The Board found that mere compliance with conservation restrictions, which were in effect before TJMC took title to the subject properties, was not an active appropriation of the subject properties for conservation purposes, but instead more akin to maintaining the subject properties as a buffer zone around Dr. Lastavica's private property. Also, while the watershed restoration was an active use of the subject properties, the undisputed facts establish that this work was performed prior to TJMC's ownership of the subject properties, not paid for by TJMC, and therefore it cannot add to TJMC's claim for charitable exemption.

On the basis of the Board's findings, the Board found and ruled that TJMC did not meet its burden of proving that the subject properties were entitled to an exemption for charitable or conservation purposes. Accordingly, the Board issued a decision for the appellee in the appeal for fiscal year 2015.

[7] For example, the appellant rented the subject properties for the Gold Coast Mortgage Services annual outing and the Linzee Family's Foundation retreat.

OPINION

1. Jurisdiction for fiscal year 2014 appeal

Clause Third provides an exemption for:

> real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purpose of such other charitable organization or organizations.

Where, as here, a tax bill is issued for property that is claimed to be exempt under Clause Third, a taxpayer has two procedural choices: (1) it may apply to the assessors for an abatement under G.L. c. 59, § 59; or (2) it may appeal directly to the Board under G.L. c. 59, § 5B. *See* ***Trustees of Reservations v. Assessors of Windsor,*** Mass. ATB Findings of Fact and Reports 1991-225.

The authority of the Board to hear and decide appeals relating to the assessment of taxes is derived solely by statute. *See* ***Stilson v. Assessors of Gloucester,*** 385 Mass. 724, 732 (1982). Accordingly, regardless of which procedural choice a taxpayer pursues, "[t]he case law is abundant in stern pronouncements requiring strict adherence by the taxpayer to the timelines and other procedural commands of the taxing statutes." ***Tambrands, Inc. v. Commissioner of Revenue,*** 46 Mass. App. Ct. 522, 525 (1999).

The first method of challenging the denial of a claim of exemption under Clause Third is an appeal to the assessors under G.L. c. 59, § 59. The Board derives its authority to review the decisions of municipal boards of assessors from G.L. c. 59, §§ 64 and 65. Those statutes permit a taxpayer aggrieved by the assessors' refusal to abate a tax on real property to file an appeal with the Board, provided that:

> if the tax due for the full fiscal year on a parcel of real estate is more than $3,000,[8] 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).

For the fiscal year 2014 appeal, the collective tax on the subject properties exceeded the $3,000 threshold and, as stipulated by the parties, the tax due was paid late, thereby incurring interest. However, if interest is incurred, a taxpayer nonetheless can appeal to the Board if it has made a timely payment of tax that is at least equal to the average tax for the three preceding

[8] An amendment to § 64, effective November 7, 2016 and therefore not applicable to these appeals, raised this amount to $5,000. *See* St. 2016, c. 218, § 149.

years; this alternative is commonly referred to as the "three-year average provision." G.L. c. 59, § 64; *see also* ***Assessors of New Braintree v. Pioneer Valley Academy, Inc***., 355 Mass. 610, 617 (1969). Under the facts of these appeals, TJMC did not meet the requirements of the three-year average provision. The Board thus found and ruled that it lacked jurisdiction to hear the appeal for fiscal year 2014 under the provisions of G.L. c. 59, §§ 59, 64 and 65.

The second method of challenging the denial of a claim of exemption under Clause Third is a direct appeal to the Board pursuant to G.L. c. 59, § 5B. Under § 5B, any taxpayer who is aggrieved by a "determination" of a board of assessors with respect to the eligibility or noneligibility of a corporation or trust for exemption under Clause Third may appeal directly to this Board within three months of that "determination." The Board in ***Trustees of Reservations*** ruled that the "determination" from which the charitable entity appeals under § 5B is the mailing of the tax bill relating to the property that the entity claims is exempt under Clause Third. Mass. ATB Findings of Fact and Reports at 1991-235-37; *see also* ***Samson Foundation Charitable Trust v. Board of Assessors of the City of Springfield***, Mass. ATB Findings of Fact and Reports 2004-150, 158. The Appeals Court agreed that the determination date "will ordinarily be the date a local board of assessors mail[s] the fiscal year tax bills." ***William B. Rice Eventide Home, Inc. v. Assessors of Quincy***, 69 Mass. App. Ct. 867, 876 (2007).

Under the facts of this appeal, the date of the assessors' "determination" was December 27, 2013, the date of the mailing of the town's third-quarter tax bills for fiscal year 2014. Pursuant to § 5B, TJMC would have had three months from that date, until March 27, 2014, to file its appeal with the Board. However, TJMC did not file the appeal for fiscal year 2014 until July 23, 2014, well beyond the three-month period of § 5B. Therefore, the Board does not have jurisdiction to hear and decide the appeal for fiscal year 2014 pursuant to § 5B.

Because the Board has no jurisdiction under either § 5B or §§ 64 and 65, the Board allowed the appellee's Post-Trial Motion to Dismiss for Lack of Jurisdiction and issued a decision for the appellee for fiscal year 2014.

2. The subject properties do not qualify for the charitable exemption of Clause Third.

Massachusetts Courts and this Board have historically understood that taxation is the rule and exemptions from taxation are the exception: "Normally all property of a taxable nature should contribute its proportionate share to the support of the State." ***Boston Chamber of Commerce v. Assessors of Boston***, 315 Mass. 712, 716 (1944). Exemptions from property taxation thus "have generally been viewed with a 'hostile eye,' ... as matters of special favor or grace to be recognized only where the property falls 'clearly and unequivocally ... within the

terms of the exemption.'" ***Trustees of Boston University v. Assessors of Brookline***, 11 Mass. App. Ct. 325, 331 (1981).

"A corporation claiming that its property is exempt under § 5, Third, has the burden of proving that it comes within the exemption, and that it is in fact operated as a public charity." ***Town of Norwood v. Norwood Civic Association***, 340 Mass. 518, 525 (1960) (citing ***American Inst. for Economic Research v. Assessors of Great Barrington***, 324 Mass. 509, 512-14 (1949)). The mere fact that an entity claiming a property tax exemption is organized as a charitable corporation or has Code § 501(c)(3) status is not sufficient to establish it as a "charitable organization" for purposes of Clause Third. ***Western Massachusetts Lifecare Corp. v. Assessors of Springfield,*** 434 Mass. 96, 102 (2001). Nor are the stated purposes in its articles of organization sufficient to qualify it as a charity for purposes of Clause Third; rather, it must prove that "it is in fact so conducted that in actual operation it is a public charity." ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket,*** 320 Mass. 311, 313 (1946).

Courts and this Board have customarily considered a number of "non-determinative factors" in deciding whether an organization is charitable for purposes of Clause Third. ***New Habitat, Inc. v. Tax Collector of Cambridge,*** 451 Mass. 729, 732 (2008). How much weight any particular factor will be given depends on how close an organization's "dominant purposes and methods are to traditionally charitable purposes and methods." ***Id.*** at 733 (citing ***Boston Chamber of Commerce v. Assessors of Boston***, 315 Mass. 712, 718 (1941)). "The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be." ***Id.*** (citing ***Boston Chamber of Commerce***, 315 Mass. at 718 (ruling that "the more remote the objects and methods become from the traditionally recognized objects and methods the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government.")) (other citation omitted).

Among the factors to consider in determining whether an organization is in fact occupying property in furtherance of its charitable purpose is whether the organization at issue offers its services or benefits "to a large and 'fluid' group of beneficiaries." *See, e.g.* ***New Habitat,*** 451 Mass. at 732 (quoting ***New England Legal Foundation v. Assessors of Boston,*** 423 Mass. 602, 609 (1996)). While charging a fee for services will not necessarily preclude charitable exemption, "the organization's services must still be accessible to a sufficiently large and indefinite class of beneficiaries in order to be treated as a charitable organization." ***Western Massachusetts Lifecare***, 434 Mass. at 105. In other words, it is necessary that "the persons who

are to benefit are of a sufficiently large or indefinite class so that the community is benefited by its operations." ***Harvard Community Health Plan, Inc. v. Assessors of Cambridge***, 384 Mass. 536, 543 (1981) (citing ***Children's Hospital Medical Center v. Assessors of Boston***, 353 Mass. 35, 44 (1967), ***Assessors of Boston v. Garland School of Home Making***, 296 Mass. 378, 388-89 (1937), and 4 A. Scott, ***Trusts*** at 2897-2898 (3d ed. 1967)).

The court in ***New Habitat,*** quoting a long-standing charitable-exemption precedent, characterized the "traditional objects and methods" of a Clause Third charity as follows:

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

New Habitat, 451 Mass. at 732 (quoting ***Jackson v. Phillips,*** 96 Mass. 539, 556 (1867)).

While TJMC does not separately analyze the applicability of the charitable exemption to each of the two separate parcels of the subject properties, the Board recognized that the improved parcel and the vacant parcel function differently and therefore should be addressed separately.

a. improved parcel

TJMC contends that it used the subject properties in furtherance of its charitable purpose of promoting patriotism, education of the public in the history of the Early Republic, and maintenance of historic public buildings. Fostering patriotism and educating the public concerning history can be charitable activities within the meaning of Clause Third. *See* ***Molly Varnum Chapter, D.A.R. v. City of Lowell***, 204 Mass. 487, 490-91 (1910). The organization in ***Molly Varnum*** had as its stated main purpose to "perpetuate the memory of those who helped achieve American independence, acquire and protect historical spots, preserve documents ... fostering true patriotism and love of country." The court held that these purposes qualified as charitable purposes and, consistent with those purposes, the taxpayer had assisted in the creation of a public library, maintained clubs and classes for the education of children, and contributed money to historical research. Therefore, the court concluded that the taxpayer in ***Molly Varnum*** demonstrated its entitlement to the exemption. ***Id***. at 494.

However, in addition to proving a charitable purpose, TJMC must also demonstrate "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) (other citations omitted)). For example, in ***Children's Hospital Medical Center,*** 353 Mass. at 37, the hospital, a

charitable corporation and, later, its successor in interest, owned a parcel of land, which was used as a central hospital laundry for a total of 7 Boston hospitals. The SJC found that "laundry work ... is an indispensable feature of hospital operation," and that such work was part of the hospital's charitable purpose. ***Id***. at 40-41. Therefore, the Supreme Judicial Court ruled that the hospital "occupied the property in connection with its charitable purpose," and accordingly, the property qualified for the charitable exemption. ***Id***.

By contrast, TJMC failed to demonstrate how it occupied the improved parcel to advance patriotism, educate the public in the history of the Early Republic, or maintain historic public buildings during the relevant time period. No public events took place at the Brick House during the relevant time period. While some tours of the Brick House were offered, access to the Brick House was restricted to its first floor, because its second floor served as a private residence to an individual unrelated to TJMC. The second floor was also used as storage space for Dr. Lastavica's personal belongings. The appellant did not maintain records of its tours, so the Board had no basis for determining how often tours were actually conducted on the premises or how many visitors attended the tours. *See* ***Jewish Geriatric Services, Inc. et al v. Assessors of Longmeadow***, Mass. ATB Findings of Fact and Reports 2002-337, 359 (in determining whether an organization is in fact charitable for Massachusetts real estate tax purposes, Massachusetts courts and the Board must consider whether the organization's benefits are readily available to a sufficiently inclusive segment of the population). Finally, while it contains some period pieces, the Brick House has no historic significance; Jefferson never lived there, nor was it a replica of his house or even registered as a historic building. In fact, the memorabilia and period pieces are actually Dr. Lastavica's private property that were purportedly "on loan" to the appellant, with no formal document memorializing any supposed agreement.

With respect to the Conference Center, the programming sponsored by TJMC or held by outside groups that rented space from TJMC were sporadic and often geared towards a very small audience or altogether closed to the public. As Ms. Mulholland acknowledged in her email, TJMC had produced "very little programming and only to a very small part of the public" during the tax years at issue. Moreover, many of the events conducted at the Conference Center were rentals by outside groups having no connection to American history –- for example, the Gold Coast Mortgage Services' annual outing for its employees -- and therefore did nothing to further TJMC's stated charitable purpose. The Board thus found insufficient evidence linking the appellant's use of the subject properties to further its stated charitable purposes related to history or patriotism. *See* ***The Vincent Club***, 351 Mass. at 14 (quoting ***Babcock v. Leopold***

Morse Home for Infirm Hebrew & Orphanage, 225 Mass. 418, 421 (1917)) (a charitable organization must demonstrate "an active appropriation to the immediate uses of the charitable cause for which the owner was organized"). Finally, Dr. Lastavica also used the Conference Center to store her personal belongings, which led the Board to conclude that the subject properties were used more as private property than for public charitable purposes.

Based on the evidence, the Board found and ruled that TJMC failed to actively appropriate the improved parcel for its stated charitable purposes of promoting patriotism, educating the public in the history of the Early Republic, or maintaining historic public buildings.

b. vacant parcel

The appellant also contended that it preserves open space and serves an environmental benefit for the public by preserving and maintaining conservation land. However, the appellant offered no evidence that it engaged in meaningful, active conservation or preservation efforts at the vacant parcel. First of all, the appellant did not include a conservation purpose in its Original Mission Statement, but instead approved a Revised Mission Statement on June 19, 2014, after the Supreme Judicial Court's decision in ***New England Forestry Foundation, Inc. v. Assessors of the Town of Hawley***, ("***NEFF***"), 468 Mass. 138 (2014), which approved a charitable exemption for an organization based on its active conservation efforts on the property at issue in that case.

In ***NEFF***, the SJC pointed to several instances of the taxpayer's active appropriation of the property towards its charitable conservation purposes, including: producing and disseminating awareness-raising materials; sponsoring educational programs for foresters; and the placement of the property under a forest management program using an independent outside consultant. ***Id***. at 158. NEFF's staff included licensed foresters, and the taxpayer offered evidence showing that it engaged in sustainable forestry practices to track the effects of its land management. ***Id***. NEFF's activities under its forest management plan included removal of "mature and poor quality" logs to "release good quality growing stock"; "[c]ombination strip cuts and patch cuts for wildlife and softwood regeneration"; and the layout of a "loop demonstration trail," taking into consideration "erosion of fragile soils." ***Id***. at 141. NEFF later updated its forestry plan and conducted a tree inventory, which resulted in a patch harvest of approximately 65 acres. ***Id.***

While the taxpayer in ***NEFF*** offered substantial evidence that it was actively engaging in conservation and educational programs at the subject property, thereby actively appropriating the

property in furtherance of its charitable purpose, TJMC merely cited the watershed restoration work that was performed at the subject properties to preserve the sea wall. However, this work was performed for the Lastavicas and paid for by Vingo Trust III before the appellant even existed, and it therefore could not be credited to the appellant.

Aside from that work, the appellant's only other argument was that it complied with the conservation restrictions impacting the vacant parcel. As the Board has previously found, the charitable exemption requires more than passively holding land in a natural state:

> [A]lthough 'holding land in its natural pristine condition and thereby protecting wildlife habitats, filtering the air and water supply, and absorbing carbon emissions,' ***New England Forestry Foundation, Inc.,*** 468 Mass. at 152, undoubtedly provides some benefit to the public in general, the Trust did not demonstrate a pattern of consistent or concerted conservation or preservation efforts sufficient to distinguish it from any other private landowner who simply holds several acres of land in an undeveloped state. *See* ***id.*** at 156**.**

Anna Harris Smith Conservation Trust, Inc. v. Assessors of Pembroke, Mass. ATB Findings of Fact and Reports 2015-123, 142. *See also* ***Wing's Neck Conservation Foundation, Inc. v. Assessors of Bourne,*** Mass. ATB Findings of Fact and Reports 2003-329, 336 ("[A]lthough the conservation of open space for the benefit of the general public is a most laudable goal, [the evidence failed to establish that the organization in question] was in actual operation a charitable organization."). Moreover, access to the subject properties is by a private road that is marked by two "no trespassing" signs, which give the impression that the subject properties are secluded properties used as buffer areas surrounding Dr. Lastavica's abutting private residence. *See* ***Brookline Conservation Land Trust v. Assessors of Brookline***, Mass. ATB Findings of Fact and Reports 2008-679, 698. Accordingly, the Board found and ruled that the appellant failed to establish that it had actively engaged in conservation or preservation efforts on the subject properties in furtherance of its stated charitable purposes.

Conclusion

After considering the evidence of record, and applying the analysis set forth by relevant precedents, the Board found and ruled that TJMC did not meet the requirement of a "charitable organization" and that the subject properties were not "occupied" by it in furtherance of charitable purposes as contemplated by Clause Third. The Board therefore found and ruled that the subject properties were not exempt from tax under Clause Third.

Accordingly, the Board issued a decision for the appellee in the appeal for fiscal year 2015. The Board also dismissed the appeal for fiscal year 2014 for lack of jurisdiction.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

VEOLIA ENERGY BOSTON, INC. **v.** **BOARD OF ASSESSORS OF THE CITY OF BOSTON**

Docket No. F325148

Promulgated:
June 5, 2018

ATB 2018-198

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("appellee" or "assessors") to abate taxes on certain personal property in the City of Boston owned by and assessed to Veolia Energy Boston, Inc. ("appellant") under G.L. c. 59, §§ 18 and 38 for fiscal year 2014 ("fiscal year at issue").

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

Kathleen S. Gregor, Esq., *Elizabeth J. Smith,* Esq., *and Erin R. Macgowan,* Esq. for the appellant.

Anthony M. Ambriano, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The appellant presented its case primarily through the testimony of four witnesses: Mr. Donald Silvia, director of system operations for Veolia North America, an affiliate of the appellant, testified about the appellant's operations; Mr. David Walls, managing director of the energy practice at Navigant Consulting, gave expert testimony regarding the appellant's operating systems; Mr. Steven Weafer, vice president and head of finance for Veolia North America, discussed the appellant's financial reporting; and Mr. Charles Clabaugh, director of personal property for the City of Boston Assessing Department, testified about the contested

assessment. The assessors did not offer any witnesses. Based on the testimony and exhibits entered into evidence at the hearing of this appeal, as well as a Statement of Agreed Facts with attached exhibits, the Appellate Tax Board ("Board") made the following findings of fact.

Introduction and Jurisdiction

The appellant is a privately-held corporation organized under the laws of Delaware. Its parent, Veolia Environment S.A., is a publicly-traded company. At all times relevant to the fiscal year at issue, the Commissioner of Revenue ("commissioner") classified the appellant as a manufacturing corporation within the meaning of G.L. c. 63, §§ 39 and 42B and 830 CMR 58.2.1.

The assessors valued certain of the appellant's personal property, consisting principally of pipes located within the city of Boston as of January 1, 2013, ("subject property") at $62,910,630 and assessed a tax thereon, at the rate of $31.18 per $1,000 of assessed value, in the amount of $1,961,553.44. The appellant timely paid the tax due in three installments and filed an Application for Abatement of Personal Property Tax with respect to the subject property on Monday, February 3, 2014. The assessors denied the appellant's Application for Abatement on April 25, 2014, and gave the appellant written notice of the denial dated May 2, 2014. The appellant seasonably filed a Petition Under Formal Procedure with the Board on July 24, 2014. On the basis of the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.[1]

Appellant's Business in Massachusetts

The appellant owns and operates a "district energy network" in Boston and assists in the operation of a similar network in Cambridge, which includes a co-generation facility[2] (the "Boston Network" and the "Cambridge Network," respectively, and collectively, the "Networks").[3] The Boston Network is a steam system that converts chemical energy from natural gas and fuel oil into high-pressure steam and then distributes the high-pressure steam. The Cambridge Network also converts chemical energy into steam and electrical energy.

The Boston Network serves approximately 250 commercial, health care, government, institutional, and hospitality customers, who use the steam (and in at least one instance, hot

[1] Pursuant to an order dated January 26, 2016, the Board bifurcated the hearing relating to the appeal. Specifically, if the Board had found that the subject property was not exempt from property tax, the Board would then have conducted proceedings regarding the property's valuation.

[2] As described by Mr. Silvia, a co-generation facility, also known as "combined heat and power," generates multiple energy sources using one fuel supply.

[3] Certain of the Networks' components, including the co-generation facility, are owned by affiliates of the appellant and other entities.

water) for various purposes, including power generation, sterilization, heating, and cooling. The appellant also provides maintenance and operation services to some of its customers. Customers are typically billed based on their steam consumption.

The Boston Network and the Cambridge Network are interdependent, and the high-pressure steam generated by each Network is distributed between the Networks as well as within a given Network. The Networks are physically connected by two sets of pipes and a variety of equipment. One set of pipes follows the Charles River Dam Road near the Museum of Science and the other set crosses the Charles River, attached to the Longfellow Bridge.

The high-pressure steam is initially generated at three generation facilities ("Generation Facilities"): the Kneeland Facility, located on Kneeland Street in Boston; the Scotia Facility, located on Scotia Street in Boston; and Kendall Station, located in Cambridge. The Scotia Facility also generates hot water and Kendall Station generates electricity that is fed through a substation and sold on the Independent System Operator New England wholesale market.

The Generation Facilities perform a number of functions, including water treatment, fuel treatment and storage, and high-pressure steam generation. With respect to water treatment, boiler feed water, which is used to generate steam, is treated to remove contaminants. The decontamination process prevents scaling, corrosion, foaming, and other adverse impacts on boiler operation. Each Generation Facility stores fuel oil and is supplied with natural gas, which are burned by the steam generation equipment. The Generation Facilities use boilers to generate the high-pressure steam.

Equipment varies somewhat among the Generation Facilities. For example, in the Scotia and Kneeland Facilities, the boilers employ a burner for combustion. Air used in combustion is pumped into the system by a forced-draft fan and the exhaust gas is pulled out by induced-draft fans. The exhaust gases exit via an exhaust stack, while the treated water is heated and becomes steam in the boiler. At Kendall Station, steam is generated both in boilers and by using a heat recovery steam generator that creates steam using heat from exhaust gases in a combustion turbine.

The pressure of the steam is highest at the point of generation, ranging from 150 to 220 pounds per square inch. After the steam is generated, it enters a pressure-regulated network of distribution mains and appurtenant equipment. Because steam can move throughout the Networks, one or more of the Generation Facilities can be used, as needed, to maintain a steady and stable supply of steam for the entire system. The Networks operate together to balance customer load and steam generation across the Generation Facilities to ensure equivalent rates of

production and consumption. The customer load is dynamic and varies based upon the time of day, the day of the week, and ambient temperature. These variables are used to create load predictions, which impact the amount of steam generated and delivered on a given day.

Generally, once the steam reaches a customer's site, its pressure is reduced by a pressure reduction valve. Pressure reduction is necessary to assure safety, to comply with regulatory requirements, and to conform to customer equipment compatibility and use requirements. Customers' pressure requirements vary. For example, a hospital may need relatively high pressure for sterilization purposes, whereas a mixed-use building on Newbury Street uses a much lower pressure for heating purposes.

The Networks consist of various components, some of which are located above ground and some underground. Pipes are used to deliver the high-pressure steam within and from the Generation Facilities to customer sites. As Mr. Silvia noted, the pipes, which store energy, are crucial to maintain the quality of the steam until its delivery to customers.

Steam valves, which may be manual or automatic, help to restrict the flow of steam and condensate (steam that has returned to an aqueous state) throughout the Networks. Flow restriction allows portions of the Networks to be shut off for maintenance or to disconnect a customer. Flow restriction also changes steam flow patterns and permits rerouting of steam to optimize its flow from the Generation Facilities to customers.

Pipe temperatures fluctuate throughout the Networks, so expansion joints are employed to allow the pipes to expand and contract in a controlled manner without incurring cyclic fatigue failures such as cracks, buckles or leaks. Expansion joints are held in place by fixed anchors, and pipe movement is controlled by guides, which permit movement only in predetermined directions.

Manholes and vaults provide access to various components of the Networks for inspection and manual operation. Steam traps remove condensate that accumulates in the Networks. Failure to remove accumulated condensate would reduce the quality of the steam and could result in portions of the Networks filling with water, thereby inhibiting the flow of steam and at times causing "water hammer," which occurs when water forced through the Networks at high pressure causes damage to the Networks and may create safety hazards. Sump pumps remove water that accumulates in manholes and vaults due to condensate or groundwater seepage. Accumulated water, if not removed, may also inhibit maintenance activities and compromise electrical devices.

Once steam has been used at a customer's site, it is generally condensed into condensate. Part of the condensate is returned to the Generation Facilities through condensate-return lines to be recycled and is used to generate more steam. Condensate not returned is generally drained or pumped into the municipal sewer system.

The Networks employ a centralized supervisory control and data acquisition ("SCADA") system to constantly monitor their activity. The SCADA system is accessible via the internet and at several places in the Networks. Each of the Generation Facilities also has an internal control system that feeds data to the master SCADA system. A system shift supervisor directs operations of the entire SCADA system, monitoring the Networks, the status of the Generation Facilities, the status of multiple monitoring points in the Networks, and the status at key customer sites.

Mr. Walls' Testimony

Mr. Walls, who has extensive experience in the operation of a variety of energy systems, offered his expert opinion as to whether the Networks, including the subject property, function as a single integrated machine. To form his opinion, Mr. Walls visited various parts of the Networks including the Generation Facilities and the street system. He also reviewed comprehensive documentation on all the components of the Networks and conducted interviews with staff.

Mr. Walls described the Networks, as well as the interaction among their various components, in great detail. In his testimony and his expert report, Mr. Walls stated his opinion of what constitutes a machine and the integrated nature of the Networks:

> The [Networks] function[] as a single, integrated machine. Machinery is any combination of mechanical means designed to work together so as to effect an end. The components of the [Networks], such as the boilers, pipes, valves and steam traps, are machinery that operate together to generate, maintain, distribute, store, and convert steam for use by customers. Therefore, each component supports operation of the [Networks] as a single, integrated machine. Without each component, [the appellant] could not generate the product that is ultimately sold to the customer.

Mr. Walls emphasized that the high pressure steam generated by the appellant "is not a finished product until it's delivered to the customer through their control valves and provided to them for use in their energy services." He discussed the function of the pipes within the Networks, which he described as not mere conduits, but an active network controlled with control valves, metered and monitored with monitoring measuring equipment. Mr. Walls also noted the importance of the storage and system flow pressure functions served by the pipes, stating that "steam is not like an instantaneous product, like electricity. When you flip a switch, you just don't have instant

steam. You have to build up pressure in the system, and so you have to have that stored amount of energy in the system to really operate it." The Board found Mr. Walls' testimony credible and agreed with his conclusion that the Networks, including the subject property, constituted and operated as a single integrated machine.

Summary

Based on the evidence presented and the reasonable inferences drawn therefrom, the Board found and ruled that the subject property and the other components of the Networks together formed a single integrated machine. Because the appellant was classified as a manufacturing corporation, the subject property was exempt from taxation as manufacturing machinery pursuant to G.L. c. 59, § 5, cl. Sixteenth(3). Accordingly, the Board issued a decision for the appellant in this appeal.

OPINION

General Laws c. 59, § 5, cl. Sixteenth(3) ("Clause 16(3)") provides certain exemptions[4] from property tax, including for property owned by manufacturing corporations, as follows:

> In the case of (i) a manufacturing corporation or a research and development corporation, as defined in section 42B of chapter 63 ... all property owned by the corporation ... other than real estate, poles and underground conduits, wires and pipes ... .

Having acknowledged that the appellant was classified by the Commissioner of Revenue as a manufacturing corporation within the meaning of G.L. c. 63, § 42B, the assessors argued that the subject property was taxable as poles and underground conduits, wires and pipes, which are excluded from Clause 16(3) and remain taxable under G.L. c. 59, § 18, cl. Fifth. The appellant disagreed, asserting that the subject property should be exempt from taxation as a component of exempt manufacturing machinery. The Board agreed with the appellant.

In ***Commonwealth v. Lowell Gas Light Co.***, 94 Mass. 75 (1866), the Supreme Judicial Court considered whether various components of a system operated by a manufacturer and distributor of gas, including mains and pipes used for gas distribution, were properly omitted from calculation of a deduction for the company's machinery. Holding that they were not, the Court stated:

> The mains or pipes laid down in the streets and elsewhere to distribute the gas among those who are to consume it were clearly a part of the apparatus necessary to be used by the corporation in order to accomplish the object for which it was

[4] Property "exempt" from taxation under Clause 16(3) is not exempt from tax in an absolute sense, but is subject indirectly to taxation by inclusion in the measure of excise imposed under G.L. c. 63. *See* ***Assessors of Holyoke v. State Tax Commn***., 355 Mass. 223, 234 (1969).

> established. They constituted a part of the machinery by means of which the corporate business was carried on, in the same manner as pipes attached to a pump or fire-engine for the distribution of water, or wheels in a mill which communicate motion to looms and spindles, or the pipes attached to a steam-engine to convey and distribute heat and steam for manufacturing purposes, make a portion of the machinery of the mill in which they are used. Indeed, in a broad, comprehensive and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes **one great integral machine**, consisting of retorts, station-meters, gas-holders, street-mains, service-pipes and consumers' meters, all connected and operating together, by means of which the initial, intermediate and final processes are carried on, from its generation in the retort to its delivery for the use of the consumers.

Lowell Gas Light, 94 Mass. at 78-79 (emphasis added).

This analysis enjoys continuing vitality in Massachusetts law. For example, in ***Lowell Gas Company v. Commissioner of Corporations and Taxation,*** 377 Mass. 255 (1979), the Court, citing ***Lowell Gas Light***, held that gas mains, meters, and meter installations that formed part of a distribution apparatus qualified as machinery exempt from sales tax. In its analysis, the Court placed particular focus on "the following basic question: 'Does the disputed item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?' Pipes and meters function, along with production, storage, and pressure regulating equipment, as integral component parts required in the gas furnishing system." ***Id***. at 260-61.

The Board has also addressed a similar issue. In ***Perma, Inc. v. Assessors of Billerica***, Mass. ATB Findings of Fact and Reports 2001-805, the Board considered whether underground storage tanks owned by a corporation classified as a manufacturing corporation qualified as personal property exempt as machinery pursuant to Clause 16(3) or real estate subject to tax. The Board cited ***Lowell Gas Light*** for the proposition "that a receptacle that does not itself contain moving parts can nonetheless be considered machinery if it is part of a complete system 'all connected and operating together, by means of which the initial, intermediate and final processes are carried on,' which 'constitutes one great integral machine.'" ***Perma, Inc.,*** Mass. ATB Findings of Fact and Reports at 2001-824-25)(quoting ***Lowell Gas Light***, 94 Mass. at 78-79). Applying this rationale, the Board found that:

> the tanks at issue should have been classified as exempt machinery of a domestic manufacturing corporation[5]... . [T]he tanks at issue are receptacles for the storage of raw materials but, due to their connections to other mechanical devices, they

[5] General Laws c. 63, § 38C, pertaining to domestic manufacturing corporations, was repealed in 2008. *See* St. 2008, c. 173, § 66. General Laws c. 63, § 42B, which previously addressed foreign manufacturing corporations, was amended in 2008 to encompass manufacturing corporations generally. *See* St. 2008, c. 173, § 85.

> play a necessary and essential role in Perma's manufacturing functions. Accordingly, the Board found that the tanks are part of 'one great integral machine' and thus property exempt from real estate taxes.

Id.

In sum, precedent spanning more than a century and dispositive in a variety of analogous contexts unequivocally supports the proposition that property that would otherwise be regarded as taxable personalty or realty, when incorporated as an integral part of exempt machinery, will be exempt as part of that machinery. Such is the case in the present appeal, where the subject property, as observed by Mr. Walls, "supports operation of the [Networks] as a single, integrated machine. Without each component, [the appellant] could not generate the product that is ultimately sold to the customer." Moreover, if property owned by a manufacturing corporation may be classified as both falling within one of the listed exceptions to Clause 16(3) (*e.g.*, real estate) and machinery, it will be exempt as machinery if, as in the present appeal, its dominant aspect is that of machinery. *See* ***Assessors of Swampscott v. Lynn Sand & Stone Co.***, 360 Mass. 595, 599 (1971); *see also* ***Boston Edison Co. v. Assessors of Boston***, 402 Mass. 1, 12 (1988).

The assessors argued that poles and underground conduits, wires and pipes are explicitly made taxable by Clause 16(3), which makes no mention of machinery. The assessors then posited that to prevail in this appeal, the appellant must demonstrate that property explicitly made taxable by Clause 16(3) (*e.g.*, pipes) is implicitly rendered exempt by the same clause, a result that would "upend well-established rules of statutory construction."

As a threshold matter, the assessors ignored that the section of the Acts and Resolves that implemented the manufacturing exemptions of Clause 16(3) is titled "An Act Exempting the Machinery of Manufacturing Corporations from Local Taxation and Changing the Methods of Determining Certain Corporation Taxes and of Distributing Certain Taxes." St. 1936, c. 362, § 1. When the title of an enactment clearly states a legislative purpose, "a contrary interpretation of the legislative intent runs afoul of the plain meaning of the statute's title." ***Town of Yarmouth v. Snowden-Lebel***, 17 LCR 654, 655-56 (Mass. Land Ct. 2009).

The language of G.L. c. 59, § 5, cl. Sixteenth, when viewed as a whole, also undermines the assessors' argument. In particular, G.L. c. 59, § 5, cl. Sixteenth(1) ("Clause 16(1)"), which applies to financial institutions and certain other corporations, begins, like Clause 16(3), by exempting all property owned by these entities. Also like Clause 16(3), Clause 16(1) provides several explicit exceptions to this exemption, including for "poles, underground conduits, wires, pipes and **machinery used in manufacture**." (emphasis added). Had the Legislature intended to

exclude such machinery from exemption in Clause 16(3) as well as in Clause 16(1), it presumably would have done so. *See, e.g.* ***Salem and Beverly Water Supply Board v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1987-1. Further, an explicit reference to machinery as exempt in Clause 16(3) is unnecessary given that its starting point is the broad exemption of "all property."

Lastly, established case law explicitly sanctions exemption of machinery by Clause 16(3). In ***Fernandes Super Markets, Inc. v. State Tax Commn***., 371 Mass. 318 (1976), which concerned an appellant's request for manufacturing corporation classification, the Court stated that "[i]f [the appellant] is a manufacturing corporation, all its machinery is exempted by G.L. c. 59, § 5, Sixteenth, from local personal property taxes which would otherwise be assessed on the machinery of a business corporation by cities and towns." ***Id.*** at 319. Similarly, in ***Assessors of Holyoke v. State Tax Commn***., 355 Mass. at 225, the Court observed that "[b]y G.L. c. 59, § 5, Sixteenth(3), as amended through St. 1957, c. 541, a 'domestic manufacturing corporation' is exempt from local taxation upon its property other than 'real estate, poles and underground conduits, wires and pipes.' Its machinery is thus not subject to local taxation." *See also,* ***Assessors of Swampscott***, 360 Mass. at 597-98 ("[A]ll machinery of a domestic manufacturing corporation ... must be treated as exempt from local taxation by virtue of G.L. c. 59, § 5, Sixteenth (3), as amended by St. 1936, c. 362, § 1, and later by St. 1957, c. 541."(additional citations omitted).

The assessors also argued that even if the Board were to find that the subject property was part of integrated machinery, the language of G.L. c. 59, § 18 itself provides an impediment to exemption under Clause 16(3). The Board disagreed. General Laws c. 59, § 18 states, in pertinent part:

> All taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on January first, except as provided in chapter sixty-three and in the following clauses of this section: ... .
>
> Second. Machinery employed in any branch of manufacture or in supplying or distributing water ... shall be assessed where such machinery or tangible personal property is situated to the owner or any person having possession of the same on January first.

As the Board observed in ***Whitten v. Assessors of the Town of Norwood,*** Mass. ATB Findings of Fact and Reports 1984-99, 102, "G.L. c. 59, § 18 states **where** personal property shall be assessed." (emphasis added). No part of G.L. c. 59, § 18 affects the exemptions provided by G.L. c. 59, § 5, cl. Sixteenth. Indeed, in ***New England Mutual Life Insurance Company v. City of***

Boston, 321 Mass. 683, 689 (1947) the Court held that "[i]n so far as [G.L. c. 59, § 18, cl. Second] deals with the assessment of personal property of a corporation, it must be interpreted in conjunction with [G.L. c. 59, § 5, cl. Sixteenth] as a part of a single system for the taxation of such property... . The field for the operation of [G.L. c. 59, § 18, cl. Second] relative to the assessment of corporate personal property is restricted to such property as is not exempted by [G.L. c. 59, § 5, cl. Sixteenth]."

The assessors placed particular emphasis on the fact that the appellant does not own every part of the Networks, opining that the appellant should not receive manufacturing exemption with respect to a Network that is, at least in part, owned and used by entities other than the appellant. The assessors, however, have provided no persuasive authority in support of their position. Further, as the Court stated in ***Boston Gas Company v. Assessors of Boston***, 334 Mass. 549, 565 (1956), "[t]here is no requirement that 'one great integral machine' be exclusively owned by a single company any more than that it be contained within the boundaries of a single municipality."

Finally, in their briefs, the assessors mounted a substantive, if not direct challenge to the appellant's manufacturing classification, arguing that the appellant's activities did not qualify as manufacturing. This argument, however, is foreclosed and was not before the Board. Pursuant to G.L. c. 58, § 2, the commissioner annually provides boards of assessors with a list of corporations that the commissioner has classified as manufacturing corporations. To receive this classification, a corporation must be engaged in manufacturing. *See* G.L. c. 63, § 42B. A corporation seeking manufacturing classification must file an application with the commissioner. 830 C.M.R. 58.2.1(7)(a). After a corporation files an application, the commissioner reviews the application and makes a determination as to whether the corporation is engaged in manufacturing. *See* 830 CMR 58.2.1(7)(c). The commissioner classifies all corporations determined to be engaged in manufacturing as manufacturing corporations. ***Id***.

General Laws c. 58, § 2 provides a mechanism to challenge a manufacturing classification made by the commissioner:

> Any person[6] aggrieved by any classification made by the commissioner under any provision of chapters fifty-nine and sixty-three or by any action taken by the commissioner under this section may, on or before April thirtieth of said year or the thirtieth day after such list is sent out by the commissioner, whichever is later, file an application with the appellate tax board on a form approved by it, stating therein the classification claimed.

[6] G.L. c. 58, § 2 provides that "[f]or the purpose of this section, 'person' shall include a board of assessors."

The assessors did not avail themselves of this mechanism for the times relevant to the fiscal year at issue, though they have done so with respect to the appellant's manufacturing classification effective January 1, 2016.[7] Consequently, the assessors only have standing to challenge the commissioner's classification and the manufacturing activities underlying that classification for later fiscal years not related to this appeal.

Conclusion

Based on the evidence presented, the Board found and ruled that the subject property, which was owned by the appellant, a corporation that was classified as a manufacturing corporation within the meaning of G.L. c. 63, §§ 39 and 42B, formed an essential part of a single integrated machine and was therefore exempt from property taxation pursuant to Clause 16(3). Accordingly, the Board issued a decision for the appellant in this appeal.

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

WAYLAND ROD & GUN CLUB, INC. v. BOARD OF ASSESSORS OF THE TOWN OF WAYLAND

Docket No. F330237

Promulgated:
September 13, 2018

ATB 2018-388

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 Wayland ("assessors" or "appellee") to abate a tax on certain real estate, located in the Town of Wayland, owned by and assessed to Wayland Rod & Gun Club, Inc. ("WRGC" or "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2016 ("fiscal year at issue").

[7] That appeal, ***Assessors of the City of Boston v. Commissioner of Revenue***, Docket No. C331142, is currently pending before the Board.

Chairman Hammond heard this appeal. He was joined in the decision for the appellee by Commissioners Scharaffa, Rose, Chmielinski, and Good.

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.

Stephen A. Garanin, Club President, for the appellant.

Mark J. Lanza, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

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

On January 1, 2015, the relevant assessment date for the fiscal year at issue, the appellant was the assessed owner of a 15.34-acre parcel of land improved with a 1,530-square-foot building located at 4 Meadow View Road in Wayland ("subject property"). For the fiscal year at issue, the assessors valued the subject property at $1,050,000, and assessed a tax thereon, at the rate of $17.34 per thousand, in the total amount of $18,462.90, inclusive of a Community Preservation Act surcharge.

The issue in this appeal was whether the subject property was exempt from tax under G.L. c. 59, § 5, Cl. Third ("Clause Third") as property owned and occupied by a charitable organization. The record showed that the appellant timely filed its Form 3ABC and a copy of its Form PC with the assessors. On January 28, 2016, the appellant timely filed an Application for Abatement with the assessors. By vote of the assessors on March 14, 2016, the assessed value was reduced to $381,000, and notice of the decision was sent to the appellant on March 16, 2016. Not satisfied with this abatement, the appellant filed its appeal with the Board on June 10, 2016. Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The subject property spans more than 15 acres, most of which are wooded, with grassy areas surrounding the improvements. The improvements on the subject property consist of a two-story brick building ("subject building"). The first floor of the subject building contains a large meeting room, and is used as the WRGC's lodge. The second floor contains a six-room apartment, which is used as the caretaker's residence. WRGC has always had a resident caretaker on the premises, in order to provide maintenance for the subject property as well as for security purposes, particularly during hours of darkness. The record indicated that the current

caretaker, Paul Ramsey, receives free lodging at the subject property in exchange for his work but he is not otherwise compensated.

The basement level of the subject building, though unfinished, has an indoor firing range, with two shooting positions. In addition, there is an outdoor firing range at the subject property, with five shooting positions.

The appellant was founded as the Waltham Rod and Gun Club in 1928. It was renamed to its current name in 1960. WRGC is a Massachusetts non-profit organization. According to its Restated Articles of Organization, filed with the Massachusetts Secretary of State, its purposes are:

> [T]o support conservation and preservation of the environment, open space and wild habitat; to promote and provide education of the sports of hunting, fishing, archery, and shooting; to cooperate and assist in the enforcement of fish and game laws; to introduce and assist in the passing of laws that may affect favorably the above; to promote more cordial relations between sportsmen and landowners; and to do such other things as the members attending a meeting may decide on by a vote... and [t]o carry on any other activity in support of and to benefit the above purposes as may be carried on by an organization described in Section 501(c)(3) of the Internal Revenue Code and by a corporation organized under Chapter 180 of the Massachusetts General Laws.

The Restated Articles of Organization also provide that

> [t]he house and grounds of the [WRGC] are available for use by any municipal, civic, fraternal or charitable organization associated with the Town of Wayland upon written request, subject to such regulations as shall be made by the Board of Governors of the [WRGC]. For safety reasons, this privilege shall not include use of the firing range unless associated with a [WRGC] function or otherwise approved by the Board of Governors.

Although the Restated Articles of Organization reference I.R.C. § 501(c)(3), the appellant is not designated as a charitable organization under I.R.C. § 501(c)(3). The record showed that the appellant applied to the Internal Revenue Service ("IRS") for such designation in 2006 but was rejected. Instead, in 2016, the IRS granted the appellant tax-exempt status under I.R.C. § 501(c)(4). That section applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4).

Information entered into the record indicated that, during the period relevant to this appeal, WRGC had approximately 170 members. Prospective members must pay a $200, non-refundable application fee. Thereafter, annual fees are $100 for individual memberships, $160 for family memberships, and $60 for senior memberships. The outdoor shooting range is open for shooting approximately 28 hours per week. WRGC members use the lodge for meetings.

WRGC offered programs and events for non-members as well as members, most of them related to firearms safety and proficiency. According to materials appended to the appellant's Application for Abatement, the firing range at the subject property is used by non-members approximately 17% of the time. The lodge is not open to the public as a general matter, but may be used by non-members upon request.

The record indicated that WRGC opened the subject property to various non-profit groups, such as the Boy Scouts, Wayland Police and Fire Department, the United States Fish and Wildlife Service, and AWARE (Arming Women Against Rape & Endangerment). WRGC did not charge civic or charitable groups for the use of the subject property.

The record also showed that WRGC used the subject property to host charitable events, such as the "Santa's Ride," held in conjunction with the Wayland Police Department, which served cookies and hot beverages and also functioned as a food drive, as well as a "Turkey Shoot" and "Spring Ham Shoot," which offered gift certificate prizes for "Lucky Shooters" and also functioned as a canned food drive for a local food pantry. There was no evidence in the record indicating the specific dates of these events, nor how many members of the public were in attendance for them. Similarly, there was no indication in the record as to the frequency of ongoing programs open to the public.

The appellant contended in this appeal that the subject property was continuously open to, and in fact used by, the public for general recreational activities such as hiking, fishing, or dog walking. However, the record did not indicate how the appellant made the public aware that it was welcome to use the subject property during the period relevant to this appeal.

To the contrary, photographs taken by the assessors during a site visit in October of 2015 showed several large signs discouraging public entrance upon the subject property. Specifically, a large, red sign on the gated entrance to the subject property stated: "Private Range: Members Only, Sign in at Clubhouse. Police Take Notice." An additional sign mounted to a tree stated "CAUTION – Firearms in Use – KEEP OUT," with another sign below stating "POSTED: Private Property. Hunting, fishing, trapping for any purpose is strictly forbidden. Violations will

be prosecuted."[1] Moreover, there was no evidence in the record documenting the frequency of use of the subject property by the public for general recreational purposes.

Ellen Brideau, who testified on behalf of the assessors at the hearing of this appeal, explained the reasons for the partial abatement for the fiscal year at issue. She explained that, based on observations made by the assessors during the aforementioned site visit, several changes were made to the subject property's record card to more accurately reflect its condition and amenities. For example, Ms. Brideau testified that the assessors increased the depreciation on the subject building, thereby lowering its value.

In addition, the assessors encouraged the appellant to seek classification as recreational land under G.L. c. 61B, § 1 ("Chapter 61B"). Such classification is available for parcels of land exceeding five acres in size and meeting other qualifications, such as being maintained in a substantially natural or wild state and used primarily for recreational purposes. Classification under Chapter 61B results in the land being taxed at a substantially reduced rate. The appellant heeded the assessors' advice, and applied for and received Chapter 61B classification for the subject property for the fiscal year at issue, which further reduced the assessment.

On the basis of all of the evidence, the Board found that the appellant's dominant function and use of the subject property was to offer a place for its members to gather, socialize, and use the subject property's firing ranges. This use was not primarily for public, charitable purposes, but for the private, recreational use of the appellant's members. As will be discussed further in the Opinion below, although the appellant provided evidence showing that it offered certain educational programming at the subject property and also allowed non-members, including various charitable organizations, to use the subject property, the record lacked specific information showing when, or how frequently, educational programming and use by the public occurred during the period relevant to this appeal.

Moreover, despite the appellant's stated purposes of supporting "conservation and preservation of the environment, open space and wild habitat," there was no indication in the record as to what steps the appellant took in furtherance of those purposes. Though the appellant maintained the subject property in a substantially natural and open condition, there was no evidence in the record showing active efforts on the part of the appellant to promote conservation

[1] Stephen Garanin, who is the President of WRGC, testified at the hearing that the signs photographed by the assessors have since been changed to signs merely cautioning the public that firearms are in use at the subject property.

and preservation at the subject property. There was nothing in the record to differentiate the use of the subject property in this respect from any other large, substantially natural parcel.

In addition, although the appellant contended that members of the public were welcome to, and did, make regular use of the subject property for fishing, hiking, dog walking, and other recreational activities, there was no indication in the record as to how the appellant advertised the availability of the subject property to the public, nor was there documentation of the frequency of such use of the subject property by members of the public. To the contrary, as shown on photographs introduced by the assessors, prominent signs displayed on the subject property during the period relevant to this appeal indicated that members of the public were prohibited from using the subject property.

Accordingly, on the basis of the evidence, the Board concluded that the appellant failed to establish that it was a charitable organization for purposes of Clause Third or that it occupied the subject property in furtherance of its charitable purposes. The Board thus found and ruled that the subject property was not exempt from taxation under Clause Third, and it therefore issued a decision for the appellee in this appeal.

OPINION

Clause Third provides in pertinent part that "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized" is exempt from taxation. There is no dispute here that WRGC owns the subject property. Therefore, to qualify for the exemption, WRGC must prove that (1) it is a charitable organization and (2) it occupies the subject property in furtherance of its stated charitable purposes. *See* ***Jewish Geriatric Services, Inc. v. Longmeadow***, Mass. ATB Findings of Fact and Reports 2002-337, 351, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing ***Assessors of Hamilton v. Iron Rail Fund of Girls Club of America***, 367 Mass. 301, 306 (1975)).

The burden of establishing entitlement to the charitable exemption lies with the taxpayer. ***New England Legal Found. v. Boston,*** 423 Mass. 602, 609 (1996). "Any doubt must operate against the one claiming an exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms." ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936). "'Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.'" ***Mass. Med. Soc'y v. Assessors of Boston,*** 340 Mass. 327, 331 (1960) (quoting ***Boston Chamber of Commerce v. Assessors of Boston,*** 315 Mass. 712, 718 (1944)).

An organization will be considered a charitable organization for the purposes of Clause Third if "the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose." ***Harvard Community Health Plan v. Assessors of Cambridge,*** 384 Mass. 536, 544 (1981) (quoting ***Mass. Medical Soc'y,*** 340 Mass. at 332). Factors developed by the courts over the years to determine if an organization is charitable include:

> whether the organization provides low-cost or free services to those unable to pay[;] whether it charges fees for its services and how much those fees are[;] whether it offers its services to a large or 'fluid' group of beneficiaries and how large and fluid that group is[;] whether the organization provides its services to those from all segments of society and from all walks of life[;] and whether the organization limits its services to those who fulfill certain qualifications and how those limitations help advance the organization's charitable purposes.

New Habitat, Inc. v. Tax Collector of Cambridge, 451 Mass. 729, 732-33 (2008) (citations omitted).

In ***New Habitat***, the Supreme Judicial Court offered a new "interpretive lens" through which to view Clause Third exemption claims. *See* ***Mary Ann Morse Healthcare Corp. v. Assessors of Framingham***, 74 Mass. App. Ct. 701, 703 (2009). Specifically, ***New Habitat*** "conditions the importance of previously established factors on the extent to which 'the dominant purposes and methods of the organization' are traditionally charitable." ***Mary Ann Morse Healthcare Corp.***, 74 Mass. App. Ct. at 703 (quoting ***New Habitat,*** 451 Mass. at 733). In other words, "[t]he closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in [the] interpretation of the organization's charitable status. ... The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be." ***Mary Ann Morse Healthcare Corp.***, 74 Mass. App. Ct. at 705.

The court in ***New Habitat,*** quoting language from a mid-nineteenth century case, characterized the "traditional objects and methods" of a Clause Third charity as follows:

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

New Habitat, 451 Mass. at 732 (emphasis added). An important factor to be considered in determining if an organization is operating as a public charity is "'whether it perform[s] activities

which advance the public good, thereby relieving the burdens of government to do so.'" ***Home for Aged People in Fall River v. Assessors of Fall River,*** Mass. ATB Findings of Fact and Reports 2011-370, 400 (quoting ***Sturdy Memorial Foundation v. Assessors of North Attleborough,*** Mass. ATB Findings of Fact and Reports 2002-203, 224, *aff'd,* 60 Mass. App. Ct. 573 (2004)). In ascertaining an organization's dominant purposes, it is necessary to look beyond the purposes recited in its articles of organization and examine whether it is "in fact so conducted that in actual operation it is a public charity." ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket,*** 320 Mass. 311, 313 (1946) (citations omitted).

Using these criteria, the Board found that WRGC's purposes and activities did not constitute traditionally charitable objects or methods. In spite of the purposes recited in its Restated Articles of Organization, the record showed that during the relevant time period, WRGC's dominant purpose was to offer a place for its members to gather, socialize, and make use of the subject property's firing ranges. The Board found that these purposes were more recreational or social in nature, rather than educational or otherwise traditionally charitable. *See* ***Marshfield Rod & Gun Club, Inc. v. Assessors of Marshfield,*** Mass. ATB Findings of Fact and Reports 1998-1130, 1136 (finding that the property of an organization was not exempt under Clause Third when its primary use was to provide "a place for its members to go and shoot"); ***Massachusetts Youth Soccer Association, Inc. v. Assessors of Lancaster,*** Mass. ATB Findings of Fact and Reports 2012-660, 670 (finding that property of an organization whose primary purpose was to promote interest and proficiency in the game of soccer was not exempt under Clause Third); ***Skating Club of Boston v. Assessors of Boston,*** Mass. ATB Findings of Fact and Reports 2007-193, 211 (finding that the property of a skating club with a stated purpose of promoting "interest in the art of skating" was not exempt under Clause Third). Although WRGC also allowed non-members to use the firing range with prior approval, and it did at times open the subject property to use by various governmental and charitable organizations, the Board found that these purposes were ancillary to the appellant's dominant purposes.

In addition, although the appellant cited the support of "conservation and preservation of the environment, open space and wild habitat," as being among its purposes, and such purposes have been recognized as being traditionally charitable, the Board found that the appellant failed to show how it actively furthered these objectives. *Contrast* ***New England Forestry Foundation, Inc. v. Assessors of Hawley***, 468 Mass. 138, 141 (2014) (ruling that property maintained in a substantially natural condition, but that was owned by a charitable organization that hired an independent, licensed forester, created a forest management plan, conducted

wildlife and vegetation inventories and oversaw the removal of poor-quality vegetation so as to promote the growth of healthy vegetation, was occupied in furtherance of that organization's charitable conservation purposes). Accordingly, because its dominant purpose was not charitable, the Board found and ruled that the appellant was not a charitable organization for purposes of Clause Third.

Even assuming arguendo that the Board found that the appellant was a charitable organization for purposes of Clause Third, the appellant was still required to show that it occupied the subject property in furtherance of its charitable purposes. As stated above, although the appellant cited conservation and preservation of wildlife as being among its charitable purposes, it failed to show how it used the subject property in furtherance of those purposes. It is clear that "'holding land in its natural pristine condition and thereby protecting wildlife habitats, filtering the air and water supply, and absorbing carbon emissions' undoubtedly provides some benefit to the public in general." ***Anna Harris Smith Foundation, Inc. v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2015-123, 141 (quoting ***New England Forestry Foundation,*** 468 Mass. at 152). However, "[s]imply keeping the land open ... is not enough to satisfy the requirement of 'occupying' the property within the meaning of the statute. Rather, there must be an 'active appropriation to the immediate uses of the charitable cause for which the owner was organized.'" ***Forges Farm, Inc. v. Assessors of Plymouth,*** Mass. ATB Findings of Fact and Reports 2007-1197, 1207 (citations omitted). Similarly, although the appellant claimed that the subject property was continuously open for use by, and in fact frequently used by, members of the public for such activities as hiking, fishing, and dog walking, it did not demonstrate how it made the public aware of the availability of the subject property or what steps it took to promote use of the subject property by the public. On the contrary, as discussed above, the record showed that, as of the relevant dates of valuation, prominent signage posted on the subject property discouraged the public from entering onto it. As the evidence of record indicated that the primary use of the subject property was by members of WRGC as a gathering place to meet, socialize, and engage in target shooting, and the Board found that these were not charitable activities for purposes of Clause Third, the Board found and ruled that the appellant did not occupy the subject property in furtherance of charitable purposes.

On the basis of all of the evidence and its subsidiary findings and rulings, the Board ultimately found and ruled that the appellant failed to meet its burden of proving that it was a charitable organization for purposes of Clause Third and that it occupied the subject property in furtherance of charitable purposes within the meaning of Clause Third.

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

THE APPELLATE TAX BOARD
By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,
Attest: _____
Clerk of the Board