**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**BRADFORD P. WYATT, TRUSTEE OF    v. BOARD OF ASSESSORS OF THE**

**18 GRAFTON STREET NOMINEE TRUST        CITY OF WORCESTER**

Docket Nos.: F318353 (FY 2012)

F319032 (FY 2013)

F323223 (FY 2014)

   F325963 (FY 2015) Promulgated:

  November 28, 2017

These are appeals under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee Assessor of the City Of Worcester (“Assessor” or “appellee”) to abate taxes on certain real estate in the City of Worcester assessed under G.L. c. 59, §§ 11 and 38 for fiscal years 2012 through 2015.

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Chmielinski, and Good joined him 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.

*Paul M. Novak, Esq.* for the appellant.

*John F. O’Day, Jr., Esq., Assistant City Solicitor,* for the appellee.

**FINDINGS OF FACT AND REPORT**

At the hearing of these appeals, Bradford P. Wyatt, Trustee of 18 Grafton Street Nominee Trust (the “appellant”) called two witnesses to testify: himself and a real estate valuation expert, James M. Curley, Jr. The appellant also entered twenty-nine exhibits into evidence, including an appraisal report prepared by William F. Curley, Jr. Associates and Mr. Curley’s amendments to it, the property record and income-valuation cards for the property at issue, as well as relevant income and expense reports for calendar years 2012, 2013, and 2014. The appellee did not present any witnesses but did enter six exhibits into evidence, including the requisite jurisdictional documents, as well as the deed for the May 21, 2015 sale of the subject property. Based on all the testimony and exhibits, and reasonable inferences drawn therefrom, the Appellate Tax Board (the “Board”) made the following findings of fact.

On January 1, 2011, 2012, 2013, and 2014, the valuation and assessment dates for fiscal years 2012, 2013, 2014, and 2015, respectively, the appellant was the assessed owner of a 32,020-square-foot, improved parcel of real estate located at 8-18 Grafton Street in the City of Worcester, identified for assessment purposes as Parcel 2-14-00011 (the “subject property”). The subject property is in the Washington Square section of Worcester on Grafton Street adjacent to the Union Station intermodal transportation center opposite the CSX freight railyard on Franklin Street and overlooking the I-290 overpass. The immediate neighborhood is a mix of older commercial and industrial uses interspersed with urban renewal projects proposed since the 1990s in various stages of completion. There is reasonable linkage to major roads and commerce. The subject property is in an area zoned BG-6 (General Business) in a mixed-use overlay district. The appellee classified the subject property with a land use code of 400 for “factory,” which is a permitted use within the zoning district.

The subject building is an eight-story, 169,304-square-foot, manufacturing structure built circa 1914 and known as the Osgood Bradley Building. The masonry structure was constructed to accommodate industry practices that are now obsolete. The first-floor ceiling is supported by massive columns, which decrease in size at each ascending level. The first floor has an 18-foot ceiling height while the other floors’ ceilings are 12 feet. The existing column spacing limits alternative development of the subject building.

During the relevant time period, approximately 3,000 square feet of space on the first floor was occupied by a lounge; approximately 9,000 square feet of space on the second floor was occupied by the appellant for industrial purposes; the third floor was unoccupied; the fourth floor was occupied by the appellant except for a small portion leased for storage; the fifth floor was unoccupied; a small room was occupied by a radio station on the sixth floor; the seventh floor was occupied by two manufacturing companies; and the eighth floor was approximately 50% occupied by a mailing operation. There were also three cell towers on the roof.[[1]](#footnote-1)

The floors are accessible by stairwells and a freight elevator, which requires a licensed operator. The main passenger elevator is not operational. The building is fully sprinklered and heated by two gas boilers located on the eighth floor. The existing heating system is so old and obsolete that none of the spaces or floors can be separately metered. Consequently, the appellant included heat in the rent. Even vacant spaces were heated to protect pipes from freezing. Separate utilities were provided, however, for the cell towers and the one tenant that requires high temperatures for a glass-blowing process.

The following table summarizes the assessed values, commercial tax rates, and tax assessments for the subject property for the fiscal years at issue:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Fiscal Year** | **2012** | **2013** | **2014** | **2015** |
| Assessed Value | $2,956,700 | $2,956,700 | $2,880,700 | $2,880,700 |
| Tax Rate/$1,000 | $29.07 | $30.85 | $30.83 | $31.73 |
| Tax Assessed | $85,951.27 | $91,214.20 | $88,811.98 | $91,404.61 |

In accordance with G.L. c. 59, § 57C, the appellant timely paid the assessed taxes without incurring interest.

The following table summarizes the dates upon which: the tax bills were mailed; the abatement applications were filed; the abatement applications were denied or deemed denied; and the appeals were filed at the Board.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Fiscal Year** | **2012** | **2013** | **2014** | **2015** |
| Tax Bills Mailed | 06/05/2012 | 12/31/2012 | 12/31/2013 | 12/31/2014 |
| Abatement Apps Filed | 06/08/2012 | 01/08/2013 | 01/15/2014 | 01/15/2015 |
| Abatement Apps Denied | 09/06/2012 | 04/01/2013 | 04/15/2014 | 04/11/2015 |
| Petitions Filed | 11/01/2012 | 04/25/2013 | 05/28/2014 | 04/27/2015 |

On the basis of these facts, the Board found and ruled that, in accordance with G.L. c. 59, §§ 59, 64, and 65, it had jurisdiction over these appeals.

The first witness to testify for the appellant was Bradford P. Wyatt, the trustee of the appellant nominee trust. He credibly discussed: the manufacturing history of the subject property; his near futile efforts to find tenants to lease space in or buyers to purchase the subject building; the many outdated and outmoded features of the subject property that made it difficult to lease or sell; the very limited parking on the subject property and nearby; the presence of and the significant costs associated with abating asbestos, PCBs, lead, and other hazardous substances in and on the subject property; the 24-hour truck and train vibrations and sounds emanating from the adjacent expressway and rail facility; the increasing crime rate in the subject property’s neighborhood; and the subject property’s relevant income and expense statements showing an unprofitable operation with significant costs and expenses. Mr. Wyatt also discussed his investigations into redeveloping the subject property for residential uses and the inherent financial risks and uncertainty for him to attempt to do so, as well as the inapplicability of certain state housing development incentive programs because of the subject property’s size and the programs’ size restrictions, which might otherwise have made redevelopment more financially feasible.[[2]](#footnote-2)

During cross-examination, Mr. Wyatt acknowledged that the subject property had been sold to a developer for $3.15 million on May 21, 2015, approximately a year and a half after the last relevant valuation and assessment date for these appeals. The sale had been contingent on, among other things, the developer/purchaser garnering certain financing approvals, historic tax credits and concessions, and a special permit from the City for the subject property’s future residential use, which the appellant finally acquired many months after the initial signing of the purchase and sale agreement and only after several tries. The original purchase and sale agreement was amended approximately fourteen times, and the appellant was not paid any earnest money until a month before the closing, and then only $25,000. Under new ownership, the subject property has been converted into student apartments.

In placing values on the subject property for the fiscal years at issue, the appellant relied upon James M. Curley, Jr., whom the parties stipulated to be and the Board qualified as a real estate valuation expert. Mr. Curley determined that the subject property’s highest and best use was its “existing commercial use” considering the “physical, functional, and economic constraints on adaptive reuse of the subject property.” With that highest and best use in mind, the original appraisal report valued the subject property using both sales-comparison and income-capitalization approaches, but did not develop a cost approach because of the nature and age of the subject building. Ultimately, Mr. Curley relied only on the income-capitalization methodology contained in his amendments to the appraisal report to value the subject property for the fiscal years at issue.[[3]](#footnote-3)

To develop values for the subject property using an income-capitalization technique, Mr. Curley first ascertained what he deemed to be appropriate rents. He considered: (1) a survey that he prepared of purportedly comparable Worcester properties, with rents ranging from $2.80 to $3.95 per square foot on a triple net basis and offerings ranging from $3.00 to $3.50 per square foot on a triple net basis; (2) the actual gross rents at the subject property, which averaged $2.00 per square foot; and (3) the $3.77 and $3.99 per square foot used by the assessor on his income valuation cards, which Mr. Curley had determined represented the blended rates for the fiscal years at issue. Based on these factors, Mr. Curley applied his own blended rate of $3.00 per square foot on a gross basis, which resulted in a potential gross income of $507,912 for the subject property’s 169,304-square-foot leasable area.[[4]](#footnote-4)

For his credit loss and vacancy factor, Mr. Curley testified that: (1) the owner of the subject property reported an actual vacancy of approximately 70%; (2) the assessor had used 29% or 30% on his income valuation cards based on citywide statistics; (3) the neighborhood where the subject property was located had a higher vacancy than the citywide percentage; and (4) 50% was “closer to historical norms.” On this basis, Mr. Curley adopted 50% as his credit loss and vacancy factor, resulting in an effective gross income of $253,956.

The assessor placed expenses at 25% of effective gross income on his income valuation cards. Based on his experience in appraising properties in the area and the subject property’s gross leasing scenario, Mr. Curley allotted expenses for: (1) insurance at $7,500; (2) maintenance at $0.60 per square foot, which equals $101,582.40; (3) management at 5% of effective gross income, which equals $12,697.80; and (4) administrative costs at 3% of effective gross income, which equals $7,618.68. These expenses totaled $129,398.88 or 51% of his effective gross income, which resulted in a net-operating income of $124,557.12.

Mr. Curley then divided his net-operating income by a 12% capitalization rate that he adopted from various market studies plus the appropriate tax factor for the fiscal year at issue.[[5]](#footnote-5) The assessor had used a loaded capitalization rate of 13.42% in his income valuation cards, which suggested a base capitalization rate of approximately 10.5%. After deriving his indicated values, Mr. Curley then added the assessed values of the cell towers to his indicated values to attain his total values for the subject property for the fiscal years at issue. The following table reproduces Mr. Curley’s valuation methodology for the fiscal years at issue.

**Mr. Curley’s Income-Capitalization Methodology**

**for Fiscal Years 2012, 2013, 2014, and 2015[[6]](#footnote-6)**

|  |
| --- |
| **INCOME** Size(SF) Rate/SF  Leasable Space 169,304 $3.00  **Potential Gross Income (“PGI”): $ 507,912** |
| |  |  | | --- | --- | | Less: Vacancy & Collection Allowance @ 50% of PGI | ($ 253,956) | |
| **Effective Gross Income (“EGI”): $ 253,956** |
|  |
| **EXPENSES** |
| Insurance $ 7,500  Maintenance @ 0.60/SF = $ 101,582  Management @ 5% of EGI = $ 12,698  Administrative @ 3% of EGI = $ 7,619  **Total Expenses:** $ 129,399 Ratio 51% ($ 129,399) |
|  |
| **Net-Operating Income: $ 124,557** |
|  |
| **Divide by: Capitalization Rate for FY 2012 – 12.00% + 0.02907 = 12.29%** |
|  |
| Indicated Value for FY 2012 $1,013,483  Rounded Value for FY 2012 $1,015,000  Plus Cell Tower FY 2012 Assessed Value $ 263,400  Total Value for FY 2012 $1,278,400  **Total Rounded Value for FY 2012 $1,280,000** |
| |  | | --- | |  | | **Divide by: Capitalization Rate for FY 2013 – 12.00% + 0.03085 = 12.31%** | |  | | Indicated Value for FY 2013 $1,011,837  Rounded Value for FY 2013 $1,010,000  Plus Cell Tower FY 2013 Assessed Value $ 395,100  Total Value for FY 2013 $1,405,100  **Total Rounded Value for FY 2013 $1,405,000**   |  | | --- | | **Divide by: Capitalization Rate for FY 2014 – 12.00% + 0.03083 = 12.31%** | |  | | Indicated Value for FY 2014 $1,011,837  Rounded Value for FY 2014 $1,010,000  Plus Cell Tower FY 2014 Assessed Value $ 395,100  Total Value for FY 2014 $1,405,100  **Total Rounded Value for FY 2014 $1,405,000** | | |  | | --- | |  | | **Divide by: Capitalization Rate for FY 2015 – 12.00% + 0.03173 = 12.32%** | |  | | Indicated Value for FY 2015 $1,011,016  Rounded Value for FY 2015 $1,010,000  Plus Cell Tower FY 2015 Assessed Value $ 395,100  Total Value for FY 2015 $1,405,100  **Total Rounded Value for FY 2015 $1,405,000** | | | |

Based on all the evidence and reasonable inferences drawn therefrom, the Board ultimately found that the appellant successfully proved that the subject property was overvalued for fiscal years 2012 through 2015. First, the Board found that the May 21, 2015 sale of the subject property was not particularly germane to its inquiry into finding the fair cash values of the subject property as of January 1, 2011, 2012, 2013 and 2014. The Board found that the sale was consummated almost a year and a half beyond the last relevant valuation and assessment date for the fiscal years at issue here. The Board further found that the purchase and sale contract controlling the sale was not only replete with challenging contingencies, but it had been amended fourteen times, suggesting continual problems and uncertainty fulfilling the terms and contingencies associated with the sale. Moreover, earnest money had not been deposited by the potential buyer until almost the eve of the closing and then the amount of that deposit was unusually low for a transaction of this magnitude. All these factors led the Board to conclude that the sale and conversion of the subject property had been highly speculative right up until the closing finally took place, and certainly as of the relevant valuation and assessment dates at issue in these appeals. Accordingly, the Board gave the sale virtually no weight in its determination of the subject property’s highest and best use and fair cash values for the fiscal years at issue.

Second, the Board agreed with Mr. Wyatt and Mr. Curley and found that the highest and best use of the subject property for the fiscal years at issue was its then existing use. The Board accepted Mr. Wyatt’s testimony that he had investigated repurposing the subject property during the fiscal years at issue but the timing was not optimal, the obstacles were somewhat overwhelming, and the subject property itself was not suitable for an easy remake. Accordingly, the Board found that, as of the relevant valuation and assessment dates, the possible future use of the subject property for student apartments was simply too speculative. The Board agreed with Mr. Curley and found that the income-capitalization approach was the best method to use to value the subject property for the fiscal years at issue.

In implementing its methodology, the Board found that a modified gross leasing scenario was appropriate for the subject property because of: its antiquated heating system necessitating the inclusion of heat in the rent; the landlord’s payment of real estate taxes and common area expenses; and at least some of the tenants’ payment of certain other costs associated with triple net leases. The Board also found that the blended rates that Mr. Curley attributed to the assessor - $3.99 for fiscal years 2012 and 2013 and $3.77 for fiscal years 2014 and 2015 - were based on and reflective of the market and were supported by other evidence in the record, including the survey of rents for reasonably comparable space prepared by Mr. Curley once the Board adjusted those triple net rents upward to bring them into equivalence with a modified gross leasing scenario.

Regarding credit loss and vacancy rate, the Board observed that the subject property experienced a 70% vacancy, the assessor used 29% or 30% on his income valuation cards, Mr. Curley suggested 50%, and the area where the subject property is located had a higher vacancy rate than Worcester’s citywide average. Based primarily on the assessor’s citywide rate and the evidence suggesting higher rates in the area where the subject property is located, the Board adopted 35% as its vacancy and credit loss rate.

The assessor placed expenses at approximately 25% of effective gross income, while Mr. Curley’s overall expense percentage was approximately 51% of effective gross income. In consideration of the rationales behind those percentages, particularly Mr. Curley’s, as well as the age, structural obsolescence, and antiquated heating system associated with the subject property’s building, plus the modified gross leasing scenario adopted here, the Board approved an expense percentage of 35% of effective gross income.

For his overall or total capitalization rate, Mr. Curley used 12% plus the applicable tax factor for each of the fiscal years at issue.[[7]](#footnote-7) On his income valuation cards, the assessor used a loaded capitalization rate of 13.42%, which breaks down into a base rate of approximately 10.5% plus the tax factor for each of the fiscal years at issue. For its methodology, the Board adopted a base capitalization rate of 11% because it better reflected the risk associated with the subject property’s location, condition, and size than the assessor’s 10.5% did and it also better accounted for the subject property’s potential than Mr. Curley’s 12% did. Just as Mr. Curley and the assessor had done, and consistent with its modified gross leasing scenario, the Board added the appropriate tax factor to its base capitalization rate for each of the fiscal years at issue. By dividing its net income by its loaded capitalization rates, the Board found the following indicated values for the subject property prior to adding in values for the cell towers:

|  |  |  |  |
| --- | --- | --- | --- |
| **Fiscal Year 2012** | **Fiscal Year 2013** | **Fiscal Year 2014** | **Fiscal Year 2015** |
| $ 2,052,265 | $ 2,026,333 | $ 1,914,869 | $ 1,902,709 |

Consistent with Mr. Curley’s methodology and the assessor’s approach on his income valuation cards, the Board then added the assessed values for the cell towers to these indicated values to obtain its total value for the subject property for the fiscal years at issue as depicted below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Fiscal Year**  **2012** | **Fiscal Year**  **2013** | **Fiscal Year**  **2014** | **Fiscal Year**  **2015** |
| **Indicated Value** | $ 2,052,265 | $ 2,026,333 | $ 1,914,869 | $ 1,902,709 |
| **Cell Tower Value** | $ 263,400 | $ 395,100 | $ 395,100 | $ 395,100 |
| **Total Value** | $ 2,315,665 | $ 2,421,433 | $ 2,309,969 | $ 2,297,809 |
| **Total Rounded Value** | **$ 2,315,000** | **$ 2,420,000** | **$ 2,310,000** | **$ 2,300,000** |

The following two tables summarize the Board’s income-capitalization methodology for the fiscal years at issue:

**Summary of the Board’s Income-Capitalization Methodology**

**for Fiscal Years 2012 and 2013**

|  |
| --- |
| **INCOME** Size(SF) Rate/SF  Leasable Space 169,304 $3.99  **Potential Gross Income (“PGI”): $ 675,523** |
| |  |  | | --- | --- | | Less: Vacancy & Collection Allowance @ 35% of PGI | ($ 236,433) | |
| **Effective Gross Income (“EGI”): $ 439,090** |
|  |
| **EXPENSES** |
| @ 35% of effective gross income ($ 153,681) |
|  |
| **Net-Operating Income: $ 285,409** |
|  |
| **Divide by: Capitalization Rate for FY 2012 – 11.00% + 2.907% = 13.907%** |
|  |
| Indicated Value for FY 2012 $2,052,269  Plus Cell Tower FY 2012 Assessed Value $ 263,400  Total Value for FY 2012 $2,315,669  **Total Rounded Value for FY 2012 $2,315,000** |
| |  | | --- | |  | | **Divide by: Capitalization Rate for FY 2013 – 11.00% + 3.0855 = 14.085%** | |  | | Indicated Value for FY 2013 $2,026,333  Plus Cell Tower FY 2013 Assessed Value $ 395,100  Total Value for FY 2013 $2,421,433  **Total Rounded Value for FY 2013 $2,420,000** | |

**Summary of the Board’s Income-Capitalization Methodology**

**for Fiscal Years 2014 and 2015**

|  |
| --- |
| **INCOME** Size(SF) Rate/SF  Leasable Space 169,304 $3.77  **Potential Gross Income (“PGI”): $ 638,276** |
| |  |  | | --- | --- | | Less: Vacancy & Collection Allowance @ 35% of PGI | ($ 223,397) | |
| **Effective Gross Income (“EGI”): $ 414,879** |
|  |
| **EXPENSES** |
| @ 35% of effective gross income ($ 145,208) |
|  |
| **Net-Operating Income: $ 269,671** |
| |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | | |  | | --- | | **Divide by: Capitalization Rate for FY 2014 – 11.00% + 3.083 = 14.083%** | |  | | Indicated Value for FY 2014 $1,914,869  Plus Cell Tower FY 2014 Assessed Value $ 395,100  Total Value for FY 2014 $2,309,969  **Total Rounded Value for FY 2014 $2,310,000** | | |  | | --- | |  | | **Divide by: Capitalization Rate for FY 2015 – 11.00% + 3.173 = 14.173%** | |  | | Indicated Value for FY 2015 $1,902,709  Plus Cell Tower FY 2015 Assessed Value $ 395,100  Total Value for FY 2015 $2,297,809  **Total Rounded Value for FY 2015 $2,300,000** | | | |

On this basis, the Board found that the subject property was overvalued for all fiscal years at issue in these appeals and, therefore, decided these appeals for the appellant and granted tax abatements as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Docket Number** | **F318353** | **F319032** | **F323223** | **F325963** |
| **Fiscal Year** | **2012** | **2013** | **2014** | **2015** |
| **Assessed Value** | $2,956,700 | $2,956,700 | $2,880,700 | $2,880,700 |
| **Fair Cash Value** | $2,315,000 | $2,420,000 | $2,310,000 | $2,300,000 |
| **Over-Valuation** | $ 641,700 | $ 536,700 | $ 570,700 | $ 580,700 |
| **Tax Rate/$1,000** | $29.07 | $30.85 | $30.83 | $31.73 |
| **Tax Abatement** | $18,654.22 | $16,557.20 | $17,594.68 | $18,425.61 |

**OPINION**

Assessors are required to assess real estate at its fair cash value as of the first day of January preceding the start of the fiscal year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both are fully informed and under no compulsion. ***Boston Gas Company v. Assessors of Boston***, 334 Mass. 549, 566 (1956).

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

In appeals before this Board, a taxpayer “‛may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.’” ***General Electric Co.,*** 393 Mass. at 600 (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)). In the present appeals, the appellant attempted to prove overvaluation by introducing affirmative evidence of the subject property’s condition, marketability, use, and potential use, as well as its value based on the report, amendments, and opinion of value developed by the appellant’s real estate valuation expert using an income-capitalization approach.

“Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most.” ***Tennessee Gas Pipeline Co. v. Assessors of Agawam***, Mass. ATB Findings of Fact and Reports 2000-859, 875 (citing ***Conness v. Commonwealth***, 184 Mass. 541, 542-43 (1903); ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989)(and the cases cited therein). According to the authoritative valuation treatise, Appraisal Institute, The Appraisal of Real Estate 277-78(13th ed. 2008), highest and best use is defined as “[t]he reasonably probable and legal use . . . that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” That use, however, must be “the most sensible and reasonable use, one which must be .  . . a reasonable, likely-to-be, [and] probable use of the premises.” ***Wenton v. Commonwealth***, 335 Mass. 78, 81-82; *see* *also* ***D.S.M. Realty, Inc. v. Assessors of Andover***, Mass. ATB Findings of Fact and Reports 1983-43, 49-50, *aff’d*, 391 Mass. 1014 (1984). Accordingly, the proposed use must not be unduly speculative, having no direct relationship to market value as of the relevant valuation and assessment dates.  *See* ***Aselbekian v. Mass. Tpke. Auth.***, 341 Mass. 398, 400-01 (1960). The Board found here that the highest and best of the subject property for the fiscal years at issue was its existing use and its possible future use for student apartments was simply too speculative as of the relevant valuation and assessment dates.

Actual sales of the subject property generally “furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 682 (1982); ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 469 (1981); ***First National Stores, Inc. v. Assessors of Somerville***, 358 Mass. 554, 560 (1971). However, the sales must be within a “reasonable time of the assessment date [to provide] credible data and information for determining the value of the property.” ***Giard v. Assessors of Colrain***, Mass. ATB Findings of Fact and Reports 2009-123 (citing ***McCabe v. Chelsea***, 265 Mass. 494, 496 (1929)).

The Board found here that the May 21, 2015 sale of the subject property was not particularly germane to the value of the subject property. The Board found that the sale was consummated almost a year and a half beyond the last relevant valuation and assessment date for the fiscal years at issue. The Board further found that the purchase and sale contract controlling the sale was not only replete with challenging contingencies, but it had been amended fourteen times suggesting continual problems and uncertainty fulfilling the terms and contingencies associated with the sale. Moreover, earnest money had not been deposited by the potential buyer until almost the eve of the closing and then the amount of that deposit was unusually low for a transaction of this magnitude. All these factors led the Board to conclude that the sale and conversion of the subject property had been highly speculative right up until the closing finally took place, and certainly as of the relevant valuation and assessment dates for the fiscal years at issue in these appeals. Accordingly, the Board gave the sale virtually no weight in its determination of the subject property’s highest and best use and fair cash values for the fiscal years at issue.

“The board is not required to adopt any particular method of valuation,” ***Pepsi-Cola Bottling Co. v. Assessors of Boston***, 397 Mass. 447, 449 (1986), but the income-capitalization method “is frequently applied with respect to income-producing property.” ***Taunton Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). Use of the income-capitalization method is appropriate when, like here, 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***, 363 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consol. Gas Co.***, 309 Mass. 60, 67 (1942).

Under the income-capitalization approach, valuation is determined by dividing net-operating income by a capitalization rate. *See* ***Assessors of Brookline v. Buehler***, 396 Mass. 520, 522-23 (1986). Net-operating income is obtained by subtracting market expenses from a market-derived gross income. ***Id.*** at 523. The capitalization rate should reflect the return on investment necessary to attract capital. ***Taunton Redev. Assocs.***, 393 Mass. at 295. Generally, it is appropriate to add a tax factor to the capitalization rate in most multiple tenant scenarios because the landlord is assumed to be responsible for paying the real estate taxes, and the tenant’s contribution toward the real estate tax, if any, is included in the landlord’s gross income. ***Id.*** at 295-96.

In the present appeals, the Board found and ruled that the capitalization of net income was the best method for determining the fair cash value of the subject property for the fiscal years at issue. In implementing this approach, the Board relied on the best available evidence in selecting its leasing scenario, market rents, vacancy and credit loss, and expenses, as well as its loaded capitalization rates. Both parties agreed on the values that the cell towers added to the subject property’s values, and the Board adopted those amounts.

“‘The board [i]s not required to accept the opinion expressed, or the valuation principles used by [an expert witness.]’” ***Foxboro Associates,*** 385 Mass. at 683 (citation omitted). Rather, “[t]he essential requirement is that the Board exercise judgment.” ***New Boston Garden Corp.***, 383 Mass. at 473. The Board may rely upon any method of valuation that is reasonable and supported by the record.” ***Analogic Corp. v. Assessors of Peabody***, 45 Mass. App. Ct. 605, 609 (1998) (quoting ***Blakely v. Assessors of Boston***, 391 Mass. 473, 477 (1984)). The Board found and ruled here that the evidence sufficiently supported its use of an income-capitalization approach to determine the value of the subject property for the fiscal years at issue.

In reaching its opinion of fair cash value, the Board was not required to believe the testimony of any particular witness. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. ***Foxboro Associates***, 385 Mass. at 682; ***New Boston Garden Corp.***, 383 Mass. at 469. “The credibility of witnesses, the weight of evidence, and the inferences to be drawn from the evidence are matters for the Board.” ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977).

On this basis, the Board decided these appeals for the appellant and granted tax abatements in the amounts of $18,654.22, $16,557.20, $17,594.68, and $18,425.61 for fiscal years 2012 through 2015, respectively.

**THE APPELLATE TAX BOARD**

### By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

#### Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Clerk of the Board

1. The right to the income from the cell towers had been previously sold to a third party. [↑](#footnote-ref-1)
2. The evidence reveals that those size restrictions were lifted sometime after the last valuation and assessment date relevant to these appeals. [↑](#footnote-ref-2)
3. The original appraisal report had been prepared for fiscal year 2012 only by an associate of Mr. Curley. Mr. Curley submitted into evidence his amendments to that original appraisal report to update the subject property’s appraised value for fiscal year 2012 and to include values for fiscal years 2013 through 2015. Mr. Curley’s estimates of the subject property’s values also incorporated values for the cellular communications facilities on the roof of the subject property, which the original appraisal report had not done. [↑](#footnote-ref-3)
4. The blended rate, which is a weighted average, proportionally combines the rents for the office, warehouse, factory, and retail space here, by each category’s square footage. [↑](#footnote-ref-4)
5. Mr. Curley did not properly add each fiscal year’s tax factor to his associated capitalization rate. Had he done so, his overall capitalization rates would have been: 14.907%, 15.085%, 15.083%, and 15.173% for fiscal years 2012 through 2015, respectively. These corrected overall rates would have led to indicated and likely total rounded values of $855,560 and $1,120,000, respectively, for fiscal year 2012, $825,701 and $1,220,000, respectively, for fiscal year 2013, $825,810 and $1,220,000, respectively, for fiscal year 2014, and $820,912 and $1,215,000, respectively, for fiscal year 2015. [↑](#footnote-ref-5)
6. *See* footnote 5, *supra*. [↑](#footnote-ref-6)
7. *See* footnote 5, *supra*. [↑](#footnote-ref-7)