COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

# IPERS TAUNTON CROSSING and v.        BOARD OF ASSESSORS OF

# RK TAUNTON CROSSING LLC        THE CITY OF TAUNTON

Docket Nos. F326631, F329314,      Promulgated:

 F332482                       January 18, 2019

These are appeals heard 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 Taunton (“appellee” or “assessors”) to abate taxes on a certain parcel of real estate located in Taunton for fiscal years 2015, 2016, and 2017 (“fiscal years at issue”), owned by and assessed to IPERS Taunton Crossing (“IPERS”) for fiscal years 2015 and 2016, and subsequently owned by and assessed to RK Taunton Crossing LLC (“RK”) (IPERS and RK collectively “appellants”) for fiscal year 2017.

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

 *Richard L. Wulsin*, Esq. and *Rachel A. Wulsin*, Esq. for the appellants.

 *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 these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

These appeals pertain to a 7.5-acre parcel of land with an address of 9 Mozzone Boulevard (“subject property”). The subject property is improved with a multi-tenant retail property containing 84,658 square feet of gross leasable space. At all times relevant to these appeals, the subject property’s tenants were: T.J. Maxx as the anchor tenant; Michaels; Pier 1 Imports; and Office Depot. Although the subject property was fully leased, the Office Depot store was vacated in 2009.[[1]](#footnote-1) There was also a freestanding automatic teller machine (“ATM”) kiosk.

 As of January 1, 2014, and January 1, 2015, IPERS was the assessed owner of the subject property. As of January 1, 2016, RK was the assessed owner of the subject property. On November 2, 2015, RK purchased the existing note and mortgage on the subject property from State Farm Life Insurance Company for $4,550,000. RK then took a deed in lieu of foreclosure from IPERS. Although the stated consideration on the deed was $9,200,000, this amount represented the forgiveness of the $9,200,000 outstanding balance on the mortgage. The parties stipulated that RK paid $4,550,000 to acquire the subject property. Relevant jurisdictional facts are summarized in the following table:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Fiscal Year** | **Assessed Value** | **Tax Amount****Tax Rate** | **Taxes Timely Paid****(Y/N)** | **Abatement Application Filed** | **Date of Denial** | **Date Petition Filed With Board** |
| **2015** | $10,032,000  | $333,564 $33.25/$1,000 | Y | 02/04/2015[[2]](#footnote-2) | 03/05/2015 | 06/01/2015 |
| **2016** | $ 8,690,100 | $294,942$33.94/$1,000 | Y | 01/25/2016 | 02/05/2016 | 04/28/2016 |
| **2017** | $ 8,714,700 | $302,400$34.70/$1,000 | Y | 01/26/2017 | 02/09/2017 | 04/28/2017 |

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

The appellants presented their case through the testimony and appraisal report of Matthew G. Pattison, certified general real estate appraiser, whom the Board qualified as an expert in the area of commercial real estate valuation.

Mr. Pattison first determined that the subject property’s highest and best use was its continued use as a multi-tenant retail property.

Mr. Pattison next considered the three approaches to value: the cost approach, the sales-comparison approach, and the income-capitalization approach. He did not develop the cost approach, opining that this approach is most reliable for newer properties that have no significant accrued depreciation. Mr. Pattison also did not develop the sales-comparison approach, opining that this approach is more appropriate for valuing leased-fee interests, but that he was analyzing the subject property’s fee-simple market value. Mr. Pattison thus developed only the income-capitalization approach, finding that this method is usually given the greatest weight when evaluating investment properties.

Mr. Pattison performed a market-rental analysis to determine market rents. For his analysis, Mr. Pattison differentiated between anchor space and junior anchor/mid-size space. For anchor space, he selected four purportedly comparable properties, each in a different county - Plymouth, Bristol, Worcester, and Norfolk - and ranging in size from 24,602 to 43,143 square feet. The leases ranged from $7.75 to $10.00 per square foot. For junior anchor and mid-size space, Mr. Pattison selected four purportedly comparable properties, two in Bristol County, one in Norfolk County, and one in Plymouth County, and ranging in size from 7,583 to 15,775 square feet. Mr. Pattison made adjustments to his comparables for differences in location, quality, and age as compared with the subject property. He also considered the subject property’s rent roll, including rents under renewal leases. Based on his analysis, Mr. Pattison selected $8.00 per square foot for the anchor space occupied by T.J. Maxx, $9.00 per square foot for the junior anchor spaces renewed by Michaels and Office Depot, and $10.00 per square foot for the mid-size space occupied by Pier 1.

Mr. Pattison next analyzed expenses. Mr. Pattison testified that he estimated operating expenses based in part on data from unidentified properties as reported in his company’s database. He testified that his company’s appraisers would enter income and expense data from completed appraisals into a company-wide database. Mr. Pattison did not reveal the sources of this data. In fact, he admitted with respect to several of his expenses that he did not know precisely where they came from but that they were a “generic” figure from the company’s database and “a typical figure used by appraisers.” Mr. Pattison concluded that a 10 percent vacancy factor was appropriate based on his database research.

For his capitalization rate, Mr. Pattison looked to national investor surveys for retail properties as well as developing a band-of-investment analysis. Based on his research, Mr. Pattison selected a base capitalization rate of 9 percent, to which he added 10 percent of the applicable tax rate for each fiscal year at issue to reflect the landlord’s obligation for real estate taxes on the vacant portion of the subject property.

The appellee did not present an affirmative case but instead rested on the validity of the assessments. However, the property record cards for the subject property were admitted into evidence. These cards included an income-capitalization analysis. The Board noted that, for fiscal year 2015, the property record card reflected a value of $8,866,775 derived from the income-capitalization analysis for the subject property, yet the assessment for that fiscal year was $10,032,000.

On the basis of the evidence, the Board agreed with Mr. Pattison and found that the subject property’s highest and best use was its current use as a retail shopping plaza with an anchor store and an ATM kiosk.

The appellants did not argue that the sale price was a reliable indicator of fair market value, and with good reason, because the circumstances of the sale suggest compulsion. In any event, the sale price was influenced by the existing leases in the subject property.

The Board next found that the appellants did not present persuasive evidence of market-value rents. Mr. Pattison distinguished between anchor space, junior anchor space, and mid-size tenant space. Mr. Pattison’s anchor space comparable-lease properties ranged from $7.75 to $10.00 per square foot, but the Board found most of his comparable leases to be inferior to the subject property, primarily because the subject property had a superior location. The Board, however, agreed with Mr. Pattison that anchor tenants tend to command a lower rent because of their importance to enticing and retaining leases at a property. Considering the evidence before it, including the current lease for the subject property’s anchor tenant, the Board found that the market-rate rent for the 32,300 square feet of anchor space should be $10.00 per square foot, the higher end of Mr. Pattison’s range of rents for anchor tenants.

The Board next categorized the remaining tenants as simply non-anchor, rather than junior anchor and mid-size tenant. Having categorized all non-anchor retail space together, the Board then weighed Mr. Pattison’s purportedly comparable leases, which the Board found inferior based on their locations and finishes. The Board also found that the subject property’s actual non-anchor leases were relevant to determining a fair market rent. The Board, therefore, found that the market rent for the subject property’s remaining 52,358 square feet of non-anchor retail space should be $13.25 per square foot.

Also with respect to the subject property’s income, the Board found that Mr. Pattison presented credible evidence on the income brought in by the ATM kiosk. The Board thus found that $29,768 should be added as an item of miscellaneous gross income in each fiscal year at issue.

With respect to vacancy, the Board was not persuaded by Mr. Pattison’s 10 percent vacancy rate but instead adopted an 8 percent rate for the subject property’s retail space and a 5 percent rate for the ATM kiosk.

Next, the Board found that Mr. Pattison’s operating expenses were simply extracted from general database sources and included no supporting detail specific to the subject property. The Board thus found that the appellants failed to meet their burden of proof on appropriate net operating expenses and instead adopted the appellee’s operating expenses of 22 percent for the retail space and 15 percent for the ATM kiosk.

For the capitalization rate, the Board found that Mr. Pattison adequately supported a base capitalization rate of 9 percent for fiscal years 2015 and 2016. However, based on surveys summarized and relied upon by Mr. Pattison, the Board noted a decline in capitalization rates from fiscal year 2016 to 2017. The Board thus adopted a lower base capitalization rate of 8.75 percent for fiscal year 2017. The Board further found that the base capitalization rate should be loaded with a pro rata portion of the tax rate to account for the landlord’s obligation to pay real estate taxes on the vacant portions of the subject property. The Board’s loaded capitalization rate accounted for the blended vacancy rates of the retail space and the ATM kiosk.

After applying the above factors, the Board found that the following rounded values were appropriate fair market values for the subject property: $8,157,000 for fiscal year 2015; $8,152,000 for fiscal year 2016; and $8,373,000 for fiscal year 2017.

The Board thus issued a decision for the appellants and granted abatements as follows: $62,343.75 for fiscal year 2015; $18,263.11 for fiscal year 2016; and $11,856.99 for fiscal year 2017.

**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. ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. ***Id.*** If the property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of its fair market value. ***Colonial Acres, Inc. v. North Reading***, 3 Mass. App. Ct. 384, 386 (1975). The Board found and ruled that the highest and best use of the subject property during the fiscal years at issue was its existing use as a shopping center with a national retail anchor tenant.

Actual sales of the subject property generally provide “very strong evidence of fair market value, for they represent what a buyer has been willing to pay to a seller for [the] particular property [under appeal].” ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 469 (1981) (quoting ***First National Stores, Inc. v. Assessors of Somerville,*** 358 Mass. 554, 560 (1971)). However, circumstances may significantly diminish the evidentiary weight accorded to the sale of the subject property. *See* ***Foxboro Assocs. v. Assessors of Foxborough***, 385 Mass. 679, 682-83 (1982). “[T]he evidentiary value of . . . sales in less than arm’s-length transactions is diminished.” ***New Boston Garden Corp.,*** 383 Mass. at 469(quoting[***Jordan Marsh Co. v. Assessors of Malden***, 359 Mass. 106, 108 (1971)](http://www.lexis.com/research/buttonTFLink?_m=84148fdab1cfffe9dde12c90d94bf116&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b383%20Mass.%20456%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=42&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b359%20Mass.%20106%2c%20108%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=7&_startdoc=1&wchp=dGLbVzk-zSkAz&_md5=91a03a4066d0a5850641e9baf7575d1d)). Therefore, the circumstances surrounding actual sales of the subject property must be examined. *See* ***Pepsi-Cola Bottling Co. v. Assessors of Boston,*** 397 Mass. 447, 449 (1986). The burden of proof that a sale price was fixed fairly rests with the proponent of the sale. *See****Epstein v. Boston Housing Authority***, 317 Mass. 297, 300-01 (1944).

In the instant appeals, there was a sale of the subject property during the relevant time period. However, the sale to RK involved a deed in lieu of foreclosure and was thus not, in the absence of contrary evidence, reliable or persuasive evidence of fair cash value. *See, e.g*., ***Glowacki v. Assessors of Upton***, Mass. ATB Findings of Fact and Reports 2013-685, 694 (quoting ***DSM Realty, Inc. v. Assessors of Andover,*** 391 Mass. 1014 (1984) (“A foreclosure sale inherently suggests a compulsion to sell.”); *see also* ***Finigan v. Assessors of Belmont***, Mass. ATB Findings of Fact and Reports 2004-533, 544 and ***Waters v. Assessors of Wayland***, Mass. ATB Findings of Fact and Reports 2001-460, 469.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. ***Correia v. New Bedford Redevelopment Authority,*** 375 Mass. 360, 362 (1978). “The board is not required to adopt any particular method of valuation.” ***Pepsi-Cola Bottling Co.,*** 397 Mass. at 449. However, the income capitalization method “is frequently applied with respect to income-producing property.” ***Taunton Redevelopment Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984).

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). 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* ***Pepsi-Cola Bottling Co****.*, 397 Mass. at 451.  In determining the earning capacity of the subject property, rents may be used only if they reflect fair market rents. ***Alstores Realty Corp. v. Assessors of Peabody***, 391 Mass. 60, 68 (1984); ***Library Services, Inc. v. Malden Redevelopment Authority***, 9 Mass. App. Ct. 877, 878 (1980).

In the instant appeals, the Board agreed with Mr. Pattison that anchor tenants tend to command a lower rent and therefore separately analyzed anchor and non-anchor leases. However, most of Mr. Pattison’s purportedly comparable properties were inferior to the subject property, particularly with respect to location. The Board also found that the subject property’s actual leases were relevant to determining a fair market rent. Finally, the Board found credible and thus adopted Mr. Pattison’s figure for income brought in by the ATM kiosk. “Choosing an appropriate gross income figure for establishing an income stream was within the board’s discretion and expertise.”***Fox Ridge Assocs. v. Assessors of Marshfield***, 393 Mass. 652, 654 (1984).

The Board next adopted the appellee’s vacancy expenses for the subject property’s retail space and the ATM kiosk. 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 also* ***Olympia & York State Street Co. v. Assessors of Boston***, 428 Mass. 236, 245 (1998). The Board was unpersuaded by Mr. Pattison’s expenses, which were simply extracted from general database sources and included no supporting detail specific to the subject property. The Board instead adopted the appellee’s operating expenses.

Next, the capitalization rate selected should consider the  return necessary to attract investment capital. ***Taunton Redevelopment Assocs.,*** 393 Mass. at 295. The Board found that Mr. Pattison credibly supported his 9 percent base capitalization rate for fiscal years 2015 and 2016. However, the Board noted a decline in capitalization rates, as reported in surveys relied upon by Mr. Pattison, from fiscal year 2016 to 2017. The Board thus adopted a base capitalization rate of 8.75 percent for fiscal year 2017. Next, in an income-capitalization approach based on triple-net leases, an appropriate pro rata portion of the tax factor is used to take into account the landlord’s responsibility for paying taxes on the vacant portion of the subject property. See Market Forge Industries, Inc. v. Assessors of Everett, Mass. ATB Findings of Fact and Reports 2014-186, 201. The Board’s loaded capitalization rate accounted for the blended vacancy rates of the retail space and the ATM kiosk.

The Board need not specify the exact manner in which it arrived at its valuation. ***Jordan Marsh Co.***, 359 Mass. at 110. “The market value of the property [can] not be proved with mathematical certainty and must ultimately rest in the realm of opinion, estimate, and judgment . . . . The board [can] select the various elements of value as shown by the record and from them form . . . its own independent judgment.” ***Assessors of Quincy v. Boston Consolidated Gas Co.,*** 309 Mass. 60, 72 (1941). *See also* ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984); ***New Boston Garden Corp.***, 383 Mass. at 473; ***Jordan Marsh Co.***, 359 Mass. at 110. “The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the Board.” ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977).

The Board found that the following rounded values were appropriate fair market values for the subject property: $8,157,000 for fiscal year 2015; $8,152,000 for fiscal year 2016; and $8,373,000 for fiscal year 2017.

Accordingly, the Board issued a decision for the appellants and granted abatements as follows: $62,343.75 for fiscal year 2015; $18,263.11 for fiscal year 2016; and $11,856.99 for fiscal year 2017.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

**Attest: \_\_\_\_\_­­­­\_\_\_**

 **Clerk of the Board**

1. Office Depot continued to pay rent on its vacated space through the expiration of its ten-year lease in May 2016. [↑](#footnote-ref-1)
2. For fiscal year 2015, the due date for payment of the first installment of the actual tax bill without incurring interest, and therefore, the due date of abatement applications, was February 6, 2015. *See* St. 2015, c. 10, § 62 (extending the due dates for fiscal year 2015 due to a severe blizzard on the initial due date). [↑](#footnote-ref-2)