**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**JELLE, LLC  v.   BOARD OF ASSESSORS OF**

 **THE TOWN OF WILMINGTON**

Docket Nos. F318966 (FY 2013) Promulgated:

 F323298 (FY 2014) March 23, 2018

 These are appeals filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Wilmington (“appellee” or “assessors”) to abate taxes on certain real estate in Wilmington, owned by and assessed to Jelle, LLC (“appellant”), under G.L. c. 59, §§ 11 and 38, for fiscal years 2013 and 2014 (“fiscal years at issue”).

 Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa 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.

 *Matthew A. Luz,* Esq. for the appellant.

*John Richard Hucksman,* Esq. for the appellee.

**Findings of Fact and Report**

On the basis of the testimony, expert reports, and other exhibits introduced at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

On 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 4.245-acre parcel of real estate located at 54 Industrial Way in Wilmington (“subject property”). For assessment purposes the subject property is identified on the assessors’ map 46 as parcel number 101 and is located in the southern part of Wilmington near the Woburn town line, in close proximity to Interstate 93. The subject property is an irregular but somewhat rectangular-shaped parcel of land located at the intersection of Industrial Way and Woburn Street, with frontage on both roads. The subject property is improved with a single-story, owner-occupied, industrial-use building containing 54,780 square feet of gross building area (“subject building”). The subject building is a steel and masonry structure constructed on a concrete slab foundation at tailgate level, which was designed for industrial warehouse use with ancillary office space.

For fiscal year 2013, the assessors valued the subject property at $2,387,200 and assessed a tax thereon, at the rate of $32.08 per thousand, in the total amount of $76,581.38. On December 28, 2012, the Collector sent out the town’s actual real estate tax bill. In accordance with G.L. c. 59, § 57C, the appellant paid the tax due without incurring interest. On January 13, 2013, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which they denied on April 10, 2013. On April 22, 2013, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

For fiscal year 2014, the assessors valued the subject property at $2,387,400 and assessed a tax thereon, at the rate of $33.04 per thousand, in the total amount of $78,879.70. On December 30, 2013, the Collector sent out the town’s actual real estate tax bill. In accordance with G. L. c. 59, § 57C, the appellant paid the tax due without incurring interest. On January 28, 2014, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which they denied on March 13, 2014. On June 3, 2014, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

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

In support of its claim that the subject property was overvalued for the fiscal years at issue, the appellant presented the testimony and appraisal report of Eric Wolff, whom the Board qualified as an expert in the area of real estate valuation. To develop a value for the subject property for the fiscal years at issue, Mr. Wolff first examined the subject property’s highest-and-best use and concluded that it was its current use as an industrial-use building. Mr. Wolff then considered the three usual methods for estimating the value of the subject property for the fiscal years at issue. He rejected both the cost and sales-comparison approaches and instead relied on the income-capitalization approach to estimate the fair cash value of the subject property for the fiscal years at issue because it was an income-producing property.[[1]](#footnote-1)

To determine what he considered to be the most appropriate rent to use in his income-capitalization methodology for the fiscal years at issue, Mr. Wolff conducted a survey of eleven purportedly comparable industrial-use spaces located in Wilmington and the neighboring town of Woburn. Of these eleven spaces, seven rented on a triple-net basis with rents ranging from $3.42 to $6.00 per square foot, with an average per-square-foot rate of $5.34, and four rented under gross-plus-utilities (“modified gross”) leases ranging from $5.50 to $7.50 per square foot. Based on his experience, Mr. Wolff determined that operating expenses for similar-type properties in the area were approximately $3.00 per square foot. Therefore, he made corresponding downward adjustments to convert the modified gross leases to a triple-net basis. Based on this information together with the subject property’s location, size, and condition, Mr. Wolff selected a stabilized economic rent of $4.00 per square foot on a triple-net basis. Applying this rate to the subject property’s net rentable area of 54,780 square feet, Mr. Wolff obtained a stabilized potential gross income of $219,120 for both of the fiscal years at issue.

For vacancy and collection loss, Mr. Wolff testified that he consulted with local brokers who reported that vacancy rates for industrial space in Woburn ranged between 5% and 10%. He further testified that market surveys conducted by CoStar indicated that the vacancy rate for industrial space in the Wilmington area was between 5.8% and 6.2%, and, according to surveys reported by Jones Lang LaSalle, the vacancy rate for industrial space in the Northwest Boston area, which included Wilmington, was 26.4%. For purposes of the subject property, Mr. Wolff selected a vacancy rate of 10% for both fiscal years, which resulted in an effective gross income of $197,208 for both of the fiscal years at issue.

Next, Mr. Wolff determined the subject property’s net-operating income for the fiscal years at issue by deducting from the effective gross income the subject property's estimated operating expenses. Mr. Wolff noted that within the subject property's competitive market area, the tenant is responsible for all operating expenses, excluding those associated with management and structural maintenance of the building. Consequently, Mr. Wolff reported that he limited his expenses to a management fee equal to 5% of the effective gross income, a replacement reserve allowance equal to 3% of potential gross income, and also a leasing commission expense equal to 1% of the potential gross income, which he testified were typical in the market. Mr. Wolff deducted these expenses from his effective gross income to derive a stabilized net-operating income of $178,583 for both of the fiscal years at issue.

Finally, Mr. Wolff developed a capitalization rate for each of the fiscal years at issue using a band-of-investment technique. For fiscal year 2013 he assumed a mortgage-to-equity ratio of 75% to 25%, with a 4.5% interest rate and a 12% equity capitalization rate to determine a capitalization rate of 8.00%. Applying the 8.00% capitalization rate to the $178,583 net-operating income resulted in an estimated rounded value for the subject property of $2,230,000 for fiscal year 2013.

For fiscal year 2014, Mr. Wolff again assumed a mortgage-to-equity ratio of 75% to 25%, with a 4.5% interest rate and a 2% higher equity capitalization rate of 14% to determine a capitalization rate of 8.50%. Applying the 8.50% capitalization rate to the $178,583 net-operating income resulted in an estimated rounded value for the subject property of $2,100,000 for fiscal year 2014.

Mr. Wolff’s income-capitalization analyses are reproduced in the following table.

**Mr. Wolff’s Income-Capitalization Analyses for FY13 & FY14**

|  |  |
| --- | --- |
| **INCOME**Industrial Space – 54,780 square feet @ $4.00 psf  |  |
| **Potential Gross Income (“PGI”)** |  **$ 219,120** |
| Vacancy & Collection Allowance (10%) |  ($ 21,912) |
| **Effective Gross Income (“EGI”)** |  **$ 197,208** |
|  |  |
| **EXPENSES** |  |
|  Management Fee $ 9,860 @ 5% of EGI Replacement Reserves $ 6,574 @ 3% of PGI Commissions $ 2,191 @ 1% of PGI**Total Expenses** |  **($ 18,625)** |
|  |  |
| **Net-Operating Income**  |  **$ 178,583** |
|  |  |
| **Divide by: Capitalization Rate for Fiscal Year 2013 – 8.0%** |  |
|  |  |
| **Indicated Value (rounded) for Fiscal Year 2013** |  **$ 2,230,000** |
|  |  |
|  |  |
| **Divide by: Capitalization Rate for Fiscal Year 2014 – 8.5%** |  |
|  |  |
| **Indicated Value (rounded) for Fiscal Year 2014** |  **$ 2,100,000** |

In support of their assessments for the fiscal years at issue, the assessors relied on the testimony and appraisal report of James R. Johnston, whom the Board qualified as a real estate valuation expert. Like Mr. Wolff, Mr. Johnston found that the subject property’s highest-and-best use was its existing use and developed his opinion of value using the income-capitalization approach. First, Mr. Johnston determined what he considered to be an appropriate market rent based on a review and analysis of competitive rentals in the subject market. Specifically, Mr. Johnston relied on nine purportedly comparable warehouse leases, six of which were located less than one mile from the subject property at 80 Industrial Way. All of Mr. Johnston’s chosen leases were on a triple-net basis with rents ranging from $5.50 to $7.48 per square foot. Based on a review and analysis of rental rates, and also the subject property’s age, size, and condition, Mr. Johnston selected a market rent of $5.00 per square foot on a triple-net basis. Applying this rate to the subject property’s net rentable area of 54,780 square feet, Mr. Johnston obtained a stabilized potential gross income of $273,900 for both of the fiscal years at issue. Next, Mr. Johnston applied a vacancy rate of 10%, the same rate used by the appellant’s expert, which resulted in an effective gross income of $246,510 for both of the fiscal years at issue.

Mr. Johnston then made allowances for management expenses equal to 4% of the effective gross income and structural maintenance reserves equal to $0.20 per square foot, noting that expenses for tenant improvements, commissions, and reserves are subsumed in his capitalization rate. He deducted his management expenses and maintenance reserves from his effective gross income to derive a stabilized net-operating income of $225,694 for both of the fiscal years at issue.

Relying on both national surveys and a band-of-investment analysis for each of the fiscal years at issue, Mr. Johnston selected a capitalization rate of 9.0% for both of the fiscal years at issue. Finally, applying the 9.0% capitalization rate to the $225,694 net-operating income, Mr. Johnston derived an indicated value of $2,507,707, rounded to $2,510,000, for both of the fiscal years at issue.

Mr. Johnston’s income-capitalization analysis is summarized in the following table.

**Mr. Johnston’s Income-Capitalization Analyses for FY13 and FY14**

|  |  |  |
| --- | --- | --- |
| **INCOME** |  |  |
| Rental Income – 54,780 square feet @ $5.00 |  |  |
| **Potential Gross Income** |  |  **$ 273,900** |
| Vacancy and Collection Allowance (10%) |  | ($ 27,390) |
| **Effective Gross Income (“EGI”)** |  |  **$ 246,510** |
|  |  |  |
| **EXPENSES** |  |  |
|  Operating  |  |  |
|  Mgmt @ 4% EGI Struc Main @ $0.20 psf | $ 9,860$10,956  |  |
| **Total Expenses** |  | **($ 20,816)** |
|  |  |  |
| **Net-Operating Income** |  |  **$ 225,694** |
|  |  |  |
| Divide by Capitalization Rate – 9.0% |   |  |
|  |  |  |
| **Indicated Value for Fiscal Years 2013 & 2014** |  |  **$2,507,711** |
|  |  |  |
| **Rounded Value for Fiscal Years 2013 & 2014** |  |  **$2,510,000** |

Based on all of the evidence, as well as reasonable inferences drawn therefrom, the Board found that the appellant did not meet its burden of proving that the subject property was overvalued for the fiscal years at issue. The Board agreed with the parties and concluded that the subject property’s highest-and-best use was its continued use as an industrial use building and also that an income-capitalization methodology was the best approach to use to value the subject property for the fiscal years at issue.

For the subject property’s income, the Board found that Mr. Wolff’s suggested rent of $4.00 per square foot on a triple-net basis was not well substantiated and lacked credibility. Most notably, Mr. Wolff failed to include in his analysis any rents from properties located in the industrial park located at 80 Industrial Way, less than one mile away from the subject property; in comparison, Mr. Johnston cited six rents from 80 Industrial Way. Based on the subject property’s location, condition, and size, along with the data submitted by both real estate valuation experts, the Board found that Mr. Johnston’s suggested rental rate of $5.00 per square foot on a triple-net basis was appropriate. The Board then applied a vacancy rate of 10%, which was supported by the evidence and suggested by both parties’ real estate valuation experts.

The Board adopted Mr. Wolff’s percentages of operating expenses, with one minor adjustment.[[2]](#footnote-2)  Finally, for its capitalization rate, the Board adopted Mr. Wolff’s underlying assumptions and analysis and ultimately his capitalization rates of 8.0% for fiscal year 2013 and 8.5% for fiscal year 2014. The Board’s analysis is contained in the following table.

**The Board’s Income-Capitalization Analysis for FY13 & FY14**

|  |  |
| --- | --- |
| **INCOME**Industrial Space – 54,780 square feet @ $5.00 psf  |  |
| **Potential Gross Income (“PGI”)** |  **$ 273,900** |
| Vacancy & Collection Allowance (10%) |  ($ 27,390) |
| **Effective Gross Income (“EGI”)** |  **$ 246,510** |
|  |  |
| **EXPENSES** |  |
|  Management Fee $ 12,326 @ 5% of EGI Replacement Reserves $ 8,217 @ 3% of PGI Commissions $ 2,465 @ 1% of EGI**Total Expenses** |  **($ 23,008)** |
|  |  |
| **Net Operating Income (“NOI”)** |  **$ 223,502** |
|  |  |
| Divide by: Capitalization Rate for Fiscal Year 2013 – 8.0% |  |
|  |  |
| **Indicated Value for Fiscal Year 2013** |  **$ 2,793,775** |
| **Rounded Value for Fiscal Year 2013** |  **$ 2,800,000** |
|  |  |
| Divide by: Capitalization Rate for Fiscal Year 2014 – 8.5% |  |
|  |  |
| **Indicated Value for Fiscal Year 2014** |  **$ 2,629,435** |
| **Rounded Value for Fiscal Year 2014** |  **$ 2,630,000** |

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 $2,387,200 and $2,387,400 for fiscal years 2013 and 2014, respectively, exceeded the subject property’s fair cash values for the corresponding years.

**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 in a free and open market 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).

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

In 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). “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). The Board agreed with the parties’ real estate valuation experts that the highest-and-best use of the subject property for the fiscal years at issue was its existing use as an industrial warehouse property containing some related or ancillary office space.

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 use of the income-capitalization approach is appropriate when reliable market-sales data are not available. ***Assessors of Weymouth v. Tammy Brook Co.,*** 368 Mass. 810, 811 (1975); ***Assessors of Lynnfield v. New England Oyster House,*** 362 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.,*** 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redevelopment Associates v. Assessors of Taunton,*** 393 Mass. 293, 295 (1984). The Board agreed with both parties’ real estate valuation experts that the income-capitalization approach was the most appropriate method to value the subject property for the fiscal years at issue.

“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. v. Assessors of Boston***, 428 Mass. 236, 239 (1998). “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. v. Assessors of Boston,*** 397 Mass. 447, 451 (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* ***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).

For the fiscal years at issue, the Board found that Mr. Wolff’s suggested rental rate of $4.00 per square foot was not well substantiated and instead found that Mr. Johnston’s suggested rental rate of $5.00 per square foot on a triple-net basis was more appropriate and supported by the record. Next, the Board found that the parties’ suggested vacancy allowance of 10% was reasonable and well supported.

After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the landlord’s appropriate expenses. ***General Electric Co.,*** 393 Mass. at 610. The expenses should also reflect the market. ***Id.;*** *see* ***Olympia & York State Street Co.***, 428 Mass. at 239, 245. The Board adopted Mr. Wolff’s expenses for landlord operating expenses with a minor adjustment to his commission expense, finding these expenses to be reasonable and well supported, to arrive at the subject property’s net-operating income for the fiscal years at issue.[[3]](#footnote-3)

The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Associates,*** 393 Mass. at 295. Based on the evidence presented, the Board found that Mr. Wolff’s capitalization rates of 8.0% for fiscal year 2013 and 8.5% for fiscal year 2014 were appropriate.

The Board is not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggests. Rather, the Board can accept those portions of the evidence that the Board determines have more convincing weight, and form its own independent judgment of fair market value. ***Foxboro Associates v. Board of Assessors of Foxborough***, 385 Mass. 679, 683 (1982); ***New Boston Garden Corp. v. Board of Assessors of Boston***, 383 Mass. 456, 473 (1981); ***New England Oyster House,*** 362 Mass. at 701-02; ***General Electric Co.****,* 393 Mass. at 605; ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984). In evaluating the evidence before it in these appeals, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp.,*** 392 Mass. at 300. “The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the Board.” ***Cummington School of the Arts, Inc. v. Assessors of Cummington,*** 373 Mass. 597, 605 (1977).

On this basis, the Board found and ruled that the subject property was not overvalued for the fiscal years at issue and therefore issued a decision for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

 **Clerk of the Board**

1. While Mr. Wolff included in his appraisal report a sales-comparison analysis for both of the fiscal years at issue, he did not testify about this method, except to say that he did not rely on the sales-comparison approaches or the values derived from them. The Board, therefore, gave no weight to Mr. Wolff's sales-comparison approaches or to the estimates of value obtained from them.  [↑](#footnote-ref-1)
2. While Mr. Wolff calculated his commissions expense as a percentage of PGI, the Board calculated this expense as a percentage of EGI.

 [↑](#footnote-ref-2)
3. Although Mr. Wolff recommended a leasing commission expense of 1% of PGI, the Board found that this cost should more properly be calculated as a percentage of EGI, which is the Board’s preferred methodology when not calculating this expense on a per-square-foot basis. *See, e.g.,* ***Star Margit ETR v. Assessors of Woburn***, Mass. ATB Findings of Fact and Reports 2016-461, 473; ***Benjamin Electric Supply Co., Inc. v. Assessors of Worcester***, Mass. ATB Findings of Fact and Reports 2001-788, 794-98 (adopting the assessors income-capitalization methodology that includes a leasing commission expense of 5% of EGI). The Board noted that leasing commissions are dependent on occupancy and are therefore variable as opposed to fixed expenses. [↑](#footnote-ref-3)