COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

# KOP PERKINS FARM v. BOARD OF ASSESSORS OF

# MARKETPLACE LLC THE CITY OF WORCESTER

Docket Nos. F323542, F326892, Promulgated:

 F331770    February 6, 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 Worcester (“appellee” or “assessors”) to abate taxes on a certain parcel of real estate located in Worcester owned by and assessed to KOP Perkins Farm Marketplace LLC (“appellant”) for fiscal years 2014, 2015, and 2016 (“fiscal years at issue”).

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

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.

 *Kenneth W. Gurge,* Esq. for the appellant.

 *David M. Moore,* City Solicitor*,* and *John F. O’Day, Jr.,* Esq*.,* Assistant City Solicitor*,* 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.

 As of January 1, 2013, January 1, 2014, and January 1, 2015, the appellant was the assessed owner of a 26.9-acre parcel of land improved with a retail-shopping plaza containing 207,263 square feet of leasable area (“Center” or “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** |
| **2014** | $16,474,600  | $507,911.92 $30.83/$1,000 | Y | 01/31/2014 | 04/28/2014 | 06/11/2014 |
| **2015** | $16,767,500 | $532,032.78$31.73/$1,000 | Y | 01/21/2015 | 04/11/2015 | 06/03/2015 |
| **2016** | $16,767,500  | $569,759.65$33.98/$1,000 | Y | 02/01/2016 | 04/26/2016 | 07/22/2016[[1]](#footnote-1) |

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

The main contentions between the parties are the valuation of the Center’s 62,120-square-foot vacant anchor space, previously occupied by Building 19, and the 67,180-square-foot supermarket anchor space, which has been occupied by Stop & Shop for about twenty years. These spaces together accounted for over 62 percent of the Center’s gross leasable space.

The appellant presented its case through the testimony and appraisal report of Susan R. Balogh, whom the Board qualified as an expert in the area of commercial, retail real estate valuation. Ms. Balogh prepared an income-capitalization analysis for valuing the Center. Pertinent points of that analysis are summarized below.

Ms. Balogh testified, and her appraisal report showed, that when Building 19 vacated in June of 2011, the vacant anchor space was left in extremely poor condition, with floor, wall, and ceiling damage. The space also required asbestos remediation. She opined that, on the relevant dates of assessment and valuation, the space was functionally obsolete and unleasable as a result of its deferred maintenance issues. Based on conversations with management, Ms. Balogh determined that it would cost approximately $26.37 per square foot, or approximately $1.6 million total, to restore the vacant anchor space to leasable condition.

Ms. Balogh further testified that many of the Center’s smaller tenants had “kick-out” clauses in their leases; these clauses allowed tenants to terminate their leases or renegotiate a lower rent when an anchor space became vacant because of the negative impact that the anchor’s vacancy would have on foot traffic to a shopping center. Ms. Balogh indicated that several tenants did exercise their “kick-out” clauses, and that the Center’s actual vacancy exceeded 30 percent during all of the fiscal years at issue.

To determine the fair market rent for the Center’s 62,120-square-foot vacant anchor space, Ms. Balogh reviewed rents from five purportedly comparable rental properties in the market, which ranged from $3.62 to $8.00 per square foot. Ms. Balogh estimated that market rent for the vacant anchor space would be $6.00 per square foot if the space were in leasable condition. Factoring in the vacant anchor space’s unleasable condition and management’s estimated costs to cure the defects, Ms. Balogh arrived at an estimated fair market rent of $3.36 per square foot.

To determine the fair market rent for the 67,180-square-foot supermarket anchor space, Ms. Balogh reviewed rents from five purportedly comparable rental properties in the market, which ranged from $7.25 to $13.63 per square foot. Ms. Balogh testified that the rents for the two properties most comparable to the subject property’s supermarket anchor space, because they were rentals of older, second-generation space, ranged from $7.25 to $7.80 per square foot. Ms. Balogh also interviewed a broker regarding efforts during the relevant time periods to lease a second-generation supermarket store, a Big Y Food Store located within two miles of the subject property, at Southwest Commons shopping mall in Worcester. Based on her comparables and research, Ms. Balogh estimated a fair market rent for the supermarket anchor space of $10 per square foot. Ms. Balogh testified that this estimate comported with industry standards, because grocery stores typically pay no more than 4 percent of gross sales for their total occupancy costs, and her $10-per-square-foot lease estimate resulted in an occupancy cost-to-sales ratio of 3.6 percent. Her estimate was also slightly higher than the actual lease for the Stop & Shop space.

The assessors presented their case through the testimony of William Ford, the city assessor, and the submission of documents, including the pertinent jurisdictional documents. With respect to the vacant anchor space, Mr. Ford produced no comparable rental properties. Mr. Ford testified that the assessors’ rent estimate started with a base rent of $11 per square foot, which was reduced to $9.68 per square foot. Mr. Ford testified that the $1.32 reduction accounted for the remediation cost of returning the space to a leasable condition; he did not specify the leases or other data upon which he relied in arriving at this figure.

With respect to the supermarket anchor space, the appellee did not provide any evidence of comparable supermarket leases negotiated during the relevant time periods. Mr. Ford provided three documents, which he called “lease abstracts.” These documents were not actually lease abstracts but were simply summaries created by the assessors. These documents purported to give information on lease renewal options from three older leases. The first was a renewal option that was built into a lease originally negotiated in 2003. The second was an automatic rent-step increase in a lease originally negotiated in 2004. The third was also a rent-step increase for a lease of a building that was built in 1965; Mr. Ford could not say when the rent was negotiated.

Based on these renewal options, Mr. Ford estimated a market rent for the supermarket anchor space of $15.00 per square foot, which he then increased to $16.50 based on a location adjustment, testifying that the subject property was the only strip mall supermarket in the neighborhood. The Board noted, however, that there were four other shopping centers that included a grocery store (including a Walmart with a grocery section) located within a two-mile radius of the subject property. Moreover, Mr. Ford’s $16.50 estimate was substantially higher than the $9.66 per square foot actual rent paid for the supermarket anchor space in the subject property during the fiscal years at issue.

On the basis of the evidence, the Board found that the appellant presented persuasive, credible evidence that the assessments at issue were based on overvaluations of the vacant anchor space and the supermarket anchor space. The Board found that Ms. Balogh’s comparable properties were sufficiently comparable to the subject property to provide meaningful rental data for both of these spaces.

With respect to the vacant anchor space, the Board found credible Ms. Balogh’s evidence of comparable rents, which averaged $6.00 per square foot. Moreover, Ms. Balogh’s appraisal report thoroughly detailed the deferred maintenance issues for that space. The Board further found that the existence of the “kick-out” clauses in the leases of smaller tenants, which several tenants exercised during the fiscal years at issue, negatively impacted both revenue and vacancy.

The Board, however, found little evidence to support the full amount of Ms. Balogh’s $1.6 million estimate to cure the defects at the vacant anchor space. The Board instead selected $5.00 per square foot as the fair rental amount for the vacant space, which took into account Ms. Balogh’s $6.00-per-square-foot base rent figure and a more modest $1.00-per-square-foot reduction to reflect the cost to cure the space’s defects.

With respect to the supermarket anchor space, the Board found credible Ms. Balogh’s reasoning for her $10.00-per-square-foot estimate for the space occupied by Stop & Shop. The Board thus adopted that figure as the rental estimate for the supermarket anchor space.

The appellee did not challenge other elements of Ms. Balogh’s income-capitalization analysis, including the rents for the remaining tenants, the vacancy and operating expenses, and the capitalization rate, all of which she amply supported with credible evidence. The Board thus adopted these portions of Ms. Balogh’s income-capitalization analysis.

The Board’s income-capitalization analysis is presented in the following chart:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Fiscal Year** **2014** | **Fiscal Year 2015** | **Fiscal Year 2016** |
| Items of Potential Gross Income **-Vacant anchor space (62,120 sf @ $5.00 psf)** **-Supermarket anchor space (67,180 sf @ $10.00 psf)** -Small in-line space (23,156 sf $15.50 psf) -Mid-size in-line space (19,307 sf @ $11.00 psf) -Large in-line space (25,213 sf @ $9.00 psf) -Bank space (7,062 sf @ $30.00 psf) -Fast food space (3,225 sf @ $20.00 psf) -Fueling station ground lease Total Potential Rental IncomeOther Income (@ $0.10 psf)Expense ReimbursementsTotal Potential Gross Income | **$ 310,600****$ 671,800**$ 358,918$ 212,377$ 226,917$ 211,860$ 64,500$ 33,275------------$ 2,090,247$ 20,726$ 304,203------------$ 2,415,176 | **$ 310,600****$ 671,800**$ 358,918$ 212,377$ 226,917$ 211,860$ 64,500$ 33,275------------$ 2,090,247$ 20,726$ 273,951------------$ 2,384,924 | **$ 310,600****$ 671,800**$ 358,918$ 212,377$ 226,917$ 211,860$ 64,500$ 33,275------------$ 2,090,247$ 20,726$ 282,788------------$ 2,393,761 |
| Less Vacancy & Collection Loss (15%) | $ 362,276 | $ 357,739 | $ 359,064 |
| Effective Gross Income | $ 2,052,900 | $ 2,027,185 | $ 2,034,697 |
| Less Operating Expenses-reimbursable common area maintenance-non-reimbursable expenses  -management (5%) -miscellaneous (utility costs x vacancy rate) -tenant improvement allowance (@ $1.00 psf) -replacement reserves (@ $0.50 psf)Total Operating Expenses | $ 304,203$ 102,645$ 23,134$ 207,263$ 103,632------------$ 740,877 | $ 273,951$ 101,359$ 26,589$ 207,263$ 103,632------------$ 712,794 | $ 282,788$ 101,735$ 25,810$ 207,263$ 103,632------------$ 721,228 |
| Net Operating Income | $ 1,312,023 | $ 1,314,391 | $ 1,313,469 |
| /Tax-Adjusted Capitalization Rate | /9.462% | /10.276% | /9.510% |
| Indicated Value | $13,866,233 | $12,790,882 | $13,811,451 |
| Rounded To | $13,866,000 | $12,791,000 | $13,811,500 |

Accordingly, the Board issued a decision for the appellant, granting abatements as detailed in the following chart:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Fiscal** **Year** | **Assessed Value** | **Fair Cash Value** | **Overvaluation** | **Abatement** |
| 2014 | $16,474,600 | $13,866,000 | $2,608,600 | $ 80,423.14 |
| 2015 | $16,767,500 | $12,791,000 | $3,976,500 | $126,174.34 |
| 2016 | $16,767,500 | $13,811,500 | $2,956,000 | $100,444.88 |

**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 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)). 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. v. Assessors of Lynn***, 393 Mass. 591, 600 (1984) (quoting***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)). “[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.***, 393 Mass. at 598 (quoting ***Schlaiker***, 365 Mass. at 245).

Generally, real estate valuation experts, 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 Redev. Auth.,*** 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), 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).

“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). “[I]t 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 (2008) (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 Redev. Auth.***, 5 Mass. App. Ct. 289, 293-94 (1977), *rev’d on other grounds,* 375 Mass. 360 (1978); ***Library Services, Inc. v. Malden Redev. Auth.***, 9 Mass. App. Ct. 877, 878 (1980) (rescript). In the instant appeals, the Board was persuaded by the rental income that Ms. Balogh imputed to the vacant anchor space and the supermarket anchor space at the subject property because her comparable properties were sufficiently comparable to the subject property to provide meaningful rental data. The Board also found that Ms. Balogh sufficiently established the extent of the deferred maintenance at the vacant anchor space and the effect that its extended vacancy had on the remaining rents at the subject property.

However, the Board found little evidence to support the full amount of Ms. Balogh’s estimated costs of curing the defects. Based on the evidence presented and the Board’s own experience and expertise, the Board selected $5.00 per square foot as the fair market rent for the subject property’s vacant anchor space. With respect to the supermarket anchor space, the Board found credible Ms. Balogh’s reasoning and thus adopted her $10.00-per-square-foot rental figure for that space.

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 Assocs. v. Assessors of Foxborough,*** 385 Mass. 679, 683 (1982); ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 473 (1981); ***Assessors of Lynnfield v. New England Oyster House, Inc.,*** 362 Mass. 696, 702 (1972). In evaluating the evidence before it, the Board selected among the various elements of value and 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).

On the basis of the foregoing, the Board found and ruled that the subject property was overvalued, and thus ordered abatements, as detailed in the following chart:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Fiscal** **Year** | **Assessed Value** | **Fair Cash Value** | **Overvaluation** | **Abatement** |
| 2014 | $16,474,600 | $13,866,000 | $2,608,600 | $ 80,423.14 |
| 2015 | $16,767,500 | $12,791,000 | $3,976,500 | $126,174.34 |
| 2016 | $16,767,500 | $13,811,500 | $2,956,000 | $100,444.88 |

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

 **Clerk of the Board**

1. The Petition for fiscal year 2016 was date-stamped by the Board on July 27, 2016. However, when a Petition is delivered to the Board by the United States mail on a date later than three months from the date that the assessors denied the abatement application, the date of the United States mail postmark is deemed to be the date that the Petition was filed at the Board, if that date is within three months of the assessors’ denial. G.L. c. 59, §§ 64 and 65. [↑](#footnote-ref-1)