COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

LEXINGTON AUGUST REALTY TRUST	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF LEXINGTON**
Docket No. F298324		Promulgated: November 5, 2019

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Lexington ("appellee" or "assessors") to abate a tax on certain real estate located in Lexington owned by and assessed to Lexington August Realty Trust ("appellant"), under G.L. c. 59, §§ 11 and 38, for fiscal year 2008 ("fiscal year at issue").

Commissioner Good heard this appeal. She was joined in the original decision for the appellee by Chairman Hammond and Commissioners Scharaffa, Rose, and Elliott. Upon further review and on its own motion, the Board issued a revised decision in favor of the appellant, which is promulgated simultaneously with these findings. Chairman Hammond and Commissioners Rose, Elliott, and Metzer joined Commissioner Good in the revised decision.

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.

James F. Sullivan, Esq. for the appellant.

Anthony M. Ambriano, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2007, the relevant date of valuation for the fiscal year at issue, the appellant was the assessed owner of an 11.03-acre parcel of land located at 0 Walnut Street in Lexington ("subject property" or "lot 6A"). For the fiscal year at issue, the assessors valued the subject property at $6,976,000, and taxed it at the commercial rate of $23.63 per $1,000 of value, in the total amount of $169,788.17, inclusive of a Community Preservation Act surcharge.

On February 1, 2008, the appellant timely filed an Application for Abatement with the assessors, which was deemed denied on May 1, 2008. By notice dated May 9, 2008, the assessors informed the appellant of the deemed denial. The appellant timely filed an appeal with the Appellate Tax Board ("Board") on July 28, 2008. Based on the foregoing facts, the Board found and ruled that it had jurisdiction to hear this appeal.

The appellant disputed the valuation of the subject property as well as its classification as commercial property. The Board bifurcated the issues for hearing, first proceeding with the classification issue and later, the valuation issue. After the hearing on the classification issue, the Board originally ruled that the assessors properly classified the subject property as commercial property under G.L. c. 59, § 2A(b) ("§ 2A(b)"). Upon

further consideration, the Board reversed its previous ruling on that issue, and found and ruled that the subject property was entitled to residential classification for the fiscal year at issue. Based on the testimony and documentary evidence introduced over the course of the hearing on both issues, including a Statement of Agreed Facts with exhibits, the Board made the following findings of fact.

The subject property is located in Lexington on the Waltham border. At all times relevant to this appeal, the subject property was located in the "RO" zoning district. This is a residential zoning district and permitted uses in this zoning district include single-family dwellings. Certain non-residential uses are also allowed as of right, and still more uses are allowed by special permit.

The subject property was formerly part of the situs of the Middlesex County Hospital ("hospital campus"), which was shuttered in the 1990s. The evidence showed that the 109.807-acre hospital campus was subdivided into lots that were gradually sold. Among the agreed exhibits entered into the record was Exhibit 10, an approval not required ("ANR")[1] plan of land created in 1996 ("1996 ANR plan") and recorded with the Middlesex Registry of Deeds in

[1] "Approval not required" plans are applicable where the lots to be developed have adequate frontage on existing or approved roadways. This type of property is subject to a less stringent approval process from local planning boards, thus the name. *See* G.L. c. 41, § 81P.

1997. The 1996 ANR plan showed the hospital campus, spanning both Lexington and Waltham, divided into six numbered lots of various sizes. A subsequent ANR plan, created in 2002 ("2002 ANR plan") and recorded with the Middlesex Registry of Deeds in 2004, showed a further division of the hospital campus. On the 2002 ANR plan were two newly created lots: the subject property, identified as lot 6A; and lot 6B.

Habib Aminipour, who is a real estate developer and a beneficiary of the appellant, testified at the hearing of this appeal regarding the circumstances surrounding the appellant's purchase of the subject property. The Board found his testimony to be credible. Mr. Aminipour explained that in April of 2005, the appellant purchased a 6.933-acre parcel of land adjacent to the subject property. That parcel was reflected as lot 6 ("lot 6") on the 1996 ANR plan. The appellant purchased lot 6, which was partially in Waltham and partially in Lexington, from the Commonwealth of Massachusetts following a public auction for a purchase price of $5,610,000. The appellant hoped to develop residential condominiums on the parcel.

Mr. Aminipour testified that almost immediately after purchasing lot 6, he approached the then-owner of the adjacent lot 6A – the subject property – about buying that parcel as well. Mr. Aminipour testified that he was interested in buying it because, with the acquisition of this sizeable adjacent parcel, his planned

housing project could be even larger. He testified that the parties negotiated back and forth before arriving at a purchase price of $4,100,000, and they entered into a purchase and sale agreement for that amount in May of 2005.

At the time the appellant entered into the purchase and sale agreement, the subject property was improved with various buildings. One of the conditions of the purchase and sale agreement was that all of the improvements would be demolished and removed from the subject property prior to the closing. That condition was satisfied, such that on May 25, 2006, when the sale of the subject property was completed, it was a vacant parcel of land.

In February of 2007, the appellant applied to Lexington's Planning Board for a Special Permit and Site Plan Review to develop a residential subdivision of nineteen single-family homes, to be known as "Lexington Hills". The Special Permit and Site Plan Review was approved by the Lexington Planning Board in May of 2007. The Lexington Hills Definitive Subdivision Plan ("Lexington Hills Subdivision Plan") was approved by the Lexington Planning Board on August 15, 2007, and recorded with the Middlesex Registry of Deeds on September 24, 2007.

On the basis of the record in its totality, and as detailed in the Opinion below, the Board found and ruled that the subject property was entitled to residential classification, as it constituted land that is situated in a residential zone and has

been subdivided into residential lots within the meaning of § 2A(b). Therefore, the Board found that the subject property should have been taxed at the residential rate of $12.52 per $1,000, rather than the commercial rate of $23.63 per $1,000.

With respect to the valuation issue, the Board found that the appellant failed to meet its burden of demonstrating that the assessed value of the subject property exceeded its fair cash value. In reaching this conclusion, the Board gave no weight to the actual sale of the subject property as it was not an arm's-length transaction. The record showed that the subject property had not been exposed to the market, and the price was the result of private discussions between the former owner and Mr. Aminipour, who was an abutter. Moreover, the abutting property, which was openly marketed, sold for $5,610,000, or approximately $809,000 per acre, well in excess of the subject property's sale price of $4,100,000, or approximately $371,700 per acre. The Board found that this disparity cast further doubt on the reliability of the subject property's sale price, and accordingly the Board placed no weight on the subject property's sale price.

Finally, the Board gave no weight to Mr. Aminipour's stated opinion of value for the subject property, which was $500,000 to $600,000 as of the relevant valuation date. He testified that this was his opinion because on that date, as of right, he could have built only two single-family homes on the subject property.

The Board discounted this opinion of value because it was not supported by market evidence, nor did it involve appropriate consideration of the subject property's highest and best use.[2] The record showed that the appellant applied for a special permit to build nineteen single-family homes just one month after the relevant date of valuation, and that the application was quickly approved by the Lexington Planning Board. The Board found that it was in no way speculative to conclude that the highest and best use of the subject property as of the relevant date of valuation was for the development of multiple single-family homes, and it therefore gave no weight to Mr. Aminipour's opinion of value.

In conclusion, the Board found that the appellant failed to meet its burden of proving that the subject property's assessed value exceeded its fair cash value for the fiscal year at issue. However, the Board found and ruled that the subject property was entitled to residential classification. The Board therefore issued a revised decision for the appellant in this appeal, and granted

[2] Due to the bifurcation of the issues, as well as medical emergencies impacting both parties, this appeal had a protracted history, such that the second day of hearing followed the first day by more than one year, and the third day in turn followed the second day by more than one year. On the third day of the hearing of this appeal, the appellant sought to introduce additional valuation evidence in the form of the testimony and appraisal report of a real estate appraiser. The assessors objected, as they had received no notice of this evidence, despite the Board's July 19, 2016 Order requiring the parties to exchange appraisal reports and file copies of any such reports with the Board. As the appellant failed to comply with that Order, and instead waited until the day of the hearing more than two years later to attempt to introduce this evidence, the Board sustained the assessors' objection and barred the testimony and appraisal from coming into the record.

an abatement of tax in the amount of $79,866.02, inclusive of the Community Preservation Act surcharge, and associated interest.

OPINION

Section 2A(b) requires the assessors of each city or town to classify all real property according to its particular usage. See ***Meachen v. Assessors of Sudbury***, Mass. ATB Findings of Fact and Reports 2001-2011, 2017. The statute provides four distinct usage classifications, two of which are at issue in this appeal: "Class one, residential" and "Class three, commercial." The descriptions of these property classifications are as follows:

> "Class one, residential", property *used or held for human habitation containing one or more dwelling units* including rooming houses with facilities designed and used for living, sleeping, cooking and eating on a non-transient basis . . . . ***Such property shall include: (i) land that is situated in a residential zone and has been subdivided into residential lots*** . . ..
>
> "Class three, commercial", ***property used or held for use for business purposes and not specifically includible in another class***, including but not limited to any commercial, business, retail, trade, service, recreational, agricultural, artistic, sporting, fraternal, governmental, educational, medical or religious enterprise, for non-profit purposes. Such property may be expressly exempt from taxation under other provisions of this chapter.

G.L. c. 59, § 2A(b) (emphasis added).

As indicated by the preceding language, property can be classified as "residential" if it contains "one or more dwelling units[.]" G.L. c. 59, § 2A(b). The record showed that the subject

property was vacant land on the relevant date of valuation, and thus it did not contain "dwelling units" as required by the statute. ***Id.*** However, property may also be classified as residential if it is "situated in a residential zone" and "has been subdivided into residential lots[.]" ***Id.*** As there was no dispute that the subject property was located in a residential zone, it is the second prong of the statutory requirement, particularly the term "subdivided," that is at issue here.

Section 2A(b) does not define the term "subdivided." However, words of a statute are "to be construed according to their natural import in common and approved usage," ***Bloomingdale's Inc. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2003-163, 176-77 (citations omitted), *aff'd* 63 Mass. App. Ct. 1110 (2005), and the Board may "look to dictionary definitions" to ascertain their meaning. ***American Honda Motor Co. v. Bernardi's, Inc.***, 432 Mass. 425, 430 (2000) (citations omitted).

Black's Law Dictionary defines "subdivision" as follows: "1. The division of a thing into smaller parts. 2. A parcel of land in a larger development. - subdivide, vb." BLACK'S LAW DICTIONARY 1560 (9th ed. 2009). The evidence of record showed that, per the 1996 ANR plan, the hospital campus had been carved into six total lots. A subsequent plan, the 2002 ANR plan, showed that additional lots had been created out of the original six lots on the 1996 ANR plan, giving way to the subject property, lot 6A, as well as lot 6B.

These facts fit comfortably within the common and approved usage of the term "subdivide." ***Id.***

It was the assessors' position in this appeal that the subject property was not "subdivided into residential lots" for purposes of § 2A(b), and as it therefore was "not specifically includible in another class," it was necessarily classified as commercial property. The Board disagreed.

First, the assessors contended that the subject property was not "subdivided into residential lots" until September 24, 2007, when the Lexington Hills Subdivision Plan that had been approved by the Lexington Planning Board, showing nineteen residential lots, was recorded.

In making this argument, the assessors placed heavy reliance on G.L. c. 41, §§ 81K-81GG, commonly known as the Massachusetts Subdivision Control Law ("Subdivision Control Law"). The Subdivision Control Law sets forth the procedure for obtaining approval from local planning boards for the creation of a subdivision, and it includes a definition of the term "subdivision," as follows:

> [T]he division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, ***however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public***

> ***way or a way which the clerk of the city or town certifies is maintained and used as a public way,*** or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

G.L. c. 41, § 81L ("§ 81L") (emphasis added). The bolded language, above, refers to ANR plans, and according to the assessors, as the Subdivision Control Law expressly excludes property that is the subject of an ANR plan from the definition of the word "subdivision," the subject property could not have been considered land that was "subdivided" for purposes of § 2A(b) while it was the subject of a recorded ANR plan but not a recorded subdivision plan.

However, the § 81L definition provides the meaning of the terms "subdivide" and "subdivision" in the context of land usage. Section 81L defines the term "subdivision" to mean "the division of a tract of land into two or more lots." Although § 81L excludes from the approval process those subdivisions that qualify as ANR lots, the fundamental definition of a subdivision as the division of a tract of land into two or more lots stands. This straightforward and common-sense definition is equally applicable to the phrase "subdivided into residential lots" in § 2A(b).

The assessors advanced no support for the proposition that the limitation of the term "subdivision" to exclude ANR developments for purposes of the Subdivision Control Law is determinative for purposes of § 2A(b). Section 2A(b) focuses on whether land has been subdivided into residential lots, not on whether a developer must seek planning board approval of a potential development. Accordingly, the Board found and ruled that the commonly understood meaning of "subdivide" as the act of dividing a tract of land into two or more lots is the appropriate construction of the phrase "subdivided into residential lots" for purposes of § 2A(b). Accordingly, the Board found that the subject property constituted "land that is situated in a residential zone and has been subdivided into residential lots" as of the relevant date of valuation in this appeal, such that it was entitled to residential classification. ***Id.***

The appellant additionally contested the valuation of the subject property. 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). The appellant has the burden of proving that the subject property's fair cash value was lower than its assessed value. "'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 the Board, taxpayers "'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).

"[S]ales of property usually 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). Usually, the actual sale of the subject property itself is "'very strong evidence of fair market value, for [it] represent[s] what a buyer has been willing to pay to a seller for [the property under appeal].'" ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 469 (1981) (quoting ***First Nat'l Stores, Inc. v. Assessors of Somerville***, 358 Mass. 554, 560 (1971)). However, if the actual sale was not an

arm's-length transaction, the Board will not give weight to the sale price. *See* ***Bolduc v. Assessors of Norfolk***, Mass. ATB Findings of Fact and Reports 2012-1163, 1173.

In the present appeal, the subject property was not openly marketed. Instead, it was sold in a private sale to the appellant, who, having just purchased the adjacent parcel, was an abutter. These circumstances suggested that the sale of the subject property was not an arm's-length transaction. *See* ***Nichols v. Assessors of Westborough***, Mass. ATB Findings of Fact and Reports 2004-459, 463. Additionally, the Board noted that although the abutting parcel was significantly smaller than the subject property, it sold for substantially more than the subject property, a disparity that cast further doubt on the reliability of the subject property's sale price. Accordingly, the Board gave no weight to the subject property's sale price.

Similarly, the Board gave no weight to Mr. Aminipour's opinion of the subject property's fair cash value of between $500,000 to $600,000. His opinion of value was premised on the fact that, as of the relevant valuation date of January 1, 2007, in the absence of a special permit, he could only have constructed two single-family homes on the subject property.

As an initial matter, there was no market evidence in the record to support Mr. Aminipour's opinion of value. Moreover, his opinion of value did not analyze the highest and best use of the

subject property. ***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 315-16 (12th ed., 2001)), *aff'd*, 62 Mass. App. Ct. 428 (2004). The record showed that the appellant applied for a special permit to build nineteen single-family homes just one month after the relevant date of valuation, and that the application was quickly approved. The Board reasoned that it was in no way speculative to conclude that the highest and best use of the subject property as of the relevant date of valuation was for the development of multiple single-family homes. The Board therefore gave no weight to Mr. Aminipour's opinion of value.

In conclusion, the Board found and ruled that the appellant failed to meet its burden of demonstrating that the subject property's assessed value exceeded its fair cash value for the fiscal year at issue. However, the Board found and ruled that the subject property was entitled to residential classification for the fiscal year at issue. Accordingly, the Board issued a revised decision for the appellant, and granted an abatement of tax in the amount of $79,866.02, inclusive of the Community Preservation Act surcharge, and associated interest.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board