**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**LOWE’S HOME CENTERS, LLC v.    BOARD OF ASSESSORS OF**

 **THE TOWN OF DARTMOUTH**

Docket Nos. F316392 Promulgated:

 F319707     November 30, 2018

 F323782

 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 Dartmouth (“appellee” or “assessors”) to abate taxes on certain real estate in Dartmouth owned by and assessed to WW North Dartmouth, LLC under G.L. c. 59, §§ 11 and 38, for fiscal years 2012, 2013, and 2014 (“fiscal years at issue”). Lowe’s Home Centers, LLC (“appellant” or “Lowe’s”) was a tenant obligated to pay more than one-half the taxes at issue and therefore had standing to prosecute these appeals pursuant to G.L. c. 59, §§ 59, 64, and 65.

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

 *Alan R. Hoffman,* Esq. and *Ryan J. Gibbs,* Esq. for the appellant.

 *Kenneth W. Gurge,* 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.

1. **Introduction and Jurisdiction**

On January 1, 2011, January 1, 2012, and January 1, 2013, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was a tenant obligated to pay more than one-half the tax on a 21.77-acre improved parcel of real estate located at 55 Faunce Corner Mall Road in Dartmouth (“subject property”). The subject property is located in a high traffic, commercial retail area, which is accessible from I-195 to the north and Route 6 from the south. There are a number of commercial properties in the immediate area, including the North Dartmouth Mall, and a limited number of residential properties.

The subject property is improved with a one-story, “big-box” retail building with approximately 136,690 square feet of net leasable space. The interior floor plan is made up of an open shopping area, standard offices, an employee training room, an employee break room, an electrical room, a fire suppression area, and three bathrooms. There are three loading docks and one truck-height bay. In addition, there is a 35,579-square-foot, fenced-in, outdoor garden center that is not included in the leasable area due to its exposure to the elements. The building was constructed in 2004 and is in good condition.

For fiscal year 2012, the assessors valued the subject property at $14,950,200 and assessed a tax thereon, at the rate of $13.53 per thousand, plus a fire district tax in the amount of $1.10 per thousand, in the total amount of $221,755.57.[[1]](#footnote-1) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 30, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on March 26, 2012.  On June 12, 2012, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

For fiscal year 2013, the assessors valued the subject property at $14,450,000 and assessed a tax thereon, at the rate of $14.29 per thousand, plus a fire district tax in the amount of $1.09 per thousand, in the total amount of $225,338.36.[[2]](#footnote-2) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 24, 2013, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on March 11, 2013. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its appeal with the Board on June 5, 2013.

For fiscal year 2014, the assessors valued the subject property at $14,375,700 and assessed a tax thereon, at the rate of $15.10 per thousand, plus a fire district tax in the amount of $1.19 per thousand, in the total amount of $237,436.25.[[3]](#footnote-3) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 17, 2014, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on March 24, 2014. On June 13, 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.

1. **The Appellant’s Case**

The appellant presented its case primarily through the testimony and appraisal report of Robert F. Shannon, a certified general real estate appraiser, whom the Board qualified as an expert witness in the area of real estate valuation. After determining that the subject property’s highest and best use was its continued use as a retail building, Mr. Shannon considered the three usual methods for estimating the value of the subject property for the fiscal years at issue. Mr. Shannon deemed his income-capitalization approach to be the most viable methodology to use to estimate the fair cash value of the subject property for the fiscal years at issue.[[4]](#footnote-4)

The first step in Mr. Shannon’s income-capitalization analysis was to determine the subject property’s potential gross revenue for each of the fiscal years at issue. To accomplish this step, Mr. Shannon researched and relied on eight purportedly comparable retail leases, which included three build-to-suit leases, to assist in estimating market rents for the subject property. Relevant information regarding Mr. Shannon’s purportedly comparable leases appears in the following table.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **No.** | **Address** | **Tenant** | **Square Feet** | **Date****Term** | **Avg Rent PSF** | **Comments** |
| 1 | 238-310 Grove St.,Braintree, MA | T.J. Maxx/Home Goods |  72,300 |  02/09 5 yrs | $ 7.22 | Pre-existing space |
| 2 | 140 Main St.,Weymouth, MA | Nat’l Wholesale Liquidators |  89,000 |  11/14 20 yrs | $ 7.00 | Pre-existing space |
| 3 | 90 Providence Hgwy.,Walpole, MA | Kohl’s | 102,445 |  07/09 20 yrs | $ 9.60 | Pre-existing space |
| 4 | 180 Pearl St.,Braintree, MA | Cardi’s Furniture | 113,000 |  06/08 5.5 yrs | $12.00 | Sub-leasePre-existing space |
| 5 | 175 Highland Ave.,Seekonk, MA | BJ’s  | 109,338 |  08/12 20 yrs | $ 9.00 | Pre-existing space |
| 6 | 200 Stonehill Dr.,Johnston, RI | BJ’s  | 121,324 |  06/10 20 yrs | $14.00 | Build to suit |
| 7 | Shops Way,Southborough, MA | BJ’s | 124,303 |  09/11 20 yrs | $19.87 | Build to suit |
| 8 | Highland Commons,Hudson, MA | BJ’s  | 117,924 |  12/10 20 yrs | $12.00 | Build to suit |

Based on his analysis, Mr. Shannon determined that a stabilized fair market rent of $11.00 per square foot on a triple net basis was an appropriate rent for the subject property for each of the fiscal years at issue. Applying this rate to the subject property’s 136,690 square feet, Mr. Shannon obtained a forecasted rental income of $1,503,590 for each of the fiscal years at issue.

Next, Mr. Shannon considered reimbursement income, noting that under the terms of a typical lease in properties similar to the subject property, the tenant is responsible for its share of operating expenses and insurance. Based on the 2010, 2011, and 2012 surveys conducted by the Institute of Real Estate Management (“IREM”), Mr. Shannon included reimbursement income for operating expenses and insurance of $412,804, $500,285, and $326,689 for fiscal years 2012, 2013, and 2014, respectively. Adding these figures to his projected rental figure produced potential gross income amounts of $1,916,394 for fiscal year 2012, $2,003,875 for fiscal year 2013, and $1,830,279 for fiscal year 2014.

The next step in Mr. Shannon’s analysis was the determination of vacancy and collection loss allowances. Mr. Shannon noted in his appraisal report that according to the KeyPoint Partners reports, the regional vacancy rate in Eastern Massachusetts decreased from 9.0% to 7.9% during the fiscal years at issue. Based on the reported market vacancy rates, as well as his assessment that there was a limited market for large big-box buildings similar to the subject property, Mr. Shannon determined that a stabilized vacancy and collection loss rate of 15% was reasonable for the fiscal years at issue.

 Next, Mr. Shannon determined the subject property’s net operating income for the fiscal years at issue by deducting expenses, which he divided into two categories - reimbursable expenses and unreimbursed expenses. For reimbursable expenses, Mr. Shannon used the same figures that he reported for reimbursement income. For unreimbursed expenses, Mr. Shannon allowed the following expenses: property management calculated at 3.0% of effective gross income; replacement reserves calculated at $0.25 per square foot; administrative costs of $10,000; leasing commissions calculated at 2.8% of market rent; and tenant improvements calculated at $0.20 per square foot. The total for the expenses amounted to $575,283 for fiscal year 2012, $664,995 for fiscal year 2013, and $486,972 for fiscal year 2014, resulting in net operating income of $1,053,652, $1,038,299, and $1,068,765, for fiscal years 2012, 2013, and 2014, respectively.

To derive his capitalization rate, Mr. Shannon developed market extraction, market survey, and band-of-investment analyses. Based on these analyses, Mr. Shannon settled on an appropriate overall capitalization rate of 10%, which he then loaded with a pro-rated tax rate to derive adjusted overall capitalization rates of 10.2195% for fiscal year 2012, 10.2307% for fiscal year 2013, and 10.2444% for fiscal year 2014.

Mr. Shannon’s income-capitalization analyses are summarized in the following tables.

**Fiscal Year 2012**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building Area  |  | 136,690 sf |  |
| Market Rent | $11.00 psf | $1,503,590 |
| Reimbursement Income |  | $412,804 |
| **Potential Gross Income** |  |  | **$1,916,394** |
|  Less Vacancy |  | 15% | ($287,459) |
| **Effective Gross Income**  |  |  | **$1,628,935** |
|  |  |  |  |
| **EXPENSES** |  |
|  Reimbursable Expenses |  |
|  Operating Expenses $2.82 psf | $ 385,466 |
|  Insurance $0.20 psf | $ 27,338 |
|  Unreimbursed Expenses |  |
|  Management |  |  3% of EGI | $ 48,868 |
|  Reserves for Replacement |  |  $0.25 psf | $ 34,173 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 42,101 |
|  Tenant Improvements |  | $0.20 psf | $ 27,338 |
|  **Total Operating Expense** |  |  | **$ 575,283** |
|  |  |  |  |
| **Net Operating Income:** |  | **$1,053,652** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 1.463% \* 15% | 10.00%0.2195%10.2195% |
| **Capitalized Value** |  | **$10,310,211** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$10,300,000** |

**Fiscal Year 2013**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building Area |  | 136,690 sf |  |
| Market Rent  | $11.00 psf | $1,503,590 |
| Reimbursement Income |  | $ 500,286 |
| **Potential Gross Income** |  |  | **$2,003,785** |
|  Less Vacancy |  | 15% | ($300,581) |
| **Effective Gross Income**  |  |  | **$1,703,294** |
|  |  |  |  |
| **EXPENSES** |  |
|  Reimbursable Expenses |  |
| Operating Expenses $3.45 psf | $ 471,581 |
| Insurance $0.21 psf | $ 28,705 |
| Unreimbursed Expenses |  |
|  Management |  | 3% of EGI | $ 51,099 |
|  Reserves for Replacement |  | $0.25 psf | $ 34,173 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 42,101 |
|  Tenant Improvements |  | $0.20 psf | $ 27,338 |
|  **Total Operating Expense** |  |  | **$ 664,995** |
|  |  |  |  |
| **Net Operating Income:** |  | **$1,038,299** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 1.538% \* 15% | 10.00%0.2307%10.2307% |
| **Capitalized Value** |  | **$10,148,859** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$10,150,000** |

**Fiscal Year 2014**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building Area |  | 136,690 sf |  |
| Market Rent  | $11.00 psf | $1,503,590 |
| Reimbursement Income |  | $ 326,689 |
| **Potential Gross Income** |  |  | **$1,830,279** |
|  Less Vacancy |  | 15% | ($274,542) |
| **Effective Gross Income**  |  |  | **$1,555,737** |
|  |  |  |  |
| **EXPENSES** |  |
|  Reimbursable Expenses |  |
| Operating expenses $2.17 psf | $ 296,617 |
| Insurance $0.22 psf | $ 30,072 |
|  Unreimbursed Expenses |  |
|  Management |  | 3% of EGI | $ 46,672 |
|  Reserves for Replacement |  | $0.25 psf | $ 34,173 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 42,101 |
|  Tenant Improvements |  | $0.20 psf | $ 27,338 |
|  **Total Operating Expense** |  |  | **$ 486,972** |
|  |  |  |  |
| **Net Operating Income:** |  | **$1,068,765** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 1.629% \* 15% | 10.00%0.2444%10.2444% |
| **Capitalized Value** |  | **$10,432,675[[5]](#footnote-5)** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$10,425,000** |

1. **The Appellee’s Case**

In support of their assessments, the assessors relied on the testimony of James R. Johnston, a licensed real estate appraiser, whom the Board qualified as an expert in the area of real estate valuation, and his summary appraisal report for the fiscal years at issue.

Mr. Johnston agreed with the appellant’s real estate valuation expert that the subject property’s highest and best use was its continued use as a retail building and that the income-capitalization approach was the preferred valuation method to use under the circumstances.[[6]](#footnote-6) Mr. Johnston began his analysis by reviewing leases of properties with similar sizes, configurations, and locations to those of the subject property. Based on these factors, Mr. Johnston selected ten purportedly comparable leases that are reproduced in the following table.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Tenant** | **Address** | **Square****Feet** | **Rent PSF** | **Date****Term** | **Comments** |
|  1 | Home Depot | 1453 Pleasant Street,Bridgewater, MA | 132,984 | $ 6.20 |  02/0825 yrs | Ground Lse Land |
|  2 | Lowe’s | 635 Huse Road,Manchester, NH | 157,626 | $ 8.25 |  01/0920 yrs | Ground Lse Land |
|  3 | BJ’s | 5 Ward Street,Revere, MA | 120,224 | $ 8.90 |  200915 yrs | Ground Lse Land |
|  4 | Kohl’s | Walpole Mall,Walpole, MA | 102,445 | $ 9.50 |  01/0920 yrs | Renewal |
|  5 | Home Depot | 500 Spaulding Tpke,Portsmouth, NH | 145,193 | $ 9.64 |  07/0730 yrs | Ground Lse Land |
|  6 | BJ’s | 25 Shelley Road,Haverhill, MA | 119,598 | $10.75 |  08/0720 yrs | Land & Bldg |
|  7 | BJ’s | 20 Seyon Street,Waltham, MA | 122,142 | $11.54 |  06/1025 yrs | Ground Lse Land |
|  8 | Kohl’s | Orchard Hill Park,Leominster, MA |  89,925 | $13.18 | 10/0520 yrs | Land & Bldg |
|  9 | BJ’s | Northboro Crossing,Northboro, MA | 124,303 | $19.87 |  09/1120 yrs | Land & Bldg |
| 10 | BJ’s | 200 Crown Colony,Quincy, MA |  84,680 | $21.85 |  06/0920 yrs | Land & Bldg |

Taking into account the differences, including: the lease structure; rents at the low end of the range being ground leases only; the physical qualities of the properties, such as Kohl’s stores having more finished space, which generally commands a higher rent; and the age and location of the purportedly comparable leases, Mr. Johnston determined that the subject property’s fair market rent would be in the upper half of his purportedly comparable properties’ rents. Mr. Johnston also noted that the economy was improving during the fiscal years at issue. On this basis, Mr. Johnston selected market rents of $9.00 per square foot for fiscal year 2012, $9.25 per square foot for fiscal year 2013, and $9.50 per square foot for fiscal year 2014. Applied to a net building area of 136,369 square feet,[[7]](#footnote-7) these rents yielded potential gross incomes of $1,227,321 for fiscal year 2012, $1,261,413 for fiscal year 2013, and $1,295,506 for fiscal year 2014.

Relying on the appellant’s good credit rating, the market vacancy, and also the subject property’s actual occupancy of 100%, Mr. Johnston determined that a vacancy rate of 7.5% was appropriate for all fiscal years at issue. This allowance resulted in an effective gross income of $1,135,272 for fiscal year 2012, $1,166,807 for fiscal year 2013, and $1,198,343 for fiscal year 2014.

Next, Mr. Johnston determined the subject property’s net operating income by deducting the subject property’s estimated market expenses. Agreeing with the appellant’s real estate valuation expert that under a triple-net leasing scenario the landlord’s expenses are those limited to the management and structural maintenance of the building, Mr. Johnston allowed a management fee equal to 2% of the effective gross income and a replacement reserve allowance equal to $0.20 per square foot, which he testified were typical in the market. Mr. Johnston deducted these expenses from his effective gross income amounts to derive net operating incomes of $1,085,293 for fiscal year 2012, $1,116,197 for fiscal year 2013, and $1,147,102 for fiscal year 2014.

For his capitalization rates, Mr. Johnston reviewed rates published by *PricewaterhouseCoopers Korpacz Report* and also *Integra Realty Resources* for the 1st Quarters of 2011, 2012, and 2013. He testified that the reports reflected declining rates during the fiscal years at issue. He also performed a band-of-investment analysis for each of the fiscal years at issue. Relying on this information, he then selected capitalization rates of 7.50% for fiscal year 2012, 7.25% for fiscal year 2013, and 7.00% for fiscal year 2014. Mr. Johnston then added a prorated tax factor based on his vacancy rate to arrive at his overall capitalization rates of 7.61% for fiscal year 2012, 7.37% for fiscal year 2013, and 7.12% for fiscal year 2014.

Finally, applying the corresponding capitalization rate to the net operating income for each of the fiscal years at issue, Mr. Johnston derived an indicated value of $14,261,917, rounded to $14,260,000 for fiscal year 2012, $15,154,708, rounded to $15,150,000 for fiscal year 2013, and $16,106,062 rounded to $16,110,000 for fiscal year 2014.

Mr. Johnston’s income-capitalization analyses are reproduced in the following table.[[8]](#footnote-8)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  |  | **Fiscal Year 2012** |  | **Fiscal Year 2013** |  | **Fiscal Year 2014** |
| **INCOME** |  |  |  |  |  |  |
| Net Rentable Area 136,369 |  |  |  |  |  |  |
|  Market Rent (PSF) |  |  $9.00 |  |  $9.25 |  | $9.50 |
| **Potential Gross Income** |  | **$1,227,321** |  | **$1,261,413** |  | **$1,295,506** |
|  Less Vacancy – 7.5% |  |  ($92,049) |  |  ($94,606) |  |  ($97,163) |
|  |  |  |  |  |  |  |
| **Effective Gross Income** |  | **$1,135,272** |  | **$1,166,807** |  | **$1,198,343** |
|  |  |  |  |  |  |  |
| **OPERATING EXPENSE** |  |  |  |  |
| Management 2% of EGI $22,705 |  |  $23,336 |  |  $23,967 |
| Reserve for Replacement $0.20 $27,274 |  |  $27,274 |  |  $27,274 |
|  Total Operating Expense |   |  ($49,979) |  |  ($50,610) |  |  ($51,241) |
|  |  |  |  |  |  |  |
| **Net Operating Income:** | **$1,085,293** |  | **$1,116,197** |  | **$1,147,102** |
|  |  |  |  |  |  |
| Base Capitalization Rate | 7.50% |  | 7.25% |  | 7.00% |
| Owner Tax Share (Vac Rate\*Tax Rate) | 0.110% |  | 0.115% |  | 0.122% |
| Total Capitalization Rate | 7.61% |  | 7.37% |  | 7.12% |
|  |  |  |  |  |  |
| **Capitalized Value** | **$14,261,917** |  | **$15,154,708** |  | **$16,106,062** |
|  |  |  |  |  |  |
| **Rounded Fair Cash Value** | **$14,260,000** |  | **$15,150,000** |  | **$16,110,000** |

1. **The Board’s Findings**

Based on all of the evidence, the Board found that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. The Board agreed with the parties’ real estate valuation experts and determined that the subject property’s highest and best use was its existing use as a retail building and also that the income-capitalization methodology was the best approach to use to value the subject property for the fiscal years at issue.

In reaching its decision, the Board found that Mr. Shannon’s projected rental income, reimbursements, and operating expenses were well supported and indicative of the market. The Board further found, however, that Mr. Shannon’s vacancy and collection loss rate of 15% was excessive and instead, based on the underlying statistical data contained in the parties’ appraisal reports and also the subject property’s actual occupancy of 100%, adopted a stabilized rate of 7.5% for each of the fiscal years at issue, which was equivalent to Mr. Johnston’s rate. Lastly, the Board found that Mr. Shannon’s base capitalization rate of 10% for all fiscal years at issue was excessive and instead relied more heavily on Mr. Johnston’s rates in exercising its own judgment in selecting a stabilized rate of 7.5% for each of the fiscal years at issue, plus the applicable pro-rata tax factors. These findings resulted in rounded fair market values of $15,700,000, $ 15,500,000, and $15,800,000, for fiscal years 2012, 2013, and 2014, respectively, which exceeded the assessed values for each of the fiscal years at issue.

On this basis, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. Accordingly, the Board issued a decision for the appellee in these appeals.

**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. Assessors of 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 subject property’s highest and best use was its continued use as a retail building.

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 Redevelopment 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). In the instant appeals, the real estate valuation experts determined that there were insufficient fee-simple market sales of reasonably comparable properties to meaningfully estimate the value of the subject property using a sales-comparison technique. The Board agreed. *See* ***Olympia & York State St. Co. v. Assessors of Boston,*** 428 Mass. 236, 247 (1988) (“The assessors must determine a fair cash value for the property as a fee simple estate, which is to say, they must value an ownership interest in the land and the building as if no leases were in effect.”). Furthermore, the “[i]ntroduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods.” ***Correia,*** [375 Mass. at 362.](http://www.lexis.com/research/buttonTFLink?_m=5b792ac3e4bebdafe533aa3d22643bbe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Mass.%20Tax%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b375%20Mass.%20360%2cat%20362%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=54&_startdoc=51&wchp=dGLzVzt-zSkAb&_md5=17209c8d4a54a05efb5a6558698cd8a0) The Board found here that no such “special situations” existed. 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 Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). In these appeals, 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.

 “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 St. Co.,*** 428 Mass. at 239. “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 (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 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). Vacancy rates must also be market based when determining fair cash value. ***Donovan v. City of Haverhill,*** 247 Mass. 69, 71 (1923). 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* ***Olympia & York State St. Co.***, 428 Mass. at 239, 245. Lastly, the capitalization rate selected should consider the return necessary to attract investment capital. ***Taunton Redev. Assocs.,*** 393 Mass. at 295.

In the present appeals, the Board found that Mr. Shannon’s projected rental income, reimbursements, and expenses were well supported and indicative of the market. The Board further found, however, that Mr. Shannon’s vacancy and collection loss rate of 15% was excessive and instead, based on the underlying statistical data contained in the parties’ appraisal reports and also the subject property’s actual occupancy of 100%, adopted a stabilized rate of 7.5% for each of the fiscal years at issue, which was consistent with Mr. Johnston’s suggested rate. Lastly, the Board found that Mr. Shannon’s base capitalization rate of 10% for all fiscal years at issue was excessive and instead relied more heavily on Mr. Johnston’s rates in exercising its own judgment in selecting a stabilized rate of 7.5% for each of the fiscal years at issue.

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); ***New England Oyster House,*** 362 Mass. at 702. In evaluating the evidence before it, 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. v. Assessors of Lynn,*** 392 Mass. 296, 300 (1984).

“‘The burden of proof is upon the [taxpayer] 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)). The appellant must show that it has complied with the statutory prerequisites to its appeal, ***Cohen v. Assessors of Boston,*** 344 Mass. 268, 271 (1962), and that the assessed valuation of its property was improper. *See* ***Foxboro Assocs.,*** 385 Mass. at 691. The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. ***Schlaiker,*** 365 Mass. at 245.

 Based on all the evidence presented in these appeals, and reasonable inferences drawn therefrom, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue.

Accordingly, the Board 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. The total amount of taxes here includes both real estate and fire district taxes, as well as a community preservation act (“CPA”) surcharge. [↑](#footnote-ref-1)
2. The total amount of taxes here includes both real estate and fire district taxes, as well as a CPA surcharge. [↑](#footnote-ref-2)
3. The total amount of taxes here includes both real estate and fire district taxes, as well as a CPA surcharge. [↑](#footnote-ref-3)
4. Although Mr. Shannon included a sales-comparison analysis for the fiscal years at issue in his appraisal report, he ultimately concluded that this methodology required excessive adjustments rendering the derived values unreliable. Therefore, Mr. Shannon placed no weight on the values developed from his sales-comparison analysis. [↑](#footnote-ref-4)
5. The Board noted mathematical errors in Mr. Shannon’s calculations. [↑](#footnote-ref-5)
6. Although Mr. Johnston included the sales information for six big-box retail stores that sold between October 2009 and October 2014 in his appraisal report, he did not complete a full sales-comparison analysis. [↑](#footnote-ref-6)
7. This figure differed only slightly from Mr. Shannon’s building area of 136,690 square feet. [↑](#footnote-ref-7)
8. The Board noted that while there was a slight difference in the net leasable areas used by the parties’ real estate valuation experts, the impact on the subject property’s overall values was negligible. [↑](#footnote-ref-8)