**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

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| **MACY’S RETAIL HOLDINGS, INC.**  **(F/K/A FEDERATED RETAIL HOLDINGS, INC. AND MAY CENTERS ASSOCIATES CORP.)** | **v.** | **BOARD OF ASSESSORS OF THE TOWN OF BARNSTABLE** |
| Docket Nos.  F322619, F322620, F326083, F326084, F330760, F330761 |  | Promulgated:  April 10, 2019 |

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 Barnstable (“assessors” or “appellee”) to abate taxes on certain real estate located in the Town of Barnstable, owned by and assessed to Macy’s Retail Holdings, Inc. (“Macy’s” or “appellant”) under G.L. c. 59, §§ 11 and 38 for the fiscal years 2014, 2015, and 2016 (“fiscal years at issue”).

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

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Laura Bellotti Cardillo*, Esq. for the appellant.

*Jeffrey Rudziak*, assessor, for the appellee.

**Findings of Fact and Report**

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

**I. Introduction**

On January 1, 2013, January 1, 2014, and January 1, 2015, the relevant dates of valuation and assessment for the fiscal years at issue, respectively, the appellant was the assessed owner of two improved parcels (“subject properties”): a 3.5-acre parcel improved with an 80,620-square-foot Macy’s main store (“main store”), and a 7.42-acre parcel improved with a 118,854-square-foot Macy’s men’s/home store (“men’s/home store”). Both improvements are two-story structures annexed to the single-story Cape Cod Mall.

**II. Assessments and Jurisdictional History**

Relevant assessment and jurisdictional facts are summarized in the following tables.[[1]](#footnote-1) On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

|  |  |  |  |
| --- | --- | --- | --- |
| **Main Store** | **Docket No. F322619** | **Docket No. F326084** | **Docket No. F330761** |
| Fiscal Year | 2014 | 2015 | 2016 |
| Assessed Value | $7,110,700 | $6,418,500 | $6,592,000 |
| Tax Rate | $8.22/$1,000 | $8.40/$1,000 | $8.41/$1,000 |
| Assessment | $85,375.33 | $78,639.46 | $82,612.92 |
| Tax Timely Paid w/o Interest | Yes | Yes | Yes |
| Abatement Application Filed | 2/3/14[[2]](#footnote-2) | 2/5/15[[3]](#footnote-3) | 1/29/16 |
| Abatement Application Denied | 2/11/14 | 2/10/15 | 4/12/16 |
| Petition Filed | 5/1/14 | 5/6/15 | 6/22/16 |
|  |  |  |  |
| **Men’s/Home Store** | **Docket No. F322620** | **Docket No. F326083** | **Docket No. F330760** |
| Fiscal Year | 2014 | 2015 | 2016 |
| Assessed Value | $9,725,800 | $9,243,000 | $9,375,800 |
| Tax Rate | $8.22/$1,000 | $8.40/$1,000 | $8.41/$1,000 |
| Assessment | $116,773.78[[4]](#footnote-4) | $113,245.24[[5]](#footnote-5) | $117,500.34 |
| Tax Timely Paid w/o Interest | Yes | Yes | Yes |
| Abatement Application Filed | 2/3/14[[6]](#footnote-6) | 2/5/15[[7]](#footnote-7) | 1/29/16 |
| Abatement Application Denied | 2/11/14 | 2/10/15 | 4/12/16 |
| Petition Filed | 5/1/14 | 5/6/15 | 6/22/16 |

**III. Expert Testimony**

The appellant and the appellee each presented the testimony of real estate appraisers whom the Board qualified as experts in real estate valuation. The appellant presented the testimony of Donald P. Bouchard, CRE, MAI, a senior vice president at Lincoln Property Company in Boston (“appellant’s appraiser”), as well as two appraisal reports prepared by him concerning the subject properties, one for the main store and one for the men’s/home store. The assessors presented the testimony of Christopher H. Bowler, MAI, CRE, of Avery Associates in Acton (“assessors’ appraiser”), as well as an appraisal report prepared by him and Jonathan H. Avery, MAI, CRE, concerning the subject properties.

Both appraisers determined that the highest and best use of the subject properties was their existing retail use, and both relied upon an income approach to valuation. The assessors’ appraiser also testified to a sales-comparison approach, but admittedly only used this approach as a check on the reasonableness of his income approach.

In his testimony and appraisal report, the appellant’s appraiser stressed the seasonal nature of Cape Cod and that average wages on Cape Cod were among the lowest in Massachusetts. He testified to a demographic transition of older and retired individuals moving into the area who are looking to spend less. He also discussed his opinion of obsolescence, that generally there is a reduction in demand for big department stores. He included numerous articles in his appraisal report to highlight a theme of shifting dynamics in the retail industry, with the millennial generation spending less on goods and clothing and more on restaurants, travel, and online shopping, resulting in the restructuring of the retail industry and a reduction in demand for retail space. The appellant’s appraiser also noted that the Cape Cod Mall is a single-story structure, whereas the subject properties are both two-story structures.

While acknowledging the changing nature of the retail industry, the assessors’ appraiser discussed ways that spaces occupied by traditional retailers are transitioning to accommodate new occupants, such as upscale grocery stores, children’s entertainment venues, fitness facilities, and discount retailers. He also noted that some traditional retailers are converting space for purposes of online fulfillment centers, given the surge in online shopping.

In conducting their respective income analyses, the appraisers agreed on the appropriate vacancy and collection loss factor but differed on their management fees, reserves for replacement, and capitalization rates as displayed in the following table:

|  |  |  |
| --- | --- | --- |
|  | Appellant’s Appraiser | Assessors’ Appraiser |
| Vacancy/Collection Loss | 5% | 5% |
| Management Fee | 2% | 4% |
| Replacement Reserves | $0.30 PSF | $0.40 PSF |
| Capitalization Rate (FY14/15) | 8.25% | 7.9% |
| Capitalization Rate (FY16) | 8% | 7.5% |

The appraisers diverged significantly on their market rents. The appellant’s appraiser selected fifteen anchor leases that ranged in time period from 2005 to 2012 and that geographically represented a diverse swath of the country. He narrowed his rent analysis predominantly to five leases that ranged in time period from 2005 to 2012, with rents ranging from $3.21 to $6.20 per square foot. With adjustments, he concluded a market rent of $5 per square foot for the main store and $4.50 per square foot for the men’s/home store for each of the fiscal years at issue.

The assessors’ appraiser selected five leases, all from properties located in New England. The leases ranged in time period from 2011 to 2013, with rents ranging from $4.50 to $10.95 per square foot. With adjustments, he derived market rents of $7.20, $7.35, and $7.50 per square foot for the men’s/home store and $7.70, $7.85, and $8 per square foot for the main store for fiscal years 2014, 2015, and 2016, respectively.

Both appraisers relied on two of the same properties in their income analyses – the Lord & Taylor at the Rockingham Mall in Salem, New Hampshire and the Bon-Ton at the Maine Mall in South Portland, Maine. However, they strongly disagreed on inclusion of a third property - the Kohl’s department store located across from the subject properties. The assessors’ appraiser included the Kohl’s lease as one of his five leases, testifying that “this is what I think is the best comparable rental that there is. It is fifteen-hundred feet across the street from the subject properties. It [] share[s] same demographics, same location, same traffic count, similar visibility.” Conversely, the appellant’s appraiser testified that “[i]t’s a different animal. It’s an open air center. It has different market issues, different market penetration. [They] are a different player. It’s not part of a mall.”

Applying their respective factors, the appellant’s appraiser arrived at a value of $4.3 million for all three fiscal years at issue for the main store, and the assessors’ appraiser calculated values of $6.7 million for fiscal year 2014, $7 million for fiscal year 2015, and $7.4 million for fiscal year 2016.

For the men’s/home store, the appellant’s appraiser calculated values of $5.6 million for fiscal years 2014 and 2015, and $5.65 million for fiscal year 2016, while the assessors’ appraiser arrived at values of $9.3 million for fiscal year 2014, $9.6 million for fiscal year 2015, and $10.2 million for fiscal year 2016. Notably, the values determined by the assessors’ appraiser for fiscal year 2014 were lower than the assessed values.

**IV. The Board’s Conclusions**

Based on the evidence of record, the Board found and ruled that the appellant met its burden of proving that the assessed values of the subject properties exceeded their fair market values for the fiscal years at issue. The Board agreed with both appraisers that the highest and best use of the subject properties was their existing retail use. The Board also agreed with both appraisers’ vacancy and collection loss of 5 percent. The Board adopted the 2 percent management fee used by the appellant’s appraiser. The subject properties are occupied by the owner and though subdivision is possible, it is unlikely given the two-story structure of the subject properties annexed to a one-story mall, thereby justifying a lower management fee. The Board adopted the replacement reserves of $0.40 per square foot used by the assessors’ appraiser, given that both appraisers noted signs of physical wear, including the need for a new ceiling in the men’s/home store.

For capitalization rates, the Board found that the rates selected by the assessors’ appraiser better reflected market conditions and determined a capitalization rate of 8 percent for fiscal years 2014 and 2015 and 7.5 percent for fiscal year 2016.

For rental values, the Board weighed the challenges facing traditional retailers against the evolving uses of spaces once occupied by such retailers. The Board also considered the unique demographics of Cape Cod, as stressed by the appellant’s appraiser, which is why the Board could not ignore the selection of the Kohl’s department store as a comparable by the assessors’ appraiser, given its location across from the subject properties. On balance, the Board found that rents of $7 for the main store and $6.50 for the men’s/home store represented fair market rents for each of the fiscal years at issue.

Applying the above elements, the Board found fair cash values of $6,150,000, $6,150,000, and $6,575,000, for the main store and $8,400,000, $8,400,000, and $8,950,000, for the men’s/home store for each of the fiscal years at issue, as shown in the following tables:

|  |  |  |  |
| --- | --- | --- | --- |
| **Main Store** | **FY14** | **FY15** | **FY16** |
| Area | 80,620 | 80,620 | 80,620 |
| Rent | $7 | $7 | $7 |
| Potential Gross | $564,340 | $564,340 | $564,340 |
| Vacancy/Collection Loss @ 5% PG | $28,217 | $28,217 | $28,217 |
| Effective Gross Income | $536,123 | $536,123 | $536,123 |
| Management Fee  @ 2% EGI | $10,722 | $10,722 | $10,722 |
| Replacement Reserves @ $0.40 PSF | $32,248 | $32,248 | $32,248 |
| Net Operating Income | $493,153 | $493,153 | $493,153 |
| Capitalization Rate | 8% | 8% | 7.5% |
| Indicated Value | $6,164,412 | $6,164,412 | $6,575,373 |
| **Fair Cash Value** | **$6,150,000** | **$6,150,000** | **$6,575,000** |
| Assessed Value | $7,110,700 | $6,418,500 | $6,592,000 |
| **Overvaluation** | $960,700 | $268,500 | $17,000 |

|  |  |  |  |
| --- | --- | --- | --- |
| **Men's/Home Store** | **FY14** | **FY15** | **FY16** |
| Area | 118,854 | 118,854 | 118,854 |
| Rent | $6.50 | $6.50 | $6.50 |
| Potential Gross | $772,551 | $772,551 | $772,551 |
| Vacancy/Collection Loss @ 5% PG | $38,628 | $38,628 | $38,628 |
| Effective Gross Income | $733,923 | $733,923 | $733,923 |
| Management Fee  @ 2% EGI | $14,678 | $14,678 | $14,678 |
| Replacement Reserves @ $0.40 PSF | $47,542 | $47,542 | $47,542 |
| Net Operating Income | $671,703 | $671,703 | $671,703 |
| Capitalization Rate | 8% | 8% | 7.5% |
| Indicated Value | $8,396,288 | $8,396,288 | $8,956,040 |
| **Fair Cash Value** | **$8,400,000** | **$8,400,000** | **$8,950,000** |
| Assessed Value | $9,725,800 | $9,243,000 | $9,375,800 |
| **Overvaluation** | $1,325,800 | $843,000 | $425,800 |

Consequently, the Board issued decisions for the appellant, granting abatements of $11,534.74, $3,289.66, and $213.05 for each of the fiscal years at issue, respectively, for the main store, and abatements of $15,918.35, $10,328.44, and $5,336.26 for each of the fiscal years at issue, respectively, for the men’s/home store.[[8]](#footnote-8)

**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).

“‘The burden of proof is upon the [appellant] 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)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayer[] . . . prove[s] the contrary.’” ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting ***Schlaiker***, 365 Mass. at 245).

In appeals before the 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.***, 393 Mass. at 600 (quoting ***Donlon v. Assessors of Holliston,*** 389 Mass. 848, 855 (1983)).

“‘Prior to valuing the subject property, its highest and best use must be ascertained.’” ***Tsissa, Inc. v. Assessors of West Tisbury,*** Mass. ATB Findings of Fact and Reports 2011-198, 216 (quoting ***Tennessee Gas Pipeline Co. v. Assessors of Agawam,*** Mass. ATB Findings of Fact and Reports 2000-859, 874). 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.*** Here, both appraisers concluded that the subject properties’ existing retail use was their highest and best use, and the Board agreed with and adopted that conclusion.

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 Authority,*** 375 Mass. 360, 362 (1978). The income-capitalization method “is frequently applied with respect to income-producing property.” ***Taunton Redevelopment Associates v. Assessors of Taunton,*** 393 Mass. 293, 295 (1984). In these appeals, both appraisers concluded that the income-capitalization approach was the most reliable way to value the subject properties, and the Board agreed that the income-capitalization approach was the best method for valuing the subject properties.

“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 (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. v. Assessors of Boston,*** 397 Mass. 447, 451 (1986).

Imputing rental income based on fair market rentals from comparable properties is evidence of value if, once the rentals are adjusted, they are indicative of the earning capacity of the property at issue. *See* ***Correia v. New Bedford Redevelopment Authority***, 5 Mass. App. Ct. 289, 293-94 (1977), *rev’d on other grounds,* 375 Mass. 360 (1978); ***Library Services, Inc. v. Malden Redevelopment Authority***, 9 Mass. App. Ct. 877, 878 (1980) (rescript). Properties are “comparable” when they share “fundamental similarities.” *See* ***Lattuca v. Robsham,*** 442 Mass. 205, 216 (2004). The taxpayer bears the burden of establishing the comparability of properties. ***Silvestri v. Assessors of Lowell,*** Mass. ATB Findings of Fact and Reports 2012-926, 935. *Accord* ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 470 (1981).

In the present appeals, the Board considered evidence offered by both parties’ appraisers to derive fair market rents for the subject properties for each of the fiscal years at issue. ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977) (“The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board.”). Applying the Board’s fair market rents and the other elements of its income-capitalization analysis resulted fair cash values that were less than the assessed values for each of the fiscal years at issue.

Accordingly, the Board issued decisions for the appellant, granting abatements of $11,534.74, $3,289.66, and $213.05 for each of the fiscal years at issue, respectively, for the main store, and abatements of $15,918.35, $10,328.44, and $5,336.26 for each of the fiscal years at issue, respectively, for the men’s/home store.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

**Clerk of the Board**

1. Assessment amounts listed in the tables include a 3 percent Community Preservation Act (“CPA”) surcharge and Hyannis Fire District tax at a rate of $3.54 per $1,000 for fiscal year 2014, $3.60 per $1,000 for fiscal year 2015, and $3.87 per $1,000 for fiscal year 2016. [↑](#footnote-ref-1)
2. Because the statutory due date under G.L. c. 59, § 59, February 1, 2014, was a Saturday, the appellant had until the next business day, Monday, February 3, 2014, to file its abatement application. *See* G.L. c. 4, § 9 and G.L. c. 41, § 110A. [↑](#footnote-ref-2)
3. Because the statutory due date under G.L. c. 59, § 59, February 1, 2015, was a Sunday, the appellant ordinarily would have had until the next business day, Monday, February 2, 2015, to file its abatement application. *See* G.L. c. 4, § 9. However, due to inclement winter weather, abatement applications due on February 2, 2015 were timely if filed by February 6, 2015. *See* St. 2015, c. 10 and Massachusetts Department of Revenue, Division of Local Services Bulletin 2015-04B, <https://archives.lib.state.ma.us/handle/2452/264162> (last visited February 21, 2019) (explaining the impact of St. 2015, c. 10 on due dates). [↑](#footnote-ref-3)
4. Excludes special assessment. [↑](#footnote-ref-4)
5. Excludes special assessment. [↑](#footnote-ref-5)
6. See footnote 2. [↑](#footnote-ref-6)
7. See footnote 3. [↑](#footnote-ref-7)
8. Abatement amounts include a 3 percent CPA surcharge and Hyannis Fire District tax at a rate of $3.54 per $1,000 for fiscal year 2014, $3.60 per $1,000 for fiscal year 2015, and $3.87 per $1,000 for fiscal year 2016. [↑](#footnote-ref-8)