

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**MACY’S RETAIL HOLDINGS, INC.  
f/k/a FEDERATED RETAIL  
HOLDINGS, INC.**

**v.**

**BOARD OF ASSESSORS OF  
THE TOWN OF BURLINGTON**

Docket Nos. F341237, F342610  
F347324

Promulgated:  
January 12, 2026

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 Burlington (“appellee” or “assessors”) to abate taxes on certain real estate located in the Town of Burlington, owned by and assessed to Macy’s Retail Holdings, Inc. f/k/a Federated Retail Holdings, Inc. (“appellant”) for fiscal years 2020, 2021, and 2022 (collectively, “fiscal years at issue”).

Commissioner Elliott heard these appeals. Chairman DeFrancisco and Commissioners Good, Metzger, and Bernier joined him 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 1.34.

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

*Daniel P. Ryan, Esq., Caroline A. Kupiec, Esq., and Richard L. Jones, Esq., for the appellee.*

**FINDINGS OF FACT AND REPORT**

The hearing of these appeals encompassed two days and included the testimony of two valuation experts and the admittance into evidence of appraisal reports and the

requisite jurisdictional documents, and additional exhibits referenced at the hearing.<sup>1</sup> The parties submitted a Joint Stipulation of Facts and post-hearing briefs.

On the basis of the evidence of record, including testimony, the exhibits entered into evidence, and the Joint Stipulation of Facts, the Appellate Tax Board (“Board”) made the following findings of fact.

## **I. Introduction and Jurisdiction**

On January 1, 2019, January 1, 2020, and January 1, 2021, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 17.403-acre parcel of land improved with a three-story retail building containing 254,712 square feet of gross leasable area, located at 75 Middlesex Turnpike within the Burlington Mall (“subject property”). The Burlington Mall (“Mall”) is a Class A retail mall with approximately 1,264,000 square feet of gross leasable area. The subject property is situated at the junction of Interstate I-95 (“Route 128”) and the Middlesex Turnpike, and has direct access and visibility from Route 128. The immediate neighborhood is densely developed with a mix of office, retail, and medical uses, along with several hotels.

During the fiscal years at issue, the retail structure operated as a Macy’s department store (“Macy’s store”), and a small portion of the subject property was leased for use as outdoor seating by the abutting Cheesecake Factory Restaurant. Others among the approximately 176 tenants in the Mall as of the relevant dates of valuation included Legal Sea Foods and upscale retailers such as Apple, Coach, and Burberry, in

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<sup>1</sup> The 2019 decision of the Appellate Tax Board and the 2021 Rule 23 decision of the Massachusetts Appeals Court involving the value of the subject property for fiscal years 2014 through 2016 were entered into evidence without objection.

addition to Nordstrom, the Mall’s only other anchor tenant throughout the fiscal years at issue.

The Macy’s store was built in 1968 and is attached to the two-level Mall. Its exterior is concrete block with decorative brick veneer. The roof is flat with a rubberized cover. Interior finishes include drywall, acoustical tile ceilings, carpet, and tile flooring. The retail structure has three-level escalators, one passenger elevator, and one freight elevator. Electrical, security, and fire protection systems are all adequate, as are loading docks to the rear of the subject property.

The following table details the jurisdictional information concerning the fiscal years at issue:

	<b>Fiscal Year 2020 Docket No. <u>F341237</u></b>	<b>Fiscal Year 2021 Docket No. <u>F342610</u></b>	<b>Fiscal Year 2022 Docket No. <u>F347324</u></b>
Assessed Value	\$24,139,000	\$24,139,000	\$22,621,200
Tax Rate	\$25.54	\$25.85	\$26.64
Tax Amount	\$616,510.06	\$623,993.15	\$602,628.77
Abatement Application Filed	01/31/20	02/1/21	02/1/22
Timely Payments Without Interest	Yes	Yes	Yes
Denial	04/30/20	02/17/21	04/20/22
Petition	08/04/20 <sup>2</sup>	05/13/21 <sup>3</sup>	07/27/22 <sup>4</sup>

<sup>2</sup> The fiscal year abatement application was deemed denied on April 30, 2020 pursuant to G.L. c. 59, § 64. However, the appellee notified the appellant that the abatement application had been denied by vote on May 6, 2020. The notice being invalid, the Board granted the appellant two additional months, pursuant to G.L. c. 59, § 65C, in which to file its petition, thus extending the petition’s due date to September 30, 2020. See *Cardaropoli v. Assessors of Springfield*, Mass. ATB Findings of Fact and Report 2001-913, 917.

<sup>3</sup> The appellant’s petition was stamped as received by the Board on May 18, 2021, but the petition was mailed in a FedEx envelope bearing a shipping date of May 13, 2021. Under G.L. c. 58A, § 7, the Board ruled that the shipping date was treated as the date of filing.

<sup>4</sup> The assessors issued a Property Tax Abatement Denial Notice on April 21, 2022, stating that the abatement “application was deemed denied on 4/20/2022.” However, the abatement application indicates that it was acted upon by the assessors on April 20, 2022, and not deemed denied due to the failure of the assessors to act on the application. Because, this notice was also invalid, the Board treated the deemed denial as having occurred on May 1, 2022, three months after the abatement application was filed. The petition was timely filed within three months thereafter.

Based upon these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals for the fiscal years at issue.

## **II. The Appellant's Case**

The appellant presented its case primarily through the testimony and appraisal report of Mark F. Tyburski, a licensed real estate appraiser and MAI member of the Appraisal Institute. The parties stipulated to his qualification as an expert real estate appraiser for purposes of these appeals.

Relative to the periods before the Board. Mr. Tyburski characterized the Mall as a Class A, rather than a Class A+, mall due to the closing of one of the three anchor stores – Lord & Taylor.<sup>5</sup> However, in terms of street appeal, he rated the Macy's store as B+, noting declining sales and issues with age and future repairs. He pointed out that on both sides of the Mall, the market was changing, with a mix of offices, hotels, retail stores, restaurants, and health and entertainment facilities. He also noted the trend away from malls and anchor stores, with retail going more toward big box retailers such as Lowe's or combinations of high-end stores, restaurants, and entertainment facilities.

Mr. Tyburski determined the highest and best use of the subject property to be its existing improvement and use. He found no surplus land, concluding that additional development was too speculative since it could not be determined as of the relevant dates (i) whether required operating agreement approvals would be secured, or (ii) whether any further development on the site would be allowed. Mr. Tyburski developed only an income-capitalization approach to the valuation of the subject property, noting the inapplicability of both (i) the cost approach, due to the property's age and related difficulty in estimating

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<sup>5</sup> The parties stipulated that the Mall included Lord & Taylor through December of 2020. A fourth anchor store, Sears, Roebuck and Co., closed before the fiscal years at issue.

accrued depreciation, and (ii) the sales-comparison approach, due to a lack of sales of anchor stores whose highest and best use remained as anchor stores for retail use in the marketplace and not for redevelopment or repurposing.

Mr. Tyburski's first step in his income-capitalization approach was to determine the subject property's potential gross income for each of the fiscal years at issue. Finding no recent or comparable quality anchor store leases, Mr. Tyburski's search expanded to include an extended time frame and a broader geographic area, focusing on the Northeast. He researched and relied upon eight purportedly comparable rents for generally Class B anchor stores in malls located in Natick and Hanover, Massachusetts; Concord and Salem, New Hampshire; South Portland, Maine; Milford, Connecticut; and Woodbridge and Mays Landing, New Jersey. The three larger properties ranged in size from 210,000 to 240,000 square feet, with the balance ranging in size from 87,736 to 158,594 square feet. Excluding one 23-year term and without regard to any renewal options, the lease terms ranged from five to fifteen years from March 2007 through February 2019. First year rents before adjustments were indicated to range from \$3.14 to \$6.15 per square foot for four gross leases and from \$3.27 to \$5.00 per square foot for three triple-net leases, excluding rent of \$7.32 per square foot indicated in the appraisal for a JC Penney triple-net lease for space in the Natick Mall,<sup>6</sup> included to demonstrate the highest end of the range.

After adjusting his comparable lease rents to account for differences between the lease provisions and the leased premises and the subject property, including location, market conditions, and functionality, Mr. Tyburski estimated the subject property to have

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<sup>6</sup> In his appraisal report, the appellee's expert referenced \$7.92 per square foot, which at the hearing Mr. Tyburski stated was the correct amount.

a market rent of \$6.00 per square foot for each of the fiscal years at issue. However, he also estimated percentage rent since his review of the leases indicated that most had percentage rent clauses which “kicked-in” if rent based on a percentage of store sales exceeded the contract rent being paid. Noting percentages in leases ranging from 1 percent to 3 percent, but most between 2 percent and 3 percent, Mr. Tyburski estimated a reasonable percentage rent of 3 percent for the Macy’s store, resulting in estimated rent of \$6.12, \$6.01, and \$5.20 per square foot for 2018, 2019, and 2021, respectively, which he found to be in line with the estimated market rent from his comparable leases.<sup>7</sup> In his final analysis, he estimated the subject property to have a market rent of \$6.00 per square foot on a triple-net basis for the effective dates of the appraisal. Applying this rate to the Macy’s store’s 254,712 square feet, Mr. Tyburski derived potential gross income of \$1,533,272 for each of the fiscal years at issue.

The next step in Mr. Tyburski’s analysis was the determination of a vacancy allowance. Noting that, as a 100 percent owner-occupied anchor store since its construction, the subject property had had a zero percent actual vacancy rate, Mr. Tyburski opined that the actual vacancy rate was not reflective of vacancy risk to investors. Based on typical lease-up periods for anchor stores of one to three years, Mr. Tyburski projected that the actual vacancy rate for the subject property would be 1.9 percent to 5.7 percent. To arrive at his rate for each of the fiscal years at issue, he referenced (i) CoStar vacancy indicators for the Mall, its mall peers, the Burlington/Woburn market, and the Boston market for the three periods spanning each of

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<sup>7</sup> Mr. Tyburski estimated percentage rent to be \$2.87 for 2020 (during COVID), based on sales of \$24,397,045. He reported sales falling from \$51,943,132 in 2018 to \$51,024,663 in 2019 and to \$44,110,530 in 2021. The appellee’s appraiser indicated sales of \$51,089,242 for 2019.

the effective dates of the appraisal, (ii) national vacancy assumptions for regional malls from the PwC Real Estate Investor Survey (“PWC”) for the fourth quarters of 2018, 2019, and 2020, and (iii) stabilized vacancy rates determined for typical five and ten year leases by Co-Star (with respect to the Burlington/Woburn and Boston markets) and PWC (for the national market).

Based on these indicators, and accounting for an allowance for credit loss risk and the trend toward lower tenant retention rates as of January 1, 2021, Mr. Tyburski arrived at a stabilized vacancy rate of 4 percent of potential gross income as of both January 1, 2019, and January 1, 2020, and of 6 percent as of January 1, 2021. These allowances resulted in an effective gross income of \$1,471,941 for each of the fiscal years 2020 and 2021, and of \$1,441,276 for the fiscal year 2022.

Turning to operating expenses, Mr. Tyburski found only four to be relevant, because market rent was estimated on a triple-net basis – (i) management fees and replacement reserves, and (ii) insurance and real estate taxes with respect to his estimated vacancy period. Mr. Tyburski settled on a management fee of 3.5 percent of effective gross income, noting typical management fees ranging from 3 percent to 5 percent, based on PWC. He estimated an expense for the replacement of long-lived items at \$0.40 per square foot of building area, an amount he considered to be reasonable based on PWC. Regarding the vacancy period, Mr. Tyburski estimated only insurance at \$0.40 per square foot based on a general market study, choosing to account for real estate taxes in his determination of the capitalization rate. Deducting his determined expenses totaling \$157,478 for the fiscal years 2020 and 2021, and totaling \$158,443 for

the fiscal year 2022, Mr. Tyburski arrived at net operating income of \$1,314,463 for each of the fiscal years 2020 and 2021, and of \$1,282,833 for the fiscal year 2022.

Turning to his capitalization rates for the relevant periods, Mr. Tyburski referred to (i) PWC's national institutional capitalization rates for Class A+, Class A, and Class B+ regional malls, (ii) RealtyRates' national surveyed rates and band-of-investment rates for Retail-Anchored Centers, and (iii) information from RealtyRates on prevailing mortgage interest rates, loan to value ratios, amortization periods, and equity dividend rates for Retail-Anchored Centers. From this information, he developed a capitalization rate via the so-called Mortgage Equity Technique, which recognizes that a typical purchaser of property like the subject will pay a major portion of the price through first mortgage financing and own the property for a specific term over which a certain yield on equity is anticipated.

Mr. Tyburski commented that the subject property could not be considered investment grade, and hence its capitalization rate would be greater than those indicated by PWC for the Class A to Class B+ categories. However, because the subject property was just below investment grade, its rate would be below the average rates based on all grades and classes of properties indicated in the RealtyRates' survey. In conclusion, Mr. Tyburski found that PWC's national institutional Class B+ rates (which he considered to be most equivalent with the subject property's non-institutional Class A rating), and the rates he developed from the Mortgage Equity Technique, best reflected rates applicable to the subject property, considering its income characteristics, age, functional utility, location, and market. He settled on a base capitalization rate of 7.25 percent for each of the fiscal years 2020 and 2021, and of 7.50 percent for the fiscal year 2022. To these he

loaded pro-rated tax factors reflective of his vacancy rates, for ultimate rounded capitalization rates of 7.35 percent for each of the fiscal years 2020 and 2021 and of 7.65 percent for the fiscal year 2022.

After applying these capitalization rates to his determined net operating income, Mr. Tyburski arrived at a final, rounded fair cash value of \$17,900,000 for each of the fiscal years 2020 and 2021 and of \$16,700,000 for fiscal year 2022.

### **III. The Appellee's Case**

The appellee presented its case primarily through the testimony and appraisal report of Thomas J. Jensen, a licensed real estate appraiser and MAI member of the Appraisal Institute. The parties stipulated to his qualification as an expert real estate appraiser for purposes of these appeals.

Mr. Jensen characterized the Mall as a Class A super regional mall because of the quality level of the retailers. It benefited from above-average highway access and a high average household income level within a radius of five miles of the property. Mr. Jensen noted nearby facilities, including restaurants, a hotel, the regional offices of Oracle, and the Lahey Clinic, and stated generally that the surrounding office parks and shopping centers provided a source of customers. Mr. Jensen opined that the subject property had development potential, there being excess land not needed for the current use of the site. Regarding the structure itself, Mr. Jensen assumed that as of the three valuation dates, the condition of the interior was sufficient to remain competitive with similar mall department stores, noting that there did not appear to be any significant items of functional obsolescence and no deferred maintenance. However, he pointed out that the third floor

of the Macy's store, which he characterized as a Class B building, did not have a direct connection to the two-story Mall complex.

Mr. Jensen determined that the highest and best use of the subject property was its existing retail use. He applied an income-capitalization approach to valuation, stating it to be widely used in appraising income-producing properties. He rejected the cost approach, concluding that accrued depreciation could not reliably be measured, and he rejected a sales-comparison approach, given insufficient market data.

To begin his income-capitalization approach, Mr. Jensen selected five purportedly comparable anchor store leases in super regional center/malls in Natick, Massachusetts; Woodbridge, New Jersey; South Portland, Maine; Roseville, Minnesota; and Altamonte Springs, Florida – indicating that his search for comparable data expanded beyond the immediate metropolitan Boston area and included leases of anchor department stores within mall complexes throughout the United States.<sup>8</sup> His selected properties ranged in size from 120,844 to 210,000 square feet. Lease terms ranged from eight to twenty years commencing on dates from March 2007 to January 2022. Base rents determined on a triple-net or modified gross basis ranged from \$5.30 to \$10.00 per square foot – with an average of \$7.87 per square foot, and the highest being for the two properties located in Minnesota and Florida.

Taking into account transaction and characteristics adjustments for market trends, expenses, location, rentable area, and economic characteristics, and placing less weight on the Minnesota lease, which he described as a sale-leaseback agreement, Mr. Jensen developed a reconciled market rent of \$7.50 per square foot on a triple-net basis. Then,

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<sup>8</sup> The first three of Mr. Jensen's comparables were also selected by the appellant's appraiser as comparables.

based on his analysis of comparable rentals, with consideration given to the subject property's five-mile average household income levels, the Mall's premier retail complex status, and the superior exposure of the Macy's store, Mr. Jensen concluded market rents per square foot, on a triple-net basis, of \$7.50 for fiscal year 2020, \$7.25 for fiscal year 2021, and \$7.00 for fiscal year 2022, noting a decline in estimated market rent between January 1, 2019, and January 1, 2021, due to the growth of on-line sales taking a greater share from brick-and-mortar sales activity.

As further support for his concluded market rents, Mr. Jensen developed a market rent for the approximately 84,904 square feet of first floor space, a discounted rental rate for the second floor, and a further discounted rate for the third floor with no direct connection to the Mall interior, based on the terms of five purportedly comparable leases for retail stores in Medford, Framingham, Newton, and Stoneham. On the basis of these leases, Mr. Jensen developed a reconciled market rent of \$16.00 per square foot on a triple-net basis for the first-floor space and of \$8.00 per square foot and \$2.00 per square foot for the second- and third-floor spaces, respectively, resulting in an overall rental rate, on a triple-net basis, of \$8.67 per square foot for the entire 254,712 square foot store. Then, concluding that a further discount would be required based on the larger size of the Macy's store, Mr. Jensen opined that his reconciled market rent of \$7.50 per square foot on a triple-net basis for the entire department store appeared reasonable.

Finally, applying his concluded triple-net lease market rents per square foot of \$7.50 for fiscal year 2020, \$7.25 for fiscal year 2021, and \$7.00 for fiscal year 2022 to the subject property's 254,712 square feet, Mr. Jensen derived estimated market rent of \$1,910,340 for fiscal year 2020, \$1,846,662 for fiscal year 2021, and \$1,782,984 for fiscal

year 2022. He concluded that the subject property was not expected to generate other forms of income from sources such as parking fees, signage, antennas, or percentage rent, noting that the inclusion of percentage rent payments based on the store's sales activity would be considered speculative.<sup>9</sup> However, the Cheesecake Factory was paying an annual fee for use of an outdoor patio seating area, which the most recent data available for review reported to be \$5,000 annually. Adding this amount to his estimated market rents, Mr. Jensen arrived at potential gross income of \$1,915,340 for fiscal year 2020, \$1,851,662 for fiscal year 2021, and \$1,787,984 for fiscal year 2022.

Turning to vacancy, Mr. Jensen applied a stabilized vacancy and collection loss rate of 3.5 percent of potential gross income based on a review of market conditions and the subject property's occupancy history, producing effective gross income of \$1,848,303 for fiscal year 2020, \$1,786,854 for fiscal year 2021, and \$1,725,405 for the fiscal year 2022.

For expenses, Mr. Jensen took into account only two. He estimated a management expense of 3.75 percent of effective gross income, which he concluded to be reasonable for a single-tenant, triple-net-leased retail asset. Considering the effective age of the Macy's store and typical market participant behavior, he arrived at a replacement reserve of \$0.40 per square foot of building area. Deducting his determined expenses totaling \$171,196 for fiscal year 2020, \$168,892 for fiscal year 2021, and \$166,587 for fiscal year 2022, Mr. Jensen arrived at net operating income of \$1,677,107 for fiscal year 2020, \$1,617,962 for fiscal year 2021, and \$1,558,818 for fiscal year 2022.

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<sup>9</sup> Mr. Jensen stated for informational purposes that the Macy's store had the ability to pay rent above 3 percent of gross sales volume due to its higher profit margins, indicating its ability to pay a market rent of at least \$1,500,000 to \$1,620,000 or \$5.89 to \$6.37 per square foot based on gross sales of \$52 million to \$54 million.

Turning to his capitalization rates, Mr. Jensen considered (i) national regional mall market capitalization rates from PWC (the same survey referenced by Mr. Tyburski) for the fourth quarters of each of 2018, 2019, and 2020, and (ii) the Sector Snapshot: Malls reports from Green Street Advisors for March 2018 and December 2019 and 2020, providing rates for the Boston area mall market based on reported publicly traded REIT information. Taking into account the PWC rates and Green Street reports, Mr. Jensen concluded the appropriate capitalization rates for the subject property to be approximately 6.5 percent for the January 1, 2019, valuation date; 6.75 percent for the January 1, 2020, valuation date; and 7.0 percent for the January 1, 2021, valuation date.

However, to derive a capitalization rate, Mr. Jensen also considered investment risk factors, including the upside potential from redevelopment, adaptation, or expansion. He observed that a typical market participant would take into consideration the potential for a substantial development expansion on the site, resulting in a lower overall risk profile and reduction in the capitalization rate. He referenced (i) a Sample Shared Parking Plan dated March 12, 2019 for 580,000 square feet of new development, and (ii) a Second Supplemental Amendment dated April 12, 2021, to the original Operating Agreement between the Macy's store and the remainder of the Mall complex, referring to the potential addition of more than 725,000 square feet of gross leasable area. Accordingly, Mr. Jensen applied a nominal reduction of 25 basis points, resulting in capitalization rates for the subject property of approximately 6.25 percent for fiscal year 2020; 6.50 percent for fiscal year 2021; and 6.75 percent for fiscal year 2022. Mr. Jensen further adjusted these rates to reflect a tax factor, resulting in ultimate capitalization rates of 6.34 percent, 6.59 percent, and 6.84 percent for fiscal years 2020, 2021, and 2022, respectively.

After applying these capitalization rates to his determined net operating income, Mr. Jensen arrived at final rounded fair cash values for the subject property of \$26,450,000 for fiscal year 2020, \$24,550,000 for fiscal year 2021, and \$22,790,000 for fiscal year 2022.

#### **IV. The Board's Findings and Rulings**

On the basis of the record in its entirety, the Board found and ruled that the appellant met its burden of proving that the subject property was overvalued for the fiscal years at issue.

In reaching this conclusion, the Board agreed with the parties' experts that the highest and best use of the subject property was its continued use as a retail property. While the Board agreed with the parties' selection of an income-capitalization approach to determine fair cash value and found portions of each expert's testimony and report to be probative on the issue of whether the assessments were excessive, it declined to adopt all of either expert's elements of value. Like the appellant's expert, the Board also ascribed no value to surplus or excess land, the development of which it found to be speculative.

After reviewing the leases relied upon by each of the experts in their respective reports, the Board selected a fair market rent for the subject property of \$6.50 per square foot on a triple-net basis for each of the fiscal years at issue. Applying rent of \$6.50 per square foot, the Board found potential gross income of \$1,655,628 for each of the fiscal years at issue.

The Board found the appellee's 3.75 percent vacancy and collection loss rate to be reasonable. Applying this rate to potential gross income resulted in an effective gross

income of \$1,597,681 for each of the fiscal years at issue. With respect to operating expenses, the Board found that the record supported a management fee of 3.75 percent of effective gross income and a replacement reserve of \$0.40 per square foot, with no allowance for insurance. After deducting these expenses, the Board determined net operating income of \$1,435,883 for each of the fiscal years at issue.

With respect to capitalization rates, the Board ultimately selected a capitalization rate of 6.75 percent for each of the fiscal years at issue, inclusive of the varying tax factor, rejecting the appellee’s nominal reduction attributable to the development of excess land. After applying this rate to its net operating income, the Board determined a rounded fair cash value for the subject property of \$21,300,000 for each of the fiscal years at issue.

The following table details these findings:

<b>Income:</b>	
Potential gross income (\$6.50 x 254,712)	\$1,655,628
Less: Vacancy (3.5%)	<u>57,947</u>
Effective gross income	\$1,597,681
<b>Expenses:</b>	
Management (3.75%)	\$59,913
Replacement Reserve (\$0.40 x 254,712)	<u>101,885</u>
Total Expenses	\$161,798
<b>Income minus Expenses</b>	\$1,435,883
Capitalization Rate	0.0675
Value Indication	\$21,272,340
<b>Value Rounded</b>	<b>\$21,300,000</b>

Based on the above, the Board issued decisions for the appellant for the fiscal years at issue, with abatements of \$72,508.06, \$73,359.76, and \$35,191.44 for fiscal years 2020, 2021, and 2022, respectively.

## OPINION

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 are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549, 566 (1956). A taxpayer bears the burden “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)). An assessment is presumed valid unless the taxpayer sustains its burden of proving that the property at issue has a lower value than its assessed value. ***Schlaiker***, 365 Mass. at 245.

Prior to valuing the subject property, its highest and best use must be ascertained. ***Tennessee Gas Pipeline Co. v. Assessors of Agawam***, Mass. ATB Findings of Fact and Reports 2000-859, 875 (citing ***Conness v. Commonwealth***, 184 Mass. 541, 542-43 (1903)). “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 (citations omitted), *aff’d in relevant part*, 62 Mass. App. Ct. 428 (2004). All uses to which the property is reasonably adapted on the relevant assessment dates should be considered with a view toward ascertaining what the property was then worth in the market for any legal use for which it would bring the most. See ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989).

In the present appeals, 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

property. However, because property cannot be valued on the basis of hypothetical or future uses that are remote or speculative, the Board declined to ascribe any value to the development potential of surplus or excess land. See ***Macy's Retail Holdings, Inc. f/k/a Federated Retail Holdings, Inc.***, Mass. ATB Findings of Fact and Reports 2019-559, 582, *aff'd*, 99 Mass. App. Ct. 1124 (decision under M.A.C. Rule 23.0) (citing, in the Board's findings, ***Tigar v. Mystic River Bridge Authority***, 329 Mass. 514, 518 (1952); ***Salem Country Club, Inc. v. Peabody Redevelopment Authority***, 21 Mass. App. Ct. 433, 435 (1986)).

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). The use of the income-capitalization approach is appropriate when reliable cost and 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, Inc.***, 362 Mass. 696, 701-02 (1972). The income-capitalization approach is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redevelopment Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). In these appeals, the Board agreed with the parties that the income-capitalization approach was the most appropriate method for valuing 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. v. Assessors of Boston***, 428 Mass. 236, 239 (1998). “[I]t is the net income that the property *should* be earning, not necessarily what it actually earns, that is the figure that should be capitalized.” ***Peterson v. Assessors of Boston***, 62 Mass. App. Ct. 428, 436 (2004) (emphasis in original). Accordingly, the income stream used in the income-capitalization method must reflect the property’s earning capacity or economic rental value. ***Pepsi-Cola Bottling Co.***, 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 to reflect reasonable operating expenses, they are indicative of the subject property’s earning capacity. See ***Correia v. New Bedford Redevelopment Auth.***, 5 Mass. App. Ct. 289, 294 (1977), *aff’d on other grounds*, 375 Mass. 360 (1978). Vacancy and credit loss rates must also be market based when determining fair cash value. ***Olympia & York State St. Co.***, 428 Mass. at 239. After accounting for market vacancy and credit loss rates, 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. See ***Olympia & York State St. Co.***, 428 Mass. at 239. Lastly, the capitalization rate selected should reflect the return necessary to attract investment capital, and account for real estate taxes borne by the landlord by use of an effective tax factor. ***Taunton Redevelopment Assocs.***, 393 Mass. at 295.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any witness or to adopt any particular method of valuation that an expert witness suggested. **Cumington School of Arts, Inc. v. Assessors of Cumington**, 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.”). Rather, the Board can accept those portions of the evidence that the Board determined had more convincing weight. **Foxboro Associates 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. The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” **Assessors of Quincy v. Boston Consol. Gas Co.**, 309 Mass. 60, 72 (1941). See also **New Boston Garden Corp.**, 383 Mass. at 473.

In **Boston Consol. Gas Co.**, 309 Mass. at 72, the Supreme Judicial Court ruled that “the conclusion reached by the board . . . did not coincide with the figure given by any witness, but it does not follow . . . that this conclusion was, therefore, unsupported by the evidence.” The Court noted that the “board was not required to believe the testimony of any particular witness but it could accept such portions of the evidence as appeared to have the more convincing weight. . . . The board could select the various elements of value as shown by the record and from them form, as it properly did, its own independent judgment.” *Id.* See also **New Boston Garden Corp.**, 383 Mass. at 473 (“The essential requirement is that the board exercise judgment.”).

In evaluating the evidence before it in these appeals, the Board selected among the various elements of value presented by the parties. See ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984). While the Board declined to adopt entirely either expert's elements of value, the record in the aggregate afforded the Board with sufficient and probative evidence to form its own judgment as to the fair cash value of the subject property for each of the fiscal years at issue. See ***Liberty Norfolk Dev. II, LLC v. Assessors of Norfolk***, 90 Mass. App. Ct. 1110 (2016) (decision under Rule 1:28).

Based on all the evidence presented in these appeals, and reasonable inferences drawn therefrom, the Board found and ruled that the appellant met its burden of demonstrating that the subject property's assessed value exceeded its fair cash value for all of the fiscal years at issue. The Board further found and ruled that for purposes of an income approach, the market rent for the subject property was \$6.50 per square foot for each of the fiscal years at issue, with no value attributable to surplus or excess land, and that the record supported a management fee of 3.75 percent of effective gross income, a replacement reserve of \$0.40 per square foot, no allowance for insurance, and a capitalization rate of 6.75 percent, inclusive of the varying tax factor, resulting in a fair cash value for the subject property of \$21,300,000 for each of the fiscal years at issue.

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Accordingly, the Board issued decisions for the appellant in these appeals and granted abatements in the amount of \$72,508.06, \$73,359.76, and \$35,191.44 for fiscal years 2020, 2021, and 2022, respectively.

**THE APPELLATE TAX BOARD**

By:   
**Mark J. DeFrancisco, Chairman**

**A true copy,**

Attest:   
**Clerk of the Board**