

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. F323027, F327642
& F329659

Promulgated:
October 31, 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 Burlington ("assessors" or "appellee") 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. ("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 Elliott heard these appeals. Chairman Hammond and Commissioners Rose, Good, and Metzger 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 1.32.

Laura Bellotti Cardillo, Esq. for the appellant.

Kevin S. Fretyag, Esq. and *John P. Flynn*, Esq. 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 and Jurisdictional History

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 a 17.403-acre parcel of land improved with a 254,712-square-foot retail building¹ located at 4 Burlington Mall Road in Burlington ("subject property").

Relevant assessment and jurisdictional facts are summarized in the following table:

¹ There was a minor discrepancy between the parties as to the size of the subject property. The appellant reported it to have 254,712 square feet of gross leaseable area. The assessors reported the subject property to have 251,764 square feet of gross leaseable area, as they did not consider escalator wells and certain atrium space to be gross leaseable area. Based on the evidence, the Board found the appellant's measurement of the subject property to be more reliable and it therefore adopted those measurements for purposes of these appeals.

| Fiscal Year | 2014 | 2015 | 2016 |
|------------------------------|----------------------|----------------------|--------------|
| Assessed Value | \$19,541,000 | \$22,475,300 | \$22,475,300 |
| Tax Rate/\$1,000 | \$32.24 | \$29.40 | \$28.28 |
| Tax Assessed | \$630,001.84 | \$660,773.82 | \$635,601.48 |
| Tax Timely Paid w/o Interest | Yes | Yes | Yes |
| Abatement Application Filed | 2/03/14 ² | 2/02/15 ³ | 1/29/16 |
| Abatement Application Denied | 2/27/14 | 3/26/15 | 2/25/16 |
| Petition Filed | 5/20/14 | 6/23/15 | 5/13/16 |

On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

II. The Subject Property

The subject property was built in 1968 and is a three-story department store containing 254,712 square feet of gross leaseable area. Its exterior is concrete block with decorative brick veneer. The roof is flat with a rubberized cover. Interior finishes include drywall and acoustical tile ceilings and carpet and tile flooring.

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.

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. For that particular year, 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 (last visited October 2, 2019) (explaining the impact of St. 2015, c. 10 on due dates). The appellant tendered evidence of timely mailing of its abatement application on February 2, 2015, and therefore the Board found that it had jurisdiction for fiscal year 2015.

The subject property 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 subject property is attached to the Burlington Mall ("Mall"), which is a super regional mall with approximately 1,313,125 square feet of gross leaseable area. As of the relevant dates of valuation, the Mall had 180 total tenants, including upscale retailers such as Apple, Coach, and Burberry, as well as restaurants such as Legal Seafood and The Cheesecake Factory. Besides the subject property, the Mall's anchors included Sears, Lord & Taylor, and Nordstrom.

The subject property is situated at the junction of Interstate I-95 ("Route 128") and 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. Overall, the subject property's location and condition are considered to be good.

III. The Appellant's Valuation Evidence

The appellant presented its valuation evidence through the testimony and appraisal report of Donald P. Bouchard ("appellant's appraiser"), who is a licensed real estate appraiser and MAI member of the Appraisal Institute. The Board qualified the appellant's

appraiser as an expert real estate appraiser for purposes of these appeals.

To prepare for his appraisal report, the appellant's appraiser inspected the subject property, the Mall, and the surrounding neighborhood. He testified that the Mall was a "fine" mall and he considered it to be a Class A mall.

The first step in his appraisal was the determination of highest and best use. He considered the subject property's highest and best use both as improved and as vacant, and ultimately concluded that its continued use as a retail store was its highest and best use.

The appellant's appraiser next considered appropriate valuation methodologies. He declined to use the cost approach because of the subject property's age and the fact it would not be the approach used by typical buyers of a property like the subject property. He additionally ruled out the sales-comparison approach because of the dearth of sufficient arm's-length sales of comparable properties. Accordingly, the appellant's appraiser relied exclusively upon the income-capitalization approach to value the subject property.

The first step in his income-capitalization approach was the determination of market rent. To develop a market rent, the appellant's appraiser examined data from twelve anchor retail leases that he personally inspected, along with information from

four additional anchor retail leases that he did not personally inspect. The leases involved large national retailers such as Boscov's, Dillard's, Macy's, JC Penney, Sears, The Bon-Ton, Lord & Taylor, and Neiman Marcus. Some of the properties were located in New England, while others were in the mid-Atlantic states, Midwest, South, and West Coast. Although all of the leases were considered in his appraisal, the appellant's appraiser ultimately culled the list down to five leases, to which he then made adjustments to account for differences from the subject property. Relevant information about those leases is contained in the following table.

Comparable Leases Considered by the Appellant's Appraiser

| Lease # | Location | Date | Tenant | Term | Rent | Sq. Ft. |
|---------|--------------------|---------|---------------|---------|--------|---------|
| 1 | South Portland, ME | 1/27/12 | The Bon-Ton | 15 yrs. | \$6.15 | 120,844 |
| 2 | Salem, NH | 4/11/11 | Lord & Taylor | 15 yrs. | \$6.18 | 158,894 |
| 3 | Eatontown, NJ | 1/27/10 | Boscov's | 14 yrs. | \$3.21 | 264,601 |
| 4 | Woodbridge, NJ | 4/26/12 | Boscov's | 15 yrs. | \$5.83 | 150,938 |
| 5 | Milford, CT | 11/1/17 | Boscov's | 17 yrs. | \$3.14 | 231,162 |

The appellant's appraiser made adjustments to each of these leases to account for differences from the subject property such as location, size, and functional utility. His adjusted rents ranged from \$4.02 to \$6.12 per square foot, with an average of \$4.88 per square foot on a triple-net basis. The appellant's

appraiser determined a market rent for the subject property of \$5.50 per square foot using his comparable leases.

Because it is common practice in the retail industry for anchor stores to negotiate rent as a percentage of sales, the appellant's appraiser additionally discussed and analyzed rents determined on this basis. He analyzed the twelve leases he personally examined in considering per-square-foot rents, which indicated rents ranging from 0.5 to 3.0% of sales. Market information contained in his appraisal report indicated that anchor rents negotiated on the basis of percentage of sales were commonly in the 2.5 to 3.0% range. Using those percentages, the appellant's appraiser analyzed chain-wide average sales for a number of national anchor stores, including JC Penney, Nordstrom, Sears, Lord & Taylor, Dillard's, and Macy's; chain-wide sales for Macy's alone; and the subject property's actual sales. Using the range of 2.5 to 3.0% for the array of national anchor chains resulted in average rents of \$5.09 to \$6.11 per square foot. Using those same percentages for chain-wide Macy's sales resulted in a range of \$4.78 to \$5.73 per square foot. Lastly, using the subject property's actual sales with those same percentages resulted in indicated rents of \$5.75 to \$6.90 per square foot. The appellant's appraiser's conclusion of rent as a percentage of sales for the subject property was in the range of \$5.25 to \$5.75 per square foot on a triple-net basis.

After considering all of this data, the appellant's appraiser ultimately concluded a market rent of \$5.50 per square foot for the subject property. Further, due to the lack of growth in anchor rents over the previous decade, the appellant's appraiser concluded that it was appropriate to use that rent for all three of the fiscal years at issue.

The next step in his income-capitalization analysis was the determination of appropriate rates for vacancy and collection loss. Although the subject property is fully occupied by the owner, the appellant's appraiser discussed market trends in general, in particular the difficulty of finding a new tenant when an anchor store becomes vacant. The appellant's appraiser pointed to several recent and local examples where it took from nine months to several years to replace a vacant anchor store. Considering this information and the market in general, he concluded a vacancy and collection loss rate of 4.0% for the subject property for all three years.

Because the appellant's appraiser considered his rents under a triple-net lease scenario, there was little discussion of expenses in his appraisal. He did note that anchor tenants typically pay a proportionate share of common area maintenance ("CAM") charges and taxes, and his final computations included management expenses of 3.5% of effective gross income along with a reserve for replacements of \$0.40 per square foot.

The final step in his income-capitalization analysis was the selection of an appropriate capitalization rate. The appellant's appraiser began his discussion of capitalization rates by discussing the "substantial economic headwinds" and "[d]eclining sales volumes" impacting retail stores due to the change in shopping patterns precipitated by the growth in on-line retail commerce. The appellant's appraiser opined that large retail department stores such as Macy's are a "mature retailing" concept that will "struggle" to remain relevant in the economy due to the "seismic shift" in the American retail scene.

The appellant's appraiser consulted numerous market sources to ascertain appropriate capitalization rates. He began with the *PwC Real Estate Investor Survey's* data for regional malls for the first quarters of 2013, 2014, and 2015. The total range in published capitalization rates for those quarters spanned from 4.0 to 10.0%. Additional information regarding average published capitalization rates by mall class for each year is contained in the following table.

Average Capitalization Rates by Mall Class

| Year | Overall | Class A+ | Class B+ |
|------|---------|----------|----------|
| 2013 | 6.92% | 5.58% | 7.08% |
| 2014 | 6.56% | 5.54% | 6.83% |
| 2015 | 6.38% | 4.88% | 6.33% |

The appellant's appraiser consulted additional industry publications such as *Fantini & Gorga* and *RealtyRates.com* in selecting his capitalization rates. He also employed a band of

investment analysis. His band of investment model resulted in an indicated overall rate of 8.16% for the period January 1, 2013 to January 1, 2014, and 7.96% for the period January 1, 2014 to January 2015.

After taking into consideration his band of investment analyses, the published market data, as well as the "nature of the real estate at issue, rates in the retail sector and the broader economic and demographic factors impacting the appeal and marketability of oversized mall anchor stores," the appellant's appraiser determined capitalization rates for the subject property as follows: 8.0% for fiscal year 2014; 7.75% for fiscal year 2015; and 7.75% for fiscal year 2016.

After applying his selected capitalization rates to his net operating income, the appellant's appraiser arrived at opinions of value for the subject property as follows: \$15,000,000 for fiscal year 2014 and \$15,450,000 for both fiscal years 2015 and 2016.

IV. The Assessors' Valuation Evidence

The assessors presented their valuation evidence through the testimony and appraisal report of Emmet T. Logue ("assessors' appraiser"), who is a licensed real estate appraiser and MAI member of the Appraisal Institute. The Board qualified the assessors' appraiser as an expert real estate appraiser for purposes of these appeals.

The assessors' appraiser prepared for his appraisal by inspecting the subject property, the Mall, and the Mall's operating history. He noted that the Mall had a solid operating history, with a high quality tenant mix and low historical vacancy. Like the appellant's appraiser, he considered the Mall to be a Class A mall.

The assessors' appraiser began his appraisal by making a determination of highest and best use. In making this determination, the assessors' appraiser noted that the subject property has approximately 1,515 lined parking spaces, or six spaces per 1,000 square feet of gross floor area. That amount exceeds the minimum zoning required ratio of five spaces per 1,000 square feet of gross floor area, potentially allowing for pad sites, i.e., building lots that are adjacent to a retail shopping center. The assessors' appraiser further noted that the appellant submitted a Conceptual Site Plan ("Plan"), dated June 5, 2014, to Burlington's Planning Board ("Planning Board") in which it sought preliminary approval for the development of three pad sites to be constructed in the subject property's parking lot. According to the Plan, these three, freestanding buildings would house restaurant businesses and they would range in size from approximately 5,000 to 8,000 square feet.

The assessors' appraiser noted that even with the addition of the buildings proposed in the Plan, the aggregate building area to

ground area ratio for the Mall would remain substantially under the maximum ratio permitted by applicable zoning guidelines. He therefore concluded that it was highly probable that the Planning Board would approve the development of the pad sites. Although he noted that Macy's would also need permission from the Mall owner to develop the pad sites, he likewise concluded that it was highly likely that the Mall owner would consent to the development of the pad sites. Accordingly, the assessors' appraiser concluded that the highest and best use of the subject property was its continued use as an anchor store along with the development of one or more pad sites in the parking area.

The assessors' appraiser next considered appropriate methodologies with which to value the subject property. He declined to use the cost approach because of the age of the subject property as well as certain elements of functional obsolescence caused by its size and design. Because the subject property is an income-producing property, the assessors' appraiser used the income-capitalization approach to value, but added a sales-comparison approach for determining the value of the pad sites.

To begin his income-capitalization approach, the assessors' appraiser selected comparable leases from which he could determine a market rent. He chose five leases that were signed between December 2006 and September 2013. Relevant information about each of his comparable leases is contained in the following table.

Comparable Leases Considered by the Assessors' Appraiser

| Lease # | Location | Date | Tenant | Term | Rent | Sq. Ft. |
|---------|-----------------------|---------------------|-----------------------|------------|--------|---------|
| 1 | Natick, MA | 12/2006 | JC Penney | 20 yrs. | \$8.32 | 199,961 |
| 2 | Woodbridge, NJ | 4/2012 | Boscov's | 15 yrs. | \$5.30 | 150,938 |
| 3 | Salem, NH | 4/2011 | Lord & Taylor | 15 yrs. | \$6.18 | 158,594 |
| 4 | South Portland, ME | 9/2013 ⁴ | The Bon-Ton | 15 yrs. | \$6.15 | 120,844 |
| 5 | Warwick, RI | 12/2011 | Jordan's Furniture | 10 yrs. | \$7.50 | 100,000 |

After making adjustments to these rents to account for such differences as mall quality, tenant mix, size, area demographics, location, date, and market conditions, the assessors' appraiser ultimately concluded a market rent for the subject property of \$6.75 for each of the fiscal years at issue.

The assessors' appraiser next considered appropriate rates for vacancy and collection loss. He cited market data published by industry sources such as *CoStar* and *KeyPoint Partners*. The assessors' appraiser noted that *CoStar* published vacancy rates ranging from 2.7 to 3.1% for the second quarter of 2012 through the first quarter of 2016 for retail properties containing at least 500,000 square feet. For large retail properties such as the Mall, *CoStar* published average vacancy rates of 2.4% from 2012 to 2015, declining to 1.9% in 2016. According to the assessors' appraiser,

⁴ Although both parties' appraisers used The Bon-Ton Lease at the Maine Mall in their income-capitalization analyses, there was a discrepancy in the reported start date of that lease which was not explained in the record. As the parties agreed on the remaining terms of the lease, the Board considered this discrepancy immaterial.

KeyPoint Partners published retail vacancy rates ranging from 6.4 to 7.9% for the Northwest submarket between 2012 and 2016, but there were zero reported vacancies for stores containing 200,000 square feet or more during that period. After considering the historical 100% occupancy of the subject property, as well as the lack of vacant anchor stores in the subject property's geographic area, the assessors' appraiser concluded that an investor or buyer would factor a modest vacancy rate into their analysis. Accordingly, he concluded a rate of 3.0% for vacancy/collection loss in his income-capitalization approach.

Because the market rent that the assessors' appraiser determined was premised upon a triple-net lease term, he offered little discussion of operating expenses. However, he determined that it was appropriate to include expenses for management and replacement reserves. Accordingly, he applied a 4.0% management expense based upon "market parameters for comparable properties," which he believed to be reasonable given the single-tenant nature of the subject property. The assessors' appraiser adopted a replacement reserve of \$0.40 per square foot, which he based on market information published in the *PwC Real Estate Investor Survey* and after taking into consideration the age and condition of the subject property.

The final step in his income-capitalization approach was the selection of an appropriate capitalization rate, for which he

consulted several sources and methodologies. First, he conducted a band of investment analysis, which yielded indicated capitalization rates for the subject property of 6.7% for fiscal year 2014; 6.8% for fiscal year 2015; and 6.6% for fiscal year 2016.

In addition, the assessors' appraiser consulted industry publications, such as the *PwC Real Estate Investor Survey*, which showed rates for institutional grade regional malls declining from an average of 6.92% in the first quarter of 2013 to an average of 6.38% in the last quarter of 2015. Average rates for non-institutional grade regional malls also declined slightly, from an average rate of 9.33% in the first quarter of 2013 to an average rate of 9.01% in the first quarter of 2015.

The assessors' appraiser also included information from the *PwC Real Estate Investor Survey* for that same time period indicating average capitalization rates for regional malls by mall class. For the first quarter of 2013, average capitalization rates for A+, A, and B+ regional malls, respectively, were 5.58%, 6.27%, and 7.08%. By the first quarter of 2015, the average rates for those same properties had declined to 4.88%, 5.4%, and 6.33%.

After taking all of this information into consideration, along with the overall improvement in the economy during the relevant time period, the assessors' appraiser selected the following capitalization rates for the subject property: 7.0% for

fiscal year 2014; 6.5% for fiscal year 2015; and 6.25% for fiscal year 2016, to which he added prorated tax factors to account for his vacancy assumptions.

After using his estimates for market rent, vacancy, expenses and his selected capitalization rates, the assessors' appraiser arrived at fair cash values for the subject property, exclusive of pad sites, as follows: \$20,900,000 for fiscal year 2014; \$22,500,000 for fiscal year 2015; and \$23,400,000 for fiscal year 2016.

The assessors' appraiser next determined an appropriate fair cash value for the subject property's potential pad sites. He noted that the Plan had not been submitted to the Planning Board until June 2014, or approximately halfway between the relevant dates of value for fiscal years 2015 and 2016. He further noted that the pad sites would most likely be occupied by restaurants, which require special permits, although he added that special permits have historically been granted by the town. For these reasons, he opted to take a "conservative" approach to valuing the potential pad sites. He included in his analysis only the potential development rights of a single pad site, rather than all three. The pad site he selected accounted for approximately 50% of the total pad site area shown on the Plan.

The assessors' appraiser opted to use the sales-comparison approach to determine the value of the pad site, as he concluded

that there were a sufficient number of timely, comparable sales on which to rely. The properties that he determined were most useful were properties located in Burlington and Waltham that had been purchased for commercial development. He identified four such sales, and relevant information about each of them is contained in the following table:

Sales-Comparison Properties Selected by the Assessors' Appraiser

| Sale Number | Address | Sq. Ft. | Sale Date | Sale Price (\$/sf) ⁵ | Sale Price (\$/sf)/FAR ⁶ |
|-------------|---------------------------------|---------|-----------|---------------------------------|-------------------------------------|
| 1 | 68 Middlesex Trnpg., Burlington | 15,871 | 11/28/12 | \$76 | \$347 |
| 2 | 170 Cambridge St., Burlington | 23,800 | 10/28/16 | \$62 | \$535 |
| 3 | 18 Third Ave., Burlington | 120,874 | 7/27/16 | \$33 | \$37 |
| 4 | 1022 and 1006 Main St., Waltham | 4,313 | 3/16/12 | \$38 | \$158 |

After making adjustments to account for differences from the subject property such as size, location, and market conditions as of the date of sale, the assessors' appraiser concluded a fair cash value for the subject property of \$200 per square foot/FAR. Applying that figure to the 8,003 square feet of building area allowed on the Plan for the pad site resulted in a rounded fair cash value of \$1,600,000 for the subject property's pad site for fiscal year 2014. The assessors' appraiser applied adjustments to account for improving market conditions in the subsequent fiscal

⁵ The assessors' appraiser included per-square-foot prices that reflected demolition costs. Those figures are omitted from this table.

⁶ "FAR" stands for floor area ratio, which is the ratio of a building's total floor area to the size of the piece of land upon which it is built.

years, and concluded fair cash values of \$1,750,000 and \$1,850,000 for fiscal years 2015 and 2016, respectively, for the subject property's pad site.

After adding his estimates of fair cash value for the subject property's pad site to his estimates of fair cash value for the remainder of the subject property, the assessors' appraiser concluded total fair cash values for the subject property as follows: \$22,500,000 for fiscal year 2014; \$24,250,000 for fiscal year 2015; and \$25,250,000 for fiscal year 2016.

V. The Board's Ultimate Factual Findings

On the basis of all of the evidence, the Board found that the appellant sustained its burden of proving that the assessed value of the subject property exceeded its fair cash value for each of the fiscal years at issue. In reaching this conclusion, the Board found that the highest and best use of the subject property was its continued use as a retail anchor store. This conclusion was substantially the same as the highest and best use determined by both parties' appraisers, with one caveat. The assessors' appraiser included the development of a portion of the subject property's pad sites as a component of its highest and best use, as well as its ultimate fair cash value. The Board disagreed with this conclusion.

As will be discussed in greater detail in the Opinion below, a property's highest and best use must be legally permissible,

physically possible, financially feasible, and maximally productive. See Appraisal Institute, THE APPRAISAL OF REAL ESTATE 331-34 (14th ed., 2013). On the basis of the record evidence, the Board found it too speculative to include the value of the pad site in the subject property's fair cash value. First, although the Plan had been submitted to the Planning Board, it had not been pursued further by the appellant nor approved by the Planning Board as of the relevant dates of valuation in these appeals. Moreover, the evidence showed that the development of the pad site would require the approval of the Mall's owner, and the Board found that there was insufficient evidence in the record to support the conclusion that the Mall's owner would grant its approval.⁷ Accordingly, the Board found that the development of the pad site was too speculative as of the relevant dates of valuation to be included in the subject property's highest and best use or in its fair cash value.

Given the attributes of the subject property, including its age, condition, and the fact that it is an income-producing property, the Board, like the parties, concluded that the income-capitalization approach was the most reliable methodology with

⁷ The Board found that the fact that potential pad site tenants would be in direct competition with current and prospective Mall tenants militated against an inference that the Mall owner would grant approval for the development of the pad site.

which to value the subject property and it therefore adopted that approach.

With respect to market rent, the appellant's appraiser developed adjusted per-square-foot rents ranging from \$4.02 to \$6.12 and rents based on percentage sales ranging from \$5.25 to \$5.75 per square foot on a triple-net basis for the subject property. The Board found that his ultimate rent of \$5.50 was too low as it did not sufficiently take into consideration the specific, and very favorable, attributes of the subject property. The relative strength of the subject property was amply demonstrated by reference to the per-square-foot sale ranges generated by its actual sales, \$5.75 to \$6.90, as compared to the lower ranges generated for Macy's as a chain, \$4.78 to \$5.73, as well as the range generated from chain-wide sales for a large array of retail anchor stores, \$5.09 to \$6.11. The subject property was clearly higher performing than its many counterparts, and the Board found that the \$5.50 rent that the appellant's appraiser offered did not adequately account for these favorable attributes.

At the same time, the Board found that the market rent of \$6.75 suggested by the assessors' appraiser was without adequate support in the record. As an initial matter, his market rent was partially premised on an admittedly incorrect understanding of one of his comparable leases. He conceded this error during the hearing and stated it would have caused him to lower his market

rent estimate. In addition, although information for each of his leases was provided, the Board found that the assessors' appraiser failed to provide an adequate explanation of how he made adjustments to his comparable rents to arrive at his final estimate of market rent.

Accordingly, the Board declined to adopt the rent estimates proffered by either party's appraiser and instead formed its own conclusion of market rent of \$6.25 for each of the fiscal years at issue based on the record evidence.

As for the factors of vacancy, management expenses, and replacement reserves, there was little difference between the parties, and the Board found that both appraisers' conclusions were supported by the record. Accordingly, the Board substantially adopted the figures advanced by both parties' appraisers and concluded a vacancy and collection loss rate of 3.5%; management expenses of 3.75%; and a replacement reserve at \$0.40 per square foot for each of the fiscal years at issue.

With respect to capitalization rates, the appellant's appraiser selected base capitalization rates of 8.0% for fiscal year 2014 and 7.75% for fiscal years 2015 and 2016. The assessors' appraiser selected base capitalization rates of 7.0% for fiscal year 2014; 6.5% for fiscal year 2015; and 6.25% for fiscal year 2016, to which he added appropriate tax factors to reflect vacancy.

Based on the record in its totality, the Board found that the appellant's appraiser selected capitalization rates that were too high for the subject property, as he relied too heavily on the national economic outlook, with insufficient consideration of the subject property's strong location and performance history. The Board additionally found that his capitalization rates were premised in part on an overly dire outlook on the retail industry that was not supported by the record.

Conversely, the Board found that the capitalization rates selected by the assessors' appraiser were too low, as they were premised on too optimistic an outlook of the Mall's status as a Class A mall and the subject property's location, with too little consideration of the relatively flat performance of large anchor stores demonstrated by the record evidence.

Accordingly, the Board relied on its own expertise, and, using the record evidence, concluded base capitalization rates of 7.5% for fiscal year 2014 and 7.25% for both fiscal years 2015 and 2016, to which it added prorated tax factors to reflect vacancy, resulting in overall capitalization rates of 7.613% for fiscal year 2014; 7.353% for fiscal year 2015; and 7.349% for fiscal year 2016.

After applying these overall capitalization rates to its concluded net operating income, the Board arrived at final fair cash values for the subject property of \$18,080,000 for fiscal

year 2014; \$18,720,000 for fiscal year 2015; and \$18,730,000 for fiscal year 2016. As these amounts were lower than the subject property's assessed values for each of the fiscal years at issue, the Board decided these appeals for the appellant, and granted abatements of tax in the following amounts: \$47,102.64 for fiscal year 2014; \$110,405.82 for fiscal year 2015; and \$105,917.08 for fiscal year 2016.⁸

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).

⁸ These amounts are for tax only and do not include statutory additions.

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). However, property cannot be valued on the basis of hypothetical or future uses that are remote or speculative. See *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).

Here, both parties' appraisers concluded that the subject property's existing retail use was its highest and best use, but the assessors' appraiser added an additional component: the development of a portion of the subject property's pad sites. However, as of the relevant dates of valuation, no development of

the subject property's pad sites had occurred, or been approved. Moreover, the evidence showed that the Mall owner would have to grant permission for any development of the pad sites, and the Board found that there was insufficient evidence to support the conclusion that the Mall owner would grant such permission. The Board therefore found and ruled that the inclusion of a portion of the subject property's pad sites in its highest and best use - and ultimately its fair cash value - was too speculative, and accordingly, it concluded that the subject property's current use as a retail anchor store was its highest and best use.

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 approach "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 parties' appraisers concluded that the income-capitalization approach was the most reliable way to value the subject properties. The Board agreed, and it adopted that approach.

"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 rents 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).

In the present appeals, the Board found that the appellant's appraiser selected a market rent that was too low for the subject property. His rent conclusion did not give enough consideration to the many favorable attributes of the subject property, which were amply demonstrated by the comparative data in his own appraisal report. At the same time, the Board found that the market rent selected by the assessors' appraiser lacked adequate

support in the record. His conclusion of rent was admittedly premised partly on an incorrect understanding of one of the comparable leases, and he conceded that a correct understanding of the lease terms would have caused him to lower his conclusion of rent. Additionally, although the assessors' appraiser made adjustments to account for differences between the subject property and his chosen comparison properties, there was no quantitative explanation of his adjustments, and the Board was unable to determine the propriety of those adjustments. See ***Bodwell Extension, LLC v. Assessors of the Town of Avon***, Mass. ATB Findings of Fact and Reports 2006-336, 351 (rejecting appraiser's opinion of value partly because he failed adequately to explain his adjustments). As the Board did not find the market rent suggested by either parties' appraiser to be appropriate for the subject property or supported by the record, it relied on its expertise and formed its own conclusion of market rent based on the record evidence.

The Board similarly exercised its own expertise and judgment in selecting appropriate capitalization rates from the information entered into the record. The Board found that the capitalization rates selected by both parties' appraisers failed to take into consideration the unique attributes of the subject property, with the appellant's appraiser selecting capitalization rates that were too high and the assessors' appraiser selecting capitalization

rates that were too low. Accordingly, the Board selected capitalization rates that more accurately reflected the subject property's characteristics, and those capitalization rates were in the middle of the range of capitalization rates concluded by the parties' appraisers. See *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 683 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *Board of Assessors of Lynnfield v. New England Oyster House, Inc.*, 362 Mass. 696, 701-02 (1972).

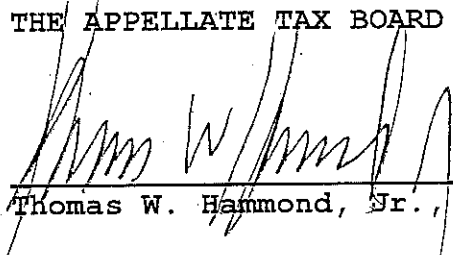
In evaluating the evidence before it, the Board selected from the various elements of value and formed its own independent judgment of fair cash value. *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 605 (1984); *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984). "The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the board." *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

Applying the Board's market rents, its capitalization rates, and the other elements of its income-capitalization analysis resulted in 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 in these appeals, granting abatements of tax in the following amounts: \$47,102.64 for fiscal

year 2014; \$110,405.82 for fiscal year 2015; and \$105,917.08 for
fiscal year 2016.

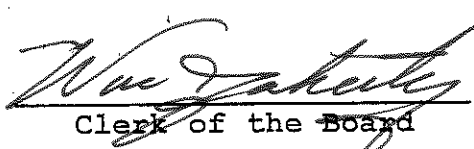
THE APPELLATE TAX BOARD

By:


Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:


Clerk of the Board