COMMONWEALTH OF MASSACHUSETTS

**APPELLATE TAX BOARD**

# RENOVATORS SUPPLY INC.   v.  BOARD OF ASSESSORS OF

# THE TOWN OF ERVING

Docket Nos. F325676, F329589 Promulgated:

December 6, 2018

These are appeals heard 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 Erving (“appellee” or “assessors”) to abate taxes on a certain parcel of real estate located in Erving owned by and assessed to Renovators Supply Inc. (“appellant”), under G.L. c. 59, §§ 11 and 38, for fiscal years 2015 and 2016 (“fiscal years at issue”).

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

*David G. Saliba*, Esq. for the appellant.

*Ellen M. Hutchinson*, Esq. for the appellee.

## FINDINGS OF FACT AND REPORT

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

On January 1, 2014 and January 1, 2015, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 25.872-acre parcel of land classified as industrial/warehouse with an address of 1 River Street (“subject property”). The subject property is improved with five buildings: (1) the main mill building built in 1912 (“subject mill”), which the property record cards list as containing 191,967 square feet; (2) an 18,992-square-foot, detached brick addition built in 1924 (“old powerhouse”); (3) a 1,932-square-foot, stand-alone service garage built in 1920; (4) a 1,620-square-foot, open “pole barn,” classified as a yard item associated with the subject mill and used as an equipment shed; and (5) a 528-square-foot shop, also classified as a yard item associated with the subject mill.

For fiscal year 2015, the assessors valued the subject property at $2,025,800 and assessed a tax at a rate of $14.32 per $1,000, in the total amount of $29,009.46.  The appellant timely paid the tax without incurring interest. On November 24, 2014, the appellant filed an abatement application with the appellee, which the appellee partially granted on February 21, 2015, reducing the subject property’s assessed value to $1,896,200. Not satisfied with that abatement, on February 27, 2015, the appellant seasonably filed a Petition Under Formal Procedure with the Board. The Board, therefore, found and ruled that it had jurisdiction over the appeal for fiscal year 2015.

For fiscal year 2016, the assessors valued the subject property at $2,019,200 and assessed a tax, at a rate of $10.99 per $1,000, in the total amount of $22,191.01.  The appellant timely paid the tax without incurring interest. On January 11, 2016, the appellant filed an abatement application with the appellee, which was deemed denied on April 11, 2016. On May 5, 2016, the appellant seasonably filed a Petition Under Formal Procedure with the Board. The Board, therefore, found and ruled that it had jurisdiction over the appeal for fiscal year 2016.

The subject mill is a multi-story manufacturing building with a brick exterior and an asphalt-shingle roof. While the subject mill was originally constructed in 1912, it has undergone several additions and modernizations, including the addition of a single-story steel warehouse with a 34-foot ceiling. The remainder of the subject mill has 12-to-14-foot ceilings. The subject mill also is equipped with three loading docks and an enclosed dock in the steel warehouse section. Heat is provided by thirteen propane-fired, forced-hot-air furnaces. There is air conditioning only in the owner’s administrative/office area on the second floor. The subject mill is equipped with three electrical services with the main service being 2000 amps/600 volt.

The appellant offered the testimony and appraisal report of Kim A. Levitch, whom the Board qualified as an expert witness in the valuation of industrial property. Mr. Levitch testified that the appellee had overestimated the subject mill’s square footage, specifically its basement area, which the property record cards list as 28,266 square feet, but which Mr. Levitch measured at 23,822 square feet. Mr. Levitch concluded that the subject mill was 187,523 square feet, not 191,967 square feet as reflected in the property record cards. The Board found Mr. Levitch’s testimony and appraisal report on this topic to be credible.

Mr. Levitch further testified to the severe deterioration and functional obsolescence of portions of the subject mill. He testified that only 120,178 square feet of the subject mill was usable space, with 67,345 square feet deteriorated from leaking. However, the appellant, as owner-occupant, was using the deteriorated space as cold, dead storage. Mr. Levitch also testified that the entire 18,992-square-foot old powerhouse was unusable space.

Mr. Levitch testified that the subject property’s highest and best use was its present use for mixed industrial purposes. Although he considered the three approaches to value, Mr. Levitch developed valuation analyses using the sales-comparison and income-capitalization approaches, finding both methods to be appropriate for the subject property.

Mr. Levitch first developed his income-capitalization approach. Mr. Levitch selected four purportedly comparable leases from buildings that he had previously appraised, testifying that the information was already “on file.” For his comparable leases, Mr. Levitch gave a general range of rental incomes for the leases, with no specific information on the individual leases, such as the names of the lessors, start date, length of lease, amount of space leased, and type of lease. Moreover, he admitted that the information was dated from his previous appraisals of the properties, at times back to 2005.

Based on his comparisons, Mr. Levitch determined that the existing rents for the two largest tenants at the subject mill, Sd Associates Charter School and Meals on Wheels, were at market level. Mr. Levitch derived per-square-foot rental figures from the actual leases: $6.90 per square foot and $10.00 per square foot, respectively. Based on his figure of 22,964 square feet of remaining leasable space, and the rental income received by the owner, Mr. Levitch calculated $4.70 per square foot for the remaining rental space leased to third parties. Mr. Levitch then adopted the following rental values for the owner-occupied space: $2.25 per square foot for the owner-occupied usable space in the unheated warehouse area; $3.00 per square foot for the owner-occupied, single-story steel warehouse building; $0.50 per square foot for the owner-occupied obsolete space with leaking roofs and damaged floors; and $0.25 per square foot for the accessory buildings. These figures yielded a gross potential income of $384,113.

For vacancy, Mr. Levitch considered other multi-tenant mill properties, as well as the subject mill’s actual vacancies, and determined the following to be appropriate vacancy expenses: 20% for the leased space; 40% for the owner-occupied usable space in the unheated warehouse area; 40% for the owner-occupied obsolete space; 20% for the owner-occupied, single-story steel warehouse building; and 50% for the accessory buildings. Applying these vacancy expenses yielded a gross effective income of $274,384.

For expenses, Mr. Levitch considered the owner’s expense statements from 2011 to 2014. He used these as a basis for his expense forecasts and ultimately determined a 73.9% expense-to-income ratio.

For his capitalization rates, Mr. Levitch extracted rates from three sales from neighboring communities. Two of those sales were industrial properties, and the sales occurred between 2010 and 2013. The extracted rates averaged 8.78%. Mr. Levitch applied a band-of-investment analysis assuming a 70% mortgage to 30% equity ratio, a mortgage constant of 10.1263%, and an equity yield rate of 16%, and then subtracted equity credit buildup through debt reduction. He thus arrived at a capitalization rate of 10.038%. Finally, Mr. Levitch applied a real estate tax adjustment of 1.432% for fiscal year 2015 and 1.099% for fiscal year 2016. His final capitalization rates were 11.470% for fiscal year 2015 and 11.137% for fiscal year 2016.

Next, Mr. Levitch performed a sales-comparison valuation analysis, selecting six purportedly comparable properties, five of which were mill properties. Three of these properties were from Holyoke, and the remaining three properties were from Deerfield, Orange, and Westfield. Mr. Levitch relied solely on Comparable Sale 3, 5 Appleton Street in Holyoke, an 89,000-square-foot mill, which sold on December 31, 2014 for $300,000, yielding a per-square-foot sales figure of $3.37. Mr. Levitch applied this figure to his opinion of the subject property’s usable space of 187,523 square feet and arrived at $631,952, which he rounded to $630,000 for his fair market value for the subject property derived under the sales-comparison approach for both fiscal years at issue. Mr. Levitch testified that he made no adjustments between fiscal years 2015 and 2016 in this approach, because he found no data to indicate a change in value from the comparable sale, and the condition of the subject property had remained constant.

For his reconciliation of values derived from his two valuation methods, Mr. Levitch stated in his report and testified that he primarily relied upon the sales-comparison approach to value the subject property. However, his conclusion of the fair market value for the subject property was the same value that he had derived from the income-capitalization approach for both fiscal years at issue. He therefore concluded a fair market value for the subject property as follows: $620,000 for fiscal year 2015 and $640,000 for fiscal year 2016.

The appellee did not present an affirmative case on value, although the property record cards for both fiscal years at issue were introduced as exhibits. The property record cards included details from the appellee’s income-capitalization analyses. Unlike the appellant’s expert, the appellee also performed income-capitalization analyses for the other two structures at the subject property, the old powerhouse and the service garage. The appellee’s income-capitalization analyses included operating expenses that were lower than Mr. Levitch’s figures and capitalization rates that were very similar to Mr. Levitch’s figures for both fiscal years at issue.

Counsel for the appellee cross-examined Mr. Levitch and presented documents to challenge aspects of his sales-comparison approach. For example, the sale of 21 Cycle Street in Westfield, Mr. Levitch’s comparable sale 6, was not an arm’s-length sale, as the manager of the grantor was also the CEO of the grantee. Moreover, Mr. Levitch made no location adjustments to his Holyoke sales despite the fact that the tax rates and economic conditions were very different between the two towns. Finally, for the sale of 6 Appleton Street in Holyoke, Mr. Levitch’s comparable sale 2, the sale was a portfolio sale of substantially all of the grantor’s assets, and was seller financed, factors that undercut the reliability of the sale as evidence of the subject property’s fair cash value.

The Board afforded no weight to Mr. Levitch’s sales-comparison approach because he relied solely on one sale, 5 Appleton Street in Holyoke, a property that was one-third the size of the subject property, located in a different town with different economic conditions, and, unlike the subject mill, it lacked rehabilitation. Mr. Levitch made no adjustments to this sale to account for any of these crucial discrepancies.

The Board further found that the income-capitalization approach was the proper method to value the subject property because of its capacity to generate an income stream.

With respect to the subject mill, the Board found that the appellant presented credible evidence that the appellee had over-calculated the total square footage of the subject mill, and found that the total square footage was 187,523 square feet. The Board further found that the leases for Meals on Wheels and Sd Associates Charter School were at market rates and thus adopted those rent figures for both fiscal years at issue. However, the Board applied the appellee’s weighted average for office space to the remaining 22,964 square feet of leased space and the appellee’s weighted average for mill space for the 156,794 square feet to the owner-occupied warehouse space, finding that these values best reflected fair market rental value.

The Board next selected 20% as the appropriate vacancy rate, which was the lower end of the appellant’s range of vacancy values. The Board also found that the appellant’s figures for operating expenses were overstated and not supported by the evidence. Instead, based on the evidence, the Board selected an operating-expense ratio of approximately 45% and a reserves-for-replacement ratio of approximately 5% of effective gross income for both fiscal years at issue.

In selecting the capitalization rates, the Board relied on the similar rates used in both parties’ analyses, as well as exercising its own judgment and adopted a 10% base capitalization rate, to which it added the applicable pro-rata tax factor for both fiscal years at issue. The Board thus arrived at a rounded fair market value for the subject mill of $1,230,000 for fiscal year 2015 and of $1,155,000 for fiscal year 2016.

The Board next reviewed the assessments for the old powerhouse, service garage, and yard items. The appellant did not present evidence to challenge those assessments. For the old powerhouse, the Board adopted the appellee’s figures for rents and then applied the same vacancy, operating-expense and reserves-for-replacement ratios as for the subject mill. The Board thus reached rounded fair market values of $64,000 for fiscal year 2015 and $40,000 for fiscal year 2016. The Board found that the subject assessments for the service garage and yard items reflected those items’ fair cash values and adopted those values for both fiscal years at issue.

The Board’s findings resulted in rounded fair market values of $1,360,900 for fiscal year 2015 and $1,245,200 for fiscal year 2016. These figures were less than the subject assessments for both fiscal years at issue.

On this basis, the Board found and ruled that the appellant met its burden of proving that the subject property was overvalued for both fiscal years at issue. Accordingly, the Board issued a decision for the appellant and ordered an abatement of taxes in the amount of $7,665.50 for fiscal year 2015 and $8,506.26 for fiscal year 2016.

**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 in a free and open market 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 petitioner to make out its right as [a] matter of law to [an] abatement of the tax.’” ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974)(quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). In appeals before this 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. v. Assessors of Lynn***, 393 Mass. 591, 600 (1984) (quoting***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.’” ***General Electric Co.***, 393 Mass. at 598 (quoting ***Schlaiker***, 365 Mass. at 245).

“Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most.” ***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) and](http://www.lexis.com/research/buttonTFLink?_m=c74ce50e9adec4dc3eef78af886e997d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2005%20Mass.%20Tax%20LEXIS%2012%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=3&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b184%20Mass.%20541%2cat%20542%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=4&_startdoc=1&wchp=dGLbVzb-zSkAA&_md5=2e503d34817a0343dc58d9605ff9cd23)  [***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989)](http://www.lexis.com/research/buttonTFLink?_m=c74ce50e9adec4dc3eef78af886e997d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2005%20Mass.%20Tax%20LEXIS%2012%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=4&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b26%20Mass.%20App.%20Ct.%20838%2cat%20843%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=4&_startdoc=1&wchp=dGLbVzb-zSkAA&_md5=4e690377f4439060b845cd97e89501bc) and the cases cited therein). A property’s highest and best use must be legally permissible, physically possible, financially feasible, and maximally productive. Appraisal Institute, The Appraisal of Real Estate 335 (14th ed., 2013); *see also* [***Skyline Homes, Inc. v. Commonwealth***, 362 Mass. 684, 687 (1972);](http://www.lexis.com/research/buttonTFLink?_m=c74ce50e9adec4dc3eef78af886e997d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2005%20Mass.%20Tax%20LEXIS%2012%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b362%20Mass.%20684%2cat%20687%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=4&_startdoc=1&wchp=dGLbVzb-zSkAA&_md5=92c75cd982580e8a5e7da450986e4c66) ***DiBaise v. Town of Rowley***, 33 Mass. App. Ct. 928 (1992). In the instant appeals, the Board agreed with the parties that the subject property’s highest and best use was its present use for mixed industrial purposes.

Generally, real estate valuation experts, the 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 board is not required to adopt any particular method of valuation,” ***Pepsi-Cola Bottling Co. v. Assessors of Boston***, 397 Mass. 447, 449 (1986), but 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).

Mr. Levitch prepared a sales-comparison analysis. Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. ***McCabe v. Chelsea***, 265 Mass. 494, 496 (1929). When comparable sales are used, however, adjustments must be made for various factors that would otherwise cause disparities in the comparable prices. *See* ***Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 1998-1072, 1082.

For his sales-comparison approach, Mr. Levitch cited six purportedly comparable properties, five of which were mill properties, but he relied only upon one single sale, a property that was one-third the size of the subject mill, had not undergone any rehabilitation, and was located in a town with different economic conditions. Yet Mr. Levitch made no adjustments to account for any of these significant differences, any of which would affect comparability to the subject mill. The Board found that, without the necessary adjustments, the appellant’s comparable-sales analysis was fundamentally flawed and thus unpersuasive.

Mr. Levitch also performed an income-capitalization approach and, while he stated otherwise, he seemed to have relied solely on that method for his final opinions of value, since his final opinions of value were the values he derived from his income-capitalization analyses. The use of the income-capitalization approach is appropriate when reliable market-sales data are not available. ***Assessors of Weymouth v. Tammy Brook Co.,*** 368 Mass. 810, 811 (1975); ***Assessors of Lynnfield v. New England Oyster House, Inc.,*** 362 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.,*** 309 Mass. 60, 67 (1941). It is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redevelopment Associates,*** 393 Mass. at 295. In the present appeals, the Board found that the income-capitalization approach was the most appropriate method to value the subject property for the fiscal years at issue.

“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 (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, they are indicative of the subject property’s earning capacity. *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 these appeals, the Board first found that the appellant presented credible evidence that the appellee had over-calculated the total square footage of the subject mill and instead adopted Mr. Levitch’s figure of 187,523 square feet. The Board next found that the appellant adequately supported the market value of the leases for Meals on Wheels and Sd Associates Charter School and thus adopted those lease figures. However, the Board found that the remaining rents assigned by Mr. Levitch lacked supporting detail and instead adopted the appellee’s weighted averages for those spaces.

After accounting for vacancy and rent losses, the net operating income is obtained by deducting the landlord’s appropriate expenses. ***General Electric Co.,*** 393 Mass. at 610. The expenses should also reflect the market. ***Id.;*** *see* ***Olympia & York State Street Co.***, 428 Mass. at 239, 245. The Board adopted the lower end of the appellant’s range of vacancy values but also found that the appellant’s remaining expenses were not supported by the evidence. Instead, relying more on the appellee’s rates as well as exercising its own independent judgment, the Board calculated operating expenses and reserves for replacement for both fiscal years at issue. *See* ***Star Margit ETR v. Assessors of Woburn,*** Mass. ATB Findings of Fact and Reports 2016-461, 473-74.

The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Associates,*** 393 Mass. at 295. Based on the evidence presented, the Board adopted a 10% base capitalization rate, to which it added the applicable pro-rata tax factor for both fiscal years at issue.

For the old powerhouse, the Board adopted the appellee’s figures for rents, applied the same vacancy rate that it applied to the subject mill, and made slight adjustments to the expenses to reach a rounded fair market value. The Board then adopted in full the assessments for the service garage and yard items, finding these assessments to properly reflect the items’ fair market values.

The Board is not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggests. Rather, the Board can accept those portions of the evidence that the Board determines have more convincing weight, and form its own independent judgment of fair market value. ***Foxboro Associates v. Board of 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, Inc.***,362 Mass. at 701-02; ***General Electric Co.****,* 393 Mass. at 605; ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984).  In evaluating the evidence before it in the instant appeals, the Board selected among the various elements of value and appropriately formed its own independent judgment of fair cash value. ***General Electric Co.,*** 393 Mass. at 605; ***North American Philips Lighting Corp.,*** 392 Mass. at 300. “The credibility of witnesses, the weight of the 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).

On the basis of the Board’s analyses, the Board found and ruled that the subject property was overvalued by $535,300 for fiscal year 2015 and by $774,000 for fiscal year 2016. The Board thus issued a decision for the appellant and ordered an abatement of taxes in the amount of $7,665.50 in Docket No. F325676 and $8,506.26 in Docket No. F329589.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

**Clerk of the Board**