COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

# SEARS, ROEBUCK & CO. v. BOARD OF ASSESSORS OF

# THE CITY OF CAMBRIDGE

Docket Nos. F318546, F322093 Promulgated:

            F325592, F329131 February 8, 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 City of Cambridge (“assessors” or “appellee”), to grant an abatement of taxes assessed on real estate owned by Sears, Roebuck & Co. (“Sears” or “appellant”) for fiscal years 2013, 2014, 2015, and 2016 (“fiscal years at issue”).

Commissioner Good heard these appeals. Chairman Hammond and Commissioners Scharaffa and Rose joined her in the decision for the appellee. Commissioner Elliott took no part in the deliberations or decision of these appeals.

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

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

*Anthony M. Ambriano,* 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, 2012, January 1, 2013, January 1, 2014, and January 1, 2015, the relevant valuation dates for the fiscal years at issue, the appellant was the assessed owner of a 42,561-square-foot parcel of real estate, improved with a three-story retail building, located at 60-68 First Street in Cambridge (“subject property”). Relevant assessment information is set forth in the following table:

|  |  |  |  |
| --- | --- | --- | --- |
| **Fiscal Year** | **Assessed Value ($)** | **Tax/$1,000** | **Total Tax ($)** |
| 2013 | 13,077,000 | 21.50 | 281,155.50 |
| 2014 | 15,543,000 | 20.44 | 317,698.92 |
| 2015 | 16,293,700 | 19.29 | 314,305.47 |
| 2016 | 17,186,700 | 17.71 | 304,376.46 |

In accordance with G.L. c. 59, §§ 59, 64, and 65, the appellant timely paid the tax due for each of the fiscal years at issue without incurring interest. Additional relevant jurisdictional information is set forth in the following table:

|  |  |  |  |
| --- | --- | --- | --- |
| **Fiscal**  **Year** | **Abatement Application Filed** | **Abatement Application Denied or Deemed Denied** | **Appeal Filed with Board** |
| 2013 | 11/01/12 | 11/15/12 | 02/06/13 |
| 2014 | 11/15/13 | 11/26/13 | 02/21/14 |
| 2015 | 11/04/14 | 11/20/14 | 12/29/14 |
| 2016 | 11/02/15 | 02/02/16 | 04/14/16 |

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

The issue in these appeals was whether the subject property’s assessed value exceeded its fair cash value for the fiscal years at issue. Three real estate appraisers testified during the course of the hearing, which lasted four days and was stenographically recorded. The following is a description of the subject property and the valuation evidence presented by both parties, along with the Board’s ultimate conclusions.

1. **The Subject Property**

The subject property is improved with a three-story Sears department store building containing 120,570 square feet of gross leasable area. Built in 1990, the building is attached to the Cambridgeside Galleria Mall (“Galleria”), and has direct access to the Galleria and the attached parking garage. The subject property is in overall good condition, with a steel, masonry, and concrete frame, a rubber membrane roof, and brick and decorative block exterior. Interior finishes include acoustical tile ceilings, and tile and carpet flooring in non-warehouse areas. The subject property is serviced by a freight elevator, two passenger elevators, and double escalators connecting each of the floors. All systems, including heating, cooling, electrical, and fire protection are adequate.

The Galleria is a 922,766-square-foot mall situated on 9.22 acres. It has 651,554 square feet of gross leasable retail area, with an additional 271,212 square feet of office and hotel space. There are 119 retail tenant spaces at the Galleria. This includes the subject property as an anchor space and three other anchor stores – Macy’s, Best Buy, and T.J. Maxx – along with 115 in-line tenants.

The Galleria is located in East Cambridge, a dense urban area situated along the Charles River. The Galleria has good frontage, visibility, and access along First Street and proximity to several major thoroughfares, as well as the Lechmere MBTA stop. The immediate vicinity features a mix of residential dwelling units, primarily condominiums, multi-family homes, and large apartment buildings, along with office, hotel, retail, and commercial properties.

The Galleria is located approximately one mile from Boston’s central business district and is also proximate to Cambridge’s many business districts, which include Porter Square, Harvard Square, Central Square, and Kendall Square. Those districts are home to major universities such as Harvard University and the Massachusetts Institute of Technology. Kendall Square is also host to a thriving sector of technology, biotechnology, research, and pharmaceutical businesses.

1. **The Appellant’s Case**

The appellant presented its case through the testimony and appraisal report of Emmet T. Logue. Mr. Logue is a licensed real estate appraiser with decades of appraisal experience and has an MAI designation (“MAI”) from the Appraisal Institute. He has testified as an expert witness before courts and the Board on numerous occasions. The Board qualified Mr. Logue as an expert in commercial real estate valuation.

To prepare for his appraisal, Mr. Logue inspected the subject property. To begin his appraisal, Mr. Logue first ascertained the subject property’s highest and best use. It was his conclusion that the improvements on the subject property contribute significant value, and that it was therefore more valuable as improved than as vacant. Ultimately, Mr. Logue concluded that the current use of the subject property as an anchor store was its highest and best use.

Mr. Logue next considered appropriate valuation methodologies. Because of the age of the subject property, he did not consider the cost approach to be a useful methodology with which to determine the subject property’s fair cash value. In addition, Mr. Logue declined to use the sales-comparison approach because of the lack of sufficient, arm’s-length sales of comparable properties within the timeframe relevant to these appeals.[[1]](#footnote-1) Mr. Logue therefore relied exclusively upon the income-capitalization approach, which he considered reliable because the subject property is an income-producing property and because he believed there was sufficient available market evidence to use in that approach.

Before selecting lease comparables, Mr. Logue discussed general market trends for anchor retail stores like the subject property. Mr. Logue noted that with the rise in popularity of on-line sales, particularly via e-commerce giant Amazon, anchor stores have seen a downward trend in store sales. Mr. Logue cited industry reports stating that since 2006, department stores nationwide have seen a 20% decline in store sales. He noted that this trend is expected to continue and result in the closure of hundreds of department stores nationwide.

More specifically, Mr. Logue analyzed store sale trends at the subject property. He compiled data showing that in-store sales have dropped consistently at the subject property in the years leading up to and into the fiscal years at issue, from a sales-per-square-foot rate of $167.42 in 2008 down to a rate of $99.39 per square foot in 2015.

As the first step in the income-capitalization approach is the determination of net operating income, Mr. Logue attempted to secure lease comparables from which to determine a fair market rent for the subject property. He ultimately selected six lease comparables, and a summary of relevant information about those leases is contained in the following table:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **No.** | **Property/**  **Location** | **Tenant** | **Commencement Date/Term** | **Leased Area (Sq. Ft.)** | **Initial Rent($)/Terms** |
| 1 | Natick Mall/  Natick, MA | J.C. Penney | 12/06  20 years + options | 199,961 | 8.31  Modified net |
| 2 | Woodbridge Center/ Woodbridge, NJ | Boscov’s | 4/12  15 years | 150,938 | 5.30  Modified net |
| 3 | Steeplegate Mall/  Concord, NH | The Bon-Ton | 1/10  5 years | 87,736 | 4.56  Modified gross |
| 4 | The Mall at Rockingham Park/ Salem, NH | Lord & Taylor | 4/11  15 years | 151,594 – effective 121,341 | 4.73  Modified gross |
| 5 | Maine Mall/  S. Portland, ME | The Bon-Ton | 9/13  15 years | 120,844 | 6.15  Modified gross |
| 6 | Warwick Mall/ Warwick, RI | Jordan’s Furniture | 12/11  10 years | 100,000 | 7.50 gross |

Mr. Logue noted that while the lease periods varied for these comparables, most of them had rent increases of approximately 10% after the first five years. He further noted that most of the leases were on a modified gross basis, with the tenant paying real estate taxes and a share of the common-area maintenance (“CAM”) charges.

With respect to comparables three through six, Mr. Logue noted that they were in locations with less population density and less favorable demographics than the subject property, such that they required an upward adjustment in comparison to the subject property. With respect to comparable one, J.C. Penney located in the Natick Mall, Mr. Logue noted that it was similar to the subject property in that it was a multi-story anchor store in a super-regional mall. In addition, although he noted that the lease had been signed years prior to the relevant dates of valuation for the fiscal years at issue, rents for anchor stores had generally declined or remained stable during the intervening period, such that he considered the rent to be reasonably indicative of market rent for the subject property, with two caveats. First, Mr. Logue noted that the lease was on a modified net basis with very low CAM charges, and he concluded that a triple-net rent for the subject property would be significantly lower. Second, it was Mr. Logue’s opinion that the Natick Mall was superior to the subject property because it was located in a market with better demographics, such that a downward adjustment to rent was necessary to account for this difference.

Based on all of these leases, and after making the aforementioned adjustments, Mr. Logue ultimately concluded a fair market rent for the subject property of $7.00 per square foot, on a triple-net basis, for each of the fiscal years at issue. Applied to the subject property’s 120,570 square feet of gross leasable area, this resulted in a potential gross income of $843,990.

Mr. Logue next considered vacancy and credit loss. He noted that there has been very limited retail vacancy in the subject property’s immediate area, and at the Galleria itself, which had just a single in-line vacancy at the time he inspected it in 2016. Published retail vacancy levels in the inner suburbs of Boston, which is the subject property’s market area, for stores between 100,000 to 200,000 square feet were similarly low, ranging from 1.1% in 2013 to 2.3% in 2015. Nevertheless, Mr. Logue opined that a prudent buyer would factor in a moderate amount of vacancy and credit loss, so he ultimately selected a stabilized vacancy and credit loss amount of 3.0%. Applying that rate to the potential gross income resulted in an effective gross income for the subject property of $818,670.

Because Mr. Logue assumed a triple-net lease for the subject property, he did not factor in operating expenses, other than a management fee and replacement reserves. For a management fee, he used 3.0% of effective gross income, which was based on typical rates for comparable properties in the market. For replacement reserves, Mr. Logue consulted market sources, such as the PWC Real Estate Investor Survey, which indicated a range of $0.20-$0.50 for replacement reserves nationally at regional malls. After taking into consideration the age and condition of the subject property, Mr. Logue concluded that $0.40 per square foot was an appropriate rate for replacement reserves. Deducting those expenses from his effective gross income resulted in a net operating income of $745,882 for the subject property for each of the fiscal years at issue.

The last component to be determined in his income-capitalization analysis was an appropriate capitalization rate. Mr. Logue used various approaches and sources to determine appropriate rates, beginning with the band-of-investment technique. Mr. Logue consulted several sources, including industry surveys, capital markets firms, and large commercial lenders to determine appropriate inputs for the calculation of both his mortgage and equity components. His band-of-investment technique ultimately yielded the following indicated capitalization rates for each of the fiscal years at issue: 7.0% for fiscal year 2013; 6.75% for fiscal year 2014; 7.25% for fiscal year 2015; and 6.75% for fiscal year 2016.

Mr. Logue additionally consulted published investor surveys in considering appropriate capitalization rates. The PWC Real Estate Investor Survey published average rates for institutional-grade and non-institutional-grade regional malls for the first quarter of each year relevant to these appeals. Those average rates are contained in the following table:

|  |  |  |
| --- | --- | --- |
| **Year** | **Institutional**  **Grade Avg. Rate** | **Non-Institutional Grade Avg. Rate** |
| 1st Q 2012 | 7.23% | 10.02% |
| 1st Q 2013 | 6.92% | 9.33% |
| 1st Q 2014 | 6.56% | 7.10% |
| 1st Q 2015 | 6.38% | 9.01% |

Mr. Logue also reviewed information published in the PWC Real Estate Investor Survey for national regional malls by mall grade. Those average capitalization rates, by grade and year, are set forth in the following table:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Mall Grade** | **Avg. Rate- 1st Q 2012** | **Avg. Rate- 1st Q 2013** | **Avg. Rate-**  **1st Q 2014** | **Avg. Rate- 1st Q 2015** |
| A+ | 6.03% | 5.58% | 5.54% | 4.88% |
| A | 6.88% | 6.27% | 5.92% | 5.40% |
| B+ | 7.75% | 7.08% | 6.83% | 6.33% |

It was Mr. Logue’s opinion that the Galleria is a grade B+/A- mall, by virtue of its location, age, design, amenities, and tenant mix.

After considering all of this information, including the published average capitalization rates and his band-of-investment technique, Mr. Logue ultimately determined the following capitalization rates for the fiscal years at issue: 7.0% for fiscal years 2013 and 2014; 6.75% for fiscal year 2015; and 6.5% for fiscal year 2016. After applying those rates to his net operating incomes, Mr. Logue’s final estimates of the subject property’s fair cash value, rounded, were as follows: $10,700,000 for fiscal years 2013 and 2014; $11,100,000 for fiscal year 2015; and $11,500,000 for fiscal year 2016.

**III. The Assessors’ Case**

The assessors did not present affirmative valuation evidence of their own, but instead presented two witnesses to demonstrate the errors and shortcomings in Mr. Logue’s income-capitalization analysis. The first witness was Ted Whitmer, who is a licensed appraiser in seven states and an MAI. Mr. Whitmer is certified by the Appraisal Institute to teach Uniform Standards of Professional Appraisal Practice (“USPAP”) and to perform review appraisals, and the Board qualified him as an expert in appraisal and review appraisal.

Mr. Whitmer conducted a review appraisal of Mr. Logue’s appraisal. A review appraisal does not always culminate in an independent opinion of value, but instead analyzes an appraisal to determine whether the opinions and conclusions therein are supported and credible. To prepare for his review appraisal, Mr. Whitmer inspected the subject property as well as the comparison properties used by Mr. Logue.

Mr. Whitmer found fault in several areas of Mr. Logue’s appraisal, most notably: Mr. Logue’s comparison properties were not comparable; his conclusion that the Galleria is not a Grade A mall was not accurate; his use of a 3.0% vacancy rate was not supported by the market data or historical performance of either the subject property or the Galleria; and he failed to explain how he adjusted the rents that he used, which he reported to be on gross, modified gross, and modified net terms, to the triple-net terms that he ultimately used to form his opinion of fair cash value.

With respect to the vacancy rate, Mr. Whitmer testified that he was surprised to see that Mr. Logue concluded a rate of 3.0%, after noting that the data he used showed much lower vacancy rates. He further noted that the subject property itself was fully occupied, and the Galleria had just one single in-line vacancy out of 119 stores during the periods relevant to these appeals. Mr. Whitmer therefore did not believe a vacancy rate of 3.0% was appropriate.

Additionally, Mr. Whitmer opined that Mr. Logue’s comparison properties were not sufficiently comparable to the subject property to provide a reliable indication of market rent for it. He noted that although there are a significant number of malls within a five-mile ring of the Galleria, Mr. Logue did not use leases from any of those properties. Instead, five of the six properties selected by Mr. Logue were located in states other than Massachusetts, and all of them were located in suburban settings, rather than urban settings, like the subject property.

Mr. Whitmer also opined that Mr. Logue’s comparison properties were not sufficiently similar to the subject property in terms of the strength of their demographics or their overall quality. He quantified the demographics of the subject property and each comparison property by calculating the total household income within a one-mile, three-mile, and five-mile radius of the property, and then added those totals together. The total for the subject property was $27,353,843,578, which Mr. Whitmer described as being “as strong as I’ve seen, period.” The totals for the purportedly comparable properties were as follows: Woodbridge Center, $9,272,809,937; Natick Mall, $5,896,927,383; The Mall at Rockingham Park, $2,846,106,210; Maine Mall, $2,770,564,573; Steeplegate Mall, $1,113,427,793; and Warwick Mall, $4,842,173,167.09.

In addition to the above-referenced demographics, Mr. Whitmer stated that the industry literature he reviewed indicated that the Galleria was “one of [the] best malls in all of the Boston area.” He cited sources such as USA Today and Trip Advisor, which rated the Galleria at number one, while the Natick Mall, for example, was rated at number three. Mr. Whitmer further noted that two of the leases used by Mr. Logue were from stores that had since closed. He also observed that the Steeplegate Mall was such a poor mall that it underwent foreclosure during the fiscal years at issue, and ultimately sold in May of 2016 for $10.8 million, even though at 480,000 square feet, it was four times the size of the subject property.

Based on all of this information, Mr. Whitmer concluded that Mr. Logue’s lease comparables were culled from properties that were, by and large, dissimilar from and inferior to the subject property. Also based on this information, he testified that he did not agree with Mr. Logue’s characterization of the Galleria as a Grade B+/A- mall rather than a Grade A mall.

The assessors’ second witness was Steven R. Foster, who is also a licensed commercial appraiser and an MAI. The Board qualified Mr. Foster as an expert in commercial real estate appraisal. Mr. Foster did not conduct an appraisal of the subject property, nor did he provide an opinion of value. He testified regarding some of the leases that were used by Mr. Logue, as well as some leases that were not.

Mr. Foster testified that Sears has been actively leasing much of its real estate portfolio in recent years, and many of those leases, in his opinion, would have been useful for valuing the subject property. For example, Mr. Foster testified that during the time period relevant to these appeals, Sears entered into leases with Dick’s Sporting Goods (“Dick’s”) and Primark in locations proximate to the subject property, and those leases would have provided useful information for valuing the subject property.

Mr. Foster also testified that he was surprised that Mr. Logue did not attempt to secure any urban rents for comparison to the subject property. He testified that the Primark lease for Downtown Crossing in Boston would have been useful for valuing the subject property in his opinion, and he was surprised that Mr. Logue did not use that lease.

**IV. The Board’s Conclusions**

On the basis of the record in its totality, the Board found that the appellant failed to meet its burden of proving that the subject property’s assessed value exceeded its fair cash value for the fiscal years at issue. The Board did not find the appraisal offered by the appellant’s expert appraiser to be persuasive or reliable evidence of value for a number of reasons.

First, Mr. Logue did not personally view the majority of the leases he selected for comparison, but instead relied on information provided to him by other people. The record ultimately showed that some of the pertinent information used by Mr. Logue was incorrect. For example, the Bon-Ton at the Steeplegate Mall occupied two separate stores. Mr. Logue believed that the lease he used was for the larger of the two stores, but the record showed that the lease in fact covered both stores. The evidence also showed that Mr. Logue incorrectly reported the Boscov’s rent for years two through five in his report. The Board found that Mr. Logue’s failure to verify the information in his report detracted from the reliability of his opinion of fair cash value.

In addition, the Board concluded that the comparison properties chosen by Mr. Logue were simply not comparable enough to the subject property to provide persuasive evidence of its fair cash value. As an initial matter, the comparison properties were all located in suburban malls. None of them had an urban location, like the subject property, although the record showed that it was possible to obtain leases for anchor spaces in urban settings such as Providence Place in Rhode Island, Downtown Crossing in Boston, or South Bay in Dorchester. Mr. Logue’s failure to include properties sharing this fundamental similarity to the subject property diminished the probative worth of his opinion of value.

Furthermore, most of the leases were from properties that were geographically remote from the subject property, when the record showed that there were many closer properties from which Mr. Logue could have sought leases. The record showed that Sears had leased space to Primark at the Burlington Mall and South Shore Plaza in Braintree during periods relevant to these appeals, but Mr. Logue did not use those leases for comparison. Moreover, the record showed that Sears leased space to Dick’s in 2014 at The Mall at Rockingham Park. Despite the fact that Mr. Logue used a lease from that mall and considered it a good comparable, he did not use the lease to Dick’s, which had a rent of $9.25 per square foot on a modified gross basis - higher than all of the rents selected by Mr. Logue as well as his concluded market rent for the subject property. The selectivity of Mr. Logue’s lease comparables called into question his objectivity and further undermined the credibility of his opinion of value.

Most importantly, the Board found that the leases selected for comparison by Mr. Logue were from properties that were inferior to the subject property. Two of the leases on which he relied were for stores that have since closed. One of the malls used by Mr. Logue was foreclosed upon, while others struggled with vacancies and tenant turnover. In reaching its conclusion that Mr. Logue’s comparison properties were not of the same caliber as the subject property, the Board was persuaded by and placed weight on the testimony and review appraisal of Mr. Whitmer. Mr. Whitmer’s testimony and review appraisal showed that the Galleria was superior to all of the malls selected for comparison by Mr. Logue, in some cases, dramatically so. In particular, Mr. Whitmer’s testimony and review appraisal convincingly demonstrated that even the Natick Mall, which was geographically closest to the Galleria and generated the highest rent used by Mr. Logue, was inferior. This evidence contradicted Mr. Logue’s conclusion that the Natick Mall was superior, such that the rent he used from it required downward adjustment to be comparable to the subject property. The Board found that Mr. Logue’s reliance on properties that were inferior to the subject property as well as this unwarranted downward adjustment to his highest rent likely caused his estimation of fair market rent to be significantly understated, which further undermined the reliability of his opinion of fair cash value.

Lastly, notwithstanding the significant differences between the subject property and the comparison properties, Mr. Logue did not provide an adjustment grid or otherwise explain in detail the basis for his adjustments to market rent. As noted by Mr. Whitmer, Mr. Logue used rents that were reported by him to be on gross, modified gross, or modified net terms, but he did not explain how he adjusted those rents to get to the triple-net rent that he ultimately used. The Board found that Mr. Logue’s failure to explain the basis for his adjustments detracted from the probative worth of his opinion of fair cash value.

In conclusion, the Board found that the valuation evidence offered by the appellant failed to provide a reliable indication of fair cash value for the subject property, and the appellant therefore failed to meet its burden of proof. Accordingly, the Board issued a decision for the appellee in these appeals.

**OPINION**

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. ***Boston Gas Co. v. Assessors of Boston,*** 334 Mass. 549, 566 (1956).

“‘The burden of proof is upon the [appellant] to make out its right as a matter of law to abatement of the tax.’” ***Schlaiker v. Assessors of Great Barrington,*** 365 Mass. 243, 245 (1974) (quoting***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayer[] . . . prove[s] the contrary.’” ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting ***Schlaiker***, 365 Mass. at 245).

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

“‘Prior to valuing the subject property, its highest and best use must be ascertained.’” ***Tsissa, Inc. v. Assessors of West Tisbury,*** Mass. ATB Findings of Fact and Reports 2011-198, 216 (quoting ***Tennessee Gas Pipeline Co. v. Assessors of Agawam,*** Mass. ATB Findings of Fact and Reports 2000-859, 874). In determining fair cash value, all uses to which the property was or could reasonably be adapted on the relevant assessment dates should be considered. ***Irving Saunders Trust v. Assessors of Boston***, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. ***Id.*** Here, the appellant’s expert appraiser concluded that the subject property’s current use as a retail property was its highest and best use, and the Board agreed with and adopted that conclusion.

Generally, real estate valuation experts, Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. ***Correia v. New Bedford Redevelopment Auth.,*** 375 Mass. 360, 362 (1978). When reliable sales data are not available and when the subject is income-producing property, the use of the income-capitalization approach is appropriate. ***Assessors of Weymouth v. Tammy Brook Co.***, 368 Mass. 807, 881 (1975); ***Assessors of Lynnfield v. New England Oyster House***, 362 Mass. 696, 701-02 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.***, 309 Mass. 60, 67 (1941). Further, the income-capitalization method “is frequently applied with respect to income-producing property.” ***Taunton Redevelopment Associates v. Assessors of Taunton,*** 393 Mass. 293, 295 (1984). In these appeals, the appellant’s expert appraiser concluded that the income-capitalization approach was the most reliable way to value the subject property. As there was a lack of comparable sales data in the record, as the subject property’s age precluded the use of the cost approach, and as the subject property is an income-producing property, the Board agreed with the appellant’s expert that the income-capitalization approach was the best 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 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 to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property’s earning capacity. *See* ***Correia v. New Bedford Redevelopment Auth.***, 5 Mass. App. Ct. 289, 293-94 (1977), *rev’d on other grounds,* 375 Mass. 360 (1978); ***Library Services, Inc. v. Malden Redevelopment Auth.***, 9 Mass. App. Ct. 877, 878 (1980) (rescript). Properties are “comparable” to the subject property when they share “fundamental similarities” with the subject property. *See* ***Lattuca v. Robsham,*** 442 Mass. 205, 216 (2004). The appellant bears the burden of “establishing the comparability of . . . properties [used for comparison] to the subject property. ***Silvestri v. Assessors of Lowell,*** Mass. ATB Findings of Fact and Reports 2012-926, 935. *Accord* ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 470 (1981).

In the present appeals, the Board found that Mr. Logue’s comparison properties were too dissimilar to the subject property to furnish reliable evidence of its fair cash value. All but one of the comparison properties were located outside of Massachusetts. None of Mr. Logue’s selected leases were from properties located in urban settings, like the subject property. Further, the leases were derived from malls that were inferior to the Galleria in quality. In sum, the geographic and demographic attributes of Mr. Logue’s comparison properties were simply too different from the subject property to provide persuasive evidence of its fair cash value.

Equally problematic were the leases upon which Mr. Logue did not rely. Although Mr. Logue used The Mall at Rockingham Park for one of his lease comparables, he did not use a timely lease from Sears to Dick’s from that same mall, which was, at $9.25 per square foot, higher than all of his purportedly comparable rents as well as his opinion of market rent for the subject property of $7.00 per square foot. The selectivity of Mr. Logue’s lease comparables cast doubt on his objectivity and further diminished the probative worth of his opinion of value. *See* ***Northshore Mall Limited Partnership v. Assessors of Peabody,*** Mass. ATB Findings of Fact and Reports 2004-195, 213 (finding that expert appraiser’s “unaccounted-for selectivity in the choice of malls for inclusion [cast] doubt on the objectivity” of his opinions).

Even assuming *arguendo* that Mr. Logue’s comparison properties could have, with proper adjustments, provided reliable evidence of the subject property’s market value, the Board found that some of Mr. Logue’s adjustments either lacked explanation or were contradicted by the record. For example, Mr. Logue opined that the Natick Mall was superior to the Galleria, such that the rent from that mall required a downward adjustment. However, Mr. Logue’s conclusion was contradicted by the evidence, which demonstrated that the Natick Mall was inferior to the Galleria, and thus this downward adjustment was unwarranted. He further failed to explain how he adjusted the rents that he used, which were on gross, modified gross, or modified net terms to the triple-net rent that he used to form his opinion of value.

In sum, the Board concluded that the rents selected by Mr. Logue did not provide reliable evidence of market rent for the subject property, as they were culled from properties that were too dissimilar from and inferior to it, and further that his adjustments were contradicted by the evidence, with the net effect of these deficiencies resulting in the understatement of the subject property’s potential gross income, and ultimately, its fair cash value. *See* ***Northshore Mall*** ***Limited Partnership***, Mass. ATB Findings of Fact and Reports at 2004-255. The Board therefore declined to place weight on Mr. Logue’s opinion of value. “The board [is] not required to believe the testimony of any particular witness.” ***Boston Consolidated Gas Co.,*** 309 Mass. at 72. *See also* ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984). The mere qualification of a person as an expert does not endow his testimony with any determinative weight. ***Boston Gas Co.,*** 334 Mass. at 579.

In conclusion, the Board found and ruled that the appellant failed to demonstrate that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue. Accordingly, the Board issued a decision for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

**Attest: \_\_\_\_\_­­­­\_\_**

**Clerk of the Board**

1. The subject property was sold on January 26, 2016. However, as the sale date was outside of the relevant dates of valuation, and the sale involved a two-year leaseback of the subject property by Sears, neither Mr. Logue nor the Board afforded any weight to the sale price. [↑](#footnote-ref-1)