

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**ANDREW AND ANNE WERT ON  
BEHALF OF "THE ANNE P. WERT  
REVOCABLE INTERVIVOS TRUST"**

**v. BOARD OF ASSESSORS OF THE  
TOWN OF WESTPORT**

Docket No. F339485

Promulgated:  
May 13, 2022

This is an appeal 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 Westport ("assessors" or "appellee") to abate a tax on certain real estate located in the Town of Westport owned by and assessed to Andrew and Anne Wert ("Werts") on behalf of "The Anne P. Wert Revocable Intervivos Trust" ("appellant" or "Trust") for fiscal year 2019 ("fiscal year at issue").

Commissioner Good heard this appeal and was joined in the decision for the appellant by former Chairman Hammond and Commissioners Elliott, Metzger, and DeFrancisco.

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

*Andrew and Anne Wert* for the appellant.<sup>1</sup>

*Theodora Gabriel*, assessor, for the appellee.

## **FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

### **I. Introduction and jurisdiction**

On January 1, 2018, the relevant date of valuation and assessment for the fiscal year at issue, the Trust was the assessed owner of real property located at 31 Atlantic Avenue in the Town of Westport ("subject property"). The subject property consists of a 14,400-square-foot lot improved with a 1,156-square-foot, non-winterized waterfront cottage built in 1950 containing two bedrooms and one-and-a-half bathrooms ("subject house").

The assessors valued the subject property at \$1,590,900 for the fiscal year at issue and assessed a tax thereon at the rate of \$8.27 per \$1,000 in the amount of \$13,156.74, exclusive of the Community Preservation Act ("CPA") surcharge of \$263.13. The appellant paid the tax due without incurring interest. The Werts timely filed an abatement application for the Trust with the

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<sup>1</sup> Anne Wert is the sole trustee of the appellant and she provided a power of attorney to Andrew Wert for purposes of representing the appellant in connection with property tax abatement.

assessors on May 31, 2019, which was deemed denied on August 31, 2019. Despite the deemed denial, the assessors later voted on September 30, 2019, to reduce the assessed value to \$1,580,200 (for its location in a velocity zone),<sup>2</sup> and then again on November 16, 2020, to reduce the assessed value to \$1,436,100 ("revised assessed value") (for a right of way on the subject property). In the midst of these post-deemed-denial reductions by the assessors, the Werts timely filed a petition on behalf of the Trust with the Board on October 18, 2019. Based upon this information, the Board ruled that it had jurisdiction to hear and decide this appeal.

## **II. The appellant's case**

Apart from the testimony of Andrew Wert, the appellant offered into evidence written analyses with supporting documentation, the subject property's property record card for the fiscal year at issue, letters from a real estate broker and the seller's realtor, a video documenting the location of the subject property, and a rebuttal to the assessors' allegedly comparable properties.

The appellant contended that its purchase of the subject property for \$780,000 in June 2018 - after the subject property had been on the market for more than 280 days with an initial

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<sup>2</sup> The provisions of 310 CMR 15.002 define a velocity zone as "[a]n area within the Special Flood Hazard Area that is subject to high velocity wave action or seismic sources."

asking price in the range of \$1,000,000 - was the fair cash value of the subject property for the fiscal year at issue. Because the subject property had previously been owned and passed down by members of the same family - a family unrelated to the Trust and the Werts - the appellant claimed that the purchase price reflected the first time in nearly seventy years that the subject property was on the open market. The appellant stressed that the revised assessed value for the fiscal year at issue was nearly double the purchase price. It attributed this allegedly inflated value to the failure of the assessors to code the sale of the subject property as an arm's-length transaction. In addition to testimony by Mr. Wert, the appellant relied upon a sales questionnaire provided to the assessors in which it attested that its purchase of the subject property was not a sale between members of the same family; a letter from the appellant's realtor, attesting that the transaction was at arm's length; and a letter from the sellers' realtor (who was also one of the sellers of the subject property) attesting that the sellers were unrelated and unknown to the Werts until the purchase.

The appellant also contended that the assessors failed to adequately recognize the subject property's numerous limiting factors: the public right of way that renders a portion of the subject property as unusable and inconvenienced from the barrage

of people constantly being dropped off at the beach and unloading beach gear; the advanced age and condition of the subject house (built in 1950 with no significant renovations in the last twenty years); and the subject property's location in a velocity zone, particularly its complete lack of any protection from the open waters of the Atlantic Ocean.

Testimony by Mr. Wert emphasized the subject property's limiting factors, especially its oceanic vulnerability, perched on a concrete slab foundation with no elevation, unlike most of the neighboring properties. He explained that even the slightest generic storm causes water to reach the subject house, with a storm in fall 2020 washing away the steps of the subject house as well as a signpost that had been cemented into the ground. His research into elevating the subject house had not been fruitful. Due to environmental restrictions and the right of way recognized by the assessors, the type of equipment allowed onto the subject property is limited. He stated that he had consulted with no fewer than six engineers and an architect, and that they have been reluctant to provide a cost estimate due to the complexity of the project, which would require crushing and removing the concrete slab below the subject house. Visual evidence in the form of a video highlighted the encroaching ocean waters at high tide, within threatening distance to the subject house's porch and door.

The appellant also provided comparison ratio charts of land values/per square foot and building values/per square foot for the subject property as compared to neighboring properties, without any adjustments. All the properties selected were larger than the subject property in both land size and building size.

### **III. The appellee's case**

In addition to the jurisdictional documents and testimony from the assessors, the appellee offered into evidence a sales grid of six Westport properties that were waterfront, water proximate, or riverfront. These properties ranged in size from 1,040 square feet to 4,047 square feet of living area, were built between 1919 and 2004, and ranged in sale prices from \$952,000 to \$2,000,000, with sales taking place between 2017 and 2019.

The assessors selected three of these properties as their comparable properties: a 3,508-square-foot, four-bedroom, two-and-a-half-bathroom, waterfront property built in 1919 that sold in 2017 for \$2,000,000; a 2,472-square-foot, two-bedroom, two-bathroom, water-proximate property built in 2004 that sold in 2018 for \$1,295,000; and a 2,884-square-foot, three-bedroom, three-and-a-half-bathroom, water-proximate property built in 1995 that sold in 2017 for \$1,500,000. The appellant credibly rebutted the comparability of these properties. Apart from disagreeing with bedroom and/or bathroom counts of some of the

properties, the appellant noted that these properties were either protected by elevation or located further inland than the subject property, and they were designed for year-round living, as opposed to the summer-cottage seasonality of the subject house.

Theodora Gabriel, the assessor, testified that the assessors did not feel that the sale of the subject property in 2018 was at arm's length - even though it was openly marketed for close to a year - because they felt the subject property did not fit in with recent area sale trends.

#### **IV. The Board's findings**

The Board found that the appellant's proffered testimony and documentary evidence established both that the purchase of the subject property by the appellant in 2018 was the product of an arm's-length transaction and that the subject property was precariously proximate to - and at times partially submerged in - the ocean. In reaching its conclusion, the Board gave weight to the purchase of the subject property in June 2018, just six months after the relevant date of valuation. Further, the Board was persuaded by the testimony of Mr. Wert. He provided a credible explanation as to why the purchase of the subject property in 2018 was an arm's-length transaction and he credibly described the negative impact of the subject property's location in a velocity zone, as well as its other limiting factors. Video

evidence corroborated his testimony. The Board did not give weight to the letters provided by the appellant's realtor and the sellers' realtor. Neither letter was signed under pains and penalty of perjury and neither realtor was present to undergo cross-examination. The Board also gave no weight to the appellant's land value and building value ratio charts. These charts failed to adjust the selected properties for economies of scale, ignoring the well-established principle that as size increases, unit values decrease.

The Board was not persuaded by the testimony of Ms. Gabriel, finding her explanation for coding the sale of the subject property as a non-arm's-length transaction to be lacking any discernible support. The Board found all but one of the assessors' allegedly comparable properties to be quite incomparable to the subject property - from their age and size to their use and design as year-round residences and lack of protection from the ocean. The Board found one property on the assessors' sales grid to be reasonably similar to the subject property - a two-bedroom, one-bathroom house built in 1950 with 1,040 square feet of living area. This property was riverfront, not oceanfront, and sold for \$952,000 in December 2017, very close to the relevant date of valuation for the subject property. This property was assessed at \$721,000 for fiscal year

2019, while the subject property's revised assessed value was nearly double its purchase price.

Based upon the above and the evidence of record, the Board found that \$780,000 was the fair cash value of the subject property for the fiscal year at issue, and that the assessors overvalued the subject property by \$656,100. Consequently, the Board found and ruled for the appellant and granted an abatement of \$5,534.47, inclusive of the CPA surcharge, for the subject property for the fiscal year at issue.

#### 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).

A taxpayer has the burden of proving that the property at issue has a lower value than that assessed. "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)). "[T]he board is entitled to 'presume that the valuation

made by the assessors [is] valid unless the taxpayer[] sustain[s] the burden of proving the contrary.'" **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 598 (1984) (quoting **Schlaiker**, 365 Mass. at 245).

In appeals before the Board, a taxpayer "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation." **General Electric Co.**, 393 Mass. at 600 (quoting **Donlon v. Assessors of Holliston**, 389 Mass. 848, 855 (1983)).

In the present appeal, the Board found that the appellant provided sufficient persuasive evidence to establish overvaluation of the subject property for the fiscal year at issue. Though the Board did not give weight to all the evidence introduced by the appellant, particularly the realtor letters (see **Pelletier v. Assessors of Oxford**, Mass. ATB Findings of Fact and Reports 2010-963, 967 n.1 - "The Presiding Commissioner noted that, aside from remoteness in time, the opinions of the realtor and on-line sources were unsupported and not subject to cross-examination by the assessors, further diminishing the evidentiary weight of the opinions.") and the appellant's land value and building value ratio charts that failed to consider economies of scale (see Appraisal Institute, **THE APPRAISAL OF REAL**

ESTATE 172 (15<sup>th</sup> ed., 2020) - "Generally, as size increases, unit prices decrease."), the Board was persuaded by the sale of the subject property in June 2018 and the testimony of Mr. Wert as to the arm's-length nature of the sale and the many limiting factors faced by the subject property, especially its proximity to the ocean. See **Cumington School of Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977) ("The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board."). The Board gave no weight to Ms. Gabriel's specious reasoning for coding the sale of the subject property as a non-arm's-length transaction and it also found the assessors' comparable properties to be incomparable but for one property on their sales grid, a property that actually supported the appellant's case rather than the assessors' revised assessed value.

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Based upon the above and the evidence of record, the Board found that \$780,000 was the fair cash value of the subject property for the fiscal year at issue. Accordingly, the Board found and ruled for the appellant and granted an abatement of \$5,534.47, inclusive of the CPA surcharge, for the subject property for the fiscal year at issue.

**THE APPELLATE TAX BOARD**

By: /s/ Patricia M. Good  
Patricia M. Good, Commissioner

A true copy,

Attest: /s/ William J. Doherty  
Clerk of the Board