**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**CSHV CONCORD, LLC v.   BOARD OF ASSESSORS OF**

**THE TOWN OF BILLERICA**

Docket Nos. F308024, F312994,   Promulgated:

F317153                 December 2, 2014

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 Billerica (“appellee” or “assessors”) to abate taxes on certain real estate in Billerica, owned by and assessed to CSHV Concord, LLC (“CSHV Concord” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2010, 2011 and 2012 (“fiscal years at issue”).

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Chmielinski and Good joined him in the decisions for the appellant in Docket No. F317153 and in the revised decisions for the appellant in Docket Nos. F308024 and F312994.

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

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

*Patrick J. Costello,* Esq. for the appellee.

**Findings of Fact and Report**

1. **Introduction and Jurisdiction**

On the basis of the evidence, including the testimony and documentary exhibits entered into the record, the Appellate Tax Board (“Board”) finds the following facts.

On January 1, 2009, the appellant was the assessed owner of an approximately 44.4-acre parcel of land identified on the appellee’s Map 86 as Block 108, Parcel 5 located at 296, 298 and 300 Concord Road in the Town of Billerica (the “subject property”).

For fiscal year 2010, the assessors valued the subject property at $34,785,000 and assessed a tax thereon, at the rate of $28.47 per thousand, in the total amount of $990,328.95. The Collector of Taxes for Billerica mailed the fiscal year 2010 actual tax bills on December 31, 2009, and the appellant paid the tax due without incurring interest. On January 21, 2010, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which they denied on April 16, 2010. In accordance with G.L. c. 58, §§ 64 and 65, the appellant seasonably filed its petition with the Board on June 24, 2010. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeal for fiscal year 2010.

For fiscal year 2011, the assessors valued the subject property at $33,414,100 and assessed a tax thereon, at the rate of $30.75 per thousand, in the total amount of $1,027,483.57. The Collector of Taxes for Billerica mailed the fiscal year 2011 actual tax bills on December 30, 2010, and the appellant paid the tax due without incurring interest. On January 13, 2011, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors. Because the assessors did not act on the abatement application within three months of its filing, it was deemed denied on April 13, 2011[[1]](#footnote-1) pursuant to G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. In accordance with G.L. c. 58, §§ 64 and 65, the appellant seasonably filed its petition with the Board on June 21, 2011. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeal for fiscal year 2011.

For fiscal year 2012, the assessors valued the subject property at $32,946,000 and assessed a tax thereon, at the rate of $31.93 per thousand, in the total amount of $1,051,965.78. The Collector of Taxes for Billerica mailed the fiscal year 2012 actual tax bills on December 30, 2011, and the appellant paid the tax due without incurring interest. On January 6, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which they denied on April 5, 2012. In accordance with G.L. c. 58, §§ 64 and 65, the appellant seasonably filed its petition with the Board on June 28, 2012. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeal for fiscal year 2012.

1. **The Subject Property**

The subject property, located in Billerica, is situated along the Route 3 North corridor. The subject property’s neighborhood is bordered by Concord Road, Route 3 and Orchard Road to the south. South of the subject property is an area of industrial development on Technology Park Drive that houses over one million square feet of office and flex-type space. The neighborhood is stable and mature with respect to its development.

The subject property consists of about 44.4 acres of land, irregular in shape and mostly level with some minor sloping, some wetlands and a small pond, which is improved with an office facility consisting of 343,000 square feet of office space that was built in stages between 1968 and 1998, as well as paved parking areas with about 1,250 parking spaces (together, the “subject building”) and a communications tower. The subject building is comprised of three interconnected structures. 296 Concord Road is a three-story building with a polygon-style footprint that is situated at the northerly end of the complex. The building is connected by a one-story walkway to the middle structure, 298 Concord Road. This single-story building consists primarily of common areas, although a portion of the building is devoted to office tenant use. A narrow corridor on its southerly side provides access to 300 Concord Road, which is a five-story office building with a center-core layout.

296 Concord Road has its original roof, which is PVC-style and adhered; 298 Concord Road’s roof was replaced in 2005 and is rubber membrane and adhered; and 300 Concord Road’s roof was replaced in 2007 and is rubber membrane and mechanically fastened. The subject building’s exterior walls are brick over block with “ribbon” style, non-operable window lines and pre-fabricated panels. The floor consists of various finishes, including carpeting and flooring tiles, over concrete. There are multiple entryways into the subject building, including the main lobby entrance on the easterly side near the primary parking areas. There are various lighting fixture types throughout the subject building, including fluorescent fixtures set in suspended ceiling grids as well as decorative and recessed lighting in certain tenant spaces. Heating is provided by forced-air, electrically fired, HVAC rooftop units with supplemental gas-fired morning warm-ups. Copper plumbing and 480-volt electricity with an emergency generator for life-safety systems are considered functionally adequate. 296 and 300 Concord Road each have three elevators.

296 Concord Road has a more traditional two-story lobby area with granite and wood finishes and an open stairway with decorative suspended lighting fixtures. 300 Concord Road does not have a traditional lobby area because there are three elevators situated in a narrow corridor that leads from the connector between 300 and 298 Concord Road. 298 Concord Road also does not have a lobby area. Its single-story connector area is finished with suspended tile ceilings, polished stone floor tile and extensive floor-to-ceiling windows.

The appellant’s opinion of value

The appellant presented its case-in-chief through the testimony and appraisal report of Donald P. Bouchard, whom the Board qualified as an expert in the area of commercial real estate valuation.

Mr. Bouchard began with a brief overview of the economy and his opinion of its effect on the subject property’s valuation. Prior to the fiscal years at issue, the national economy had been impacted by an overall economic downturn as a result of a recession that began in 2007. The economy continued to deteriorate as of January 1, 2009 with the stock market collapse and the Dow Jones Industrial Average steadily declining. By January 1, 2010, there was some improvement in stock values, but the Dow Jones remained at a level that was about 18% below its high point. The economic downturn also negatively impacted the suburban real estate market, both nationally and in Massachusetts. This resulting stagnation in leasing caused elevated vacancy rates in the suburban office market, including the subject property’s specific market.

After determining that the highest and best use of the subject property was its current use as an office building, Mr. Bouchard next reviewed the three approaches to value: cost approach, income-capitalization approach and sales-comparison approach. Mr. Bouchard opined that, while he considered all three approaches, he found only the income-capitalization approach to be appropriate for valuing the subject property. Mr. Bouchard testified that the sales of other office buildings involved leased-fee rights and therefore had limited merit with respect to valuing the subject property for tax purposes, while the cost approach involves much speculation. Therefore, he presented the income-capitalization approach as the only relevant approach for his study.

In developing his income-capitalization approach, Mr. Bouchard first determined the rentable area of the subject building. He testified that he found the subject building to contain 343,000 square feet of rentable area and a basement of 10,000 feet of storage space, which he determined was not rentable space. Mr. Bouchard explained that he determined square footage by studying the architect’s plans for the subject building and its rent rolls. Mr. Bouchard deducted from his calculations areas that are not typically regarded as rentable space, like a loading dock and basement storage space, as well as the HVAC “penthouse” on the roof. Mr. Bouchard also consulted the subject property’s managing agent’s stacking plan and floor inventory form, which itemizes the square foot area of the subject building.

Mr. Bouchard opined that the subject building, to some degree, suffered from functional obsolescence. In particular, Mr. Bouchard believed that the functional obsolescence of the older buildings, 296 and 298 Concord Road, rendered them Class B office space while 300 Concord Road was a Class A office building. Therefore, in valuing the market rent for the subject property, he considered 172,666 square feet to be Class A space and 170,334 square feet to be Class B space.

Mr. Bouchard testified that he studied the detailed financial statements for the subject property to determine its revenue, which included rental income and reimbursements. He next reviewed market-supported leases of comparable rental properties in the subject property’s market area. Mr. Bouchard selected fifteen purportedly comparable rental properties from the subject property’s market area for the three fiscal years at issue. The data included transactions in both Class A and Class B buildings, which Mr. Bouchard explained reflected the range in quality in the subject buildings. These purportedly comparable rental properties and Mr. Bouchard’s adjustments are summarized in the table below:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Location**  **(Floor)** | **Tenant/**  **Landlord** | **Area (sf)** | **$/SF**  **Basis** | **Adjustments specified in appraisal report** |
| 1 | 100 Apollo Dr., Chelmsford  (3rd floor) | Desktone Inc./  RREEF | 5,218 | $18.00  Gross | Adjusting to net basis indicates a range of $10.50-$11.50 psf. |
| 2 | 100 Apollo Dr., Chelmsford  (unknown) | Sanovi/  RREEF | 8,790 | $18.00  Gross | After adjustments for taxes and operating expenses, net rent equivalent of $10.50 psf. |
| 3 | 1 Execution Dr.,  Chelmsford  (1st floor) | Kewill/  RREEF | 27,911 | $18.50  Gross |  |
| 4 | 1 Execution Dr.,  Chelmsford  (2nd floor) | Conmed/  RREEF | 39,233 | $18.50  Gross |  |
| 5 | 300 Apollo Dr., Chelmsford  (1st floor) | HNTB/  USAA Real Estate | 13,354 | $12.63  NNN |  |
| 6 | Building 5  Billerica Business Center, Billerica  (1st floor) | Winchester Systems/  LNR | 12,121 | $9.00  NNN |  |
| 7 | 285 Billerica Road, Chelmsford  (1st floor) | Millenial Net/  Altid Properties | 14,169 | $18.00  Gross |  |
| 8 | 2 Executive Dr., Chelmsford  (3rd floor) | Tribridge/  Novaya Ventures | 5,399 | $21.75  Gross |  |
| 9 | 2 Highwood Office Park, Tewksbury  (1st floor) | Tactical Communications/  Highwood Investors | 19,904 | $17.25  Gross |  |
| 10 | 150 Apollo Dr., Chelmsford  (Full bldg.) | Harris Corp/  Farley White | 79,873 | $8.45  NNN |  |
| 11 | 1 Federal St., Billerica  (Full bldg.) | Parexel International/  REFF Reit 3 | 57,064 | $13.00  NNN |  |
| 12 | 270 Billerica Rd., Chelmsford  (1st floor) | Brix Networks/ Lexington Realty Tr. | 29,200 | $14.57  Gross |  |
| 13 | 250 Apollo Dr., Chelmsford  (1st & 2nd floors) | AECOM Technology Corporation/  CSHV Apollo | 91,332 | $19.75  Gross |  |
| 14 | 2 Executive Dr, Chelmsford  (3rd floor) | Auriga Measurement Systems/  Novaya Ventures | 12,227 | $17.47  Gross |  |
| 15 | 600 Technology Park Dr., Billerica  (4th floor) | Avaya/  The Gutierrez Co | 136,136 | $23.50  Gross | -20-25% for superior property, being a renewal of an existing tenant rather than new lease, and a longer term |

Mr. Bouchard stated that he adjusted the above rents for periods of free rent and “other factors” to achieve consistent indicators of fair market rent for the subject property. His report cited the specific adjustments listed above.

Mr. Bouchard also reviewed publications by Colliers-Meredith & Grew, Jones Lang LaSalle and CBRE Richard Ellis. He reported that each of these publications showed relatively consistent downward trends in asking rents since mid-2008 for suburban office space, and they classify the economic conditions as creating a “tenant’s market” due to the prevailing vacancy rates and uncertain conditions which prevented landlords from seeking asking rent increases.

Based on his research, Mr. Bouchard settled upon the following fair market rents for the fiscal years at issue.

|  |  |  |
| --- | --- | --- |
| **Date** | **Class A** | **Class B** |
| January 1, 2009 | $18.75 | $18.00 |
| January 1, 2010 | $18.50 | $17.75 |
| January 1, 2011 | $18.00 | $17.50 |

Mr. Bouchard specified that these rental amounts reflected new rents, not renewals, expansions or lease options, and that the leases are gross with the expectation that the tenants will reimburse the landlord for tenant electricity.

Mr. Bouchard next reviewed tenant reimbursements, for which he included collections for tenant electricity as well as other miscellaneous items. Mr. Bouchard explained that the reimbursements for tenant electricity reflected negotiations with the utility provider. Therefore, his reimbursements varied widely between each fiscal year, from a high of $2.75 per square foot in fiscal year 2011 to a low of $1.86 per square foot in fiscal year 2012. His miscellaneous revenues, which were based on rental of storage space in the subject building’s basement and leases of communications equipment, varied for each fiscal year as well.

For vacancy, Mr. Bouchard consulted rates in CoStar, Jones Lang LaSalle, and CB Richard Ellis, and reviewed vacancy rates in the subject property’s market area. He arrived at the following vacancy rates for the fiscal years at issue: 12.0% for fiscal year 2010; 13.5% for fiscal year 2011; and 13.0% for fiscal year 2012.

For his operating expenses, Mr. Bouchard reviewed the actual operating expenses for the subject property from 2008 through 2011. He did not include reserves for replacement, expenditures for capital projects or tenant allowances in his general expenses category. Mr. Bouchard also reviewed industry information provided by the Building Owners and Managers Association (BOMA). He explained that this data assisted in supporting the reasonableness of the operating expenses at the subject property and helped him determine that they are within the ranges of expenses for the greater Boston marketplace. As a separate category, Mr. Bouchard included a 2% management fee. With respect to tenant improvement allowances and brokerage commissions, Mr. Bouchard assumed that these would be taken into consideration in the capitalization rate. Because he did not separately value the cell tower, Mr. Bouchard included the expenses associated with the cell tower in his overall expenses.

For his capitalization rate, Mr. Bouchard extracted rates from three office-building sales, reviewed Korpacz Survey data, and performed a band-of-investment analysis. The sales which Mr. Bouchard selected were located in Wakefield, Burlington and Newton and all occurred during 2009. These sales yielded capitalization rates ranging from 7.70% to 9.0%. Next, Mr. Bouchard reported that the Korpacz data revealed that the change in the capital markets between the end of the fourth quarter of 2008 and 2010 resulted in substantial increases in the average reported capitalization rate for the national suburban market over that period. Likewise, the average capitalization rate ranges for the Boston office market for the fourth quarters of 2009 and 2010 had increased by about 100 basis points over their 2008 level. Further distinctions between the central business district downtown market and suburban office market revealed that overall rates were higher for the suburban markets than for the downtown market. Additional support for his capitalization rate came from Mr. Bouchard’s development of a band-of-investment technique.

On the basis of his data, Mr. Bouchard selected the following base capitalization rates for the subject property: 8.0% for fiscal year 2010; 8.3% for fiscal year 2011; and 8.0% for fiscal year 2012. To these, Mr. Bouchard added Billerica’s commercial tax factor to produce the following overall capitalization rates: .10847 for fiscal year 2010; .11375 for fiscal year 2011; and .11193 for fiscal year 2012.

A summary of Mr. Bouchard’s income-capitalization analysis for each fiscal year is reproduced below[[2]](#footnote-2):

**Fiscal Year 2010**

Class A space 172,666

Market Rent PSF Gross $18.75

Class A Gross Potential Revenue $ 3,237,488

Class B space 170,334

Market Rent PSF Gross $18.00

Class B Gross Potential Revenue $ 3,066,012

Total Potential Rent Revenue $ 6,303,500

Electrical Reimb. (@ $2.59 psf) $ 890,167

Miscellaneous Revenues $ 300,000

Gross Potential Revenue $ 7,493,667

Vacancy/collection (@ 12%) ($ 899,240)

Effective Gross Revenue $ 6,594,427

Operating Exps (@ $8.75 psf) ($ 3,007,323)

Management fee (@ 2%) ($ 149,873)

Other Expenses (@ 0.50%) ($ 37,468)

Net operating income $ 3,399,763

Capitalization rate /10.8470%

Capitalized value $31,342,885

Rounded $31,340,000

**Fiscal Year 2011**

Class A space 172,666

Market Rent PSF Gross $18.50

Class A Gross Potential Revenue $ 3,194,321

Class B space 170,334

Market Rent PSF Gross $17.75

Class B Gross Potential Revenue $ 3,023,429

Total Potential Rent Revenue $ 6,217,750

Electrical Reimb. (@ $2.75 psf) $ 945,159

Miscellaneous Revenues $ 325,000

Gross Potential Revenue $ 7,487,908

Vacancy/collection (@ 13.5%) ($ 1,010,868)

Effective Gross Revenue $ 6,477,040

Operating Exps (@ $9.00 psf) ($ 3,093,246)

Management fee (@ 2%) ($ 149,758)

Other Expenses (@ 0.50%) ($ 37,440)

Net operating income $ 3,196,597

Capitalization rate /11.3750%

Capitalized value $28,101,949

Rounded $28,100,000

**Fiscal Year 2012**

Class A space 172,666

Market Rent PSF Gross $18.00

Class A Gross Potential Revenue $ 3,107,988

Class B space 170,334

Market Rent PSF Gross $17.50

Class B Gross Potential Revenue $ 2,980,845

Total Potential Rent Revenue $ 6,088,833

Electrical Reimb. (@ $1.86 psf) $ 639,271

Miscellaneous Revenues $ 375,000

Gross Potential Revenue $ 7,103,104

Vacancy/collection (@ 13%) ($ 923,403)

Effective Gross Revenue $ 6,179,700

Operating Exps (@ $9.00 psf) ($ 3,093,246)

Management fee (@ 2%) ($ 142,062)

Other Expenses (@ 0.50%) ($ 35,516)

Net operating income $ 2,908,877

Capitalization rate /11.1930%

Capitalized value $25,988,357

Rounded $26,000,000

Because Mr. Bouchard concluded that only the income-capitalization approach was relevant for valuing the subject property, his opinion of fair market value was the value he obtained through that method: $31,340,000 for fiscal year 2010; $28,100,000 for fiscal year 2011; and $26,000,000 for fiscal year 2012.

The appellee’s defense of the subject assessments

The appellee presented its first witness, Richard Scanlon, the Chief Assessor and Chairman of the Board for the Town of Billerica. Mr. Scanlon testified that the rentable square footage figure recorded by the appellee on the property record card –- 353,242 square feet –- was consistent with the data provided to the appellee by the appellant on its rent roll forms for the fiscal years at issue. Upon questioning by the Presiding Commissioner, Mr. Scanlon testified that the subject property’s rent roll forms did not parcel out the storage space. Therefore, to the best of Mr. Scanlon’s knowledge, the appellee’s 353,242-square-feet figure included the rented storage space in the subject property’s basement.

The appellee next presented its witness, John R. Ryan, whom the Board qualified as an expert in the area of commercial real estate valuation.

Mr. Ryan testified that, in his opinion, the subject property was located within the “upper echelon” of the Route 3 North market area, particularly because it was located near the Route 128 corridor, and therefore was a “realistic option” for renters seeking space near Route 128 but who could not afford to be directly on that corridor. Moreover, despite the fact that it was developed at various times, it was well maintained. Therefore, Mr. Ryan opined that the subject property was “well-positioned in the marketplace to compete for the best clients.”

With respect to Mr. Bouchard’s opinion that the subject property should be parceled out into Class A and Class B space, Mr. Ryan opined that this was a “distinction without a difference,” because all of the tenants of the subject property have access to the subject property’s amenities, and the subject property’s rent rolls do not reveal a difference in the rental income figures. Therefore, Mr. Ryan considered all of the subject property’s rentable space to be Class A property.

Mr. Ryan determined that there were not enough sales of comparable real estate in the metro Boston market to justify a sales-comparison approach. Therefore, Mr. Ryan developed only an income-valuation approach to value the subject property.

Mr. Ryan explained that he analyzed rental information that was available to him from multiple sources, including rental contracts at the subject property that were renewed within the period of valuation, of which there were four. These renewal leases ranged from $13.34 per square foot to $19.17 per square foot, but in Mr. Ryan’s opinion, these leases’ “effective rents” were closer to $18 per square foot. Mr. Ryan also reviewed published surveys of the Metro North suburban market and conducted a survey in the subject property’s Route 3 North market area. According to Mr. Ryan, the rents ranged from $5.75 to $18.50 on a net basis, because he claimed that most of the office rents in the subject area were on a net basis, including the subject property’s leases. Mr. Ryan opined that the subject property trended towards leases at the higher end of the spectrum and thus selected $18.50 per square foot for the subject property for all three fiscal years at issue.

For reimbursements, Mr. Ryan used actual figures but he then made adjustments, particularly to the fiscal year 2010 reimbursement, to reflect the market; as Mr. Ryan explained, “[t]hat higher reimbursement was, in all likelihood, from previous lease agreements that were executed before the years in question here,” and to include the higher figure would “over-inflat[e]” his study.

For vacancy, Mr. Ryan considered published surveys, particularly those by CBRE that have “the most refined market delineations that encompass the subject.” Mr. Ryan reported that the published rates for the Route 3 North area over the relevant period ranged from 16.4% to 19.7%. However, Mr. Ryan opined that some of the inventory was in buildings with less desirable locations as compared with the subject building. Moreover, the subject building has a higher quality and more ample parking than many of those in its general vicinity. Mr. Ryan also reviewed the actual contract rent roll for the subject property for fiscal years 2010, 2012 and 2013 and he testified that they reported that the subject property’s actual vacancy was “substantially” below the market rate. Accordingly, Mr. Ryan arrived at a vacancy of 10% plus an additional 1% for collection loss, for a total vacancy and collection loss rate of 11% for the subject building.

With respect to expenses, Mr. Ryan testified that the subject leases were on net terms, which means that the tenant was responsible for their pro rata share of all fixed and variable operating expenses while the property owner was responsible for those same expenses for vacant areas. Mr. Ryan testified that he used the subject property’s actual expenses as they were reported, except that he did not have access to expenses for fiscal year 2010. However, Mr. Ryan considered the vacancy levels and determined that interior space would have to be renovated for new tenants. Therefore, Mr. Ryan also included an allowance of $0.20 per square foot for reserves for long-term items.

Lastly, Mr. Ryan developed his capitalization rate. He explained that, ideally, a capitalization rate should be derived from comparable sales. However, as of the valuation dates, a survey of brokers and sales did not provide him with any appropriate data. Therefore, Mr. Ryan developed his rate using a debt-coverage formula and using national survey data, specifically the Korpacz Investor Survey, which specifically tracked the Boston suburban market. Using this method, Mr. Ryan calculated the following capitalization rates: 7.97% for fiscal year 2010; 8.72% for fiscal year 2011; and 8.69% for fiscal year 2012. Mr. Ryan then reported that the Korpacz Investor Survey indicated average overall capitalization rates stabilizing and turning more positive as competition for quality commercial properties increased during the fiscal years at issue. Mr. Ryan found that the Korpacz rates provided good support for the rates he developed using the debt-coverage-ratio analysis. Given the data, Mr. Ryan concluded that the market evidence supported a base capitalization rate of 8% for each of the fiscal years at issue. To this, Mr. Ryan added the applicable property tax factor and reached the following “loaded” capitalization rates: 10.8% for fiscal year 2010; 11.1% for fiscal year 2011; and 11.2% for fiscal year 2012.

Mr. Ryan next separately valued the cell tower at the subject property. He first used actual income for each of the fiscal years at issue. Next, Mr. Ryan determined vacancy and operating expenses to be 25% based on the actual expenses from the cell tower, which included insurance, maintenance, utilities, management, reserves for replacement and miscellaneous expenses. In developing his capitalization rate for the cell tower, Mr. Ryan explained that cell tower capitalization rates are different than those derived for commercial space, and that they are typically in the 8% to 12% range depending on location. Because he deemed this cell tower to be in an excellent location, close to a major highway, he expected demand for this particular cell tower to be strong and thus used an 8% capitalization rate, to which he added the applicable property tax factor, for each fiscal year at issue.

Mr. Ryan’s cell-tower analysis is reproduced below:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **FY2010** | **FY2011** | **FY2012** |
| **Gross Income** | 234,987 | 240,786 | 240,786 |
| **Expense Ratio** | 25% | 25% | 25% |
| **Expenses** | $ 58,747 | $ 60,197 | $ 60,197 |
| **Net Operating Income** | $ 176,240 | $ 180,590 | $ 180,590 |
| **Base Rate** | 0.08 | 0.08 | 0.08 |
| **Property Tax Factor** | 0.02847 | 0.03075 | 0.03193 |
| **Capitalization Rate** | 0.10847 | 0.11075 | 0.11193 |
| **Indicated Value** | $1,624,783 | $1,630,605 | $1,613,415 |
| **Rounded** | $1,625,000 | $1,631,000 | $1,613,000 |

Mr. Ryan’s analyses for the subject property for each fiscal year are reproduced below[[3]](#footnote-3):

**Fiscal Year 2010**

Rental space 353,242

Market Rent psf $18.50

Gross Income $ 6,534,977

Reimbursements/Other $ 1,100,000

Gross Income $ 7,634,977

Vacancy/collection (@ 11%) ($ 839,847)

Effective Gross Revenue $ 6,795,130

Management fee (@ 2%) ($ 144,408)

Administration (@ 3.1%) ($ 222,726)

Utilities (@ 20%) ($ 1,435,615)

Repairs (@8.7%) ($ 625,073)

Security (@0.5%) ($ 33,840)

Cleaning (@4.6%) ($ 329,127)

Common Area Expense (@4.8%) ($ 366,479)

Insurance (@ 0.6%) ($ 46,230)

Legal/Marketing (@0.9%) ($ 66,556)

Reserves for Replacement ($ 70,648)

Credit Cell Tower Expense $ 58,747

Total Expenses (@43%) ($ 3,281,956)

Net operating income $ 3,513,174

Capitalization rate /10.85%

Capitalized value $32,388,439

Plus Cell Tower $ 1,624,783

Total Value $34,013,222

Rounded $34,000,000

**Fiscal Year 2011**

Rental space 353,242

Market Rent psf $18.50

Gross Income $ 6,534,977

Reimbursements/Other $ 1,090,366

Gross Income $ 7,625,343

Vacancy/collection (@ 11%) ($ 838,788)

Effective Gross Revenue $ 6,786,555

Management fee (@ 2%) ($ 144,408)

Administration (@ 3.1%) ($ 222,726)

Utilities (@ 20%) ($ 1,435,615)

Repairs (@8.7%) ($ 625,073)

Security (@0.5%) ($ 33,840)

Cleaning (@4.6%) ($ 329,127)

Common Area Expense (@4.8%) ($ 366,016)

Insurance (@ 0.6%) ($ 46,230)

Legal/Marketing (@0.9%) ($ 66,556)

Reserves for Replacement ($ 70,648)

Credit Cell Tower Expense $ 60,197

Total Expenses (@43%) ($ 3,280,043)

Net operating income $ 3,506,512

Capitalization rate /11.08%

Capitalized value $31,661,507

Plus Cell Tower $ 1,631,000

Total Value $33,292,507

Rounded $33,300,000

**Fiscal Year 2012**

Rental space 353,242

Market Rent psf $18.50

Gross Income $ 6,534,977

Reimbursements/Other $ 1,090,366

Gross Income $ 7,625,343

Vacancy/collection (@ 11%) ($ 838,788)

Effective Gross Revenue $ 6,786,555

Management fee (@ 2%) ($ 144,408)

Administration (@ 3.1%) ($ 222,726)

Utilities (@ 20%) ($ 1,435,615)

Repairs (@8.7%) ($ 625,073)

Security (@0.5%) ($ 33,840)

Cleaning (@4.6%) ($ 329,127)

Common Area Expense (@4.8%) ($ 366,016)

Insurance (@ 0.6%) ($ 46,230)

Legal/Marketing (@0.9%) ($ 66,556)

Reserves for Replacement ($ 70,648)

Credit Cell Tower Expense $ 60,197

Total Expenses (@43%) ($ 3,280,043)

Net operating income $ 3,506,512

Capitalization rate /11.19%

Capitalized value $31,327,722

Plus Cell Tower $ 1,613,000

Indicated Value $32,940,722

Rounded $33,000,000

Because Mr. Ryan did not develop a sales-comparison approach, the values he obtained under the income-capitalization approach were his final opinions of value for each of the fiscal years at issue.

The Board’s findings

The Board agreed with both expert witnesses, who espoused the income-capitalization approach for valuing the subject property. The Board, likewise, adopted the income-capitalization method as the only relevant valuation method for valuing the subject property during the fiscal years at issue. The Board also agreed with Mr. Ryan that the subject building and the subject cell tower should be separately analyzed.

The Board found that Mr. Bouchard presented the more convincing evidence with regards to the rentable square footage for the subject property. The Board, therefore, adopted 343,000 square feet as the rentable area for the subject property. However, the Board agreed with Mr. Ryan that, given its prime location and that rents in this particular market remained stable during the fiscal years at issue, this entire space should be regarded as Class A rental space. The Board thus applied Mr. Bouchard’s Class A rental rates to the entire 343,000 square feet for fiscal year 2010 and 2011; for fiscal year 2012, the Board adopted a rate of $18.50, rather than Mr. Bouchard’s lower Class A rate of $18.00, finding that this figure better reflected the stability and high-end ranking of the subject property and the surrounding suburban market during that fiscal year.

For tenant reimbursements, the Board adopted Mr. Ryan’s stabilized $1,100,000 figure from fiscal year 2010. The Board noted that Mr. Bouchard’s reimbursements included those from the cell tower, but the Board adopted Mr. Ryan’s approach of separately valuing the cell tower. Moreover, Mr. Bouchard had used actual utility reimbursements, but these greatly fluctuated during the fiscal years at issue because the management renegotiated a contract with the electricity supplier. The Board thus adopted Mr. Ryan’s more stabilized figure, which was based on market data.

With regards to vacancy, the Board reviewed the data presented by both expert witnesses and reached its own determination that 12% was the appropriate vacancy rate for all of the fiscal years at issue, which was within the range suggested by the expert witnesses.

For operating expenses, the Board essentially adopted Mr. Bouchard’s expenses, finding that they were well-supported with actual data from the subject property. However, because Mr. Bouchard included cell tower expenses in his overall expenses, the Board reduced his expense figures by Mr. Ryan’s cell tower expenses to arrive at the appropriate expenses for the subject buildings.

With respect to the capitalization rates, the Board found Mr. Bouchard’s data to be very detailed and well supported. The Board thus adopted Mr. Bouchard’s capitalization rate for each of the fiscal years at issue.

However, the Board agreed with Mr. Ryan’s methodology of separately valuing the cell tower and using a capitalization rate and expenses that were particular to the cell tower. The Board thus adopted Mr. Ryan’s valuation for the cell tower for each fiscal year at issue.

A summary of the Board’s analysis follows:

**Fiscal Year 2010**

Rental space 343,000

Market Rent psf $18.75

Gross Rental Income $6,431,250

Reimbursements/Other $ 1,100,000

Gross Income $ 7,531,250

Vacancy/collection (@ 12%) ($ 903,750)

Effective Gross Revenue $ 6,627,500

Operating Expenses ($3,135,917)

Net operating income $ 3,491,583

Capitalization rate /10.85%

Capitalized value of bldg. $32,180,488

Plus Cell Tower $ 1,624,783

Total Indicated Value $33,805,271

Fair Cash Value $33,800,000

Assessed $34,785,000

Abated Value $ 985,000

Abatement (@ $28.47 per $1,000) $ 28,042.95

**Fiscal Year 2011**

Rental space 343,000

Market Rent psf $18.50

Gross Rental Income $6,345,500

Reimbursements/Other $ 1,100,000

Gross Income $ 7,445,500

Vacancy/collection (@ 12%) ($ 893,460)

Effective Gross Revenue $ 6,552,040

Operating Expenses ($3,220,247)

Net operating income $ 3,331,793

Capitalization rate /11.375%

Capitalized value of bldg. $29,290,488

Plus Cell Tower $ 1,631,000

Total Indicated Value $30,921,488

Fair Cash Value $30,920,000

Assessed $33,414,100

Abated Value $ 2,494,100

Abatement (@ $30.75 per $1,000) $ 76,693.57

**Fiscal Year 2012**

Rental space 343,000

Market Rent psf $18.50

Gross Rental Income $6,345,500

Reimbursements/Other $ 1,100,000

Gross Income $ 7,445,500

Vacancy/collection (@ 12%) ($ 893,460)

Effective Gross Revenue $ 6,552,040

Operating Expenses ($ 3,210,627)

Net operating income $ 3,341,413

Capitalization rate /11.193%

Capitalized value of bldg. $29,852,703

Plus Cell Tower $ 1,631,000

Total Indicated Value $31,483,703

Fair Cash Value $31,485,000

Assessed $32,946,000

Abated Value $ 1,461,000

Abatement (@ $31.93 per $1,000) $ 46,649.73

Because the fair cash value for the subject property is less than its assessed value for each of the fiscal years at issue, the Board found and ruled that the subject property was over assessed for each of the fiscal years at issue.

Accordingly, the Board issued revised decisions for the appellant granting the following abatements, as calculated above according to the applicable tax rates: $28,042.95 for fiscal year 2010 and $76,693.57 for fiscal year 2011; and the Board issued a decision for the appellant granting an abatement of $46,649.73 for fiscal year 2012.

**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 appellant has the burden of proving that the property 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 taxpayers . . . prov[e] the contrary.’” ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 598 (1984) (quoting ***Schlaiker***, 365 Mass. at 245).

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.*** If the property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of its fair market value. ***Colonial Acres, Inc. v. North Reading***, 3 Mass. App. Ct. 384, 386 (1975). “In determining the property’s highest and best use, consideration should be given to the purpose for which the property is adapted.” ***Peterson v. Assessors of Boston***, Mass. ATB Findings of Fact and Reports 2002-573, 617 (citing Appraisal Institute, The Appraisal of Real Estate 315-316 (12th ed., 2001)), *aff’d*, 62 Mass. App. Ct. 428 (2004). In the instant appeals, the Board agreed with both parties’ witnesses and ruled that the highest-and-best use of the subject property during the fiscal years at issue was its existing use as an office property.

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). While arm’s-length sales of comparable realty generally produce persuasive evidence of value (s*ee* ***Correia***, 375 Mass. at 362), 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,*** 362 Mass. 696, 701-702 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.,*** 309 Mass. 60, 67 (1941). Furthermore, the income-capitalization method “is frequently applied with respect to income-producing property.” ***Taunton Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984).

In the present appeals, both expert witnesses relied solely on the income-capitalization method, finding that there were not enough sales of comparable realty to justify development of a sales-comparison approach and that the cost approach was too speculative. The Board agreed that the income-capitalization approach provided the most accurate indication of the fair cash value of 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 (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.,*** 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 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).

In these appeals, the parties differed in their determination of building area and its classification. The Board found that Mr. Bouchard presented the more convincing evidence with regards to the rentable square footage for the subject property. The Board, therefore, adopted 343,000 square feet as the rentable area for the subject property. However, the Board agreed with Mr. Ryan that, given the prime location and stable rental conditions during the fiscal years at issue, this entire space should be regarded as Class A rental space. The Board thus applied Mr. Bouchard’s Class A rental rates to the entire 343,000 square feet for fiscal years 2010 and 2011; for fiscal year 2012, the Board adopted a rate of $18.50, rather than Mr. Bouchard’s lower Class A rate of $18.00, finding that this figure better reflected the stability and high-end ranking of the subject property and the surrounding suburban market during that fiscal year. However, the Board found more persuasive Mr. Ryan’s methodology of separately valuing the subject building and the subject cell tower and thus adopted that methodology.

Next, the Board reviewed the data presented by both experts and reached its own independent determination that 12% was the appropriate vacancy rate for all of the fiscal years at issue.

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 Mr. Bouchard’s expenses and subtracted Mr. Ryan’s figures for the cell-tower expenses for each of the fiscal years at issue to arrive at the net operating income for the subject buildings.

The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Associates,*** 393 Mass. at 295. The Board found Mr. Bouchard’s analysis to be credible and thus adopted his capitalization rates for the subject buildings to arrive at the value of the subject buildings for each of the fiscal years at issue.

However, the Board agreed with Mr. Ryan’s methodology of separately valuing the cell tower and applying a separate capitalization rate specific to the cell tower. The Board, therefore, adopted Mr. Ryan’s valuation of the cell tower for each fiscal year at issue and added that value to its determination of the subject buildings’ value to arrive at the fair cash value of the subject property.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. ***Foxboro Associates,*** 385 Mass. at 683; ***New Boston Garden Corp.,*** 383 Mass. at 473; ***New England Oyster House, Inc.,*** 362 Mass. at 702. In evaluating the evidence before it, 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. v. Assessors of Lynn,*** 392 Mass. 296, 300 (1984). “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 calculations, the Board found the following fair cash values for the subject property: $33,800,000 for fiscal year 2010; $30,920,000 for fiscal year 2011; and $31,485,000 for fiscal year 2012. The Board, therefore, determined the following abatements: $28,042.95 for fiscal year 2010; $76,693.57 for fiscal year 2011; and $46,649.73 for fiscal year 2012.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

**Clerk of the Board**

1. The appellee’s notice to the taxpayer states that the abatement application was deemed denied on April 19, 2011, but as this exceeds the three-month period for acting on the application, the Board found that the application was deemed denied on April 13, 2011. [↑](#footnote-ref-1)
2. Some of Mr. Bouchard’s calculations do not appear to be accurate, but the Board is reproducing his analysis. [↑](#footnote-ref-2)
3. Some of Mr. Ryan’s calculations do not appear to be accurate, but the Board is reproducing his analysis. [↑](#footnote-ref-3)