**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**FREDERICK FOWLER, TRUSTEE,  v.   BOARD OF ASSESSORS OF**

**CRESCENT STREET ASSOCIATES   THE CITY OF NEWTON**

**REALTY TRUST**

Docket Nos.: F310544, F315163   Promulgated:

                  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 City of Newton (“appellee” or “assessors”) to abate taxes on certain real estate in Newton, owned by and assessed to Frederic Fowler as Trustee of the Crescent Street Associates Realty Trust Corporation (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2011 and fiscal year 2012 (“fiscal years at issue”).

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa and Mulhern joined him in the decision for the appellant for fiscal year 2011 and in the decision for the appellee in fiscal year 2012.

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

*Matthew A. Luz,* Esq. for the appellant.

*Julie B. Ross,* Esq., and *Angela Buchanan* *Smagula*, Esq. for the appellee.

**Findings of Fact and Report**

1. **Introduction and Jurisdiction**

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

On January 1, 2010, the appellant was the assessed owner of a 1.007-acre parcel of land identified on the appellee’s Map 44 as Block 23, Parcel 16 with an address of 45 Crescent Street in the City of Newton (the “subject property”).

For fiscal year 2011, the assessors valued the subject property at $2,519,300 and assessed a tax thereon, at the rate of $20.89 per thousand, in the total amount of $53,154.46.[[1]](#footnote-1) The Collector of Taxes for Newton mailed the fiscal year 2011 actual tax bills on December 31, 2010, and the appellant paid the tax due without incurring interest. On January 28, 2011, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which the assessors denied on February 25, 2011. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petition with the Board on March 8, 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 $2,227,300 and assessed a tax thereon, at the rate of $21.32 per thousand, in the total amount of $47,960.90.[[2]](#footnote-2) The Collector of Taxes for Newton mailed the fiscal year 2012 actual tax bills on December 30, 2011, and the appellant paid the tax due without incurring interest. On January 18, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors, which the assessors denied on February 15, 2012. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petition with the Board on April 23, 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 is located in the northwestern corner of the City of Newton, within the Auburndale section of the city. Access to local and regional transportation routes is good. The Auburndale section is bordered by Interstate 90 to the south, and the closest means of accessing Route 128/Interstate 95 is available about one mile west of the subject property by Rowe Street, which connects with Commonwealth Avenue/Interstate Route 90. The subject property is located at the intersection of Crescent Street and Rowe Street within a cluster of industrial-use and commercial-use properties surrounded by residential neighborhoods. Crescent Street is a lightly traveled, one-way public roadway developed with residential, mostly single-family homes. Rowe Street is a private street. The western portion of Rowe Street is developed with single-family residential homes; however, the subject property’s immediate vicinity is developed with industrial-use buildings. There are commercial-use buildings located in the vicinity, including office buildings, a Shaw’s Supermarket, retail stores, a bank branch office, restaurants, and gasoline service stations. Access to the subject property is provided by curb cuts along Rowe Street. The subject property also has a nineteen-space designated parking lot and includes six additional parking spaces along Rowe Street.

The subject property is improved with a building totaling 24,728 square feet in size that was built in 1979 (“subject building”). The subject building is 100% owner occupied by a tool and measurement company. The subject building was originally constructed for industrial use but contains about 6,000 square feet of office space situated on two floors. The ground floor office space consists of a large open reception and administrative office area, eight private offices, a mail room, a storage room and four lavatories. The second floor office space consists of a large open office area, four private offices, a conference room, and three lavatories. There is also a 1,728-square-foot mezzanine area that can be accessed by the second-floor office space and a staircase located in the industrial area of the building. The mezzanine contains two private offices and a storage area, which is utilized as an additional warehouse space and is accessed by a forklift. Four interior staircases provide access to the second-floor office space.

The subject building’s industrial space is about 15,000 square feet in size, on one floor, and contains two private offices, warehouse space, a repair shop area, a demonstration area, a utility closet, and an employee break room. There is an enclosed loading dock area located at the right side of the subject building, which has drive-in access via an overhead door with tailboard access. There is another overhead door with drive-in tailboard access located along the rear of the building. The clearance height within the industrial area of the building is about twenty-four feet. The subject property is in average overall condition.

**The appellant’s case**

The appellant presented its case-in-chief through the testimony and appraisal report of its witness, Eric Wolff, whom the Board qualified as an expert in the area of commercial and industrial real estate valuation. Mr. Wolff inspected the subject property on December 6, 2012 and reviewed information and data from the neighborhood and the surrounding area. The effective dates of his appraisal report are January 1, 2010 and January 1, 2011. Mr. Wolff determined that the highest and best use of the subject property was its current use as an industrial-use warehouse property.

Mr. Wolff next considered the three approaches to determining the fair market value of real property – the cost approach, the sales-comparison approach, and the income approach. While he considered the cost approach, he opined that the age of the building and other economic conditions rendered this approach not meaningful for the subject property, and therefore, he did not develop this approach.

Sales-Comparison Approach

The sales-comparison approach involves a comparison of the subject property with sales of comparable properties.

**Fiscal year 2011**

Mr. Wolff testified that his search for comparable industrial-use warehouse properties yielded a limited number of sales in the Newton area. He thus expanded his search to include other communities in Norfolk and Middlesex Counties and found five purportedly comparable sales in this expanded market area. The table below summarizes the comparable sales and adjustments as reported by Mr. Wolff:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Sale 1** | **Adj.** | **Sale 2** | **Adj.** | **Sale 3** | **Adj.** |
| **Address** | 35 Perwal St., Westwood |  | 31 Astor Ave., Norwood |  | 25 Union Ave., Sudbury |  |
| **Location** | Good |  | Good |  | Fair | 20% |
| **Sale date** | 12/29/2009 |  | 09/30/2009 |  | 11/20/2008 |  |
| **Sale price** | $1,400,000 |  | $1,585,000 |  | $1,775,000 |  |
| **Building area (sf)** | 41,927 | 10% | 19,260 |  | 33,000 |  |
| **Building condition** | Average |  | Average |  | Average |  |
| **Total adjustments** |  | 10% |  | 0 |  | 20% |
| **Price per square foot** | $33.39 | **$36.73** | $82.29 | **$82.29** | $53.79 | **$64.55** |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Sale 4** | **Adj.** | **Sale 5** | **Adj.** |
| **Address** | 664 Pleasant St.,  Norwood |  | 90 Hudson Rd.,  Canton |  |
| **Location** | Average | 10% | Good |  |
| **Sale date** | 09/28/2008 |  | 09/08/2008 |  |
| **Sale price** | 1,100,000 |  | $1,780,000 |  |
| **Building area (sf)** | 20,709 |  | 21,935 |  |
| **Building condition** | Average |  | Average |  |
| **Total adjustments** |  | 10% |  | 0 |
| **Price per square foot** | $53.12 | **$58.43** | $81.15 | **$81.15** |

After adjustments, Mr. Wolff’s purportedly comparable properties yielded sales values ranging from approximately $37 to $81 per square foot with an average of $64 per square foot. However, Mr. Wolff opined that the subject property was most similar to Comparable Sales 2, 4 and 5, which had a range of approximately $58 to $81 per square foot with an average of $72 per square foot. Taking into account the differences in size, location, physical condition and market condition, Mr. Wolff selected $72 per square foot as the indicated value for the subject property. At 24,728 square feet of gross floor area, Mr. Wolff calculated a value of $1,780,416, which he rounded to $1,780,000 as the market value for the subject property yielded by the sales-comparison approach for fiscal year 2011.

**Fiscal year 2012**

Mr. Wolff testified that his search for comparable industrial-use warehouse properties yielded a limited number of sales in the Newton area. He thus expanded his search to include other communities located in Norfolk and Middlesex Counties. He found five comparable sales in this expanded market area. The table below summarizes the comparable sales and adjustments as reported by Mr. Wolff:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Sale 1** | **Adj.** | **Sale 2** | **Adj.** | **Sale 3** | **Adj.** |
| **Address** | 90 Morse St.,  Norwood |  | 264 Arlington St., Watertown |  | 191-199 Dexter Ave., Watertown |  |
| **Location** | Good |  | Good |  | Good | -10% |
| **Sale date** | 12/16/2010 |  | 04/09/2010 |  | 04/01/2010 |  |
| **Sale price** | $1,375,000 |  | $1,350,000 |  | $1,850,000 |  |
| **Building area (sf)** | 19,250 | -5% | 15,600 | -10% | 17,188 | -10% |
| **Building condition** | Average |  | Average |  | Average/Good | -10% |
| **Total adjustments** |  | -5% |  | -10% |  | -30% |
| **Price per square foot** | $71.43 | **$67.86** | $86.54 | **$77.88** | $107.63 | **$75.34** |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Sale 4** | **Adj.** | **Sale 5** | **Adj.** |
| **Address** | 35 Perwal St., Westwood |  | 31 Astor Ave.,  Norwood |  |
| **Location** | Good |  | Good |  |
| **Sale date** | 12/29/2009 |  | 09/30/2009 |  |
| **Sale price** | 1,400,000 |  | $1,585,000 |  |
| **Building area (sf)** | 41,927 | 10% | 19,260 | -5% |
| **Building condition** | Average |  | Average |  |
| **Total adjustments** |  | 10% |  | -5% |
| **Price per square foot** | $33.39 | **$36.73** | $82.29 | **$78.18** |

After adjustments, Mr. Wolff’s purportedly comparable properties yielded sales values ranging from approximately $37 to $78 per square foot with an average of $67 per square foot. However, Mr. Wolff opined that the subject property was most similar to Comparable Sales 1, 2, 3 and 5, which had a range of approximately $68 to $78 per square foot with an average of $75 per square foot. Taking into account the differences in size, location, physical condition and market condition, Mr. Wolff selected $75 per square foot as the indicated value for the subject property.[[3]](#footnote-3) At 24,728 square feet of gross floor area, Mr. Wolff calculated a value of $1,854,600, which he rounded to $1,855,000 as the market value for the subject property yielded by the sales-comparison approach for fiscal year 2012.

Income-Capitalization Approach

Mr. Wolff next considered the income-capitalization approach. This approach involves estimating the anticipated economic benefit that an investor would expect to derive from the property. Mr. Wolff’s development of that approach is detailed below.

Mr. Wolff first developed the rental revenue for the subject property. He selected twelve purportedly comparable rental properties from the subject property’s market area for both fiscal years at issue. These purportedly comparable rental properties are listed in the table below:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Location** | **Tenant** | **Area (sf)** | **Date**  **Term** | **$/SF**  **Triple Net** |
| 1 | 213-217 California Street, Newton | Vanguard | 3,700 | 05/2010 | $8.50 |
| 2 | 281 Newtonville Ave., Newton | NEFCO Corp. | 37,475 | 09/2007 | $7.00 |
| 3 | 241 Riverview Ave., Newton | Olympus NDT Inc. | 20,000 | 10/2010  6 years | $9.00 |
| 4 | 78 Silver Lake Ave., Newton | (Confidential) | 5,000 | 01/2008 | $7.50 |
| 5 | 445 Watertown Street, Newton | Cataldo Ambulance | 6,000 | 12/2009  4 years | $9.00 |
| 6 | 26-34 Wexford Street, Needham | Savio Lighting Inc. | 5,000 | 04/2008  3 years | $8.75 |
| 7 | 101 Clematis Ave., Waltham | Armstrong Ambulance | 4,400 | 02/2010  5 years | $8.00 |
| 8 | 101 Clematis Ave., Waltham | Imports Adonna | 3,600 | 03/2008 | $8.75 |
| 9 | 108 Clematis Ave., Waltham | For the Love of Cheer | 7,500 | 05/2010  5 years | $8.75 |
| 10 | 108 Clematis Ave., Waltham | Asmara | 7,500 | 02/2010 | $8.00 |
| 11 | 104 Clematis Ave., Waltham | Science Applications International | 11,500 | 05/2009 | $7.50 |
| 12 | 196-200 Newton Street, Waltham | PakCom Incorporated | 5,000 | 11/2009 | $7.32  \*Gross + utilities |

Mr. Wolff’s rental amounts per square foot thus ranged from $7.00 to $9.00 per square foot on a triple-net basis. However, Mr. Wolff considered that the subject property is located within a cluster of industrial-use properties surrounded by residential neighborhoods with good access to local and regional transportation systems, and that the subject property is larger in size than the square footage of most of the above leased spaces, with the exception of Rental Comparable 2. Mr. Wolff opined that if the above rentals were adjusted for these factors, the estimated market rent falls near the lower end of the unadjusted range. Therefore, he opined that the market rent for the subject property’s industrial space was $7.00 per square foot on a triple net basis as of both relevant assessment dates. Applying this to the subject property’s 24,728 square feet of industrial space, Mr. Wolff calculated a potential gross income for the subject property at $173,096 for both fiscal years at issue.

To determine an appropriate vacancy rate, Mr. Wolff surveyed local industrial properties similar to the subject property and found vacancies in the range of 5% to 15%. A market survey report conducted by CoStar Group indicated that the vacancy rate for industrial space in Newton was in the range of 5% to 18%. Considering the subject property’s location, relative size, and current physical condition, Mr. Wolff selected 5% as the appropriate vacancy rate for the subject property for both fiscal years at issue.

Mr. Wolff then determined operating expenses. Leasing conditions as of the relevant assessment dates in the subject property’s market revealed that leases were on a triple-net basis, with tenants responsible for all operating expenses of the building, excluding those associated with the management and structural maintenance of the property. Mr. Wolff considered leases in the market area and he determined the following expenses, as expenses per square foot of rented area: management fee at $0.33; replacement reserve allowance at $0.21; and commission expense at $0.07 for both fiscal years at issue. Mr. Wolff applied these operating expenses to both fiscal years at issue.

For the capitalization rate, Mr. Wolff utilized the band-of-investment technique and determined a rate of 8.5%. He also consulted the rates published by national surveys, including: *First Quarter 2010 Korpacz Report* for “non-institutional” grade industrial warehouse properties, which ranged from 7.1% to 12.3% with an average of 8.955%; *CB Richard Ellis Cap Rate Survey 2010* for Class B/C industrial warehouse properties in the Boston area, which ranged from 9.0% to 12.0%; and *Real Estate Research Corporation 2010 East Regional Investment Criteria* for east region industrial warehouse properties, which ranged from 8% to 10.5% with an average of 9.3%. Mr. Wolff opined that his capitalization rate of 8.5% was in keeping with the above rates from these publications.

Mr. Wolff also performed a similar capitalization-rate analysis for fiscal year 2012 and determined a rate of 8.0%. Mr. Wolff also consulted the rates published by national surveys, including: *First Quarter 2011 Korpacz Report* for “non-institutional” grade industrial warehouse properties, which ranged from 6.1% to 12.3% with an average of 7.723%; *CB Richard Ellis Cap Rate Survey First Quarter 2011* for Class B/C industrial warehouse properties in the Boston area, which ranged from 8.5% to 12.0%; and *Real Estate Research Corporation First Quarter 2011 East Regional Investment Criteria* for east region industrial warehouse properties, which ranged from 5.8% to 11.7% with an average of 7.9%. Mr. Wolff opined that his capitalization rate of 8.0% was in keeping with the above rates from these publications.

Applying his capitalization rates to his net operating income yielded a value of $1,755,000 (rounded) for fiscal year 2011 and of $1,865,000 (rounded) for fiscal year 2012.

A summary of Mr. Wolff’s analysis is reproduced below:

**Fiscal Year 2011**

Building square foot area 24,728

Triple net market rent $ 7.00 psf

Gross rental revenue $ 173,096

Vacancy/collection (@ 5%) ($ 8,655)

Effective gross income $ 164,441

Management fee (@ $0.33) ($ 8,222)

Reserves for Replacement (@ $0.21) ($ 5,193)

Commissions (@ $0.07) ($ 1,731)

Net operating income $ 149,295

Capitalization rate /8.5%

Capitalized value $1,756,412

Rounded $1,755,000

**Fiscal Year 2012**

Building square foot area 24,728

Triple net market rent $ 7.00 psf

Gross rental revenue $ 173,096

Vacancy/collection (@ 5%) ($ 8,655)

Effective gross income $ 164,441

Management fee (@ $0.33) ($ 8,222)

Reserves for Replacement (@ $0.21) ($ 5,193)

Commissions (@ $0.07) ($ 1,731)

Net operating income $ 149,295

Capitalization rate /8.0%

Capitalized value $1,866,188

Rounded $1,865,000

Mr. Wolff then reconciled the values he obtained through the sales-comparison and income-capitalization approaches. He considered both approaches to be reliable indicators for the subject property. For fiscal year 2011, Mr. Wolff reconciled his sales-comparison-approach value of $1,780,000 with his income-capitalization-approach value of $1,755,000 and arrived at a fiscal year 2011 fair market value for the subject property of $1,770.000. This was less than its assessed value of $2,519,500. For fiscal year 2012, Mr. Wolff reconciled his sales-comparison-approach value of $1,855,000 and his income-capitalization-approach value of $1,865,000 and arrived at a fiscal year 2011 fair market value for the subject property of $1,860,000. This was less than its assessed value of $2,227,300. The appellant, therefore, contended that the subject property was overvalued for both fiscal years at issue.

**The appellee’s case**

The appellee presented its case-in-chief through the testimony of its witness, Alan Cohen, a member of the appellee whom the Board qualified as an expert in the area of real estate valuation, and his appraisal report, which was also signed by the other members of the appellee. Mr. Cohen first addressed a discrepancy in the measurement of the subject building’s square footage. While the appellant reported an area of 24,728 square feet, Mr. Cohen measured the building and determined that the area was 23,384 square feet.

Mr. Cohen next presented background information on the real estate market in the vicinity of the subject property. Mr. Cohen explained that Newton’s desirable mix of a highly-rated public school system and designation among the nation’s “Safest Cities,” together with its easy access into Boston and public amenities and services, contribute to Newton’s AAA bond rating, high land values and steady occupancy in office buildings. These dynamics in Newton and communities inside Route 128 attract equity real estate investors because of the market’s stability. Moreover, he stated that Newton’s market for commercial real estate outperforms neighboring communities. The subject property in particular has a good mix of office and warehouse space as well as ample on-site parking, making it a desirable commercial property.

Mr. Cohen performed a sales-comparison analysis and an income-capitalization analysis for each fiscal year at issue to value the subject property. A summary of the appellee’s analyses follows.

Sales-comparison Approach

**Fiscal year 2011**

Mr. Cohen presented three comparable sales in the subject property’s market area. The table below summarizes the comparable sales and adjustments as reported by the appellee:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Sale 1** | **Adj.** | **Sale 2** | **Adj.** | **Sale 3** | **Adj.** |
| **Address** | 191-199 Dexter Ave., Watertown |  | 281 Newtonville Ave., Newton |  | 70 Hichborn St., Brighton |  |
| **Distance from subject** | 4 miles |  | 2 miles |  | 5 miles |  |
| **Location** | Lacks direct highway access but closer to Downtown Boston and Cambridge |  |  |  |  |  |
| **Sale date** | 04/01/2010 |  | 04/02/2007 | 5% | 03/11/2009 |  |
| **Sale price** | $1,850,000 |  | $3,037,500 |  | $1,100,000 |  |
| **Land area** | 23,456 |  | 55,983 |  | 11,220 |  |
| **Building area (sf)** | 17,188 | -5% | 32,823 |  | 11,214 |  |
| **Building age** | 1940 | 3% | 1959 |  | 1965 |  |
| **Quality and construction** | Masonry and wood frame |  | Masonry and corregated aluminum; inferior quality and building construction | 5% | Masonry block; inferior quality and condition |  |
| **Parking spaces per 1,000 sf** | 1.43 |  | 1.07 |  | 1.87 |  |
| **Other** | Minimal office; ample parking |  | Buyer installed new roof, modernized HVAC systems and decorated offices |  | Well suited for auto service and storage. Converted after sale to commercial condominiums | Upward adj. in all areas except bldg. size |
| **Total adjustments** |  | -2% |  | 10% |  | approx.23% |
| **Price per square foot** | $107.63 | **$105.48** | $92.54 | **$104.57** | $90.09 | **$111.00** |

The above comparables yielded a range of sales prices from $104 to $111. Giving added weight to Sale One and Sale Two for their location and higher comparability to the subject property, Mr. Cohen arrived at an adjusted-sales-price of $105 per square foot. Applying that to the subject property’s 23,284 square feet of building size produced a rounded value of $2,450,000 for fiscal year 2011.

**Fiscal year 2012**

Mr. Cohen presented three comparable sales in the subject property’s market area. The table below summarizes his comparable sales and adjustments:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Sale 1** | **Adj.** | **Sale 2** | **Adj.** | **Sale 3** | **Adj.** |
| **Address** | 191-199 Dexter Ave., Watertown |  | 93 Border St., Newton |  | 224 Calvary St., Waltham |  |
| **Distance from subject** | 4 miles |  | 1/3 mile |  | 1.75 miles |  |
| **Location** | Lacks direct highway access but closer to Downtown Boston and Cambridge |  | Rents on Border St. are lower because of low traffic; zoned for many industrial uses |  | Inferior to subject | Non-specified adj. |
| **Sale date** | 04/01/2010 |  | 05/12/2011 |  | 05/02/2011 | -2% |
| **Sale price** | $1,850,000 |  | $1,250,000 |  | $2,500,000 |  |
| **Land area** | 23,456 |  | 20,598 |  | 1.401 acres |  |
| **Building area (sf)** | 17,188 | -5% | 12,409 (does not include storage space in basement) | 8% | 29,574 | Non-specifiedadj. |
| **Building age** | 1940 |  | 1960 |  | 1900 |  |
| **Quality and construction** | Masonry and wood frame; average quality and condition; needs modernization | 3% | Masonry frame; inferior quality and condition |  | 2 stories brick & timber; dated and mixed condition | Non-specified adj. |
| **Parking** | 12 spaces |  | 20 spaces |  | + 75 spaces |  |
| **Other** | Minimal office; ample parking |  | Predominantly vacant at time of sale |  | Substantial vacancy in recent years; buyer was 2nd floor tenant | 5% |
| **Total adjustments** |  | -2% |  | 8% |  | 28% |
| **Price per square foot** | $107.63 | **$105.48** | $100.73 | **$108.79** | $84.53 | **$108.20** |

The above comparables yielded a range of sales prices from $105 to $109. Giving added weight to Sale One and Sale Two for their location and higher comparability to the subject property, and less weight to Sale Three for its high total adjustment, Mr. Cohen arrived at an adjusted sales price of $107 per square foot, which reflects the subject property’s good location, condition and superior overall appeal. Applying that to the subject property’s 23,284 square feet of building size produced an indicated value of $2,502,088, which he rounded to $2,500,000 as the fiscal year 2012 fair market value for the subject property.

Income-Capitalization Approach

**Fiscal year 2011**

In analyzing the fair market value under this approach, Mr.  Cohen first selected five purportedly comparable rental properties from the subject property’s market area for fiscal year 2011 to determine the appropriate rent. These purportedly comparable rental properties are listed in the table below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **No.** | **Location** | **Type of Use** | **Area (sf)** | **Rent(psf)/term** |
| 1 | 84-94 Rowe St., Newton | Auto parts distributor | + 30,285 | $11.50/net |
| 2 | 55 Border St., Newton | Light assembly & distribution | + 18,000 | $9.72/NNN |
| 3 | 285 Newtonville Ave., Newton | Marketing company | + 11,480 | $8.00/NNN increasing $0.50 per year[[4]](#footnote-4) |
| 4 | 287 Newtonville Ave., Newton | Storage facility | + 38,000 | $8.00/NNN |
| 5 | 610 Pleasant St., Watertown | Auto parts distributor | 17,000 mostly warehouse | $7.50/NNN fixed for 5 years |

These leases ranged from $7.50 to $11.50 per square foot. Leases Two through Five are on a triple-net basis, meaning that the tenant pays most expenses, thereby increasing the tenant’s total cost of occupancy. Mr. Cohen also considered the demand for Newton industrial space that, like the subject property, is modern, efficient, and convenient to Route 128/95, and he selected a market rent of $10.00, triple net, for fiscal year 2011.

Next, Mr. Cohen reviewed the vacancy rate. He determined that the market area’s vacancy was from 5% to 7% as of January 1, 2010. He also considered potential income loss due to free rent or nonpayment. Mr. Cohen also noted that CoStar reported vacancy for the fourth quarter of 2009 in the subject property’s submarket to be at 10.4%, falling to 9.2% in the first quarter of 2010. Based on all of this information, he selected 10% as the appropriate vacancy and loss rate.

Mr. Cohen then reviewed expenses based on his research and judgment of the market. He selected the following expenses for fiscal year 2011: management at 5%; professional services (legal/accounting) at 1.5%; reserves for replacement at $11,658, based on the cost and service-life years of the roof, various equipment, tenant fit up and leasing fees; and miscellaneous at 1%.

In developing his capitalization rate, Mr. Cohen noted that trends in the financial markets as of the valuation date for fiscal year 2011 indicated declining interest rates, which signaled lower borrowing costs for investors and thus increasing property values as properties become affordable to more potential buyers. He developed his capitalization rate through four components: the cost of borrowed funds; the owner’s return on equity; deduction for equity gained (or mortgage paid off) during the time of ownership; and increases (or decreases) for rental income and property appreciation. Using a mortgage-equity approach, Mr. Cohen determined a base capitalization rate of 7.93% for fiscal year 2011. He opined that capitalization rates significantly below 10% were the norm in the subject property’s market area as of January 1, 2010, and that his capitalization rate was supported by ongoing financing and returns on equity that surpass other investment vehicles, including middle and low-grade corporate bonds. Mr. Cohen further opined that this rate was supported by Korpacz, which reported overall capitalization rates for single-user industrial buildings ranging from 6% to 10%. Because Newton is perceived as a safe area for investment, Mr. Cohen opined that a capitalization rate at the higher end of the range was not supported. He thus applied a 7.93% capitalization rate to his net operating income.

A summary of his valuation under the income-capitalization approach is reproduced below:

**Fiscal Year 2011**

Building square foot area 23,384 sf

Triple net market rent $ 10.00 psf

Gross rental revenue $ 233,840

Vacancy/collection (@ 10%) ($ 23,384)

Effective gross income $ 210,456

Management fee (@ 5%) ($ 10,520)

Professional services (1.5%) ($ 3,160)

Reserves ($ 11,658)

Miscellaneous (@ 1%) ($ 2,100)

Net operating income $ 183,018

Capitalization rate /7.93%

Capitalized value $2,307,306[[5]](#footnote-5)

Rounded $2,300,000

**Fiscal year 2012**

In analyzing the fair market rent for fiscal year 2012, Mr. Cohen selected the same five purportedly comparable rental properties as those listed above for fiscal year 2011 and again selected a market rent of $10.00, triple net, for the subject property.

To arrive at his vacancy rate, Mr. Cohen reported that the market area’s vacancy remained at 5% to 7% and that CoStar reported vacancy in the subject’s submarket for the fourth quarter of 2010 was at 7.7%, falling to 7.4% by the end of 2011. Based on all of his information, and again adding additional income loss for free rent or nonpayment, he selected 10% as the appropriate vacancy and loss rate.

Mr. Cohen also adopted the same expenses fiscal year 2012 as he used for the prior fiscal year: management at 5%; professional services (legal/accounting) at 1.5%; reserves for replacement at $0.52 per square foot; and miscellaneous at 1%.

With respect to the capitalization rate, Mr. Cohen noted a continuing decline of interest rates in the market. Using a mortgage-equity approach, Mr. Cohen determined a base capitalization rate of 7.5% for fiscal year 2012. He opined that capitalization rates significantly below 10% remained the norm, and that the selected 7.5% capitalization rate was supported by ongoing financing and returns on equity. Mr. Cohen opined that this rate was also supported by Korpacz, which again reported overall capitalization rates for single-user industrial buildings ranging from 6% to 10%, and he again opined that a capitalization rate at the higher end of the range was not supported. He thus applied the 7.5% capitalization rate to his net operating income.

A summary of Mr. Cohen’s valuation under the income-capitalization approach is reproduced below:

**Fiscal Year 2012**

Building square foot area 23,384 sf

Triple net market rent $ 10.00 psf

Gross rental revenue $ 233,840

Vacancy/collection (@ 10%) ($ 23,384)

Effective gross income $ 210,456

Management fee (@ 5%) ($ 10,520)

Professional services (@ 1.5%) ($ 3,160)

Reserves (@ $0.52) ($ 12,158)

Miscellaneous (@ 1%) ($ 2,100)

Net operating income $ 182,518

Capitalization rate /7.50%

Capitalized value $2,433,573

Rounded $2,430,000

In considering the values obtained through the sales-comparison approach and the income-capitalization approach, Mr. Cohen gave more weight to the income-capitalization approach for both fiscal years at issue. He arrived at a fair market value of $2,300,000 for the subject property for fiscal year 2011, which was less than its assessed value of $2,519,300, thus recognizing that the subject property was overvalued for fiscal year 2011. For fiscal year 2012, he arrived at a value of $2,450,000 for the subject property, which was more than its assessed value of $2,227,300. Therefore, he concluded that no abatement was warranted for fiscal year 2012.

The Board’s findings

Overall, the Board found Mr. Cohen to be the more credible witness and thus gave his testimony and appraisals report the greater weight. The Board found that, with respect to the discrepancy in the subject building’s square footage, Mr. Cohen had actually measured the space and, therefore, the Board adopted the appellee’s measurement of 23,384 square feet as the area of the subject building.

The Board agreed with both witnesses that the highest and best use of the subject property was its current use as an industrial-use warehouse property. The Board also agreed with the witnesses that the most reliable method for valuing the subject industrial-use property was the income-capitalization approach. The Board thus adopted this method for determining the fair market value of the subject property for both fiscal years at issue.

The Board was not persuaded by Mr. Wolff’s analysis and instead found that Mr. Cohen’s analysis under the income-capitalization approach was better supported and more credible. Mr. Cohen’s comparable-rent properties were from the subject property’s market area and overall more readily comparable to the subject property. However, in reviewing his comparable-rent properties and the other evidence of record, the Board adjusted the rental rates downward by $0.50 per square foot and found that the fair market rent for both fiscal years should be $9.50 per square foot.

The Board also found more persuasive the vacancy rate and expenses developed by Mr. Cohen, finding his development of these elements to be better supported. Finally, the Board found credible Mr. Cohen’s determination of the appropriate capitalization rate. He chose capitalization rates at the lower end of the range, which Mr. Cohen explained were justified by the subject property being a single-user industrial building and located in Newton, a safe investment market.

The Board’s income-capitalization analyses for the fiscal years at issue are presented below:

**Fiscal Year 2011**

Building square foot area 23,384 sf

Triple net market rent $ 9.50 psf

Gross rental revenue $ 222,148

Vacancy/collection (@ 10%) ($ 22,215)

Effective gross income $ 199,933

Management fee (@ 5%) ($ 9,997)

Professional services (@ 1.5%) ($ 2,999)

Reserves (@ $0.52 psf) ($ 12,159)

Miscellaneous (@ 1%) ($ 1,999)

Net operating income $ 172,779

Capitalization rate /7.93%

Indicated value $2,178,802

Fair cash value $2,178,800

Assessed value $2,519,300

Abatement $ 340,500

Because the fair cash value for the subject property is less than its assessed value for fiscal year 2011, the Board found and ruled that the subject property was over assessed for fiscal year 2011. The Board calculated the abatement by applying the $20.90 per thousand tax rate to the $340,500 overvaluation, plus the appropriate portion of the CPA, resulting in an abatement of $7,184.18.

**Fiscal Year 2012**

Building square foot area 23,384 sf

Triple net market rent $ 9.50 psf

Gross rental revenue $ 222,148

Vacancy/collection (@ 10%) ($ 22,215)

Effective gross income $ 199,933

Management fee (@ 5%) ($ 9,997)

Professional services (@ 1.5%) ($ 2,999)

Reserves (approx. $0.52 psf) ($ 12,159)

Miscellaneous (@ 1%) ($ 1,999)

Net operating income $ 172,779

Capitalization rate /7.50%

Indicated value $2,303,720

Fair cash value $2,303,700

Assessed value $2,227,300

Because the fair cash value for the subject property is more than its assessed value for fiscal year 2012, the Board found and ruled that the subject property was not over assessed for fiscal year 2012. Therefore, no abatement is due for fiscal year 2012.

Accordingly, the Board issued a decision for the appellant granting an abatement of $7,184.18 for fiscal year 2011 and issued a decision for the appellee 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 industrial-use warehouse 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). The fair cash value of property may often best be determined by recent sales of comparable properties in the market. *See* ***Correia***, 375 Mass. at 362; ***McCabe v. Chelsea***, 265 Mass. 494, 496 (1929). Actual sales generally “furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 682 (1982); ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 469 (1981); ***First National Stores, Inc. v. Assessors of Somerville***, 358 Mass. 554, 560 (1971).

However, 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, although the parties’ witnesses used both a sales-comparison method and an income-capitalization method, they preferred the income-capitalization method and applied greater weight to the values they obtained using this method. The Board agreed with the appellee’s witness 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. In weighing the evidence, the Board found that Mr. Wolff failed to substantiate how he had arrived at his 24,728-square-feet figure, while Mr. Cohen testified that he had personally measured the buildings, and the Board found his testimony on this matter to be credible. The Board thus accepted Mr. Cohen’s 23,384-square-feet figure as the building area for the subject property.

With respect to the rental income, the Board found the comparable-rent properties offered by Mr. Cohen to be closer to the subject property’s market area and overall more comparable to the subject property and, therefore, more persuasive than the comparables provided by Mr. Wolff. However, in reviewing the rental data provided by the Mr. Cohen and the other evidence of record, the Board adjusted his rental values downward and found that the evidence supported a fair market rental figure of $9.50 per square foot. The Board therefore adopted $9.50 per square foot as the market rent for the subject property for both fiscal years at issue.

Next, the Board found that the vacancy rate developed by Mr. Cohen was better supported with data and research than the rate developed by Mr. Wolff. The Board, therefore, adopted Mr. Cohen’s 10% vacancy rate for both 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 found that Mr. Cohen’s operating expenses were well supported by his data. The Board thus adopted Mr. Cohen’s percentages for vacancy and operating expenses.

The capitalization rate should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Associates,*** 393 Mass. at 295. The Board found credible Mr. Cohen’s explanation of his selection of a lower capitalization rate, given the subject property had a single-user tenant and was located in Newton, a safe investment environment. The Board was thus not persuaded by Mr. Wolff’s higher capitalization rates and therefore selected Mr. Cohen’s capitalization rates, which were well developed and supported by the evidence, for both fiscal years at issue.

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 a fair market value of $2,178,800 for fiscal year 2011, and determined that the subject property was overvalued by $340,500. The Board thus issued a decision for the appellant and granted an abatement in the amount of $7,184.18 for fiscal year 2011, which included an appropriate portion of the CPA surcharge.

For fiscal year 2012, the Board found a fair market value of $2,303,700 and determined that the subject property was not overvalued. The Board thus issued a decision for the appellee for fiscal year 2012.

**THE APPELLATE TAX BOARD**

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

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

**A true copy,**

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

**Clerk of the Board**

1. This amount includes a Community Property Act (“CPA”) surcharge. [↑](#footnote-ref-1)
2. This amount includes a Community Property Act (“CPA”) surcharge. [↑](#footnote-ref-2)
3. Mr. Wolff’s report stated that he selected $74 per square foot as the indicated value, but his calculation of $1,854,600 indicated that he actually used $75 per square foot. [↑](#footnote-ref-3)
4. Comparable 3 was re-leased in 2012 to a PETCO subsidiary with an average rent of $14.75 NNN for over 10 years. The appellee excluded this lease from its analysis because it was negotiated in 2012. However, the appellee’s report states that this newer lease “remains instructive.” [↑](#footnote-ref-4)
5. This figure is taken from Mr. Cohen’s report, but the Board here calculated $2,307,919. [↑](#footnote-ref-5)