**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**LOWE’S HOME CENTERS, INC. v.    BOARD OF ASSESSORS OF**

 **THE CITY OF QUINCY**

Docket Nos. F317851 (FY 2012)

 F321484 (FY 2013)

 F324962 (FY 2014) Promulgated:       March 23, 2018

 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 Quincy (“appellee” or “assessors”) to abate taxes on certain real estate in Quincy owned by and assessed to Lowe’s Home Centers, Inc. (“appellant” or “Lowe’s”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2012, 2013, and 2014 (“fiscal years at issue”).

 Commissioner Chmielinski heard these appeals. Chairman Hammond, and Commissioners Rose and Good joined him in the decisions for the appellee.

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

 *Alan R. Hoffman,* Esq. and *Ryan J. Gibbs,* Esq. for the appellant.

 *Peter Moran,* chair of the assessors, for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of testimony and exhibits offered into evidence at the hearing of these appeals, as well as its view of the subject property, the surrounding area, and several of the purportedly comparable properties, the Appellate Tax Board (“Board”) made the following findings of fact.

1. **Introduction and Jurisdiction**

On January 1, 2011, January 1, 2012, and January 1, 2013, the relevant valuation and assessment dates for the fiscal years at issue, the appellant was the assessed owner of a 12.81-acre improved parcel of real estate located at 599 Thomas Burgin Parkway in Quincy (“subject property”). For assessment purposes, the subject property is identified as Map 3089, Block 18, Lot A. The subject property is situated in South Quincy just outside of downtown Quincy and near the intersection of Interstate 93. More specifically the subject property is located within a planned unit development zoning district, which allows for many uses with city council approval for a special permit. Within the immediate area, there are varying property uses, including two- and four-family residential dwellings, small mixed-use properties with retail or office spaces on the first floor and apartments on the upper floors, and also large apartment complexes. In addition to the subject property, Home Depot and BJ’s big-box retail stores are within the immediate area. Also located nearby is the Quincy Adams MBTA station and parking facility.

The subject property is improved with a one-story, plus mezzanine, big-box retail building with approximately 124,825 feet of net leasable area, which was constructed in 2010 (“subject building”). The subject building has a steel-frame structure with a concrete slab foundation, a flat membrane roof, and a concrete block exterior. The first floor is primarily retail and receiving with ceiling heights of 20-25 feet. The mezzanine level consists of offices, an employee break room, an employee training room, and 4 lavatories. The subject building also has 3 loading docks and 1 truck-height bay. In addition, there is a 26,769-square-foot, fenced-in, outdoor garden center that is not included in the leasable area due to its exposure to the elements. The subject property is subject to a renewable 20-year ground lease at an annual rent of $1,662,500 for the first 5 years. Pursuant to the lease, the appellant is responsible for all costs associated with construction of the subject building, which according to the subject property’s building permits totaled $16,753,635.

For fiscal year 2012, the assessors valued the subject property at $14,454,800 and assessed a tax thereon, at the rate of $28.66 per thousand, in the total amount of $418,667.32.[[1]](#footnote-1) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 26, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on February 9, 2012. On April 19, 2012, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

For fiscal year 2013, the assessors valued the subject property at $14,753,000 and assessed a tax thereon, at the rate of $30.61 per thousand, in the total amount of $456,105.22.[[2]](#footnote-2) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 25, 2013, in accordance with G. L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which they denied on February 8, 2013. Because the appellant alleged that it did not receive notice of the denial, the appellant filed its appeal with the Board on July 23, 2013, within three months of the deemed denial of its abatement application.

For fiscal year 2014, the assessors valued the subject property at $14,865,300 and assessed a tax thereon, at the rate of $31.23 per thousand, in the total amount of $469,135.75.[[3]](#footnote-3) In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. On January 17, 2014, in accordance with G. L. c. 59, § 59, the appellant timely filed an abatement application with the assessors, which was deemed denied on April 17, 2014. On July 16, 2014, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board.

At the hearing of these appeals, the assessors made an oral motion to dismiss the appellant’s fiscal year 2013 appeal, arguing that it was not timely filed with the Board. In support of their motion, the assessors submitted the affidavit of Jacquelyn Reid, the head clerk for the assessors. Ms. Reid stated in her affidavit that her job with the assessors’ office is to process the abatement applications by logging them into the computer system, preparing them for the assessors’ review, and then sending notice of the assessors’ decision to the taxpayers. Ms. Reid further stated in her affidavit that with respect to the appellant’s fiscal year 2013 abatement application, the assessors denied the application by vote on February 8, 2013 and, on February 11, 2013, she processed and mailed the denial notice to the appellant’s then counsel, as identified on and pursuant to the appellant’s abatement application.

The appellant, however, maintained that it did not receive the assessors’ fiscal year 2013 denial notice. In support of its position, the appellant presented the affidavit of Justine T. Mahoney, a paralegal with the law firm of the appellant’s then counsel since 2004. Ms. Mahoney stated in her affidavit that since 2011 her main responsibilities include tracking deadlines for and preparation and filing of real estate tax abatement applications with the local boards of assessors and subsequent appeals with the Board. As part of her daily responsibilities, she received and opened all mail delivered to the office and docketed receipts of abatement denials.

According to Ms. Mahoney, on or about January 29, 2013, she received from the assessors a date-stamped copy of the appellant’s abatement application, which indicated that it was received by the assessors on January 25, 2013. She further stated that she did not receive any other documentation as it related to the appellant’s fiscal year 2013 abatement application. Accordingly, on or about July 23, 2013, Ms. Mahoney arranged for the appellant’s signed appeal to be filed with the Board within 3 months of the deemed denial date. Lastly, Ms. Mahoney stated that upon further review of the law firm’s abatement filings for other properties located in Quincy for fiscal year 2013 - 30 in total - she received only 7 denials from the assessors.

Based on the evidence presented, the Board found that the appellant did not receive the assessors’ denial notice dated February 8, 2013 and, for the reasons more fully explained in the following Opinion, the Board found that the appellant’s appeal, filed on July 23, 2013, within 3 months of the deemed denial date of April 25, 2013, was timely.

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

1. **The Appellant’s Case-in-Chief**

The appellant presented its case-in-chief primarily through the testimony and appraisal report of John A. Shuka, a certified general real estate appraiser, whom the Board qualified as an expert witness in the area of commercial real estate valuation. After determining that the subject property’s highest-and-best use was its continued use as a retail building, Mr. Shuka considered the 3 usual methods for estimating the value of the subject property for the fiscal years at issue. Mr. Shuka considered his direct income-capitalization approach to be the most viable methodology to use to estimate the fair cash value of the subject property for the fiscal years at issue.[[4]](#footnote-4)

The first step in Mr. Shuka’s income-capitalization analyses was to determine the subject property’s potential gross revenue for each of the fiscal years at issue. To accomplish this step, Mr. Shuka researched and relied on 8 purportedly comparable retail leases, which included 3 build-to-suit leases, to assist in estimating market rents for the subject property. Relevant information regarding Mr. Shuka’s purportedly comparable leases appears in the following table.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **No.** | **Address** | **Tenant** | **Square Feet** | **Date** | **Term** | **Avg Rent PSF** | **Comments** |
| 1 | 238-310 Grove St.,Braintree, MA | TJ Maxx/Home Goods |  72,300 |  7/2009 |  5 years | $ 7.22 | Pre-existing space  |
| 2 | 140 Main St.,Weymouth, MA | Nat’l Wholesale Liquidators |  89,000 | 11/2014 | 20 years | $ 7.00 | Pre-existing space |
| 3 | 90 Providence Hgwy.,Walpole, MA | Kohl’s | 102,445 |  7/2009 | 20 years | $ 9.60 | Pre-existing space |
| 4 | 180 Pearl St.,Braintree, MA | Cardi’s Furniture | 113,000 |  6/2008 | 5.5 years | $12.00 | Sub-leasePre-existing space |
| 5 | 175 Highland Ave.,Seekonk, MA | BJ’s Wholesale | 109,338 |  8/2012 | 20 years | $ 9.00 | Pre-existing space |
| 6 | 200 Stonehill Dr.Johnston, RI | BJ’s Wholesale | 121,324 |  6/2010 | 20 years | $14.00 | Build to suit |
| 7 | 200 Crown Colony,Quincy, MA | BJ’s Wholesale |  84,360 |  5/2010 | 20 years | $21.93 | Build to suit |
| 8 | Highland Commons,Hudson, MA | BJ’s Wholesale | 117,924 | 12/2010 | 20 years | $12.00 | Build to suit |

Mr. Shuka testified that comparable numbers 1 and 2, which represented the low end of the range, are inferior to the subject property in terms of size and physical characteristics.He also maintained that comparable number 7, which is at the high end of the range at $21.93 per square foot, was an outlier. The remaining comparables, he noted, indicated a much tighter rental range of $9.00 to $14.00 per square foot. Considering what he reported as all of the relevant factors, Mr. Shuka determined that a stabilized fair market rent of $13.00 per square foot on a triple net basis was an appropriate rent for the subject property for the fiscal years at issue. Applying this rate to the subject property’s 124,825 square feet, Mr. Shuka obtained a forecasted rental income of $1,622,725 for the fiscal years at issue.

Next, Mr. Shuka considered reimbursement income, noting that under the terms of a typical lease in properties similar to the subject property, the tenant is responsible for its share of operating expenses and insurance. Based on the 2010, 2011, and 2012 surveys conducted by the Institute of Real Estate Management (“IREM”), Mr. Shuka included reimbursement income for operating expenses and insurance, of $376,972, $456,860, and $298,332 for fiscal years 2012, 2013, and 2014, respectively. Adding these figures to his projected rental figure produced potential gross income amounts of $1,999,697 for fiscal year 2012, $2,079,585 for fiscal year 2013, and $1,921,057 for fiscal year 2014.

The next step in Mr. Shhuka’s analysis was the determination of vacancy and collection loss allowances. Mr. Shuka noted in his appraisal report that according to the Keypoint Partners reports, the regional vacancy rate in Eastern Massachusetts decreased from 9.7% to 7.9% during the fiscal years at issue. Further, the vacancy rate for the south market, which included Quincy, decreased from 9.2% to 8.1% during the same time period. Based on the reported market vacancy rates, as well as the limited market for large big-box buildings similar to the subject property, Mr. Shuka determined that a stabilized vacancy and collection loss rate of 15% was reasonable for the fiscal years at issue.

 Next, Mr. Shuka determined the subject property’s net-operating incomes by deducting expenses, which he divided into two categories - reimbursable expenses and unreimbursed expenses. For reimbursable expenses, Mr. Shuka used the same figures that he reported for reimbursement income. For unreimbursed expenses, Mr. Shuka allowed the following expenses: property management calculated at 3.0% of effective gross income; replacement reserves calculated at $0.25 per square foot; administrative costs of $10,000; leasing commissions calculated at 2.8% of forecasted rental income; and tenant improvements calculated at $0.20 per square foot. The total expenses amounted to $539,571 for fiscal year 2012, $621,496 for fiscal year 2013, and $458,926 for fiscal year 2014, resulting in net-operating incomes of $1,160,171, $1,146,150, and $1,173,972, for fiscal years 2012, 2013, and 2014, respectively.

Mr. Shuka derived his capitalization rates from a combination of factors. First, he extracted rates from sales of 18 single-tenant properties that occurred between February 2009 and July 2014. Second, Mr. Shuka considered the information published by RealtyRates.com for free-standing retail properties for the period 2011 through 2014, which reported average capitalization rates between 10.31% and 10.69% during this period. Lastly, Mr. Shuka employed a band-of-investment technique, which resulted in suggested capitalization rates of 9.83% for fiscal year 2012, 9.63% for fiscal year 2013, and 9.46% for fiscal year 2014.

Relying on this information, Mr. Shuka selected a stabilized base capitalization rate of 10% for the fiscal years at issue. Because Mr. Shuka did not include any tax payments from tenants in his reimbursements, he only added a prorated tax factor based on his vacancy rate to arrive at his overall capitalization rates of 10.4299% for fiscal year 2012, 10.4592% for fiscal year 2013, and 10.4685% for fiscal year 2014.

Mr. Shuka’s income-capitalization analyses are reproduced in the following tables.[[5]](#footnote-5)

**Fiscal Year 2012**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building area |  | 124,825 sf |  |
| Market Rent (psf) | $13.00 psf | $1,622,725 |
| Reimbursement Income |  | $376,972 |
| **Potential Gross Income** |  |  | **$1,999,697** |
|  Less Vacancy |  | 15% | ($299,954) |
| **Effective Gross Income (“EGI”)** |  |  | **$1,699,742** |
|  |  |  |  |
| **EXPENSES** |  |
|  Reimbursable Expenses |  |
|  Operating Expenses $2.82 psf | $ 352,007 |
|  Insurance $0.20 psf | $ 24,965 |
|  Non-Reimbursable Expenses |  |
|  Management |  | 3% of EGI | $ 50,992 |
|  Reserves for Replacement |  | $0.25 psf | $ 31,206 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 45,436 |
|  Tenant Improvements |  | $0.20 psf | $ 24,965 |
|  **Total Operating Expense** |  |  | **$ 539,571** |
|  |  |  |  |
| **Net-Operating Income:** |  | **$1,160,171** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 2.866% \* 15% | 10.00%0.4299%10.4299% |
| **Capitalized Value** |  | **$11,123.508** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$11,125,000** |

**Fiscal Year 2013**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building area |  | 124,825 sf |  |
| Market Rent (psf) | $13.00 psf | $1,622,725 |
| Reimbursement Income |  | $ 456,860 |
| **Potential Gross Income** |  |  | **$2,079,585** |
|  Less Vacancy |  | 15% | ($311,938) |
| **Effective Gross Income (“EGI”)** |  |  | **$1,767,647** |
|  |  |  |  |
| **EXPENSES** |  |
| Reimbursable expenses |  |
| Operating expenses $3.45 psf | $ 430,646 |
| Insurance $0.21 psf | $ 26,213 |
| Non-Reimbursable expenses |  |
|  Management |  | 3% of EGI | $ 53,029 |
|  Reserves for Replacement |  | $0.25 psf | $ 31,206 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 45,436 |
|  Tenant Improvements |  | $0.20 psf | $ 24,965 |
|  **Total Operating Expense** |  |  | **$ 621,496** |
|  |  |  |  |
| **Net-Operating Income:** |  | **$1,146,150** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 3.061% \* 15% | 10.00%0.4592%10.4592% |
| **Capitalized Value** |  | **$10,958,351** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$10,950,000** |

**Fiscal Year 2014**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
| **INCOME** |  |  |  |
| Building area |  | 124,825 sf |  |
| 7Market Rent (psf) | $13.00 psf | $1,622,725 |
| Reimbursement Income |  | $ 298,332 |
| **Potential Gross Income** |  |  | **$1,921,057** |
|  Less Vacancy |  | 15% | ($288,159) |
| **Effective Gross Income (“EGI”)** |  |  | **$1,632,898** |
|  |  |  |  |
| **EXPENSES** |  |
|  Reimbursable expenses |  |
| Operating expenses $2.17 psf | $ 270,870 |
| Insurance $0.22 psf | $ 27,462 |
|  Non-Reimbursable expenses |  |
|  Management |  | 3% of EGI | $ 48,987 |
|  Reserves for Replacement |  | $0.25 psf | $ 31,206 |
|  Administrative |  |  | $ 10,000 |
|  Lease Commissions |  | 2.8% of market rent  | $ 45,436 |
|  Tenant Improvements |  | $0.20 psf | $ 24,965 |
|  **Total Operating Expense** |  |  | **$ 458,926** |
|  |  |  |  |
| **Net-Operating Income:** |  | **$1,173,972** |
|  |  |  |
| Base RateTax Factor (owner’s share)Overall Capitalization Rate | 3.123% \* 15% | 10.00%0.4685%10.4685% |
| **Capitalized Value** |  | **$11,123.508** |
|  |  |  |
| **Rounded Fair Cash Value** |  | **$11,125,000** |

1. **The Appellee’s Case-in-Chief**

In support of their assessments, the assessors relied on the testimony of James R. Johnston, a licensed real estate appraiser, whom the Board qualified without objection as an expert in the area of commercial real estate valuation, and his summary appraisal report for the fiscal years at issue.

Mr. Johnston agreed with the appellant’s real estate valuation expert that the subject property’s highest-and-best use was its continued use as a retail building and that the income-capitalization approach was the preferred method of valuation to use under the circumstances.[[6]](#footnote-6) Mr. Johnston began his analysis by reviewing leases of properties with similar sizes, configurations, and locations to those of the subject property. Based on these factors, Mr. Johnston selected 10 purportedly comparable leases which are reproduced in the following table.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Tenant | Address | Bldg Area | Rent PSF | DateTerm | Comments |
|  1 | Home Depot | 1453 Pleasant St.,Bridgewater, MA | 132,984 | $ 6.20 |  2/0825 yrs | Ground Lse Land |
|  2 | Lowe’s | 635 Huse Rd.,Manchester, NH | 157,626 | $ 8.25 |  1/0920 yrs | Ground Lse Land |
|  3 | BJ’s Wholesale | 5 Ward St.,Revere, MA | 120,224 | $ 8.90 |  200915 yrs | Ground Lse Land |
|  4 | Kohl’s | Walpole Mall, Walpole, MA | 102,445 | $ 9.50 |  1/0920 yrs | Renewal |
|  5 | Home Depot | 500 Spaulding Tpke.,Portsmouth, NH | 145,193 | $ 9.64 |  7/0730 yrs | Ground Lse Land |
|  6 | BJ’s Wholesale | 25 Shelley Rd., Haverhill, MA | 119,598 | $10.75 |  8/0720 yrs | Land & Bldg |
|  7 | BJ’s Wholesale | 20 Seyon St.,Waltham, MA | 122,142 | $11.54 |  6/1025 yrs | Ground Lse only |
|  8 | Kohl’s | Orchard Hill Pk.,Leominster, MA |  89,925 | $13.18 | 10/0520 yrs | Land & Bldg |
|  9 | BJ’s Wholesale | Northboro Crossing,Northboro, MA | 124,303 | $19.87 |  9/1120 yrs | Land & Bldg |
| 10 | BJ’s Wholesale | 200 Crown Colony,Quincy, MA |  84,680 | $21.85 |  6/0920 yrs | Land & Bldg |

 Taking into account the differences, including: the lease structure; rents at the low end of the range being ground leases only; the physical qualities of the properties, such as Kohl’s stores having more finished space, which generally commands a higher rent; and the age and location of the purportedly comparable leases, Mr. Johnston determined that the subject property’s fair market rent would be in the upper half of his purportedly comparable properties’ rents. Mr. Johnston also noted that rents were increasing during the fiscal years at issue and that the subject property had “head-to-head” competition with the Home Depot located just across the street. On this basis, Mr. Johnston selected market rents of $10.50 per square foot for fiscal year 2012, $11.00 per square foot for fiscal year 2013, and $11.50 per square foot for fiscal year 2014. Applied to a net building area of 124,597 square feet,[[7]](#footnote-7) these rents yielded potential gross incomes of $1,308,269 for fiscal year 2012, $1,370,567 for fiscal year 2013, and $1,432,866 for fiscal year 2014.

Relying on the appellant’s good credit rating, the market vacancy, and also the subject property’s actual occupancy of 100%, Mr. Johnston determined that a vacancy rate of 5% was appropriate for all fiscal years at issue. This allowance resulted in an effective gross income of $1,242,855 for fiscal year 2012, $1,302,039 for fiscal year 2013, and $1,361,222 for fiscal year 2014.

Next, Mr. Johnston determined the subject property’s net-operating income by deducting the subject property’s estimated market expenses. Agreeing with the appellant’s real estate valuation expert that under a triple-net leasing scenario the landlord’s expenses are those limited to the management and structural maintenance of the building, Mr. Johnston allowed a management fee equal to 2% of the effective gross income and a replacement reserve allowance equal to $ 0.20 per square foot, which he testified were typical in the market. Mr. Johnston deducted these expenses from his effective gross income amounts to derive net-operating incomes of $1,193,079 for fiscal year 2012, $1,251,078 for fiscal year 2013, and $1,309,078 for fiscal year 2014.

For his capitalization rates, Mr. Johnston reviewed rates published by *PwC Real Estate Investor Survey – First* Quarters 2011, 2012, and 2013. He testified that the reports reflected declining rates during the fiscal years at issue. He also performed a band-of-investment analysis for each of the fiscal years at issue. Relying on this information, he then selected capitalization rates of 7.75% for fiscal year 2012, 7.25% for fiscal year 2013, and 7.00% for fiscal year 2014.[[8]](#footnote-8)

Finally, applying the corresponding capitalization rate to the net-operating income for each of the fiscal years at issue, Mr. Johnston derived an indicated value of $15,394,562, rounded to $15,390,000 for fiscal year 2012, $17,256,255, rounded to $17,260,000 for fiscal year 2013, and $18,701,120, rounded to $18,700,000 for fiscal year 2014.

Mr. Johnston’s income-capitalization analyses are summarized in the following table.[[9]](#footnote-9)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  |  | **Fiscal Year 2011** |  | **Fiscal Year 2012** |  | **Fiscal Year 2014** |
| **INCOME** |  |  |  |  |  |  |
| Net Rentable Area 124,597 |  |  |  |  |  |  |
|  Market Rent (PSF) |  |  $10.50 |  |  $11.00 |  |  $11.50 |
| **Potential Gross Income** |  |  **$1,308,269** |  |  **$1,370,567** |  |  **$1,432,866** |
|  Less Vacancy – 5% |  |  ($65,413) |  |  ($68,528) |  |  ($71,643) |
|  |  |  |  |  |  |  |
| **Effective Gross Income** |  |  **$1,242,855** |  |  **$1,302,039** |  |  **$1,361,222** |
|  |  |  |  |  |  |  |
| **OPERATING EXPENSE** |  |  |  |  |
| Management 2% of EGI $24,857 |  |  $26,041 |  |  $27,224 |
| Reserve for Replacement $0.20 psf $24,919 |  |  $24,919 |  |  $24,919 |
|  Total Operating Expense |   |  ($49,777) |  |  ($50,960) |  |  ($52,144) |
|  |  |  |  |  |  |  |
| **Net-Operating Income:** |  **$1,193,079** |  |  **$1,251,078** |  | **$1,309,078** |
|  |  |  |  |  |  |
| Overall Capitalization Rate |  7.75% |  |  7.25% |  |  7.00% |
| **Capitalized Value** |  **$15,394,562** |  |  **$17,256,255** |  | **$18,701,120** |
|  |  |  |  |  |  |
| **Rounded Fair Cash Value** |  **$15,390,000** |  |  **$17,260,000** |  | **$18,700,000** |

1. **The Board’s Findings**

Based on all of the evidence, the Board found that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue. The Board agreed with the parties’ valuation witnesses and determined that the subject property’s highest-and-best use was its existing use as a retail building and that the preferred method for ascertaining the fair cash value of the subject property for the fiscal years at issue was through an income-capitalization methodology.

With respect to the subject property’s rental income, the Board found that Mr. Shuka’s market rental of $13.00 per square foot, which was derived from large investment-quality chain retail properties like the subject property, best reflected the subject property’s market rent. For vacancy and credit loss, the appellant’s valuation witness adopted a rate of 15%, compared to the 5% adopted by the assessors’ valuation witness. Based on the valuation witnesses’ recommendations as well as the subject property’s actual 100% vacancy during the fiscal years at issue, the Board adopted a stabilized vacancy and credit loss rate of 7.5% for the fiscal years at issue.

For expenses, the Board agreed with Mr. Shuka that under a triple-net leasing scenario the tenant pays for most operating expenses and the landlord is responsible for only that portion attributable to vacancy. The Board also found that Mr. Shuka’s expenses for common area maintenance and insurance, which were based on market data published in IREM, were reasonable. The Board then applied its vacancy rate of 7.5% to these amounts. The Board further found that Mr. Shuka’s reserves for replacement calculated at $0.25 per square foot, leasing commissions calculated at 2.8% of potential gross income, and tenant improvements calculated at $0.20 per square foot were market based and therefore appropriate. With respect to the management expense, the Board found that Mr. Shuka’s expense calculated at 3% of effective gross income was excessive given the nature of the tenancy and instead found that Mr. Johnston’s allowance of 2% of effective gross income was more reasonable.

 Mr. Shuka recommended a stabilized base capitalization rate of 10% for the fiscal years at issue, plus applicable pro-rata tax factors. In comparison, Mr. Johnston recommended capitalization rates of 7.75%, 7.25% and 7.00%, respectively, for fiscal years 2012, 2013, and 2014, and did not include pro-rata tax factors. In the present appeals, the Board found that Mr. Johnston’s capitalization rates more closely reflected the market and, consequently, adopted base capitalization rates of 8.75% for fiscal year 2012, 8.50% for fiscal year 2013, and 8.25% for fiscal year 2014, plus applicable pro-rata tax factors.

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

**Board’s Income-Capitalization Analyses**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  | **Fiscal Year 2012** | **Fiscal Year 2013** | **Fiscal Year 2014** |
| **INCOME** |  |  |  |  |
| Building area 124,825 sf |  |  |  |
| @ market rent of $13/sf |  |  |  |  |
| **Potential Gross Income** |  |  $1,622,725 | $1,622,725 | $1,622,725 |
|  Less Vacancy/Credit Loss 7.5% |  |  ($121,704)  |  ($121,704) |  ($121,704) |
|  |  |  |  |  |
| **Effective Gross Income** |  |  **$ 1,501,021** | **$ 1,501,021** | **$ 1,501,021** |
|  |  |  |  |  |
| **OPERATING EXPENSE** |  |  |
|  Landlord’s Expenses Attributable to Vacancy |  |  |
|  Operating Expenses |  |  $ 26,401 | $ 32,298 | $ 20,315 |
|  Insurance |  |  $ 1,872 | $ 1,966 | $ 2,060 |
|  Management Fees |  2% of EGI |  $ 30,020 | $ 30,020 | $ 30,020 |
|  Replacement Reserves |  $0.25 psf |  $ 31,206 | $ 31,206 | $ 31,206 |
|  Leasing Commission | 2.8% of PGI  |  $ 45,436 | $ 45,436 | $ 45,436 |
|  Tenant Improvement | $0.20 psf |  $ 24,965 | $ 24,956 | $ 24,956 |
|  Total Operating Expense |  |  $ 159,900 | $ 165,882 | $ 153,993 |
|  |  |  |  |  |
| **Net-Operating Income:** |  **$ 1,341,121** | **$ 1,335,139** | **$ 1,347,019** |
|  |  |  |  |
|  Base Capitalization Rate |  8.750% |  8.500% |  8.250% |
|  Tax Factor |  .258% |  .275% |  .281% |
|  Overall Capitalization Rate |  9.008% |  8.775% |  8.531%  |
|  |  |  |  |
| **Capitalized Value** |  **$14,888,111** | **$15,215,259** | **$15,789,802** |

On this basis, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property’s assessments of $14,454,800, $14,753,00, and $14,865,300 for fiscal years 2012, 2013, and 2014, respectively, exceeded the subject property’s fair cash values for the corresponding years. Accordingly, the Board issued decisions for the appellee in these appeals.

**OPINION**

**Jurisdiction Regarding Fiscal Year 2013 Appeal**

At the hearing of these appeals, the assessors made an oral motion to dismiss the appellant’s fiscal year 2013 appeal, arguing that it was not timely filed with the Board.

 General Laws c. 59, §§ 64 and 65 provide that a taxpayer may file an appeal with the Board, within three months of the assessors' decision on an abatement application or, if the assessors fail to timely act on an abatement application, within three months of the date of deemed denial. Assessors are required under G.L. c. 59, § 63 to give written notice of their decision on an abatement application, or their deemed denial, to the taxpayer within 10 days of the decision or deemed denial date.

In the fiscal year 2013 appeal, the appellant filed its abatement application on January 25, 2013, which was denied by the assessors on February 8, 2013. However, based on credible evidence, the Board found that the appellant did not receive the assessors’ fiscal year 2013 denial letter.

"[S]tatutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary**."**  ***Becton, Dickinson & Co. v. State Tax Commission,*** 374 Mass. 230, 233 (1978). In ***SCA Disposal Services of New England v. State Tax Commission***, the Supreme Judicial Court ruled “where it has been found that notice was never received, the Legislature did not intend that proof of mere mailing of the notice . . . is sufficient to trigger [] the time period.” 375  Mass. 338, 341 (1978). *See* ***Boston Gas Company v. Assessors of Boston***, 402 Mass. 346, 348 (1988)(holding that the taxpayer is notified within the meaning of § 63 upon receipt of the notice, not upon the sending of such notice);***Stagg Chevrolet, Inc. v. Bd. of Water Comm’rs***, 68 Mass. App. Ct. 120, 125 (2007)(holding that the assessors non-compliance with § 63 may be cured by allowing a reasonable time for appeal and that the “deemed to be denied” time frame provides a reasonable time period with dates easily ascertainable by both parties).

The Board thus found here that the appellant’s appeal, which was filed on July 23, 2013, more than 3 months after the assessors’ denial but within 3 months of the deemed denial date of April 25, 2013, was timely. Accordingly, the Board found that it had jurisdiction to hear and decide the appellant’s fiscal year 2013 appeal.

**Valuation**

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

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. Assessors of 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). Both valuation witnesses in this matter recommended that the subject property’s highest-and-best use was its existing use. On this basis, the Board found that the subject property’s highest and best use was its continued use as a retail building.

Generally, real estate valuation experts, Massachusetts courts, and this Board rely upon 3 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). In the instant appeals, the valuation witnesses determined that there were insufficient fee-simple market sales of reasonably comparable properties to meaningfully estimate the value of the subject property using a sales-comparison technique. The Board agreed. *See* ***Olympia & York State Street Co. v. Assessors of Boston,*** 428 Mass. 236, 247 (1988) (**“**The assessors must determine a fair cash value for the property as a fee simple estate, which is to say, they must value an ownership interest in the land and the building as if no leases were in effect”). Furthermore, the “[i]ntroduction of evidence concerning the value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods.” ***Correia,*** [375 Mass. at 362.](http://www.lexis.com/research/buttonTFLink?_m=5b792ac3e4bebdafe533aa3d22643bbe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Mass.%20Tax%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b375%20Mass.%20360%2cat%20362%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=54&_startdoc=51&wchp=dGLzVzt-zSkAb&_md5=17209c8d4a54a05efb5a6558698cd8a0) The Board found here that no such “special situations” existed. 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). It is also recognized as an appropriate technique to use for valuing income-producing property. ***Taunton Redev. Assocs. v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). In these appeals, the Board agreed with both parties’ valuation witnesses that the income-capitalization approach was the most appropriate method to value the subject property.

 “The direct capitalization of income method analyzes the property’s capacity to generate income over a one-year period and converts the capacity into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved.” ***Olympia & York State Street, Co.,*** 428 Mass. at 239. “It is the net income that a property *should* be earning, not necessarily what it actually earns, that is the figure that should be capitalized.” ***Peterson v. Assessors of Boston***, 62 Mass. App. Ct. 428, 436 (2004) (emphasis in original). Accordingly, the income stream used in the income-capitalization method must reflect the property’s earning capacity or economic rental value. ***Pepsi-Cola Bottling Co.,*** 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property’s earning capacity. *See* ***Correia v. New Bedford Redevelopment 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). Vacancy rates must also be market based when determining fair cash value. ***Donovan v. City of Haverhill,*** 247 Mass. 69, 71 (1923). After accounting for vacancy and rent losses, the net-operating income is obtained by deducting the landlord’s appropriate expenses. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 610 (1984). The expenses should also reflect the market. ***Id.;*** *see* ***Olympia & York State Street Co.***, 428 Mass. at 239, 245.

In these appeals, the Board found that Mr. Shuka’s projected rental of $13.00 per square foot, which was derived from large investment-quality chain retail properties like the subject property and was higher than the rent suggested by Mr.  Johnston, was appropriate. *See* ***Fox Ridge Assoc. v. Assessors of Marshfield***, 393 Mass. 652, 654 (1984) (“Choosing an appropriate gross income figure for establishing an income stream was within the board’s discretion and expertise.”). The Board found that Mr. Shuka’s vacancy and collection loss rate of 15% was excessive and instead, based on the underlying statistical data contained in his appraisal report, as well as Mr. Johnston’s recommendation to use a lower rate, adopted a stabilized rate of 7.5% for the fiscal years at issue. *See****Olympia & York State Street Co.***, 428 Mass. at 242 (acknowledging that it is appropriate for the Board to “exercise . . . independent decision-making based on the evidence”). This calculation yielded a stabilized effective gross income of $1,501,021 for the fiscal years at issue.

For expenses, the Board found that Mr. Shuka’s operating expense figures for common area maintenance and insurance, which were based on market data, were appropriate. However, the Board adjusted this computation to reflect its lower vacancy rate. The Board also determined that Mr. Shuka’s expenses for reserves for replacement calculated at $0.25 per square foot, leasing commission calculated at 2.8% of potential gross income, and tenant improvements calculated at $0.20 per square foot, were market based and appropriate. With respect to the management expense, the Board found that Mr. Shuka’s expense calculated at 3% of EGI was excessive given the nature of the tenancy and instead found Mr. Johnston’s expense of 2% of EGI more reasonable. “The issue of what expenses may be considered in any particular piece of property is for the board.” ***Alstores Realty Corp. v. Assessors of Peabody***, 391 Mass. 60, 65 (1984); *see also* ***Olympia & York State Street Co.***, 428 Mass. at 242.

The capitalization rate selected should consider the return necessary to attract investment capital.  ***Taunton Redev. Assocs.,*** 393 Mass. at 295. Based on the evidence presented in the instant appeals, the Board found that base capitalization rates were within the range offered by the parties’ valuation witnesses: 8.75% for fiscal year 2012, 8.5% for fiscal year 2013, and 8.25% for fiscal year 2014, were appropriate. The Board then added the applicable prorated tax factor to account for vacancy for each of the fiscal years at issue. The “tax factor” is a percentage added to the capitalization rate “to reflect the tax which will be payable on the assessed valuation produced by the [capitalization] formula.” ***Assessors of Lynn v. Shop-Lease Co.,*** 364 Mass. 569, 573 (1974).

On this basis the Board found and ruled that the assessments did not exceed the subject property’s fair cash values for the fiscal years at issue, which the Board determined to be $14,888,111 for fiscal year 2012, $15,215,259 for fiscal year 2013, and $15,789,801 for fiscal year 2014.

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 v. Assessors of Foxborough,*** 385 Mass. 679, 683 (1982); ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 473 (1981); ***New England Oyster House, Inc.,*** 362 Mass. at 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 fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” ***Boston Consolidated Gas Co.,*** 309 Mass. at 72. “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).

“‘The burden of proof is upon the [appellant] to make out its right as a matter of law to abatement of the tax.’” ***Schlaiker v. Assessors of Great Barrington,*** 365 Mass. 243, 245 (1974)(quoting***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). The appellant must show that it has complied with the statutory prerequisites to its appeal, ***Cohen v. Assessors of Boston,*** 344 Mass. 268, 271 (1962), and that the assessed valuation of its property was improper. *See* ***Foxboro Assoc.,*** 385 Mass. at 691. The assessment is presumed valid until the taxpayer sustains its burden of proving otherwise. ***Schlaiker,*** 365 Mass. at 245.

Based on the evidence presented in these appeals, and reasonable inferences drawn therefrom, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was overvalued for the fiscal years at issue.

Accordingly, the Board issued decisions for the appellee in these appeals.

 **THE APPELLATE TAX BOARD**

### By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

**A true copy,**

#### Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

#  Clerk of the Board

1. This amount includes a Community Preservation Act (“CPA”) assessment of $4,142.75 and also a special assessment in the amount of $250.00. [↑](#footnote-ref-1)
2. This amount includes a CPA assessment of $4,515.89. [↑](#footnote-ref-2)
3. This amount includes a CPA assessment of $4,642.43 and also a special assessment in the amount of $250.00. [↑](#footnote-ref-3)
4. Although Mr. Shuka included in his appraisal report a sales-comparison analysis for each of the fiscal years at issue, he ultimately concluded that this methodology required excessive adjustments rendering the derived values unreliable. Therefore, Mr. Shuka placed no weight on the values derived from his sales-comparison analyses. [↑](#footnote-ref-4)
5. The Board noted that there were several minor mathematical errors in Mr. Shuka’s income-capitalization analyses but found that these errors did not impact his overall estimates of value for the fiscal years at issue. [↑](#footnote-ref-5)
6. Although Mr. Johnston included in his appraisal report the sales information for 6 big-box retail stores that sold between October 2009 and February 2014, he did not complete a full sales-comparison analysis. [↑](#footnote-ref-6)
7. This figure differed only slightly from Mr. Shuka’s building area of 124,825 square feet. [↑](#footnote-ref-7)
8. Mr. Johnston reported that he did not add a tax factor to reflect his 5% vacancy to “keep the capitalization process simple.” [↑](#footnote-ref-8)
9. The Board noted that while there was a slight difference in the net leasable areas used by the parties’ real estate valuation experts, the impact on the subject property’s overall values was negligible. [↑](#footnote-ref-9)