
**Massachusetts Department of Revenue
Division of Local Services**

**Current Developments
in
Municipal Law**



2009

**Appellate Tax Board Decisions
Land Court and Superior Court Cases**

Book 2A

**Navjeet K. Bal, Commissioner
Robert G. Nunes, Deputy Commissioner**

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Appellate Tax Board and Lower Court Decisions

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COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

MILTON B. and
MARILYN J. ADAMS

v.

BOARD OF ASSESSORS OF
THE TOWN OF WESTPORT

Docket No. F292092

Promulgated:
December 30, 2008

ATB 2008-1507

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 61A, § 19, from the refusal of the appellee to abate a tax on certain real estate in the Town of Westport assessed to the appellants under G.L. c. 61A, § 12 for fiscal year 2007.

Commissioner Mulhern heard the appeal. Chairman Hammond and Commissioners Scharaffa, Egan and Rose joined him in the decision for the appellants.

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

Peter L. Paull, Jr., Esq., for the appellants.
Paul Matheson, assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts with attached exhibits and testimony offered at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On June 21, 2005, Milton B. and Marilyn J. Adams ("appellants") purchased a 13.41-acre parcel of real estate in the Town of Westford located at "assessors Map 50 Lot 25 and portion lot 25" ("subject property"). On October 10, 2005, the appellants filed Form CL-1, Application for Classification under G.L. c. 61A ("Application") with the Board of Assessors of Westport ("assessors"), requesting agricultural/horticultural classification for fiscal year 2007 based on cultivation of an alfalfa crop on the subject property. The appellants wrote "13.41" on the line of the Application indicating the subject property's "Total Acres," but left blank the adjoining line entitled "Acres

to be Classified."¹ The assessors granted the Application for the entire 13.41-acre parcel on November 7, 2005. By a Notice of Action dated December 14, 2005, the assessors notified the appellants that the Application had been allowed as to all 13.41 acres and that the classification would be effective January 1, 2006 for fiscal year 2007.

On December 11, 2006, the appellants applied for a building permit from the Westport Building Inspectors Office to begin construction of a home for themselves on a 1.4-acre parcel that was part of the 13.41 acres classified under Chapter 61A ("building lot"). The permit was issued on January 5, 2007.

The assessors subsequently assessed a conveyance tax in the amount of \$61,709.00 on May 11, 2007. According to the tax bill, the tax was assessed pursuant to G.L. c. 61A, § 12, and was computed by applying a 9% taxation rate to a value of \$685,590.00 and adding a \$6.00 "Cert. Fee."² The appellants paid the tax on June 14, 2007, with interest of \$142.02 and a \$5.00 demand, for a total payment of \$61,856.02.³

The appellants timely filed an Application for Abatement with the assessors on May 11, 2007. On June 4, 2007, the assessors denied the application and sent notice of the denial to the appellants on June 5, 2007. On July 14, 2007, the appellants seasonably filed a Petition Under Formal Procedure with the Board. Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

On the basis of the evidence presented, to the extent that it is a finding of fact, and for the reasons detailed in the following Opinion, the Board found and ruled that the appellants' initiation of the building process for a residence on the subject property intended for their own use did not constitute a change in use within the meaning of G.L. c. 61A. Thus, imposition of the conveyance tax was not justified and the Board issued a decision for the appellants, granting an abatement in the amount of \$61,709, plus statutory additions.

¹ On the second page of the Application, the appellants stated that all 13.41 acres of the subject property were currently being used to cultivate alfalfa.

² The Board could not discern from the record the method used to arrive at the valuation or confirm that the tax assessed was based solely on the value of the building lot. See G.L. c. 61A, § 12 ("The conveyance tax shall be assessed on only that portion of land on which the use has changed.")

³ Timely payment is not a prerequisite to appeal of an asserted conveyance tax. See G.L. c. 61A, § 19.

OPINION

The sole issue presented for the Board's consideration in this appeal is whether the assessors properly assessed a conveyance tax to the appellants under G.L. c. 61A, § 12. The appellants contend that imposition of the tax was improper, stating that they never intended to request classification of all of the subject property under Chapter 61A, and that such classification by the assessors was mistaken and based on an unwarranted assumption as to the appellants' intentions. In support of these claims, the appellants point to their failure to complete the portion of the Application describing the "Acres to be Classified," an omission which they argued was clearly inadvertent given the temporal proximity of the Application's filing and the appellants' commencement of their building plans. Indeed, the appellants derived little benefit from classification of the building lot under Chapter 61A, which was effective beginning in fiscal year 2007, the same fiscal year in which the conveyance tax was assessed. Accordingly, they maintained that they were unfairly subject to a harsh penalty for their error.

Although the Board cannot grant an abatement based on the claimed inequity of the disputed assessment, relevant provisions of Chapter 61A are dispositive in this appeal. General Laws c. 61A, § 12 provides, in pertinent part:

Any land in agricultural, horticultural or agricultural and horticultural use which is valued, assessed, and taxed under the provisions of this chapter, if sold for other use within a period of ten years from the date of its acquisition . . . shall be subject to a conveyance tax applicable to the total sales price of such land. . . Any land in agricultural or horticultural use which is valued, assessed, and taxed under the provisions of this chapter, if changed by the owner thereof to another use within a period of ten years from the date of its acquisition by said owner, shall be subject to the conveyance tax applicable hereunder at the time of such change in use as if there had been an actual conveyance . . .

The assessors assessed the conveyance tax at issue based on their determination that the appellants had changed the use of the building lot from agricultural/horticultural land to

a residential building lot, thereby triggering the application of G.L. c. 61A, § 12. This conclusion, however, directly conflicts with G.L. c. 61A, § 14, which states that "specific use of land for a residence for the owner . . . shall not be deemed to be a conversion of land from agricultural to another use." See also *Ross v. Assessors of Ipswich*, Mass. ATB Findings of Fact and Reports 2001-961, 965 (ruling that a conveyance of land formerly classified under Chapter 61A by the property owners to their son did not trigger the imposition of a roll-back tax under G.L. c. 61A, § 13 because "G.L. c. 61A, § 14 explicitly provides '[s]pecific use of land for a residence for the owner or a . . . child . . . of the owner . . . shall not be deemed to be a conversion' of land from agricultural or horticultural use."). Accordingly, the Board found and ruled here that the appellants did not change the use of the building lot within the meaning of Chapter 61A when they initiated building plans for their residence. Absent such a change, the conveyance tax was improperly imposed.

On this basis, the Board issued a decision for the appellants and granted an abatement in the amount of \$61,709.00, plus statutory additions.

THE APPELLATE TAX BOARD

By: _____
Thomas J. Mulhern, Commissioner

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CHRISTOPHER BROWNING

v.

BOARD OF ASSESSORS OF
THE CITY OF BOSTON

Docket No. F294055

Promulgated:
April 1, 2009

ATB 2009-247

This is an appeal under the formal procedure pursuant to G.L. c. 59, § 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("assessors") to grant a residential exemption pursuant to G.L. c. 59, § 5C to Christopher Browning ("appellant") for fiscal year 2008.

Commissioner Mulhern ("Presiding Commissioner") heard the appeal. Chairman Hammond and Commissioners Scharaffa, Egan and Rose joined him in the decision for the appellant.

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

Christopher Browning and *Lisa Browning, pro se*, for the appellant.

Nicholas Ariniello, Esq. and *Laura Caltenco, Esq.* for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits¹ entered into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2007, the appellant was an owner of property located at 145 Englewood Avenue, Unit 27, in the Brighton section of Boston ("subject property"). The appellant resided at the subject property from August of 2005 to the date of the hearing of this appeal, and maintained no other residence during this time.

¹ The assessors offered jurisdictional documents into evidence. The appellant submitted copies of his 2006 and 2007 Form 1040 U.S. Individual Tax Returns, as well as a copy of his 2007 Form 1 Massachusetts Resident Income Tax Return. The appellant was not required to and did not file a 2006 Massachusetts income tax return because his 2006 income did not meet the statutory filing requirement. See G.L. c. 62C, § 6(a).

On November 1, 2007, the appellant filed a Residential Exemption Application with the assessors for fiscal year 2008. The assessors denied the application on December 31, 2007, and mailed notice of the denial to the appellant on the same day. On February 7, 2008, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably appealed the denial by filing a Petition Under Formal Procedure with the Board. Accordingly, the Board found it had jurisdiction to hear and decide this appeal.

Both the appellant and Lisa Browning, his mother, testified at the hearing of the appeal. Their testimony, which was uncontroverted, indicated that the appellant was an owner of the subject property, to which the assessors stipulated. The testimony also indicated that the appellant used the property as his principal residence on January 1, 2007, the relevant assessment date. Based on this testimony, and documentary evidence including three federal and Massachusetts income tax returns relating to calendar years 2006 and 2007, each of which reflect the subject property as the appellant's address of record, the Board found and ruled that the appellant sustained his burden of demonstrating that he owned and occupied the subject property as his principal residence for income tax purposes as of January 1, 2007. On this basis, the Board found and ruled that the appellant qualified for the residential exemption under G.L. c. 59, § 5C, and issued a decision in his favor, granting an abatement in the amount of \$1488.57.

OPINION

The sole issue presented for the Board's consideration is whether the appellant was entitled to a residential exemption under G.L. c. 59, § 5C ("§ 5C") for fiscal year 2008. The operative language of § 5C provides that "an exemption shall be applied only to the principal residence of a taxpayer as used by the taxpayer for income tax purposes." The assessors construed this language to require submission of a Massachusetts income tax return to substantiate a claim for exemption, without which, they argued, the exemption should be denied. With regard to a residential exemption relating to fiscal year 2008, the assessors required a 2006 Massachusetts income tax return, and argued that a 2007 Massachusetts income tax return was not only insufficient, but irrelevant to establishing principal residence as of January 1, 2007, the relevant assessment date for fiscal year 2008. The assessors' position was summarized by counsel during the course of the hearing:

Essentially our argument is consistent with our objections² in that there was no 2006 state income tax information available for that address, and so there is no ability to determine the owner's principal residence as of the lien date, which is January 1, 2007.

Hearing Transcript, p. 10.

The Board rejected a similar argument in *Wiggins v. Board of Assessors of the City of Boston*, Mass. ATB Findings of Fact and Reports 2009-34. In *Wiggins*, the Board considered the assessors' denial of a taxpayer's Residential Exemption Application based solely on the taxpayer's failure to report the address at which he claimed residency as the address on his Massachusetts income tax return. The Board rejected this "mechanical analysis," finding that the assessors' challenge had no basis in § 5C. The Board stated that "[t]he clear legislative intent in limiting the residential exemption to the taxpayer's principal residence is to prevent the taxpayer from qualifying for the exemption for multiple properties," and cited several tax benefits afforded under the Internal Revenue Code and Massachusetts tax law that are associated with and limited to one's "principal residence." *Id.* at 48-50. The Board observed that for both federal and Massachusetts income tax purposes, principal residence is determined "based on an analysis of all the facts and circumstances present in each case." *Id.* at 51. Considering this "well established principle," and absent legislative intent indicating a contrary result, the Board adopted a facts and circumstances analysis to determine whether the taxpayer had used the property for which the exemption was sought "in such a manner as to qualify it as his principal residence for income tax purposes." *Id.* at 48, 51.

The instant appeal is distinct from *Wiggins* in certain respects, but none that favors the assessors. The similarities are, however, dispositive. In both cases, the assessors ignored uncontroverted credible evidence of principal residence and maintained a singular focus within § 5C. In the current matter, the assessors required a 2006 Massachusetts income tax return from the appellant, without

² The assessors objected to the admission of the appellant's 2006 and 2007 federal tax returns as well as his 2007 Massachusetts return on the basis of relevancy. The Presiding Commissioner overruled the objections and admitted the returns into evidence.

which they refused to grant a residential exemption for fiscal year 2008. This demand is without foundation in § 5C.

Consistent with the Board's analysis in *Wiggins*, the Board here found and ruled that the assessors cannot deny a residential exemption solely because an applicant does not submit a Massachusetts income tax return to substantiate a claim for exemption.³

Applying the facts and circumstances analysis articulated in *Wiggins*, the Board reviewed the evidence of record in the present appeal, which included uncontroverted testimony, evidence that the appellant was an owner of the subject property, two federal income tax returns relating to calendar years 2006 and 2007, and a Massachusetts income tax return relating to calendar year 2007, each of which delineate the subject property as the appellant's address of record. Moreover, no evidence indicated that the appellant maintained any other residence after August of 2005. Thus, the Board found and ruled that the appellant presented ample, credible evidence that the subject property was his principal residence as of January 1, 2007.

In sum, the Board found and ruled that the assessors could not require a Massachusetts income tax return as the *sine qua non* for granting a residential exemption. The Board also found that the appellant sustained his burden of demonstrating that he used the subject property as his principal residence as of January 1, 2007. On this basis, the Board found and ruled that the appellant was entitled to the residential exemption under § 5C for fiscal year 2008, and issued a decision granting an abatement in the amount of \$1488.57.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

³ It is noteworthy, but not necessary to the Board's findings in this appeal, that the appellant did not file a 2006 Massachusetts income tax return because he was not required to do so under the laws of the Commonwealth. The assessors' demand that he file a return solely to substantiate his claim for a residential exemption finds no support in law.

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

CAPE COD FIVE CENTS SAVINGS v. BOARD OF ASSESSORS OF
BANK and WILLIAM R. ENLOW, THE TOWN OF HARWICH
as TRUSTEES OF THE and
JOHN R. PFEFFER FAMILY TRUST BOARD OF ASSESSORS OF
and CAPE COD NATIONAL THE TOWN OF BREWSTER
GOLF FOUNDATION, INC.

Docket Nos.: F277365 (FY 05)
 F277363-364 (FY 06)
 F282675, F282763 (FY 07)
 F288014-015 (FY 08)

ATB 2009-659

Promulgated:
July 17, 2009

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 appellee to abate real estate taxes assessed to the appellants under G.L. c. 59, §§ 11 and 38 by the Town of Brewster for fiscal years 2006, 2007 and 2008, and by the Town of Harwich for fiscal years 2005, 2006, 2007 and 2008.

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Egan, and Mulhern joined him in the decisions for the appellee.

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

F. Alex Parra, Esq. and Louis N. Levine, Esq. for the appellants.

Jeffrey T. Blake, Esq. for the Harwich assessors.
Edward E. Veara, Esq. for the Brewster assessors.

FINDINGS OF FACT AND REPORT

On the basis of the parties' Stipulation of Facts and Issues ("Stipulation") and attached exhibits, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2004, January 1, 2005, January 1, 2006, and January 1, 2007, the John R. Pfeffer Family Trust, Cape Cod Five Cents Savings Bank and William R. Enlow, as Trustees of the John R. Pfeffer Family Trust (the "Trust"), were the assessed owners of 151.86 acres of contiguous

land, of which approximately 70.66 acres are located in Brewster (the "Brewster property"), and about 81.20 acres are located in Harwich (the "Harwich property"), (collectively the "subject property").

At all times relevant to these appeals, the subject property was used as an 18-hole golf course known as the Cape Cod National Golf Course ("golf course"), which the Trust leased to the Cape Cod National Golf Foundation, Inc. ("Foundation" and with the Trust, "appellants"). Approximately 90 acres of the subject property's 151.86 acres are landscaped for use as a golf course, including tees, fairways, and greens. As part of the golf course design, the Cape Cod Commission (the "Commission") required the Trust to preserve fifty acres of undisturbed pine/oak woodlands to "provide travel corridors and significant habitat for wildlife." The Commission also required the installation of a comprehensive groundwater monitoring program and, except for the restoration of previously disturbed wetlands, that the golf course be developed without further wetland alteration.

Located on the Brewster property is a clubhouse, the golf pro's residence and a maintenance building. Situated on the Harwich property is a 2,000-square foot barn, which is in dilapidated condition and unused; another barn, which is used as a pump house in connection with the irrigation of the golf course; and a 130-square-foot bathroom facility. All buildings are used solely in connection with the golf course.

I. Jurisdiction

Brewster property

In accordance with G.L. c. 61B, § 3, applications for recreational classification must be submitted to the assessors prior to October first of the year preceding the tax year at issue. For fiscal years 2006, 2007 and 2008, the Trust, as the assessed owner, and the Foundation, as lessee, applied to the Brewster Board of Assessors (the "Brewster assessors") for recreational classification of the Brewster property under G.L. c. 62B. The relevant jurisdictional information is set forth in the following table.

Docket Number	Fiscal Year	Chapter 61B Application Filed	Application Denied	Request for Modification	Modification Denied	ATB Appeal Filed
F277363	2006	9-28-04	12-28-04. ¹	12-29-04	3-14-05	3-18-05
F282763	2007	9-19-05	11-30-05	12-05-05	1-06-06	1-26-06
F288015	2008	9-25-06	11-13-06	12-29-06	No action	3-28-07

For fiscal year 2006, the Brewster assessors valued the Brewster property at \$5,252,500 and assessed a tax thereon at the rate of \$5.58 per \$1,000, in the total amount of \$30,188.22, exclusive of land bank tax. For fiscal year 2007, the Brewster assessors valued the Brewster property at \$5,709,600 and assessed a tax thereon at the rate of \$5.47 per \$1,000, in the total amount of \$31,231.51, exclusive of land bank tax. The parties stipulated that the fiscal year 2008 assessment information was not known at the time of filing the Stipulation and, therefore, it was not presented to the Board. At all times material to these appeals, the Trust was the assessed owner of the Brewster property.

Based on these facts, the Board found and ruled that it had jurisdiction over the appellants' Brewster appeals.

Harwich property

For fiscal years 2005 through 2008, the Trust, as the assessed owner, and the Foundation, as lessee, applied to the Harwich Board of Assessors (the "Harwich assessors") for recreational classification of the Harwich property under G.L. c. 62B. The relevant jurisdictional information is set forth in the following table.

Docket Number	Fiscal Year	Chapter 61B Application Filed	Application Denied	Modification	Modification Denied	ATB Appeal Filed
F277365	2005	9-28-04	12-14-04	12-21-04	No action	03-18-05
F277364	2006	9-28-04	12-14-04	12-21-04	No action	03-18-05
F282675	2007	9-19-05	09-27-05	10-04-05	10-25-05	11-23-05
F288014	2008	9-25-06	12-05-06	12-29-06	01-09-07	03-28-07

For fiscal year 2005, the Harwich assessors valued the Harwich property at \$4,170,700 and assessed a tax thereon, at the rate of \$6.24 per \$1,000, in the total amount of \$26,025.17, exclusive of land bank tax. For fiscal year 2006, the Harwich assessors valued the Harwich property at \$4,379,600 and assessed a tax thereon, at the rate of \$5.89 per \$1,000, in the total amount of \$25,795.84, exclusive of

¹ Pursuant to G.L. c. 61B, § 6, the appellants' application for recreational classification was deemed denied three months from the date of filing, September 28, 2004. The appellants then had sixty days to file a request for a modification. G.L. c. 61B, § 14.

land bank tax. For fiscal year 2007, the Harwich assessors valued the Harwich property at \$4,522,000 and assessed a tax thereon, at the rate of \$5.58 per \$1,000, in the total amount of \$25,232.76, exclusive of land bank tax. As with the Brewster property, the parties stipulated that the fiscal year 2008 assessment information was not known at the time of filing the Stipulation and, therefore, it was not presented to the Board.

The Harwich property was assessed to the Trust on a single tax bill, despite being shown as twenty-three separate lots on the Harwich assessors' Maps 114, 115 and 118. At all material times, the Trust was the record owner of the six lots identified on Maps 114 and 115, and also one lot identified on Map 118. By virtue of a deed dated January 3, 1997, and recorded on May 31, 2006, eight lots on Map 118 were conveyed to the Trust by John R. Pfeffer. Further, at all times relevant to these appeals, an additional eight lots identified on the assessors' Map 118, parcels N1-149 through N1-156, were owned by John R. Pfeffer, individually.

Pursuant to G.L. c. 61B, § 3, the appellants' fiscal year 2005 application for recreational classification was due no later than October 1, 2003. As stated on the appellants' petition to the Board, the appellants did not file the application until September 28, 2004, nearly a year after the statutory due date. Accordingly, the Board found and ruled that it did not have jurisdiction over the appellants' fiscal year 2005 Harwich appeal. The Board found that the appellants' fiscal years 2006, 2007 and 2008 applications for classification and subsequent appeals were timely filed. Accordingly, and for the reasons more fully explained in the following Opinion, the Board found and ruled that it had jurisdiction over the appellants' fiscal years 2006, 2007 and 2008 Harwich appeals.

II. Recreational classification

For the four fiscal years preceding the fiscal years at issue in these appeals, fiscal years 2001 through 2004, the Trust and the Cape Cod National Golf Club, LLC (the "Club") filed appeals with the Board concerning denials by the Harwich assessors and the Brewster assessors of their applications for recreational classification under G.L. c. 61B. The Trust and the Club took the position in those appeals that the subject property was available to the general public. During those years, the subject property was leased to the Club and was available only to

members of the Club and patrons of the Wequasset Inn. In August 2004, the Trust, the Club, and the assessors entered into an Agreement for Judgment in the fiscal years 2001 through 2004 appeals, which provided that "the Appellants' claims in the Appeals for recreational land classification of the Properties under the provisions of G.L. c. 61B [were] dismissed." The Agreement further provided that "[f]or so long as the Appellants and/or golf course thereon are as presently constituted and/or organized, the Appellants shall not apply for recreational land classification as a golf course of the [subject property] under the provisions of G.L. c. 61B, § 1" Based on the Agreement for Judgment the Board issued a decision dated August 26, 2004 "for the appellees on the issue of classification under G.L. c. 61B."

On September 14, 2004, approximately one month after the Agreement for Judgment was executed, the Club conveyed its leasehold interest in the subject property to the then recently organized Foundation. The Assignment of Lease between the Club and the Foundation states that the lease was conveyed for \$1.00 and "other valuable consideration" not identified. Notwithstanding this assignment, the Club continued to manage the subject property and remained responsible for the day-to-day operations of the golf course.

The Foundation was organized under the laws of the State of Florida on April 28, 2004, purportedly as a non-profit organization. According to the Foundation's Articles of Incorporation:

[t]he general purposes for which the corporation is organized are exclusively for charitable, religious, medical, educational, scientific or literary purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations In addition to the general purpose of the corporation, the corporation is also organized to promote not-for-profit botanical gardens, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations

The Foundation's By-Laws provide that "[a]ny golf member of our wholly-owned subsidiary [the Club] shall be considered a non-voting member [of the Foundation] and will be eligible to serve on the Member Advisory Board of the Golf Club." All members of the Foundation are also members of

the Club, a private organization. The golf course is available only to members of the Club, who are also ex-officio members of the Foundation, as well as to patrons of the Wequassett Inn.

The day-to-day operations of the golf course are managed by the Club. The Club derives revenues from the following sources: annual membership dues and greens fees paid by members of the Club, which includes ex-officio members of the Foundation; fees paid by patrons of the Wequassett Inn; and, pro shop and food sales to members of the Club and Foundation and patrons of the Wequassett Inn. All revenues derived from the operation of the golf course, after the payment of operating expenses, not including rent or real estate taxes, are required to be paid by the Club to the Foundation. Under the terms of the lease, the Foundation is then obligated to pay to the Trust rent equal to the Trust's allowable depreciation of the cost of the improvements to the golf course and also real property taxes assessed on the subject property.

For calendar year ending December 31, 2004, the Club reported a total income of \$2,809,203 and total operating expenses, which included payment of rent and property taxes, of \$2,747,015, with a net profit paid to the Foundation of \$62,189. For calendar year ending December 31, 2005, the Club reported a total income of \$2,584,195 and total operating expenses, which included payment of rent and property taxes, of \$2,575,739, with a net profit of \$8,456 paid to the Foundation. No financial information was provided for calendar years 2006 and 2007.

Pursuant to the Foundation's Articles of Organization, after the payment of rent, taxes, debts and other expenses and obligations, the Foundation was required to distribute all funds received from the Club for charitable purposes. During the fiscal years at issue, however, the Foundation made only two nominal charitable distributions, totaling \$1,500: one to the Harwich Cultural Council in the amount of \$500 and another to the Leadership Institute in the amount of \$1,000. The Foundation was also organized to promote or make donations to not-for-profit botanical gardens. The appellants failed to provide any evidence to demonstrate that the Foundation attempted to carry out this purpose.

On the basis of these facts, the Board found and ruled that the golf course was in fact available only to members of a private club and guests of the Wequassett Inn and, therefore, was not available to the general public or members of a non-profit organization. The Board further

found that the appellants' applications for Chapter 61B classification, based on the lease of the golf course to the Foundation, were submitted for the purpose of evading payment of the "full and proper taxes due" on the subject property. See G.L. c. 61B, § 6.

The Foundation was organized on April 28, 2004, while the Trust had appeals for prior fiscal years pending before the Board in which the availability of the golf course to the general public was in issue. In August of 2004, the parties agreed that the Trustees' appeals for those years should be dismissed and the Trustees agreed that they would not apply for Chapter 61B classification "[f]or so long as the Appellants and/or the golf course thereon are as presently constituted and/or organized." Less than one month later, the Club transferred its leasehold interest in the golf course to the newly created Foundation. The clear purpose of the creation of the Foundation, and the transfer to it of the leasehold interest in the golf course, was to give the appearance that the golf course was no longer available only to private club members and guests of a particular hotel, but to "members of a non-profit organization" as required under G.L. c. 61B, § 1. However, the creation of the Foundation had no impact on the operation or use of the golf club and its availability only to the private Club members and hotel guests.

In effect, there was no difference in the operation and use of the golf course as a result of the Foundation lease. The Club continued to maintain the day-to-day operations of the golf course and all members of the Foundation were also members of the Club. Despite the lease to the Foundation, only private club members and Wequassett Inn guests continued to be afforded exclusive access to the course. Accordingly, the Board found that the golf course was not open to the general public or members of a non-profit organization for purposes of G.L. c. 61B, § 1.

The Board further found that the creation of the Foundation, and the assignment of the lease of the golf course to it, was for the sole purpose of supporting an application for Chapter 61B classification in an attempt to evade the payment of the full and proper tax due on the subject property.

The appellant also maintained, as an alternative argument, that the subject property qualified under the first sentence of G.L. c. 61B, § 1, even if it was not available to the general public or members of a non-profit organization, because it is "retained in substantially a

natural, wild or open condition or in a landscaped condition" for purposes of G.L. c. 61B, § 1.

As detailed in the Opinion which follows, however, the Board found and ruled that the specific language of § 1 regarding classification of land used for golfing and other recreational uses and not the general language of § 1 applicable to land in a natural, wild, open or landscaped condition, applies to the subject property. Where, as here, the relevant statute provides for classification of land put to a particular use and provides conditions for such classification, a taxpayer cannot avoid those conditions by using the land for unspecified purposes. The parties stipulated that the sole use of the subject property was as a golf course, together with a club house and various improvements used solely in connection with the golf course. Accordingly, to qualify under Chapter 61B, the subject property must be available to the general public or members of a non-profit organization. Because it was not so available, the assessors were correct in denying classification for the fiscal years at issue.

On the basis of the foregoing findings of fact and for the reasons more fully explained in the following Opinion, the Board found that the appellants did not qualify for recreational classification and issued decisions for the appellees in these appeals.

OPINION

I. Jurisdiction

Pursuant to G.L. c. 61B, § 2, taxpayers seeking classification of their land as "recreational land" must apply to the board of assessors no later than October first of the year preceding each tax year for which such classification is sought. Accordingly, for taxpayers seeking classification for fiscal year 2005, the period beginning July 1, 2004 and ending June 30, 2005, they must have filed a classification application no later than October 1, 2003. In the present appeals, the appellants filed their fiscal year 2005 application with the Harwich assessors on September 28, 2004, nearly one year after its statutory due date. Accordingly, the Board found and ruled that it did not have jurisdiction over the appellants' fiscal year 2005 Harwich appeal.

In addition, the Harwich assessors argued that the Board lacked jurisdiction over the appellants' fiscal years 2006, 2007, and 2008 Harwich appeals because the appellants

failed to list and obtain the signatures of all property owners on Section D of the application form. The applications were signed by one of the Trustees, Cape Cod Five Cent Savings Bank, on behalf of the Trust, and John R. Pfeffer, on behalf of the Foundation as lessee. There is no dispute that eight of the parcels, which comprise the Harwich property, are owned by John R. Pfeffer, individually. Therefore, the Harwich assessors argued that Mr. Pfeffer was required to sign the applications in his individual capacity and that his failure to do so is a jurisdictional defect which should result in the dismissal of the appellants' Harwich appeals for fiscal years 2006, 2007 and 2008.

At all material times, the Harwich assessors sent to the Trust a single tax bill for all Harwich parcels, which listed the Trust as the assessed owner of the Harwich property. Acceptance of the Harwich assessors' argument would mean that the assessed owner of property has no standing to seek recreational classification for land on which he is being taxed. There is nothing in Chapter 61B or elsewhere that supports such a result.

Under G.L. c. 61B, § 3, the assessors shall provide forms for use "by applicants" and the "applicant" is required to provide certain certifications to the assessors. The focus of the § 3 application process is therefore on the "applicant," not the "owner," of the property. Although § 3 also provides that the commissioner "may [] prescribe" a "certification by a landowner" that the information in his application is true, the statute nowhere specifically requires that only the owner of record may apply for Chapter 61B classification. It would be an anomalous result to prevent the assessed owner from applying for classification, particularly where, as here, the assessors assessed the multiple Harwich parcels comprising the subject property on a single bill to a single owner. Cf. c. 59, § 59 ("a person upon whom a tax has been assessed" may apply for an abatement of real estate tax). Accordingly, the Board ruled that it had jurisdiction to hear and decide the Harwich appeals for fiscal years 2006, 2007 and 2008.

II. Recreational Classification

G.L. c. 61B, § 1 provides in pertinent part that:
Land not less than five acres in area shall be deemed to be recreational land if it is retained in substantially a natural, wild, or open

condition or in a landscaped condition in such a manner as to allow to a significant extent the preservation of wildlife and other natural resources, including but not limited to, ground or surface water resources, clean air, vegetation, rare or endangered species, geologic features, high quality soils, and scenic resources. Land not less than five acres in area shall also be deemed to be recreational land which is devoted primarily to recreational use and which does not materially interfere with the environmental benefits which are derived from said land, and is available to the general public or to *members of a non-profit organization* (emphasis added)

For purposes of this chapter, the term recreational use shall be limited to the following: . . . golfing

The parties agree that the subject property is not less than five acres and is used solely as an 18-hole golf course, together with a club house and various improvements used solely in connection with the golf course. The primary issue, therefore, is whether the golf course is available to the general public or members of a non-profit organization. The appellants argued that since the golf course is available to members of the Foundation, a non-profit organization, the subject property qualified for recreational classification. The assessors, however, argued that the Foundation does not act as a non-profit organization for real estate tax purposes and that the golf course is, in fact, only available to members of a private club and guests of a particular hotel. Further, the assessors maintained that the appellants' filing of their Chapter 61B applications for the fiscal years at issue was "for the purpose of evading payment of full and proper taxes" because the creation of the Foundation and the transfer to it of a leasehold interest in the golf course had no effect on the availability of the golf course to the general public. See, G.L. c. 61B, § 6.

For fiscal years 2001 through 2004, the golf course was leased to the Club and available only to members of the Club and the Wequassett Inn. By decision dated August 24, 2004, the Board found and ruled for those fiscal years, based on the Trustees' concession reflected in the parties' Agreement for Judgment, that the subject property, which

was open only to members of the Club and patrons of the Wequasset Inn, did not qualify for recreational classification because it was not available to members of the general public or a non-profit organization. Less than one month later, on September 14, 2004, the Club conveyed its leasehold interest in the subject property to the Foundation. The Club, however, continued to manage the day-to-day operations of the golf course and access to the course continued to be limited to Club members and guests of the Wequasset Inn.

Pursuant to the Foundation's Articles of Organization, "[t]he general purposes for which the corporation is organized are exclusively for charitable, religious, medical, educational, scientific or literary purposes" including making distributions to various civic organizations. In addition, "the corporation is also organized to promote not-for-profit botanical gardens." These purposes underscore the fact that the Foundation has no practical purpose other than to support the appellants' classification application. The stated purposes are a generic listing of charitable purposes and the specific inclusion of "botanical gardens" is curious; the appellants fail to explain how aiding botanical gardens is consistent with the operation of a golf course.

Moreover, as of the date of these appeals, approximately three years after the establishment of the non-profit organization, the Foundation had made only two charitable contributions totaling a mere \$1,500. The appellants offered no evidence that the Foundation performed any other charitable activity during the relevant time period.

Based on the evidence presented, the Board found that the golf course, which was open only to members of a private club and patrons of a particular hotel, was not open to the general public or members of a non-profit organization within the meaning of G.L. c. 61B, § 1. Given that the members of the Foundation were also members of the Club and that the only evidence that the Foundation acted in a manner consistent with its stated purposes was its nominal charitable contributions, the Board found and ruled that the subject property was not open to members of a non-profit organization for purposes of § 1.

Generally, real estate tax benefits are conferred only on non-profit organizations that perform charitable works consistent with their stated purposes. See *Lasell Village, Inc. v. Assessors of Newton*, 67 Mass. App. Ct. 414 (2006) (ruling that an institution is a charitable organization

for purposes of the property tax exemption under G.L. c. 59, § 5, cl. 3, if the dominant purpose of its work is for the public good, but if the dominant purpose of its work is to benefit its members or a limited class of persons, it does not qualify for the exemption.) There is no indication that the legislature intended to confer a tax benefit under Chapter 61B where, as here, a non-profit organization is not fulfilling its stated charitable purposes but is merely acting as a façade to allow a members-only golf course to receive a tax benefit.

Further, the availability of the course to guests of the Wequassett Inn does not mean that the course was open to the general public for purposes of G.L. c. 61B, § 1, a point which even the appellants do not attempt to argue in these appeals. Favorable tax treatment of land available only to a select few, as opposed to the general public, has consistently been denied. See, e.g., *Brookline Conservation Land Trust v. Assessors of Brookline*, Mass. ATB Findings of Fact and Report, 2008-679, 699-700; *Wing's Neck Conservation Foundation, Inc. v. Board of Assessors of Bourne*, Mass. ATB Findings of Fact and Reports 2003-329, 343, *aff'd*, 61 Mass. App. Ct. 1112 (2004). ("the absence of public access to land has consistently proven fatal to a landowner's claim of charitable exemption.")

The Board further found and ruled that the assessors were justified in denying the applications based on their determination that the appellants' "application [was] submitted for the purpose of evading payment of full and proper taxes." See G.L. c. 61B, § 6. Despite the Foundation being listed as the lessee, the private, members-only Club continued to operate the golf course on a day-to-day basis and its members, along with guests at the Wequassett Inn, were the only individuals able to use the course. Accordingly, the Board found and ruled that the operation and use of the subject property was unaffected by the transfer of the leasehold interest to the Foundation. The sole purpose of the Foundation, whose members were also members of the Club, was to allow the golf course to continue to be used exclusively by its members and Inn guests while enjoying the tax benefits of recreational classification.

"It is axiomatic that taxpayers have the right to mold business transactions in such a manner as to minimize the incidence of taxation, for no taxpayer is obligated to pay more tax than the law demands of him." *Brown, Rudnick, Freed & Gesmer v. Assessors of the City of Boston*, Mass. ATB Findings of Fact and Report 1982-41, 53, *aff'd*

389 Mass. 298 (1983) (quoting *Aldon Homes, Inc. v. Commissioner of Internal Revenue*, 33 T.C. 582 (1959)). However, "this right does not bestow upon the taxpayer the right to structure a paper entity to avoid tax when that entity does not stand on the solid foundation of economic reality." *Zmuda v. Commissioner*, 79 T.C. 714, 719 (1982), aff'd. 731 F.2d 1417 (9th Cir. 1984).

The Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation.

Higgins v. Smith, 308 U.S. 473 (1940). "To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies." *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945).

Chapter 61B, § 6, explicitly provides assessors with the authority to deny classification applications where the applicant's purpose is to evade payment of taxes by providing "[i]f any board of assessors shall determine that any such application is submitted for the purpose of evading payment of full and proper taxes, such board shall disallow such application." G.L. c. 62B, § 6. In the present appeals, the Board found and ruled that the Foundation was created, and the leasehold interest in the golf course was transferred to it, for the sole purpose of attempting to qualify for Chapter 61B classification and thereby evade the full and proper real estate tax. Accordingly, the Board found and ruled that the assessors properly determined that the appellants' submitted applications for classification were "for the purpose of evading payment of full and proper taxes."

In the alternative, the appellants also argued that the subject property qualified under chapter 61B, § 1 as land "retained in substantially a natural, wild, or open condition or in a landscaped condition in such a manner as to allow to a significant extent the preservation of

wildlife and other natural resources." Where, as here, the statute provides for classification of land put to a particular use, such as golfing, and provides conditions for such classification, a taxpayer cannot avoid those conditions by claiming the benefit of classification as land used for unspecified purposes. It is a familiar principle of statutory construction that a statutory provision of specific applicability trumps one of general applicability. *W.D. Cowls, Inc. v. Board of Assessors of Shutesbury*, 34 Mass. App. Ct. 944, 945 (1993) (citing *Hennessey v. Berger*, 403 Mass. 648, 651 (1988)). See also *Pereira v. New England LNG Co.*, 3674 Mass. 109, 118-19 (1973) (If a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute).

In the present appeals, the parties stipulated that the sole use of the subject property was as a golf course, together with a club house and various improvements used solely in connection with the golf course. Accordingly, the Board found that to qualify under Chapter 61B as land used for the recreational use of golfing, the subject property must be available to the general public or members of a non-profit organization. Because it was not, the assessors were correct in denying classification for the fiscal years at issue.

On these bases, the Board found and ruled that the subject property did not qualify for recreational classification for the fiscal years at issue and therefore decided these appeals for the appellees.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CHRISTMAS TREE SHOPS, INC. v. COMMISSIONER OF REVENUE

Docket No. C278588

Promulgated:
October 30, 2008

ATB 2008-1389

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the appellee Commissioner of Revenue ("appellee" or "Commissioner") to grant an abatement of corporate excise assessed to the appellant, Christmas Tree Shops, Inc. ("appellant" or "CTS") under G.L. c. 63, § 32 for the taxable years ending December 31, 1999, December 31, 2000, and December 31, 2001 (collectively, the "years at issue".)

This appeal was submitted on stipulated facts and briefs pursuant to 831 CMR § 1.31. Chairman Hammond and Commissioners Scharaffa, Egan, Rose, and Mulhern joined in the decision for the appellant.

These findings of fact and report are made on the Board's own motion pursuant to G.L. c. 58A, § 13 and 831 CMR § 1.32 and are issued simultaneously with the decision in this appeal.

Philip S. Olsen, Esq. and Natasha Varyani, Esq., for the appellant.

Diane M. McCarron, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

At all material times, CTS was an S corporation organized under the laws of the Commonwealth of Massachusetts, with its headquarters located in South Yarmouth, Massachusetts. During the tax years at issue, CTS was operated as a closely held discount variety retail business with 23 stores located in Massachusetts, New York, Connecticut, New Hampshire, Rhode Island, and Maine.

CTS filed Massachusetts corporate excise returns for the tax years at issue. The returns were selected for examination by the New England Audit Bureau of the Massachusetts Department of Revenue. Following the audit, the Commissioner issued a Notice of Intention to Assess ("NIA") on April 28, 2004, proposing the assessment of additional corporate excise for the tax years at issue. A

Notice of Assessment ("NOA") was issued on January 26, 2005, assessing a corporate excise deficiency in the amount of \$58,216 tax plus interest. For the 2001 tax year, the Commissioner imposed penalties as well.

On March 29, 2005, CTS timely filed a Form CA-6, Application for Abatement, seeking abatement of the additional assessment of tax, interest, and penalties. The Commissioner issued a Notice of Abatement Determination dated April 20, 2005 denying CTS's request for abatement of the deficiency assessment. CTS filed its appeal with the Appellate Tax Board ("Board") on May 23, 2005. On the basis of the foregoing facts, the Board found and ruled that it had jurisdiction over this appeal.

The sole issue presented was whether the book value of certain real estate situated in the Town of Middleborough ("subject property") was includable in the non-income measure of CTS's corporate excise for the tax years at issue. See G.L. c. 63, § 30(7). Under the provisions of § 30(7), if real estate is subject to local taxation, then it is properly excluded from the non-income measure of the corporate excise.

The subject property was subject to a Tax Increment Financing ("TIF") Agreement entered into between CTS and the Town of Middleborough on December 18, 1995 ("subject TIF agreement"), pursuant to G.L. c. 40, § 59 (the "TIF enabling statute"). CTS excluded the full book value of the subject property from the tangible property tax base reported on its corporate excise tax returns. On audit, the Commissioner determined that the subject property was not subject to local taxation due to the subject TIF agreement and adjusted the non-income measure of the corporate excise by including the book value of the real estate, resulting in the disputed assessment.

The TIF enabling statute provides a mechanism whereby municipalities may adopt "tax increment financing exemptions from property taxes . . . for any parcel of real property which is located in the TIF zone and for which an agreement has been executed with the owner thereof." G.L. c. 40, § 59(iii). TIF zones are designated by the affected municipalities "provided, however, that each area so designated is wholly within an area designated by the director of economic development . . . as presenting exceptional opportunities for increased economic development". G.L. c. 40, § 59(i).

TIF agreements authorized by the TIF enabling statute operate to reduce or eliminate incremental taxation associated with improvements to real property provided that

"all construction and construction-related activity, public and private, contemplated for such TIF zone as of the date of the adoption of the TIF plan" is "describe[d] in detail" within the four corners of the agreement. See G.L. c. 40, § 59(ii). The TIF agreement must "specify the level of such exemptions expressed as an exemption percentage, not to exceed one hundred percent, to be used in calculating the exemption under clause fifty-first of said section five of said chapter fifty-nine." G.L. c. 40, § 59(iii).¹ Exemptions are required to be calculated "using an adjustment factor for each fiscal year of the specified term equal to the product of the inflation factors for each fiscal year since the parcel first became eligible for such exemption." *Id.* The result is that a portion of the increased property value attributable to the incentivized economic development, represented by the "exemption percentage," is disregarded in the determination of the amount of property tax owing on a parcel subject to a TIF agreement.

The corresponding provision at G.L. c. 59, § 5, clause fifty-first, confers exemption on

the value of a parcel of real property which is included within an executed agreement under the provisions of paragraph (v) of section fifty-nine of chapter forty, together with all personal property situated on such parcel; provided, however, that taxes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt pursuant to the provisions of section fifty-nine of chapter forty; . . . provided, further, that the amount of the exemption under this clause for any parcel shall be the exemption percentage adopted under paragraph (iii) of said section fifty-nine of said chapter forty multiplied by the amount by which the parcel's value exceeds the product of its assessed value for the last fiscal year before it became eligible for exemption under this clause multiplied by the

¹ G.L. c. 40, § 59(v) requires that TIF agreements include: (1) "all material representations . . . "; (2) "a detailed recitation of the tax increment exemptions and the maximum percentage of the cost of public improvements that can be recovered through betterments or special assessments . . . "; (3) "a detailed recitation of all other benefits and responsibilities" for both parties; and (4) "a provision that such agreement shall be binding upon subsequent owners of such parcel of real property".

adjustment factor determined in accordance with said section fifty-nine of chapter forty. Taxes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt hereunder.

Accordingly, G.L. c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, read together, exclude a portion of the value of property subject to a TIF agreement from local taxation, in an amount determined in part on the basis of exemption percentages set forth in the agreement and in part on an inflation factor.² The property remains subject to a tax based on the remainder of the property value not exempted.

Describing the TIF mechanism as an "incentive for economic development," the Property Tax Bureau of the Department of Revenue's Division of Local Services issued Informational Guideline Release No. 94-201 contemporaneously with the passage of the relevant legislation. According to the Department of Revenue, "[t]he TIF exemption is an exemption of a percentage of the increase in a parcel's value over the base value in the year before the exemption was granted." IGR No. 94-201.

The subject TIF agreement was offered into evidence in this appeal. The recitals at the beginning of the document identify the parties' respective motivations for entering into the subject TIF agreement:

WHEREAS, the Company desired to increase its warehouse and distribution capacity and to locate certain of its corporate offices at a single site; and

WHEREAS, the Town, as an inducement to attract the Company, and its attendant capital investment and employment opportunities, is willing to grant to the Company certain tax concessions; and

WHEREAS, the Company has committed to constructing its principal corporate warehouse and distribution facilities and a significant portion of its corporate offices at 64 Leona Drive (Lot 9) Middleborough, Plymouth County, Massachusetts (the "Project").

² The record does not reveal the amount of the reductions in value accorded to the subject property as computed pursuant to statute and the subject TIF agreement, for the years at issue.

CTS made certain commitments as part of the subject TIF agreement. First, CTS agreed to give Middleborough residents "priority . . . in its hiring of new employees for the office, warehouse, and distribution facility." Employment opportunities were required to be posted in the *Middleborough Gazette*.

Second, CTS agreed to make good faith efforts to use qualified local contractors for renovation and development of the Project and for construction of additional phases of the Project, including future repairs and renovations.

Third, CTS agreed to provide yearly reports to the Town on the number of Middleborough residents employed at the distribution facility.

Fourth, CTS agreed to locate its warehouse and distribution facility and certain corporate offices at the Project site.

Fifth, while the existing offices in South Yarmouth would be maintained, CTS agreed that any consolidation or expansion of its offices would occur at the Project site in Middleborough, except for future minor expansions and renovations at the South Yarmouth facility.

Sixth, CTS committed to developing the Project site by constructing a 1,000,000 square foot building with combined office, warehouse, and distribution uses. When finished and operational (within ten years of the date of the subject TIF agreement), the facility would employ "approximately 500-600 people." Project completion was scheduled to occur in four phases, with approximately 150 new employees added in Phase One, and 80-100 new employees during Phases Two, Three, and Four.

Finally, CTS agreed to give the Town "at least two months [written notice]" of any sale or transfer of, or discontinuance of operations at, the subject property. Should CTS fail to comply with the agreement, the Town would be entitled to seek revocation of the tax concessions.

The Town of Middleborough in turn "grant[ed] a tax increment financing exemption to" CTS with respect to the subject property for a period of twenty years, commencing with fiscal year 1997 (July 1, 1996) and ending with fiscal year 2016 (June 30, 2016). The agreed-upon exemption percentages applicable to the subject property, as contained on Schedule A of the Agreement, were as follows:

YEARS	PERCENTAGES
1-3	25%
4-5	35%
6-7	45%
8-10	55%
11-13	45%
14-16	35%
17-19	25%
20	0%

For the reasons detailed in the following Opinion, the Board found and ruled that the subject property remained subject to local taxation notwithstanding the exemption of a portion of its value from local tax during the term of the TIF agreement. Because the subject property was subject to local taxation, it is excluded from the non-income measure of appellant's corporate excise. The Commissioner erred in including the book value of the property in the non-income measure of the corporate excise owed by CTS for the years at issue. Accordingly, the Board granted an abatement of corporate excise in the amount of \$58,216 plus statutory additions.

OPINION

The corporate excise is imposed on "every domestic corporation . . . exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth." G.L. c. 63, § 32. The amount of the corporate excise owing is determined on the basis of corporate net income, and in addition a non-income measure which varies depending on whether the corporation is considered a "tangible property corporation" or an "intangible property corporation" as defined at G.L. c. 63, § 30(10) and (11). See G.L. c. 63, § 32 (1).

As a "tangible property corporation" for purposes of the corporate excise, appellant paid a tax measured in part on the value of its "tangible property as determined to be taxable under paragraph 7 of section thirty [of chapter sixty-three]." G.L. c. 63, § 32(a)(1)(i).³ The non-income measure of appellant's corporate excise is calculated taking into account: "the book value of such of

³ As an S corporation, appellant paid a tax also based, in part, on its net income in accordance with the provisions of G.L. c. 63, § 32D.

[appellant's] tangible property situated in the commonwealth on the last day of the taxable year as is **not subject to local taxation.**" G.L. c. 63, § 30(7) (emphasis added.) Accordingly, the excludability of the "book value" of the subject real property (and all personal property therein at the end of the tax year) in the total value of the corporation's tangible property for purposes of the non-income measure of the corporate excise is a function of whether the subject property is "subject to local taxation." See G.L. c. 63, § 30(7). See generally *Springfield Sugar & Products Co. v. State Tax Commission*, 381 Mass. 587, 588-89 (1980).

The Commissioner argued that the tax concessions provided for in the TIF agreement represented an exemption of the subject property from tax, and rendered the subject property "not subject to local taxation" for purposes of G.L. c. 63, § 30(7). She emphasized the references to "exemption" in G.L. c. 59, § 5, clause fifty-first, and the subject TIF agreement. The Commissioner concluded that, "[s]ince the property at issue here is not subject to local tax, it must be added into the Massachusetts taxable tangible property computation of the non-income measure of the corporate excise in accordance with the clear and unambiguous language of G.L. 63, § 30(7)." Commissioner's Brief at 9.⁴

The Commissioner's attempt to treat the tax concessions linked to the TIF agreement as a substantive exemption of the subject property from local taxation conflicts with the plain language of G.L. c. 59, § 5, clause fifty-first. This provision does not operate to provide a blanket exemption of the property from taxation. On the contrary, taxes are specifically required to be paid on the property: "[t]axes on property eligible for exemption under this clause shall be assessed only on that portion of the value of the property that is not exempt hereunder." *Id.* The tax concessions apply only to the increase in the value of the subject property over that assessed before the TIF agreement came into effect. A portion of the value added by the sought-after economic development of an eligible site is excluded from the value which is multiplied by the applicable municipal tax rate

⁴The Commissioner relied heavily on LR 03-9 to argue that the book value of the subject property should be included in the non-income measure of the corporate excise. However, that letter ruling expressly states that it does not address "whether . . . real estate which is partially exempt from local taxation under the TIF plan is included in the non-income measure of the corporate excise." LR 03-9, n.1.

to fix the amount of property tax being assessed. The effect is to subtract some of the incremental value, not to exempt the property itself from taxation.⁵

This narrow interpretation of the G.L. c. 59, § 5, clause fifty-first exemption, as applying only to a portion of an increased property value, rather than the property itself, accords with the well-settled rule "that statutes granting exemptions from taxation are . . . to be strictly construed." *Macy's East, Inc. v. Commissioner of Revenue*, 441 Mass. 797, 804 (2004) (citation omitted.) Accordingly, the subject property cannot be considered wholly exempt from tax consistent with canons of statutory construction.

Further, in the manifest legislative intent to stimulate economic development, the tax concessions available through TIF agreements under G.L. c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, parallel the favorable tax treatment accorded to corporations "engaged in manufacturing." See G.L. c. 63, § 38C. The tax benefits made available by statute to manufacturing corporations are to be construed so as to promote the economic development purposes they serve:

We have stated the broad purpose of the statute to be promotion of the general welfare by inducing new industries to locate in Massachusetts and by fostering an expansion and development of our own industries We have further stressed that the statute should be construed, if reasonably possible, to effectuate this legislative intent and purpose.

Joseph T. Rossi Corp. v. State Tax Commission, 369 Mass. 178, 181 (1975). See also *The First Years, Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2007-1004, 1010-11.

General Laws c. 40, § 59 and G.L. c. 59, § 5, clause fifty-first, serve a similar legislative purpose by encouraging economic growth in areas deemed to be much in need of it, and should likewise be construed to effectuate that legislative purpose. Cf. *Assessors of Newton v. Pickwick Ltd.*, 351 Mass. 621, 624-26 (1967) (ruling that statute conferring exemption on property of the Massachusetts Bay Transportation Authority, to benefit the

⁵ The Commissioner acknowledged and failed to refute CTS's position that "the ultimate effect of the TIF Agreement is that all of its tangible property is actually taxed, but it is taxed at a lower effective rate." Commissioner's Brief at 12.

public by alleviating pressure for fare increases, also applied to lessees).

The Commissioner's interpretation of G.L. c. 63, § 30(7), which would expand the tangible property base used to measure the corporate excise and thereby absorb a substantial portion of the agreed-upon reduction in taxable property value, would curtail the tax incentives intended by the TIF enabling statute to boost economic development. Such an interpretation, which would simply shift some of appellant's tax burden from the local to the state level, would hardly provide the tax incentive intended by the Legislature. As the Appeals Court has explained, "the principle of liberal construction militates against any interpretation or application that would create results inconsistent not only with the words but also with the public purposes expressed in the underlying statute." **Martha's Vineyard Land Bank Commission v. Assessors of West Tisbury**, 62 Mass. App. Ct. 25, 32 (2004). The Commissioner's view of the interaction of G.L. c. 40, § 59, G.L. c. 59, § 5, clause fifty-first, and G.L. c. 63, § 30(7) would "thwart or hamper the accomplishment of the [relevant] statute's obvious purpose [and should not be adopted] . . . if another construction which would avoid this undesirable result is possible." **Watros v. Greater Lynn Mental Health and Retardation Association, Inc.**, 421 Mass. 106, 113 (1995). Treating the TIF agreement as a reduction in taxable value, rather than an exemption of the underlying property, furthers the statutory goal of stimulating economic growth.⁶

Based on these principles of statutory construction, the Board ruled that real estate subject to TIF agreements remains "subject to local taxation" for purposes of G.L. c. 63, § 30(7), notwithstanding the exclusion of a portion of the value as improved from the computation of the property tax. Although the TIF statute operates to reduce the tax on a portion of the value of a taxpayer's real estate, it does not provide a complete exemption for the real estate itself. Accordingly, the Board ruled that the subject real estate is "subject to tax" for purposes of G.L. c. 63, § 30(7).

⁶ The Board also recognized that "tax statutes" like G.L. c. 63, § 30(7) "are usually construed 'against the taxing authority, and all doubts resolved in favor of the taxpayer.'" **Commissioner of Revenue v. Franchi**, 423 Mass. 817, 822 (1996) (Citations omitted.) Doubts as to whether the subject property was includible in the non-income measure of the appellant's corporate excise under G.L. c. 63, § 30(7) were accordingly resolved in favor of CTS.

On this basis, the Board determined that the Commissioner erred in including the book value of the subject property in the non-income measure of appellant's corporate excise, and ordered the abatement of the \$58,216 tax at issue, together with penalties assessed for the 2001 tax year and interest.

Accordingly, the Board issued a decision for the appellant in the present appeal.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

KENNETH DOTSON

v.

COMMISSIONER OF REVENUE

Docket No. C276419

Promulgated:

May 21, 2009

ATB 2009-568

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the appellee, the Commissioner of Revenue ("Commissioner" or "appellee"), to abate personal income taxes for the tax year ended December 31, 1999.

Commissioner Rose heard this appeal. Chairman Hammond and Commissioners Scharaffa, Egan, and Mulhern joined him in the decision 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.

J. Thomas Price, Esq. and William A. Hazel, Esq., for the appellant.

Laura S. Kershner, Esq. and Kevin M. Daly, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

At issue in this appeal is whether appellant Kenneth Dotson ("Mr. Dotson" or "appellant") was domiciled in Massachusetts at the time he received \$5,317,145.35 ("disputed income") as a result of the exercise of certain stock options on January 22, 1999. On April 15, 2000, Mr. Dotson timely filed a non-resident Massachusetts personal income tax return for the tax year 1999, which reported the disputed income as non-Massachusetts source income. He received a refund in the amount of \$312,287. Following an audit of Mr. Dotson's personal income tax return, the Commissioner issued to Mr. Dotson a Notice of Intention to Assess dated November 12, 2002, which reflected an intention to assess personal income taxes in the amount of \$320,294, along with statutory interest, based on the inclusion of the disputed income in the appellant's Massachusetts taxable income. By Notice of Assessment dated September 18, 2003, the Commissioner assessed personal income taxes in that amount, along with interest.

Mr. Dotson timely filed an Application for Abatement with the Commissioner on November 25, 2003, seeking an abatement of the additional assessment. By Notice of Abatement Determination dated July 15, 2004, the Commissioner denied Mr. Dotson's request for an abatement. Mr. Dotson timely filed his Petition Under Formal Procedure with the Appellate Tax Board ("Board") on September 13, 2004. On the basis of these facts, the Board found that it had jurisdiction to hear and decide this appeal.

The resolution of this appeal turns on whether Mr. Dotson was domiciled in Massachusetts at the time he received the disputed income, rather than in Florida, as Mr. Dotson claimed. Based on the Statement of Agreed Facts, testimony and exhibits offered into evidence at the hearing of this appeal, the Board made the following findings of fact.

Mr. Dotson, who testified at the hearing of this appeal, stated that he was born in Centerville, Tennessee, where he lived throughout his childhood and teenage years. Mr. Dotson testified that he left Tennessee to attend the University of Mississippi, where he earned both an undergraduate and a graduate degree. After receiving his master's degree in 1983, Mr. Dotson worked briefly in Memphis, Tennessee before moving to Ft. Lauderdale, Florida in 1985 for another job opportunity. In 1986, Mr. Dotson left Florida and moved to Connecticut for yet another job opportunity. He remained there until 1990, when he returned to Florida.

In 1994, while in Florida, Mr. Dotson began a business venture with a local entrepreneur. That venture ultimately became Sportsline.com, a very successful business that was later acquired by CBS. What began as a small company grew into a public company, which employed approximately 400 people by 1998. Mr. Dotson testified that he preferred a small, start-up company environment to that of a large public company, so he began to look for new employment opportunities.

Sometime in late 1997 or early 1998, Mr. Dotson was contacted by a Cambridge, Massachusetts company, Sage Enterprises, Inc., d/b/a PlanetAll ("PlanetAll"), which was a technology company in the process of developing a web-based product to allow users to synchronize their contact information and calendars. In June of 1998, PlanetAll offered Mr. Dotson the position of Senior Vice President, Marketing & Business Development. The offer was formalized in a letter dated July 1, 1998 and accepted by Mr. Dotson on July 2, 1998. He was scheduled to commence employment with the company in Massachusetts in August of 1998.

During July of 1998, while Mr. Dotson was still in Florida, he learned that Amazon.com, Inc. ("Amazaon.com") had engaged in discussions to buy PlanetAll. Mr. Dotson testified that he was not interested in working for Amazon.com for a number of reasons, including that he had no interest in moving to Seattle, Washington, where Amazon.com was based. Mr. Dotson also testified that he was not interested in going through the acquisition process with another company because his experiences with corporate acquisitions in the past had been negative.

Mr. Dotson testified that this change of events caused him to reconsider his decision to join PlanetAll, and he informed the company in late July that he was no longer interested in coming to work for them. Shortly thereafter, Mr. Dotson received a telephone call from Jeff Bezos, the founder of Amazon.com. According to Mr. Dotson, he expressed to Mr. Bezos his concerns regarding Amazon.com's potential acquisition of PlanetAll and his reluctance to move to Seattle. Mr. Dotson testified that Mr. Bezos then guaranteed him that if PlanetAll were acquired by Amazon.com and moved to Seattle, the stock options given to Mr. Dotson as a part of his employment offer would immediately vest, allowing Mr. Dotson to cash in and resign his employment. Based on this promise, Mr. Dotson once again agreed to join PlanetAll and his employment agreement was finalized on August 3, 1998. At or around this time, he resigned his employment with Sportsline.com.

Mr. Dotson travelled from Florida to Boston on August 16, 1998 and commenced work at PlanetAll the next day. In preparation for his move to Massachusetts, Mr. Dotson placed certain personal items in storage in a warehouse space in Florida, which belonged to his friend, Peri Proctor, who also testified at the hearing of this appeal. Mr. Dotson had rented an apartment in Boca Raton, Florida during the time he was working at Sportsline.com but that rental terminated in September of 1998, nearly simultaneously with his move to Boston. Much of Mr. Proctor's testimony concerned the circumstances surrounding the termination of Mr. Dotson's lease. Both Mr. Proctor and Mr. Dotson testified that they believed that Mr. Dotson's landlord did not renew the lease because of complaints from neighbors about the noise made by Mr. Dotson's dogs. After the termination of his lease, Mr. Dotson did not maintain a residence in Florida. Mr. Dotson owned two cars, one of which he brought to Massachusetts and another which he left in Florida.

Mr. Dotson arranged for the short-term rental of a furnished apartment in a building located at 345

Commonwealth Avenue in Boston. He lived at that address from August 16, 1998 through September 7, 1998. However, because that building did not allow pets, Mr. Dotson quickly looked for another apartment. Mr. Dotson had left his two beloved teacup poodles behind in Florida and planned to retrieve them when he returned to Florida for Labor Day weekend. Mr. Dotson therefore secured another short-term, furnished rental apartment, located at 335 Beacon Street, and rented that apartment from September 7, 1998 through October 5, 1998.

Ultimately, Mr. Dotson decided to buy, rather than rent, a home in the Boston area. He began looking at real estate in early August of 1998, and put down a deposit on a condominium located at 447 Marlborough Street in Boston on August 9, 1998, during a weekend visit to Boston. Mr. Dotson finalized the purchase of that condominium on September 21, 1998, and moved in immediately. The purchase price was \$480,000.

During the fall of 1998, Mr. Dotson lived in Boston and worked at PlanetAll, although he left Massachusetts on several occasions for visits to family and friends in Florida, Tennessee and elsewhere. Despite the fact that he frequented local dining establishments, Mr. Dotson testified that his focus while in Massachusetts was his job, not his social life. According to Mr. Dotson, he made few, if any, new friends in Massachusetts and socialized infrequently. Mr. Dotson did not register his car in Massachusetts or acquire a Massachusetts driver's license, nor did he change his voter registration. The record reflected that he was registered to vote in Florida from 1992 to 1999.

In early November of 1998, Mr. Dotson learned that Amazon.com was moving PlanetAll to Seattle. He tendered his resignation on or about November 8, 1998. Mr. Dotson received a letter dated November 25, 1998, detailing the terms of separation from his position. That letter reflected the company's intention to honor Mr. Bezos' oral promise to Mr. Dotson regarding the vesting of his stock options and further set the effective separation date as November 9, 1998. After retaining an attorney to review the terms of the separation agreement and engaging in brief negotiations, Mr. Dotson signed a separation agreement on January 11, 1999. That agreement was signed by Amazon.com as successor in interest to PlanetAll on January 14, 1999.

On January 22, 1999, Mr. Dotson exercised his options to purchase 91,724 shares of Amazon.com. The exercise of these stock options generated income in the amount of \$5,317,145.35, which was reflected on a Form W-2 issued to

Mr. Dotson and is the disputed income at issue in this appeal.

Aware that his employment in Massachusetts was coming to an end, Mr. Dotson decided to return to Florida. He began looking for houses there in December of 1998. In January of 1999, Mr. Dotson made an offer on a home in Florida, but that offer was not accepted until February 4, 1999. Mr. Dotson closed on that property on March 10, 1999, and moved in immediately. He sold his condominium at 447 Marlborough Street in late 1999, using the services of a broker. Mr. Dotson testified that he left Massachusetts in early March of 1999 and did not return to his Marlborough Street condominium after that time.

Thereafter, Mr. Dotson lived in Florida for some time before subsequently moving to Chicago, Illinois, where he resided at the time of the hearing of this appeal.

On the basis of the foregoing facts, the Board found that Mr. Dotson moved to Massachusetts in August of 1998, acquired a Massachusetts residence, and began a new job in Massachusetts. The Board found that in so doing, Mr. Dotson came to Massachusetts in August of 1998, with an intent to remain for an indefinite period of time. In addition, the Board found that, following the termination of the lease for his rental apartment in Boca Raton in September of 1998, Mr. Dotson did not maintain a residence in Florida.

Based on these subsidiary findings, the Board found and ruled that Mr. Dotson abandoned his Florida domicile and established a new domicile in Massachusetts by September of 1998. Further, the Board found and ruled that he remained domiciled in Massachusetts until at least March of 1999, when he returned to Florida and acquired a residence there. The Board therefore found and ruled that the income received by Mr. Dotson as a result of the exercise of his stock options was Massachusetts taxable income because Mr. Dotson was a Massachusetts domiciliary when he received that income. Based on these findings, the Board issued a decision for the appellee.

OPINION

Under G.L. c. 62 § 2, Massachusetts residents¹ are taxed, with certain limitations not relevant here, on all of their income from whatever sources derived.

¹ G.L. c. 62, § 1(f) defines resident as "any natural person domiciled in the Commonwealth."

In contrast, Massachusetts taxes non-residents only on income from Massachusetts sources. See G.L. c. 62, § 5A. Accordingly, if the appellant was domiciled in Massachusetts when he received the disputed income,² all of that income is subject to tax in Massachusetts regardless of whether the income was from Massachusetts sources.

Domicile has been defined as "the place of actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." *McMahon v. McMahon*, 31 Mass. App. Ct. 504, 505 (1991). A person's domicile is primarily a question of fact, but the elements to be considered in locating a domicile present a question of law. *Reiersen v. Commissioner of Revenue*, 26 Mass. App. Ct. 124, 124-25 (1988). The most persuasive indicators of domicile are the physical, business, social and civic activities of the taxpayer. See *Id.* at 131.

A change of domicile occurs "when a person . . . is physically present in the place and intends to make that place his home for the time at least; the fact and intent must concur." *Reiersen*, 26 Mass. App. Ct. at 125 (citing *Hershkoff v. Board of Registered Voters of Worcester*, 366 Mass. 570, 577 (1974)). Moreover, "[i]t is a general rule that the burden of showing a change of domicile is upon the party asserting the change." *Mellon Nat'l Bank & Trust Co. v. Comm'r of Corporations and Taxation*, 327 Mass. 631, 638 (1951); *Horvitz v. Commissioner of Revenue*, 51 Mass. App. Ct. 386, 394 (2001). See also *Commonwealth v. Davis*, 284 Mass. 41, 49 (1933) ("The burden of proof that his domicile was changed rested on the defendant because he is the one who asserted that such change had taken place.")

In the present appeal, it was undisputed that Mr. Dotson had been domiciled in Florida for many years prior to 1998. Because the Commissioner was the party asserting that Mr. Dotson changed his domicile to Massachusetts, the Commissioner had the burden of proving that Mr. Dotson's domicile had changed. The Board found and ruled that the Commissioner met that burden.

The evidence of record showed that Mr. Dotson moved

² Following the decisions by the Board in *Destito v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1986-122, *aff'd* 23 Mass. App. Ct. 977 (1987) and *Gersh v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 1997-502, G.L. c. 62, 5A was amended, effective tax years beginning on or after January 1, 2003, to include as Massachusetts taxable income that income earned by a taxpayer while a Massachusetts resident, regardless of whether the taxpayer was a Massachusetts resident at the time the income was received.

from Florida to Massachusetts in August of 1998 and began a job in Cambridge. Further, Mr. Dotson began the process of purchasing a \$480,000 condominium in Boston by placing a deposit on that property in August of 1998. He finalized the purchase of that condominium in September of 1998 and moved in at that time. The Board therefore found that Mr. Dotson came to Massachusetts with an "intention to remain... for an indefinite time." *McMahon*, 31 Mass. App. Ct. 504 at 505.

In connection with these changes, Mr. Dotson resigned his employment in Florida, terminated his apartment lease in Florida and thereafter maintained no residence or employment in Florida. The locus of Mr. Dotson's physical and business activities shifted from Florida to Massachusetts. See *Reiersen*, 26 Mass. App. Ct. at 131. Accordingly, the Board found and ruled that the Commissioner met her burden of proving that Mr. Dotson changed his domicile from Florida to Massachusetts.

The appellant's primary argument was that Mr. Dotson never established a Massachusetts domicile because he never abandoned his Florida domicile. In other words, he argued that he remained, at all relevant times, domiciled in Florida. The Board found this argument to be unsupported by the evidence. Although there are many factors to be considered in determining the location of one's domicile, domicile requires at a minimum an "actual residence." *McMahon*, 31 Mass. App. Ct. at 505. A person can have a home in a place where he is not domiciled but he cannot be domiciled in a place where he has no home. Following the termination of his lease in Boca Raton in September of 1998, Mr. Dotson no longer rented or owned a residence in Florida.³ The Board therefore found and ruled that Mr. Dotson abandoned his Florida domicile and established a Massachusetts domicile.

The appellant contended in the alternative that if Mr. Dotson did establish a Massachusetts domicile, he did so only for a brief period in 1998 and changed his domicile

³ At the hearing and in his post-hearing brief, the appellant emphasized the fact that it was his landlord's choice not to renew his apartment lease in Boca Raton, rather than his own choice. However, there was no evidence in the record that following the termination of his lease, Mr. Dotson attempted to secure other housing in Florida. Regardless of the circumstances surrounding Mr. Dotson's departure from that particular apartment, the evidence showed that after September of 1999, he no longer maintained a residence in Florida and had, in fact, left Florida to live near his new place of employment in Massachusetts. Accordingly, the Board did not find the circumstances surrounding the termination of Mr. Dotson's lease to be probative evidence of his place of domicile during the period at issue in this appeal.

back to Florida before the receipt of the disputed income in 1999. Because Mr. Dotson conceded for the purposes of this argument that he changed his domicile to Massachusetts in 1998, it was his burden to prove that he changed his domicile to Florida before he received the disputed income. **Mellon Nat'l Bank & Trust Co.**, 327 Mass. at 638. The Board found and ruled that he did not meet that burden.

Mr. Dotson claimed that he was no longer domiciled in Massachusetts by January of 1999, despite having a residence here, because he had no "intent" to remain here following his resignation from PlanetAll on November 8, 1998. Rather, he asserted that his intent was to return to live in Florida, as evidenced by his longstanding ties to Florida, the fact that he had placed items in storage there, left one of his two cars there, and never changed his Florida voter's registration or driver's license.

However, the Board found that the "appellant's continuing ties to Florida do not foreclose a finding of change of domicile: such change does not require that a taxpayer divest himself of all remaining links to the former place of abode, or stay away from that place entirely." **Horvitz v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports, 2002-252, 259 (citing **Gordon v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1988-367, 375). Moreover, the Board found that Mr. Dotson's ties to Massachusetts were not severed on the date of his resignation. Although Mr. Dotson tendered his resignation in November of 1998, there remained several loose ends to be tied in connection with his employment. The evidence showed that Mr. Dotson continued to actively negotiate the terms of his separation from the company and that his separation agreement was not signed by both parties until January 14, 1999. Even if Mr. Dotson intended to return to Florida following the termination of his employment with PlanetAll, he did not acquire a new residence in Florida until he closed on his home on March 10, 1999. His "intent" to establish a new domicile did not "concur" with the fact of establishment of a new domicile until that date. See **Reierson**, 26 Mass. App. Ct. at 125.

Further, although Mr. Dotson took several trips to Florida or elsewhere between November of 1998 and early March of 1999, the record showed that he continued to reside at his Marlborough Street condominium until March of 1999 and his brief departures therefrom did not affect his domicile. "Mere absences from home even for somewhat prolonged periods do not work a change of domicile." **McMahon**, 31 Mass. App. Ct. at 506. Accordingly, the Board

found that Mr. Dotson remained domiciled in Massachusetts until March of 1999.

Mr. Dotson exercised his stock options on January 22, 1999 and received \$5,317,145.35 in income. Because the Board found and ruled that he was domiciled in Massachusetts at that time, it therefore found and ruled that the disputed income was Massachusetts taxable income.

Accordingly, the Board issued a decision for the appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

STEPHANIE SPINOSA
d/b/a GOURMET DECISIONS

v.

BOARD OF ASSESSORS OF
THE TOWN OF WELLESLEY

Docket No. F294337

Promulgated:
August 6, 2009

ATB 2009-744

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain personal property located in the Town of Wellesley, owned by and assessed to the appellant under G.L. c. 59, §§ 2 and 18, for fiscal year 2008.

Commissioner Egan heard the appeal, and Commissioners Scharaffa, Rose and Mulhern joined her in a decision for the appellee. Chairman Hammond took no part in the deliberation or decision of this appeal.

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

Dennis R. Brown, Esq. for the appellant.
James A. Goodhue, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the evidence offered into the record in the hearing of this appeal, the Appellate Tax Board ("Board") made the following Findings of Fact. On January 1, 2007, Stephanie Spinosa d/b/a Gourmet Decisions ("Ms. Spinosa" or "appellant"), was the owner of certain restaurant equipment ("subject property") located at 57 Washington Street in the Town of Wellesley. Prior to June 13, 2007, the appellant used the subject property in the operation of her restaurant known as Gourmet Decisions, which is no longer in operation. The appellant sold the subject property on June 13, 2007.

The Board of Assessors of the Town of Wellesley ("assessors" or "appellee") valued the property at \$10,000 and assessed to the appellant a tax thereon, at the rate of \$9.18 per \$1,000, in the amount of \$91.80. The appellant paid the tax, with interest in the amount of \$2.39, on January 7, 2008. On that same date, the appellant timely

filed an Application for Abatement with the assessors, which they denied on January 23, 2008.

The appellant timely filed her Petition with the Board on April 16, 2008. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.¹

There are no facts in dispute in the instant appeal.² The appellant's sole contention was that she was not liable for the tax at issue because she did not own the subject property at any time during the fiscal year at issue, which ran from July 1, 2007 through June 30, 2008. The undisputed facts show that the appellant sold the subject property on June 13, 2007. However, because the appellant owned the subject property on January 1, 2007, the Board found and ruled that she was the owner of the subject property on the relevant assessment date and that the assessors therefore properly assessed the tax at issue to her.

Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

General Laws chapter 59, section 18, states, in relevant part: "All tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five, be taxed to the owner in the town where it is situated on January first." Though each taxable fiscal year begins on July first and ends on June thirtieth, by statute, the relevant date for the determination of ownership with respect to tangible personal property is the first day of January preceding the fiscal year.

¹ The appellant filed a Motion for Summary Judgment because the assessors did not file an Answer within thirty days of the service of her Petition, in accordance with 830 CMR 1.12. However, 830 CMR 1.12 allows the appellee to file an Answer later than thirty days from the service of the Petition if the Answer is filed "within such further time as the Board may allow." In the instant appeal, the Board allowed the appellee to file its Answer on October 8, 2008, and accordingly, denied the appellant's Motion for Summary Judgment.

² The appellant's petition raised the issue of overvaluation of the subject property. However, the appellant made additional filings with the Board in which she asserted that the subject "property was overvalued for the simple reason that I did not own any such taxed property during the FY2008 year." Further, the appellant offered no evidence into the record as to the value of the subject property. Accordingly, the Board found and ruled that the appellant did not meet her burden of proving that the subject property was overvalued.

The property tax is not, like an income tax and some excise taxes, assessed for a definite period of time, but as of a fixed date recurring annually, unless the legislature makes a change. The questions of ownership, of exemption, and of domicile all relate to the date when the status of the property is ascertained for the current year. The assessment, of course, may be made at a later date, but it must be levied on the person who was owner on January first.

P. NICHOLS, *TAXATION IN MASSACHUSETTS* 276 (3d ed. 1938) (internal citations omitted). Because it was undisputed that the appellant owned the subject property on January 1, 2007, the Board found and ruled that the assessors properly assessed to her the tax at issue.

The appellant's argument that she was not liable for the tax because she did not own the subject property at any time during the fiscal year at issue ignores the plain, unambiguous language of the statute, which states that personal property shall be "taxed to the owner in the town where it is situated on January first." G.L. c. 59, § 18. There is no support in the statute for the appellant's assertion that the relevant date for the determination of ownership of non-exempt, tangible personal property is July first. Rather, it is clear from the statutory scheme that when the Legislature intended for the operative date with respect to any provision to be July first, it was perfectly able to say so.

For example, G.L. c. 59, § 18 provides that "[s]hips and vessels, except those used in or designed for use in carrying trade or commercial fishing, shall be taxed to the owner as of July first in the town where it is habitually moored or docked, otherwise where it is principally situated during the calendar year." Similarly, G.L. c. 59, § 5, which exempts certain types of property from tax, provides, in relevant part "[t]he following property shall be exempt from taxation and the date of determination as to age, ownership or other qualifying factors required by any clause shall be July first of each year." G.L. c. 59, § 5.

"The primary source of the insight into the intent of the Legislature is the language of the statute." *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 853

(1983). In G.L. c. 59, § 18, with respect to the taxation of tangible personal property, the Legislature set January first as the relevant date for the determination of ownership of tangible personal property. Had the Legislature intended to make July first the relevant date for the determination of ownership of such property, it could have done so. See *Anderson Street Associates v. City of Boston & another*, 442 Mass. 812, 817 (2004) ("Had the Legislature intended G.L. c. 121A to guarantee tax concessions to be permanent, it could have included statutory language to that effect. It has done so elsewhere."); *Commissioner of Revenue v. Cargill, Inc.*, 429 Mass. 79, 82 (1999) ("Had the Legislature intended to limit the credit in the manner advocated by the commissioner, it easily could have done so.") Accordingly, the Board found and ruled that the relevant date for the determination of the ownership of the subject property for the fiscal year at issue was January 1, 2007.

"The burden of proof is upon the petitioner 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)). Because the appellant owned the subject property on the relevant assessment date, and offered no evidence to prove that it was overvalued, she did not carry her burden of proving that she was entitled to an abatement. Accordingly, the Board issued a decision for the appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Frank J. Scharaffa, Commissioner

A true copy,

Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

STRAIGHT AHEAD MINISTRIES, INC. v. BOARD OF ASSESSORS OF
THE TOWN OF HUBBARDSTON

Docket No. F293888

Promulgated:
January 5, 2009

ATB 2009-1

This is an appeal filed under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Hubbardston ("assessors") to grant an exemption under G.L. c. 59, § 5, Third ("Clause 3") and abate the full amount of real estate taxes on property assessed to Straight Ahead Ministries, Inc. ("SAM" or "appellant"), under G.L. c. 59, §§ 11 and 38, for fiscal year 2008.

Commissioner Egan heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Mulhern joined her in the decision for the appellant.

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

Henry J. Lane, Esq. for the appellant.
Ellen Hutchinson, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2007, SAM was the assessed owner of certain real estate in the Town of Hubbardston located at 39 Burnshirt Road ("subject property"). The subject property consists of approximately 6.5 acres and is improved with multiple buildings. For fiscal year 2008, the assessors assessed a tax on the subject property, at the rate of \$9.43 per \$1,000, in the total amount of \$18,625.29, which included a \$261.31 assessment under the Community Preservation Act ("CPA").¹

On February 13, 2007, in accordance with Clause 3, the appellant timely filed its Form 3ABC for fiscal year 2008,

¹ While neither the actual tax bill nor the property record card were introduced into evidence, the Board did determine that the subject property was likely assessed at \$1,947,400 after considering the amount of tax (not including the amount attributable to the CPA) paid and after taking judicial notice of the tax rate.

with a copy of its Form PC attached, with the assessors.² On September 24, 2007, the assessors determined that the appellant was not eligible for the exemption under Clause 3. On December 24, 2007, in accordance with G.L. c. 59, § 5B, the appellant seasonably filed its direct appeal of the assessors' determination with the Appellate Tax Board ("Board").³

At the hearing of this appeal, the appellant presented its case-in-chief through the testimony of John Kingsley, SAM's New England Director and Director of Outreach, and the submission of several exhibits, including: a brochure describing SAM's Straight Ahead Academy ("Academy"); a memo to the assessors in support of SAM's request for exemption; certain financial statements for tax years ending March 31, 2006 and 2007; and a certificate of exemption from Massachusetts sales tax (Form ST-2). In support of their denial of the exemption, the assessors did not call any witnesses, but submitted several jurisdictional documents and a print-out of a web page from SAM's website, as well as an affiliation agreement. The assessors also cross-examined Mr. Kingsley. Neither party submitted pre- or post-trial briefs. Based on the evidence and logical inferences drawn therefrom, the Board made the following findings of fact.

At all relevant times, SAM was a faith-based organization that was organized for charitable purposes and was granted tax-exempt status for federal tax purposes under Internal Revenue Code ("IRC") 501(c)(3). SAM's mission included ministering to juvenile offenders' spiritual, educational, and physical needs. SAM was also a Massachusetts corporation that had as one of its purposes the ownership and operation of the Academy, which was a temporary group home for young men who had recently been in a juvenile detention center. The Academy was not a separate corporation or entity.

At all relevant times, there were nine buildings on the subject property's 6.5-acre parcel. The buildings were used for various housing, educational, and related purposes. One of the buildings was used as a dormitory for the youth residing at the Academy; another was the Academy

² The appellant also timely filed its Form PC with the Division of Public Charities within the Massachusetts Office of the Attorney General.

³ Pursuant to G.L. c. 59, § 5B, the "three months," within which a taxpayer must appeal a determination by the assessors that the Clause 3 exemption does not apply, means three calendar months measured from, but excluding, the date of the assessors' determination. See *Berkshire Gas Co. v. Assessors of Williamstown*, 361 Mass. 873 (1972) (rescript).

Director's home; and there was a three-bedroom apartment for the Vocational Director.⁴ Additionally, there was a pool house, a warehouse used for carpentry vocational training, and an automotive and small engine shop, plus several storage or utility buildings. The young men who attended the Academy occupied their rooms in the dormitory at the Academy in a similar way that college students occupy their dormitory rooms at their college. SAM retained virtually complete control over the subject property and the improvements; it both used and integrated them into its charitable mission deployed at the Academy.

At all relevant times, there were two primary components to SAM's revenue -- the larger part consisted of tax-deductible gifts or donations while the other was made up of government payments and grants. The government contributions included tuition payments from the Commonwealth. In addition, SAM's employees raised financial support from a variety of sources to fund their modest stipends for working at the Academy.

At all relevant times, the Academy provided young men who had recently been discharged from juvenile detention facilities with transitional, educational, and vocational training and opportunities with a view toward returning them, as productive members, to the community. It was a short-term residential program based on Judeo-Christian religious principles. The Academy provided these services to young men who were between the ages of 16 and 20, were interested in leadership, had been approved by the Department of Youth Services ("DYS") to attend, and were open to spiritual growth. At all relevant times, there were less than a dozen students attending the Academy. The Massachusetts judicial system oversaw the young men who attended the Academy and assigned them case workers. DYS paid tuition for each of the young men attending the Academy, which covered only a portion of the costs associated with the program. There were no benefits, other than modest salaries paid to the Academy's employees, that flowed to the employees, officers, directors, or shareholders of SAM.

The assessors argued that the subject property was not exempt from real estate tax because the Academy was not, in their view, a charitable venture and the work performed at the Academy was not consistent with SAM's charitable

⁴ As of January 1, 2007, part of the lower portion of the building in which the Vocational Director resided was used for storage by a non-charitable entity. As of July 1, 2007, "the date of determination as to age, ownership or other qualifying factors required by [Clause 3]" for fiscal year 2008, that use had apparently ended.

mission. Based on all of the evidence and for reasons set out more fully in the Opinion below, the Board found and ruled that, at all relevant times, SAM was a charitable organization within the meaning of Clause 3 and SAM occupied the subject property, through the Academy, for the charitable purposes for which it was organized. Accordingly, the Board found that SAM was entitled to the Clause 3 exemption for the subject property for fiscal year 2008, and therefore decided this appeal for the appellant. On this basis, the Board granted an abatement for the full amount of the tax assessed.

OPINION

Clause 3 provides an exemption for:

Real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations.

A taxpayer claiming exemption under Clause 3 must demonstrate that the property fulfills three requirements: the property must be owned by a charitable organization; the property must be occupied by a charitable organization; and the property must be used to further a charitable purpose. See *Jewish Geriatric Services, Inc. v. Assessors of Longmeadow*, Mass. ATB Findings of Fact and Reports 2002-337, 351, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing *Assessors of Hamilton v. Iron Rail Fund of Girls Club of America*, 367 Mass. 301, 306 (1975)). "Any doubt must operate against the one claiming an exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption." *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 257 (1936). "It is well established that a party claiming exemption bears a grave burden of proving the claim." *Kings' Daughters and Sons Home v. Assessors of Wrentham*, Mass. ATB Findings of Fact and Reports 2002-427, 452 (citing *Meadowbrooke Daycare Center, Inc. v. Assessors of Lowell*, 374 Mass. 509, 513 (1978)).

I. At all relevant times, SAM was a charitable organization under Clause 3 and operated the Academy as a public charity for purposes of Clause 3.

"For purposes of local property tax exemption, the term 'charitable' includes more than almsgiving and assistance to the needy." *New England Legal Foundation v. City of Boston*, 423 Mass. 602, 609 (1996). The definition accepted by the Massachusetts Courts and this Board is that charity is:

a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of **education or religion**, by relieving their bodies from disease, suffering or constraint, by erecting or maintaining public buildings or works or otherwise lessening burdens of government. (Emphasis added.)

Boston Symphony Orchestra, 294 Mass. at 254-55 (quoting *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867)).

However, espousing a recognized charitable purpose does not, in itself, mean that an organization operates as a public charity. See *American Inst. for Economic Research v. Assessors of Great Barrington*, 324 Mass. 509, 513 (1949). The organization "must prove that it is in fact so conducted that in actual operation it is a public charity." *Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313 (1946). The test for determining whether an organization is operating as a public charity is two-fold:

"An institution will be classed as charitable if the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose. But if the dominant purpose of its work is to benefit its members or a limited class of persons it will not be so classed, even though the public will derive an incidental benefit from such work."

Harvard Community Health Plan v. Assessors of Cambridge, 384 Mass. 536, 543 (1981) (quoting *Mass. Medical Soc'y v. Assessors of Boston*, 340 Mass. 327, 332 (1960)).

A. The services provided by SAM at the Academy relieved some burdens of government and were traditionally charitable in nature.

The first component of the above-recited charitable test requires the organization to "perform activities which advance the public good, thereby relieving the burdens of

government to do so." *Sturdy Memorial Foundation v. Assessors of North Attleborough*, Mass. ATB Findings of Fact and Reports 2002-203, 224, *aff'd*, 60 Mass. App. Ct. 573 (2004) (citing *Molly Varnum Chapter DAR v. City of Lowell*, 204 Mass. 487 (1909)). "The fact that an organization provides some service that would, in its absence, have to be provided by the government, 'is frequently put forward as the fundamental reason for exempting charities from taxation.'" *Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 105 (2001) (quoting *Assessors of Quincy v. Cunningham Foundation*, 305 Mass. 411, 418 (1940)).

Ordinarily, the Court examines and weighs a number of "non-determinative factors" in determining whether an organization is charitable. See *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732 (2008). These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay, see *New England Legal Found.*, 423 Mass. at 610; whether it charges fees for its services and how much those fees are, see *Assessors of Boston. v. Garland Sch. Of Home Making*, 296 Mass. 378, 390 (1937); and whether it offers its services to a large or "fluid" group of beneficiaries and how large and fluid that group is. See *New England Legal Found.*, 423 Mass. at 612; *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 601 (1977). The significance of these factors depends on the dominant purposes and methods of the organization. *New Habitat, Inc.*, 451 Mass. at 733. The closer an organization's dominant purposes and methods are to "traditionally charitable" purposes and methods, the less significant these factors will be in the determination of the organization's charitable status under Clause 3. See *New Habitat, Inc.*, 451 Mass. at 733. The further an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be. See *id.*

In *New Habitat, Inc.*, the appellant provided long-term housing for persons with acquired brain injury and promoted the well-being of its residents by providing them with educational programs, personal assistance programs, and programs to improve their physical and psychological health. The organization, which could accommodate a maximum of four residents, received only three applicants for admission. *Id.* at 730. The Court found that *New Habitat, Inc.* had purposes and methods close to traditionally charitable ones because it tended to the injured and sought to relieve them of the hardships and

constraints that afflict those with acquired brain injury. *Id.* at 734. The Court further found that because New Habitat's dominant purposes and methods were traditionally charitable, the fact that the organization charged fees for its services played a less significant role in the determination of its charitable status. *Id.* Moreover, the Court noted that the number of its beneficiaries was also less significant the closer its dominant purposes and methods were to traditionally charitable ones. *Id.* at 737. The Court held that New Habitat's purposes and methods coincided with traditionally charitable ones and the fact that it had a relatively small number of beneficiaries and charged a fee played less significant roles in the determination of its charitable status. *Id.* at 734-37.

In the present appeal, SAM operated the Academy, which served as a temporary group home for young men, between the ages of 16 and 20, who had recently been in a juvenile detention center. SAM was granted IRC § 501(c)(3) tax-exempt status, which is another non-determinative factor in determining eligibility for an exemption under Clause 3. *See, e.g., H-C Health Services v. Assessors of South Hadley*, 42 Mass. App. Ct. 596, rev. denied, 425 Mass. 1104 (1997). The Academy was funded primarily by governmental grants and tuition payments, as well as private gifts or donations. There were no revenues or assets, other than modest salaries, that were distributed to employees, officers, directors, or shareholders of SAM or the Academy. Furthermore, the employees raised their own stipends from other organizations such as churches and non-profit organizations, and often worked for less than their projected salaries. Moreover, the young men committed to the Academy by DYS were each assigned a caseworker who oversaw and provided input into their individual programs to insure that the programs met any of the judicial system's requirements and individual rehabilitative needs. The young men were placed in the Academy by a state agency, and the agency paid a modest fee for each young man who attended. The Board found that, at all relevant times, the Academy was committed to preparing youth for a healthy transition out of the juvenile judicial system into society. SAM's work through the Academy benefited society in general and eased the burden on government. It enabled the Commonwealth to meet its burden of rehabilitating wayward young men and helping them successfully transition back into society. Furthermore, the Commonwealth helped pay for the young men to attend the Academy.

The Board found that, in this instance, it was logical for it to infer that where the government financially

contributed to SAM to perform services for it through the Academy, SAM was assuming a "burden" of government. SAM's purposes and methods in running the Academy were very similar to traditionally charitable ones, such as those that attend to social, vocational, spiritual, and/or educational needs. Therefore, the Board recognized that the dominant work done by SAM at the Academy was for the public good and was synonymous with a traditionally charitable endeavor. Accordingly, the Board found and ruled here that, at all relevant times, the services provided by SAM at the Academy relieved some burdens of government and were traditionally charitable in nature.

B. SAM's benefits were available to a sufficiently broad segment of the population to qualify as a public charity.

The second component of the above-recited charitable test requires that "the persons who are to benefit must be 'of a sufficiently large or indefinite class so that the community is benefited by its operations.'" *Western Mass. Lifecare*, 434 Mass. at 103-104 (quoting *Harvard Community Health Plan*, 384 Mass. at 543). "An organization 'operated primarily for the benefit of a limited class of persons,' such that 'the public at large benefits only incidentally from [its] activities,' is not charitable." *Western Mass. Lifecare*, 434 Mass. at 104 (quoting *Cumington School of the Arts, Inc.*, 373 Mass. at 600). "While there is no 'precise number' of persons who must be served in order for an organization to claim charitable status, and 'at any given moment an organization may serve only a relatively small number of persons,' membership in the class served must be 'fluid' and must be 'drawn from a large segment of society or all walks of life.'" *Western Mass. Lifecare*, 434 Mass. at 104 (quoting *New England Legal Found.*, 423 Mass. at 612). Even though, at any given time, an organization may serve only a relatively small number of persons, it nevertheless may be considered or remain a charitable organization. *New England Legal Found.*, 423 Mass. at 612. The fact that there are a relatively small number of beneficiaries plays a less significant role in the determination of its charitable status if the organization's purposes and methods are close to traditionally charitable one. *New Habitat, Inc.*, 451 Mass. at 737. "[S]election requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption." *Western Mass. Lifecare*, 434 Mass. at 104. But "[t]he fact that an organization charges fees for its services does not

preclude a determination that the organization is charitable." *Id.* (citing *Garland School of Home Making*, 296 Mass. at 389; *New England Sanitarium v. Assessors of Stoneham*, 205 Mass. 335, (1910)). However, when the fees charged effectively limit access to the services provided, an organization cannot be regarded as charitable. *Western Mass. Lifecare*, 434 Mass. at 105; *Boston Symphony Orchestra*, 294 Mass. at 256; *New England Sanitarium*, 205 Mass. at 341.

The appellant here contended that the services it provided were inclusive to a sufficient segment of the population. At all relevant times, the Academy was open to young men, ages 16 and 20, who were planning on independent living and were interested in spiritual growth and leadership. Furthermore, there was no religious test or requirement that the youth have a Judeo-Christian background before being accepted into the Academy. The assessors contended that the Academy was not available to a wide enough range of persons because of the age requirement and the fact that there were very few youth who actually benefited from the Academy. Conversely, the appellant contended that there are private high schools, such as St. John's High School in Shrewsbury, and many colleges, such as Smith College, that are limited to men or women, have age requirements, and whose applicants have to show leadership characteristics before they are accepted. See, e.g., *Smith College v. Board of Assessors*, 385 Mass. 767 (1982); *Mt. Herman Boys' School v. Gill*, 145 Mass. 139 (1887). These institutions are exempt and have been classified as charitable organizations. Furthermore, the Academy's requirements are similar to many other religious-based exempt institutions that provide educational and spiritual services. See, e.g., *South Lancaster Academy v. Lancaster*, 242 Mass. 553, 558 (1922); *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 540 (1956). See also *Springfield Y.M.C.A. v. Board of Assessors*, 284 Mass. 1, 3 (1933).

Moreover, the fees charged by SAM for attendance at the Academy did not limit access to the services that it provided. A state agency paid a modest fee for each student to attend the Academy. That fee was supplemented by SAM's fundraising to meet SAM's cost of servicing the students at the Academy. The Board found and ruled that SAM's acceptance of the modest fees paid by a state agency indicated, as with nursing homes that accept a relatively high percentage of patients who require government subsidized Medicaid payments, see, e.g. *H-C Health Services, Inc. v. South Hadley*, 42 Mass. App. Ct. at 598

and *Fairview Extended Care Services, Inc. v. Assessors of Danvers*, Mass. ATB Findings of Fact and Reports 1997-800, 805, that, at all relevant times, the Academy's benefits were available to a broad range of people. Furthermore, SAM's fee structure and screening procedure did not significantly narrow the pool of potential young men who could utilize its services and programs. At any rate, because SAM's dominant purposes and methods were traditionally charitable, these factors hold less significance. See *New Habitat, Inc.*, 451 Mass. at 733.

Accordingly, the Board found and ruled that the appellant met its burden of proving that its benefits were available to a sufficiently broad segment of the population to qualify as a public charity. Further, the Board found and ruled that SAM not only provided services to a sufficiently broad population of young men, but that it also relieved some government burden. Therefore, the Board found and ruled that, at all relevant times, SAM was a charitable organization for purposes of Clause 3.

II. At all relevant times, the subject property was occupied by SAM through the Academy.

This part of the three-prong test under Clause 3 was never in dispute in this appeal. Regardless, an examination by the Board of SAM's occupation of the subject property (through its Academy) is still appropriate.

In the instant appeal and at all relevant times, SAM, through the Academy, ran a short-term residential program for young men who had been recently released from a juvenile detention facility. The young men lived in a dormitory along with members of the staff. There also were living quarters for the Academy's administration and buildings devoted to educational, vocational and related ancillary uses. The Board found and ruled that the dormitory and other buildings were occupied by SAM, through the Academy, and not the young men who were afforded a temporary home there. The young men had no interest in their dormitory rooms and no statutory protection from eviction; they were merely lodgers. The young men's occupation of dormitory rooms at the Academy was equivalent to a college student's occupation of a college dormitory room. SAM retained virtually complete control over the subject property and the improvements and used and integrated them into its charitable mission deployed at the Academy. Therefore, the Board found and ruled, in conformity with *Franklin Square House v. Boston*, 188 Mass. 409, 411 (1905) ("The occupation of the property [a home

for working girls at moderate cost] is that of the corporation itself, and not of those to whom it affords a home, just as the occupation of a college dormitory or refectory is that of the institution of learning rather than that of its students") and G.L. c. 59, § 5, cl. 3(e), that SAM occupied the subject property and the improvements thereon for the purposes of Clause 3. See also *M.I.T. Student House, Inc. v. Assessors of Boston*, 350 Mass. 539, 540 (1966).

III. At all relevant times, the subject property was used to further SAM's charitable purpose.

The evidence reveals that at all relevant times, SAM's primary mission, function and purpose, was "to provide spiritual and educational services to troubled teens while in institutions and upon release to the community." SAM's witness, John Kinsley, testified that the charitable purpose of SAM was to provide educational and vocational benefits and spiritual direction to young men who had been in a juvenile detention center and to help them transition back into society. At the hearing, SAM also introduced an independent auditor's report into evidence, which described SAM as "a non-profit educational organization." The evidence revealed that the Academy had several different educational components, including, a GED program for the young men who did not have their high-school diploma and vocational programs in which the young men learn basic carpentry, automotive, and auto-body repair skills. In addition, the staff at the Academy assisted the young men with job applications and interviewing skills.

In response to the assessors' contention that the appellant was also a religious organization, which somehow conflicted with its education component, and, therefore, rendered it ineligible for a Clause 3 exemption, the Board noted that SAM readily admitted that it was a faith-based organization like every other religious college, but it also convincingly demonstrated that the Academy was an educational institution. Moreover, the Board found and ruled that the fact that there was a religious component to the Academy's program did not disqualify the appellant from a Clause 3 tax exemption for the subject property. See *Boston Symphony Orchestra*, 294 Mass. at 254-55 ("[charity is a] gift . . . by bringing [] hearts under the influence of education or religion"). See also *South Lancaster Academy*, 242 Mass. at 558-59; cf. *Wesleyan Academy*, 99 Mass. at 602-604. In addition, the Academy had no religious test or requirement that the young men have a

Judeo-Christian background before being accepted into the Academy; the young men must simply be open to spirituality. Despite the assessors' protestations, the Board found that the Academy was quite clearly an educational institution, with a religious component, that was partially funded by the government to provide GED, vocational, and personal-growth programs to young men recently released from juvenile detention facilities. On the basis of all of the evidence, the Board found and ruled that, at all relevant times, the subject property was used for educational purposes, in furtherance of SAM's charitable purpose. Accordingly, the Board found and ruled that SAM used the subject property to further its charitable purpose.

IV. Conclusion

In sum, the Board found and ruled that, at all relevant times, the dominant purpose of SAM's work was charitable; that the programs and services, which SAM offered at the subject property through the Academy, were available to a sufficiently broad cross-section of the population and did relieve some burden of government. Furthermore, the Board found and ruled that, at all relevant times, SAM, not the individual participants in the Academy's programs, occupied the subject property. Finally, the Board found and ruled that, at all relevant times, the appellant used the subject property and all of the buildings thereon in furtherance of its charitable purpose, which was "traditional" in nature. Therefore, for fiscal year 2008, the Board found and ruled that SAM qualified as a charitable organization under Clause 3 and for the Clause 3 exemption on the subject property, which SAM used for the Academy.

On this basis, the Board decided this appeal for the appellant and granted an abatement of the full amount of the taxes assessed for fiscal year 2008.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JAMES WIGGINS

v.

BOARD OF ASSESSORS OF
THE CITY OF BOSTON

Docket No. X299727

Promulgated:

January 13, 2009

ATB 2009-34

This is an appeal under the informal procedure pursuant to G.L. c. 58A, § 7A and G.L. c. 59, § 64 and 65, from the refusal of the Board of Assessors of the City of Boston ("assessors") to grant a residential exemption pursuant to G.L. c. 59, § 5C to appellant James Wiggins ("appellant") for fiscal year 2008.

Commissioner Scharaffa heard the assessors' motion to dismiss and the merits of appellant's claim for a residential exemption. Commissioner Scharaffa denied the motion to dismiss and was joined by Chairman Hammond and Commissioners Egan, Rose and Mulhern in the decision for the appellant.

These findings of fact and report are made on the Board's own motion¹ pursuant to G.L. c. 58A, § 13 and 831 CMR § 1.32 and are promulgated simultaneously with the Board's decision.

James Wiggins, pro se for the appellant.

Laura Caltenco, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

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

I. PURCHASE AND USE OF SUBJECT PROPERTY

In July of 2006, appellant purchased and moved into the property located at 20 Walnut Park 1, in the Roxbury section of Boston ("subject property"). Accordingly, appellant was the owner of the subject property as of the January 1, 2007 assessment date for fiscal year 2008.

¹ The Board issues these findings *sua sponte* to provide guidance regarding the residential exemption application and appeal procedure and the criteria for qualification for the exemption, issues which affect numerous similarly situated taxpayers and appeals pending before this Board.

Appellant submitted documentary evidence showing that he occupied the subject property as his principal residence before, on, and after January 1, 2007. Monthly bills from Keyspan addressed to appellant at the subject property for gas service provided to the subject property covered charges for December, 2006 through the end of 2007. A bill from Comcast dated January 1, 2007 addressed to appellant at the subject property showed new charges for the period January 7, 2007 through February 6, 2007, as well as a previous balance that appellant had paid on December 15, 2006. Appellant also produced letters dated December 20, 2006 and May 24, 2007 from the Boston Public Schools, addressed to him at the subject property as the parent of a Boston Public School student. In addition, appellant submitted into evidence Internal Revenue Service ("IRS") Forms 1098 for calendar years 2006 and 2007, generated by Bank of America, N.A., the holder of the mortgage on the subject property, which were addressed to appellant at the subject property. The Forms 1098 showed, among other information, the amount of deductible home mortgage interest that appellant paid during 2006 and 2007. Appellant deducted the home mortgage interest amounts shown on the Forms 1098 on his federal income tax returns for the corresponding years.

II. EXEMPTION "APPLICATION" AND APPEAL

Purporting to act under G.L. c. 59, 5C, the assessors mailed to the appellant, at the subject property address, a form entitled "Residential Exemption Application" (hereinafter, the "form"). According to the testimony of Ellen McLaughlin, the assessors' Executive Secretary, the Registry of Deeds informs the assessors of the transfer of Boston property, including the identity of the purchaser, within a short time of the transaction. Accordingly, the assessors knew that appellant was the owner of the subject property shortly after his July, 2006 purchase and knew that appellant was the proper party to whom the form should be sent.

The form instructed "applicants" to "respond by October 1, 2007." The form also advised appellant that: Every taxpayer in the City of Boston who **owns residential property and occupies the property as his or her principal residence on January 1, 2007** may be eligible for the residential exemption for Fiscal Year 2008. For the purposes of this exemption, the principal residence is the **address**

from which your Massachusetts income tax is filed. [emphasis added]

The form went on to advise appellant that he must complete the form and return it to the assessors in order to receive the residential exemption. The form also advised him that he "may file an application for exemption within 3 months of the mailing of the third quarter tax bill."

Complying with the terms of the form, the appellant completed the form, acknowledging that he owned and occupied the subject property as his principal residence on January 1, 2007, and filed it with the assessors on August 30, 2007, well in advance of the assessors' deadline of October 1, 2007.

Some four months later, the assessors purported to "deny" the appellant's "application" for residential exemption. The purported denial notice included a decision date of December 31, 2007 and a mailing date of the same day. The notice advised appellant that:

Taxpayers who disagree with the decision of the Assessing Department have the right to appeal. Appeals must be filed with the Appellate Tax Board of the Commonwealth of Massachusetts within three months of the date of decision.

The fiscal year 2008 third quarter actual tax bill for the subject property was also mailed on December 31, 2007. The bill did not reflect the allowance of a residential exemption. Appellant timely paid the tax assessed for fiscal year 2008. The Board received appellant's appeal on Friday, April 4, 2008, in an envelope postmarked April 3, 2008.

III. MOTION TO DISMISS

The assessors filed a motion to dismiss appellant's appeal on the ground that he filed his appeal with the Board more than three months after the December 31, 2007 denial of appellant's application for residential exemption. However, for the reasons detailed in the Opinion which follows, the assessors' practice of requiring an application for exemption prior to the issuance of a tax bill, and their argument that the 3-month appeal period begins on or before the date of issuance of the tax bills when they issue a denial of the application, is inconsistent with the language of § 5C, and improperly

truncated the application and appeal process.² This practice, together with the forms and notices used by the assessors, was misleading and could be, as it was in the present appeal, a "trap for unwary" taxpayers. See, e.g., *Phifer v. Assessors of Cohasset*, 28 Mass. App. Ct. 552, 555 (1990).

On the facts of this appeal, the Board finds and rules that: (1) the assessors' act of requiring appellant to file an "application" for exemption prior to the mailing of the tax bill caused appellant to file a premature application for exemption under § 5C; (2) the assessors' purported denial of the premature application was therefore a nullity; (3) the earliest possible date on which appellant could file an application for exemption under § 5C was January 2, 2008, the first business day after issuance of the tax bill, and the Board therefore deems that appellant's application was filed on that date; (4) the earliest date that the assessors could have acted on the appellant's application was therefore January 2, 2008; (5) the assessors took no action on appellant's application for exemption within three months of its January 2, 2008 deemed filing date; (6) the application for exemption was therefore deemed denied on April 2, 2008; and (7) appellant's April 4, 2008 filing of his appeal to the Board was timely.

On the basis of these facts, the Board finds and rules that it has jurisdiction over this appeal and, in the decision promulgated simultaneously with these findings, denies the assessors' motion to dismiss.

IV. QUALIFICATION FOR RESIDENTIAL EXEMPTION

Appellant presented ample, credible documentary evidence to establish that the subject property was his principal residence on January 1, 2007. The Keyspan and Comcast bills, the letters from the Boston School Department, and the IRS forms described above all support a finding that the subject property was appellant's principal residence before, on, and after January 1, 2007. Further, appellant offered uncontroverted testimony that he moved into the subject property shortly after his purchase of the property and that he used it as his principal, and only, residence since that time.

² The assessors may, of course, request information regarding a taxpayer's qualification for the residential exemption prior to the issuance of the tax bill. They may not, however, advance the statutory application and appeal deadlines.

The assessors' offered no evidence or argument challenging the fact that appellant purchased the subject property in July of 2006 and resided there at all material times thereafter. Rather, their sole challenge to appellant's qualification for the exemption was that appellant did not report the address of the subject property as his record address on his 2006 state and federal income tax returns. Appellant used the address of his place of business -- P.O. Box 272, Medford, MA 02155 -- as the record address on his state and federal income tax returns. The assessors maintained that a taxpayer must use the address of the property for which an exemption is claimed on the taxpayer's Massachusetts income tax return in order to qualify for the exemption.

For the reasons detailed in the following Opinion, the Board finds and rules that appellant met his burden of proving that he owned and used the subject property as his principal residence as of January 1, 2007 and that his use of the subject property qualified it as his principal residence for income tax purposes. Accordingly, the Board rejects the assessors' mechanical analysis that the subject property's address must appear as the record address on his income tax returns in order to qualify for the residential exemption. Therefore, simultaneously with the promulgation of these findings, the Board issues a decision for the appellant granting an abatement in the amount of \$1,488.57.

OPINION

I. MOTION TO DISMISS

The procedure for applying for a residential exemption is governed by G.L. c. 59, § 5C, which provides in pertinent part that:

In those cities and towns in which an exemption is made available hereunder, a taxpayer aggrieved by the failure to receive such residential exemption may apply for such residential exemption to the assessors, in writing, on a form approved by the commissioner within three months after the date on which the bill or notice of assessment was sent.

The above language is the only mention in § 5C of an application to the assessors for a residential exemption. There is nothing in § 5C that requires an application process prior to the issuance of the tax bill. By

measuring the three-month appeal period from the date that the tax bill is sent, the language of the statute makes clear that the taxpayer is aggrieved when his tax bill does not reflect a residential exemption.

Further, the language in § 5C that a taxpayer "may apply . . . to the assessors, in writing, on a form approved by the commissioner" mirrors the language in G.L. c. 59, § 59, which provides that taxpayers "may apply in writing to the assessors, on a form approved by the commissioner, for an abatement" of real estate tax. In each case, it is the assessors' action as reflected on the tax bill which triggers the time period for appeal.

In a similar context, taxpayers can be "aggrieved" by the denial of a charitable exemption when their tax bill does not reflect the exemption, and they have a right of appeal measured from the date that the tax bill is mailed. See *Kings Daughters & Sons Home v. Assessors of Wrentham*, Mass. ATB Findings of Fact and Reports, 2007-1043, 1054 (ruling that the "determination" by which a taxpayer is aggrieved is the issuance of a tax bill which does not reflect a charitable exemption).

By requiring a taxpayer to file an "application" prior to the issuance of the tax bill, the assessors have misread § 5C so as to improperly limit the time period for appealing their denial of a residential exemption. In the present appeal, the tax bill was mailed on December 31, 2007. The taxpayer should have had three months, or until March 31, 2008, to apply to the assessors for the exemption. The assessors would then have three months to act on the application and, if the application was denied or deemed denied, the taxpayer would have an additional three months from the denial to appeal to the Board. See G.L. c. 59, §§ 64 and 65. Instead, by requiring a pre-bill application and purportedly denying the application on the date the tax bills were issued, the assessors have improperly attempted to advance the deadline for applying for the exemption and appealing its denial to the Board.

In addition to being contrary to the procedure mandated in § 5C, the form that the assessors provided to appellant for the pre-bill application injects confusion into the process. The first sentence of the form, which states that every Boston taxpayer "who owns residential property and occupies the property as his or her personal residence on January 1, 2007 may be eligible for the residential exemption for Fiscal Year 2008," is an accurate statement of the law.

However, in the next sentence, inaccuracy and confusion are introduced when the form provides that "the principal residence is the address from which your Massachusetts income tax return is filed." There is nothing in the statute that supports that statement: there is no mention of a tax return, much less a "Massachusetts income tax return," and there is nothing to suggest that the address "from which" the return is filed has any bearing on the exemption. All that the statute provides is that property must be used as a taxpayer's principal residence "for income tax purposes."

Moreover, the form also provides that "[i]f the credit does not appear on your Fiscal Year 2008 third quarter tax bill, you may file an application for the exemption within 3 months of the mailing date of the third quarter tax bill." Although this statement is consistent with § 5C, it is internally inconsistent with the rest of the form, which purports to require an application by a prescribed date before the tax bill is issued, in this case October 1, 2007, as well as being inconsistent with the "denial" form that the assessors issued on the same day as the tax bill. A taxpayer, particularly a *pro se* homeowner attempting to decipher the assessors' various conflicting and inaccurate pronouncements, would be understandably confused as to the proper procedure to secure a residential exemption.

"Tax laws should be construed and interpreted as far as possible so as to be susceptible of easy comprehension and not likely to become pitfalls for the unwary." *Assessors of Brookline v. Prudential Insurance Company*, 310 Mass. 300, 313 (1941). In addition, statutes embodying procedural requirements should be construed without "creating snares for the unwary." *SCA Disposal Services of New England, Inc. v. State Tax Commission*, 375 Mass. 338, 340 (1978). Further, it is reversible error to interpret a statute in a manner that creates "a trap for the unwary and inexperienced in light of the plain language of the statute. Particularly is this so where a lay taxpayer is proceeding *pro se*, perhaps (if not probably) incautiously." *Phifer v. Assessors of Cohasset*, 28 Mass. App. Ct. 552, 555 (1990).

The plain language of § 5C provides for an application to the assessors for a residential exemption only after the tax bill is mailed. Accordingly, appellant's application, filed at the direction of the assessors prior to the issuance of the tax bill for the subject property, was premature. Such prematurity, however, does not deprive the Board of jurisdiction over this appeal. See *Becton*,

Dickinson and Company v. State Tax Commission, 374 Mass. 230, 234 (1978). ("It is well settled in similar cases, where a statute required action within a certain time "after" an event, that the action may be taken before that event.").

However, the fact that the application was filed prematurely does not allow the assessors to accelerate the statutory application and appeal procedure. The earliest date that appellant could file a residential exemption application under the statutory procedure established by § 5C was January 2, 2008, the first business day after the mailing of the fiscal year 2008 tax bills. Therefore, January 2, 2008 was also the earliest date that the assessors could have acted on the application. Issuance of a denial prior to January 2, 2008 is contrary to § 5C and, therefore, a nullity. See *Stagg Chevrolet, Inc. v. Bd. of Water Comm'rs*, 68 Mass. App. Ct. 120, 121 (upholding Board's ruling that notice of decision that did not comply with applicable statute was "ineffective for the purpose of determining when to commence the running of the three-month appeal period."); see also *Cardaropoli v. Assessors of Springfield*, Mass. ATB Findings of Fact and Reports 2001-913, (ruling that a notice of decision mailed beyond the statutory period did not begin the three-month appeal period).

The assessors took no action on the application within three months after January 2, 2008 and, therefore, the application was deemed denied by operation of law on April 2, 2008. See G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. Appellant had three months from April 2, 2008 to file its appeal with the Board. G.L. c. 59, §§ 64 and 65. Accordingly, because appellant filed his appeal on April 4, 2008, his appeal was timely and the assessors' motion to dismiss is denied.

II. QUALIFICATION FOR RESIDENTIAL EXEMPTION

The operative language of § 5C provides that "an exemption shall be applied only to the principal residence of a taxpayer as used by the taxpayer for income tax purposes." The assessors denied appellant the exemption on the sole ground that appellant did not use the address of the subject property as his mailing address on his income tax returns.

The assessors apparently read the statutory phrase "the principal residence of a taxpayer as used by the taxpayer for income tax purposes" as meaning "the *address*

of the principal residence of a taxpayer as used by the taxpayer **on his income tax return.**" The assessors offer no support for engrafting the emphasized language onto § 5C and they ignore the plain meaning of the statutory language as well as the numerous references in income tax statutes to the taxpayer's "use" of property as his principal residence.

First, the plain meaning of the "principal residence" language in § 5C is that the taxpayer must use the property in such a manner as to qualify it as his principal residence for income tax purposes. The clear legislative intent in limiting the residential exemption to the taxpayer's principal residence is to prevent the taxpayer from qualifying for the exemption for multiple properties and the Legislature has adopted the well-established income tax concept of "principal residence" to carry out this intent.

The Internal Revenue Code ("IRC") provides a number of tax benefits which are limited to a taxpayer's "principal residence." For example, the gain on the sale of a personal residence is excluded from gross income up to certain limits (IRC § 121), interest paid on a mortgage secured by a taxpayer's principal residence is deductible (IRC § 163), interest paid on certain government-program mortgages secured by a taxpayer's principal residence qualify for a tax credit (IRC § 25), and no gain is recognized on the receipt of insurance proceeds resulting from the conversion of a taxpayer's principal residence or its contents as a result of a presidentially declared disaster (IRC § 1033(h)).

Sections 163, 25, and 1033(h) refer to § 121 for the meaning of the term "principal residence." Section 121 provides for the exclusion of gain from the sale of property if "such property has been owned and **used by the taxpayer as the taxpayer's principal residence**" for the required period (emphasis added). The relevant regulation, 26 CFR 1.121-1(b)(2) provides that:

In the case of a taxpayer **using** more than one property as a residence, whether property is **used** by the taxpayer as the taxpayer's principal residence depends upon all facts and circumstances.

(Emphasis added). Accordingly, for federal income tax purposes, the taxpayer's "use" of property as his principal residence depends on all of the relevant facts and

circumstances of his use, not on whether he uses the address of the property on his income tax return.

For Massachusetts income tax purposes, G.L. c. 62, § 2(a)(3)(B) explicitly refers to and adopts IRC § 121 and excludes gain on the sale of a taxpayer's principal residence from Massachusetts gross income. In addition, Massachusetts allows for a deduction of 50 percent of the rent paid for a taxpayer's principal residence. In defining "principal residence" for purposes of the rental deduction the Commissioner, as did the IRS in 26 CFR 1.121-1(b)(2), determined that the "determination of whether property is used by a taxpayer as his principal residence depends upon all the facts and circumstances in the case." 830 CMR 62.3.1. See also 830 CMR 62.6.1(3)(a) (applying same facts and circumstances standard to determine whether taxpayer uses property as his principal residence for purposes of the residential energy credit under G.L. c. 62, § 6(d)).

In both the federal and Massachusetts income tax contexts, the determination of whether a taxpayer is using his property as his principal residence is based on an analysis of all the facts and circumstances present in each case. There is no indication that the Legislature in drafting § 5C intended to depart from this well-established principle; to the contrary, the Board rules that the Legislature intentionally referred to and adopted the familiar income tax concept of "principal residence" to limit the residential exemption to a single property owned by the taxpayer.

Applying a facts and circumstances analysis to the facts of the present appeal, the Board concluded that appellant used the subject property as his principal residence as of the relevant assessment date, January 1, 2007. First, there is no evidence that appellant owned or used any other property as a residence as of the relevant date. Appellant offered uncontroverted testimony that he moved into the subject property shortly after his purchase of the property and that he has used it as his principal, and only, residence since that time. The determination of what constitutes a taxpayer's principal residence is generally relevant only where the taxpayer has more than one residence. See 26 CFR 1.121-1(b)(2).

Second, appellant presented ample, credible documentary evidence to establish that the subject property was his principal residence on January 1, 2007. The bills that he received from Keyspan and Comcast addressed to him at the subject property established that he was receiving

utility service at the subject property during the relevant period. The letters from the Boston School Department, again addressed to him at the subject property, indicate that his child attended the Boston Public Schools during the relevant period. The IRS Forms 1098 mailed to the taxpayer at the subject property's address showed that he was making mortgage payments on the subject property during the relevant period and showed the amount of deductible home mortgage interest that appellant paid during the relevant period. Appellant's income tax returns for 2006 and 2007 also showed that he deducted home mortgage interest in the amounts shown on the IRS Forms 1098; since appellant had no other residence as of the relevant date, the deduction could only be allowed for interest paid on a mortgage secured by his principal residence. See IRC § 163(h)(4)(A)(i) (mortgage interest deductible only for mortgages secured by principal residence and one other residence selected by the taxpayer).

Finally, the assessors offered no evidence to contradict the appellant's evidence. Rather, they acknowledged that the Registry of Deeds notified them of appellant's ownership of the subject property shortly after the July, 2006 purchase and they sent him tax bills, forms, and notices using the subject property's address.

Accordingly, the Board rules that appellant met his burden of proving that he used the subject property as his principal residence for income tax purposes on January 1, 2007. The Board therefore rules that appellant was entitled to the residential exemption and issues a decision for the appellant in the amount of \$1,488.57 simultaneously with the promulgation of these findings.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

**TOWN OF OXFORD, acting by and through its BOARD OF SELECTMEN
v. EAV REALTY, LLC, and PULTE HOMES OF NEW ENGLAND, LLC**

Misc. Case No. 323064

MASSACHUSETTS LAND COURT

17 LCR 325; 2009 Mass. LCR LEXIS 58

May 6, 2009, Decided

HEADNOTES

Chapter 61B-Notice of Intent-Notice to Convert-Defective Notice

SYLLABUS

[**1]

A defective Notice of Intent to sell 126 acres in Oxford classified as recreational land under Chapter 61B could not be considered a valid Notice to Convert where the plain language of the notice unambiguously referred to a sale, not a conversion, and the notice was defective in general having not been sent by certified mail to all the proper parties.

COUNSEL: Jonathan Silverstein, Esq., Kopelman and Paige, P.C. for Plaintiff.

Michael P. Lynch, Esq. for Defendant.

JUDGES: Alexander H. Sands III, Justice.

OPINION BY: SANDS III

OPINION

[*325] DECISION

Plaintiff filed its Verified Complaint for Declaratory Judgment and Injunctive Relief on May 10, 2006, seeking to enforce its rights under G. L. c. 61B ("Chapter 61B") relative to a 126.5 acre parcel of land located on Pleasant and Leicester Streets in Oxford, MA ("Locus"). On the same day Plaintiff filed its Motion for a Preliminary Injunction. This court allowed, in part, Plaintiff's Motion for Preliminary Injunction on May 26, 2006 (the "Order"), finding that the 120-day option period under *G. L. c. 61B, § 9* had not yet begun to run because of a

defective notice, and ordering that Defendant EAV Realty, LLC ("EAV") be enjoined from conveying Locus to Defendant Pulte Homes of New England, [**2] LLC ("Pulte") or any other party except Plaintiff until final adjudication of the merits of this case.¹ Pulte filed its Answer on June 9, 2006, and EAV filed its Answer on June 28, 2006. A case management conference was held on July 18, 2006.

1 This court also allowed Plaintiff's Motion for *Lis Pendens* contingent upon Plaintiff's filing of an Amended Verified Complaint. Because Plaintiff failed to amend its Complaint accordingly, its *Lis Pendens* was never effective.

EAV filed its Motion for Judgment on the Pleadings and/or Summary Judgment on August 17, 2006, together with supporting memorandum, Concise Statement of Material Facts, and Appendix, and a hearing was scheduled for February 9, 2007. At a status conference on December 7, 2006, the parties acknowledged that they were in settlement discussions and the summary judgment hearing was put on hold. At a status conference on May 21, 2007, the parties announced that settlement talks had fallen through, and this court scheduled a second hearing for EAV's summary judgment motion to take place on December 17, 2007. On August 30, 2007, Plaintiff filed its Opposition and Cross-Motion for Summary Judgment, together with supporting memorandum, [**3] [*326] Reply to Concise Statement of Material Facts, and Affidavit of Shirin Everett, Esq. On December 17, 2007, the parties again requested a postponement of the summary judgment hearing because of continued negotiations, yet at a status conference on March 6, 2008, the parties once more indicated negotiations had fallen through and requested a new hearing

date.² On September 16, 2008, EAV filed its Supplemental Memorandum, and this court held a hearing on both motions on September 17, 2008, at which time the matter was taken under advisement.³

2 A date for the summary judgment motion to be heard was extended three additional times.

3 At the hearing, the parties agreed that this would be a summary judgment hearing, and that this court could rely on all documents submitted into the record as a part of the summary judgment/judgment on the pleading briefs.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *See Cassesso v. Comm'r. of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l. Bank v. Dawes*, 369 Mass. 550, 553 (1976); *Mass. R. Civ. P. 56(c)*.

The following material **[**4]** facts are not in dispute:

1. EAV is the record owner of Locus, which consists of approximately 126.5 acres of property located in Oxford, MA. One hundred and twenty-six of these acres are classified as recreational land pursuant to G. L. c. 61B, and EAV has received tax benefits based on such classification. The remaining 0.5 acre is not so classified.

2. On September 22, 2005, EAV executed an Agreement for Sale with Pulte for Locus (the "Agreement"). The Agreement's purchase price (the "Purchase Price") is stated as:

The Purchase Price for the Premises shall be calculated with reference to the number of market rate units ("MRUs") and limited price units ("LPUs") that Buyer obtains *final approval* for. The Purchase Price shall be calculated at \$ 37,500 for each MRU and an amount as set forth on Exhibit B for each LPU for which Buyer receives Final Approval. . . .⁴

Through a footnote in its definition of Purchase Price, the Agreement notes that the term "Final Approval" "shall mean that all permits or approvals required prior to the issuance of an unconditional building permit have been issued with conditions reasonably acceptable to the Buyer with no appeal taken or if an appeal is taken **[**5]** it has been resolved on terms reasonably satisfactory to the Buyer."

The Closing Date of the Agreement states:

Unless this Agreement is terminated earlier, or been extended as provided in this Agreement, the Closing shall occur between the 31st and 60th day (at Buyer's election) from the later of: (i) the date that Buyer has received the Final Approvals (as previously defined) of all permits and approvals set forth in Section 6 and the Preconditions to Closing set forth in this section have been satisfied and (ii) the date the Seller records the waiver of the Town's rights pursuant to Chapter 61B.

The Agreement also confers a discretionary right of termination in the buyer

if at any time the Buyer determines in its sole opinion that it is unlikely to obtain approvals for a minimum of 175 market rate units or if such approval will contain conditions which the Buyer finds unacceptable, the Buyer shall have the option to terminate the Agreement and upon such termination, all Deposits paid shall be returned to the Buyer. . . .

3. By certified letter dated January 20, 2006, addressed to the Planning Board of the Town of Oxford (the "Notice of Intent"), EAV notified Plaintiff of its intent to **[**6]** sell Locus to Pulte.⁵ The Notice of Intent was not sent by certified mail to the Town of Oxford (the "Town") Board of Selectmen (the "Board of Selectmen"), the Town Board of Assessors (the "Board of Assessors") or the Town Conservation Commission (the "Conservation

Commission"). The Notice of Intent did not include a copy of the Agreement. The Notice of Intent stated a purchase price of "not less than Six Million Five Hundred Sixty-Two Thousand Five Hundred and 00/100 Dollars. . . ."and stated that "[t]he Property is valued, assessed and taxed on the basis of its recreational use under the terms and conditions of M.G.L. c 61B and Pulte intends to convert the Property to residential use if it completes the transaction described in the Agreement of Sale."

4. EAV delivered a copy of the Agreement to the Town Manager, at the Town Manager's request, on February 6, 2006. The Agreement was not delivered to the Board of Selectmen, the Board of Assessors, or the Conservation Commission.

5. On December 6, 2007, Pulte sent EAV a notice of termination of the Agreement.⁶

4 Exhibit B includes a combinations of definitions and mathematic formulas.

5 The Notice of Intent states, "This letter shall serve [**7] as notice of EAV Realty's intent to sell recreational land as required by [G.L. c. 61B § 9]."

6 At the summary judgment hearing, the parties indicated that they would fill a Stipulation of Dismissal relative to Pulte. Such a stipulation was filed on April 23, 2009.

* * *

Both Plaintiff and EAV argue that the Notice of Intent is defective; however, that is the extent of the parties' agreement. EAV argues that the Notice of Intent was intended as notice to sell Locus, and, as a result of it being defective, the 120-day period during which the Town could exercise their first right of refusal was never triggered.⁷ While Plaintiff agrees that the Notice of Intent was defective, it reaches a far different conclusion. Plaintiff contends that the defective notice to sell results in valid notice to convert, conferring to Plaintiff the right to purchase Locus once the fair market value of Locus is obtained from an impartial appraiser.

7 In the alternative, EAV argues that if the Notice of Intent was not defective, Plaintiff's 120-day period has since run and, thus, Plaintiffs have no remaining rights in Locus. Given this court's finding regarding the inva-

lidity of the Notice of Intent, *infra*, I need [**8] not address this argument by EAV.

G. L. c. 61B, § 9, as in effect when this matter was filed,⁸ states in part:

[*327] Land which is valued, assessed and taxed on the basis of its recreational use under an application filed and approved pursuant to this chapter shall not be sold for or converted to residential, industrial or commercial use while so valued, assessed and taxed unless the city or town in which such land is located has been notified of intent to sell for or convert to such other use. . . . For a period one hundred and twenty days subsequent to such notification, said city or town shall have, in the case of intended sale, a first refusal option to meet a bona fide offer to purchase said land, or, in the case of intended conversion not involving sale, an option to purchase said land at full and fair market value to be determined by impartial appraisal Such notice of intent shall be sent by the landowner via certified mail to the mayor and city council of a city, or to the board of selectmen of a town, to its board of assessors and to its planning board and conservation commission, if any, and said option period shall run from the day following the latest date of deposit of any such [**9] notices in the United States mails. . . .

Both parties agree that the Notice of Intent was not sent as required by the statute, and the record so indicates. The Notice of Intent was not sent to the proper parties and it was only sent by certified mail to the planning board; moreover, the Agreement was not included with the Notice of Intent. In addition, the Notice of Intent also covered both 61B land and non-61B land. Both parties cite *Town of Billerica v. Card*, 11 LCR 195 (2003) (Misc. Case No. 272985) (Sands, J.), *aff'd*. 66 Mass. App. Ct. 664 (2006), where the Appeals Court stated that

[t]he statutory requirement that notice be sent by certified mail ensures that all parties will receive a notice of intent reflecting a readily ascertainable date of mailing, which sets the option period running. To construe the statute otherwise would permit a degree of imprecision as to the start of the 120-day option period, which the Legislature deemed undesirable.

Card, 66 Mass. App. Ct. at 668. Plaintiff also relies upon *Plante v. Grafton*, 56 Mass. App. Ct. 213, 217 (2002), for the proposition that "a seller may not defeat a right of first refusal by confronting the optionee with terms that include [**10] acquisition of land in addition to that covered by the right." In this respect, this court agrees with the parties.⁹ As a result of the foregoing, I find that the Notice of Intent was defective and was not valid notice of an offer to sell Locus to Plaintiff.

8 This section was amended in 2006, effective March 22, 2007, to indicate that "a bona fide offer to purchase shall mean a good faith offer, not dependent upon potential changes to current zoning or conditions or contingencies relating to the potential for, or the potential extent of, subdivision of the property for residential use. . . made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed."

9 Both parties distinguish *Town of Franklin v. Wyllie*, 443 Mass. 187, 197 (2005), where the Supreme Judicial Court found a contingent purchase and sale agreement sufficient to satisfy the requirement for a "bona fide offer." In that case, the subdivision plan was a conventional plan and the court determined that the town "through its own officials and experts, [could determine] the ultimate number of permissible lots in the proposed subdivision."

The parties, however, disagree as to the consequences [**11] of the invalidity of the Notice of Intent. EAV argues that since the Notice of Intent was defective, it did not give proper notice to Plaintiff and, therefore, the parties should return to the respective positions that they held prior to when the

Notice of Intent was mailed. Plaintiff agrees that the Notice of Intent was defective and that the Agreement was not a bona fide offer to sell, but argues that this court should construe it as a valid notice to convert. Plaintiff maintains that the Notice of Intent started a chain of events which now provides Plaintiff with the right to retain an appraisal to determine the fair market value of Locus, which thus triggers a 120-day period during which Plaintiff could determine whether it wishes to purchase Locus.

There are two basic problems with Plaintiff's analysis. First, the plain language of the Notice of Intent is unambiguous; it specifically states that it is a notice of sale. Second, *G. L. c. 61B, § 9* provides a municipality with "an option to purchase said land at full and fair market value to be determined by impartial appraisal" only "in the case of an intended conversion not involving sale." The facts presented in the case at bar [**12] do not involve any intent to convert Locus not involving a sale. More importantly, when Plaintiff argues that the Notice of Intent was defective as to notice of sale but not as to notice to convert, it ignores the substance of its own argument that the notice was defective in general. Whereas Plaintiff's argument that the absence of the Agreement in the notice package and the lack of specificity in the Agreement relate directly to the issue of sale, Chapter 61B's requirements of a certified mailing and its application to exclusive recreational land go to the general issue of improper notice. This court does not read *G. L. c. 61B, § 9* as creating a situation where notice must be either one of sale or one to convert.¹⁰ Rather, here is a situation where there was not a proper notice at all. In light of the above, I find that the defective Notice of Intent to sell Locus was not valid notice to convert Locus to a residential, industrial, or commercial use.

10 This conclusion by the court is reinforced by the following language from *G. L. c. 61B, § 9*: "If the notice of intent to sell or convert does not contain all of the material as described above, then the town or city, within 30 days [**13] after receipt, shall notify the landowner in writing that notice is insufficient and does not comply." Neither party addresses this issue.

Plaintiffs observe, and this court agrees to a degree, that Chapter 61B's right of first refusal shows a legislative intent to preserve and protect recreational land within the Commonwealth. In line with such intent, recreational land is protected in the case at bar for Plaintiff is not without recourse. Plaintiff is protected for EAV must comply with Chapter 61B if it desires to either sell or convert Locus. Plaintiff has not lost any of its rights of first refusal.¹¹ This is not a situation of "un-ringing the bell," as Plaintiff proclaims, for the bell was never rung in the first place.

11 Plaintiff raises the issue of what happens in the event that EAV removes Locus from Chapter 61B classification, and argues that it will be harmed by such action if it loses its right to purchase Locus. The statute, however, is clear that a right of first refusal is only required while the land is being given special tax classification. Plaintiff is entitled to no more protection than that allowed by statute.

Plaintiff acknowledges that its argument is one of an **[**14]** equitable remedy and cites *Sudbury v.*

Scott, 439 Mass. 288 (2003), to argue that a municipality retains the right of first refusal when the owner does not inform the municipality of its right. However, *Sudbury* is distinguishable because in the case at bar the sale never took place; in *Sudbury*, the owner sold the property without **[*328]** notifying the municipality. *Id.* at 290. Similarly, Plaintiff cites *Card* to argue that a right of withdrawal of a right of first refusal cannot be read into the statute. *Card*, however, is distinguishable for it involved a valid notice of intent. *See Card*, 11 LCR at 198. Finally, EAV argues that since the Agreement has been terminated, this case is moot, and any new sale will require a new notice of intent. This further supports this court's ruling that the parties are back at square one and EAV must notify Plaintiff again in the event that it intends to sell or convert the use of Locus.

As a result of the foregoing, I ALLOW EAV's Motion for Summary Judgment and DENY Plaintiff's Cross-Motion for Summary Judgment.

Judgment to enter accordingly.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z v. ANTONIO IBANEZ; LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates Series 2007-HE2 v. FREDDY ROSARIO; WELLS FARGO BANK, N.A., as Trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1 v. MARK A. LARACE and TAMMY L. LARACE

Misc. Case Nos. 384283, 386018, 386755

MASSACHUSETTS LAND COURT

17 LCR 202; 2009 Mass. LCR LEXIS 41

March 26, 2009, Decided

HEADNOTES

Foreclosure Sale-Post Foreclosure Assignments-Newspaper of General Circulation-Boston Globe in Western Massachusetts

SYLLABUS

[**1]

Ruling on the validity of foreclosure sales by three different banks, Justice Keith C. Long refused to validate two of the sales where the lenders had not been assigned the mortgages as of the date of sale and therefore the legal notices failed to accurately state the name of the mortgagee. The third foreclosure was deemed acceptable because the lender, while not holding the assignment as of the publication date of the notice of sale, had obtained the assignment prior to the date of the foreclosure. Justice Long also ruled that these lenders, all of whom were foreclosing on properties in Springfield, could properly post notices in the *Boston Globe*, since it qualified as a newspaper with general circulation in Springfield, notwithstanding its circulation in that community of only 1,400-1,600 weekday copies, in contrast to the circulation of more than 21,959 offered by the *Springfield Republican*. The foreclosure statutes do not require notices to be published in the newspaper with the highest circulation so long as the paper is in general circulation in the relevant community.

COUNSEL: Walter Harley Porr, Jr., Esq., Coleen Hayes, Esq., Ablitt Law Offices, P.C. for Plaintiff.

JUDGES: Keith C. Long, Justice.

OPINION BY: LONG

OPINION

[*202] MEMORANDUM [2] AND ORDER ON PLAINTIFFS' MOTIONS FOR ENTRY OF DEFAULT JUDGMENT**

Introduction and Facts

The above-captioned cases, each brought pursuant to *G.L. c. 240, §6* to "remove a cloud from the title" of the properties in question, present two issues, one in common and the other in three variations. Each arises from a foreclosure sale of property in Springfield. The first issue is whether the *Boston Globe*, in which the notices of foreclosure sale were published, was "a newspaper with general circulation in the town where the land lies" (Springfield) within the meaning of *G.L. c. 244, § 14* at the times of publication.¹ The second is whether the published notices, which named the plaintiffs as the foreclosing parties even though they had no record interest in the property at the time of either publication or foreclosure, complied with *G.L. c. 244, § 14*.

¹ The notice in *Rosario* was published on June 5, 12, and 19, 2007 for auction to take

place on June 26, 2007. Complaint to Remove Cloud from Title at 2, P 5; 3, P 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint"). The notices in *Ibanez* and *Larace* were published on June 14, 21, and 28, 2007 for auctions to take place on [**3] July 5, 2007. Complaint to Remove Cloud from Title at 2, P 5; 3, P 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"); Complaint to Remove Cloud from Title at 2, P 5; 3, P 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint").

The variations of the second issue are as follows. In *Ibanez*, U.S. Bank National Association,² in whose name notice was published and sale took place, had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, P 3; 3, P 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"). Further, there was nothing in the notice to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 3 (Jan. 30, 2009) (filed in Misc. 384283) (hereinafter, the "Ibanez Motion"). U.S. Bank only acquired an interest in the *Ibanez* mortgage by assignment nearly fourteen months *after* the auction took place. *Ibanez* Complaint at 2, P 3; 3, P 8.

2 I refer to the plaintiffs by bank name (U.S. Bank, LaSalle Bank, and Wells [**4] Fargo Bank) solely for ease of reference. None of these banks hold the mortgages in question for *themselves*. Instead, they are the servicing trustees of the securitized mortgage pools identified in the case captions, which are the actual beneficial owners of the mortgages. Neither the details of the pools nor the particulars of the trust agreements are relevant for purposes of this Memorandum and Order, which assumes that the pools were duly and properly formed and compliant with all applicable laws, that the mortgages in question were properly included in those pools, and that the banks, as trustees, had full authority to act as they did.

In *Larace*, Wells Fargo Bank, in whose name notice was published and sale took place, also had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, P 3; 3, P 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint"). There also was nothing to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 2-3 (Feb. 2, 2009) (filed in Misc. [**5] 386755) (hereinafter, the "Larace Motion"). However, it acquired the mortgage by assignment ten months after the sale, with the assignment declaring an effective date prior to foreclosure (April 18, 2007). *Larace* Complaint at 2, P 3.

In *Rosario*, LaSalle Bank, in whose name notice was published and sale took place, was the unrecorded holder of the mortgage at the time of publication and sale, but did not record the assignment reflecting that interest until over a year after the sale. Com [*203] plaint to Remove Cloud from Title at 2, P 3; 3, P 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint").

In each of these cases, the bank was the only bidder at the foreclosure sale. Stipulation of Walter Porr, Esq., Counsel for Plaintiffs (Feb. 11, 2009 oral argument).³ In *Ibanez*, the bank bought the property for \$ 94,350, which was \$ 16,437.27 less than the amount of the outstanding loan (\$ 110,787.27) and \$ 16,650 (15%) less than the bank's calculation of the property's actual market value (\$ 111,000). *Ibanez* Complaint at 3, P 8; Aff. of Walter H. Porr, Jr., Ex. G (Jan. 30, 2009). In *Larace*, the bank bought the property for \$ 120,397.03, which was the amount of the outstanding [**6] loan plus "all outstanding fees and costs" and \$ 24,602.97 (17%) less than the bank's calculation of the property's actual market value (\$ 145,000). *Larace* Complaint at 3, P 8; Aff. of Walter H. Porr, Jr., Ex. E (Feb. 2, 2009). In *Rosario*, the bank bought the property for \$ 136,000. *Rosario* Complaint at 3, P 8. Unlike *Ibanez* and *Larace*, the record in *Rosario* does not include information on the amount of the outstanding loan or the market value of the property.

3 I may consider such stipulation as an admission binding on the plaintiffs for purposes of these motions. *White v. Peabody Constr. Co., Inc.*, 386 Mass. 121, 126 (1982).

According to the plaintiffs, despite their successful bids and their subsequent recording of all the relevant documents, they cannot obtain title insurance for the properties -- making them effectively unsaleable -- unless and until these issues are resolved in their favor. They have thus brought these actions seeking such relief. In each of these cases, the defendants (the mortgagors/equity holders of the properties at issue) have been served, failed to respond, and have been defaulted. The plaintiffs have moved for entry of default judgment. The issues were clearly [**7] identified before those motions were heard and the parties were given full opportunity to submit whatever affidavits or other admissible materials they believed necessary for adjudication of those issues. Notice of Docket Entry (Jan. 7, 2009) (filed in each case).

Based on the record before me and for the reasons discussed below, I find and rule that the *Boston Globe* was "a newspaper of general circulation" in Springfield at the time of the notices and sales and thus meets that requirement of *G.L. c. 244, § 14*. I also find and rule that LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as the holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked. ⁴ Finally, I find and rule, however, that the other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices that named those entities failed to name the mortgage holder as of the date of the sale as required by *G.L. c. 244, § 14*. [**8] Neither U.S. Bank nor Wells Fargo Bank had been assigned the mortgages at the time notice was published and sale took place. Neither an intention to do so in the future nor the backdating of a future assignment meets the statute's strict requirement that the holder of the mortgage *at the time notice is published and auction takes place* be named in the notice.

4 The notices gave its agent's (counsel for the foreclosure) name and address.

Analysis

Whether Publication in the Boston Globe Was Sufficient to Meet the Requirements of G.L. c. 244, § 14

G.L. c. 244, § 14 requires notification of a foreclosure sale to be published "in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation where the land lies" for that sale to be valid. *See Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) ("The manner in which the notice of the proposed sale shall be given is one of the important terms of the power and a strict compliance with it is essential to the valid exercise of the power."). The purpose behind that requirement is easily discerned and simply stated. It is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish [**9] or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result. *See Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) ("There is the more reason for this [requiring strict adherence to the statute's notice provisions], where the power [of sale] is made to a mortgagee, who is interested merely for himself, and has opportunities for collusion and for taking unfair advantage of the mortgagor."). Underlying the notice requirement is the notion that most of the interested and likely bidders will either live or work locally or, if from afar, expect the local newspapers to carry the relevant notices.

The plaintiffs in these cases did not choose "a newspaper... published in the town where the land lies" or even, for that matter, the newspaper with the greatest local circulation. That would have been, for both these criteria, the *Springfield Republican*. Instead, they chose the *Boston Globe* for reasons of cost and convenience. According to plaintiffs' counsel, the *Globe* has competitive advertising rates and its legal notices advertising department is able [**10] to receive electronically-transmitted notices from foreclosing parties, immediately acknowledge that receipt, and promptly publish notices. The record does not indicate, and counsel did not know, if

the *Springfield Republican* has similar rates or capacities.

G.L. c. 244, § 14, however, does not require publication in a locally-published newspaper, in the newspaper with greatest circulation, or even on the day with the greatest circulation.⁵ It is enough to publish in "a newspaper with general circulation in the town where the land lies. . . ." *G.L. c. 244, § 14*. The statute does not contain an explicit definition of "general circulation," none appears anywhere in the relevant statutory provisions (those governing foreclosures), and counsel has not directed the court's attention to any relevant decisions of our appellate courts. Thus, the familiar tools of statutory interpretation must be employed.

[*204] [A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object [*11] to be accomplished, to the end that the purpose of its framers may be effectuated. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. Words that are not defined in a statute should be given their usual and accepted meanings, provided that those meanings are consistent with the statutory purpose. We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.

5 The circulation data submitted for both the *Springfield Republican* and the *Boston Globe* show that their Sunday editions have

their largest readership. The notices in each of these cases were published on weekdays.

Seideman v. City of Newton, 452 Mass. 472, 477-78 (2008) (internal quotations and citations omitted).

Black's Law Dictionary is such a source. *See id.* at 478; *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 453 (2008) (both citing Black's). It defines "newspaper" as "a publication for general circulation, usually in sheet form, appearing [*12] at regular intervals, usually daily or weekly, and containing matters of general public interest, such as current events." Black's Law Dictionary at 1069 (8th ed. 2004). "Newspaper of general circulation" is defined as "a newspaper that contains news and information of interest to the general public, rather than to a particular segment, and that is available to the public within a certain geographic area." *Id.* The *Boston Globe* met each of these tests in Springfield at the time the notices were published. It was a "publication for general circulation" in Springfield.⁶ It "contain[ed] matters of general public interest," such as national and international news, sports, and business coverage. And it was available in Springfield on a daily basis during the times in question, both through subscription and single-copy sales at stores and by vendors.

6 *See* circulation figures discussed immediately below.

The *Globe* also was a newspaper that, for the times in question, met the statute's intent of reaching a broad audience of likely bidders. While it had a fraction of the *Springfield Republican's* circulation (the *Republican* sold somewhere between 21,959 and 24,733 copies in Springfield on an average [*13] weekday during the relevant time period),⁷ the *Globe's* figures (somewhere between 1,400 and 1,600 copies in Springfield during the relevant time period)⁸ were nonetheless significant and sufficiently "general" in the context of Springfield's overall population at the times in question.⁹ The *Globe's* status as one of New England's major newspapers also makes it likely to reach a large, additional audience of institutional and other bidders.^{10, 11}

7 The *Republican* sold 21,959 copies in Springfield on March 7, 2007, and 24,733

copies in Springfield on March 28, 2008. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B (Feb. 3, 2009) (filed in the *Larace* case). On March 7, 2007, it sold an additional 11,985 copies in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.* On March 28, 2008, it sold an additional 14,720 copies in those same adjacent localities. *Id.*

8 The *Globe* sold 1600 copies in Springfield on October 24, 2006 and 1,400 copies in Springfield on October 23, 2007. Aff. of Walter H. Porr, Jr. at Exs. B, C (Feb. 2, 2009) (filed in the *Larace* case). It sold an additional 896 copies on October 24, 2006 and an additional 674 copies on October [**14] 23, 2007 in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.*

9 According to the U.S. Census data submitted by the plaintiffs, there were approximately 57,000 households in Springfield during this time period. *Id.* at Ex. D.

10 This is also true of the *Springfield Republican* and, as shown by their comparative circulation data, even more so in the Pioneer Valley area. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B.

11 The record did not indicate, and counsel did not know, if the notices at issue in these cases appeared statewide or only in more localized editions of the *Globe*. For purposes of this Memorandum and Order, I make the conservative assumption that they appeared only in an edition circulated in Springfield and the neighboring Pioneer Valley area.

In short, while far from the best alternative, the *Globe* was good enough to meet the statutory test at the times in question. It was "a newspaper with general circulation in the town where the land lies" when the notices were published and thus sufficed under *G.L. c. 244, § 14*.¹²

12 This ruling is not intended, and should not be construed, as a finding that the *Globe* meets the statutory test in [**15] Springfield for any times other than those at issue in these cases. The drop-off in the *Globe's* circulation in Springfield between October 24, 2006 and October 23, 2007 (1,600 to 1,400

copies -- a 12.5% reduction in a single year from an already small figure) suggests that foreclosure notices published subsequent to October 2007 may need to be assessed on a case-by-case basis.

Whether Publication Occurred in the Name Required by G.L. c. 244, § 14

G.L. c. 244, § 14 requires that notice of a foreclosure auction be given not only to the mortgagor and "all persons of record" holding junior interests in the property (by registered mail), but also by publication in a newspaper of general circulation at least "once in each of three successive weeks, the first publication to be not less than twenty-one days prior to the date of sale." The purpose of such publication, as previously noted, is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result.¹³ See *Roche, 106 Mass. at 513*. [**16] It is thus, broadly speaking, a consumer protection statute and, as the courts have repeatedly made clear, one that requires "strict compliance" with its notice provisions. *Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 484 (1982)* and cases cited therein.

13 It is also for the benefit of junior creditors, whose chances for recovery may be diminished or eliminated by the foreclosure if there are insufficient proceeds from the foreclosure to cover all liens. See *G.L. c. 183, § 27* (disposition of proceeds of foreclosure sale); *Wiggin v. Heywood, 118 Mass. 514, 516 (1875)*; *Pioneer Credit Corp. v. Bloomberg, 323 F. 2nd 992, 993-94 (1st Cir. 1963)* (foreclosure of senior encumbrance discharges junior liens whose holders are made parties to the proceeding).

One of those requirements is that the notice identify "the holder of the mortgage." *Id.* at 483. Failure to do so renders the "sale void as a matter of law." *Id.* at 484. The purpose of this requirement and the need for "strict compliance" is readily discerned. As even a cursory glance at the current caseload of this court reveals, titles arising from

mortgage foreclosures can have many problems. These include the most fundamental: Did the party [**17] conducting the foreclosure have the authority to do so and, if challenged, can it prove that it had such authority? In short, will a [**205] purchaser at the foreclosure sale get good title and will get it in prompt fashion? These are increasingly important questions in the current deteriorating real estate market and are not small concerns. It is increasingly rare for a mortgage to remain with its originating lender. Often, as here, mortgages are assigned to other entities, and then assigned yet again into large securitized pools.¹⁴ Often, as here, the paperwork lags far behind. Sometimes mistakes are made.¹⁵ Mistakes can only be corrected, if at all, through confirmatory documents (which the borrower may not so easily agree to) or litigation. With so many foreclosed properties available for purchase, why bid on a property with even the possibility for such trouble? Why bid on a property when the foreclosing party cannot produce all the documents (including proper mortgage assignments in recordable form) that would give good title? Why take the risk that the foreclosing party will be able to produce the documents promptly after the auction takes place, that those documents will be complete [**18] and in proper form, or even (in this era of failed and failing institutions) that the foreclosing party will still be in existence, with intact files and knowledgeable employees able to find those files so that the proper paperwork can be completed? Since these concerns affect the ability to obtain clear, marketable title, why bid a reasonable market value instead of a discount price to account for that risk?

14 In *Ibanez*, for example, the mortgage was originally granted to Rose Mortgage, Inc., then assigned to Option One Mortgage Corporation, then assigned to American Home Mortgage Servicing, Inc., and then assigned to the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, of which U.S. Bank is currently the trustee. *Ibanez* Complaint at 2, P 3. *Larace* and *Rosario* have similar histories.

15 See, e.g., *LaSalle Bank National Association, as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-*

1 v. Truong, Land Court Misc. Case No. 390707 (KCL) (assignment made, service-members action brought and judgment entered, *G.L. c. 244, § 14* notices published, foreclosure conducted, and foreclosure [**19] deeds issued in incorrect name).

None of this is the fault of the mortgagor, yet the mortgagor suffers due to fewer (or no) bids in competition with the foreclosing institution. Only the foreclosing party is advantaged by the clouded title at the time of auction. It can bid a lower price, hold the property in inventory, and put together the proper documents at any time it chooses. And who can say that problems won't be encountered during this process? It is interesting that it took the plaintiff (the foreclosing party and successful bidder) almost *fourteen months* after the auction to obtain its assignment in *Ibanez* and *ten months* after the auction in *Larace*.¹⁶ Would any reasonable third-party bidder have been willing to wait that long, trusting that no other issues would arise?¹⁷ Only in *Rosario* was the assignment (showing that the foreclosing party held the mortgage and could convey title as a result of the sale) in hand and ready for recording at the time of the auction sale.

16 The foreclosure auction in *Ibanez* took place on July 5, 2007. *Ibanez* Complaint at 3, P 8. The mortgage was not assigned to U.S. Bank until September 2, 2008. *Id.* at 2, P 3. The foreclosure auction in *Larace* [**20] took place on July 5, 2007. *Larace* Complaint at 3, P 8. The mortgage was not assigned to Wells Fargo until May 7, 2008. *Id.* at 2, P3.

17 There may be an innocent explanation for the delay (*i.e.*, a rational business reason for waiting months to document the assignment), but none was offered or apparent in the record. Moreover, such an explanation is unlikely given the many months of delay, the deteriorating real estate market, the properties' carrying costs (upkeep, security, and real estate taxes) and the bank's desire for cash. Surely, each of these was a powerful incentive to move as quickly as possible.

The plaintiffs defend the validity of their post-foreclosure assignments (in *Ibanez* and *Larace*) and post-foreclosure recording of their assignments (in

all cases), making essentially three arguments. First, they say that the language of *G.L. c. 244, § 14* does not require that the notice name the holder of the mortgage. They agree that the form of foreclosure notice included in the statute contains that requirement *explicitly* (the signature line on that form is labeled "Present holder of said mortgage" and its text contains both the representation "of which mortgage the undersigned is **[**21]** the present holder" and the command "if by assignment, or in any fiduciary capacity, give reference"), but contend that these are not *statutory* requirements because the statute permits "alter[ation] [of the form] as circumstances require" and does not "prevent the use of other forms." *G.L. c. 244, § 14* (Form).

This argument is unpersuasive, for three reasons. First, it ignores *Bottomly v. Kabachnick*, which states that the notice in that case "was defective because it failed to identify the holder of the mortgage, thereby rendering the first foreclosure sale void as a matter of law." 13 *Mass. App. Ct.* at 483-84 (citing *Roche v. Farnsworth*, 106 *Mass.* 509 (1871)) (emphasis added).^{18, 19} Second, it ignores the "fundamental precept[]" that "[c]ourts must ascertain the intent of a statute from *all its parts* and from the subject matter to which it relates" *DeGiacomo v. Metropolitan Property & Casualty Ins. Co.*, 66 *Mass. App. Ct.* 343, 346 (2006) (emphasis added). The form of foreclosure notice included in *G.L. c. 244, § 14* is a part of that statute, indicative of its intent, and clearly contemplates (as *Bottomly* holds) that the present holder of the mortgage be identified in the notice. **[**22]** There is nothing to indicate that *this* aspect of the notice could be "altered."²⁰ See *G.L. c. 244, § 14*. Indeed, at oral argument, plaintiffs' **[*206]** counsel conceded that the current practice is to obtain and record all assignment documents before publication and commencement of foreclosure proceedings. Third, the language in the body of the statute clearly contemplates that the "holder of the mortgage" is the entity to give notice, as indicated by its reference to notices to be mailed "to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage" *G.L. c. 244, § 14* (emphasis added).

18 *Roche* invalidated a mortgage foreclosure sale because the notice, *inter alia*, failed to name the holder of the mortgage at the

time of the foreclosure sale (defendant *George B. Farnsworth*). 106 *Mass.* 509, 513 (1871). This omission and the other failings in the notice were "inconsistent with the degree of clearness that ought to exist in such an advertisement." *Id.*

19 One can become the "holder of the mortgage" (an interest in land) only by a writing satisfying the statute of frauds, *G.L. c. 259, § 1*, in recordable form. Thus, the plaintiffs' **[**23]** contention at oral argument that *G.L. c. 244, § 14*'s requirement of "holder" status was satisfied by the assignment of the promissory notes secured by the mortgages to the securitized pools (apparently done by contract documents referencing them generally, along with hundreds or thousands of other such notes) fails. In any event, no such documents were included in the record, so any arguments based upon them are unsupported and waived. Moreover, there is nothing in the record to indicate when the promissory notes were assigned and the record is unambiguously clear that the *mortgages* were assigned on the dates referenced herein.

20 Plaintiffs cite *146 Dundas Corp. v. Chemical Bank*, 400 *Mass.* 588, 593 (1987), for the proposition that the precise form of notice contained in *G.L. c. 244, § 14* is not mandatory. True enough. But the inclusion of that form in *G.L. c. 244, § 14* reflects the Legislature's intent regarding the *contents* of the notice, the suggested notice contains *two* places for "the present holder" of the mortgage to be identified (including a blank line to "give reference" if the mortgage is held by assignment), and there is nothing in *146 Dundas Corp.* that holds (or even suggests) **[**24]** that such an identification can be omitted from an alternate form of notice.

The plaintiffs' second argument is that the statute should be read "in its practical application, purpose and effect [to] uphold the exercise of the power of sale even though the assignment of the mortgage was recorded afterwards." Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 5 (Feb. 16, 2009) (filed in *Larace*). This argument is made in two parts. First, the plaintiffs argue that the mortgagor "had ample time and opportunity to exercise his

rights in equity to challenge the foreclosure at the time it was ongoing and failed to do so." This contention (which places the burden and expense of a lawsuit on the mortgagor and allows a statutory violation with potentially severe adverse consequences to proceed unchecked if a lawsuit is not brought) is contrary to the "consumer protection" nature of the statute. The defaulting mortgagor is often a layperson, unfamiliar with law and legal proceedings, and often financially distressed and thus without resources to hire counsel.²¹ Second, the plaintiffs' argument that the mortgagor already knows the identity of the assignee [**25] of his mortgage from his RESPA notices²² and thus cannot credibly complain, *id.*, completely misses the point of the publication requirement. As noted above, its purpose is to notify potential *bidders* who do *not* have that information and whose bids may be chilled by concerns over the foreclosing party's inability to show, in recordable form, an assigned interest in the mortgage it purports to foreclose. Based upon the facts of these cases, such chilling is not speculative. In each of the two cases for which market value information was provided (*Ibanez* and *Larace*), the plaintiff purchased the property at the foreclosure auction for significantly less than that value (15% and 17%, respectively). See discussion, *supra* at 3-4.

21 These cases are perfect examples. None of the defendants ever came to court or filed a responsive pleading even though they had meritorious defenses. There is no suggestion that the mortgagors "waited until the owner may have added largely to the estate, or it has increased in value by a general rise, before bringing [a claim for redemption]." *Montague v. Dawes*, 12 Allen (94 Mass.) 397, 400 (1866).

22 Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, *et seq.*

Even [**26] the plaintiffs' argument premised on a general notion of "practical application, purpose and effect" fails. As current practice shows, there is nothing difficult or inhibitive in a requirement that assignment documents be in place at the time of notice and auction. That is precisely what the plaintiffs do now. Those documents must be created, executed and recorded before title can pass in any event, so no additional time or expense is

incurred by having them ready at the time of publication and auction sale. Having the assignments in place in recordable form at the time of publication and auction avoids the chilling effects on bidding described above. Interpreting the statute in this manner thus not only comports with its language and the intent inferred from that language, but also with common sense and a rational policy objective. See *DiGiacomo*, 66 Mass. App. Ct. at 346 (statutes to be interpreted "so as to render the legislation effective, consonant with sound reason and common sense").

The plaintiffs' third argument is that both case law and prevailing title practice support their contention that post-notice/post-auction assignment, so long as the ultimate assignee was the foreclosing [**27] party, suffices under *G.L. c. 244, § 14*. I disagree and discuss this argument in turn.

Bottomly is the most recent case construing the notice provisions of the statute and is the starting point for the proper interpretation of the earlier cases and proper title practice. As noted above, *Bottomly* unequivocally holds that a notice that fails to identify the holder of the mortgage is defective, thereby rendering the "foreclosure sale void as a matter of law." 13 Mass. App. Ct. at 483-84. None of the cases cited by the plaintiffs either hold or suggest the contrary.

The first case plaintiffs cite is *Montague v. Dawes*, 12 Allen (94 Mass.) 397 (1866). *Montague* predates the publication provisions of *G.L. c. 244, § 14*, which were not enacted until 1877, so it is unclear what, if any, guidance it gives on the notice issue.^{23, 24} What it *does* hold, and *only* holds, is that title derived from a foreclosure sale by an assignee of a mortgage *in possession of that assignment at the time of the auction* is not defeated by the fact that the assignment was not *recorded* until after the foreclosure took place, so long as the mortgagor is aware of the assignment and it is "unaccompanied with the suggestion [**28] that it was not recorded from improper motives, or that in some way the circumstance actually affected the sale by misleading purchasers or otherwise . . ." ²⁵ [**207] *Id.* at 400. Thus, it is directly applicable to *Rosario* (where the foreclosing party, LaSalle Bank, was correctly named in the notice as the holder of the mortgage and was ready, willing and able to produce its assignment, in recordable form, at the time

of auction) and *inapplicable* to *Ibanez* and *Larace* (where the named foreclosing party had not been assigned the mortgage at the time of notice and auction, either on or off record).

23 The foreclosure in *Montague* took place under St. 1857, c. 229, which allowed sales to take place with "such notices . . . as are authorized or required by such power [of sale in the mortgage deed]," so long as a copy of that notice and an affidavit by the mortgagee "set[ting] forth his acts in the premises fully and particularly" were filed in the registry of deeds within thirty days after the sale. The statutory requirement for published notice was not enacted until 1877, which provided the following:

No sale under and by virtue of a power of sale contained in any mortgage of real estate shall **[**29]** be valid and effectual to foreclose said mortgage, unless previous to such sale notice of the same shall have been published once a week, the first publication to be not less than twenty-one days before the date of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town wherein the mortgaged premises are situated; but nothing herein shall avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.

St. 1877, c. 215. It would not be surprising if it came about, in part, as a result of the practices exemplified in the fact pattern and condemned by the court in *Montague v. Davis*. 14 Allen (96 Mass.) 369, 374 (1867) ("Here the notice proved ineffectual to attract purchasers, as might reasonably have been anticipated from the meagre information it contained, its irresponsible character, and the

place of sale selected, remote from the premises to be sold.").

24 Although not statutorily required at the time, the power of sale in *Montague* apparently contained a publication requirement of some form or fashion. *See Montague*, 12 Allen (94 Mass.) at 400 (referring to "public notice by advertisement of the time and **[**30]** place of sale"). The form and type of notice, however, was apparently never placed in issue since the defendant "aver[red] that the notices and affidavit required by statute were duly made and recorded" and the plaintiff "nowhere charg[ed] that the sale was wrongfully made . . . [or] that there was any irregularity in the proceedings." *Id.* at 399.

25 Samuel Rice, the original mortgagee, assigned the note and mortgage to Henry Dawes on June 19, 1862. Mr. Dawes conducted the foreclosure sale on August 11, 1862, *after* he was assigned the mortgage, and conveyed the property to John Dunbar, who purchased it at Dawes's request. Dunbar then conveyed it to Dawes on August 20, 1862. Dawes later conveyed it to a Mr. Hassam, who conveyed it to Lydia Hawes. The case involved the mortgagor's (George Montague) attempt to redeem the property, which the court denied.

The plaintiffs next cite the Rule 1:28 *Memorandum and Order in Federal Deposit Insurance Corporation v. Kefelas*, 62 Mass. App. Ct. 1121, 2005 WL 277693 (2005), for the proposition that the foreclosure notice need not contain the name of the holder of the mortgage in order for the sale to be valid. As a pre-February 26, 2008 unpublished opinion, **[**31]** *Federal Deposit Insurance Corporation* has no precedential value. Order Amending Appeals Court Rule 1:28 (Nov. 25, 2008). Even so, when closely examined, *Federal Deposit Insurance Corporation* does not reflect the holding plaintiffs argue. The notice in that case stated that the Bank of New England ("BNE") was the mortgage holder when, in fact, that bank had failed and substantially all of its assets (including the Kefelas mortgage) had transferred to a "bridge bank," New Bank of New England ("NBNE"). *Federal Deposit Insurance Corp.*, 2005 WL 277693 at *1. The Appeals Court failed to see why, under these circumstances,

"the change in name was significant" and thus refused to invalidate the foreclosure sale. *Id.* at 2-3. This is completely consistent with *Bottomly*. NBNE was, for foreclosure purposes, effectively the same entity as BNE and, given the general knowledge that BNE had failed and its assets acquired by NBNE, likely no one could have been confused or had their bid chilled.

The plaintiffs' final citation is REBA Title Standard No. 58, "Out of Order Recording of Mortgage Discharges and Assignments."²⁶ It provides, in relevant part, "[a] title is not defective by reason of . . . [t]he [**32] recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." REBA Title Standard No. 58. The accompanying note states that this portion of the standard "is based on *Montague v. Dawes*, 12 Allen 397 (1866)." *Id.* (Comment). No explanation is given and no authority other than *Montague* is cited or discussed. So far as I can tell, this aspect of REBA Title Standard No. 58 has never been reviewed or ruled upon by a court at any level. I have great respect for REBA and the work of its committees, and the *initial* portion of its standard is certainly a correct reading of *G.L. c. 244, § 14* and *Montague* ("[a] title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed . . . prior . . . to foreclosure . . ."). But the *latter* portion (relating to assignments made *after* notice is published and sale has occurred) misconstrues the statute, the holding in *Montague*, and the teachings of *Bottomly* and *Roche*. As discussed above, *G.L. c. 244, § 14* requires publication in the name of the holder of the mortgage for the foreclosure sale to be valid. *Bottomly*, 13 *Mass. App. Ct.* at 483-84. [**33] It does so to assure potential bidders that the foreclosing

party can promptly deliver good title and to prevent "opportunities for collusion and for taking unfair advantage of the mortgagor." See *Roche*, 106 *Mass. at 513*. The best practice, of course, is to put the assignment on record prior to notice publication so it is available for all to examine. At the very least, the assignment should be fully executed and available, in recordable form, at the time of the foreclosure sale. *Montague*, 12 Allen at 400. To allow a foreclosing party, without any interest in the mortgage at the time of the sale (recorded or unrecorded), to conduct the sale in these circumstances, bid, and then acquire good title by later assignment is completely contrary to *G.L. c. 244, § 14*'s intent and commands.

26 REBA is the Real Estate Bar Association for Massachusetts, a private organization.

Conclusion

For the foregoing reasons, none of the three foreclosures at issue in these lawsuits were rendered invalid because notice was published in the *Boston Globe*. LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior [**34] to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked. The other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices (which named those entities) failed to name the mortgage holder as required by *G.L. c. 244, § 14*. Judgment shall enter accordingly.

SO ORDERED.

CITY OF WOBURN v. WILLIAM J. HAWKINS, Trustee, VIRGINIA REALTY TRUST

Tax Lien Case No. 131489

MASSACHUSETTS LAND COURT

17 LCR 26; 2009 Mass. LCR LEXIS 7

January 8, 2009, Decided

HEADNOTES

Tax Title-Substantially Irregular Taking-Property Description-Attorney's Fees Due Municipality-Calculation of Redemption Amount-Deduction of Unregistered Parcel

SYLLABUS

[1]**

Justice Alexander H. Sands III ruled that two 1992 Woburn tax-title takings were not substantially irregular merely because of reversed addresses where the owner, square footage, street, book and page, and taxes were accurately reflected, and the City's inability to produce a copy of the demand made on the landowner for unpaid taxes for one of the takings did not rebut its presumption of validity. In addition, Justice Sands ruled that the redemption amount was properly calculable by subtracting from the entirety of the amount due the amount due for the unregistered portion of the Locus.

COUNSEL: John D. Finnegan, Esq., Tarlow, Breed, Hart & Rodgers, P.C. for the Plaintiff.

James T. Dangora, Jr., Esq., Shea Dangora & Nelson for the Defendant.

JUDGES: Alexander H. Sands III, Justice.

OPINION BY: SANDS

OPINION

[*26] DECISION

Plaintiff City of Woburn filed a verified Complaint to Foreclose Tax Lien on March 3, 2005 for

property that it took for non-payment of taxes and owned by Defendant William J. Hawkins as Trustee of Virginia Realty Trust. A citation was issued on August 2, 2005, returnable September 5, 2005. Defendant filed an Answer on September 2, 2005, objecting to the validity of the Instrument of Taking for his property ("Locus") **[**2]**¹ and asking this court to dismiss the Complaint or alternatively declare that Defendant is ready and willing to redeem the tax taking upon such terms as may be fixed by this court. On September 6, 2006, Plaintiff filed a Motion for Entry of Finding and Award of Attorneys Fees and Court Costs, together with a Statement of Facts, supporting memorandum, and Affidavits of Donald N. Jenson (the Treasurer-Collector for the City of Woburn), and Attorney John D. Finnegan. On September 18, 2006, Defendant filed a memorandum in opposition to Plaintiff's motion, a Response to Plaintiff's Statement of Facts, and an Additional Statement of Facts. A hearing on Plaintiff's motions was held on September 19, 2006, and this court (Breuer, Deputy Recorder) issued an Order on April 10, 2007 (the "Order") finding, in part, that: (1) Plaintiff possesses a valid tax lien on the registered portion of Locus only; (2) the scrivener's errors made by Plaintiff were neither substantial nor misleading; (3) Defendant should have been aware that the taking recited on the Memoranda of Encumbrances for his Certificate of Title referred to Locus; and (4) the taking was timely and without procedural defect.

¹ Locus contains **[**3]** 12,068 sq. ft., has an address of 11-13 Virginia Avenue, Woburn and is comprised of a registered portion containing 10,843 sq. ft. and an unregistered portion containing 1,225 sq. ft.

The Order also required Plaintiff to submit an affidavit from the Treasurer of the City of Woburn as to the amount owed for redemption of the registered portion of Locus. In accordance with the Order, on April 24, 2007, Plaintiff filed Affidavits of Donald N. Jenson (Treasurer-Collector of the City of Woburn) ("Jenson") and Andrew Creen (Chief Appraiser in the Office of the City Assessors of the City of Woburn) ("Creen") calculating the amount required for Defendant to redeem the registered portion of Locus. In response, Defendant filed an objection to the redemption amount specified in the affidavits on May 2, 2007, and a notice of appeal of the Order on May 8, 2007. Plaintiff filed a Response to Defendant's objection on May 10, 2007, and a motion to strike the notice of appeal on May 11, 2007.

On May 21, 2007, this court (Sands, J.) held a status conference and set a date for the filing of a joint stipulation of agreed upon facts and motions for summary judgment. The Joint Stipulation of Facts, Agreed **[**4]** Upon List of Exhibits, and Defendant's Motion for Summary Judgment with supporting memorandum were filed on July 6, 2007. Plaintiff filed an opposition to Defendant's motion and cross-motion for summary judgment on August 3, 2007, together with supporting memorandum, Separate Statement of Legal Elements, and Appendix. On August 17, 2007, Defendant filed a Separate Statement of Legal Elements and Statement of Issues Presented. This court held a hearing for both motions on September 6, 2007, at which time the matter was taken under advisement.

This court finds the following facts are not in dispute:

1. J & B Builders, Inc. ("J&B") purchased three contiguous parcels of registered land (Lots 1, 2, and 3) and an unregistered parcel of land between Lots 1 and 2, all located on Virginia Avenue in the City of Woburn (the "J&B Lot"), by Quitclaim Deed from James F. Tavanese dated April 29, 1988, recorded at Middlesex South Registry of Deeds (the "Registry") at Book 19021, Page 452, and registered as Document No. 772811 on Transfer Certificate of Title No. 182618 at Book 1043, Page 68 (the "J&B Certificate").

2. The three registered parcels are depicted as Lots numbered 1, 2, and 3 on Plan No. **[**5]**

6947B titled "Subdivision Plan of Land in Woburn," dated March 18, 1988 (the "Plan"). Lot 1 contains 10,595 sq. ft., Lot 2 contains 12,068 sq. ft., and Lot 3 contains 12,015 sq. ft. The unregistered lot, labeled "Domenico Calsolari" on the Plan, contains approximately 2,450 sq. ft. of land.²

2. The unregistered parcel was split in half and each half (containing 1,225 sq. ft.) became a part of its adjacent lot (Lots 1 and 2).

3. The three registered parcels bear the following street numbers: Lot 1: 9 Virginia Avenue; Lot 2: 11-13 Virginia Avenue; and Lot 3: 15-17 Virginia Avenue.

4. On April 29, 1988, J&B granted the Woburn Five Cent Savings Bank (the "Bank") a mortgage (the "Mortgage") in the amount of \$ 555,000.00 on the J&B Lot, which was recorded **[*27]** with the Registry at Book 19021, Page 455, and registered on the J&B Certificate as Document 772813.

5. In June of 1991, the Bank was declared insolvent.

6. On September 11, 1992, Plaintiff published Notice in the Woburn Daily Times Chronicle of its intent to take Locus and 15-17 Virginia Avenue for non-payment of taxes. The notices stated:

J & B Builders

About 12,068 square feet of land with building located at 15-17 Virginia Avenue, situated **[**6]** in said Woburn as recorded in South Middlesex Registry of Deeds, Book 1043 Page 68. Taxes for the year 1990 - \$ 819.60.

J & B Builders

About 12,015 square feet of land with building located at 11-13 Virginia Avenue situated in said Woburn as recorded in South Middlesex Registry of Deeds, Book 1043 Page 68. Taxes for the year 1990 - \$ 819.60.

7. On September 28, 1992, Plaintiff registered an Instrument of Taking ("Taking 1") dated September 28, 1992, as to a portion of the J&B Lot. Taking 1

showed a total amount owed, as of that date, of \$ 1157.04 (including interest and expenses). Taking 1 was not recorded on the "recorded side" of the Registry, but was noted on the Memoranda of Encumbrances to the J&B Certificate as Document 882090. Taking 1 described the land taken as:

J & B Builders

About 12,068 square feet of land with building located at 15-17 Virginia Avenue, situated in Woburn, as recorded in South Middlesex Registry of Deeds, Book 1043, Page 68. Taxes for the year 1990 - \$ 819.60³

3 There is a handwritten reference to "Lot 2 -1043 p. 68" on Taking 1. The identity of the person who added the handwritten notation and the date of such note are not known.

Taking 1 states that Plaintiff's [**7] demand for unpaid 1990 taxes was made on J&B on September 7, 1990. A copy of Plaintiff's demand is not available, having been lost or replaced.

8. On September 28, 1992, Plaintiff registered an Instrument of Taking ("Taking 2") dated September 23, 1992, as to a portion of the J&B Lot. Taking 2 showed a total amount owed, as of that date, of \$ 1157.04 (including interest and expenses). Taking 2 was noted on the Memoranda of Encumbrances to the J&B Certificate as Document No. 882091.⁴ Taking 2 described the land taken as:

J & B Builders

About 12,015 square feet of land with building located at 11-13 Virginia Avenue situated in Woburn, as recorded in South Middlesex Registry of Deeds, Book 1043, Page 68. Taxes for the year 1990 - \$ 819.60⁵

Taking 2 states that Plaintiff's demand for unpaid 1990 taxes was made on J&B on September 7, 1990. A copy of Plaintiff's demand is not available, having been lost or replaced.

4 The Summary Judgment record does not make reference to whether Taking 2 was recorded on the "recorded side" of the Registry.

5 There is a handwritten reference to "Lot 3 -1043 p 68" on [**8] Taking 2. The identity of the person who made the notation and the date of such note are not known.

9. On August 14, 1995, Plaintiff issued Municipal Lien Certificate No. 904 ("MLC No. 904") and an accompanying Account Payoff Report. MLC No. 904 and the Account Payoff Report detail the taxes due for property located at 15-17 Virginia Avenue with a land area of 12,068 sq. ft. The Account Payoff Report recites the Assessor's Account No. as "03-69238-55334," and shows an outstanding balance of \$ 12,902.69 as of August 14, 1995, due for the period 1989 to 1995. MLC No. 904 and the Account Payoff Report were registered on December 1, 1995 on the J&B Certificate as Document No. 989059.

10. On October 17, 1995, the Federal Deposit Insurance Corporation ("FDIC"), as liquidating agent for the Bank, executed a certificate that it had made entry upon Locus and 15-17 Virginia Avenue for the purposes of foreclosing the Mortgage. Such Certificate was recorded with the Registry at Book 25764, Page 592 and registered as Document No. 989003 on the J&B Certificate.

11. Ronald, Michele, and Mark Auriemma (together with Christine, Stephen, and Bonnie Jean Auriemma, the "Auriemma Family") purchased 15-17 [**9] Virginia Avenue (Lot 3) on October 27, 1995 by foreclosure deed (the "Auriemma Deed").

12. The FDIC, as liquidating agent for the Bank, sold Locus to Defendant for \$ 142,500.00 by foreclosure deed dated October 27, 1995 ("Defendant Deed").

13. By check in the amount of \$ 13,369.69 dated November 21, 1995 and received by Plaintiff on November 22, 1995, Stephen and Bonnie Jean Auriemma paid off real estate taxes for the amount shown on MLC No. 904, updated to November 22, 1995. The City of Woburn Massachusetts Schedule of Departmental Payments to Treasurer dated No-

vember 22, 1995 recites "Payment for Tax Title Property located at 15 Virginia Ave. in the Name of J&B Builders (Now Owned by Stephen Auriemma." An account payoff report issued on November 22, 1995 for Account No. 03-69238-55334 also listed the amount owed as \$ 13,369.69.

14. The Auriemma Deed was registered on December 1, 1995 on the J&B Certificate as Document No. 989060. The Registry also issued a new Certificate of Title No. 203820 for 15-17 Virginia Avenue (the "First Auriemma Certificate").⁶ Neither Taking 1 nor Taking 2 was listed on the Memoranda of Encumbrances for the First Auriemma Certificate.

6 The Summary Judgment [**10] record does not contain either the Auriemma Deed or the First Auriemma Certificate.

15. Defendant Deed is recorded with the Registry at Book 25889, Page 240 and registered as Document No. 989749 on the J&B Certificate on December 12, 1995. The Registry also issued a new Certificate of Title No. 203893 for the registered portion of Locus (the "Defendant Certificate") dated December 12, 1995. Taking 1 was listed on the Defendant Certificate Memoranda of Encumbrances as Document No. 882090 and is noted:

[*28] 882090 KIND: Tax Taking
IN FAVOR OF: City of Woburn
TERMS: Taking of Lot 2 for non-payment of taxes for 1990.
DATE OF INSTR: Sept. 28, 1992
DATE OF REG: Sept. 28, 1992
TIME OF REG: 12:14 PM

16. On May 11, 2004, Plaintiff issued a Real Estate Tax Statement and an Account Payoff Report to Defendant for Locus. The Parcel Identification number was listed as 08/08/01. The land area was recited as 12,015 sq. ft. The Assessor's Account No. is listed as 03-69233-55326. The documents listed unpaid real estate taxes of \$ 73,076.49 dating back to 1989.

17. On March 3, 2005, Plaintiff filed a Complaint to Foreclose Tax Lien with the Land Court

for Locus, which lists Defendant as owner and describes the [**11] property as:

J & B Builders

About 12,068 square feet of land with building located at 15-17 Virginia Avenue, situated in said Woburn as recorded in Middlesex South District Registry of Deeds Book 1043, Page 68.

Taxes for the year 1990: \$ 819.60

18. On October 26, 2005, the Auriemma Family registered a master deed dated October 24, 2005 for Lot 3, converting the property to a condominium, which listed all six Auriemmas as owners. The Registry also issued a new Transfer Certificate of Title No. C683 (the "Second Auriemma Certificate"), recorded at Book 33, Page 13.

19. Plaintiff issued Municipal Lien Certificate No. 14164 ("MLC No. 14164") dated October 3, 2005, and Municipal Lien Certificate No. 14378 ("MLC No. 14378") dated November 9, 2005, for property located at 15 Virginia Avenue. These municipal lien certificates (the "MLCs") were registered at the Registry on October 26, 2005, and November 22, 2005, respectively. The MLCs list 12,068 sq. ft. as the land area of the property and both receipts of registration note Certificate No. C683, located at Book 33, Page 13. The MLCs show no outstanding real estate taxes prior to 2006.

20. On November 14, 2005, Plaintiff prepared an Account Payoff [**12] Report and an Account Transaction History for Defendant relative to Locus, which lists the account number as 03-69233-55326 and shows an outstanding balance due of \$ 89,693.63 dating back to 1989. The Account Transaction History also lists a \$ 5.00 charge as of August 18, 1995, and a \$ 70.00 charge as of April 11, 2005, for the recording of certificates of redemption. Neither of these reports, however, show any payment of real estate taxes in this regard.

21. The City of Woburn Assessor's Card currently references Locus as follows:

MBLU: 08/08/04

Location: 11 Virginia Ave.
Owner Name: Hawkins William
JTR
Account No.: 036923855334 0

Such an instrument of taking shall not be valid unless recorded within sixty days of the date [**14] of taking. If so recorded it shall be prima facie evidence of all facts essential to the validity of the title so taken. . . .

22. No real estate taxes have been paid by Defendant to Plaintiff on Locus since Defendant's purchase in 1995.

23. For fiscal year 2007, Creen calculated the assessed value of Locus (based on 12,068 sq. ft.) to be \$ 183,600. Creen then adjusted for the 1,225 sq. ft. unregistered portion of Locus (valued at \$ 2,000), which resulted in an adjusted assessment of Locus of \$ 181,600 (a 1.1% reduction in value).

24. As calculated by Jenson, as of August 23, 2006, the unpaid real estate taxes (including interest and costs) owed on the 10,843 sq. ft. registered portion [**13] of Locus totaled \$ 97,464.98. This amount increases \$ 24.37 per day for each day the taxes remain unpaid after April 23, 2007.

* * *

The issues before this court are twofold, whether Plaintiff possesses a valid tax title on Locus and, if so, what amount can be determined for redemption by Defendant. Defendant argues that Taking 1 is invalid and that the tax title account is void because of errors, and as a result a proper amount cannot be ascertained for redemption. Plaintiff argues that Taking 1 is valid because it does not contain substantial or misleading errors, and therefore, Plaintiff can determine the proper amount required for redemption. I shall address each of these issues in turn.

Validity of Taking 1

G. L. c. 60, § 54 states the requirements of an instrument of taking. The statute states, in part:

The instrument of taking . . . shall contain a statement of the cause of taking, a substantially accurate description of each parcel of land taken, the name of the person to whom the same was assessed, the amount of the tax thereon, and the incidental expenses and costs to the date of taking.

The description within an instrument of taking is adequate if it "is reasonably accurate and fairly designates the property for the information of those interested." *City of Lowell v. Boland*, 327 Mass. 300, 302 (1951). The purpose behind requiring a substantially accurate description is to provide notice to the owners and prospective buyers that the parcel is being taken. *Town of Franklin v. Metcalfe*, 307 Mass. 386, 389-90 (1940). *G. L. c. 60, § 37* states: "[n]o tax title and no item included in a tax title account shall be held to be invalid by reason of any error or irregularity which is neither substantial nor misleading" Accordingly, an error will not invalidate the instrument or its associated tax taking account unless it is "substantial" or "misleading."

G.L. c. 60 § 53 authorizes municipalities to commence tax takings. It states, in part:

If a tax on land is not paid within fourteen days after demand therefor . . . the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, [**15] which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published

[*29] See also *G.L. c. 60, § 37* ("Said taxes, if unpaid for fourteen days after demand therefor, may, with said charges and fees, be levied by sale or taking of the real estate").

A. The Document

Defendant claims that Taking 1 did not contain a "substantially accurate description" of Locus and therefore is invalid. Taking 1 described Locus as:

J & B Builders

About 12,068 square feet of land with building located at 15-17 Virginia Avenue, situated in Woburn, as recorded in South Middlesex Registry of Deeds, Book 1043, Page 68. Taxes for the year 1990 - \$ 819.60

The only inaccuracy in the notice is the address, which is listed as 15-17 rather than 11-13 Virginia Avenue. The owner, square footage, street, book and page, and taxes are all reflected accurately. In the language of *Boland*, this instrument was "reasonably accurate" and "fairly designate[d]" the property in order for J&B to identify Locus. Additionally, J&B was on notice that Plaintiff also intended to take Lot 3 for taxes. Taking 2 (for Lot 3) described the property as:

J & B Builders

About [**16] 12,015 square feet of land with building located at 11-13 Virginia Avenue situated in Woburn, as recorded in South Middlesex Registry of Deeds, Book 1043, Page 68. Taxes for the year 1990 - \$ 819.60

Again, while the address was misstated, the owner, square footage, street, and book and page in Taking 2 were accurate.⁷ Moreover, Taking 1 and Taking 2 were both registered on the J&B Certificate, so J & B was, or should have been, aware that both Locus and Lot 3 were subject to a tax taking. In spite of the inaccuracy of the street numbers, J&B was on notice that both Locus and Lot 3 were subject to a tax taking. As such, the purpose of the statute has been realized. Additionally, after Locus and Lot 3 were both sold in October of 1995, and the Auriemma Family (the purchaser of Lot 3), paid off the real estate taxes on Lot 3, the First Auriemma Certificate did not list any taking, but Defendant Certificate listed Taking 1. As a result, both purchasers were aware of the legal status of the respective takings.⁸ Accordingly, I find that the transposition of the street numbers in the two takings (relative to Locus and Lot 3) is not substantial and Plaintiff provided an adequate description [**17] for both Taking 1 and Taking 2.

7 It appears that either the taxes in Taking 2 were overstated or, conversely, the taxes in Taking 1 were understated, for both Taking 1 and Taking 2 reference same amount of taxes due for Lots 2 and 3 despite the fact that Lot 2 contains 53 sq. ft. more than Lot 3. The summary judgment record does not reflect this information. Whether either situation is applicable has no impact on this case.

8 Both account payoff reports, dated May 11, 2004 and November 14, 2005, the which Plaintiff provided to Defendant, listed the Assessor's Account No. as 03-69233-55326. When dealing with the tax title account, Plaintiff has consistently applied Account No. 03-69233-55326 to Locus and Account No. 03-69238-55334 to the Auriemma Lot, despite the fact that the Assessor's Office references Locus as Account No. 03-69238-55334.

B. The Proceedings

Defendant asserts that Taking 1 was not duly exercised because Plaintiff cannot produce proof of the demand and Taking 1 was not recorded with respect to the 1,225 sq. ft. of unregistered land. Plaintiff does not deny that Taking 1 was not recorded with respect to the unregistered portion of Locus and therefore does not claim it has [**18] a lien on such unregistered land.

A copy of the demand made upon J&B for taxes unpaid for the year 1990 is not necessary for Plaintiff to possess a duly exercised taking. Taking 1 is dated September 28, 1992, and was registered on the registered side of the Registry on the same day. The instrument of taking must be recorded or registered within sixty days of the taking to be valid and once registered is prima facie evidence of all facts essential to the validity of the tax title. *G. L. c. 60, § 54*. The registration of Taking 1 therefore acts as prima facie evidence of all facts essential to the validity of the tax title, including the demand. Taking 1 recites the date Plaintiff purports to have made a demand as September 7, 1990. Defendant has not produced any evidence to show that demand was not made on this date. Defendant's reliance upon the fact that Plaintiff cannot produce a copy of the demand made on J&B for unpaid taxes does not rebut Taking 1's presumption of validity.

In addition, this court is permitted to weigh the passage of time against the challenger when determining whether the document should be produced. *See Krueger v. Devine*, 18 Mass. App. Ct. 397, 402 (1984) (noting [**19] that it is appropriate for courts to weigh the passage of time against challengers when assessing the validity of a tax title). Where the demand was made in 1990, the taking was registered in 1992, and the Complaint was filed thirteen years later, together with a lack of evidence to the contrary, it is equitable to offer that the demand was made as stated in Taking 1. Nine years passed between Defendant's purchase of Locus in 1995 and the request for an Account Payoff Report in 2004, and during that time Defendant paid no real estate taxes. Notwithstanding the large amount owed on the Account Payoff Report in 2004, Defendant has acknowledged that, to date, it still has not made any payments of real estate taxes. Moreover, the Defendant Certificate has reflected Taking 1 since it was issued to Defendant in 1995.

For the foregoing reasons, I find that Taking 1 did not contain a substantial or misleading error in the description of Locus, and that Taking 1 was duly exercised by Plaintiff.

Redemption

The issues arising from the redemption of Locus in this case are governed by *G.L. c. 59, § 59*, *G.L. c. 60, §§ 37, 50, 54, and 62*, and *G.L. c. 185, §§ 46 and 54*. *G. L. c. 60, § 50* states in part, [**20] "[t]he tax title account . . . shall be prima facie evidence of all facts essential to the determination of the amount necessary for redemption." *G.L. c. 59, § 59* states in part, "[a] person upon whom a tax has been assessed . . . if aggrieved by such tax, may . . . apply in writing to the assessors . . . for an abatement thereof . . ." *G.L. c. 185, § 54* states in part, "[t]he original certificate in the registration book . . . shall be received as evidence in all courts of the commonwealth, and shall be conclusive as to all matters contained therein . . ." In addition, "every subsequent purchaser of [**30] registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate . . . and . . . liens . . . for unpaid taxes . . ." *G.L. c. 185 § 46*. *G.L. c. 60, § 62* states, in part, that

[a]ny person having an interest in land taken or sold for nonpayment of taxes . . . may redeem the same by paying . . . the amount of the tax title account of the land being redeemed . . .

A. Status of Redemption

Defendant claims he is not liable for Taking 1 because Taking 1 has already been redeemed. The certificate [**21] of title is conclusive as to all matters contained therein, and a subsequent purchaser is encumbered by liens noted on the certificate, or liens on the property whether noted on the certificate or not. *G. L. c. 185, § 54*; *G.L. c. 185 § 46*. Taking 1 appeared on the J&B Certificate and was transferred to the Defendant Certificate, where it remains. Taking 1 is still in effect as to the registered portion of Locus because the Defendant Certificate still lists Taking 1 on its Memoranda of Encumbrances. Neither the First nor the Second Auriemma Certificate list Taking 2 because the real estate taxes for Lot 3 were paid prior to the issuance of these certificates. Defendant has not paid any taxes on Locus and does not deny that it has not redeemed Locus. As evidenced by the tax title account and the certificates of title, J&B (Defendant's predecessor in title) did not redeem Locus.

Defendant suggests that the Auriemma Family has redeemed Locus and points to three MLCs issued by Plaintiff. Once a person with "an interest" in the land taken redeems it, the municipality must execute an instrument acknowledging the redemption. *G.L. c. 60, § 62*. However, the Auriemma Family does not, nor did it [**22] ever, have an interest in Locus and therefore could not redeem it. In addition, the MLCs applied to Lot 3. The same transposition of addresses in the two takings between Locus and Lot 3 has occurred throughout the history of this case, and, as discussed, *supra*, is not a substantial or misleading error. MLC No. 904 references Account No. 03-69238-55334, and the Auriemma Family paid the amount due on the 03-69238-55334 account by check dated November 21, 1995. Plaintiff maintains that the account number for Locus is 03-69233-55326. On December 1,

1995, the same day MLC No. 904 was registered, the Auriemma Family registered the First Auriemma Certificate. The First Auriemma Certificate does not reference a taking on its memoranda of encumbrances. From this, I find that MLC No. 904 applied to Lot 3, not Locus, and that MLC No. 904 did not indicate a redemption of Locus because it did not refer to the amounts owed for Locus and the Defendant Certificate still lists Taking 1.

MLC Nos. 14164 (filed on October 26, 2005) and 14378 (filed on November 22, 2005) both reference 15-17 Virginia Avenue, but do not reference an account number. The receipts of registration for both MLC No. 14164 and **[**23]** MLC No. 14378 refer to the Second Auriemma Certificate. These three MLCs (904, 14164, and 14378), that Defendant purports to be issued for Locus, all reference Lot 3 and were not registered on the Defendant Certificate, which is conclusive to all matters regarding it.⁹ I find that MLC No. 904, MLC No. 14164, and MLC No. 14378 apply to Lot 3 and do not apply to Locus.

9 The fact that the account for Locus lists a charge for recording the certificate of redemption does not invalidate the account. In fact, this charge has never been paid, and taxes have been certified to the lien every year after this charge was added.

B. Determination of Amount Required for Redemption

Defendant claims that Plaintiff is unable to determine an accurate amount for redemption because of errors or irregularities in the tax title account. I agree, *supra*, with the Order, which concluded that Plaintiff made no substantial or misleading errors and found Taking 1 and its accompanying tax title account valid. Therefore, the tax title account is prima facie evidence for all facts essential to determining the amount of redemption. *G. L. c. 60, § 50*. The amount required for redemption of the registered portion of Locus **[**24]** can be ascertained by subtracting the amount due for the unregistered portion of Locus from the amount due for the entirety of Locus.

Pursuant to the Affidavits of Jenson and Creen, Plaintiff has reassessed the tax taking account to subtract the unregistered portion of land for which it

does not have a proper tax title, and has valued the registered portion of Locus at \$ 181,600. Defendant's contention that Plaintiff's method of calculating the amount required for redemption is fundamentally flawed is not persuasive. Defendant offers no evidence that Plaintiff's assessment of Locus minus the unregistered portion is flawed; nor does it explain why Plaintiff should reduce the assessment by the percentage of the land area, apparently in contravention to municipal-standard assessment methods.¹⁰ Moreover, Plaintiff has consistently stated the amounts due on Locus in Taking 1, and in its Account Payoff Reports dated May 11, 2004, and November 14, 2005, and both were sent to Defendant.¹¹

10 Defendant claims there is a discrepancy between the original assessment in the Affidavit of Jenson and the original assessment in the Account Transaction History. The Affidavit of Jenson and the Account **[**25]** Transaction History for Account No. 03-69233-55326, which Plaintiff says applies to Locus, both begin with an initial unpaid balance of \$ 819.60. I do not find a discrepancy between the calculations of Jenson, and the Account Transaction History.

11 Defendant argues that the amounts stated are not always consistent, but fails to acknowledge the fact that interest and costs are continuing to accrue.

It appears that Defendant is objecting to the amount assessed to it. Per *G.L. c. 59, § 59*, "[a] person upon whom a tax has been assessed . . . if aggrieved by such tax, may . . . apply in writing to the assessors . . . for an abatement thereof . . ." The correct path for a party aggrieved by a mistake in the amount assessed to him is administrative relief. See *New England Legal Found. v. City of Boston*, 423 Mass. 602, 607 (1996) (noting that a taxpayer must seek an abatement prior to access to the courts), see also *D'Errico v. Bd. of Assessors of Woburn*, 384 Mass. 301, 306 (1981) ("statutory abatement procedures are exclusive, absent exceptional circumstances"). As stated, *supra*, a tax title account is prima facie evidence of the amount required for redemption, and to rebut this amount, Defendant **[**26]** must first exhaust its administrative remedies. *G.L. c. 185, § 54*. Defendant needed to apply for an abatement if it felt its account con-

tained errors or was misleading, and it failed to do so.

[*31] Plaintiff, therefore, possesses a valid account from which it may, and did, determine the amount of redemption for Locus. This court accepts Plaintiff's amount required for redemption of Locus as presented through the Affidavits of Jenson and Creen. As such, I find that as of August 23, 2006, the unpaid real estate taxes (including interest and costs) owed on the 10,843 sq. ft. registered portion of Locus totaled \$ 97,464.98. This amount shall increase \$ 24.37 per day for each day the taxes remain unpaid after April 23, 2007.

Fees

Finally, Plaintiff moves for legal fees associated with this matter. In support of this motion, Plaintiff provides a detailed account of legal services performed between February 15, 2005, and July 11, 2006, seeking to recover \$ 6,275 in legal fees. Defendant argues that Plaintiff's legal costs result from Plaintiff's own misleading and confusing record keeping. This court

may, upon motion, order the payment of legal fees to a city or town, which amount shall be added [*27] to the tax title account of the land to which the right of redemption is being foreclosed; in no event shall the legal fees awarded exceed the actual costs incurred and the judge shall consider the taxpayer's ability to pay said fees in any such fee award.

G. L. c. 60, § 65. Such an order is permitted to the extent the costs and attorney's fees are reasonable. *See G. L. c. 60, § 68.* After reviewing Plaintiff's rundown of legal services performed in context of the facts and legal issues involved in this matter, I find \$ 6,275 is a reasonable amount for legal fees and ORDER \$ 6,275 to be added to the amount required for the redemption of Locus, discussed *supra*.

In sum, this court finds that both Taking 1 and the tax title account for Locus do not include substantial or misleading errors or irregularities, and therefore, are valid. Even if there were errors in the amount assessed to the tax title account, Defendant failed to apply for an abatement, which is the proper administrative remedy for an error in a tax title account. The lien has not been redeemed, disclaimed, nor discharged by a person with an interest in Locus and, therefore, Plaintiff is entitled to rely upon its tax title account [**28] in setting the amount required for redemption. Because of the foregoing, I find that Defendant may redeem Locus upon payment to Plaintiff, on or before thirty days from the date of this court's Judgment, of the sum of \$ 97,464.98, plus a per diem of \$ 24.37 since April 23, 2007, in addition to \$ 6,275 of legal fees.

For the reasons discussed above, Defendant's Motion for Summary Judgment is DENIED, and Plaintiff's Cross Motion for Summary Judgment is ALLOWED.

Judgment to enter accordingly.

The Patriot Ledger v. Edward Masterson, as Executive Director of the Quincy Retirement Board et al.

Opinion No.: 106511, Docket Number: 09-400

SUPERIOR COURT OF MASSACHUSETTS, AT NORFOLK

25 Mass. L. Rep. 261; 2009 Mass. Super. LEXIS 62

April 2, 2009, Decided

April 2, 2009, Filed

JUDGES: [*1] Janet L. Sanders, Justice of the Superior Court.

OPINION BY: Janet L. Sanders

OPINION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In this action, the plaintiff The Patriot Ledger (the Ledger) seeks an order directing two local retirement boards to turn over the names of physicians who certified disability applications for 41 municipal employees receiving accidental disability pensions. The case is now before the Court on the Ledger's request for a preliminary injunction. In opposing the request, the defendants argue that the information sought falls within an exemption to the public records law and that disclosure of this information would be an unwarranted invasion on the privacy of the employees. For the following reasons, this Court disagrees, and concludes that the Motion must be Allowed.

The relevant facts are set forth in the Verified Complaint. In October 2008, the Ledger made a request upon the Directors of the Quincy Retirement Board and the Plymouth Retirement Board (the Boards) that they disclose the names of doctors who had certified the disability applications for a number of municipal employees whom the Ledger had already identified as having received accidental [*2] disability pensions. Twenty-nine of these employees were from Quincy; twelve were from Plymouth. The request was made pursuant to *G.L.c. 66, §10*, the Massachusetts Public Records Statute. In response to the Ledger's request, a lawyer for the

Boards acknowledged that each employee was required to and did submit a "Physician Statement" addressing the issue of the disability and its permanency as well as its causation. The attorney contended, however, that the identity of the doctors submitting such statements fell within *G.L.c. 4, §7, cl. 26(c)*, the so-called "privacy exemption" to the statute. The Ledger turned for legal assistance to the New England First Amendment Center at Northeastern University. This lawsuit followed.

In determining whether injunctive relief is appropriate, this Court applies the test set forth *Packaging Industries v. Cheney*, 380 Mass. 609, 616-22, 405 N.E.2d 106 (1980). First, the moving party must show that it is reasonably likely to prevail on the merits of the underlying claim. Second, this Court weighs the relative harms to the parties if the injunction is or is not granted.

In the appropriate case, the Court should also consider the public interest. See *Commonwealth v. Mass. CRINC, Inc.*, 392 Mass. 79, 89, 466 N.E.2d 792 (1984). [*3] This Court concludes that the Ledger has sustained its burden of showing its entitlement to the relief it seeks.

With regard to the merits of the underlying claim, the issue before the Court is strictly a legal one--namely, whether this request seeks records which fall within *G.L.c. 4, §7, cl. 26(c)*, which exempts from public disclosure "personnel and medical files or information" as well as "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy." This "privacy" exemption was interpreted and analyzed in *Boston Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 446 N.E.2d 1051 (1983). In that case, the Globe sought, among other things, infor-

mation or files which would reveal the medical reason given by each employee in applying and receiving his disability pension. The SJC held that "medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." 388 Mass. at 439. Although the Globe was entitled to know the names of those receiving disability and the amounts received, the medical [*4] certificates setting forth the medical condition for the request (e.g. bad back, heart problem, hypertension) were private. The instant case is quite different. As the Court understands it, the Ledger is not interested in the contents of any physician statement submitted in connection with an application but wants to know only the identifying information of the physician who submitted it.

The defendants contend that revealing the doctor's name would necessarily reveal something about the underlying medical condition, since many doctors are specialists. Many so-called specialties are broad enough, however, to encompass a wide variety of diseases and medical conditions. For example, one may go to a gastroenterologist for any number of digestive problems. Moreover, the defendants (who have the burden of showing that the exemption claimed in fact applies) have presented no information that the specialty of any particular doctor involved here is of the type which would necessarily reveal the underlying medical condition that was claimed in seeking the disability pension. Indeed, it would appear that the Ledger is more interested in knowing whether the same doctor (or small group of doctors) [*5] has certified all the disability applications in question than it is in knowing what the underlying medical reasons for the applications were. So long as the documents produced reveal only information relating to the identity of the doctor,¹ they would not implicate that portion of *G.L.c. 4, §7, cl. 26(c)* which absolutely exempts medical files from disclosure. Nor would the second portion of that exemption apply, since disclosure of this information would not constitute an "unwarranted invasion of privacy."

1 The defendants have presented a sample Physician Statement. On page 4 of the form, the physician certifies that all the information he or she provides in connection with the individual application is true; the doctor then

fills out information identifying himself or herself (by name, address, medical license and specialty, among other things). It is this information which the Court understands that the Ledger is seeking--and which the injunction is intended to cover. If revealing some portion of this information would in fact indirectly disclose the medical condition of a particular applicant, then that portion could be redacted. This must be done on an individual basis, however, [*6] and not in some wholesale fashion.

With respect to the balancing of harms, the defendants contend that an injunction would effectively decide the case before a full adjudication of the merits. Because the issue before the Court is strictly a legal question, however, there is no benefit to waiting: I will be in no better position later to decide the issues than I am now. Moreover, the Public Records Statute itself requires that records not exempt from disclosure be produced without unreasonable delay and that, where the custodian of public records fails to comply with a request, the Superior Court has jurisdiction to order compliance. *G.L.c. 66, §10(a)* and *(b)*; see also *950 C.M.R. 32.05(2)*. Indeed, a motion for a preliminary injunction made in a lawsuit filed pursuant to *G.L.c. 66, §10* is precisely how an issue under the Public Records Statute is best addressed.

More important, this Court concludes that there is a strong public interest in prompt disclosure of this information which outweighs any conceivable harm to the defendants. Much of the process by which disability pensions are awarded is shrouded in secrecy. The awards themselves, however, involve taxpayer money and impact the [*7] budgets of our cities and towns, which are already struggling to fund important public services in these difficult economic times. Although no individual should have the intimate details of his or her medical history open for public inspection, the public must be also be satisfied that the applicants for disability are not abusing the benefits extended to them and that the powers conferred on retirement boards to grant or deny such applications are being exercised wisely. If some light can be shed on the process by which those decisions are reached in a way which does not impinge on individual privacy, then

that will promote public confidence--or lead to reform if problems are revealed.

Accordingly, for all the foregoing reasons and for other reasons outlined in the plaintiff's Memorandum of Law, the Motion for a Preliminary Injunction is *ALLOWED* and it is hereby *ORDERED* that the defendants disclose all information which identifies the physician or physicians who filed

statements supporting applications for accidental disability pensions on behalf of the forty-one municipal employees already identified by the Ledger.

Janet L. Sanders

Justice of the Superior Court

Dated: April 2, 2009



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

100 Cambridge Street
Boston, Massachusetts 02114

Docket Nos.

MASSPCSCO
v.
COMMISSIONER OF REVENUE

C278479
C284149
C288621

MASSPCSCO
v.
BOARD OF ASSESSORS OF WOBURN

F283510
F293338

MASSPCSCO
v.
BOARD OF ASSESSORS OF SPRINGFIELD

F282451
F287119

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DECISION

With regard to MASSPCSCO v. Commissioner of Revenue, Docket Numbers C278479 (2005), C284149 (2006), C288621 (2007), the decisions are for the appellant. In accordance with G.L. c. 58, § 2, the Board finds and rules that the appellant was a foreign corporation within the meaning of G.L. c. 63, § 30 for the years at issue and was entitled to be classified as such by the appellee.

With regard to MASSPCSCO v. Board of Assessors of Woburn, Docket Numbers F283510 and F293338, and with regard to MASSPCSCO V. Board of Assessors of Springfield, Docket Numbers F282451 and F287119, the decisions are for the appellees. The Board finds and rules that MASSPCSCO was not entitled to the exemption under G.L. c. 59, § 5 cl. 16 (2).

ORDERED ACCORDINGLY.

APPELLATE TAX BOARD

By *[Signature]* Chairman

Frank Sciarappa Commissioner

Charles J. Co Commissioner

[Signature] Commissioner

[Signature] Commissioner

Attest: *Selen Marie Warner*
Clerk of the Board

Date:
(Seal)

SEP 10 2009



THE COMMONWEALTH OF MASSACHUSETTS

Appellate Tax Board

100 Cambridge Street
Boston, Massachusetts 02114

F282536, F283668

MASSPCSCO,
Appellant.

BOARD OF ASSESSORS OF THE CITY OF BOSTON,
Appellee.

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ORDER

With regard to MASSPCSCO v. Board of Assessors of Boston, Docket Numbers F282536 and F283668, the Board finds and rules that MASSPCSCO was not entitled to the exemption under G.L. c. 59, § 5 cl. 16 (2).

A pretrial conference will be held on Monday, October 5, 2009 at 9:30 a.m. to establish a date for the completion of the hearing of this appeal.

ORDERED ACCORDINGLY.

APPELLATE TAX BOARD

By [Signature] Chairman
[Signature] Commissioner
[Signature] Commissioner
[Signature] Commissioner
[Signature] Commissioner

SEP 10 2009

Date:
(Seal)

Attest: [Signature]
Asst Clerk of the Board