

---

Massachusetts Department of Revenue  
Division of Local Services

Current Developments  
in  
Municipal Law



2011

Appellate Tax Board and Superior Court Cases

Book 2A

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

---

[www.mass.gov/dls](http://www.mass.gov/dls)



# APPELLATE TAX BOARD AND SUPERIOR COURT CASES

## Book 2A

### Table of Contents

#### Appellate Tax Board Cases

<b><u>Boston Communications Group, Inc. v. Board of Assessors of Woburn</u></b> , ATB 2011-780, Docket No. F304869, Findings of Fact and Report (August 15, 2011) - <i>Untimely Abatement Denial Notice - Additional Time to File ATB Petition</i>	1
<b><u>Chelmsford Mobile Home Park Properties, LLC v. Assessors of Chelmsford</u></b> , ATB 2011-646, Docket Nos. F298316, F304236, Findings of Fact and Report (June 24, 2011) – <i>Valuation - Manufactured Home Parks - Income from Site Pad Rentals — Exemptions</i>	8
<b><u>Cocchi v. Assessors of Ludlow</u></b> , ATB 2010-861, Docket Nos. F301789, F301790, Findings of Fact and Report (September 28, 2010) - <i>Principally Engaged in Agriculture — Personal Property Equipment — Exemption</i>	25
<b><u>Community Care Services, Inc. v. Assessors of Berkley</u></b> , ATB 2011-713, Docket No. F293959, Findings of Fact and Report (June 29, 2011) - <i>Occupancy for Charitable Purposes — Occupancy Permit</i>	34
<b><u>Farmhouse Lane Realty Trust v. Assessors of Rowley</u></b> , ATB 2011-226, Docket Nos. F294842-F294854, F299674-F299686, Findings of Fact and Report (April 5, 2011) – <i>Valuation — Conservation Land – Undevelopable – Unbuildable — Burden Of Proof</i>	40
<b><u>Florio &amp; Novak, Trustees et al. v. Assessors of Newbury</u></b> , ATB 2011-725, Docket Nos. F287875, F294075, F299082, F305469, X302672, X302664, X302689, X302682, X302656, Findings of Fact and Reports (June 29, 2011) - <i>Plum Island Erosion — Effects on Valuation — Assessment Practice</i>	52
<b><u>GD Fox Meadow, LLC v. Assessors of Westwood</u></b> , ATB 2011-501, Docket No. F303504, Findings of Fact and Report (June 8, 2011) – <i>Valuation — Lots Owned by Developer — In Bulk or as Individual Parcels</i>	82
<b><u>Home For Aged People in Fall River v. Assessors of Fall River</u></b> , ATB 2011-370, Docket Nos. F288407, F296842, F300683, Findings of Fact and Report (May 4, 2011) - <i>Dominant Purpose — Objects of Traditional Charity — Luxury Housing and Services for Seniors</i>	94

<b><u>Indianhead Penny LP v. Assessors of Edgartown</u></b> , Mass. ATB 2011-680, Docket Nos. F298945, F298948, F304194, F304196, F308987, F308990, Findings of Fact and Report (June 24, 2011) - <i>Assessment Unit — Multiple Contiguous Lots</i>	<b>114</b>
<b><u>LeFaver v. Assessors of North Adams</u></b> , ATB 2011-489, Docket No. F306880, Findings of Fact and Report (June 7, 2011) – <i>Overvaluation — Contamination By Hazardous Waste</i>	<b>131</b>
<b><u>Ziering v. Assessors of Concord</u></b> , ATB 2010-925, Docket No. F298606, Findings of Facts and Report (October 22, 2010) – <i>Valuation - Conservation Restriction</i>	<b>137</b>

### **Superior Court Cases**

<b><u>Leicester School Committee v. Town of Leicester et al.</u></b> , 27 Mass. L. Rep. 467, Worcester Superior Court (October 22, 2010) - <i>Prepayment of Special Education (SPED) Services – Payment from One Fiscal Year's Budget for Services in Next Fiscal Year – Payment Due Dates</i>	<b>148</b>
<b><u>David C. Richardson et al. v. Board of Selectmen of Blackstone et al.</u></b> , 27 Mass. L. Rep. 591, Worcester Superior Court (December 20, 2010) – <i>Eminent Domain – Offset for Payment of Real Estate Taxes</i>	<b>152</b>

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**BOSTON COMMUNICATIONS v.  
GROUP, INC.**

**BOARD OF ASSESSORS OF  
THE CITY OF WOBURN**

Docket No. F304869

Promulgated:  
August 15, 2011

ATB 2011-780

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Woburn (“assessors” or “appellee”) to abate taxes on certain personal property located in Woburn and assessed to Boston Communications Group, Inc. (“BCGI” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2009 (“fiscal year at issue”).

Chairman Hammond heard the appellee’s Motion to Dismiss for Lack of Jurisdiction (“Motion to Dismiss”). He was joined in granting the Motion and deciding this appeal for the appellee by Commissioners Scharaffa, Egan, Rose and Mulhern. These findings of fact and report are made at the request of the appellant pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

*John W. MacSweeney, Esq.* for the appellant.

*John D. McElhiney, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

At all times relevant to this appeal, BCGI was a Massachusetts corporation engaged in the business of providing billing services for the mobile telecommunications industry. BCGI’s principal place of business was in Bedford, Massachusetts, but it also had a facility in Woburn. On January 1, 2008, BCGI was the assessed owner of personal property, consisting of machinery and equipment (“personal property at issue”), located at its Woburn facility. For the fiscal year at issue, the assessors valued the personal property at issue at \$5,273,950, and assessed taxes thereon, at the rate of \$24.54 per \$1,000, in the total amount of \$129,422.73. It was undisputed that the appellant paid at least half of the taxes so assessed prior to filing its appeal with the Appellate Tax Board (“Board”), and therefore, under G.L. c. 59, § 64, the appellant’s

failure to pay the remaining taxes due was not a jurisdictional bar to its appeal.<sup>1</sup>

On January 30, 2009, the appellant filed an Application for Abatement with the assessors. The appellant's abatement application was denied by vote of the assessors on April 18, 2009, but it appeared from the record that the assessors did not sign and mail the notice of abatement denial until May 1, 2009, more than ten days after the assessors' decision on the application. *See* G.L. c. 59, § 63 ("§ 63"). The appellant received the notice of abatement denial on May 2, 2009.<sup>2</sup>

The evidence further established that, following the appellant's receipt of the notice of denial, there was a series of telephone calls, meetings, and correspondence between the appellant and the assessors regarding the valuation of the personal property at issue for the fiscal year at issue and subsequent fiscal years. These discussions commenced in the beginning of May of 2009 and continued into the fall of 2009. Notes taken by counsel for the appellant at one such meeting on June 4, 2009, were entered into evidence. Those notes reflected that:

[Counsel for the appellant] suggested that in the interest of efficiency for all concerned, it might make sense for the parties to settle the Fiscal 2009 valuation/abatement issue at the level of [BCGI's] current short payment . . . **[Chief Assessor] responded that while he is not in an internal (political/financial/prior year budgetary position to agree to same) and would be forced to exercise rights and defend status quo position at the Appellate Level, he . . . would be willing to work with me on a significantly lower fiscal 2010 Woburn personal property valuation . . . .** (emphasis added).

Additionally, the evidence showed that, during this same time period, the appellant desired to obtain a building permit for another of its properties located in Woburn, and that its failure to pay in full the taxes assessed for the personal property at issue had created an impediment to receiving such a permit. After additional meetings and discussions, the appellant entered into an agreement ("agreement") with Woburn's Tax Collector ("Tax Collector"), dated September 30, 2009, in which the Tax Collector agreed not to oppose the issuance of the building permit provided the appellant made monthly installment payments of the remaining taxes due associated with the personal property at issue. In particular, the agreement stated:

---

<sup>1</sup> G.L. c. 59, § 64 provides a right to appeal a tax on personal property or on a parcel of real estate, provided that "at least one-half of [the tax] has been paid."

<sup>2</sup> The notice of denial sent to the appellant stated that it was a denial of the abatement application filed by "Sprint PCS." However, the notice of denial was addressed to, and received by, BCGI at its Bedford headquarters.

It is understood that BCGI has contested the Fiscal Year 2009 personal property assessment and that an appeal of the April 18, 2009 decision of the City Board of Assessors to SPRINT PCS which was mailed to Boston Communications Group will be formally filed with the Appellate Tax Board on or before October 16, 2009. During the pendency of the BCGI's appeal, BCGI desires to make installment payments toward the unpaid balance of the Fiscal Year 2009 Personal Property taxes remaining due to the City.

The appellant filed its petition with the Board for the fiscal year at issue on October 19, 2009. The assessors thereafter filed a Motion to Dismiss. The appellant opposed the assessors' Motion to Dismiss, arguing that principles of equitable estoppel prohibited the assessors from raising a jurisdictional issue because, it claimed, the assessors induced the appellant not to timely file an appeal with the Board by engaging in discussions with the appellant following the issuance of the notice of abatement denial. The appellant further asserted that it was induced not to file an appeal with the Board because of the agreement it entered into with the Tax Collector.

On the basis of the foregoing facts, the Board found that, although the assessors voted to deny the appellant's abatement application on April 18, 2009, they did not sign or mail the notice of abatement denial until May 1, 2009, which was more than ten days later. Because the assessors failed to give notice of their denial within ten days, as required by § 63, the Board found that the date of the notice of abatement denial was "ineffective for the purpose of determining when to commence the running of the three-month appeal period." *Stagg Chevrolet, Inc. v. Bd. of Water Comm'rs*, 68 Mass. App. Ct. 120, 121 (2007). The Board further determined that, because the assessors failed to comply with the requirements of § 63, the appellant had a "reasonable time [to file an] appeal based on the most relevant statutory standards." *Id.* at 126.

The Board found that the relevant statutory standards were those found in G.L. c. 59, § 65 ("§ 65"), which allows taxpayers three months to file an appeal following a notice of abatement denial or a deemed denial, and those found in G.L. c. 59, § 65C ("§ 65C"), which grants taxpayers up to an additional two months to file an appeal in the event that the assessors fail to send notice of a deemed denial within ten days from the deemed denial. The Board found that both of these statutes were relevant because they operate to preserve a taxpayer's appeal rights in circumstances where the assessors have failed to act promptly on an application for abatement or have failed to give notice in a manner that complies with the requirements of § 63. Additionally, the Board found that

the filing periods provided by these statutes were reasonable, particularly where the appellant admitted to receiving the notice of abatement denial in early May of 2009.

The appellant's appeal was not timely under either standard. Had there been a deemed denial of the appellant's abatement application, it would have occurred on April 30, 2009, and § 65 would have allowed the appellant three months from the date of deemed denial, or until July 30, 2009, to file an appeal with the Board. Further, § 65C would have allowed the appellant an additional two months, or until September 30, 2009, to file an appeal. Under the relevant statutory standards, the latest date the appellant could have timely filed its appeal was September 30, 2009, but the appellant did not file its petition until October 19, 2009. The appellant therefore did not timely file its appeal within a reasonable time period based on the relevant statutory standards, and the Board found that it did not have jurisdiction to hear and decide this appeal.

Additionally, the Board found that the appellant's equitable estoppel argument was misplaced. First, the Board does not have the authority to act based on principles of equitable estoppel; it has only that authority to act which has been granted to it by statute. Second, the Board found no merit in BCGI's claim that it was induced by the assessors not to file an appeal with the Board. Contemporaneous notes taken by counsel for BCGI reflected the assessors' unequivocal statement that they did not intend to settle with the appellant for the fiscal year at issue, and would instead defend the assessment at the Board. Similarly unavailing was the appellant's assertion that the agreement reached between the appellant and the Tax Collector caused the appellant not to timely file an appeal with the Board. The agreement related to the issuance of a building permit, not the merits of the assessment at issue. Moreover, parties cannot consent to extend the time for filing at the Board, nor can they confer jurisdiction upon the Board.<sup>3</sup> The deadline for filing an appeal at the Board is set by statute, and appeals filed later than the deadline set by statute must be dismissed. Based on the foregoing, the Board rejected the appellant's equitable estoppel argument.

On the basis of all of the evidence, the Board found that it did not have jurisdiction to hear and decide this appeal because the appellant failed to timely file its petition with the Board. Accordingly, the Board allowed the assessors' Motion to

---

<sup>3</sup> Per G.L. c. 59, § 64, the taxpayer may consent to extend the time for the assessors to act on an abatement application, which would in turn extend the time for filing an appeal with the Board. Absent such an extension, the parties cannot agree or consent to extend the time for filing an appeal with the Board.

Dismiss and issued a decision for the appellee in this appeal.

## OPINION

Section 65 provides that:

[a] person aggrieved . . . with respect to a tax on property in any municipality may, subject to the same conditions provided for an appeal under section sixty-four, appeal to the appellate tax board by filing a petition with such board within three months after the date of the assessors' decision on an application for abatement as provided in section sixty-three, or within three months after the time when the application for abatement is deemed to be denied as provided in section sixty-four.

Further, Section 63 provides that:

[a]ssessors shall, within ten days after their decision on an application for an abatement, send written notice thereof to the applicant. If the assessors fail to take action on such application for a period of three months following the filing thereof, they shall, within ten days after such period, send the applicant written notice of such inaction.

Thus, the statutory scheme generally requires the taxpayer to file an appeal with the Board within three months of the assessors' decision on an abatement application or, if the assessors fail to timely act on an abatement application, within three months of the date of deemed denial. Assessors are required under § 63 to give notice of their decision on an abatement application, or of its deemed denial, within ten days of the decision or deemed denial date. Courts have ruled that a notice of abatement decision issued in a manner that does not comply with the relevant statute is insufficient to trigger the appeal period, and the Board so found and ruled in the present appeal. *See Stagg Chevrolet*, 68 Mass. App. Ct. at 124-26; *SCA Disposal Servs. of New England, Inc. v. State Tax Commission*, 375 Mass. 338, 376 (1978). Here, because the notice of abatement denial did not comply with the requirements of § 63, the Board found and ruled that the denial date reflected in the notice did not trigger the statutory appeal period. Instead, the appellant had a "reasonable time for appeal based on the most relevant statutory standards." *Stagg Chevrolet*, 68 Mass. App. Ct. at 126.

The Board found and ruled that the most relevant statutory standards were those found in §§ 65 and 65C, and further found and ruled that these statutes provided a reasonable period of time for the appellant to file an appeal, particularly in light of the fact that the appellant conceded that it received the notice of abatement denial in early

May of 2009. Under §§ 65 and 65C, the appellant had, at the latest, until September 30, 2009 to file its appeal. The appellant did not file its appeal with the Board until October 19, 2009, which was nineteen days past the latest day for the filing of the appeal.

“The Board has only that jurisdiction conferred on it by statute.” *Stilson v. Assessors of Gloucester*, 385 Mass. 724, 732 (1982). “Since the remedy of abatement is created by statute, the [B]oard lacks jurisdiction over the subject matter of proceedings that are commenced at a later time or prosecuted in a different manner from that prescribed by statute.” *Nature Church v. Assessors of Belchertown*, 384 Mass. 811, 812 (1981) (citing *Assessors of Boston v. Suffolk Law School*, 295 Mass. 489, 495 (1936)). Because the appellant failed to file its appeal within the timeline set forth in the relevant statutes, the Board found and ruled that it did not have jurisdiction to hear and decide this appeal.

The Board further found and ruled that the appellant’s equitable estoppel argument was misplaced. The Board does not have the authority to act based on principles of equitable estoppel; it has only that authority granted to it by statute. See *Stilson*, 385 Mass. at 732; *Commissioner of Revenue v. Marr Scaffolding*, 414 Mass. 489, 493 (1993) (“An administrative agency has no inherent or common law authority to do anything. An administrative board may act only to the extent that it has express or implied statutory authority to do so.”); see also *Hillside Country Club Partnership, Inc. v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2011-191, 196 (“[T]he Board lacks the authority to grant an abatement based on principles of equitable estoppel.”).

In addition to being misplaced, the appellant’s argument was without merit. The appellant contended that it was induced not to file a formal petition with the Board because of the actions of the assessors and other Woburn officials. The Board disagreed. Contemporaneous notes taken by counsel for the appellant reflected the unequivocal statements of the assessors that they would not settle the fiscal year 2009 appeal, but would instead defend the assessment at the Board. Further, the agreement entered into between the appellant and Woburn’s Tax Collector related to the issuance of a building permit, and contained no indication that the assessors would settle the appeal for the fiscal year at issue. Even if any of the evidence cited by the appellant could be construed as reflecting the assessors’ attempts to induce the appellant not to file an appeal with the Board, which the Board found that it did not, such evidence

would not carry the day for the appellant. The Board's jurisdictional requirements are set by statute, and neither agreements entered into between the parties nor any actions taken by the assessors can confer jurisdiction upon the Board where it does not exist. "[A] statutory prerequisite to jurisdiction cannot be waived by any act of the assessors." *Suffolk Law School*, 295 Mass. at 494; *Old Colony R. Co. v. Assessors of Quincy*, 305 Mass. 509, 511-12 (1940). "The time limit provided for filing the petition is jurisdictional and a failure to comply with it must result in dismissal of the appeal." *Doherty v. Assessors of Northborough*, Mass. ATB Findings of Fact and Reports 1990-372, 373 (citing *Cheney v. Inhabitants of Dover*, 205 Mass. 501, 503 (1910)); *Suffolk Law School*, 295 Mass. at 495. In sum, the Board found and ruled that the appellant's argument was misplaced and without merit, and it therefore rejected that argument.

On the basis of the evidence presented, the Board found and ruled that the appellant failed to timely file its appeal with the Board for the fiscal year at issue. Accordingly, the Board allowed the assessors' Motion to Dismiss and entered a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**CHELMSFORD MOBILE HOME PARK v.  
PROPERTIES, LLC, Successor  
to CJD REAL ESTATE, LP<sup>1</sup>**

**BOARD OF ASSESSORS OF  
THE TOWN OF CHELMSFORD**

Docket Nos. F298316, F304236

Promulgated:  
June 24, 2011

ATB 2011-646

These are appeals 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 real estate in the Town of Chelmsford assessed under G.L. c. 59, §§ 11 and 38 for fiscal years 2008 and 2009.

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

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.

*Gregg S. Haladyna*, Esq. for the appellant Chelmsford Mobile Home Park Properties, Inc.

*Robert Kraus*, Esq. for intervener Massachusetts Manufactured Housing Association, Inc.

*Richard P. Bowen*, Esq. and *Jeffrey Honig*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

On January 1, 2007 and January 1, 2008, the appellant, Chelmsford Mobile Home Park Properties, LLC successor to CJD Real Estate Limited Partnership (the “appellant”), was the assessed owner of a number of contiguous parcels of real estate located at 270-288 Littleton Road in the Town of Chelmsford (the “subject property”). At all relevant times, the appellant operated the subject property as a manufactured home park, named Chelmsford Mobile Home Park (the “Park”). The subject property consists of approximately 37.75 acres, improved with roads, 254 site pads, and other infrastructure necessary for the operation of a manufactured home park. There are also four residential cabins and a commercial building, the second floor of which is used as an office and the

---

<sup>1</sup> On September 23, 2009, Chairman Hammond granted Massachusetts Manufactured Housing Association, Inc.’s Motion to Intervene.

first floor as a Laundromat.

For fiscal years 2008 and 2009, the Board of Assessors of Chelmsford (the “assessors”) valued the subject property at \$11,530,500 and \$11,635,300, respectively. The assessors assessed taxes on the subject property at the rates of \$13.50 per \$1,000 for fiscal year 2008 and \$14.07 per \$1,000 for fiscal year 2009, resulting in tax assessments of \$155,661.75, plus a Community Preservation Act (“CPA”) surcharge in the amount of \$2,314.68, for fiscal year 2008 and \$163,708.67, plus a CPA surcharge in the amount of \$2,434.53, for fiscal year 2009. On December 26, 2007 and December 29, 2008, the Tax Collector for Chelmsford caused the town’s actual tax bills to be mailed for fiscal years 2008 and 2009, respectively. In accordance with G.L. c. 59, § 57C, the appellant timely paid each fiscal year’s taxes without incurring interest.

On January 30, 2008 and January 30, 2009, in accordance with G.L. c. 59, § 59, the appellant timely filed Applications for Abatement with the assessors for fiscal years 2008 and 2009, respectively. The assessors denied the appellant’s abatement application for fiscal year 2008 on April 30, 2008; the appellant’s abatement application for fiscal year 2009 was deemed denied on April 30, 2009. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably appealed these denials by filing Petitions Under Formal Procedure with the Appellate Tax Board (the “Board”) on July 28, 2008 for fiscal year 2008 and July 24, 2009 for fiscal year 2009. On the basis of these facts, the Board found and ruled that it had jurisdiction over these appeals.

The appellant couched the issue in these appeals as one of exemption. It claimed that the assessors valued the subject property at \$3,873,600 in fiscal year 2007, but then raised the assessment to \$11,530,500 in fiscal year 2008 and to \$11,635,300 in fiscal year 2009, by improperly including in the assessments the value of some 255 exempt manufactured homes located in the Park.<sup>2</sup> According to the appellant, these manufactured homes qualified for the statutory exemption for manufactured homes under G.L. c. 59, § 5, cl. 36 (“Clause 36”)<sup>3</sup> and, therefore, should not have been included in the appellant’s real estate tax assessment or assessed a personal property tax. The appellant further contended that the hearing of these appeals should therefore be limited to evidence necessary for a determination of whether the \$7,650,000 portion of the

---

<sup>2</sup> The evidence indicates that, at all relevant times, there were not more than 254 manufactured homes in the Park.

<sup>3</sup> General Laws, c. 59, § 5, cl. 36 provide an exemption for “Manufactured homes located in manufactured housing communities subject to the monthly license fee provided for under section thirty-two G of chapter one hundred and forty . . . .”

assessment, which the appellant claimed the assessors attributed to the manufactured homes located at the Park, should be abated in full because of the exemption.

The assessors asserted that the appellant's view of the scope of the hearing was unduly restricted. The assessors claimed that the Board should admit evidence relevant and material to the more general issue of whether the assessors had overvalued the subject property for the fiscal years at issue.<sup>4</sup> They further argued that, even if the appellant's burden of proof required it to prove here that the manufactured homes were exempt, the appellant still had to show that the subject property's fair cash value for each of the fiscal years at issue was less than its assessed value.

As a threshold matter, and as more fully explained in its Opinion below, the Board agreed with the assessors regarding the scope of the hearing. The issues here were not limited to a mere determination of exemption, but necessarily included a finding on overvaluation. Even if the Board found that the manufactured homes were exempt, it could not abate the \$7,650,000 portion of the assessment purportedly allocated to the manufactured homes unless the assessment that the assessors had placed on the subject property as a whole for fiscal years 2008 and 2009 actually included values for the manufactured homes and exceeded the subject property's fair cash value, excluding the value of the exempt manufactured homes for those fiscal years. It is undisputed that, at all relevant times, the assessors never sent real estate or personal property tax bills to the individual owners of the manufactured homes or personal property tax bills for the manufactured homes to the appellant. Accordingly, the only assessments at issue in these two appeals are the two on the subject property – the Park – for the two fiscal years at issue. To the extent that the value of the manufactured homes might have been included in the subject property's assessments, it would have had to have been as a component of those two assessments.

In deciding whether to abate an assessment, the Board must consider the value of the property as a whole and not just the property's component parts. Only if it is proven that the fair cash value of the property as a whole is less than the assessment will the Board order abatement, even if the methodology that the assessors used for establishing

---

<sup>4</sup> The appellant submitted a Motion in Limine to preclude the assessors from offering evidence of valuation. The appellant argued that the pleadings did not raise the issue of valuation, only exemption. Accordingly, any evidence pertaining to valuation should be excluded from the hearing of these appeals. At the hearing, the Board took the motion under advisement and allowed the introduction of valuation evidence *de bene*. See *Commonwealth v. Curry*, 341 Mass. 50, 54 (1960) (“evidence may be admitted *de bene* and the determination of its admissibility or effect postponed until the parties have rested.”). After the close of the hearing, the Board denied the motion and allowed the evidence without qualification.

the assessment is flawed or improper. If the evidence shows that the assessment is less than or equal to the subject property's fair cash value, the assessment stands.

The appellant called two witnesses to testify in its case-in-chief. The first witness was Francis Reen, the Chief Assessor for Chelmsford. Mr. Reen readily conceded that, at all relevant times, the Park was a manufactured housing community licensed by the Chelmsford Board of Health under G.L. c. 140, § 32B and that the operator of the Park paid the requisite monthly licensing fee pursuant to G.L. c. 140, § 32G. Accordingly, the assessors considered the manufactured homes located in the Park to be exempt under Clause 36, and did not assess a personal property tax on the manufactured homes located at the Park.

Mr. Reen also testified about the various valuation components on the subject property's fiscal year 2008 property record card. According to Mr. Reen, the assessors assessed the subject property's land at \$3,655,100, four residential cabins at \$159,200, a commercial office and laundry building located at the Park for \$66,200, and the site pads for the manufactured homes at \$7,650,000, for a total valuation of \$11,530,500. For fiscal year 2009, the assessors set those values at \$4,142,400, \$159,200, \$66,200, and \$7,267,500, respectively, for a total valuation of \$11,635,300. Mr. Reen insisted that the assessors did not value the manufactured homes themselves for real estate tax purposes but rather were valuing the site pads for the manufactured homes, which the assessors had neglected to assess before fiscal year 2008. Certain other evidence suggested that the assessors may have misconstrued or misspoken about the taxability of the manufactured homes as real estate when preparing the Park's fiscal year 2008 assessments before clarifying their rationale.<sup>5</sup> There is no dispute that the assessors did not maintain property record cards for the manufactured homes.

Mr. Reen further testified that the assessors used an income approach to value the Park. Because the appellant failed to provide the assessors with income and expense information, the assessors relied on "secondary sources," such as the monthly license fee statements and expenses and income from other rental properties, for that data. The

---

<sup>5</sup> This evidence includes Mr. Reen providing to the appellant's counsel as justification for dramatically raising the assessed value of the appellant's real estate from fiscal year 2007 to fiscal year 2008 a copy of the case *Ellis v. Assessors of Acushnet*, 358 Mass. 473 (1970)(holding that under certain circumstances manufactured homes may be taxed as real estate) and certain public pronouncements by Mr. Reen, which he attempted to explain away when testifying. After the close of the hearing and after the Board took these appeals under advisement, the appellant attempted to submit additional evidence into the record by attaching minutes of a Chelmsford Finance Committee meeting to its post-trial brief. The assessors promptly filed a motion to strike the minutes. Primarily for the reasons set forth in the assessors' motion, the Board allowed it and struck the minutes.

assessors' income approach, which is based on the average monthly site-pad rental that the appellant charged the owners of the manufactured homes, is summarized in the following table.

**Summary of the Assessors' Income Approach**

<b>Gross Income</b> (\$500/month x 255 units x 12 months)	\$ 1,530,000
<b>Vacancy @ 4%</b>	(61,200)
<b>Expense Allowance @ 20%</b>	<u>(293,760)</u>
<b>Net Income</b>	<b>\$ 1,175,040</b>
<b>Capitalization Rate</b> (including tax factor)	<b>9.50%</b>
<b>Value</b>	<b>\$12,368,842</b>

The appellant's second witness was David G. Piper, Jr.<sup>6</sup> At the time of his appearance, Mr. Piper was operating two manufactured housing communities and was the President of the Massachusetts Manufactured Housing Association. He had recently completed a four-year term on the Commonwealth's Manufactured Housing Commission. Before testifying, he had inspected the exterior of the manufactured homes in the Park and, relying on his familiarity with manufactured homes and related state laws and regulations, confirmed that the Park's manufactured homes complied with the definition of "manufactured homes" under G.L. c. 140, § 32Q. In his capacity as an experienced operator of parks for manufactured homes, Mr. Piper also testified that expenses associated with the operation of manufactured housing parks are ordinarily one-third of the park's gross income, while occupancy rates now approach one-hundred percent because of the scarcity of parks, particularly in the eastern part of the state, and the downturn in the economy. The leases at the parks which he operated included in their rent clauses provisions requiring the lessees to pay base rent, real estate taxes, licensing fees, and water and sewer charges. He related that increases in his parks' taxes, fees, and charges were usually passed on to the tenants in the form of increased rent. On cross-examination, he acknowledged that he never reviewed the subject Park's financials and was not familiar with the specific details relating to the Park's categories of income and expenses. The appellant did not present any testimony or other evidence from a real estate valuation expert.

The assessors called William A. LaChance to testify as their real estate valuation expert. Based on his education, appraisal designations, experience, and background

---

<sup>6</sup> The assessors submitted a Motion in Limine to exclude Mr. Piper from testifying at the hearing, which the Board denied.

appraising and researching manufactured housing communities,<sup>7</sup> the Board qualified Mr. LaChance to testify in these appeals as a real estate valuation expert. Using income-capitalization and sales-comparison approaches, Mr. LaChance valued the Park, as of January 1, 2007, at \$10,000,000 and \$9,950,000, respectively. Ultimately he relied predominantly on his income-capitalization approach in reconciling these estimates at \$10,000,000. Mr. LaChance also indicated that the market was stable between January 1, 2007 and January 1, 2008.

In his sales-comparison approach, Mr. LaChance examined five manufactured-housing-park sales in Massachusetts and New Hampshire, which occurred from January, 2002 to April, 2007. The sale prices ranged from \$3,000,000 for a 117-pad site to \$15,485,700 for a 392-pad site. A summary of the manufactured housing communities' sales data appears in the following table.

**Summary of the Assessors' Real Estate Valuation Expert's Sales-Comparison Approach**

	<u>Sale 2</u>	<u>Sale 1</u>	<u>Sale 3</u>	<u>Sale 4</u>	<u>Sale 5</u>	
	<u>Lindenshire</u>	<u>SUBJECT</u>	<u>Oakhill</u>	<u>Rocky</u>	<u>Forest</u>	<u>Pine</u>
	<u>MH Park</u>	<u>Chelmsford,</u>	<u>Home-town</u>	<u>Knoll</u>	<u>Park</u>	<u>Ridge</u>
	<u>Exeter, NH</u>	<u>MA</u>	<u>America</u>	<u>West</u>	<u>Estates</u>	<u>Estates</u>
			<u>Attleboro,</u>	<u>Taunton,</u>	<u>Jaffrey,</u>	<u>Loudon,</u>
			<u>MA</u>	<u>MA</u>	<u>NH</u>	<u>NH</u>
<u>Sale Date*</u>	April	January	January	January	April	January
	2007	2007	2006	2005	2005	2002
<u>Sale Price*</u>	\$15,485,700	\$11,530,500	\$6,990,000	\$3,450,000	\$3,000,000	\$4,500,000
				0		0
<u>Area in Acres</u>	89	37.75	49	68.6	50.16	148
<u># of Site Pads</u>	392	254	175	125	117	148
<u>Site Pads/Acre**</u>	4.4		3.6	1.8	2.3	1.0
<u>Occupancy</u>	98%	98%	100%	98%	100%	99%
<u>Net Oper. Inc.**</u>	\$1,238,850		\$510,000	\$280,000	\$219,384	\$418,523
<u>Cap. Rate**</u>	6.5%		7.3%	8.0%	7.3%	9.3%
<u>Sale Price/Pad**</u>	\$39,504		\$39,943	\$27,600	\$25,641	\$30,405

\*For the subject property, the sale date and price are the assessment date and amount for fiscal year 2008.

\*\*The rows left blank correspond to Mr. LaChance's *pro forma*.

Mr. LaChance concluded that his comparable sales' characteristics and the Park's

<sup>7</sup> In 2002, Mr. LaChance studied and included the subject Park as a comparable rental property for an appraisal that he was hired to perform on another manufactured housing park.

were sufficiently similar to warrant adjustments only for location and physical attributes. The pertinent differences in physical characteristics that he deemed important were the availability of public sewer, the density of the pads, and the condition of the infrastructure. He found that Sale 1 in Attleboro, Massachusetts and Sale 2 in Exeter, New Hampshire shared comparable locations with the Park. Recognizing the age of Sale 5, he only included it to illustrate “the existence of a multi-million dollar market for such properties as well as showing that capitalization rates had declined from 2002 to 2007.”

Instead of making explicit adjustments to his comparables, Mr. LaChance instead placed them in an array from best (Sale No. 2) to worst (Sale No. 5) and then inserted the Park in “its perceived position” within the array. He used this qualitative analysis because in his view these types of properties do not lend themselves to a quantitative analysis. Given its placement in the array, Mr. LaChance concluded that the Park’s value was about \$39,000 per site pad or a total of \$9,906,000. Instead of then adding the values for the other improvements in the Park, he instead theorized that the cabins would be converted into site pads at a cost of \$3,200 to \$8,000 per site pad, which would add an estimated \$50,000 in value to the Park, after accounting for expenses. Accordingly, using a sales-comparison approach, he valued the Park at \$9,956,000 which he rounded to \$9,950,000.

Mr. LaChance also performed an income-capitalization approach in which he first developed an estimate of market rents for the Park’s site pad and one of the cabins<sup>8</sup> using actual rents and rents from what he considered comparable properties. This exercise allowed him to develop a gross potential income for the Park which he then compared to the Park’s effective gross rental incomes reported for calendar years 2005, 2006, and 2007 of \$1,510,691, \$1,540,308, and \$1,546,776, respectively. Ultimately, in his methodology, Mr. LaChance relied on the Park’s actual effective gross income, which included an implied vacancy/credit loss rate of less than 5%.

For operating expense, Mr. LaChance analyzed three years of actual expenses and adjusted and categorized them in accordance with the Industry Standard Chart of Accounts for Manufactured Homes. For 2005, 2006, and 2007, this exercise resulted in respective expense ratios of 36.9%, 30.4%, and 34.4% of effective gross income, which Mr. LaChance then compared to industry operating expense ratios reported in the 2006 *Allen Report*. He concluded that the Park’s range of expense ratios compared favorably to industry standards, as well as to another nearby park’s expense ratio with which Mr.

---

<sup>8</sup> The other three cabins were not rentable because of their dilapidated condition.

LaChance was familiar. Based on these investigations and conversations with other manufactured housing park operators, Mr. LaChance selected an operating expense ratio of 35% to use in his income-capitalization approach.

To derive an appropriate capitalization rate to use in his methodology, Mr. LaChance spoke with industry investors and operators and reviewed the capitalization rates associated with the sales that he had incorporated into his sales-comparison approach. This investigation resulted in his approximation of a capitalization-rate range of 7.5% to 8.5%. Recognizing that the Park's rents were already on the high side with little room for immediate growth, Mr. LaChance selected a capitalization rate on the higher end of the range, 8.5%, to which he added a tax factor of 1.35% to reflect the fiscal-year-2008 tax rate of \$13.50 per \$1,000. After capitalizing the net-operating income, Mr. LaChance deducted what he estimated to be the value of several non-realty items that had contributed to the Park's net-operating income but should not be part of the real estate valuation ("FF&E").<sup>9</sup> A summary of Mr. LaChance's income-capitalization approach is contained in the following table.

**Summary of the Assessors' Real Estate Valuation Expert's Income-Capitalization Approach**

Effective Gross Income*	\$ 1,543,730
Less Operating Expenses (35%)	\$ 540,306
Net-Operating Income	\$ 1,003,424
Capitalization Rate (8.5% + 1.35% = 9.85%)	\$10,187,051
Less Value of FF&E	\$ 187,051
Indicated Market Value	\$10,000,000

\*Accounts for vacancy and credit loss.

Based on all of the evidence, the Board found that the income-capitalization method that Mr. LaChance employed to estimate the value of the Park for fiscal year 2008 produced the best evidence of the Park's value for that fiscal year. The Board found that each step in his methodology was adequately supported by relevant market information and actual data that reflected the market or the Park's place in the market.

<sup>9</sup> Mr. LaChance identified those items as a nearly new truck/snow plow, a bucket loader, office and laundry equipment, and miscellaneous other things.

Mr. LaChance's expense ratio and treatment for vacancy and credit loss were also supported by the testimony of the appellant's witness, Mr. Piper. While the Board had reservations about Mr. LaChance's handling of the Park's FF&E in his income-capitalization methodology to account for the effect of the Park's personal property on income and value, his approach had some logical appeal. In addition, it was not without precedent, was not specifically challenged by the appellant, and may have been his only option given the unavailability of actual data for creating reserves for the items. Under the circumstances and lacking any better evidence, the Board adopted it.

The Board further found that, given the stability in the market reported by Mr. LaChance, Mr. LaChance's methodology also produced the best evidence of the Park's value for fiscal year 2009 once the tax factor used in the capitalization rate was adjusted to reflect the tax rate for fiscal year 2009. The Board's adjustment to Mr. LaChance's methodology is reflected in the following table.

**Summary of the Board's Income-Capitalization Approach**  
**For Fiscal Year 2009**

Effective Gross Income	\$ 1,543,730
Less Operating Expenses (35%)	\$ 540,306
Net-Operating Income	\$ 1,003,424
Capitalization Rate (8.5% + 1.41% = 9.91%)	\$10,125,368
Less Value of FF&E	\$ 187,051
Indicated Market Value	\$ 9,938,317
Rounded	\$ 9,938,300

In addition, the Board found, as the parties had, that the manufactured homes in the Park were exempt under Clause 36 from personal property and real estate taxes because they were "[m]anufactured homes located in [a] manufactured housing community subject to the monthly license fee provided for under section thirty-two G of chapter one hundred and forty." The Board also found that for fiscal years 2008 and 2009, the assessors had not assessed personal property or real estate taxes on the manufactured homes located at the Park. Rather, the Board found that the increase in the subject property's assessment from fiscal year 2007 to fiscal year 2008, and continuing into fiscal year 2009, resulted from the inclusion of values for the 254 site pads starting in

fiscal year 2008, which the assessors had previously and erroneously excluded. The Board therefore found that the assessors had not improperly assessed taxes on the exempt manufactured homes but merely included the value produced by the site pads for manufactured homes in the valuation and assessment of the Park. The Board also found that the assessors were not bound to continue their failure to assess the value of site pads into perpetuity just because they had erroneously neglected to do so in earlier fiscal years.

In making these findings, the Board additionally found that it was appropriate for the assessors to include in their overall assessment for the Park values for the various components of the Park, including values for its land, cabins, office/laundry, and site pads; moreover, if the values allocated to one or more of the components were excessive, the subject property was still not overvalued unless the subject property's overall assessment exceeded its fair cash value. The Board further found that an income-capitalization approach was the best technique to use to value the Park because, at all relevant times, the Park was an income-producing property where the rental of its site pads produced the Park's income, not manufactured homes owned by third parties. Because of the limited number of timely and meaningfully comparable sales of manufactured housing communities during the relevant time period, the Board found that values derived from a comparable-sales approach were useful only as checks. The Board further found that the qualitative analysis which Mr. LaChance adopted in his sales-comparison approach lacked precision because he only used a limited number of comparables, he rated only one property out of five superior to the subject, and he made no quantitative adjustments before undertaking his qualitative analysis. The assessors' reliance on an income-capitalization methodology in setting their assessment on the subject property and Mr. LaChance's almost total reliance on the income-capitalization technique in his reconciliation both provided additional support for the Board's finding in this regard.

Because the assessments for fiscal years 2008 and 2009 were \$11,530,500 and \$11,635,300, respectively, and the values developed using Mr. LaChance's methodology were \$10,000,000 and \$9,938,300 respectively, the Board found that the Park was overvalued for both fiscal years and therefore decided these appeals for the appellant and granted tax abatements in the amount of \$20,971.68 for fiscal year 2008 and \$24,234.95 for fiscal year 2009.<sup>10</sup>

---

<sup>10</sup> The tax abatements include appropriate abatements for the CPA surcharge.

## OPINION

The assessors have a statutory and constitutional obligation to assess all real property at its full and fair cash value. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth; art. 10 of the Declaration of Rights; G.L. c. 59, §§ 38, 52. *See Coomey v. Assessors of Sandwich*, 367 Mass. 836, 837 (1975) (citations omitted). “Real property” is statutorily defined to include “all land within the commonwealth and all buildings . . . unless otherwise exempted from taxation under other provisions of law.” G.L. c. 59, § 2A (a). Fair cash value means fair market value, which is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The appellant has the burden of proving that the property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974)(quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayer[] . . . prov[es] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984)(quoting *Schlaiker*, 365 Mass. at 245).

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

With respect to “exposing flaws or errors in assessors’ method of valuation,” taxpayers do not conclusively establish a right to abatement merely by showing that their land, or a portion of it, is overvalued. “The tax on a parcel of land and the building thereon is one tax . . . although for statistical purposes they may be valued separately.” *Assessors of Brookline v. Prudential Insurance Co.*, 310 Mass. 300, 316-17 (1941). In abatement proceedings, “the question is whether the assessment for the parcel of real estate, including both the land and the structures thereon, is excessive. The component parts, on which that single assessment is laid, are each open to inquiry and revision by the appellate tribunal in reaching the conclusion whether that single assessment is excessive.” *Massachusetts General Hospital v. Belmont*, 238 Mass. 396, 403 (1921). *See also*

*Buckley v. Assessors of Duxbury*, Mass. ATB Findings of Fact and Reports 1990-110, 119; *Jernegan v. Assessors of Duxbury*, Mass. ATB Findings of Fact and Reports 1990-39, 48-49; *Everhart v. Assessors of Dalton*, Mass. ATB Findings of Fact and Reports 1985-49, 54.

In the present appeals, the appellant asserted that the assessors had included the value of exempt manufactured homes in their assessment of the subject property for fiscal years 2008 and 2009 and that this addition explained the dramatic \$7,650,000 increase in the subject property's assessment from fiscal year 2007 to fiscal year 2008. To prove this point, the appellant attempted to use Mr. Reen's conduct prior to the hearing as evidence against the assessors at the hearing. "Evidentiary admissions are the 'conduct of a party while not on the stand used as evidence against him at trial. The conduct may be in the form of an act, a statement, or a failure to act or make a statement.'" *General Electric Co.*, 393 Mass. at 603 (quoting P.J. LIACOS, MASSACHUSETTS EVIDENCE 275-276 (5<sup>th</sup> ed. 1981)). While the Board found that this evidence of Mr. Reen's prior conduct was probative, the Board also found that it did not carry the day. Based on Mr. Reen's testimony, the subject property's property record cards, and Mr. Reen's income-capitalization methodology, as well as other evidence and inferences, the Board found that the weight of the evidence established that in valuing the subject property for fiscal years 2008 and 2009, the assessors had valued the site pads for the manufactured homes, which they had erroneously omitted in prior fiscal years, not the manufactured homes; the manufactured homes were neither taxed as personal property or real estate to either their actual owners or the appellant.

The fair cash value of property may often best be determined by recent sales of comparable properties in the market. See *Correia*, 375 Mass. 360, 362 (1978); *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929). Actual sales generally "furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller." *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 469 (1981); *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554, 560 (1971). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. See *McCabe*, 265 Mass. at 496. "In the sales comparison approach, an opinion of market value is developed by comparing properties similar to the subject property that have

recently sold.” APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 297 (13<sup>th</sup> ed., 2008). “A major premise of the sales comparison approach is that an opinion of the market value of a property can be supported by studying the market’s reaction to comparable and competitive properties.” *Id.* When comparable sales are used, however, allowance must be made for various factors which would otherwise cause disparities in the comparable prices. *See Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. “After researching and verifying the transactional data and selecting the appropriate unit of comparison, the appraiser adjusts for any differences.” THE APPRAISAL OF REAL ESTATE at 307.

Because of the limited number of timely and meaningfully comparable sales of manufactured housing communities during the relevant time period, the Board found that values derived from a comparable-sales approach were useful only as checks. The Board further found that the qualitative analysis which Mr. LaChance adopted in his sales-comparison approach lacked precision because he only used a limited number of comparables, he rated only one property out of five superior to the subject, and he made no quantitative adjustments before undertaking his qualitative analysis. Consequently, the Board found and ruled that this method was not the best available methodology to use to determine the value of the subject property.

“The board is not required to adopt any particular method of valuation,” *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449 (1986), but the income-capitalization method “is frequently applied with respect to income-producing property.” *Taunton Redev. Assocs. v. Assessors of Taunton*, 393 Mass. 293, 295 (1984). Use of the income-capitalization method is appropriate when reliable market-sales data are not available. *Assessors of Weymouth v. Tammy Brook Co.*, 368 Mass. 810, 811 (1975); *Assessors of Lynnfield v. New England Oyster House*, 363 Mass. 696, 701-702 (1972); *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 67 (1942). Under the income-capitalization approach, valuation is determined by dividing net-operating income by a capitalization rate. *See Assessors of Brookline v. Buehler*, 396 Mass. 520, 522-23 (1986). Net-operating income is obtained by subtracting market expenses from a market-derived gross income. *Id.* at 523. The capitalization rate should reflect the return on investment necessary to attract capital. *Taunton Redev. Assoc.*, 393 Mass. at 295. Generally, it is appropriate to add a tax factor to the capitalization rate in most multiple tenant scenarios because the landlord is assumed to be responsible for paying the real

estate taxes, and the tenant's contribution toward the real estate tax is included in the landlord's gross income. *Id.* at 295-96.

In the present appeals, the Board ruled that the capitalization of net income was the best method for determining the fair cash value of the Park. There were too few comparable sales within the relevant time period to use that technique for anything more than a check on values derived from an income-capitalization approach. The Board found that Mr. LaChance's income-capitalization methodology was suitably supported by relevant market information and actual data and, accordingly, with one alteration regarding the tax factor for fiscal year 2009, adopted it. The Board, however, only reluctantly approved Mr. LaChance's approach for accounting for the effect of FF&E on the Park's value. Instead of deducting the income attributable to the FF&E from the Park's net income by multiplying either the current value or the replacement cost of the FF&E by factors that represent returns on and of the personal property, *see, e.g. Cambridge Hyatt Joint Venture v. Assessors of Cambridge*, Mass. ATB Findings of Fact and Reports 1990-182, 218-20, Mr. LaChance deducted his estimate of the current value of the FF&E from his preliminary determination of the Park's value. While not ordinarily preferred, that approach is not without precedent. *See, e.g. District of Columbia v. Washington Sheraton Corp.*, 499 A.2d 109, 114 (D.C. App. 1985) (reporting that the assessors' witness deducted the value of personal property after applying the capitalization rate to the total stabilized net income of the enterprise) and *Analogic Corp. v. Assessors of Peabody*, Mass. ATB Findings of Fact and Reports 1999-267, 296 (adopting an enterprise valuation approach in which the hotel enterprise was first valued as a whole using an income-capitalization approach and then values for non-realty items, including personal property, were deducted to obtain a value for the real estate alone). The Board found that Mr. LaChance's approach had some logical appeal, was not without precedent, was not specifically challenged by the appellant, and may have been his only option given the unavailability of actual data for expensing or creating reserves for the items. Therefore, under the circumstances and lacking any better evidence, the Board adopted it.

“The board [i]s not required to accept the opinion expressed, or the valuation principles used by [an expert witness.]” *Foxboro Associates*, 385 Mass. at 683 (citation omitted.) Rather, “[t]he essential requirement is that the Board exercise judgment.” *New Boston Garden Corp.*, 383 Mass. at 473. The Board may rely upon any method of valuation that is reasonable and supported by the record.” *Analogic Corp. v. Assessors*

*of Peabody*, 45 Mass. App. Ct. 605, 609 (1998) (quoting *Blakely v. Assessors of Boston*, 391 Mass. 473, 477 (1984)). The Board found and ruled here that Mr. LaChance's income-capitalization approach was reasonable and sufficiently supported.

The Board further found and ruled that the appellant's attempt to limit the scope of the hearing for these appeals to the exempt status of the manufactured homes located in the Park and an abatement commensurate with any value allocated or assigned to them was misplaced. First, G.L. c. 59, § 59, provides, in pertinent part, that:

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, and if they find him taxed at more than his just proportion or upon an improper classification, or upon an assessment of any of his property in excess of its fair cash value, they shall make a reasonable abatement.

Accordingly, an appellant has three grounds for appeal under c. 59: (1) disproportionate assessment, (2) misclassification, or (3) overvaluation. The appellant, here, has not brought its appeals under either of the first two grounds. It has brought its appeal under the third ground, overvaluation, by alleging that part of the assessed property was exempt. In overvaluation appeals, the Board will allow competent and relevant evidence of value and examine the entire record before rendering findings or rulings on valuation. See *General Electric Co.*, 393 Mass. at 600 (“[T]he board’s decision [on whether] the taxpayer ha[s] met its burden of persuasion, [is] made upon *all* of the evidence.”)(emphasis in original).

Second, the assessors did not contest that the manufactured homes were exempt under Clause 36. Consistent with that determination, the assessors did not assess personal property taxes or real estate taxes on the manufactured homes or send tax bills to the owners of them, nor did the assessors prepare and maintain property record cards for the manufactured homes. Notwithstanding the appellant's assertions to the contrary, the Board found that the dramatic increase in the Park's assessment from fiscal year 2007 to fiscal year 2008, and continuing into fiscal year 2009, was for the value added by the site-pad components which the assessors had neglected to value and assess in the earlier fiscal years. The Board further found that, at all relevant times, the assessors were not assessing the manufactured homes located at the Park; they were simply including in the Park's overall assessment an appropriate value for the 254 site pads. Accordingly, the appellant's complaint amounted to a challenge to the methodology that the assessors used to value the Park. The Board found, however, that an income-capitalization approach was the appropriate methodology to use to capture the value that the site pads added to

the Park and to ascertain an overall value for the Park for fiscal years 2008 and 2009. By using this methodology, the Board found values, based on the analysis provided by the assessors' real estate valuation expert, that resulted in abatements for each of the fiscal years at issue. To the extent that the assessors may have overvalued one component of the Park, the Board found and ruled that it could not make a finding of overvaluation unless the Park as a whole had been overvalued.

In reaching its opinion of fair cash value, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 682; *New Boston Garden Corp.*, 383 Mass. at 469. "The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the Board." *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

Lastly, the appellant's suggestions that the assessors cannot from fiscal year to fiscal year change their assessment strategy, correct a previous assessment error, or even retreat from a prior public pronouncement by an official with apparent or perhaps even actual authority are without merit. The invocation of principles of equitable estoppel against the government has long been disfavored in Massachusetts. See *Municipal Light Co. of Ashburnham v. Commonwealth*, 34 Mass. App. Ct. 162, 167, cert denied, 510 U.S. 866 (1993) ("Generally, the principles of estoppel are not applicable against the government in connection with its exercise of public duties."). Moreover, the courts are very "reluctant to apply principles of equitable estoppel to public entities where to do so would negate requirements of law intended to protect the public interest." *Holahan v. Medford*, 394 Mass. 186, 191 (1985)(quoting *Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth.*, 387 Mass. 687, 693 (1982). "If [a taxing authority] has made a mistake in determining [a] classification . . . , unless specifically prohibited by statute or constitutional principles, [the taxing authority] should not be estopped from correcting that mistake and from assessing a tax that is otherwise lawfully due." *John S. Lane v. Commissioner of Revenue*, 396 Mass. 137, 140 (1985). "Statutory authority (like an easement in land) is not subject to atrophy or abandonment merely from nonuse." *Polaroid Corp. v. Commissioner of Revenue*, 393 Mass. 490, 496 (1984). Furthermore, equitable estoppel is not a bar to correction by a taxing authority of a mistake of law. *Automobile Club v. Commissioner*, 353 U.S. 180, 183-84 & n.7 (1957).

Here, the assessors are merely performing their statutory duty by attempting to value the Park at its fair cash value and ensure that the appellant is assessed its proportional and just amount of real estate tax. It is in the best interests of all taxpayers that the assessors be allowed to timely correct errors or misconceptions particularly where those most affected are only being asked to pay what is constitutionally, statutorily, and otherwise legally required. See, e.g., *Bell Atlantic Mobile of Massachusetts Corporation, LTD. d/b/a Verizon Wireless v. Assessors of Boston, Newton, Springfield and Westborough*, Mass. ATB Findings of Fact and Reports 2010-897 (ruling that, contrary to long-standing erroneous practice, corporate cell-phone providers were not entitled to corporate utility exemption). Moreover, a taxpayer is entitled to abatement under G.L. c. 59, §§ 59 and 64 and 65, only if they are aggrieved as a result of disproportionate assessment, misclassification, or overvaluation. Based on the Board's findings and rulings, *supra*, the appellant here was aggrieved only by overvaluation, for which the Board granted abatements. "Equitable considerations, not prescribed by statute, are not major players in tax matters (and, indeed, often do not even enter the game)." *Commissioner of Revenue v. Marr Scaffolding*, 414 Mass. 489, 495 (1993).

On this basis, the Board decided these appeals for the appellant and granted tax abatements in the amounts of \$20,971.68, including the CPA surcharge, for fiscal year 2008 and \$24,234.95, including the CPA surcharge, for fiscal year 2009. The Board's bases of computation of abatement for fiscal years 2008 and 2009 are summarized in the following two tables, respectively.

<u>Docket No.</u>	<u>Fiscal Year</u>	<u>Assessed Value (\$)</u>	<u>Tax Assessed (\$)</u>	<u>Fair Cash Value (\$)</u>	<u>Over-Valuation (\$)</u>
F298316	2008	11,530,500	157,976.43*	10,000,000	1,530,500

<u>Docket No.</u>	<u>Fiscal Year</u>	<u>Assessed Value (\$)</u>	<u>Tax Assessed (\$)</u>	<u>Fair Cash Value (\$)</u>	<u>Over-Valuation (\$)</u>
F304236	2009	11,635,300	166,143.20*	9,938,300	1,697,000

\*Includes the CPA Surcharge

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,  
 Attest: \_\_\_\_\_  
**Clerk of the Board**

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

PAUL B. COCCHI d/b/a v.  
HICK-O-ROCK FARM  
Docket No. F301789

BOARD OF ASSESSORS OF  
THE TOWN OF LUDLOW

PAUL B. COCCHI v.  
Docket No. F301790

BOARD OF ASSESSORS OF  
THE TOWN OF LUDLOW

Promulgated:  
September 28, 2010

ATB 2010-861

These are appeals 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 and real property in the Town of Ludlow owned by and assessed to the appellant, under G.L. c. 59, §§ 11 and 18, for fiscal year 2009 (“fiscal year at issue”).

Commissioner Rose (“Presiding Commissioner”) heard these appeals, and, in accordance with G.L. c. 58A, § 1A and 831 CMR 1.20, issued single-member decisions for the appellee.

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

*Paul B. Cocchi, pro se*, for the appellant.  
*David J. Martel, Esq.*, for the appellee.

**FINDINGS OF FACT AND REPORT**

**I. Docket Number F301789**

On January 1, 2008, appellant Paul B. Cocchi d/b/a Hick-o-Rock Farm (“Mr. Cocchi” or “appellant”) owned certain personal property located at 312 Miller Street in Ludlow (“subject personal property”). In accordance with G.L. c. 59, § 29, the appellant timely filed a Form of List for fiscal year 2009 listing the subject personal property. The Board of Assessors of Ludlow (“assessors” or “appellee”) valued the subject property at \$22,720 and assessed a tax thereon, at the rate of \$14.96 per \$1,000, in the amount of

\$324.44. The appellant paid the tax due on February 2, 2009.<sup>1</sup> The appellant timely filed an Application for Abatement with the assessors on February 2, 2009. On March 10, 2009, the assessors denied the appellant's Application for Abatement and on June 10, 2009, the appellant seasonably appealed the denial to the Appellate Tax Board ("Board").<sup>2</sup> On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

The subject personal property consisted of a backhoe. The appellant asserted that the value of the backhoe was approximately \$7,800, rather than its assessed value of \$22,720, and further argued that, under G.L. c. 59, § 8A, ("§ 8A") the backhoe was subject to an excise tax at the rate of \$5.00 per \$1,000, not a personal property tax at the rate of \$14.96 per \$1,000.<sup>3</sup>

The Board has dealt with the assessment of the appellant's backhoe in previous appeals. See *Paul Cocchi d/b/a Hickory Rock Farm v. Assessors of Ludlow*, Mass. ATB Findings of Fact and Reports 2006-680 ("*Cocchi I*"). *Cocchi I* involved, among other things, the valuation of the appellant's backhoe for fiscal year 2004. The Board found in that appeal that the fair cash value of the backhoe was \$38,637. The Board reached its finding of value in *Cocchi I* by taking the \$53,000 purchase price of the backhoe and applying a 10% annual depreciation factor.<sup>4</sup> More recently, in *Paul Cocchi d/b/a Hick-o-Rock Farm v. Assessors of Ludlow*, Mass. ATB Findings of Fact and Reports 2007-1379 ("*Cocchi II*"), which involved the valuation of the appellant's backhoe for fiscal year 2005, the Board applied the same depreciation factor to its finding

---

<sup>1</sup> The Board notes that although the tax was due on February 2, 2009 and the appellant paid the tax on that date, the assessors nevertheless charged an additional \$7.95 of interest to the appellant. Regardless of whether interest was in fact owed, the appellant's payment of the tax on his personal property prior to filing this appeal preserves the Board's jurisdiction, notwithstanding the incurring of interest. See G.L. 59, § 64 (requiring payment of at least one-half of the tax on personal property prior to filing an appeal).

<sup>2</sup> The petition was received by the Board via mail on June 11, 2009. However, because the envelope was postmarked by the United States Postal Service on June 10, 2009, the appellant's appeal was deemed filed on that date, and, therefore, it was timely filed. See G.L. c. 58A, § 7 and G.L. c. 59, § 64.

<sup>3</sup> G.L. c. 59, § 8A provides, in pertinent part:

Any person . . . engaged principally in agriculture, who owns farm machinery and equipment . . . shall annually, on or before March first, make a return on oath to the assessors of the town where such machinery or equipment . . . are located, setting forth the make, age, model, if any, and purchase price of such machinery and equipment . . . . If the assessors are satisfied of the truth of the return they shall assess such machinery and equipment . . . at the rate of five dollars per one thousand dollars of valuation, as determined by the commissioner of revenue, of such machinery and equipment . . . and such persons shall be otherwise exempt from taxation on these classes of property under this chapter.

<sup>4</sup> The appellant purchased the backhoe in 1999.

of value for the backhoe in *Cocchi I* and found that the value of the appellant's backhoe for fiscal year 2005 was \$34,773. The Board took judicial notice of its findings in *Cocchi I* and *Cocchi II* in the present appeal.

As he did in *Cocchi I* and *Cocchi II*, the appellant asserted in the present appeal that because he was engaged in farming at Hick-o-Rock Farm, the backhoe should be valued and taxed under § 8A at \$5.00 per thousand dollars of value, instead of G.L. c. 59, § 38 (“§ 38”), under which property is taxed at the town's applicable property tax rate of \$14.96 per thousand dollars of value. The Presiding Commissioner found in this appeal, as the Board did in previous appeals, that the appellant failed to prove that he was “engaged *principally* in agriculture” (emphasis added) as required by § 8A, because the appellant did not introduce sufficient evidence of the extent to which he was engaged in agriculture.

Mr. Cocchi did not provide a detailed account of the amount of time or resources that he committed to agriculture as compared to other business activities. Both *Cocchi I* and *Cocchi II* involved the taxation of equipment used by Mr. Cocchi in connection with his tree business, “Paul's Tree Service.” *Paul Cocchi d/b/a Hickory Rock Farm*, Mass. ATB Findings of Fact and Reports 2006-680 at 687; *Paul Cocchi d/b/a Hick-o-Rock Farm*, Mass. ATB Findings of Fact and Reports 2007-1379 at 1385. In those appeals, the Board found and ruled that Mr. Cocchi was a “tree surgeon.” There was uncontroverted testimony in the present appeal that Mr. Cocchi continued to operate his tree business during the fiscal year at issue. Mr. Cocchi did not even claim, let alone prove, that he devoted the majority of his time to Hick-o-Rock Farm rather than his tree business. The only evidence offered by Mr. Cocchi in support of his argument was a series of checks, totaling just over \$2,000, made out to “Hick-o-Rock Farm” for the purchase of cord wood. Given the amount of money involved, the Presiding Commissioner found that the checks did not lend themselves to the inference that farming was Mr. Cocchi's principal pursuit. Mr. Cocchi failed in the present appeal to prove that agriculture, as opposed to his tree business or other ventures, was his principal pursuit, as required by § 8A. The Presiding Commissioner found that Mr. Cocchi failed to establish that his backhoe was entitled to be taxed under the provisions of § 8A, and therefore, found that it was proper for the assessors to value and tax the backhoe under § 38.

Regarding the valuation of the backhoe, the appellant alleged that its fair cash value was approximately \$7,800. However, he offered no evidence to support, or even to

explain, how he arrived at that valuation. On the basis of all of the evidence, and in accordance with the depreciation factors used by the Board in *Cocchi I* and *Cocchi II*, the Presiding Commissioner found that the fair cash value of the backhoe was \$22,814.57, which was more than its assessed value of \$22,720. Accordingly, the Presiding Commissioner found that the appellant failed to establish his right to an abatement, and issued a decision for the appellee in Docket Number F301789.

## **II. Docket No. F301790**

On January 1, 2008, the appellant was the assessed owner of a 6.55-acre parcel of land improved with a single-family Cape Cod-style dwelling located at 312 Miller Street in Ludlow (“subject real property”). For the fiscal year at issue, the assessors valued the subject real property at \$205,600 and assessed a tax thereon, at the rate of \$14.28 per thousand, in the total amount of \$2,935.97. The appellant timely paid the tax due without incurring interest. The appellant timely filed an Application for Abatement with the assessors on February 2, 2009. The Application for Abatement was denied by vote of the assessors on March 10, 2009. The appellant timely filed an appeal with the Board on June 10, 2009.<sup>5</sup> On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

The Cape-Cod-style dwelling situated on the subject real property contains 1,420 square feet of finished living area, including four bedrooms. The exterior of the dwelling is brick with an asphalt-shingled, gabled roof. Interior finishes include hardwood floors and plaster walls. The dwelling also has an 80-square-foot porch, a 216-square-foot patio, a 270-square-foot wood deck, and a detached two-car garage.

The appellant contended that the subject real property was overvalued because water run-off from a nearby subdivision built in 1997 has caused much of the subject real property to become wetland. The appellant introduced pictures, maps, and various items of correspondence in support of this assertion. Among those items of correspondence is a letter from an environmental consultant who had been retained by the appellant to perform an evaluation of the subject real property. Also among the items of correspondence is a letter dated March 15, 2005 from Dwane Coffey, District Conservationist, which states that the National Wetlands Inventory Forested Wetlands map showed no wetlands on the subject real property.

The appellant also contended that the assessed value of the subject real property

---

<sup>5</sup> See footnote two.

exceeded its fair cash value because of the deterioration of the dwelling, including a cracked foundation, damaged chimney, and rotted wood on the porch and deck. Photographs of the porch, deck and chimney were introduced into evidence by the appellant. Mr. Cocchi's opinion of fair cash value for the subject real property was \$150,000.

In support of the assessment, the assessors introduced a sales-comparison analysis of three properties in Ludlow. The three comparable-sales properties all featured single-family Cape-Cod-style dwellings, like the dwelling on the subject real property. The dwellings on the three comparable-sales properties were constructed around the same time as the dwelling on the subject real property.

The assessors' comparable number one was 55 Lehigh Street, which is 1.61 miles from the subject real property. It consists of an 8,184-square-foot lot improved with a Cape-Cod-style dwelling which has 1,322 square feet of finished living space, including two bedrooms. Comparable number one also features a 120-square-foot patio, a 126-square-foot enclosed porch, an unfinished basement and a detached one-car garage. Comparable number one sold on September 4, 2007 for \$200,000.

The assessors' comparable number two was 37 Lakeview Avenue, which is 1.88 miles from the subject real property. Comparable number two consists of a 5,000-square-foot lot improved with a Cape-Cod-style dwelling which has 1,170 square feet of finished living area, including four bedrooms. It also has a partially-finished basement, a 160-square-foot enclosed porch, and a one-car detached garage. Comparable number two sold on March 5, 2007 for \$195,000.

The assessors' comparable number three was 84 Yale Street, which is 1.78 miles from the subject real property. Comparable number three consists of a 10,000-square-foot lot improved with a Cape-Cod-style dwelling which has 1,154 square feet of finished living area, including three bedrooms. It also has an unfinished basement, a 156-square-foot open porch, and a two-car detached garage. Comparable number three sold on July 27, 2007 for \$181,000.

The Presiding Commissioner found that the assessors' sales-comparison analysis involved properties substantially similar to the subject real property. All three properties were improved with Cape-Cod-style dwellings similar in size and age to the dwelling on the subject real property. They were each located less than two miles from the subject real property and each sold in reasonably close proximity to the relevant date of

assessment. The Presiding Commissioner therefore found that the assessors' sales-comparison analysis provided probative and reliable evidence of the fair cash value of the subject real property.

The assessors' three comparable-sales properties sold for between \$181,000 and \$200,000, slightly less than the assessed value of the subject real property, which was \$205,600. However, the subject real property had a vastly larger lot than the three comparable-sales properties, and the Presiding Commissioner found that this fact warranted a higher fair cash value. The Presiding Commissioner therefore found that the assessors' sales-comparison analysis provided reliable evidence that the assessed value of the subject real property did not exceed its fair cash value.

In contrast, the evidence offered by the appellant failed to establish that the fair cash value of the subject real property was less than its assessed value. The appellant's primary contention was that the subject real property was overvalued because of the presence of wetlands. However, the Presiding Commissioner found that the evidence was inconclusive as to whether there are wetlands on the subject real property. Moreover, it appears from the record that the assessors accounted for that possibility in valuing the subject real property. The assessors valued all but one of the subject real property's 6.55 acres as rear or excess acreage and made an additional 25% reduction to the value of the 5.55 excess acres, valuing those acres in the total amount of only \$13,070. The Presiding Commissioner found that, to the extent the subject real property suffered from water drainage issues, the assessors accounted for this fact in setting the assessment.

Similarly, although the appellant introduced photographs showing the deterioration of the dwelling's porch, deck, and chimney, he failed to detail the impact of the condition of the dwelling on its fair cash value or to prove that the assessors did not take the condition of the dwelling into consideration in valuing the subject real property. The property record cards entered into evidence for the assessors' three comparable-sales properties showed that the dwellings on those properties were constructed during the same time period as the dwelling on the subject real property and they were given condition factors similar to the condition factors used by the assessors for the subject real property. The appellant failed to persuade the Presiding Commissioner that the assessors did not adequately account for the condition of the subject real property in valuing it, nor did he otherwise prove that its fair cash value was less than its assessed value.

In conclusion, the Presiding Commissioner found that the appellant failed to establish his right to an abatement, and, accordingly, the Presiding Commissioner issued a decision for the appellee in Docket No. F301790.

## OPINION

### I. Taxation of the Subject Personal Property

Generally, assessors are required to assess real and personal property subject to taxation at its fair cash value and apply the applicable tax rate for their municipality to determine the tax due and payable on such property. G.L. c. 59, § 38. However, G.L. c. 59, § 8A provides an exception to the general rule of § 38 for the taxation of “farm machinery and equipment” used by any person “engaged principally in agriculture.” Section 8A provides that such machinery and equipment shall be assessed at the rate of “five dollars per one thousand dollars of valuation, as determined by the commissioner of revenue.”

The appellant asserted that his backhoe should be valued and taxed under the more favorable provisions of § 8A, instead of § 38, because it was used at Hick-o-Rock Farm. The Presiding Commissioner found and ruled, however, that the appellant did not introduce sufficient evidence to support a finding that he was “engaged *principally* in agriculture,” as required by § 8A (emphasis added). There was uncontroverted evidence that, in addition to Hick-o-Rock Farm, Mr. Cocchi runs a business called Paul’s Tree Service. In the present appeal, Mr. Cocchi did not introduce sufficient evidence to establish that his principal pursuit was farming, rather than his tree business or other ventures. The appellant introduced a series of checks made out to Hick-o-Rock Farm for the purchase of cord wood. However, the checks totaled approximately \$2,000, a sum of money which did not persuade the Presiding Commissioner that Mr. Cocchi was “engaged principally in agriculture.” G.L. c. 59, § 8A. Accordingly, the Presiding Commissioner found and ruled that the appellant did not establish the appropriateness of valuing and taxing the backhoe under § 8A, and, therefore, concluded that it was proper for the assessors to value and tax it under § 38.

With respect to the valuation of the backhoe, the appellant asserted that its fair cash value was \$7,800. However, he offered no evidence to support that value. Based on the evidence presented, and in accordance with the methodology used by the Board to value the backhoe in *Cocchi I* and *Cocchi II*, the Presiding Commissioner found that the

fair cash value of the backhoe was \$22,814.57, which was more than its assessed value of \$22,720. The appellant therefore failed to demonstrate that the fair cash value of the backhoe was less than its assessed value, and accordingly, failed to prove his right to an abatement. The Presiding Commissioner therefore issued a decision for the appellee in Docket No. F301789.

## II. Valuation of the Subject Real Property

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

In appeals before this Board, a taxpayer “may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 600 (1984) (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date often contain probative evidence for determining the value of the property at issue. *Graham v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2008-321, 400 (citing *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929)), *aff’d*, *Graham*, 73 Mass. App. Ct. 1107 (2008). The evidence introduced by the appellant with respect to the valuation of the subject real property included documents, photographs and his own testimony regarding the existence of possible wetlands on the subject real property as well as damage to the dwelling’s exterior, including its porch, deck and chimney. The Presiding Commissioner found and ruled that this evidence regarding the subject real property’s condition did not constitute “affirmative evidence of value,” nor was it evidence which revealed “flaws or errors” in the assessors’ method of valuation. *General Electric Co.*, 393 Mass. at 600.

The appellant contended that the fair cash value of the subject real property was negatively impacted by the existence of wetlands on the subject real property. The assessors valued as excess or rear acreage all but one of the subject real property’s 6.55 acres. They further reduced the value of the excess 5.55 acres by 25%, valuing them in the total amount of \$13,070. The record was inconclusive as to whether there are wetlands on the subject real property; moreover, to the extent there are such wetlands,

there was no evidence suggesting that the assessors did not take this issue into consideration in valuing the subject real property. Accordingly, the Presiding Commissioner did not find the appellant's argument to be persuasive.

Further, there was no evidence indicating that the assessors failed to take into consideration the condition of the dwelling when valuing the subject real property. The subject real property was valued commensurately with other, similar properties in close proximity to it, as evidenced by the assessors' sales-comparison analysis involving three other properties in Ludlow. The assessors' comparable-sales properties were Cape-Cod-style dwellings similar in style, size and age to the dwelling on the subject real property. The three comparable-sales properties sold reasonably close in time to the relevant date of assessment for between \$181,000 and \$200,000, slightly less than the assessed value of the subject real property, which was \$205,600. However, the subject real property has a much larger lot size than the comparables, which the Presiding Commissioner found warranted its higher valuation.

In conclusion, the Presiding Commissioner found and ruled that the evidence offered by the appellant did not demonstrate that the fair cash value of the subject real property was less than its assessed value. The Presiding Commissioner further found and ruled that the assessors' sales-comparison analysis provided reliable evidence that the assessed value of the subject property did not exceed its fair cash value. Based on the foregoing, the Presiding Commissioner found and ruled that the appellant failed to meet his burden of establishing his right to an abatement. Accordingly, the Presiding Commissioner issued a decision for the appellee in Docket No. F301790.

### CONCLUSION

On the basis of all of the evidence, the Presiding Commissioner found and ruled that the appellant failed to meet his burden of proving his right to an abatement, and accordingly, issued decisions for the appellee in these appeals.

### THE APPELLATE TAX BOARD

By: \_\_\_\_\_  
James D. Rose, Commissioner

A true copy,  
Attest: \_\_\_\_\_  
Clerk of the Board

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**COMMUNITY CARE SERVICES, INC. v.**

**BOARD OF ASSESSORS OF  
THE TOWN OF BERKLEY**

Docket No. F293959

Promulgated:

June 29, 2011

ATB 2011-713

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 Berkley (“assessors” or “appellee”) to grant an exemption under G.L. c. 59, § 5, Third (“Clause Third”) and abate taxes on certain real estate located in Berkley owned by and assessed to Community Care Services, Inc. (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2008 (“fiscal year at issue”).

Commissioner Mulhern heard the appeal. A decision was issued on October 14, 2010 which was, because of an administrative error, incorrectly issued in favor of the appellee. Chairman Hammond and Commissioners Scharaffa, Egan and Rose now join Commissioner Mulhern in this Revised Decision in favor of the appellant, which is promulgated simultaneously with this Findings of Fact and Report.

This Findings of Fact and Report is issued at the request of the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*David C. Mangoonian, Esq.* for the appellant.

*David T. Gay, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

Based on the testimony and exhibits offered into evidence in this appeal, the Appellate Tax Board (“Board”) makes the following findings of fact.

On July 1, 2007, the relevant date for qualification for the exemption under G.L. c. 59, § 5, Third (“determination date”), the appellant was the owner of a 282,593-square-foot parcel of land improved with a single-family residential dwelling located at 1 Vary Way in Berkley (“subject property”). For the fiscal year at issue, the assessors valued the subject property at \$756,800 and assessed taxes thereon, at the rate of \$7.55 per \$1,000, in the total amount of \$5,713.84. The appellant did not pay the assessed taxes and on February 11, 2008, within three months of the date of the tax bill, seasonably filed a

direct appeal with the Board, pursuant to G.L. c. 59, § 5B.<sup>1</sup> On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The parties stipulated that the appellant was at all material times a Massachusetts not-for-profit corporation organized and operated for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. On June 16, 2006, the appellant purchased the subject property for \$595,000.00. At the time of the purchase, the appellant intended to use the subject property for its residential program known as the “Lindencroft program.” The Lindencroft program, which was operating on another property owned by the appellant in Berkley when the subject property was purchased, is a residential program offering behavioral interventions for adolescent girls.

Shortly after it purchased the subject property, the appellant contracted with an architect for architectural services in late July, 2006 and with engineering firms in late August and mid-September, 2006. The proposed renovations included a new septic system, parking, upgraded kitchen facilities, office space, and additional living space. The appellant undertook the renovations to adapt the dwelling to a 14-bed facility which would be able to accommodate up to 14 adolescent girls, as well as the necessary staff.

As of the determination date, the appellant was proceeding with the preliminary measures necessary for the establishment of the program at the subject property. A letter from the Building Commissioner and Zoning Officer for Berkley indicates that no Occupancy Permit had yet been issued as of April 29, 2008, and that the building renovations were “not complete” as of that date. However, the appellant established that it had entered into contracts for architectural services, engineering services, and had proceeded with the necessary permitting procedures, including filings with the Town’s Conservation Commission and Board of Health and with the Massachusetts Division of Fisheries and Wildlife. The appellant also chose a contractor for the renovation of the existing structure on the subject property, mediated settlements of two appeals by abutters and had gained approval to commence work on the subject property as of the hearing date of this appeal.<sup>2</sup>

---

<sup>1</sup> Where, as here, a tax bill is issued for property that the appellant claims is exempt under the Clause Third exemption, the appellant has two choices: it may apply to the assessors for an abatement under G.L. c. 59, § 59, with timely payment of the tax, or it may appeal directly to the Board under G.L. c. 59, § 5B with or without timely payment of the tax. *See generally Trustees of Reservations v. Assessors of Windsor, Mass. ATB Findings of Fact and Reports 1991-22, 25.*

<sup>2</sup> On or about March 19, 2007, abutters appealed the issuance of the Order of Conditions for the Premises that was issued by Berkley’s Conservation Commission. On or about June 15, 2007, the Massachusetts Department of Environmental Protection (“DEP”) issued a Superseding Order of Conditions approving the

The appellant contended that its active and diligent pursuit of permits and other preliminary measures necessary to establish the program at the subject property qualifies as its “occupancy” of the subject property for purposes of the Clause Third exemption. The appellee disagreed and cited the fact that no permit of occupancy had been issued as of the relevant determination date as evidence that the appellant was not occupying the subject property during the fiscal year at issue.

The Board found that the appellant purchased the subject property with the intent to use it in the furtherance of its charitable purpose, which was to operate a residential facility offering a program of behavioral services to adolescent girls, known as the “Lindencroft program.” The Board further found that, as of the relevant determination date, the appellant was diligently pursuing the preliminary measures that were necessary for establishing its Lindencroft program at the subject property, including entering into contracts for architectural and engineering services, proceeding with necessary filings with the various Town and Commonwealth boards, and settling lawsuits that would have otherwise prevented construction and use of the subject property for its intended purpose. Therefore, for the reasons stated in the following Opinion, the Board found and ruled that, despite the fact that no Occupancy Permit had yet been issued, the appellant did “occupy” the subject property for purposes of the Clause Third exemption. Accordingly, the Board issued a revised decision for the appellant and granted an abatement in the amount of \$5,713.84.

### OPINION

The Clause Third exemption applies to “[r]eal 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.” (emphasis added). The organization bears the burden of proving the elements necessary to qualify for the exemption, including its occupation of the property in furtherance of the charitable purposes for which it was organized. *See Assessors of Hamilton v. Iron Rail Fund of Girls Club of America, Inc.*, 367 Mass. 301, 306 (1975); *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009).

In the instant appeal, it is undisputed that the appellant’s use of the property was

---

appellant’s work on the subject property. On or about June 29, 2007, abutters once again appealed the Superseding Order of Conditions and requested an adjudicatory hearing. The appellant reached a settlement agreement with the abutters on September 13, 2007.

its preparation of that property for use in its charitable endeavors. The appellant contended that the use of the property, as of the determination date of July 1, 2007, extended beyond “simple ownership and possession” and qualified as an active appropriation of the subject property for its charitable purposes, thus qualifying as an “occupation” of the property for purposes of the Clause Third exemption.

The issue in the instant appeal – whether the appellant’s occupancy can include its presence at the subject property during preparations for use in its charitable endeavor – was addressed by the Supreme Judicial Court in *New England Hospital for Women and Children v. City of Boston*, 113 Mass. 518 (1873). The appellant there, a charitable organization, purchased the property “for the purposes of establishing and maintaining a hospital for the treatment of the diseases of women and children, and of giving therein clinical instruction to female students of medicine, and of training nurses.” *Id.* The relevant date for determining qualification for the exemption, which was the predecessor of the Clause Third exemption, was May 1, 1871. Within a period of about a month from its purchase in April, 1871, the appellant had hired an architect, who had prepared plans and specifications for the hospital, which the appellant approved, and by May 27, 1871, the architect had staked off the property in preparation for digging the foundation. *Id.* The Supreme Judicial Court found that the appellant, as of the relevant determination date, was “diligently proceeding with the preliminary measures necessary to the erection” of the hospital, and accordingly, did “occupy” the property in accordance with the statute<sup>3</sup> as of that time. *Id.* at 521.

In *Trinity Church v. City of Boston*, 118 Mass. 164 (1875), the subject property was purchased to house a church to replace one that had been destroyed by fire. Trinity Church sought exemption for its property as a “house of religious worship”<sup>4</sup> although, as is the case in the present appeal, work was on-going on the property at issue. As of the relevant determination date in that appeal, the work done consisted of driving piles for the foundation, which was all that could be accomplished before the winter. According to the agreed statement of facts, “[i]t was then, and is now, the intention of the proprietors of the plaintiff corporation to use the lot on St. James Avenue for purposes of religious worship only; and they have caused the work of building the new church to be carried on with all reasonable diligence.” *Id.* Citing *New England Hospital*, the Court declared that actual use was not required by the statute, and under the facts of that case, sufficient

---

<sup>3</sup> The statute in effect at that time was Gen. Sts. c. 11, § 5, cl. 3, the predecessor to Clause Third.

<sup>4</sup> Gen. Sts. c. 11, § 5 cl. 7.

steps had been taken towards actual use of the property to qualify it for the real estate exemption. *Id.* at 165-66. More recently, the Massachusetts Appeals Court, in *Mt. Auburn Hospital v. Assessors of Watertown*, cited *New England Hospital* as reflecting “a less rigid formulation [with respect to occupancy] focusing on the organization’s intentions and diligence.” *Mt. Auburn Hospital v. Assessors of Watertown*, 55 Mass. App. Ct. 611, 622, n.11 (2002) (“although construction had not commenced yet, planning had been undertaken with due diligence and the hospital had not leased the premises or derived a profit therefrom; exemption allowed”). See also *The Children’s Hospital Medical Center v. Assessors of Boston*, 353 Mass. 35, 37-8 (1967) (finding that, even prior to the conversion of the subject property from a garage to a hospital laundry facility, “[a]ctual occupation by Children’s was made . . . when two employees of Children’s moved into the premises and supervised arrangements for the conversion.”).

The appellee cited *Boston Society of Redemptionist Fathers v. City of Boston*, 129 Mass. 178 (1880) to support its contention that an organization’s intent to use a property for charitable purposes at some time in the future is not sufficient to qualify for the exemption. In that case, a religious organization owned property adjacent to the property upon which its church was erected. The plaintiff found the property to be unsuitable for its church, but claimed that it intended to use the property at some time in the future “for school purposes.” *Id.* at 181. In denying the application of the charitable exemption, the Court found that the plaintiff’s intent to occupy for a specific charitable purpose was not sufficiently formulated at of the relevant assessment date:

The most that can be said is that the plaintiff intends that it shall be so occupied at some time; ***but to all appearance the time of such occupation is left wholly indefinite***, and there is nothing to prevent the plaintiff from changing its plans and alienating the property whenever it pleases. Without insisting on the strictest and most literal interpretation of the word “occupied,” as found in the third clause, we cannot avoid the belief that ***some actual appropriation of the land to the purpose for which the plaintiff was incorporated must be unequivocally shown***, in order to exempt it from taxation, and that an intent to do so at some wholly indefinite future time is not sufficient for that purpose. It should at least appear that it had begun to build.

*Id.* at 181-82 (emphasis added) (citing *New England Hospital v. Boston*, 113 Mass. 518 (1873)). In the instant appeal, by contrast, the Board found several instances of the appellant taking active steps to prepare the property for use in its Lindencroft program, including engaging architectural and engineering services for necessary renovations of the property and seeking permits with the appropriate Town and Commonwealth boards.

The Board found that these steps sufficiently demonstrated the appellant's appropriation of the subject property for its use as soon as possible for the appellant's charitable purpose, and thus established the "occupation" of the property for purposes of the Clause Third exemption.

The parties agreed that the appellant purchased the subject property for the operation of its Lindencroft program, which at the time of purchase was operating on a different parcel of land. To be used for the Lindencroft program, the subject property, which contained a single-family residence at the time of purchase, required significant modifications. The Board found that the appellant was actively pursuing the necessary modifications as of the relevant determination date for the Clause Third exemption. The Board thus found that the appellant established occupation of the subject property as of the determination date in furtherance of its charitable purpose, the operation of the Lindencroft program. The Board further found that, while no Occupancy Permit had been issued as of the relevant determination date, the appellant was nevertheless "diligently proceeding with the preliminary measures necessary" to establish the Lindencroft program as soon as possible at the subject property, and thus occupied the subject property for purposes of the Clause Third exemption. *New England Hospital*, 113 Mass. at 521.

On the basis of its findings and rulings, the Board issues a Revised Decision in favor of the appellant.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,  
Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**FARMHOUSE LANE REALTY TRUST, v. BOARD OF ASSESSORS OF  
JOHN R. SERAFINI, JR. AND THE TOWN OF ROWLEY  
JOHN E. DARLING, TRUSTEES**

Docket Nos. F294842-F294854,  
F299674-F299686

Promulgated:  
April 5, 2011

ATB 2011-226

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, Board of Assessors of the Town of Rowley (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of Rowley, owned by and assessed to the appellant, Farmhouse Lane Realty Trust (“Trust” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2008 and 2009 (“fiscal years at issue”).

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

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

*John R. Serafini, Jr., Esq.* for the appellant.

*Gary S. Brackett, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2007 and January 1, 2008, the appellant was the assessed owner of a 53.8-acre parcel of real estate located in the Town of Rowley, which was separately assessed and taxed as thirteen residential building lots (collectively, the “subject property”). For fiscal year 2008, the assessors separately assessed the subject property’s individual lots in the total amount of \$2,801,200.00 and assessed a tax thereon, at the rate of \$10.38 per \$1,000, in the total amount of \$29,948.75.<sup>1</sup> The appellant timely paid the tax in full without incurring interest. On January 31, 2008, the appellant timely applied to the assessors for abatement, claiming that the subject property was overvalued. By a

---

<sup>1</sup> This amount includes a Community Preservation Act assessment of \$872.29.

vote on February 11, 2008, the assessors granted a partial abatement reducing the subject property's valuation to \$1,038,100.00, resulting in final taxes of \$11,098.78.<sup>2</sup> By written notice dated February 12, 2008, the assessors notified the appellant of their decision. The appellant seasonably filed petitions with the Board on May 8, 2008. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeals for fiscal year 2008.

For fiscal year 2009, the assessors separately assessed the subject property's thirteen individual lots in the total amount of \$972,200.00 and assessed a tax thereon, at the rate of \$11.34 per thousand, in the total amount of \$11,355.50.<sup>3</sup> The appellant timely paid the tax in full without incurring interest. On January 30, 2009, the appellant timely applied to the assessors for abatement, claiming that the subject property was overvalued. By notice dated February 9, 2009, the assessors informed the appellant that its abatement application had been denied by vote on that same day. The appellant seasonably filed petitions with the Board on April 30, 2009. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide the appeals for fiscal year 2009.

The appellant presented its case-in-chief through the testimony of the following witnesses: Charles Wear, a Massachusetts Registered Professional Engineer and Vice President of Meridian Associates, Inc., whom the Board qualified as an expert in the field of civil engineering and subdivision and land-use planning; Ann Marton, Director of Ecological Services and President of LEC Environmental Consultants, Inc., whom the Board qualified as an expert in the areas of wetlands and rare species covered under the Massachusetts Endangered Species Act ("MESA") as these subjects affect land development; and Robert Noone, Appraiser and Chairman of the Board of Assessors of Peabody, Massachusetts, whom the Board qualified as an expert in the field of real estate valuation.

The parties agreed that the subject property had previously received approval for a 4-lot subdivision plan in 1994, the year that the appellant acquired the property. On September 13, 2000, the Rowley Planning Board ("Planning Board") granted subdivision approval, under G.L. c. 41, § 81L *et seq.*, for the subject property to be divided into thirteen separate residential building lots ("13-lot subdivision plan"). The appellant filed Notices of Intent under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40,

---

<sup>2</sup> This amount includes a Community Preservation Act assessment of \$335.40.

<sup>3</sup> This amount includes a Community Preservation Act assessment of \$330.75.

with the Rowley Conservation Commission (“Conservation Commission”) for the roads and subdivision lots, but the Conservation Commission never approved them. Rowley subsequently adopted its own set of wetlands bylaws in 2004 (“Rowley Wetlands Bylaws”).

As a result of the concerns raised by the Conservation Commission with respect to wetlands surrounding the access point at Wilson Pond Road, the appellant sought amendment of the 13-lot subdivision plan. In the fall of 2000, the Planning Board approved the amendment, which shifted the internal access road, known as “Road A” or “Farmhouse Lane,” about twenty feet to the south near the Wilson Pond crossing, in order to use part of the historic location of Meetinghouse Road. However, an abutter to the subject property appealed the amendment to the Land Court.

The 13-lot subdivision plan expired in September, 2006, and the appellant filed at the Land Court for an extension of the plan. However, after the abutter’s appeal, the appellant withdrew the Notices of Intent from the Conservation Commission and never pursued any other permits. The Planning Board refused to extend endorsement of the 13-lot subdivision plan by letter dated October 2, 2006. The abutter’s appeal at the Land Court was still active as of the date of the hearing of these appeals.

The subject property is assessed and taxed as 13 separate lots, each classified as class 131 “potentially developable” property. It is undisputed that the 13-lot subdivision plan has expired and its appeal is pending at the Land Court. The appellant contends that the subject property is overvalued, because given the history of the appellant’s efforts to develop the subject property, as well as the application of regulations under MESA, the appellant would not be able to obtain permits to develop the subject property at any time in the foreseeable future. Therefore, the argument continues, the subject property should be assessed as equivalent in value to conservation land, regardless of its designation. The appellant does not challenge the subject property’s designation as class 131 “potentially developable.”

The appellant’s first witness, Mr. Wear, testified to the history and challenges surrounding development of the subject property. Mr. Wear opined that the expired 13-lot subdivision plan could not be duplicated as of the subject assessment dates, because the current zoning, wetlands and MESA regulations were different or did not originally apply to the subject property at the time of the 13-lot plan’s development. He also detailed the multiple permits that would be required to cross Wilson Pond, including a

“Chapter 91 License” to be issued by the Massachusetts Department of Environmental Protection (“DEP”) under G.L. c. 91, a “Section 401 water quality certification” to be issued by DEP, an additional permit to be issued by the U.S. Army Corps. of Engineers, a permit to be issued under MESA, and one under the Massachusetts Environmental Protection Act (“MEPA”). Mr. Wear projected that the many permits required at the local, state and federal levels would be nearly impossible to obtain and, even if they were approved, the project would be very expensive. He further opined that accessing the subject property from alternate directions posed additional challenges, including the refusal of an abutting owner to grant a right to pass over adjoining property, steep grade changes in the subject property, and the requirement for a dimensional variance from the Rowley Board of Appeals. He further testified that access from Cindy Lane was not viable, because it was a private way.

Mr. Wear detailed further issues, including: the requirement that a subdivision plan meet the Rowley Wetlands Bylaw, which is more restrictive than the standards under the Massachusetts Wetlands Protection Act; physical changes to Wilson Pond caused by extensive beaver activity, resulting in the expansion of the wetlands area as part of the subject property has become submerged; changes to the Rowley zoning bylaws, which, at the time of the original 13-lot subdivision’s approval, required 125 feet of frontage and 60,000 feet of lot area but now require 150 feet of frontage and 40,000 feet of lot area; issues relating to septic systems, including the percolation tests which revealed that Title V septic system requirements are not met in some areas of the subject property; and finally, the MESA restriction on development of the subject property to protect the habitat of the blue-spotted salamander, which has been discovered on the property. Mr. Wear acknowledged, however, that the Trust never proceeded with the Notices of Intent before the Commission nor with any of the permits required for development of the subdivision.

Ms. Marton next testified with respect to the permitting procedures that applied to development of the subject property. She explained that extensive procedures would apply to development, including at least six permits from the Conservation Commission, the DEP, and the Army Corps. of Engineers to cross Wilson Pond to provide access to the subject property, as well as three other permits with respect to interior wetlands. Ms. Marton opined that permitting requirements have become more complex with the adoption of the Rowley Wetlands Bylaw in 2004 and the inclusion of the property under

MESA. Like Mr. Wear, Ms. Marton explained that in 2006, the subject property was designated as a priority habitat for the blue-spotted salamander under MESA, and this designation has a direct impact on permitting processes before the Conservation Commission and under MESA. She testified that the planned areas for the road crossing of Wilson Pond and the cul-de-sac were closest to a vernal pool where a blue-spotted salamander breeding area was located.

Ms. Marton acknowledged on cross-examination that, while the subject property's MESA designation presents permitting issues, the application of MESA would not necessarily result in the inability to develop the site, and in fact, it is not common for there to be a disqualification of development for an entire site. Ms. Marton also admitted that she had not measured the size of the vernal pool on the subject property. Documentation from the Conservation Commission admitted into evidence reveals that the size of the certified vernal pool occupied only 0.19 acres out of the 53-acre site. Ms. Marton also admitted that the Division of Fisheries and Wildlife has never made a determination of a "take" (a potential destruction) of an endangered species on the subject property. With respect to the extensive permitting procedures, Ms. Marton admitted that the Trust did not seek the permits which would be needed for completion of the crossing at Wilson Pond Road, and further, that the Conservation Commission never stated that it would deny the permit for the wetlands but only that it wanted the Trust to propose a means of access to the site other than Wilson Pond Road. Like Mr. Wear, Ms. Marton testified that Cindy Lane was not a viable means of access to the site, because it was a private way. Finally, Ms. Marton acknowledged that she had not been asked by the Trust to consider the development of the subject property as an Open Space Residential District.

The appellant's third witness, Mr. Noone, prepared an appraisal report for the subject property for each fiscal year at issue. Mr. Noone opined that the subject property's development potential was speculative and remote, because of the many restrictions on the land. He cited the restrictions imposed by MESA, because of the subject property's classification as a habitat for endangered species, as particularly limiting. Therefore, in his opinion, the "highest and best use" of the subject property was as one large parcel of residentially zoned land having a possible, but speculative, potential for development as a residential subdivision with an undetermined number of lots. Accordingly, Mr. Noone regarded the subject property as equivalent in value to

conservation land, even though it had been classified as potentially developable.

Mr. Noone's appraisal reports for both tax years at issue each included an identical comparable-sales analysis. The comparable-sales analysis did not include any sales of land located in Rowley because Mr. Noone could not find any such comparable sales. Instead, the analysis included four sales of land in neighboring communities – Ipswich, Salisbury, Newbury, and Newburyport at the Newbury/Newburyport line.

Sale One in Ipswich is comprised of two contiguous parcels of land that contain a total of 44.2 acres, which were purchased by Ipswich for conservation purposes on December 20, 2006. The total sale price for both parcels was \$110,000, which yields a price of \$2,489 per acre. The land features some wetland and some areas of upland. The land is not equipped with utilities, and it has no street frontage. It is zoned for residential use.

Sale Two is comprised of 43.39 acres located in Salisbury. Sale Two was actually a two-part sale, made from a family group of grantors to a private developer. The various sales occurred on June 22, 2006 and July 12, 2006, for a total sale price of \$46,593, which yields a price of \$1,074 per acre. The land has about 118 feet of frontage along Forest Road and also abuts the Little River. The land near the river features salt marsh, while the upland portions are rolling and are covered with heavy scrub and tree vegetation. Available utilities are water, electric, telephone and cable. The land is zoned for Residential/Agricultural uses. Mr. Noone testified that this comparable-sales property was "generally very inferior" to the subject in overall location, features and amenities and thus required "a substantial plus adjustment" for comparison with the subject property. Mr. Noone did not specify any particular adjustments that he made with respect to Sale Two's sale price.

Sales Three and Four were both part of a large parcel of vacant land that is within both Newbury and Newburyport. The total area of the large parcel is 170.168 acres, 46.734 acres of which are in Newbury and the remaining 123.434 acres of which are in Newburyport. Mr. Noone describes the tract as a "wet meadow," a term of art referring to a meadow that is a wetland for much of the time, as large portions of the property feature wetlands. The land was purchased on December 29, 2006 for conservation purposes. Water, electric and telephone are available in certain portions of the property. Sale Three, the 46.734-acre parcel in Newbury, was purchased by the Essex County Greenbelt Association, Inc. for \$113,700, which yields a price of \$2,861 per acre. Sale

Three has no road frontage and is zoned for residential/agricultural purposes. Sale Four, the 123.434-acre parcel in Newburyport, was purchased by the City of Newburyport's Conservation Commission for \$366,300, which yields a price of \$2,968 per acre. Sale Four has 451.62 feet of street frontage and is zoned for agricultural/open space purposes.

Mr. Noone's report noted that the comparable-sales properties had sale prices ranging from \$1,074 per acre to \$2,968 per acre. After applying his adjustments, which he did not detail, Mr. Noone's comparable sales yielded adjusted-sale values between \$2,500 and \$3,000 per acre. He settled on \$2,750 per acre and applying this value to the subject's 52.91 acres, his comparable-sales analysis yielded a fair market value of \$145,503, which he rounded to \$145,500. Mr. Noone's final estimate of value was \$145,500 for the subject property for both fiscal years at issue.

Mr. Noone acknowledged on cross-examination that his comparable-sales properties were conservation properties having as their highest and best use being held as conservation land; only Sale Two was sold for the potential of future development, but he admitted that that property was "very inferior" to the subject. Mr. Noone also admitted that the decision of the Planning Board denying the extension of the 13-lot subdivision was still being appealed before the Land Court and therefore was not final. He further admitted that the subject property had sufficient frontage along Wilson Pond Lane and it satisfied the lot size requirement for a single building lot. Finally, Mr. Noone was unaware of the existence of a so-called "tripartite agreement," detailed in a letter from the Chairman of the Planning Board to the Chairman of the Conservation Commission, by which a developer of a subdivision called Meetinghouse Village was required to extend Cindy Lane (referred to in the tripartite agreement as "Road A") to the boundary of the subject property, thereby providing an alternative access to the subject property. This letter, admitted into evidence, continues as follows:

In the Planning Board's opinion, Road A could be used as a means of accessing the Farmhouse site, regardless of whether access from Tenney Road would be feasible or economical. Moreover, while the Planning Board's rules and regulations limit the length of a cul-de-sac to 500 feet, the [Planning] Board can grant a waiver of this limitation if the property is developed as an Open Space Residential Subdivision under section 6.4 of the Rowley Protective Zoning Bylaw.

Mr. Noone ultimately admitted that, although it may be "a long time coming," "the land at some point in time could be developed."

The appellee presented its case-in-chief through the testimony of Sean McFadden,

Principal Assessor for Rowley. Mr. McFadden first testified to the method by which the assessors abated the subject property for fiscal year 2008. He explained that he considered the subject property to be potentially developable property, which qualified for a 30% reduction from the assessors' previously determined fair cash value, but upon receiving the appellant's abatement request, he decided to adjust the subject's taxable value to approximately 70% of its fair cash value, in consideration of the appellant's arguments regarding the constraints on development. However, Mr. McFadden rejected Mr. Noone's claim that the subject property should be valued on the basis of a highest-and-best use as conservation land. He explained that the 13-lot subdivision plan and the earlier 4-lot subdivision plan would never have been filed if the 53-acre subject property were completely incapable of being developed. He surmised that, at the very least, the subject property could be developed as a single-lot plan with Tenney Road as an access point.

Mr. McFadden based the abatement for fiscal year 2009 on his own research, which included a comparable-sales analysis using eleven sales of individual residential lots, occurring during 2006 and 2007, which, collectively, he determined were comparable to the 13-lot subject property. Mr. McFadden submitted a spreadsheet listing: the map/block/lot and address of each of his comparable properties; the size, date of sale, sale price and class of the properties; and the properties' assessments for fiscal years 2008 and 2009. His spreadsheet did not include any adjustments. As a result of his analysis, Mr. McFadden determined that property values had declined by about 3% from fiscal year 2008 to fiscal year 2009. He thus decided to reduce the subject property's fiscal year 2009 assessment to \$972,200.00.

On the basis of the evidence, the Board found that the appellant failed to prove that subject property could not be developed. After the abutter's appeal, the Trust never proceeded with the Notices of Intent before the Commission, and it never pursued any of the several other permits which were required for the development of the subdivision. All three of the appellant's witnesses were mistaken in their assumptions that Cindy Lane was a private road and unable to be used to access the subject property; as evidenced by the tripartite agreement, the use of Cindy Lane as an access point was, at the very least, a possibility. Furthermore, Mr. Wear never developed a conceptual plan for development of the subject property based upon the changes to the Rowley Zoning Bylaw. The Board thus found that he was not in a position to state definitively that development under those

new guidelines was prohibited. Moreover, Mr. Wear acknowledged that he thought it was still possible to reconfigure the thirteen lots on the site, or at the very least, to develop the subject property with at least one residential lot. In addition, the prior 4-lot development supported the conclusion that the subject property has development potential.

Ms. Marton also did not establish that the subject property was unbuildable. She, in fact, acknowledged that it was not common to disqualify development of an entire site under MESA requirements. Like Mr. Wear, Ms. Marton also conceded that the Trust never sought the permits needed to develop the subject property. She further admitted that no application was filed with MESA regarding the subject property and that Massachusetts Fisheries and Wildlife never made a determination of a “take” of an endangered species on the subject property. Ms. Marton also acknowledged that the Commission never stated that it would deny the wetlands permit for the subject property, but only that it wanted the Trust to propose a means of access to the site other than Wilson Pond Road. Finally, Ms. Marton conceded that she was never asked by the Trust to consider the development of the subject property as an Open Space Residential District under the Rowley Zoning Bylaw.

On the basis of these findings, the Board found that the appellant failed to prove that the subject property was unbuildable and thus should be valued as conservation land.

Additionally, the Board was not persuaded by the appellant’s valuation evidence, specifically Mr. Noone’s comparable-sales analysis. The Board found that three of Mr. Noone’s four purportedly comparable properties were purchased specifically for conservation purposes, with one of the properties, Sale One, being land-locked. Only one property, Sale Two, was purchased for future development, and Mr. Noone admitted that that property was “very inferior” to the subject property and required substantial adjustment. Moreover, Mr. Noone did not specify any of his adjustments to his purportedly comparable-sales properties for size, topography, frontage and other factors. Because Mr. Noone did not use sales of land that were sufficiently comparable to the subject property, and because he failed to specify adjustments to account for differences between the subject property and the purportedly comparable properties, the Board found that the appellant’s comparable-sales evidence did not constitute persuasive, credible evidence that the subject property was overvalued.

On the basis of the evidence presented, the Board found that the appellant failed

to meet its burden of proving that the subject property was overvalued. Accordingly, the Board issued a decision for the appellee in these appeals.

### OPINION

Assessors are required to assess real estate at its fair cash value as of the first day of January preceding the fiscal year at issue. G.L. c. 59, §§ 11 and 38. The fair cash value of a property is defined as the price upon which a willing buyer and a willing seller would agree if both are fully informed and under no compulsion. *Boston Gas. Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

An assessment is presumed valid unless the taxpayer sustains its burden of proving otherwise. *Schlaiker v. Board of Assessors of Great Barrington*, 356 Mass. 243, 245 (1974). Accordingly, the burden of proof is upon the appellant to make out its right as a matter of law to an abatement of the tax. *Id.* The appellant must show that the assessed valuation of its property was improper. *See Foxboro Associates v. Board of Assessors of Foxborough*, 385 Mass. 679, 691 (1982). In appeals before this Board, a taxpayer “may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 600 (1984)(quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

“Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most.” *Tennessee Gas Pipeline Co. v. Assessors of Agawam*, Mass. ATB Findings of Fact and Reports 2000-859, 874 (citing *Conness v. Commonwealth*, 184 Mass. 541, 542-43 (1903)); *see also Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 843 (1989) (and the cases cited therein). A property’s highest and best use is one that is legally permissible, physically possible, financially feasible, and maximally productive. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 279 (13<sup>th</sup> ed., 2008). *See also Skyline Homes, Inc. v. Commonwealth*, 362 Mass. 684, 687 (1972); *Northshore Mall Limited Partnership et al. v. Board of Assessors of the City of Peabody*, Mass. ATB Findings of Fact and Reports 2004-195, 247 (“In determining the property’s highest and best use, consideration should be given to the purpose for which the property is adapted.”) (citing APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE

at 315-16 (12<sup>th</sup> ed., 2001); *Tennessee Gas Pipeline Co.*, Mass. ATB Findings of Fact and Reports at 2000-875).

In the instant appeals, the appellant, while not challenging the subject property's classification as potentially developable, nonetheless contended that the subject property should be valued as akin to conservation property. However, the Trust did not establish that the Commission definitively denied its 13-lot subdivision plan, much less any development of the subject property; it established only that the Trust needed to draw up a plan with an alternative point of access. All three of the appellant's witnesses were mistaken in their belief that Cindy Lane could not be used as a point of access, yet as evidenced by the tripartite agreement, the use of Cindy Lane for access was at least a possibility. Furthermore, after the abutter's appeal, the Trust never pursued the permits required for development of the subject property, and apparently never considered alternative development plans, like reconfiguration of the 13-lot development, revisiting the prior 4-lot subdivision plan, a one-lot residential development, or an Open Space Residential District. The Board thus found and ruled that the appellant failed to meet its burden of proving that the subject property was in fact incapable of development and thus should be valued as akin to conservation land.

The appellant's valuation evidence was also deficient. Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 362 (1978). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date generally contain probative evidence for determining the value of the property at issue. *Graham v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2008-321, 400 (citing *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929)), *aff'd*, 73 Mass. App. Ct. 1107 (2008). The properties used in a comparable-sales analysis must be comparable to the subject property in order to be probative of the fair cash value. See *Anne B. Sroka v. Assessors of Monson*, Mass. ATB Findings of Fact and Reports 2009-835, 846 (citing *Lattuca v. Robsham*, 442 Mass. 205, 216 (2004)). The appellant bears the burden of "establishing the comparability of . . . properties [used for comparison] to the subject property." *Fleet Bank of Mass. v. Assessors of Manchester*, Mass. ATB Findings of Fact and Reports 1998-546, 554. *Accord New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 470 (1981).

“Once basic comparability is established, it is then necessary to make adjustments for the differences, looking primarily to the relative quality of the properties, to develop a market indicator of value.” *Id.*

In the instant appeals, Mr. Noone performed a comparable-sales analysis. Three of Mr. Noone’s four comparable-sales properties were conservation lands with no potential for development. Yet, Mr. Noone admitted at the hearing that the 13-lot subdivision was still being appealed and therefore, denial was not final. Mr. Wear also admitted that the subject property had sufficient frontage along Wilson Pond Lane and satisfied the lot size requirement for a one-lot development. As for Mr. Wear’s only potentially developable comparable-sales property, Sale Two, that property was, in his own words, “very inferior” to the subject property. Therefore, the Board found and ruled that Mr. Noone’s analysis failed to include a property sufficiently comparable to the subject property. Moreover, Mr. Noone’s analysis failed to specify adjustments to account for obvious differences between the subject property and its comparison properties where adjustments would have been required for meaningful comparison. The Board thus found and ruled that Mr. Noone’s comparable-sales analysis was not probative evidence of the subject property’s valuation. *See, e.g., Diamond Ledge Properties Corp. v. Assessors of the Town of Swansea*, Mass. ATB Findings of Fact and Reports 2009-1185, 1192.

On the basis of the evidence provided, the Board found and ruled that the appellant failed to meet its burden of proving a fair market value for the subject property that was lower than that assessed for the fiscal years at issue. The Board therefore decided these appeals for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**CHRISTINE M. FLORIO, TRUSTEE v.  
WANDA J. NOVAK, TRUSTEE<sup>1</sup>**

Docket No. F287875 (FY 2007)

Docket No. F294075 (FY 2008)

Docket No. F299082 (FY 2009)

Docket No. F305469 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

**JOSEPH DINAPOLI v.**

Docket No. X302672 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

**STEPHEN A. & CATHERINE T. DeSALVO v.**

Docket No. X302664 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

**CANDACE & PETER ERICKSON v.**

Docket No. X302689 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

**DONALD ACCETTA, TRUSTEE<sup>2</sup> v.**

Docket No. X302682 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

**HENRY A. & SUSAN S. CHRIST<sup>3</sup> v.**

Docket No. X302656 (FY 2010)

**BOARD OF ASSESSORS OF  
THE TOWN OF NEWBURY**

Promulgated:

June 29, 2011

ATB 2011-725

These are appeals under the formal and informal procedures, pursuant to G.L. c. 59, §§ 7 and 7A and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Newbury (the “assessors” or “appellee”) to abate taxes on certain real estate in the Plum Island section of the Town of Newbury assessed under G.L. c. 59, §§ 11 and 38 for fiscal years 2007, 2008, 2009 and 2010. The six parcels located along Northern Boulevard (collectively, the “subject properties”) are owned by and assessed to the parties captioned on the preceding page and identified below in Table One (collectively, the “appellants”). A summary of some of the basic identifying information related to each of

---

<sup>1</sup> Christine M. Florio, as Trustee of the PMNEMN Nominee Trust, Eugene Novak and Christine Florio brought the fiscal year 2007 and 2008 appeals. Wanda J. Novak, as Trustee of the PMNEMN Nominee Trust, brought the fiscal year 2009 and 2010 appeals.

<sup>2</sup> Donald Accetta, as Trustee of the Surfside Nominee Trust, brought this appeal.

<sup>3</sup> Susan S. Christ communicated a suggestion of Henry A. Christ’s death.

the subject properties is contained below in Table One.

**Table One**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Property Address</u>	<u>Assessors Map/Lot</u>	<u>Parcel Size Square Feet</u>
2007	F287875	Florio, TE	58 Northern Blvd.	U03-187	9,429
2008	F294075	“	“	“	“
2009	F299082	Novak, TE	“	“	“
2010	F305469	“	“	“	“
2010	X302672	DiNapoli	46 Northern Blvd.	U03-191	18,206
2010	X302664	DeSalvo	16 Northern Blvd.	U02-12	8,429
2010	X302689	Erickson	48 Northern Blvd.	U03-190	21,306
2010	X302682	Accetta, TE	76 Northern Blvd.	U03-182	16,945
2010	X302656	Christ	26 Northern Blvd.	U02-4	17,195

Chairman Hammond heard these appeals. Pursuant to G.L. c. 58A, §§ 7A and 8 and 831 CMR 1.19(5) and 1.37(1) and (2), and without objection from the parties, the Chairman joined and consolidated these appeals. Commissioners Scharaffa, Egan, Rose, and Mulhern joined him in the decisions for the appellee in docket numbers F287875, F294075, and F299082, which relate to the 58 Northern Boulevard property for fiscal years 2007, 2008, and 2009, respectively, and the decisions for the appellants in the remaining docket numbers F305469, X302672, X302664, X302689, X302682, and X302656, which relate to the 58 Northern Boulevard, 46 Northern Boulevard, 16 Northern Boulevard, 48 Northern Boulevard, 76 Northern Boulevard, and 26 Northern Boulevard properties for fiscal year 2010, respectively.

The Appellate Tax Board (the “Board”) promulgates this Findings of Fact and Report on its own motion under G.L. c. 58A, § 13 and 831 CMR 1.32. The Board’s decisions are promulgated simultaneously with this Findings of Fact and Report.

*Joseph DiNapoli, pro se, Stephen A. DeSalvo, pro se, Peter Erickson, pro se, Donald Accetta, pro se, Susan Christ, pro se, and Paul Novak, Esquire, for the appellants.*

*Frank Kelley, assessor, E. Peter Murphy, assessor, Sanford Wechsler, assessor, and Carrie Keville, administrative assessor, for the appellee.*

## **FINDINGS OF FACT AND REPORT**

### **Basic Assessment and Jurisdictional Information**

On January 1, 2006, 2007, 2008, and 2009, the appellants were the assessed owners of their respective parcels of real estate located along Northern Boulevard in the Plum

Island section of Newbury. The relevant assessment information for the subject properties for the fiscal years at issue is contained below in Table Two.

**Table Two**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Northern Boulevard Address</u>	<u>Tax Rate \$/1,000</u>	<u>Overall Assessment (\$)</u>	<u>Real Estate Tax (\$)</u>	<u>Land Assessment (\$)</u>
2007	F287875	Florio, TE	58	8.23	963,800	7,932.06*	645,900
2008	F294075	"	"	8.57	935,700	8,018.94*	645,900
2009	F299082	Novak, TE	"	9.16	859,900	7,876.68*	581,300
2010	F305469	"	"	9.52	830,400	7,905.40*	569,900
2010	X302672	DiNapoli	46	9.52	823,900	7,843.52*	699,000
2010	X302664	DeSalvo	16	9.52	782,500	7,449.40*	625,700
2010	X302689	Erickson	48	9.52	837,300	7,971.10*	722,300
2010	X302682	Accetta, TE	76	9.52	819,000	7,796.88	689,700
2010	X302656	Christ	26	9.52	1,070,400	10,190.20*	691,500

\* In addition to real estate tax, a betterment charge appeared on these appellants' tax bills.

The pertinent payment and other jurisdictional information, including relevant filing dates, for the subject properties for the fiscal years at issue are contained below in Table Three.

**Table Three**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Tax Bill Mailed</u>	<u>Tax Payment</u>	<u>Abatement Application</u>	<u>Assessors' Denial</u>	<u>Petition or Statement to Board</u>
2007	F287875	Florio, TE	12/29/2006	timely	01/17/2007	02/06/2007	02/23/2007
2008	F294075	"	12/26/2007	timely	01/24/2008	02/19/2008	03/18/2008
2009	F299082	Novak, TE	12/31/2008	timely	01/26/2009	02/17/2009	03/09/2009
2010	F305469	"	12/28/2009	timely	01/25/2010	02/12/2010	04/20/2010
2010	X302672	DiNapoli	12/28/2009	timely	01/28/2010	02/12/2010	05/12/2010
2010	X302664	DeSalvo	12/28/2009	timely	01/26/2010	02/12/2010	05/11/2010
2010	X302689	Erickson	12/28/2009	timely	01/26/2010	02/12/2010	05/12/2010**
2010	X302682	Accetta, TE	12/28/2009	timely*	01/25/2010	02/12/2010	05/12/2010**
2010	X302656	Christ	12/28/2009	timely	01/27/2010	02/12/2010	05/11/2010

\* The appellant timely paid the average of the previous three years' tax assessments. See G.L. c. 59, §§ 64 & 65 ("a sum not less than the average of the tax assessed . . . for the three years next preceding the year of assessment may be deemed to be the tax due.")

\*\* The appellants timely mailed Statements Under Informal Procedure on May 12, 2010, which the Board received on the following day. See G.L. c. 59, §§ 64 and 65 ("If any complaint under this section is, after the period or date prescribed by this section, . . . delivered by United States mail, to the clerk of the . . . board, the date of the United States postmark . . . affixed on the envelope or other appropriate wrapper in which such complaint is mailed or delivered shall be deemed to be the date of delivery.").

Based on these facts and in accordance with G.L. c. 59, §§ 57C, 59, and 64 and 65, the Board found and ruled that it had jurisdiction over these appeals.

### **Summary of Valuation Evidence**

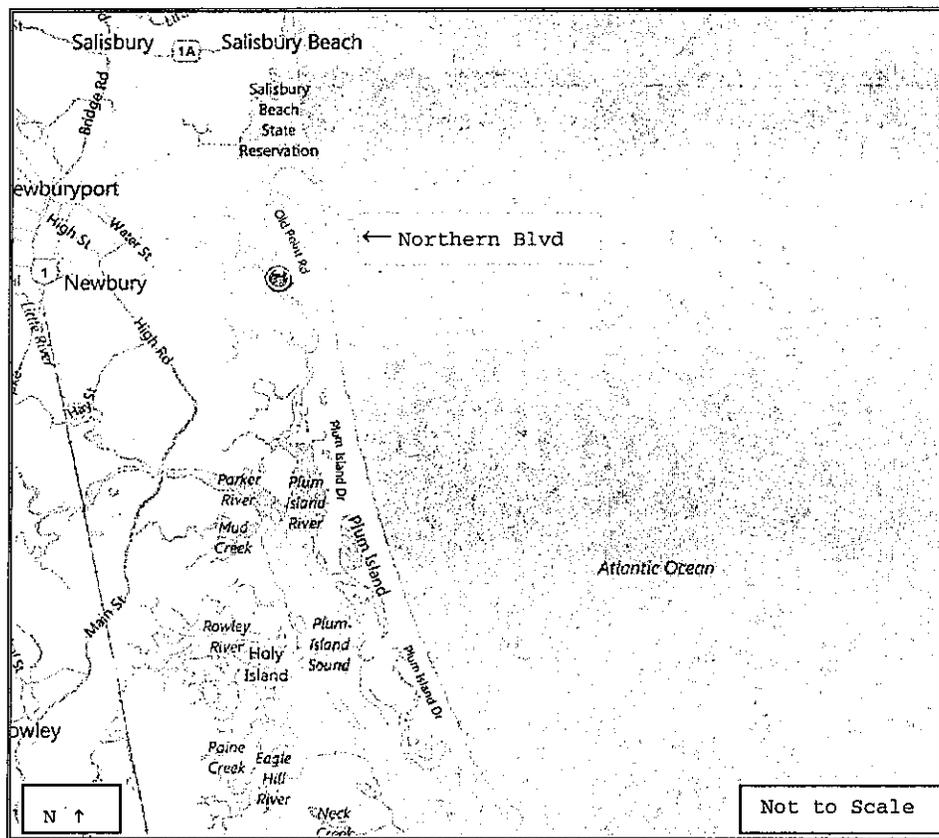
#### **Introduction**

Plum Island, named after the plethora of beach plum bushes once found there, is an approximately eleven-mile long barrier island and beach, composed of sand and sediment and formed after the last ice age, some 18 thousand years ago, when the great glaciers receded. The island, which varies in width from about one-quarter mile to over one-half mile, extends from the south side of the mouth of the Merrimack River in Newburyport southward, through the towns of Newbury, Rowley, and Ipswich, to the mouth of the Ipswich River and Ipswich Bay. The western boundary of Plum Island is formed by the Plum Island River and Plum Island Sound; the eastern boundary is the Atlantic Ocean. A little over two miles of the island's most northern stretch is densely developed with about 1,200 year-round and seasonal homes and cottages, all in the Newburyport and Newbury sections. The remaining three-quarters of the island is comprised of a 4,662-acre federal wildlife refuge, named the Parker River National Wildlife Refuge, and, at the very southern tip, called Sandy Point, a small state reservation, named Sandy Point State Reservation.

For reference and for illustrative purposes only, a map of Plum Island is provided below.<sup>4</sup>

---

<sup>4</sup> The map was taken from a website referenced by at least one of the appellants.



Geological and historical evidence reveals that the island, or various oceanfront parts of it, have undergone periods of accretion and erosion throughout its history. In the past, however, when property was lost to the ocean, it usually only involved undeveloped sand dunes or sections of beach, or, in the more recent past, seasonal cottages. Presently, however, and similar to numerous other locales located along the Massachusetts shoreline, such as Salisbury and Scituate and various other communities on Cape Cod and the Islands, Plum Island is experiencing what engineers now refer to as “severe coastal erosion” affecting relatively expensive beachfront properties. Current efforts to curb that process have focused on stop-gap, but still costly solutions, such as dredging and sand replenishment projects, which have provided at best only temporary relief from the increased erosion.

### Overview

Based on the combined testimony and documentary evidence that forms the record in these consolidated appeals, the Board makes the following findings of fact. In December 2008 and January 2009, the town installed massive sand bags to protect Plum Island center, which is the southern boundary of Northern Boulevard (the “Dune Stabilization Project”). In September 2009, nine months after the relevant assessment date

for fiscal year 2010, the U.S. Army Corps of Engineers (“Corps”) completed a so-called *§204 Detailed Project Report and Environmental Assessment for Newburyport Harbor and Plum Island and Salisbury Beaches* (“§204 Report”).<sup>5</sup> In its study, the Corps reported, *inter alia*, that: “Plum Island . . . ha[s] experienced localized, acute, erosion rates along the beach face exposed to the Atlantic Ocean. [Based on previous studies conducted in 2000 and 2007], [t]he [average] annual coastal erosion rate has been estimated at 13 feet per year at Newbury, far in excess of the long term average for this region.” The study further reveals that some areas along Northern Boulevard in Newbury nearest to Plum Island Center are receding at an even more accelerated rate of over 21 feet per year, as are some other properties located south of the center along Fordham and Annapolis Ways. To help ameliorate the rapid reduction of the remaining beach buffer ostensibly protecting some 26 residences located on Northern Boulevard and believed to be in imminent danger from the acute erosion, the Corps recommended that the majority of the sand removed from the Merrimack River dredging project, equivalent to roughly 120,000 cubic yards, be directed to that 2,500-foot-long section of the Newbury beach on Plum Island (the “Replenishment Project”). The Replenishment Project was started and completed by the Corps in calendar year 2010. To participate, the affected property owners were required to sign easements which ceded substantial rights to the town while significantly restricting each property owner’s access to and use of the area of nourishment on their property.<sup>6</sup> Originally projected to prevent or delay coastal erosion damages for approximately four to five years, it now appears that this estimate is overly optimistic. According to published accounts, some argue that a more permanent solution necessitates the repair of the compromised southern jetty at the mouth of the Merrimack River, which may have created off-shore currents and drifts that are scouring the shoreline to its south. Local officials are currently lobbying for the institution of such a project.

According to the testimony and other accounts in evidence, it appears that over the past several years, numerous newspaper articles and television news broadcasts have disseminated pictures and accounts of the severe beach erosion problem and the concomitant loss of property on Plum Island’s Newbury and Newburyport beachfronts, including the November 2008 loss of an imperiled single-family home located at 4 5<sup>th</sup>

---

<sup>5</sup> The study was authorized by § 204 of the Water Resources Development Act of 1992 (33 USC Sec. 2326), as amended.

<sup>6</sup> Two of the 26 property owners initially refused to sign the easement agreement. Because the replenishment project went forward, that issue apparently was resolved.

Street, off Northern Boulevard and along the same beachfront where the subject properties are located. Local, regional, and even national news media continue to report and broadcast accounts of erosion on Plum Island.

Recent sales of beachfront property located on Northern Boulevard in the Newbury section of Plum Island, which the Corps has identified as subject to “severe erosion,” have been few and far between. On May 8, 2008, an undeveloped oceanfront parcel of approximately 9,350 square feet or 0.215 acres, located at 60 Northern Boulevard in Newbury, which the Corps considers to be within the severe erosion area, sold for \$150,000. According to the property record card, this property is undevelopable and was assessed at \$126,500 for fiscal year 2010 and at \$129,100 for fiscal year 2009. The purchaser -- in the form of an LLC -- was an abutter and one of the appellants in these appeals. On June 11, 2010, 25 months later, an undeveloped oceanfront parcel of approximately 15,660 square feet or 0.36 acres, located at 30 Northern Boulevard in Newbury, which the Corps also considers to be within the “severe erosion” area, sold for \$136,000, approximately 9½% less than the prior sale, despite its considerably larger size. According to that property record card, it too is undevelopable and was assessed at \$136,000 for fiscal year 2010 and at \$138,700 for fiscal year 2009. The purchaser -- this time as trustee of a nominee trust -- is essentially the same appellant in these appeals who purchased 60 Northern Boulevard approximately two years earlier.

In addition, the appraiser who estimated the value of the 76 Northern Boulevard property for one of the appellants in these appeals did not testify or appear before the Board. The appellant submitted the appraiser’s report, which contained three purportedly comparable-sale properties, into evidence. The only oceanfront property is his first sale, which is located at 4 Grant Street in Newburyport, about ½ mile north of that appeal’s subject property. This purportedly comparable property sold for \$760,000 on February 2, 2008 and required less than 10% in gross adjustments for the appraiser to determine an adjusted sale price or indicated value for the 76 Northern Boulevard property of \$720,500. This purportedly comparable property is close to but not in the severe erosion area, and it is not directly on the beach and subject to the ocean’s fury in the same way that the subject properties are because it is buffered by a substantial dune and beach area.

In the four appeals which relate to the 58 Northern Boulevard property for fiscal years 2007, 2008, 2009, and 2010, discussed in greater detail below, the assessors introduced eight sales of oceanfront property in the Newbury section of Plum Island that

occurred from August 15, 2005 to June 22, 2007.<sup>7</sup> These sales include 5 on Northern Boulevard, one on 41<sup>st</sup> Street, and two on Fordham Way, which are all within about one mile of one another. Table Four below summarizes the salient information pertaining to these sales.

**Table Four**

<u>Property</u>	<u>Sale Date</u>	<u>Sale Price \$</u>	<u>Ass'd. Val. at Sale \$</u>	<u>Curr. Ass'd. Value \$</u>	<u>Parcel Size SF</u>	<u>Improve Fin. Area SF</u>
68 Northern Blvd	08/15/2005	1,600,000	1,293,400	1,193,300	18,308	2,225
50 Northern Blvd	08/19/2005	1,685,000	1,438,300	1,328,200	19,850	2,852
72 Northern Blvd	09/02/2005	1,640,000	1,176,800	1,108,300	16,310	3,548
6 Fordham Way	01/04/2006	900,000	910,400	910,400	8,100	1,729
7 41 <sup>st</sup> Street	11/08/2006	1,200,000	1,078,900	990,000	14,383	1,865
10 Fordham Way	01/22/2007	749,000	708,400	641,000	8,100	620
4 Northern Blvd	04/18/2007	720,000	670,000	612,300	2,340	2,113
100 Northern Blvd	06/22/2007	1,350,000	1,038,700	963,700	15,871	2,307

Several of the appellants testified and introduced a flyer which stated that “[t]o settle the Estate of Helen C. Loyko,” an auction, subject to seller’s confirmation, was to be held in July 2009 to attempt to sell an oceanfront property composed of an approximately ¼-acre parcel improved with a 1,674-square-foot, single-family, 2-story, year-round residence built in the 1950s and located at 37 Southern Boulevard in the Newbury section of Plum Island. The testimony revealed that the property, which is presently assessed for \$764,900, did not garner the minimum bid of \$585,000.

Another oceanfront property located at 27 Annapolis Way in the Newbury section of Plum Island, south of Plum Island Center but still within an area experiencing severe erosion, was listed, as of November 12, 2010, as being “under agreement” for \$299,000. According to the MLS report, it originally had been listed in December 2009 for \$779,000, and it went under agreement in July 2010, with an anticipated sale date of December 2010. The listing describes the home as uninhabitable and advises prospective purchasers that it will have to be moved or demolished at the buyer’s expense or the buyer may obtain a building permit for a 1,570-square-foot home to be built further from the ocean. This property’s fiscal year 2009 assessment was \$820,000. The improvement on this property was recently demolished after its cement-block foundation was compromised by surf and erosion. The two neighboring properties’ improvements are also currently on the brink.

<sup>7</sup> While the property at 4 Northern Boulevard appears to be one parcel removed from the ocean, it apparently has an unrestricted ocean view.

For safety, one of those property owners was ordered to vacate the premises.

For fiscal year 2009, the assessors granted an abatement of \$930.93 -- which equates to \$101,630 of value -- to the owner of the property located at 4 5<sup>th</sup> Street in the Newbury section of Plum Island pursuant to an Act that specifically authorized them to do so. This property is the improved oceanfront parcel just south of Plum Island center that presumably received significant publicity when the home was demolished in late 2008 due to erosion. The owner is presently seeking permits for reconstruction at the portion of the parcel furthest from the ocean.

Several of the appellants testified that federal flood insurance only covers up to \$250,000 of their improvements' values. Private property insurance is essentially unavailable, and the cost of private flood insurance, if it is available at all, is exorbitant. Several appellants also stated that lenders refuse to offer mortgages on Plum Island properties located along Northern Boulevard in excess of the federal flood insurance limit.

In a journal article written by Warren Kriesel and Robert Friedman, entitled *Coping with Coastal Erosion: Evidence for Community-Wide Impacts*, and published in *Shore & Beach* Vol. 71, No. 3, July 2003, pp. 19-23 ("*Coping with Coastal Erosion*"), the authors discovered that oceanfront properties located along ten Atlantic and Gulf Coast counties that are threatened by an erosion rate of 3 feet per year lose about 25% of their value, while comparable properties in communities that nourish their beaches can reclaim approximately one-half of this loss.<sup>8</sup> The Board notes that the subject properties are threatened by an erosion rate in excess of the one used in this study and it now appears that the Replenishment Project on Plum Island is not meeting its expected goals.

### **The Appeals**

All of the appellants in these consolidated appeals similarly assert, at least to some extent, that the values of their properties have been adversely affected by: erosion, both actual and threatened, of the upland portion of their parcels; the restrictive easements; the limited availability and, in their opinions, outrageous pricing of private property insurance; the FEMA flood insurance limit of \$250,000; the reluctance or even refusal of lenders to loan funds beyond the \$250,000 federal flood insurance limit; and the stigmas related to both the presence of their properties in the *§204 Report*, as well as the mention of their properties' general location in news reports and broadcasts.

---

<sup>8</sup> It is not clear in the article what, if any, easements the property owners may have signed to participate in the replenishment projects.

*Fifty-eight Northern Boulevard*, which is identified by the assessors as Map/Lot U03-187, consists of an approximately 0.216-acre or 9,429-square-foot parcel improved with a conventional, 2-story, year-round home built in 1998. The house has a finished area of 2,584 square feet, and a total of seven rooms, including four bedrooms plus one full bathroom and two half bathrooms. The house also has a 60-square-foot open porch, a 204-square-foot deck, and a 308-square-foot unfinished attic area. The interior walls are drywall, and the floors are hardwood or carpeted. The home is centrally heated with a gas-fired forced hot water system. The exterior of the cottage has vinyl siding and an asphalt-shingled gable roof. The property is serviced by town water and sewer. The assessment history for fiscal years 2007 through 2010 is summarized below in Table Five.

**Table Five**

	<u>Fiscal Year 2007</u>	<u>Fiscal Year 2008</u>	<u>Fiscal Year 2009</u>	<u>Fiscal Year 2010</u>
<b><u>Date of Assessment</u></b>	01/01/2006	01/01/2007	01/01/2008	01/01/2009
<b><u>Land Assessment (\$)</u></b>	645,900	645,900	581,300	569,900
<b><u>Improvement Assessment (\$)</u></b>	317,900	289,800	278,600	260,500
<b><u>Total Assessment (\$)</u></b>	963,800	935,700	859,900	830,400

On her abatement applications for fiscal years 2007 and 2008, the appellant asserted that her property lost 38% of its land from erosion. On her petitions, the appellant suggested that the value of the parcel associated with the 58 Northern Boulevard property for fiscal year 2007 was \$400,458 and for fiscal year 2008, it was \$391,288, which may have been a typo considering her suggested figure for fiscal year 2009 was \$331,288. On her abatement application and petition for fiscal year 2009, the appellant requested that the assessment attributable to the land be reduced from \$581,300 to \$331,288. On her abatement application for fiscal year 2010, the appellant again asserted that her property had lost about 38% of its area from erosion and, for the first time, she also raised the issue of the easement devaluing her property. In her petition, she suggested that the value of the land component of the assessment be reduced to \$150,000.

At the hearing of these appeals, the appellant requested alternative overall values for her property premised on either reductions in the assessments attributable to the land component or on a straight 25% reduction in the overall assessment based on the *Coping with Coastal Erosion* study referred to above. Table Six below summarizes these values

for the property located at 58 Northern Boulevard.

**Table Six**

<u>Docket No.</u>	<u>Fiscal Year</u>	<u>Assessed Values (\$)</u>	<u>Requested Values (\$)</u>	<u>25% Reduced Values (\$)</u>
F287875	2007	963,800	718,358	722,850
F294075	2008	935,700	681,088	701,775
F299082	2009	859,900	609,888	644,925
F305469	2010	830,400	410,560	622,800

*Forty-six Northern Boulevard*, which is identified by the assessors as Map/Lot U03-191, contains an approximately 0.418-acre or 18,206-square-foot parcel improved with an old-style, wood-framed, two-level, cottage built in 1930. The cottage has a finished area of 1,020 square feet and a total of seven rooms, including four bedrooms plus one bathroom. The cottage also has an unfinished concrete basement/foundation and a 584-square-foot open porch. The interior walls are painted drywall, and the floors are carpeted. The cottage has oil heat. The exterior of the cottage has vinyl siding and an asphalt-shingled hip roof. The property is serviced by town water and sewer. The assessors valued the property at \$823,900, as of January 1, 2009, allocating \$124,900 to the property's cottage and \$699,000 to its land.

On his abatement application and at the hearing, the appellant asserted that his property should be valued at \$411,950, essentially one-half its assessment.

*Sixteen Northern Boulevard*, which is identified by the assessors as Map/Lot U02-12, consists of an approximately 0.194-acre or 8,429-square-foot parcel improved with an old-style, wood-framed, two-level, cottage built in 1905. The cottage has a finished area of 1,211 square feet and a total of six rooms, including three bedrooms plus one full bathroom and one half bathroom. The cottage also has an unfinished concrete-block basement/foundation along with a 492-square-foot enclosed porch and 468-square-feet in wood decking. The interior walls are painted drywall, and the floors are carpeted. The cottage has electric heat. The exterior of the cottage has wood shingle siding and an asphalt-shingled gable roof. The property is serviced by town water and sewer. The assessors valued the property at \$782,500, as of January 1, 2009, allocating \$156,800 to the property's cottage and \$625,700 to its land.

On his abatement application and at the hearing, this appellant asserted that his property should be valued at \$391,250, essentially one-half its assessment.

*Forty-eight Northern Boulevard*, which is identified by the assessors as Map/Lot U03-190, consists of an approximately 0.489-acre or 21,306-square-foot parcel improved with a seasonal cottage on piers originally built around 1890. The cottage has a finished area of between 960 and 1,130 square feet, depending on the source, and a total of five rooms, including two bedrooms plus one full bathroom and one half bathroom. The cottage also has a 558-square-foot enclosed porch, an 882-square-foot deck, and a 374-square-foot storage area below the deck. There is also a 336-square-foot, single-car detached garage along with another deck. The interior walls are primarily plywood panels, and the floors are vinyl or carpeted. There is also a wood stove. The exterior of the cottage has clapboard siding and an asphalt-shingled gable roof. The property is serviced by town water and sewer. The assessors valued the property at \$837,300, as of January 1, 2009, allocating \$108,600 to the property's cottage, \$722,300 to its land, and an additional \$6,400 to the other improvements.

On their Statement Under Informal Procedure, the appellants asserted that their property should be valued at \$460,515, and at the hearing, they sought to have the part of the assessment attributed to the land value reduced proportionately by the portion of the parcel affected by the easement -- from \$722,300 to \$453,821, a 37% reduction.

*Seventy-six Northern Boulevard*, which is identified by the assessors as Map/Lot U03-182, contains an approximately 0.389-acre or 16,945-square-foot parcel improved with an old-style, wood-framed, two-level, cottage built in 1910. The year-round cottage has a finished area of 1,229 square feet and a total of six rooms, including three bedrooms plus one full bathroom and one half bathroom. The cottage also has a concrete block foundation. The interior walls are plywood panel, and the floors are soft wood, vinyl, and carpeted. The cottage has a forced-hot-water heating system. The exterior of the cottage has wood clapboard siding and an asphalt-shingled hip roof. The property is serviced by town water and sewer. The assessors valued the property at \$819,000, as of January 1, 2009, allocating \$129,300 to the property's cottage and \$689,700 its land.

At the hearing, the appellant asserted that his property should be valued at \$595,867 -- about 73% of its overall assessment -- because the portion of the assessment attributed to the property's cottage was too high given its condition, the portion of the assessment attributed to the subject property's land assessment was excessive compared to other nearby properties and considering the subject parcel's decreasing area, and the Corps identified the property as one of 26 structures along Northern Boulevard in imminent

danger of land loss and structural damage due to storm surge and accelerated erosion. The appellant also asserted that the property is now subject to a “permanent federal storm damage reduction easement.”

*Twenty-six Northern Boulevard*, which is identified by the assessors as Map/Lot U02-4, consists of an approximately 0.395-acre or 17,195-square-foot parcel improved with a contemporary-style, wood-framed, two-story year-round home built in about 1977. The house has a total of six rooms, including two bedrooms. There are two full bathrooms and one half bathroom. The interior is painted drywall, and the floors are carpeted or ceramic tile. The house has oil heat along with one fireplace and a one-car garage under. The basement has a concrete floor. The exterior of the home had wood-shingle siding and an asphalt-shingled gable roof. The property is serviced by town water and sewer. The assessors valued this property at \$1,070,400, as of January 1, 2009, allocating \$378,900 to the improvement and \$691,500 to the land.

On her abatement application, Statement Under Informal Procedure, and at the hearing, the appellant asserted that the overall value of her property should be reduced by 50% to \$535,200.

#### **Time-Table of Related Events and Circumstances**

The dates when various value-affecting events occur are important considerations for determining a property’s value as of a specific valuation date. For the subject appeals, the Board found that it was necessary to evaluate the evidence and ascertain when stigma, property loss, diminished marketability, and any combination thereof first began to affect the value of the subject properties. The following time-table attempts to summarize and relate those events or circumstances *in evidence* that could affect the values of the subject properties to the subject fiscal year 2007, 2008, 2009, and 2010 appeals’ valuation and assessment dates of January 1, 2006, January 1, 2007, January 1, 2008, and January 1, 2009, respectively.<sup>9</sup>

#### **Time-Table**

*January 1, 2006 Valuation/Assessment Date  
for Fiscal Year 2007*

- (1) August and September, 2005 – Sales of three 16,300- to 19,850-square-foot oceanfront properties on Northern Boulevard for \$1,600,000 (assessed at sale for \$1,293,400), \$1,685,000 (assessed at sale for \$1,438,300), and \$1,640,000

---

<sup>9</sup> The Board recognizes, however, that, under certain circumstances, some post-January first events may have some relevance to preceding fiscal years.

(assessed at sale for \$1,176,800);

*January 1, 2007 Valuation/Assessment Date  
for Fiscal Year 2008*

- (2) January and November, 2006 – Sales of two oceanfront properties on Fordham Way (8,100 square feet) and 41<sup>st</sup> Street (14,383 square feet) located within a mile of the subject properties for \$900,000 (assessed at sale for \$910,400) and \$1,200,000 (assessed at sale for \$1,078,900), respectively;

*January 1, 2008 Valuation/Assessment Date  
for Fiscal Year 2009*

- (3) January, April, and June, 2007 - Sale of a 8,100-square-foot oceanfront property located on Fordham Way for \$749,000 (assessed at sale for \$708,400) and sales of a 2,340-square-foot oceanfront property and a 15,871-square-foot oceanfront property both on Northern Boulevard in the amounts of \$720,000 (assessed at sale for \$670,000) and \$1,350,000 (assessed at sale for \$1,038,700), respectively;
- (4) April, 2007 – The so-called Patriots Day storm pounds coast & takes away several feet of dune & in late 2007 additional erosion at Plum Island center is evident, however, there is insufficient evidence of widespread reporting;

*January 1, 2009 Valuation/Assessment Date  
for Fiscal Year 2010*

- (5) Early 2008 – Plum Islanders and local officials begin to lobby for Federal help to dump sand from the Merrimack River dredging project on the eroding beach;
- (6) Spring, 2008 – Commercial structure & 4 residential homes lost decks and/or steps due to storm/erosion;
- (7) May, 2008 – Sale of 9,350-square-foot unimproved & undevelopable beachfront parcel located at 60 Northern Boulevard to abutter for \$150,000 (assessed for \$129,100 for fiscal year 2009);
- (8) November, 2008 – Loss of an imperiled single-family home located at 4 5<sup>th</sup> Street, off Northern Boulevard and along the same beachfront;
- (9) November, 2008 – *Boston Globe* article describing the loss of the above home on Plum Island;
- (10) December, 2008 through January, 2009 – Dune Stabilization Project involved the installation of massive sandbags by the Town of Newbury to protect Plum Island center, which is the southern boundary of Northern Boulevard;

*January 1, 2010 Valuation/Assessment Date  
for Fiscal Year 2011  
Not at Issue in These Appeals*

- (11) July, 2009 – Auction for oceanfront property located at 37 Southern Boulevard did not fetch bid of \$585,000 (assessed at time of auction for \$764,900);
- (12) September, 2009 – U.S. Army Corps of Engineers completes the so-called §204 *Detailed Project Report and Environmental Assessment for Newburyport Harbor and Plum Island and Salisbury Beaches* which identifies 26 homes -- most along Northern Boulevard -- as environmentally imperiled & in a severe erosion zone;
- (13) September - December, 2009 - Permanent Public Access and Beach Management Easement agreements, which cede substantial rights to the town and restrict each property owner's access to and use of the area of nourishment on their property, are signed by and obtained from owners;
- (14) Late October, 2009 – Date of survey of the 58 Northern Boulevard property showing area on that property consumed by easement; certified plot plan dated May, 2005 also submitted for the 48 Northern Boulevard property but undated portion depicting “Area of Public Easement” was apparently added to plan by appellants, and not by registered surveyor;
- (15) Late October, 2009 – Newbury town meeting appropriates \$135,000 for the town's share of the beach replenishment project;
- (16) October, 2009 – Start of many newspaper articles & radio and television broadcasts and reports regarding property damage, evacuation by some property owners, & beach Replenishment Project on subject or related areas of Plum Island, as well as articles & broadcasts with every pending storm & ocean surge questioning whether imperiled properties on Plum Island will survive impending event;

*January 1, 2011 Valuation/Assessment Date  
for Fiscal Year 2012  
Not at Issue in These Appeals*

- (17) March, 2010 – Installation of large commercial bales of hay reinforced with snow fencing with proposed re-vegetation to temporally abate coastal dune erosion and protect approximately 19 homes and 1,500 feet of coastal dune;
- (18) June, 2010 - Sale of 15,660-square-foot unimproved & undevelopable beachfront parcel located at 30 Northern Boulevard to the same party who purchased 60 Northern Blvd. two years earlier, for \$136,000 (assessed for \$138,700 for fiscal year 2009);
- (19) September, 2010 – Sale of non-oceanfront improved parcel of approximately 4,900 square feet located at 150 Northern Boulevard, in the Newburyport section of Plum Island, for \$268,780 (assessed for \$322,100 in fiscal year 2010). Previously in May, 2006 (a little more than 4 years prior), the property sold for \$405,000. The latest sale is a 33% reduction in value;

- (20) Fall, 2010 - Plum Island beach Replenishment Project started and completed;
- (21) December, 2010 – Sale of uninhabitable oceanfront property (improvement demolished after sale) located at 27 Annapolis Way for \$299,000 (assessed in FY 2009 for \$820,000) to developer;

In addition to the events and circumstances described in the above time-table, several of the appellants testified that Federal flood insurance, up to a maximum of only \$250,000, is available to insure their properties' improvements. They further testified that private flood insurance is prohibitively expensive, if available at all. Several of the appellants also stated that banks were unwilling to loan funds over the \$250,000 Federal flood insurance limit if the loans were secured solely by mortgages on the subject properties. The parties did not submit any evidence regarding insurance or banking practices relating to Plum Island directly from insurance agents, brokers, or underwriters, or from bank officials or personnel. The parties did not provide the Board with any definitive start dates for these purported limitations and restrictions. One of the appellants introduced an article, *Coping with Coastal Erosion*, which is referred to above. This study evaluated the diminution of property values in ten counties along the Atlantic and Gulf coasts as a result of stigma. The article concluded, *inter alia*, that the affected properties lost up to 25% of their pre-stigmatization values. However, after replenishment, property values rebounded, reclaiming about one-half the original value lost.

#### **Board's Ultimate Findings**

First, with respect to the two appeals for fiscal years 2007 and 2008 relating to the 58 Northern Boulevard property, the comparable sales of oceanfront property entered into evidence by the assessors for calendar years mid-2005 to mid-2007 support the assessments for fiscal years 2007 and 2008. While the appellant alleged that her property lost 38% of its area from erosion by January 1, 2006 and January 1, 2007, the valuation and assessment dates for fiscal years 2007 and 2008, respectively, she did not introduce adequate demonstrative evidence substantiating this claim. The §204 Report, which on one map shows two defined shorelines -- one in 2000 and another in 2007 -- depicts high total recession rates but does not reveal how much was lost or gained during any period in between. In addition, the 2007 shoreline study referred to in the §204 report is after the January 1, 2006 and January 1, 2007 valuation and assessment dates for fiscal years 2007 and 2008, respectively. Moreover, another map in that same report reveals that the area's historic shoreline, from 1928 to 1994, went through differing periods and degrees of

accretion and erosion depending on the location, supporting the proposition that the shoreline is unpredictably dynamic.

Also the certified easement plan introduced into evidence by this appellant that shows the area of the 58 Northern Boulevard property that is affected by the easement, and presumably the area of erosion, is dated October 2009, almost three and four years beyond the respective valuation and assessment dates for fiscal years 2008 and 2007, and even beyond the valuation and assessment date of January 1, 2009 for fiscal year 2010. Additionally, given the evidence pertaining to recent erosion in the area, it is difficult to accept the notion advanced by the appellant that the amount of erosion related to this property remained stagnant from January 1, 2006 to January 1, 2009. Moreover, there is no additional engineering or other reliable evidence to directly connect the October 2009 easement plan to the 58 Northern Boulevard property's condition on January 1, 2006 or January 1, 2007.

Lastly in this regard, the appellant did not provide adequate evidence on how to properly adjust the value of the 58 Northern Boulevard property assuming a 38% diminution in its parcel's area. As explained more fully below, it is not appropriate valuation practice to simply reduce, proportionately, the subject property's overall assessment or the portion of the assessment allocated to the land to account for the loss. Accordingly, the Board finds that the appellant has not met her burden of demonstrating that the 58 Northern Boulevard property was overvalued for this reason for fiscal years 2007 and 2008.

Second, for the fiscal-year-2009 appeal relating to the 58 Northern Boulevard property, the Board finds that the appellant similarly alleged that the 58 Northern Boulevard property's parcel lost 38% of its area from erosion by January 1, 2008, the valuation and assessment date for fiscal year 2009. However, for this fiscal year, the Board finds that she did introduce some credible demonstrative evidence substantiating this claim. The §204 Report reveals that at least by the end of calendar year 2007, the 58 Northern Boulevard property had lost a substantial portion of its parcel. However, the certified easement plan introduced into evidence by the appellant and discussed above is dated almost two years beyond the January 1, 2008 valuation and assessment date for fiscal year 2009. The appellant did not submit any additional engineering or other reliable evidence to directly connect this plan to the 58 Northern Boulevard property's condition on January 1, 2008.

Lastly in this regard, and as with the fiscal-year-2007 and fiscal-year-2008 appeals, the appellant once again did not provide adequate evidence on how to properly adjust the 58 Northern Boulevard property's value assuming a substantial diminution in its parcel's size. As was the case for the fiscal year 2007 and 2008 appeals and as more fully explained below, it is not appropriate valuation practice to simply reduce, proportionately, the subject property's overall assessment or the portion of the assessment allocated to the land to account for the loss. Accordingly, the Board finds that the appellant has not met her burden of demonstrating that the 58 Northern Boulevard property was overvalued for this reason for fiscal year 2009.

Third, for all of the fiscal-year-2010 appeals, the Board finds that the appellants did introduce some demonstrative evidence substantiating their claims that the subject properties suffered from the effects of erosion. The §204 Report reveals that at least by the end of calendar year 2007, essentially all of the subject properties had lost a portion of their parcel. However, the certified easement plan introduced into evidence for the 58 Northern Boulevard property and discussed above is dated almost one year beyond the January 1, 2009 valuation and assessment date for fiscal year 2010, and there is no additional engineering or other reliable evidence to directly connect this plan to the 58 Northern Boulevard property's condition on January 1, 2009. The appellants who are appealing the assessment on the 48 Northern Boulevard property recently drew the area affected by the easement onto a 2005 plot plan for their property. No additional evidence was submitted to certify that the area encompassed by the easement was equivalent to the 48 Northern Boulevard property's condition on January 1, 2009.

In addition, the easements were signed in the fall of 2009, more than 9 months after the relevant January 1, 2009 valuation and assessment date for fiscal year 2010. The Corps' Replenishment Project did not occur until 2010. Therefore, the easements were not in effect until after the January 1, 2009 valuation and assessment date for fiscal year 2010. Moreover, and as with the 58 Northern Boulevard property's appeals for fiscal years 2007, 2008, and 2009, the appellants with appeals for fiscal year 2010 failed to introduce adequate evidence on how to reasonably reduce the subject properties' values assuming a certain amount or degree of diminution in their parcels' areas due to erosion. As was the case for the prior fiscal years' appeals and as explained more fully below, it is not appropriate valuation practice to simply reduce, proportionately, the subject property's overall assessment or the portion of the assessment allocated to the land to account for the

loss. Accordingly, the Board finds that the appellants did not meet their burden of demonstrating that the subject properties were overvalued for this reason for fiscal year 2010.

Fourth, with respect to the claim that the 76 Northern Boulevard property was overvalued because, among other reasons, the assessors did not adequately take its dilapidated condition into consideration, the Board agrees with the appellant. Based on his description of his property and placing some weight on repair estimates, the Board finds that it is appropriate to reduce his building assessment by 10%, from \$129,300 to \$116,370, before accounting for a possible reduction resulting from stigma.

The Board, however, did not rely on the comparable-sales analysis prepared by his appraiser because the Board found that the properties which the appraiser used in his analysis were not comparable to the subject property; they were not oceanfront or not located in a comparable area. In addition, the appraiser did not testify at the hearing and was not available for *voir dire* or cross-examination. The Board also finds that the appellant's rationale for reducing the assessment allocated to his parcel — a smaller-sized parcel should have a smaller per-square-foot value than nearby larger-sized parcels — is simply incorrect. *See APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 212 (13<sup>th</sup> ed. 2008)* (“Size differences can affect value and are considered in site analysis. Reducing sale prices [or assessments] to consistent units of comparison facilitates the analysis of comparable sites. . . . Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase.”).

Fifth, as for presence and possible effects of stigma on the subject properties for fiscal year 2010, the Board finds that, as of January 1, 2009, the valuation and assessment date for fiscal year 2010, the appellants demonstrated that the subject properties were adversely affected by stigma. The factors supporting a finding of stigma include, among others: the actual destruction and loss of properties from erosion in the immediate vicinity of the subject properties; the actual erosion on and property loss suffered by the subject properties themselves; the necessity for and implementation of immediate remediation to at least forestall the problem; the discussions regarding the desirability of and mechanism for both additional short-term and long-term solutions; the widely disseminated and prominent negative publicity about the erosion problem on Plum Island and in the area where the subject properties are located; the anticipated identification of the subject properties in the *§204 Report*; and the complete lack of sales of developed or developable oceanfront

property in the area during the relevant fiscal-year-2010 time period, which indicates an abnormally diminished marketability that is presumably at least partially the result of and further proof of the existence of stigma relating to environmental risk.

Based on the timing of the events discussed in its findings and listed in the foregoing timetable, the Board finds that the appellant for the 58 Northern Boulevard property failed to show stigma or diminished marketability for the 58 Northern Boulevard property fiscal years 2007, 2008, and 2009, just as she failed to prove property loss from erosion for fiscal years 2007 and 2008 and failed to properly value presumed property loss for fiscal years 2007, 2008, and 2009. The single piece of demonstrative stigma evidence is a submission relating to fiscal year 2009, which consists of a *Newburyport Daily News* article that merely outlines or lists the timing of certain events. The Board finds that this lone newspaper piece does not constitute wide-spread and notorious or prominent publicity and is insufficient to support a finding of stigma. Moreover, the sales that occurred from September, 2005 to June, 2007 support the assessments on the subject oceanfront property for at least two of these earlier fiscal years. Not until the spring of 2008 does the evidence begin to convincingly reflect the beginning of widespread property loss, the initiation of extensive mitigation measures, the possibility of diminished marketability, and the concomitant negative publicity. Notwithstanding this finding, the Board also finds that after January 1, 2009, the valuation and assessment date for fiscal year 2010, the evidence demonstrates more frequent and widespread media reports of erosion and property damage.

On this basis, the Board finds that the evidence reflects that by January 1, 2009, conditions on and reported about Plum Island clear the hurdle for a finding that an environmental stigma, in the form of severe erosion and ocean surges coupled with property loss and damage and extensive media reports, exists in the area where the subject properties are located and is adversely impacting the marketability and value of the subject properties. The lack of any relevant sales occurring in calendar year 2008, the storm and erosion damage to a commercial and several residential structures in 2008, reports in the *Boston Globe* and *Newburyport Daily News* about the property damage, the start of the Dune Stabilization Project, and continuing discussions for both additional short- and long-term solutions, all contribute to this adverse impact and finding of stigma. After January 1, 2009, the valuation and assessment date for fiscal year 2010, the evidence reveals, among others things, more frequent and widespread media reports of erosion and property damage, the actual listing of the subject properties in the §204 Report, and the signing and

implementation of the easements.

Accordingly, for fiscal year 2010, the Board finds that a stigma, measured by a percentage of the subject properties' overall assessed values -- and not limited to just their land values -- exists. The Board further finds that 15% is a sufficient adjustment to apply to the subject properties' overall assessed values to compensate for the existence of stigma as of January 1, 2009. The Board used the available evidence to help it determine this percentage, including, among other things, the article, *Coping with Coastal Erosion*, the start of the Dune Stabilization Project, the anticipated start and completion of the Corps' Replenishment Project, the lack of relevant sales of improved or buildable oceanfront properties in the area in 2008, the two sales of unimproved and unbuildable Northern Boulevard lots, and sales of other Plum Island properties, as well as the Board's own expertise. This percentage does not reflect the actual listing of the subject properties in the §204 Report and additional widespread and even more negative publicity in 2009, and thereafter.

#### **Conclusion**

Based on all of the evidence and reasonable inferences drawn therefrom, the Board finds, with respect to all of the appeals for all of the fiscal years at issue — fiscal years 2007, 2008, 2009, and 2010 -- that the appellants did not meet their burden of proving that the subject properties were overvalued because of the direct effects of erosion diminishing the size of the subject properties' parcels. The Board also finds, however, with respect to the 76 Northern Boulevard property, that it was overvalued in fiscal year 2010 because that appellant proved that the assessors did not adequately account for his property's dilapidated condition. Based on that appellant's description of his property and placing some weight on repair estimates, the Board finds that it is appropriate to reduce his building assessment by 10%, from \$129,300 to \$116,370, thereby reducing the 76 Northern Boulevard property's overall value for this reason for fiscal year 2010 to \$806,070.

As for the presence and possible effects of stigma on the subject properties for fiscal year 2010, the Board finds that, as of January 1, 2009, the valuation and assessment date for fiscal year 2010, but not for the earlier valuation and assessment dates for fiscal years 2007, 2008, and 2009, the appellants demonstrated that the subject properties were adversely affected by stigma. Accordingly, for fiscal year 2010, the Board finds that a stigma, measured by a percentage of the subject properties' overall assessed values -- and

not limited to just their land values -- existed. The Board further finds that 15% is a sufficient adjustment to apply to the subject properties' overall assessed values to compensate for the existence of stigma-related issues as of January 1, 2009.

Moreover, the Board recognizes the difficulty in accounting for the diminished size of the subject properties' parcels due to erosion but does not adopt the appellants' suggestion of reducing the amount of a subject property's assessment or the portion of the assessment allocated to an affected property's parcel in proportion to the amount of land lost because it is not an appropriate valuation methodology under the circumstances. Rather, the Board suggests that it may be appropriate in future fiscal years to re-determine the size of each of the affected parcels by subtracting the square footage of the actual erosion or replenishment measurements from the assessors' parcel measurements (assuming the assessors have not already done so) and then, using the assessors' land-valuation tables, land assessments for comparably sized parcels, or other comparable tools, re-determine the subject properties' values. Based on the present record, however, this approach cannot be implemented.

The following two tables, Table Seven and Table Eight, summarize the Board's decisions in these appeals.

**Table Seven**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Northern Boulevard Address</u>	<u>Overall Assessment (\$)</u>	<u>Decision</u>	<u>15% Value Abated Stigma</u>	<u>FCV* (\$)</u>	<u>Tax Abated @ \$9.52 per \$1,000</u>
2010	X302672	DiNapoli	46	823,900	Appellant	123,585	700,315	1,176.53
2010	X302664	DeSalvo	16	782,500	Appellant	117,375	665,125	1,117.41
2010	X302689	Erickson	48	837,300	Appellant	125,595	711,705	1,195.66
2010	X302656	Christ	26	1,070,400	Appellant	160,560	909,840	1,528.53
2007	F287875	Florio, TE	58	963,800	Assessors	N/A	N/A	N/A
2008	F294075	"	"	935,700	Assessors	N/A	N/A	N/A
2009	F299082	Novak, TE	"	859,900	Assessors	N/A	N/A	N/A
2010	F305469	"	"	830,400	Appellant	124,560	705,840	1,185.81

\*"FCV" is an acronym for fair cash value.

**Table Eight**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Northern Boulevard Address</u>	<u>Overall Assessment (\$)</u>	<u>Decision</u>	<u>10% Value Abated Condition</u>	<u>15% Value Abated Stigma</u>	<u>FCV* (\$)</u>	<u>Tax Abated @ \$9.52 per \$1,000</u>
2010	X302682	Accetta, TE	76	819,000	Appellant	12,930	120,910	685,160	1,274.16

\*“FCV” is an acronym for fair cash value.

**OPINION**

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

The appellants have the burden of proving that the property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245).

In appeals before this Board, a taxpayer “may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.” *General Electric Co.*, 393 Mass. at 600 (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)). In the present appeals, the appellants focused primarily on perceived errors in the assessors’ valuation of the land component associated with the subject properties, and the assessors’ failure to recognize the concept of stigma in their assessments.

A taxpayer, however, does not conclusively establish a right to abatement merely by showing that his land is overvalued. “The tax on a parcel of land and the building thereon is one tax . . . although for statistical purposes they may be valued separately.” *Assessors of Brookline v. Prudential Insurance Co.*, 310 Mass. 300, 317 (1941). In abatement proceedings, “the question is whether the assessment for the parcel of real

estate, including both the land and the structures thereon, is excessive. The component parts, on which that single assessment is laid, are each open to inquiry and revision by the appellate tribunal in reaching the conclusion whether that single assessment is excessive.” *Massachusetts General Hospital v. Belmont*, 238 Mass. 396, 403 (1921). See also *Duquette v. Hinsdale*, Mass. ATB Findings of Fact and Reports 2008-1494, 1502-03 (citations omitted).

In these appeals, the Board found that for fiscal years 2009 and 2010, but not before, the appellants successfully demonstrated that the sizes of the subject properties’ parcels were diminished by erosion. The appellants also showed that, as of the fall, 2009 and the completion of the Corps’ Replenishment Project in January, 2010, their access to and use of the areas of nourishment on their properties were significantly restricted by the easement. However, the Board also found that the appellants failed to provide a reasonable means to measure how the reduction in the subject properties’ parcel area affected the subject properties’ values. The Board found that it is not appropriate valuation practice to simply reduce, proportionately, the subject property’s overall assessment or the portion of the assessment allocated to the land to account for the loss. See *Finigan v. Assessors of Belmont*, Mass. ATB Findings of Fact and Reports 2004-533, 537 (“One cannot take a unit of value for a given parcel and apply that unit value to increase the value of a larger parcel or decrease the value of a smaller one.”). The Board suggests that a better way might be to use the assessors’ land-valuation tables, land assessments for comparably-sized properties, or other comparable tools to value the remaining land in accordance with that size parcel’s value. Such information, however, was not part of the record. See *Reliable Electronic Finishing Co. v. Assessors of Canton*, 410 Mass. 381, 382-83 (1991)(holding that abatement not warranted where taxpayer did not prove impact on fair cash value from contamination of site); *Novak v. Assessors of Newbury*, 73 Mass. App. Ct. 1112 (2008)(affirming, under Rule 1:28, the Board’s decision to uphold the assessment on the 58 Northern Boulevard property for fiscal year 2006 because “there was no evidence presented as to the effect of the erosion on the subject property’s value.”).

In addition, the Board determined that the easements did not affect the subject properties as of January 1, 2009, the valuation and assessment date for fiscal year 2010, because they were not in existence or effect until at least 9 months later. The Board, therefore, did not factor them in to the subject properties’ valuation for fiscal year 2010 or before then.

With respect to the claim that the 76 Northern Boulevard property was overvalued because, among other reasons, the assessors did not adequately take its dilapidated condition into consideration, the Board agreed with the appellant. Based on his description of his property and placing some weight on repair estimates, the Board found that it was appropriate to reduce his building assessment by 10%, from \$129,300 to \$116,370.

The Board did not rely on the comparable-sales analysis prepared by his appraiser because the Board found that the properties which the appraiser used in his analysis were not comparable to the 76 Northern Boulevard property; they were not oceanfront or not located in a comparable area. The appellant bears the burden of “establishing the comparability of . . . properties [used for comparison] to the subject property.” *Fleet Bank of Mass. v. Assessors of Manchester*, Mass. ATB Findings of Fact and Reports 1998-546, 1998-554. *Accord New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 470 (1981). In addition, the appraiser did not testify at the hearing and was not available for *voir dire* or cross-examination. The Board also found that the appellant’s rationale for reducing the assessment allocated to his parcel — a smaller-sized parcel should have a smaller per-square-foot value than nearby larger-sized parcels — is simply incorrect. *See APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 212 (13<sup>th</sup> ed. 2008)* (“Size differences can affect value and are considered in site analysis. Reducing sale prices [or assessments] to consistent units of comparison facilitates the analysis of comparable sites. . . Generally, as size increases, unit prices decrease. Conversely, as size decreases, unit prices increase.”).

While the Board found that the evidence was insufficient to support the appellants’ claims for a direct and proportional reduction in the subject properties’ overall assessments, or the part of the assessment allocated to their land, to account for a certain amount or degree of diminution in their parcels’ areas due to erosion, the Board did determine that the evidence supported a finding that the subject properties suffered from stigma for fiscal year 2010. According to *APPRAISAL INSTITUTE, THE DICTIONARY OF REAL ESTATE APPRAISAL (4<sup>th</sup> ed. 2002)*, “stigma” is defined as “[a]n adverse public perception regarding a property; the identification of a property with some type of opprobrium (environmental contamination, a grisly crime), which exacts a penalty on the marketability of the property and hence its value.” *Id.* at 277. In *Woburn Services, Inc. v. Assessors of Woburn*, Mass. ATB Findings of Fact and Reports 1996-553, which involved valuation appeals of income-producing contaminated and uncontaminated

properties within a Superfund site, the Board similarly defined “stigma” as “the negative impact on real estate values that results from public perception.” *Id.* at 1996-565.<sup>10</sup> In *Woburn Services, Inc.*, the Board identified two kinds of stigma - locational stigma and direct contamination stigma. The Board observed that:

Locational stigma is the negative impact to value suffered by property located in an existing Superfund site[, and] [d]irect contamination stigma is the negative impact on the value of property that is not only located within a Superfund site, but is also directly contaminated beyond federal maximum contaminant levels. The stigma engendered by a property’s location within a Superfund site and its actual excessive direct contamination, diminishes that property’s value due to impaired mortgageability, greater risk and uncertainty, and the possibility of associated costs.

*Id.*

A property’s identity with some type of ignominy which diminishes its value through stigmatization is usually precipitated by wide-spread negative publicity. *See Wayland Business Center Holdings, LLC v. Assessors of Wayland*, Mass. ATB Findings of Fact and Reports 2005-557, 573, 596-97 (finding that negative publicity concerning an income-producing property’s environmental contamination was “wide-spread and notorious” and adversely affected its value because newspaper articles, broadcasts, state designations, testimony, and the like publicized the contamination resulting in high vacancies); *see also Woburn Services Inc.*, Mass. ATB Findings of Fact and Reports at 1996-565 (finding that the locational and direct contamination stigmas lowered the values of associated properties because of negative publicity that was “prominent and notorious” thereby adversely affecting public perception). To value property so afflicted, “[t]raditional appraisal techniques, which are appropriately modified to account for the effects of stigma caused by environmental [risk] are satisfactory for determining a property’s fair cash value.” *Woburn Services, Inc.*, Mass ATB Findings of Fact and Reports at 1996-574.

The Board’s finding of stigma in these appeals is premised on the above definitions and on analogous reasoning and factors for which the Board found stigma in *Woburn*

---

<sup>10</sup> Numerous articles in *The Appraisal Journal* offer variations on the definition of stigma. *See, e.g.*, Richard Roddewig, “Stigma, Environmental Risk and Property Value: 10 Critical Inquiries,” *The Appraisal Journal*, October 1996: 375-387 in which stigma, as it applies to real estate affected by environmental risk, is generally defined as “an adverse public perception about a property that is intangible and not directly quantifiable.” Roddewig also notes that stigma can be a temporary condition. *See also* Lusvardi, Wayne and Charles B. Warren, ASA, “The Stigma Enigma: Doublespeak, Double Standards, and Double Dipping in Toxic Tort Property Damage Claims,” <http://www.jurispro.com/uploadArticles/Warren-Stigma.pdf> (date last visited May 19, 2011), in which the authors posit that stigma is a function of the probable magnitude of any future problem, the probability of public acceptance of a present fix and/or the probability of recurrence of the problem.

*Services, Inc.* In general, the parallel reasoning and factors as applied to these appeals include: the actual destruction and loss of properties from erosion in the immediate vicinity of the subject properties; the actual erosion on and property loss suffered by the subject properties themselves; the necessity for and implementation of immediate remediation to at least forestall the problem; the discussion regarding the desirability of and mechanism for both additional short-term and long-term solutions; the widely disseminated and prominent negative publicity about the erosion problem on Plum Island and in the area where the subject properties are located; the anticipated identification of the subject properties in the §204 Report; and the complete lack of sales of developed or developable oceanfront property in the area during the relevant fiscal-year-2010 time period, which indicates an abnormally diminished marketability that is presumably the result of and further proof of the existence of stigma relating to environmental risk.

Based on the timing of the events discussed in its findings and listed in the foregoing timetable, the Board found that the appellants failed to demonstrate stigma or diminished marketability for fiscal years 2007, 2008, and 2009. The single piece of evidence relating to fiscal year 2009, which is a *Newburyport Daily News* article that merely outlines or lists the timing of certain events, is insufficient to support a finding of stigma. Moreover, the sales that occurred from September, 2005 to June, 2007 support the assessments on the subject oceanfront properties for at least two of these three earlier fiscal years. Not until the spring of 2008 does the evidence begin to convincingly reflect property loss, the initiation of mitigation measures, the possibility of diminished marketability, and concomitant negative publicity.

The evidence reflects that as of January 1, 2009 conditions on or reported about Plum Island clear the hurdle for a finding that an environmental stigma, in the form of severe erosion and ocean surges coupled with property loss and damage and prominent and notorious media reports, exists in the area where the subject properties are located and is likely adversely impacting the marketability and value of the subject properties. The lack of any relevant sales occurring in calendar year 2008, the storm and erosion damage to a commercial and several residential structures in 2008, reports in the *Boston Globe* and *Newburyport Daily News* about the property damage, the start of the Dune Stabilization Project, and continuing discussions for both short- and long-term solutions, all contribute to this adverse impact and finding of stigma. After January 1, 2009, the valuation and assessment date for fiscal year 2010, the evidence reveals, among other things, more

frequent and widespread media reports of erosion and property damage, the actual listing of the subject properties in the Corps' §204 Report, and the signing and implementation of the easements.

Accordingly, for fiscal year 2010, and consistent with the notion of stigma first discussed by the Board in *Woburn Services, Inc.*, *supra*, the Board finds that a stigma, measured by a percentage of the subject properties' assessed values - and not limited to just their land values - exists. The Board further finds that 15% is a sufficient adjustment to apply to the subject properties' overall assessed values to compensate for the existence of stigma as of January 1, 2009. The Board used the available evidence to help it determine this percentage, including, among other things, the article, *Coping with Coastal Erosion*, the start and anticipated completion of the Dune Stabilization Project, the anticipated start and completion of the Corps' Replenishment Project, and the lack of relevant sales of ocean-front properties in the area in 2008. This percentage does not reflect the actual listing of the subject properties in the Corps' §204 Report and additional widespread and even more negative publicity in 2009, and thereafter.

In reaching its decision in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that a witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982); *New Boston Garden Corp.*, 383 Mass. at 469. "The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the Board." *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 605 (1977).

### Conclusion

Based on all of the evidence and reasonable inferences drawn therefrom, the Board finds and rules, with respect to all of the appeals for all of the fiscal years at issue — fiscal years 2007, 2008, 2009, and 2010 -- that the appellants did not meet their burden of proving that the subject properties were overvalued because of the effects of erosion diminishing the size of the subject properties' parcels. The Board also finds and rules, however, with respect to the 76 Northern Boulevard property, that it was overvalued in fiscal year 2010 because that appellant proved that the assessors did not adequately account for his property's dilapidated condition. Based on that appellant's description of his property and placing some weight on repair estimates, the Board reduced his building assessment by

10%, from \$129,300 to \$116,370, thereby reducing the 76 Northern Boulevard property's overall value for this reason for fiscal year 2010 to \$806,070, before accounting for a reduction resulting from stigma.

As for the presence and possible effects of stigma on the subject properties, the Board finds and rules that, as of January 1, 2009, the valuation and assessment date for fiscal year 2010, but not for the earlier valuation and assessment dates for fiscal years 2007, 2008, and 2009, the appellants demonstrated that the subject properties were adversely affected by stigma. Accordingly, for fiscal year 2010, the Board finds and rules that a stigma, measured by a percentage of the subject properties' overall assessed values -- and not limited to just their land values -- existed. The Board further finds and rules that 15% is a sufficient adjustment to apply to the subject properties' overall assessed values to compensate for the existence of stigma as of January 1, 2009.

Furthermore, the Board recognizes the difficulty in accounting for the diminished size of the subject properties' parcels due to erosion but does not adopt the appellants' suggestion of reducing the subject properties' overall assessment or the amount of the assessment allocated to an affected property's parcel in proportion to the amount of land lost because it is not an appropriate valuation methodology under the circumstances. Rather, the Board suggests that it may have been appropriate to re-determine the size of each of the affected parcels by subtracting the square footage of the actual erosion or replenishment measurements from the assessors' parcel measurements -- assuming the assessors have not already done so -- and then, using the assessors' land-valuation tables, land assessments for comparably-sized parcels, or a comparable tool, re-determine the subject properties' values. Based on the record in these appeals, the Board could not implement this approach.

On this basis, the Board decides the appeals relating to the 58 Northern Boulevard property for fiscal years 2007, 2008, and 2009 for the appellee and decides all of the fiscal-year-2010 appeals for the appellants.

The following two tables, Table Seven and Table Eight, summarize the Board's decisions in these appeals.

**Table Seven**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Northern Boulevard Address</u>	<u>Overall Assessment (\$)</u>	<u>Decision</u>	<u>15% Value Abated Stigma</u>	<u>FCV* (\$)</u>	<u>Tax Abated @ \$9.52 per \$1,000</u>
2010	X302672	DiNapoli	46	823,900	Appellant	123,585	700,315	1,176.53
2010	X302664	DeSalvo	16	782,500	Appellant	117,375	665,125	1,117.41
2010	X302689	Erickson	48	837,300	Appellant	125,595	711,705	1,195.66
2010	X302656	Christ	26	1,070,400	Appellant	160,560	909,840	1,528.53
2007	F287875	Florio, TE	58	963,800	Assessors	N/A	N/A	N/A
2008	F294075	"	"	935,700	Assessors	N/A	N/A	N/A
2009	F299082	Novak, TE	"	859,900	Assessors	N/A	N/A	N/A
2010	F305469	"	"	830,400	Appellant	124,560	705,840	1,185.81

\*"FCV" is an acronym for fair cash value.

**Table Eight**

<u>Fiscal Year</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Northern Boulevard Address</u>	<u>Overall Assessment (\$)</u>	<u>Decision</u>	<u>10% Value Abated Condition</u>	<u>15% Value Abated Stigma</u>	<u>FCV* (\$)</u>	<u>Tax Abated @ \$9.52 per \$1,000</u>
2010	X302682	Accetta, TE	76	819,000	Appellant	12,930	120,910	685,160	1,274.16

\*"FCV" is an acronym for fair cash value.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy

Attest: \_\_\_\_\_  
Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

GD FOX MEADOW, LLC v.

BOARD OF ASSESSORS OF  
THE TOWN OF WESTWOOD

Docket No. F303504

Promulgated: June 8, 2011

ATB 2011-501

This is an appeal under the formal procedure, pursuant to G.L. c. 59, §§ 64 and 65 and c. 58A, § 7, from the refusal of the appellee to abate taxes on certain real estate in the Town of Westwood assessed under G.L. c. 59, §§ 11 and 38 for fiscal year 2009.

Commissioner Rose heard this appeal. Commissioners Scharaffa and Egan 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.

*Stephen W. Kidder, Esq., Diana C. Tillotson, Esq., and Andrew Eberle, Esq.* for the appellant.

*Deborah Robbins*, assessor, for the appellee.

**FINDINGS OF FACT AND REPORT**

The parties submitted this appeal for decision on two Stipulations of Facts with exhibits attached, the representations of Deborah Robbins, a member of the Town of Westwood's Board of Assessors (the "assessors"), and several additional exhibits entered into evidence by the assessors. Based on this evidence and reasonable inferences drawn therefrom, the Appellate Tax Board ("Board") made the following findings of fact.

On March 26, 2008, almost three months after the January 1, 2008 valuation and assessment date for fiscal year 2009, the appellant, GD Fox Meadow, LLC (the "appellant"), became the owner of a near turn-key subdivision which contained a completed drive with a base coat of asphalt, underground utilities, and nineteen unimproved, contiguous residential parcels of real estate located on Fox Meadow Drive in Westwood (collectively, the "subject property").<sup>1</sup> At all relevant times, the subject property consisted of a total of approximately 53.55 acres, and included the nineteen

---

<sup>1</sup> As originally developed, the subdivision contained twenty-two lots, but three had been retained by or previously sold to others.

remaining subdivision lots ranging in size from 1.19 acres to 8.32 acres.

Westwood is a town in north-central Norfolk County located less than 15 miles to the southwest of Boston’s central business district. Westwood has a total area of approximately 11.1 square miles, and according to a valuation report in evidence which references the 2000 United States Census, it has a population of 13,651. Westwood borders the communities of Walpole, Dover, Needham, Norwood, Canton, and Dedham. Originally called “West Dedham,” Westwood was first settled in 1640 as part of the Town of Dedham and officially incorporated in 1897. In July, 2005, *CNN/Money* and *Money Magazine* ranked Westwood 13<sup>th</sup> on its list of the “100 Best Places to Live in the United States.” During the relevant time period, *Boston Magazine* listed Gay Street in Westwood, which is situated in the subject property’s neighborhood, on its list of the “Best Streets in the Boston Area.”

The appellant acquired the subject property for \$10,532,000<sup>2</sup> through a Membership Interest Purchase and Sale Agreement (the “Agreement”).<sup>3</sup> Mr. Duffey, the seller, was not related to any other party to the transaction, and the sale was an arm’s-length transaction. The appellant and its parent company, Gilbane Development Company (“Gilbane”) are in the business of purchasing raw land or developed but unimproved lots to sell to builders or individuals who build homes on them. The subject subdivision lots were held for sale in the ordinary course of the appellant’s business.

The relevant assessment information for the subject property’s nineteen remaining lots on Fox Meadow Drive is contained in the following table.

<u>Assessors</u> <u>Map/Lot</u>	<u>Street</u> <u>#</u>	<u>Area</u> <u>in</u> <u>Acres</u>	<u>Original</u> <u>Assessed</u> <u>Value (\$)</u>	<u>Original</u> <u>Tax @</u> <u>\$12.01/</u> <u>\$1,000</u>	<u>Assessed</u> <u>Value (\$)</u> <u>After Any</u> <u>Abatement</u>	<u>Amounts of</u> <u>Partial</u> <u>Abatements</u> <u>(\$)</u>
15-003	1	1.98	880,600	10,576.00	874,300	6,300
15-048	2	1.45	696,250	8,361.96	696,250	0
15-030	3	2.36	894,400	10,741.74	879,350	15,050
15-004	5	6.01	907,700	10,901.48	907,700	0
15-033	6	1.32	638,400	7,667.18	638,400	0
15-031	7	4.43	1,003,100	12,047.23	1,003,100	0
15-038	8	1.45	696,250	8,361.96	696,250	0

<sup>2</sup> Shortly before the transaction, the parties reduced the final purchase price by \$1,000,000 to the \$10,532,000 amount.

<sup>3</sup> The appellant’s parent company, Gilbane Development Company, entered into the Agreement with the then owners of the subject property, William N. Duffey, Jr., individually and as trustee of various trusts. The sale was effectuated by having Mr. Duffey, in his multiple capacities, convey the subject property to Captain’s Crossing, LLC, a Massachusetts limited liability company. After this conveyance, Captain’s Crossing, LLC transferred all of its membership interest to the appellant.

15-034	9	3.61	944,400	11,342.24	708,050	236,350
15-039	10	1.19	579,900	6,964.60	579,900	0
15-035	11	6.11	1,044,400	12,543.24	742,600	301,800
15-047	12	1.32	638,400	7,667.18	638,400	0
15-036	13	2.01	874,450	10,502.14	700,050	174,400
15-037	15	2.11	874,950	10,508.15	700,550	174,400
15-040	17	2.85	704,250	8,458.04	704,250	0
15-041	19	8.32	731,600	8,786.52	731,600	0
15-042	21	1.54	741,850	8,909.62	741,850	0
15-043	23	1.80	857,250	10,295.57	857,250	0
15-045	27	1.97	880,100	10,570.00	880,100	0
15-046	29	1.72	819,100	9,837.39	819,100	0
<b>TOTAL</b>	<b>19 lots</b>	<b>53.55</b>	<b>15,407,350</b>	<b>185,042.24</b>	<b>14,499,050</b>	<b>908,300</b>

In accordance with G.L. c. 59, § 57C, the real estate tax was timely paid without incurring interest. On January 29, 2009, in accordance with G.L. c. 59, § 59, the appellant, having acquired title to the subject property a few months after the assessment and valuation date of January 1, 2008, timely filed its applications for abatement for each of the lots or tax parcels contained within the subject property.<sup>4</sup> On March 31, 2009, the assessors denied the abatement applications for thirteen of the tax parcels, namely 15-048, 15-004, 15-033, 15-031, 15-038, 15-047, 15-039, 15-040, 15-041, 15-042, 15-043, 15-045, and 15-046; and granted partial abatements for six of the tax parcels, namely 15-003, 15-030, 15-034, 15-035, 15-036, and 15-037. On June 29, 2009, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its appeal of all of these denials and partial abatements with the Board by joining the tax parcels on one Petition Under Formal Procedure.

Based on these facts and in accordance with G.L. c. 59, §§ 57C, 59, and 64 and 65, the Board found and ruled that it had jurisdiction over this appeal.

The appellant contended that the \$10,532,000 purchase price for the subject property, which was for a bulk purchase of the entire remaining subdivision and was paid in an arm's-length transaction within three months of the assessment date, created a rebuttable presumption that \$10,532,000 was the fair market value of the subject property as of January 1, 2008. Therefore, the appellant asserted, the assessors had overvalued the subject property, as abated, by approximately \$4,000,000.

In valuing the subject property, the assessors essentially ignored the sale of the subject property, as the bulk sale of nineteen subdivision parcels and related

<sup>4</sup> General Laws, c. 59, § 59 provides in pertinent part that: "Notwithstanding any other provision in this section, a person who acquires title to real estate after January first in any year, shall for the purposes of this section be treated as a person upon whom a tax has been assessed."

infrastructure to one purchaser, and instead valued each of the lots as separate unimproved buildable parcels available for sale to multiple purchasers. In challenging the assessors' approach, the appellant did not deny that the "retail value" assigned to each of the nineteen lots by the assessors was reasonable if considered for sale separately to multiple purchasers; rather, the appellant maintained that the lots, now being the appellant's inventory and having been purchased in bulk by the appellant, should have been assessed at their "wholesale value," which was the equivalent of the subject property's sale price appropriately allocated to each of the nineteen lots.

The appellant bolstered its contention that the sale price represented the fair cash value of the subject property with an appraisal report which was attached as an exhibit to one of the Stipulations and which valued the subject property as of March 26, 2009, almost fifteen months after the assessment date, at \$9,000,000 using a discounted-cash-flow or "development" approach that assumed an income of over \$16 million, expenses of over \$3.5 million, a 20% discount rate, and a six-year total sell-off period.<sup>5</sup> The self-contained appraisal report was prepared by two Principals and one Senior Associate of Birch/REA Partners, Inc. for Sovereign Bank to use for mortgage collateral valuation purposes. The authors of the appraisal report did not testify at the hearing of this appeal. The appraisal report also indicated that, as of March 26, 2009, the nineteen lots were for sale with asking prices ranging from \$895,000 to \$1,295,000. However, based on an analysis of sales data and conversations with brokers and developers, the authors of the Birch/REA Partners, Inc. appraisal report suggested that the asking prices should be reduced by 15% leaving "an average lot value (rounded) for the subject subdivision of \$900,000."<sup>6</sup>

Ms. Robbins, appearing for the assessors, represented that the assessors valued and taxed the remaining nineteen parcels as separate buildable lots for sale to multiple parties because, as of January 1, 2008, the relevant assessment date for fiscal year 2009, the nineteen lots were essentially ready to be sold and were being marketed separately to builders or individuals for the construction of homes. Several of the subdivision lots had been retained by or sold to others before the bulk sale of the remaining nineteen to the

---

<sup>5</sup> This analysis also included the completion and year-one sale of a then partially constructed improvement on one of the nineteen parcels.

<sup>6</sup> Assuming that the nineteen subject lots had an average retail value of only \$900,000 each as of January 1, 2008, which, according to this appraisal report, is likely a conservative estimate for that earlier time, their total retail value was \$17,100,000, which still exceeds the total assessed values, as abated, by more than \$2,500,000.

appellant, including one sale for \$899,000 on January 7, 2008, within one week of the relevant assessment date, and more than two-and-one-half months before the bulk sale. Ms. Robbins also noted that the subdivision's infrastructure was basically complete, including a base coat of asphalt on Fox Meadow Drive and the delivery of utilities. Construction of a home on one of the nineteen lots began in October, 2008. She confirmed that the assessors used a comparable-sales approach to derive the values that they placed on the nineteen tax parcels. The Board noted that the sales or listings upon which the assessors relied in setting the assessments corresponded to three of the thirteen sales or listings upon which the authors of the Birch/REA Partners, Inc. appraisal report also relied to establish an average lot value of \$900,000 for the subdivision.

Based on all of the evidence, and as explained more fully in its Opinion below, the Board found that the appellant did not prove that the nineteen remaining lots associated with the subject property were overvalued for fiscal year 2009. The Board found that for *ad valorem* tax purposes, the subject property's highest and best use, as of January 1, 2008, was as nineteen separate retail building lots that were presently being marketed and were currently ready to be sold to and utilized by multiple purchasers at retail prices. The Board based its highest-and-best-use determination on numerous factors including the retention by or sale to others of three of the subdivision's original twenty-two lots and the fact that the sale of one of these three lots for \$899,000 occurred within a week of the assessment date and two-and-one-half months before the bulk sale. The Board also recognized that the infrastructure associated with the subject nineteen lots was essentially completed, including the delivery of utilities and the basecoat on the road. Further, the appellant and its parent, Gilbane, were in the business of selling lots separately to builders or other individuals for home construction. The lots had been separately marketed prior to the relevant assessment date. At all relevant times, the subject property was not a mere paper subdivision without tangible embodiment, but rather was one that had reached near full physical fruition. Because of these facts and subsidiary findings, the Board found, notwithstanding the bulk sale of the subject property to one purchaser, that the retail use of the subject nineteen lots -- that is their sale to and utilization by multiple purchasers -- best corresponded to the criteria for determining highest and best use articulated in the Appraisal Institute's authoritative real estate treatise on valuation, *THE APPRAISAL OF REAL ESTATE* (13<sup>th</sup> ed. 2008). That treatise provides in pertinent part that a property's highest and best use is "[t]he

reasonably probable and legal use of vacant land . . . that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” *Ibid.* at 277-78.

The Board found that its highest-and-best-use finding for the subject property best met all of the Appraisal Institute’s criteria for determining highest and best use. A succinct review of those criteria and related facts for the relevant time period reveals that: (1) the subdivision’s approval, its essentially finished development, and the sale and retention of some of the lots shows that the Board’s highest and best use was legally permissible; (2) the actual physical embodiment and sale of the lots demonstrates that the Board’s highest and best use was physically possible; (3) the value of the lots compared to the costs incurred to develop them shows that the Board’s highest and best use was financially feasible; and (4) the sale prices and values associated with lots, particularly when compared to the subject property’s bulk-sale value, confirms that the Board’s highest and best use was maximally productive.

Consequently, the Board did not regard an allocation of the purchase price for the subject property among the remaining nineteen lots as being equivalent to the fair cash value of the remaining nineteen lots for separate sale to and utilization by multiple purchasers at retail prices. The Board found that the purchase price reflected a value based on a different use - the bulk sale value of the subject property’s lots and infrastructure to one purchaser - but not the total retail value of the nineteen separate building lots that were presently being marketed and were currently ready to be sold to and utilized by multiple purchasers at retail prices, which the Board found to be the subject property’s highest and best use.

Another authoritative treatise on real estate valuation, D. EMERSON, APPRAISAL INSTITUTE, SUBDIVISION VALUATION (2008), distinguishes between the bulk sale value of lots when sold to a single purchaser and the retail value of lots marketed and sold to multiple purchasers:

Subdivision valuation considers the value of the entire group of lots to one purchaser . . . . Accordingly, bulk sale value really is the *market value* for a group of lots . . . . In subdivision valuation, the retail value is the *market value* of one lot . . . . [T]he bulk sale value is not a separate type of value; rather it is a *market value* for a group of lots, which reflects a bulk sale scenario.

*Ibid.* at 15 (emphasis in original). Because the Board determined that, as of January 1, 2008, the highest and best use of the subject property was as nineteen separate buildable

but as yet unimproved parcels, which were presently being marketed and currently being offered for sale to and utilization by multiple purchasers at retail prices, and was not as a subdivision of nineteen lots to be sold in bulk along with infrastructure to just one purchaser, the Board also found that the proper way to value the parcels in the subdivision was as retail lots using a comparable-sales analysis. Accordingly, the Board rejected a valuation methodology that relied on the actual bulk sale or a bulk-sale scenario that employed a development analysis treating the lots as inventory within a subdivision to be sold in bulk to one purchaser. The Board observed that the appellant did not meaningfully dispute the retail values assigned to the subject lots, and the evidence, including comparable sales and comparable-sales analyses in evidence, supported those amounts, but it argued that, under the circumstances, the wholesale or bulk value should be applied instead.

On this basis, and particularly in light of the Board's highest and best use determination, the Board decided this appeal for the appellee.

#### OPINION

The assessors are required to assess real estate at its fair cash value as of the first day of January preceding the start of the fiscal year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both of them are fully informed and under no compulsion. *Boston Gas v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The appellants have the burden of proving that the property has a lower value than that assessed. "The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax." *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). "[T]he board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.'" *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245).

In determining fair market value, all uses to which the property was or could reasonably be adapted on the relevant assessment date should be considered. *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authy.*, 335 Mass. 189, 193 (1956); *Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 843 (1989). The goal is to ascertain the maximum value of the property for any legitimate and reasonable

use. *Id.* If the property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of its fair market value. *Colonial Acres, Inc. v. North Reading*, 3 Mass. App. Ct. 384, 386 (1975). “In determining the property’s highest and best use, consideration should be given to the purpose for which the property is adapted.” *Peterson v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2002-573, 617 (citing THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12<sup>th</sup> ed., 2001) 315-316)), *aff’d*, 62 Mass. App. Ct. 428 (2004).

In the present appeal, the Board found that for *ad valorem* tax purposes, the subject property’s highest and best use was as nineteen retail building lots currently being marketed and ready to be sold to and utilized by multiple purchasers and not as a subdivision composed of infrastructure and a bulk inventory of lots to be sold to a single purchaser. The Board found that, at all relevant times, the nineteen remaining parcels were essentially ready to be sold and were being marketed separately to builders or individuals for the construction of homes at retail prices. Indeed, several of the original twenty-two parcels had been retained by or previously sold to others before the bulk sale. One of those parcels sold for \$899,000 within a week of the relevant assessment date and more than two-and-one-half months before the bulk sale. The Board also noted that the subdivision’s infrastructure was basically complete, including a base coat of asphalt on Fox Meadow Drive and the delivery of underground utilities. The subject property was in no way a mere paper subdivision; it was virtually turn-key with lots that were ready to be sold to and utilized by multiple purchasers at retail prices.

The Board found that its highest-and-best-use determination embraced the factors contained in the definition of highest and best use in THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 277-78 (13<sup>th</sup> ed. 2008): “The reasonably probable and legal use of vacant land . . . that is physically possible, appropriately supported, and financially feasible and that results in the highest value.” The fact that the nineteen remaining lots were commonly owned and part of a bulk transaction did not change the Board’s perspective – the lots were, notwithstanding ownership and the bulk sale, buildable and located on a street with a base coat of asphalt, and they were currently being marketed and ready to be sold to and utilized by multiple purchasers at retail prices. In the Board’s view, these facts and subsidiary findings inexorably led it to its highest-and-best-use determination and finding that the lots be valued at retail. The lots could not be valued in bulk for *ad valorem* tax purposes because a bulk sale was not the subject property’s

highest and best use. The Board found that its highest-and-best-use finding for the subject property met all of the Appraisal Institute's criteria for determining highest and best use and rendered the subject property maximally productive.

On this basis, the Board ruled that the highest and best use for the subject property was as nineteen separate building lots that were developed but unimproved and were presently being marketed and were currently ready to be sold to and utilized by multiple purchasers at retail prices.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization; sales comparison; and cost reproduction. *Correia v. New Bedford Redevelopment Auth.*, 375 Mass. 360, 362 (1978). However, “[t]he [B]oard is not required to adopt any particular method of valuation.” *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449 (1986).

Actual sales of the subject property generally “furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 469 (1981); *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554, 560 (1971). The sale price recited in the deed, however, is not conclusive evidence of fair cash value. *Foxboro Associates* at 682-83. The burden of proof that the price was fixed fairly rests with the proponent of the sale; but there is a rebuttable presumption that the price was freely established. *Epstein v. Boston Housing Authy.*, 317 Mass. 297, 300-01 (1944); see *Thorndike Properties of Massachusetts II, LLC v. Assessors of Plymouth*, Mass. ATB Findings of Fact and Reports 2006-127, 135 (“[The evidence revealed that] the sale price recited in the deed was not indicative of [the subject lots’] fair cash value and . . . the appellant had not met its burden showing [otherwise; accordingly, the Board did not rely on price in the deed].”).

In the present appeal, the Board did not rely on the sale of the subject property to the appellant to determine the fair cash value of the nineteen remaining lots because the Board found that the subject property’s highest and best use as of the relevant assessment date was not the bulk sale of the nineteen lots and related infrastructure to one purchaser, but rather was separate sales of the developed but unimproved nineteen lots to multiple purchasers at retail prices averaging approximately \$900,000 per lot. The Board found

and ruled that the sale price recited in the deed did not represent the fair cash value of the nineteen remaining lots for sale to and utilization by multiple purchasers at retail prices; it instead represented the value of the subject property in a bulk-sale scenario to one purchaser.

For buildable but as yet unimproved lots within an existing subdivision, a comparable-sales approach is an appropriate method for estimating their value. THE APPRAISAL OF REAL ESTATE at 300 (“The sales comparison approach is applicable to all types of real property interests when there are sufficient recent, reliable transactions to indicate value patterns or trends in the market.”). In *Crossen v. Assessors of Uxbridge*, Mass. ATB Findings of Fact and Reports 2002-675, the Board found that a sales-comparison analysis was the appropriate methodology to use to value the lots in a subdivision that were ready to be separately sold to and utilized by multiple purchasers:

[T]he Board found that eight of the lots contained in the Park were adjacent to Road A, which was in existence and finished as of the relevant assessment dates. Accordingly, these eight lots were essentially salable and ready for improvements without any further development of the Park’s infrastructure. Because of this, the Board found that a sales comparison approach might have been the most appropriate technique to use to value these eight lots. Using the [retail] value for the lots that the appellants’ valuation expert developed for use in step one of his development approach, the Board found that the total value of these eight lots [was the sum of their retail values].

*Id.* at 2002-686. See generally *Thorndike Properties of Massachusetts II, LLC*, Mass. ATB Findings of Fact and Reports 2006-127 (using appropriately adjusted comparable sales to determine the fair case value of lots in a fully completed area of a subdivision). Furthermore, the sales-comparison approach was used to estimate the retail value of the subject lots in the Birch/REA Partners, Inc. appraisal report upon which the appellant relied to support its case.<sup>7</sup>

“[S]ales of property usually furnish strong evidence of market value, provided they are arm’s-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller.” *Foxboro Associates*, 385 Mass. at 682. Sales

---

<sup>7</sup> Those retail values were then discounted in accordance with the development approach contained in the appraisal report, which the Board found and ruled was an inappropriate methodology to use here given the Board’s highest-and-best-use determination. The appropriate method for valuing developed lots that are ready to be sold to and utilized by multiple purchasers at retail prices is the sales-comparison approach for which no absorption rate is prescribed. See *supra* and *infra*. To the extent that *Crossen*, Mass. ATB Findings of Fact and Reports 2002-675 may be read to suggest otherwise, the Board overrules that portion of the Findings.

of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929). Based on the comparable sales and the comparable-sales analyses in evidence, the Board found that, as of the relevant assessment date, the average value of the nineteen remaining lots was no less than approximately \$900,000, which supported the total assessment amount, as abated, placed on the nineteen remaining lots. The Board further found that the appellant did not introduce substantial valuation evidence consistent with the Board's finding of highest and best use, which could refute the individual assessments, as abated, that the assessors had placed on the nineteen remaining lots for fiscal year 2009.

The Board also found and ruled that the development approach described in the Birch/REA Partners, Inc. appraisal report was not a suitable methodology to use to value the nineteen remaining lots because of the Board's highest-and-best-use determination. As explained in THE APPRAISAL OF REAL ESTATE: "The subdivision development method . . . is most useful for reporting the market value for a group of subdivision lots. The method uses what is known as a bulk sale scenario to develop the value of all lots to one purchaser." *Ibid.* at 370. Where as here, the highest-and-best-use determination is as building lots ready to be sold separately to and utilized by multiple purchasers at retail prices, a valuation methodology that relies on a development approach for valuing a group of lots to be sold to a single purchaser is improper. *Cf. Khan v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports 2004-403, 444-45 ("[T]he development approach . . . was not appropriate for determining the value of the property's real estate considering the Board's finding regarding the subject's highest and best use.").

In making its various findings and rulings in this appeal, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 682; *New Boston Garden Corp.*, 383 Mass. at 469. "The credibility of witnesses, the weight of evidence, the inferences to be drawn from the evidence are matters for the Board." *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

The Board applied these principles in reaching its ultimate finding and ruling that

the appellant failed to demonstrate that the subject property, which, for *ad valorem* tax purposes, consisted of the nineteen tax parcels, was overvalued for fiscal year 2009. On this basis, the Board decided this appeal for the appellee.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**HOME FOR AGED PEOPLE v.  
IN FALL RIVER**

**BOARD OF ASSESSORS OF  
THE CITY OF FALL RIVER**

Docket Nos. F288407, F296842, F300683

Promulgated:  
May 4, 2011

ATB 2011-370

These are appeals 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 Board of Assessors of the City of Fall River (“assessors” or “appellee”) to abate real estate taxes on certain real estate located in Fall River, owned by and assessed to the appellant, Home for Aged People in Fall River (“appellant” or “Home”), under G.L. c. 59, §§ 11 and 38 for fiscal years 2007 through 2009 (“fiscal years at issue”).

Commissioner Mulhern heard these appeals. Chairman Hammond and Commissioners Scharaffa, Egan, and Rose joined him in the decisions for the appellant, which are promulgated simultaneously with these findings of fact and report.

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.

*Stephen W. Kidder, Esq. and Diane C. Tillotson, Esq. for the appellant.  
Burton Peltz, Esq. for the appellee.*

**FINDINGS OF FACT AND REPORT**

**I. Introduction and Jurisdiction**

On the basis of the stipulated facts and documents, testimony and exhibits offered into evidence at the hearings of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.<sup>1</sup>

At all times relevant to these appeals, the appellant was a Massachusetts non-

---

<sup>1</sup> At the June 25, 2008 hearing of these appeals, evidence for only fiscal years 2007 and 2008 was entered into the record. Subsequent to that hearing, the appellant filed its appeal for fiscal year 2009. The parties stipulated that the evidence with respect to fiscal year 2009 would be substantially similar to the evidence entered for the previous two fiscal years, and they asked the Board to include fiscal year 2009 in its decision and in its Findings of Fact and Report. Accordingly, the Board found that the evidence entered with respect to fiscal years 2007 and 2008, as it related to the exemption issue, was substantially similar for fiscal year 2009, and it included fiscal year 2009 in its Decision and Findings of Fact and Report.

profit corporation organized under G.L. c. 180. It was exempt from federal income taxes under Internal Revenue Code § 501(c)(3). The appellant's Articles of Organization stated that its purpose was "to contribute to the well-being and financial security of primarily elderly individuals by providing nursing, housing, health-care, recreational and social services in a charitable manner, in the Greater Fall River area."

Home was the owner of two parcels of real estate located in Fall River. The first parcel, located at 1168 Highland Avenue, was improved with a facility known as Adams House ("subject property" or "Adams House parcel"). Adams House was a nursing home which was licensed by the Department of Public Health as a Level III/IV long-term care facility.

The second parcel, located at 4380 North Main Street ("Bay View parcel"), was improved with a facility known as Bay View. Bay View was an independent-living community, available to individuals age sixty-two or older, consisting of a forty-six unit apartment building and twenty-two townhouse-style units, referred to as cottages ("cottages"). Residents of Bay View had the option to contract for certain services such as house cleaning, meals, and transportation, but Bay View was not licensed as an assisted-living facility.

For fiscal year 2007, the appellant timely filed with the assessors its Form 3 ABC and a copy of its Form PC and paid the taxes due without incurring interest. The appellant timely filed an Application for Abatement with the assessors on January 31, 2007. The assessors denied the Application for Abatement on February 7, 2007, and the appellant timely filed its petition with the Board on May 4, 2007.

For fiscal year 2008, the appellant timely filed its Form 3 ABC and a copy of its Form PC with the assessors and paid the taxes due without incurring interest. The appellant timely filed an Application for Abatement with the assessors on January 30, 2008. The assessors denied the Application for Abatement on April 17, 2008, and the appellant timely filed its petition with the Board on June 19, 2008.

For fiscal year 2009, the appellant timely filed its Form 3 ABC and a copy of its Form PC with the assessors and paid the taxes due without incurring interest. The appellant timely filed its Application for Abatement on January 29, 2009, and that application was denied by the assessors on March 4, 2009. The appellant timely filed its petition with the Board on May 29, 2009.

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

decide these appeals.

## II. Procedural History

There were two issues in these appeals: (1) whether the assessed value of the subject property exceeded its fair cash value and (2) whether the subject property was exempt from tax under G.L. c. 59, § 5, Clause Third (“Clause Third”). Prior to the fiscal years at issue, the assessors considered the Adams House parcel to be exempt under Clause Third and assessed no real estate or personal property taxes upon it. Beginning in fiscal year 2007, the assessors ceased treating the Adams House parcel as an exempt property and assessed taxes based on its fair cash value.

These appeals were originally heard by the Board on June 25, 2008. The Board issued a Decision for the appellee on January 26, 2009. Subsequently, on August 19, 2009, the appellant filed a Motion for Reconsideration of the Board’s decision, following the Appeals Court’s decision in *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 705 (2009), which was promulgated on July 27, 2009. In that case, the Appeals Court reversed the Board’s finding that a corporation which operated an assisted-living facility was not a charitable organization for the purposes of Clause Third. In consideration of this development in relevant case law, the Board allowed the appellant’s Motion for Reconsideration and re-opened the hearing of these appeals to receive further evidence and hear additional arguments by the parties. A second hearing was held before the Board on January 20, 2010.

Following that hearing, but before the Board issued its decision, the parties reached an agreement as to the second issue, the valuation of the subject property. The parties stipulated that the subject property’s assessed value for each of the fiscal years at issue exceeded its fair cash value. The parties’ stipulations on the valuation issue are summarized in the following table:

<b>Fiscal Year</b>	<b>Assessed Value (\$)</b>	<b>Fair Cash Value (\$)</b>	<b>Over-valuation (\$)</b>	<b>Tax Rate (\$/\$1,000)</b>	<b>Abatement Amount (\$)</b>
2007	3,794,000	2,200,000	1,594,000	16.37	26,093.78
2008	3,784,300	2,000,000	1,784,300	16.31	29,101.93
2009	3,771,300	1,800,000	1,971,300	17.49	34,478.04

### **III. The Exemption Issue**

At the June 25, 2008 hearing, the appellant offered the testimony of David Westgate, a longtime member of Home's Board of Trustees and Finance and Executive Committee, and the testimony of William Girrier, Home's Chief Executive Officer. At the January 20, 2010 hearing, the appellant offered the testimony of James H. Kay, who was serving on a volunteer basis as the Chairman of Home's Board of Trustees. On the basis of the stipulated facts and documents, testimony and exhibits offered into evidence at the hearings of these appeals, the Board made the following subsidiary findings of fact.

#### **A. Adams House**

Adams House was established in 1891 and has provided care for the elderly continuously since that time. The current Adams House building was built in 1898, and is a three-story, brick Victorian-style building. At all relevant times, its residential floors were organized by varying levels of care. The first floor housed the most independent residents, those who received some assistance with activities of daily living, but who could "pretty much get along on their own," according to Mr. Girrier. The second floor housed residents needing more extensive assistance with activities of daily living, and the third floor was home to residents needing the most intensive level of care.

Although Adams House was licensed for up to fifty-nine beds, Mr. Westgate testified that Adams House operated at a fifty-four bed capacity. In 2007, Adams House had forty-one residents. In 2008, it had forty-seven residents.

Mr. Westgate testified that the philosophy of Adams House was "to provide care that is extraordinary in nature and is of the highest quality that we can do." Part of that "extraordinary" care involved maintaining very low staff-to-resident ratios. Because of the superior staffing ratios which it maintained, Adams House was able to provide on average 4.6 hours of daily care to each resident, in comparison to the statewide average at long-term care facilities of 3.8 hours.

Adams House did not accept Medicaid. Mr. Westgate testified that Adams House declined to participate in the Medicaid program because the low reimbursement rates associated with that program would prevent Adams House from maintaining the level of staffing it wished to maintain.

Mr. Westgate described the admission process at Adams House. Individuals seeking admission to Adams House were screened by an admissions committee to ensure that they were appropriate candidates for admission. The health of the applicant was an

important consideration in the admission process. Mr. Westgate explained that health was an important consideration because of the need to ensure that Adams House could provide the appropriate level of care for all residents.

Once it was determined that the applicant was an appropriate candidate for residency at Adams House, Home requested financial information so that it could determine whether the applicant had sufficient assets to pay the fees charged by Adams House. Upon admission to Adams House, residents were required to pay a one-time admission fee of \$10,000; after admission, the daily fee at Adams House was \$270, or approximately \$8,000 per month. Mr. Girrier testified that Adams House tried “to be competitive in the market rate. [Home tried] to make sure that we’re not overpriced so that, you know, we alienate people from coming in who would otherwise go to another nursing home. We feel our rates are competitive.”

Mr. Westgate stated that Adams House generally drew its residents from the greater Fall River area and that the residents came from diverse backgrounds. A roster of residents entered into evidence showed that, during the years at issue, Adams House residents included people retired from a variety of professions.

Home had an endowment totaling nearly \$7 million, which allowed it to subsidize the care of those residents whose assets had been depleted and who therefore could not pay the full daily rate. Mr. Westgate testified that Home’s goal was to have thirty-two of its beds occupied by full-paying residents, with the remaining twenty-two beds earmarked for residents needing financial assistance - the so-called “supported” residents.<sup>2</sup> However, no written policy to that effect was introduced into evidence. In 2007, approximately 29% of the care provided at Adams House was supported care. In 2008, approximately 33% of the care provided at Adams House was supported care.

Prior to 2007, the Adams House Admission Agreement (“Admission Agreement”) expressly provided that “once admitted, a Resident will not be discharged for reasons of financial ability.” Mr. Westgate testified that Adams House had never evicted a resident because of an inability to pay. However, in 2007 the Admission Agreement was amended and that language was removed. The language inserted into the Admission Agreement, as amended in 2007, provided: “once admitted to Adams House under this Agreement, a RESIDENT becomes eligible for charitable assistance from [Home] in the

---

<sup>2</sup> The evidence showed that the amount of subsidy varied from resident to resident. Some of the supported residents received only modest financial assistance while others received completely subsidized care.

event that RESIDENT becomes financially unable to pay for his or her own care for reasons beyond his or her own control and [Home] determines in its sole discretion that sufficient . . . funds for such charitable assistance are available.” The amended Admission Agreement also provided for a right of recovery of funds – with interest - from a resident who received supported care, or the estate of such a resident, in the event that the resident terminated occupancy at Adams House.

Further, Mr. Westgate testified that it was Home’s goal that incoming residents have the financial resources to sustain at least three years worth of living expenses at Adams House. However, no written policy to that effect was offered into evidence. Although Mr. Westgate testified that “there have been times in [Home’s} history” when people with no assets were admitted,” he did not elaborate on this statement, or even approximate how many times in Home’s more than 115-year history that people with no assets were admitted.<sup>3</sup> In addition, no documents evidencing such admissions were introduced into evidence. Both the original and amended Admission Agreements stated that incoming residents should have sufficient resources to pay for their care for their entire life expectancy:

The Resident shall have furnished information to [Home] with respect to the Resident’s financial resources demonstrating that the Resident has the financial ability to pay the nonrefundable Application Fee, the daily Residency Rate for the accommodation provided, charges for additional services, and personal living expenses for the life expectancy of the Resident.

The evidence showed that no residents admitted in 2007 or 2008 received supported care immediately upon admission. The record indicated that the vast majority of Adams House residents had sufficient funds to pay the \$10,000 admission fee and \$270 daily fee and did not receive financial assistance.

### **B. Bay View**

Bay View was an independent-living community consisting of a forty-six unit apartment building and twenty-two cottages. Residency at Bay View was available to

---

<sup>3</sup> The Board noted that Mr. Westgate’s passing and isolated reference that “there have been times in [Home’s} history” when individuals with no assets were admitted to Adams House stood in stark contrast to the detailed and elaborate testimony that he gave on other topics. The Board inferred from Mr. Westgate’s statement, along with the lack of evidence to the contrary, that the instances alluded to by Mr. Westgate represented exceptions to Home’s general practice, rather than its common practice. This inference was further supported by the documentary evidence, including the resident roster, showing that the residents residing at Adams House generally had significant assets upon admission.

individuals age sixty-two or older.<sup>4</sup>

Home first acquired Bay View's apartment building in 1991. The apartment building had been a condominium project which failed. Most of the units were two-bedroom, two-bathroom units with approximately 1,300 square feet of gross living area. Mr. Girrier testified that Bay View was conceived as an independent-living community offering limited services to its residents. As its resident population aged, Bay View began to offer a more comprehensive menu of optional services, including meals, transportation, cleaning services and social and recreational activities, for additional fees. However, Bay View was not licensed as an assisted-living facility, and the services that it offered did not include assistance with activities of daily living.

In light of these changes at Bay View, Home decided to expand its offerings to include housing for more active adults. In 2005, Home began construction on twenty-two independent-living units, known as cottages. As of the June 25, 2008 hearing of these appeals, five of the cottages were occupied and a sixth cottage was being utilized as a "model" unit; the remaining sixteen units were not yet completed or occupied.

The entrance fees for the apartment complex at Bay View ranged from \$125,000 to \$350,000, depending on the unit. The entrance fees for the cottages ranged from \$425,000 to \$500,000, depending on the unit. Optional services were available for prices ranging from \$1,600 to \$2,500 per month. A mandatory, monthly fee of \$390 was charged for residence in the cottages, which the "Residence and Use Agreement" described as covering concierge services. Utilities were separately metered for each unit, and were not covered by the entrance or monthly fees. Bay View did not accept Medicaid, and it was undisputed by the parties that Bay View was not exempt from tax under Clause Third during the fiscal years at issue.

**C. Home's Dominant Purposes and Methods Were Not Traditionally Charitable**

On the basis of all of the evidence, the Board found that Home provided housing and other services to a variety of individuals in two different settings, Bay View and Adams House. With respect to Adams House, the Board found that Home provided housing and nursing care to the elderly. The Board found that the residents of Adams house had varying levels of need. Some residents were relatively independent and active,

---

<sup>4</sup> In cases where a unit is occupied by more than one resident, at least one of the residents must be age sixty-two or older upon admission to Bay View.

while others required considerable support for medical issues and assistance with activities of daily living.<sup>5</sup> The majority of residents had sufficient financial means to pay for their care. A minority of residents received subsidized care from Home, usually after having lived at, and paid full fees to, Adams House for a number of years. Neither Adams House nor Bay View accepted Medicaid, and therefore the population served by Home did not include individuals dependent on Medicaid.

With respect to Bay View, the Board found that it was an independent-living community primarily for independent individuals age sixty-two or older. Bay View was not licensed to operate as an assisted-living facility, and the Board found that it was not an assisted-living facility. Entrance fees at Bay View ranged from \$125,000 to \$500,000, depending on the unit. Bay View offered to its residents certain services, such as house cleaning, meals, and transportation, but those services were optional and residents were required to pay additional fees for them. The optional services were available for between \$1,600 and \$2,500 per month. Further, a mandatory, monthly fee of \$390 for concierge services was charged to residents of the cottages. Based on the foregoing, the Board found that the accommodations and amenities offered at Bay View made it more akin to a luxury living *milieu* than a facility which provided assistance with activities of daily living, such as dressing and bathing. Therefore, the Board found that the operation of Bay View was not a traditionally charitable activity.

In making its determination as to Home's dominant purposes and methods, the Board looked at Home's overall operations and the population which it served. Bay View was the larger of Home's two facilities. The apartment building at Bay View contained forty-six apartments and there were twenty-two cottages, for a total of sixty-eight units at Bay View. Adams House, in contrast, operated on a fifty-four bed capacity.<sup>6</sup> Bay View's residents did not require assistance with activities of daily living or other medical issues, nor did Home offer those services at Bay View. Even within Adams House, the evidence showed that a number of its residents were relatively physically independent, and the majority of its residents were financially independent. Home's dominant purposes and methods were to provide housing and other services at both Bay View and Adams House, and the Board found that the majority of the persons

---

<sup>5</sup> For example, while there was testimony that the average age of Adams House residents was in the early nineties, there was also testimony that organized trips to casinos, picnic outings, and the like were among the recreational opportunities that Home provided to residents of Adams House.

<sup>6</sup> Despite its capacity, Adams House had just forty-one residents in fiscal year 2007 and forty-seven residents in fiscal year 2008.

served by Home were not traditional objects of charity. Rather, the population served by Home largely consisted of comparatively independent persons who paid market-rate fees for Home's services.<sup>7</sup> Based on these facts, the Board concluded that, although some of the services provided by Home at Adams House may have been traditionally charitable, Home's dominant purposes and methods were not traditionally charitable.

The Board next considered and weighed the established factors relevant to the determination of an organization's charitable status in light of its finding that Home's dominant purposes and methods were not traditionally charitable. Entrance fees for Bay View ranged from \$125,000 to \$350,000 in the apartment building and \$425,000 to \$500,000 for the cottages, depending on the unit. In addition, a \$390 mandatory monthly fee for concierge services was charged to residents of the cottages. That fee did not cover utilities, which residents were responsible for and which were separately metered for each unit. The Board found that the fees charged at Bay View barred access to individuals of limited financial means, and therefore, it was not accessible to a large and fluid class of people.

In addition, Bay View offered to its residents a menu of optional services, such as meals, transportation, and house cleaning, for prices ranging from \$1,600 to \$2,500 per month. As stated above, a mandatory monthly fee of \$390 was charged for concierge services at the cottages. The Board found that the charging of these fees did not advance a charitable purpose, but instead merely facilitated the delivery of premium lifestyle services akin to services available in a luxury living setting.

Residents at Adams House paid \$10,000 for admission and \$8,000 per month thereafter. Despite their diverse professional backgrounds, the Board found that the residents at Adams House by and large shared one commonality, i.e., the financial means to pay for their care at Adams House. The vast majority of the individuals on the resident roster had assets totaling hundreds of thousands of dollars upon admission to Adams House. Most residents also had monthly incomes between \$1,000 and \$3,000. The

---

<sup>7</sup> In making this finding, the Board was aware that many of the cottages were unoccupied as of the relevant determination dates. However, by the express terms of the "Residence and Use Agreement," applicants wishing to reside at the cottages were required to furnish documentation of a physical exam establishing that they were "capable of self-maintenance" following admission to the cottages. Moreover, the entrance fees and mandatory monthly fees required all potential residents to have considerable financial resources. Therefore, because the cottages could only be occupied by individuals who were physically and financially independent, the fact that some of the cottages were vacant during the fiscal years at issue did not impact the Board's finding that Home's services were predominantly available to physically and financially independent individuals.

financial information of some residents listed on the resident roster was omitted and replaced with the notation that their financial resources were adequate or that their family members were paying for their care.

Although Home subsidized the care of a minority of Adams House residents, the evidence indicated that the residents receiving subsidized care at Adams House were not elders of limited financial means upon entry to Adams House. Rather, they were persons who had resided at, and paid full fees to, Adams House for a number of years prior to receiving subsidized care. The Board found that the fact that Home subsidized the care of a minority of residents at Adams House did not prove that its services were accessible to a large and fluid class of persons. In fact, Mr. Girrier essentially conceded in his testimony, excerpted below, that it was not:

[Mr. Peltz]: By placing more emphasis on admitting people with means, hopefully meeting the three-year litmus test that you mentioned, are you not prejudicing admission for people of limited or no means?

[Mr. Girrier]: Yes.

[Mr. Peltz]: You're then limiting the scope of the community that can be admitted?

[Mr. Girrier]: At that point in time, because of the necessity with the business, we have no other recourse.

Based on all of the evidence, the Board found that the fees charged by Home barred access to elders of limited financial means, and, therefore, its services were not accessible to a large and fluid class of people.

In addition, the Board found that Home did not benefit the public or serve to relieve a burden of government in the manner intended by Clause Third. Neither Bay View nor Adams House accepted Medicaid, and the Board found that they were not accessible to elders dependent on government assistance. The evidence indicated that a majority of the residents at Bay View and Adams House either had sufficient resources to pay for their care and lodging, or had family members who were able to pay for them. The Board found that the residents of Adams House and Bay View were primarily individuals with many options for their care, not individuals who would otherwise be dependent upon government support.

Moreover, the evidence established that the accommodations and fees at Adams House were designed to make it an attractive alternative to other area nursing homes.

The Board found that the fees and policies in place at Adams House were guided by a desire to remain competitive with other local nursing homes, rather than to relieve the government of any burden. The Board found that Home operated more like a typical commercial enterprise, by charging market-rate fees for its services, rather than a charitable organization. Only a minority of residents at Adams House received subsidized care, and those residents comprised just a fraction of the overall population served by Home. Furthermore, some of the residents receiving supported care received only modest financial assistance from Home; many of the subsidized residents continued to pay a portion of the daily fee. The record further established that, typically, residents of Adams House were eligible to receive subsidized care only after residing at, and paying full fees to, Adams House for a number of years.

The Board therefore found that any benefit provided to the public by Home was merely incidental to Home’s dominant purposes and methods, which were the provision of housing and services in return for market-rate fees. Accordingly, the Board found that Home did not benefit the public or relieve a burden of government in the manner intended by Clause Third.

**IV. The Board’s Ultimate Findings of Fact**

After considering and weighing the relevant factors in light of its finding that Home’s dominant purposes and methods were not traditionally charitable, the Board found that Home was not a charitable organization for the purposes of Clause Third. The Board therefore found that the subject property was not exempt under Clause Third for the fiscal years at issue because it was not owned by a charitable organization.

Additionally, as stipulated by the parties, the Board found that the subject property’s assessed value for each of the fiscal years at issue exceeded its fair cash value. The Board’s findings of fair cash value and the corresponding abatement amounts are set forth in the following table:

<b>Fiscal Year</b>	<b>Assessed Value (\$)</b>	<b>Fair Cash Value (\$)</b>	<b>Over-valuation (\$)</b>	<b>Tax Rate (\$/\$1,000)</b>	<b>Abatement Amount (\$)</b>
2007	3,794,000	2,200,000	1,594,000	16.37	26,093.78
2008	3,784,300	2,000,000	1,784,300	16.31	29,101.93
2009	3,771,300	1,800,000	1,971,300	17.49	34,478.04

Based on the foregoing, the Board decided these appeals for the appellant and granted abatements as set forth above.<sup>8</sup>

### OPINION

Clause Third 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.” Thus, a taxpayer claiming exemption under Clause Third must prove first that the property is owned by a charitable organization, and second, that a charitable organization occupies it for charitable purposes. *See Jewish Geriatric Services, Inc. v. 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)).

Merely espousing a recognized charitable purpose does not mean that an organization is a charitable organization for the purposes of Clause Third. *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).

#### **I. Home’s Dominant Purposes and Methods Were Not Traditionally Charitable**

An organization will be considered a charitable organization for the purposes of Clause Third 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.”

---

<sup>8</sup> The parties also stipulated that the abatement amounts had already been paid.

*Harvard Community Health Plan v. Assessors of Cambridge*, 384 Mass. 536, 544 (1981) (quoting *Mass. Medical Soc’y v. Assessors of Boston* 340 Mass. 327, 332 (1960)). For several decades, courts have used the following factors to determine whether an organization is operating as a public charity:

[W]hether the organization provides low-cost or free services to those unable to pay, see *New England Legal Found. v. Boston*, 423 Mass. 602, 610 (1996); 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); 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 Sch. of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 601, (1977); whether the organization provides its services to those from all segments of society and from all walks of life, see *Harvard Community Health Plan, Inc.*, 384 Mass. at 544; and whether the organization limits its services to those who fulfil certain qualifications and how those limitations help advance the organization's charitable purposes, see *Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 103-104 (2001); *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 256 (1936).

*New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732 (2008).

In 2008, the Supreme Judicial Court decided the *New Habitat* case, in which it considered whether a non-profit organization providing long-term housing for persons with acquired brain injury was a charitable organization for the purposes of Clause Third. It was undisputed that the residents served by New Habitat, Inc. were unable to care for themselves or live independently, and required 24-hour support. Moreover, there was no question that the provision of housing and services to persons with acquired brain injury was New Habitat, Inc.’s dominant purpose because that was its sole activity. “[I]n light of these facts, [the Court] conclude[d] that New Habitat’s dominant purposes and methods were traditionally charitable.” *Id.* at 734 (internal citations omitted).

Because New Habitat’s dominant purposes and methods were traditionally charitable, the Court placed less significance on the above-referenced factors in concluding that it qualified for the exemption. Thus, although New Habitat, Inc. served only a small number of individuals and charged considerable fees,<sup>9</sup> the Court held that it

---

<sup>9</sup> The facility at issue in *New Habitat* had a maximum capacity of four residents. Since the time New Habitat began providing services, three individuals had applied to enter the program, and all three had been accepted. At the time relevant to the appeal, New Habitat housed only two residents. Further, the record reflected that New Habitat charged a \$150,000 entrance fee and monthly fees of \$17,000 to \$18,000. *New Habitat*, 451 Mass. at 730.

was a charitable organization for purposes of Clause Third. *Compare Boston Symphony Orchestra*, 294 Mass. at 256 (holding that organization which charged significant fees for admission and whose services were not accessible to a large segment of the public was not a charitable organization for purposes of Clause Third).

In 2009, the Appeals Court had its first opportunity to decide a case involving the Clause Third exemption following the *New Habitat* decision. In *Mary Ann Morse Healthcare*, the Appeals Court considered whether property owned and used by the taxpayer as an assisted-living facility, a substantial portion of which served Alzheimer's and dementia residents, was entitled to the Clause Third exemption. *Id.* at 702. The Appeals Court held that *New Habitat* provided a new “interpretive lens” with which to view cases arising under Clause Third. *Mary Ann Morse Healthcare*, 74 Mass. App. Ct. at 703. The Appeals Court noted that, although *New Habitat* left intact the previously-established factors, it “emphatically condition[ed] the importance of previously established factors on the extent to which the ‘dominant purposes and methods of the organization’ are traditionally charitable.” *Mary Ann Morse Healthcare*, 74 Mass. App. Ct. at 703 (citing *New Habitat*, 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 our determination of the organization’s charitable status . . . [t]he farther an organization’s dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be.”). Thus, the Appeals Court in *Mary Ann Morse Healthcare* ruled that, where the majority of the taxpayer’s activities were dedicated to serving the needs of Alzheimer's and dementia residents, it was entitled to the Clause Third exemption because it was indisputably performing a “traditional public charitable function.” *Id.* at 705.

Reviewing the facts of the present appeals in light of the analysis of *New Habitat* and *Mary Ann Morse Healthcare*, the Board found and ruled that Home’s dominant purposes and methods were to provide housing and other services to a variety of individuals in two settings, Bay View and Adams House. The larger of the two facilities, Bay View, was an independent-living community, as distinguished from the assisted-living facility at issue in *Mary Ann Morse Healthcare*. Bay View’s residents did not require assistance with activities of daily living, and Home did not provide such assistance. Rather, Bay View’s residents were relatively healthy and independent persons, age sixty-two and older, who could opt and pay for additional services such as

house cleaning, meals, and transportation. The Board thus found and ruled that Bay View was more akin to a luxury-living setting than an assisted-living facility or nursing home, and the operation of Bay View was not a traditionally charitable activity. See *Western Mass. Lifecare*, 434 Mass. at 105.

With respect to Adams House, the Board found and ruled that Home was engaged in the operation of a long-term care facility which provided housing, meals, nursing care, social opportunities, and assistance with activities of daily living to its residents, most of whom paid market-rate fees for those services. Although the Board is cognizant that “the operation of a nursing home for the elderly and infirm” has been found to be the work of a charitable corporation, *H-C Health Services, Inc. v. Assessors of S. Hadley*, 42 Mass. App. Ct. 596, 599 (1997), the work conducted by Home at Adams House must be viewed within the context of Home’s “dominant purposes and methods.” *New Habitat*, 451 Mass. at 733. Home’s dominant purposes and methods involved operating both Bay View and Adams House, and the Board found and ruled that, between Bay View and Adams House, the majority of the population served by Home consisted of financially and physically independent individuals rather than traditional objects of charity. See *Western Mass. Lifecare*, 434 Mass. at 105.

These appeals are therefore distinguishable from *Mary Ann Morse Healthcare*, 74 Mass. App. Ct. 701. The Appeals Court ruled in *Mary Ann Morse Healthcare* that the taxpayer, which used seventy-one percent of its assisted-living facility to service the needs of its Alzheimer's and dementia residents (*id.* at 702), was “indisputabl[y] perform[ing] a traditional public charitable function.” *Id.* at 705. However, because the Board heard and issued its Decision in *Mary Ann Morse Healthcare* before the *New Habitat* case was decided<sup>10</sup>, the assessors in that case did not emphasize the proximity of the taxpayer’s “dominant purposes and methods” to traditional charitable purposes. *New Habitat*, 451 Mass. at 733.<sup>11</sup> In contrast, the assessors in these appeals offered ample evidence demonstrating that the majority of Home’s activities were devoted to the operation of Bay View, which was a luxury independent-living community. Although the provision of services to Alzheimer's and dementia residents such as those offered by the taxpayer in *Mary Ann Morse Healthcare* may constitute the “indisputable

---

<sup>10</sup> The Board issued its Decision, though not its Findings of Fact and Report, prior to the *New Habitat* decision.

<sup>11</sup> Nor did the assessors emphasize this issue in the proceedings at the Appeals Court, in which they did not file a brief. See *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 702.

performance of a traditional public charitable function,” the provision of luxury housing and services for seniors does not. *See Western Mass. Lifecare*, 434 Mass. at 105.

Where, as here, the majority of the appellant’s efforts were devoted to non-charitable purposes, the Board found and ruled that the dominant purposes and methods of the appellant were not traditionally charitable.

Moreover, the evidence offered by the appellant failed to persuade the Board that Home was operating as a public charity. Much of that evidence consisted of testimony regarding Home’s goals and unwritten policies, some of which were directly contradicted by the written policies introduced into evidence.

In making its determination, the Board was mindful of the fact that organizations need not serve exclusively the poor or needy to be considered charitable, nor does the charging of fees preclude a finding that an organization is charitable. *See Western Mass. Lifecare*, 434 Mass. at 104 (citing *New England Legal Found.*, 423 Mass. at 609; *Garland Sch. of Home Making*, 296 Mass. at 389) (other citations omitted). However, it is also true that many activities and services that “are commendable, laudable and socially useful [do] not necessarily come within the definition of ‘charitable’ for purposes of the exemption.” *Western Mass. Lifecare*, 434 Mass. at 103 (citing *Massachusetts Med. Soc’y*, 340 Mass. at 333). Though Home undoubtedly provided “commendable, laudable and socially useful” services, the Board could not find on the record before it that the dominant purposes and methods of Home were traditionally charitable. *Western Mass. Lifecare*, 434 Mass. at 103. Accordingly, the Board gave greater weight to the traditional factors used for determining whether an organization is operating as a public charity. *See New Habitat*, 451 at 732.

## **II. Home Did Not Relieve a Burden of Government for Purposes of Clause Third**

One of the factors to be considered in determining whether an organization is operating as a public charity is whether it “perform[s] 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*, 434 Mass. at 105 (quoting *Assessors of Springfield*

v. *Cunningham Foundation*, 305 Mass. 411, 418 (1940)).

Thus, in *Straight Ahead Ministries, Inc. v. Assessors of Hubbardston*, the Board found that a corporation which ran a non-profit academy for young males who had just been released from a juvenile detention center operated as a public charity, despite the fact that the academy housed less than a dozen young men at any given time and was only available to males between the ages of sixteen and twenty. *Straight Ahead Ministries, Inc. v. Assessors of Hubbardston*, Mass. ATB Findings of Fact and Reports 2009-1, 13-14. In that case, a state agency placed the young men in the academy and paid for a portion of their attendance costs; governmental grants, private gifts and donations made up the remainder of the academy's budget. *Id.* at 2009-12-13. Because the academy was partly funded by the government, because the population which it served entered the academy directly from a government-care setting, and because its goal was to prevent re-entry of the men it served into the criminal justice system, the Board found and ruled that the academy served to relieve a burden of government. *Id.* at 2009-12-14.

Unlike in *Straight Ahead Ministries*, there was no direct correlation between the work done by Home and the work of the government. Adams House and Bay View were expressly off-limits to those dependent on Medicaid, as Home did not accept Medicaid payments. *Contrast H-C Health Services*, 42 Mass. App. Ct. at 598, *William B. Rice Eventide Home v. Assessors of Quincy*, Mass. ATB Findings of Fact and Reports 2006-457, 481, *rev'd* on other grounds, 69 Mass. App. Ct. 867 (2007). Because of the fees which Home charged, Adams House and Bay View were not accessible to elders of limited means, and the majority of their residents were not in the class of persons who would otherwise be dependent on government assistance.

Further, Mr. Girrier stated that Adams House strove to maintain competitive market rates in order to avoid losing potential residents to other nursing homes. Similarly, Mr. Westgate testified that Adams House strove to deliver "extraordinary" care, which included maintaining low staff-to-resident ratios and providing more individualized care than most nursing homes. Mr. Westgate testified that one of the reasons that Home did not accept Medicaid was that the low reimbursement rates would have made it impossible to maintain superior staffing ratios. Thus, the Board found that the policies and fees in place at Adams House were not dictated by a concern with preventing residents from becoming dependent upon the government, but by a desire to

prevent them from going to Home's competitors.

Lastly, Home provided subsidized care to only a minority of residents at Adams House and the amount of subsidy varied for each "supported" resident. The care of some "supported" residents was subsidized almost completely, while other "supported" residents received only modest financial assistance. No subsidized care was provided for residents of Bay View, which was the larger of Home's two facilities. The Board found and ruled that, although Home provided subsidized care to a minority of residents at Adams House, the provision of subsidized care was incidental to Home's dominant purposes and methods, which was the provision of housing and other services in return for market-rate fees. See *The Mediation Group v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports 2003-64, 78-79 (finding that entity which charged market-rate fees to the majority of its clients and conferred only an incidental benefit to the general public was not a charitable organization). The Board therefore found and ruled that the appellant failed to demonstrate that it "advance[d] the public good, thereby relieving the burdens of government to do so." *Sturdy Memorial Foundation*, Mass. ATB Findings of Fact and Reports at 2002-224.

### **III. Home's Services Were Not Available to a Large and Fluid Class of People**

Residents at Adams House paid \$10,000 for admission and approximately \$8,000 per month thereafter. Entrance fees at Bay View ranged from \$125,000 to \$500,000, depending on the unit. A mandatory fee of \$390 per month was charged for residence at the cottages, while a menu of optional services was available for prices ranging from \$1,600 to \$2,500 per month. The Board found and ruled that the considerable fees charged by Home, along with its failure to accept Medicaid, limited the class of persons eligible to receive its services.<sup>12</sup> "The class of elderly persons who can pay [such entrance and monthly fees] is a limited one, not a class that has been 'drawn from a large segment of society or all walks of life.'" *Id.* (quoting *New England Legal Found.*, 423 Mass. at 612).

Although Home subsidized the care of a minority of Adams House residents, the Board found and ruled that this fact did not prove that Adams House was accessible to a

---

<sup>12</sup> The fact that an organization charges fees will not automatically defeat a claim for exemption. However, "[i]n weighing this factor, we consider whether the organization's charging of fees helps to advance the organization's charitable purpose." *New Habitat*, 451 Mass. at 734, (citing *Boston Symphony Orchestra*, 294 Mass. at 255-56). With respect to the fees charged at Bay View, the Board found and ruled that they did not advance a charitable purpose, but merely facilitated the delivery of premium lifestyle services akin to services available in a luxury-living setting.

large and fluid class of persons. The evidence indicated that the residents receiving subsidized care at Adams House were not elders of limited means upon entry to Adams House. Rather, they were persons who had resided at, and paid full fees to, Adams House for a number of years prior to receiving subsidized care. The Board found that the fees charged by Adams House barred access to elders of limited financial means, and, therefore, it was not accessible to a large and fluid class of people.

Accordingly, the Board found and ruled that Home's services were not accessible to a large and fluid class of persons.

#### **IV. The Appellant's Arguments Were Unavailing**

The appellant introduced evidence into the record showing that Home operated at a loss during the fiscal years at issue. However, the Board did not find this evidence to be a persuasive indication that it was a charitable organization. Adams House was licensed for up to fifty-nine beds, yet it housed only forty-one residents in 2007 and forty-seven residents in 2008. Similarly, during the years at issue, many of the cottages were unoccupied. Though the appellant asserted that Home operated at a loss, there was no testimony or other evidence which addressed the impact of the significant vacancies at Adams House and Bay View upon its finances.<sup>13</sup> As there were myriad possible reasons why Home operated at a loss, the Board did not find the fact that it operated at a loss to be persuasive evidence that it was a charitable organization.

Similarly, the facts that Home was organized under chapter 180, tax-exempt under § 501(c)(3) of the Internal Revenue Code, and that its Articles of Organization stated that its purpose was to serve the elderly in a charitable manner did not prove that Home was a charitable organization. These facts, though germane, did not persuade the Board that Home was "conducted . . . in actual operation . . . as a public charity." *Jacob's Pillow Dance Festival, Inc.*, 320 Mass. at 313. Because substance and not form must control, the Board's determination that Home was not a charitable organization was based on its findings as to Home's actual operations, the population which it served, and its dominant purposes and methods. The Board therefore rejected the appellant's arguments.

"Any doubt must operate against the one claiming an exemption, because the

---

<sup>13</sup> Furthermore, no evidence was presented that Home offered reduced fees to low-income elders in an effort to fill its vacancies, an indication that the provision of charitable services was not its "dominant purpose." *New Habitat*, 451 Mass. at 733.

burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within [its] terms . . . ." *Boston Symphony Orchestra*, 294 Mass. at 257. "It is well established that a party claiming exemption bears a grave burden of proving the claim." *Kings' Daughters and Sons Home v. Board of 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)). On the basis of all of the evidence, the Board found and ruled that the appellant did not meet its burden of proving that it was a charitable organization for purposes of Clause Third. Accordingly, the Board found that the subject property was not "owned by a charitable organization," and therefore it was not exempt under Clause Third.

**Conclusion**

Although it found and ruled that the Adams House parcel was not exempt under Clause Third, the Board found and ruled that, as stipulated by the parties, the Adams House parcel was assessed at greater than its fair cash value for each of the fiscal years at issue. Accordingly, the Board decided these appeals for the appellant and granted abatements as follows:

<b>Fiscal Year</b>	<b>Assessed Value (\$)</b>	<b>Fair Cash Value (\$)</b>	<b>Over-valuation (\$)</b>	<b>Tax Rate (\$/\$1,000)</b>	<b>Abatement Amount (\$)</b>
2007	3,794,000	2,200,000	1,594,000	16.37	26,093.78
2008	3,784,300	2,000,000	1,784,300	16.31	29,101.93
2009	3,771,300	1,800,000	1,971,300	17.49	34,478.04

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

A true copy,

Attest: \_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**INDIANHEAD PENNY LP v.**

**BOARD OF ASSESSORS OF  
THE TOWN OF EDGARTOWN**

Docket Nos.: F298945, F298948 (FY 08)  
F304194, F304196 (FY 09)  
F308987, F308990 (FY 10)

Promulgated:  
June 24, 2011

ATB 2011-680

These are appeals under the formal procedure, pursuant to G.L. c. 59, §§ 64 and 65 and G.L. c. 59, § 7, from the refusal of the Board of Assessors of the Town of Edgartown (the “assessors” or “appellee”) to abate taxes on two adjacent parcels of real estate located at 8 Ocean View Avenue and 6 Menamsha Avenue in the Town of Edgartown (collectively, the “subject assessing parcels”), owned by and assessed to Indianhead Penny LP (the “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal years 2008, 2009, and 2010.

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

The Appellate Tax Board (the “Board”) promulgates these findings of fact and report on its own motion under G.L. c. 58A, § 13 and 831 CMR 1.32. The Board’s decisions are promulgated simultaneously herewith.

*Donald P. Quinn, P.C., Esq. and Danielle Justo, Esq. for the appellant.  
Ellen M. Hutchinson, Esq. for the appellee.*

**FINDINGS OF FACT AND REPORT**

**Introduction**

The two subject assessing parcels are owned by and assessed to the appellant and are located at 8 Ocean View Avenue and 6 Menamsha Avenue in the Town of Edgartown on Martha’s Vineyard. They are part of a larger tract of land which is identified on more recent deeds as “Parcel Two: Unregistered Land” (“Parcel Two”). The 8 Ocean View Avenue assessing parcel is unimproved and contains approximately 2.45 acres; the

assessors identify it as Parcel ID 29-145. The 6 Menamsha Avenue assessing parcel is also unimproved, and it contains approximately 1.50 acres of land. The assessors identify this assessing parcel as Parcel ID 29-151. Parcel Two also contains two additional unimproved assessing parcels: the 9 Menamsha Avenue assessing parcel (Parcel ID 29-152), which contains 1.38 acres and the 15 Menamsha Avenue assessing parcel (Parcel ID 29-153), which contains 1.38 acres.<sup>1</sup> The parties settled the appeals related to these two additional assessing parcels, and they are not before the Board (the “settled parcels”).

The subject assessing parcels -- as well as the two settled parcels that form the rest of Parcel Two -- are located in a neighborhood that is close to Edgartown Harbor in the Tower Hill area of town and is less than one mile from the historic downtown. The neighborhood is comprised of mostly large, luxurious homes on parcels ranging from 1.5 to 3 acres in size. The area is predominantly wooded and contains the unpaved roads that are typical of areas outside of the island town centers. The beach is approximately two miles away.

The relevant assessment information for the subject assessing parcels for the fiscal years at issue is contained in the following two tables.

**The 8 Ocean View Avenue Assessing Parcel**

<u>Docket Number</u>	<u>Fiscal Year</u>	<u>Assessment</u>	<u>Tax Rate /\$1,000</u>	<u>Tax Assessed*</u>
F298945	2008	\$807,900	\$ 2.73	\$2,263.55
F304196	2009	\$807,900	\$ 2.91	\$2,417.79
F308987	2010	\$781,200	\$ 3.09	\$2,477.06

\*The tax assessed includes a Community Preservation Act (“CPA”) charge.

**The 6 Menamsha Avenue Assessing Parcel**

<u>Docket Number</u>	<u>Fiscal Year</u>	<u>Assessment</u>	<u>Tax Rate /\$1,000</u>	<u>Tax Assessed*</u>
F298948	2008	\$1,274,300	\$ 2.73	\$3,575.02
F304194	2009	\$1,274,300	\$ 2.91	\$3,815.73
F308990	2010	\$1,227,900	\$ 3.09	\$3,898.77

\*The tax assessed includes a CPA charge.

<sup>1</sup> The street addresses were taken from the property records cards in evidence and the August 2, 1998 deed from David Brown to the appellant. The appellant also owns a third other property in the area, with an Ocean View Cliffs address, that is not directly connected to these appeals and is identified by the assessors as Parcel ID 29-150. It is referred to in more recent deeds as “Parcel One: Registered Land” (“Parcel One”).

The pertinent payment<sup>2</sup> and other jurisdictional information, including relevant filing dates, for the subject assessing parcels for the fiscal years at issue are contained in the following table.

**The 8 Ocean View Avenue & 6 Menamsha Avenue**

**Assessing Parcels**

<b><u>Docket Number</u></b>	<b><u>Fiscal Year</u></b>	<b><u>Tax Bill Mailed</u></b>	<b><u>Tax Payment</u></b>	<b><u>Abatement Application</u></b>	<b><u>Assessors' Denial</u></b>	<b><u>Petition to Board</u></b>
F298945/48	2008	05/06/2008	timely	06/04/2008	10/30/2008	01/26/2009
F304196/94	2009	12/30/2008	timely	01/28/2009	04/28/2009	07/24/2009
F308987/90	2010	12/30/2009	timely	01/21/2010	04/20/2010	07/15/2010

For fiscal year 2008, there is no evidence that the appellant granted the assessors an extension of time, under G.L. c. 59, §§ 64 & 65, within which to act on its abatement applications. Consequently, the appellant's applications were deemed denied on September 4, 2008, and the assessors' purported denials on October 30, 2008 are ineffectual. There is also no evidence that the assessors sent timely notices of inaction to the appellant under G.L. c. 59, § 63 or that the appellant filed Petitions for Late Entry under G.L. c. 59, § 65C. However, where, as here, the assessors fail to send written notice of their inaction to a taxpayer within ten days of the deemed denial date, this Board, in accordance with G.L. c. 59, § 65C, may extend the deadline for filing an appeal by two months. *See American House, LLC v. Assessors of Greenfield*, Mass. ATB Findings of Fact and Reports 2005-41-42, 54-59.

In the present appeals, extension of the appeal period by two months results in a filing deadline of February 4, 2009. The appellant filed its petitions on January 26, 2009, well within the two-month extension period allowed under § 65C. Accordingly, the Board finds that the filing of the fiscal year 2008 petitions is seasonable. *See Attilio F. Cardaropoli v. Assessors of Springfield*, Mass. ATB Findings of Fact and Reports 2001-913, 925 ("If it is determined that the conditions for allowing a petition for late entry exist, then the Board [will allow] the petition[s] to be entered *nunc pro tunc* and exercise jurisdiction over the appeal[s].").

Based on these subsidiary findings and rulings and the jurisdictional information contained in the above table, the Board finds and rules that it has jurisdiction over these appeals.

<sup>2</sup> Because the tax due for the 8 Ocean View Avenue assessing parcel for each fiscal year at issue is not more than \$3,000, timely payment is not a prerequisite to the Board's jurisdiction. G.L. c. 59, §§ 64 & 65.

### Summary of the Evidence

The appellant entered numerous exhibits and called two witnesses to testify in these appeals.<sup>3</sup> The appellant called attorney Dennis Crimmins as its first witness to testify in support of its position that the subject assessing parcels should be valued and taxed as part of a single parcel which also includes the two settled parcels. Responding to the assessors' attorney's objection and testimony on *voir dire*, the Board refused to qualify Mr. Crimmins as an expert witness in the field of conveyancing. Among the reasons supporting this ruling include: the witness's lack of independence and the proposed testimony concerned a legal issue for which expert testimony was not necessary.

First, it was established on *voir dire* that Mr. Crimmins has worked and continues to work with appellant's co-counsel on matters litigated and currently before the Board concerning assessments on other properties on Martha's Vineyard and in Edgartown. The Board found that Mr. Crimmins's on-going association with appellant's counsel on other Martha's Vineyard and Edgartown appeals called his independence into question. Second, the Board did not believe that it was necessary to receive testimony from an expert witness to assist it in determining whether, as a matter of law, the two subject assessing parcels coupled with the two settled parcels should be valued and taxed as a single assessing parcel. The Board is capable of deciding this question without the aid of an expert witness in the field of conveyancing. The Board, however, did allow Mr. Crimmins to testify conditionally as a fact witness.

After examining the various deeds, plans, and zoning regulations, but not having spoken with any town zoning, planning, building, or assessing officials, Mr. Crimmins concluded that Parcel Two should be treated as a single lot for purposes of building a residence and assessing it. He believed that the continuous description of Parcel Two as a single tract of land since 1965 was the primary reason for this conclusion, as well as his determination that Parcel Two could not now be divided into and conveyed as smaller parcels with what he termed "marketable title."

Mr. Crimmins also testified that the 6 Menamsha Avenue assessing parcel (Parcel ID 29-151) was not a buildable lot, without a zoning variance or a waiver of certain deed restrictions, because this assessing parcel's dimensions did not conform to the relevant zoning set-back requirements or certain deed restrictions. Mr. Crimmins did believe, however, that it would be possible to obtain a building permit for the 8 Ocean Avenue

---

<sup>3</sup> Neither party availed themselves of the opportunity to file post-trial briefs.

assessing parcel (Parcel ID 29-149), but if obtained, it would likely be subjected to a lengthy legal challenge by abutters.

The appellant called Jo-Ann Resendes, the assistant assessor in Edgartown, as its second and final witness. Ms. Resendes verified certain information on the subject assessing parcels' property record cards, including the area encompassed by the primary site designation, the sea factors for the first and second landlines, the unit value for excess land, and the neighborhood adjustments.

The assessors' case-in-chief consisted of an appraisal report that Ms. Resendes had prepared, which contained three comparable-sales analyses for estimating the value of the 8 Ocean View Avenue assessment parcel for each of the fiscal years at issue. In her analysis for fiscal year 2008, she used three purportedly comparable sale properties and derived an adjusted value of \$1,075,000, and for fiscal years 2009 and 2010, she used three other purportedly comparable sale properties and derived adjusted values of \$1,075,000 and \$1,000,000, respectively.

Summaries of her analyses are contained in the following three tables.

**Fiscal Year 2008**

	<b><u>Subject</u></b> <b><u>8 Ocean View</u></b> <b><u>Ave.</u></b>	<b><u>Comp. 1</u></b> <b><u>31 Slough</u></b> <b><u>Cove Rd.</u></b>	<b><u>Comp. 2</u></b> <b><u>242 Katama</u></b> <b><u>Rd.</u></b>	<b><u>Comp. 3</u></b> <b><u>96</u></b> <b><u>Edgartown</u></b> <b><u>Bay Rd.</u></b>
<b><u>Sale Price*</u></b>	\$807,900	\$831,250	\$535,000	\$830,000
<b><u>Sale Date*</u></b>	01/01/2007	05/19/2006	11/28/2006	10/21/2005
<b><u>Proximity to Subject</u></b>	n/a	1.5 miles SW	0.3 miles	1.8 miles S
<b><u>Verification</u></b>	Deed	Deed	Deed	Deed
<b><u>Time Adjustment</u></b>	n/a	4%	0.5%	8%
<b><u>Time Adjusted Sales Price</u></b>	n/a	\$864,500	\$537,675	\$896,400
<b><u>Location</u></b>	Tower Hill Edgartown Harbor	Katama	Katama	Edgartown Bay Road
<b><u>Location Adjustment</u></b>	n/a	30%	20%	15%
<b><u>Lot Size (acres)</u></b>	2.45	1.5	0.59	0.54
<b><u>Lot Size Adjustment</u></b>	n/a	20%	30%	30%
<b><u>Shape Adjustment</u></b>	n/a	-25%	-25%	-25%
<b><u>Net Adjustment (excl. time)</u></b>		25%	25%	20%
<b><u>Net Dollar Adjustment (")</u></b>		\$216,125	\$134,419	\$179,280
<b><u>Adjusted Value</u></b>		<b>\$1,080,625</b>	<b>\$672,094</b>	<b>\$1,075,680</b>

\* For the subject, the sale price and date are the assessed value and assessment date

**Fiscal Year 2009**

	<b><u>Subject</u></b> <b><u>8 Ocean</u></b> <b><u>View Ave.</u></b>	<b><u>Comp. 1</u></b> <b><u>12 Coffins</u></b> <b><u>Field Rd.</u></b>	<b><u>Comp. 2</u></b> <b><u>3 Bitter-</u></b> <b><u>sweet Lane</u></b>	<b><u>Comp. 3</u></b> <b><u>128 Herring</u></b> <b><u>Creek Rd.</u></b>
<b><u>Sale Price*</u></b>	\$807,900	\$745,000	\$795,000	\$885,000
<b><u>Sale Date*</u></b>	01/01/2008	05/10/2007	05/30/2008	12/04/2008
<b><u>Proximity to Subject</u></b>	n/a	5 miles W	1.1 miles SW	1.1 miles SW
<b><u>Verification</u></b>	Deed	Deed	Deed	Deed
<b><u>Time Adjustment</u></b>	n/a	0%	2.5%	5.5%
<b><u>Time Adjusted Sales Price</u></b>	n/a	\$745,000	\$814,875	\$933,675
<b><u>Location</u></b>	Tower Hill Edgar Harbor	Coffins Field	Katama	Katama
<b><u>Location Adjustment</u></b>	n/a	40%	30%	30%
<b><u>Lot Size (acres)</u></b>	2.45	0.85	1.5	1.56
<b><u>Lot Size Adjustment</u></b>	n/a	30%	20%	20%
<b><u>Shape Adjustment</u></b>		-25%	-25%	-25%
<b><u>Net Adjustment (excl. time)</u></b>		45%	25%	25%
<b><u>Net Dollar Adjustment (“)</u></b>		\$335,250	\$203,719	\$233,419
<b><u>Adjusted Value</u></b>		<b>\$1,080,250</b>	<b>\$1,018,594</b>	<b>\$1,167,094</b>

\* For the subject, the sale price and date are the assessed value and assessment date

**Fiscal Year 2010**

	<b><u>Subject</u></b> <b><u>8 Ocean</u></b> <b><u>View Ave.</u></b>	<b><u>Comp. 1</u></b> <b><u>12 Coffins</u></b> <b><u>Field Rd.</u></b>	<b><u>Comp. 2</u></b> <b><u>3 Bitter-</u></b> <b><u>sweet Lane</u></b>	<b><u>Comp. 3</u></b> <b><u>128 Herring</u></b> <b><u>Creek Rd.</u></b>
<b><u>Sale Price*</u></b>	\$807,900	\$745,000	\$795,000	\$885,000
<b><u>Sale Date*</u></b>	01/01/2009	05/10/2007	05/30/2008	12/04/2008
<b><u>Proximity to Subject</u></b>	n/a	5 miles W	1.1 miles SW	1.1 miles SW
<b><u>Verification</u></b>	Deed	Deed	Deed	Deed
<b><u>Time Adjustment</u></b>	n/a	-6%	-3.5%	-0.5%
<b><u>Time Adjusted Sales Price</u></b>	n/a	\$700,300	\$767,175	\$880,575
<b><u>Location</u></b>	Tower Hill Edgar Harbor	Coffins Field	Katama	Katama
<b><u>Location Adjustment</u></b>	n/a	40%	30%	30%
<b><u>Lot Size (acres)</u></b>	2.45	0.85	1.5	1.56
<b><u>Lot Size Adjustment</u></b>	n/a	30%	20%	20%
<b><u>Shape Adjustment</u></b>		-25%	-25%	-25%
<b><u>Net Adjustment (excl. time)</u></b>		45%	25%	25%
<b><u>Net Dollar Adjustment (“)</u></b>		\$315,135	\$191,794	\$220,114
<b><u>Adjusted Value</u></b>		<b>\$1,015,435</b>	<b>\$958,969</b>	<b>\$1,100,719</b>

\* For the subject, the sale price and date are the assessed value and assessment date

The two witnesses' testimony and the various exhibits, including deeds, plans, and property record cards, reveal that in 1998, the two subject assessing parcels were conveyed to the appellant by David Brown for nominal consideration. The descriptions

in that deed refer to two larger parcels: “Parcel One: Registered Land” and “Parcel Two: Unregistered Land,” which were mentioned, *supra*. It is the description for Parcel Two that contains not only the two subject assessing parcels, but also the two settled parcels on which the parties previously reached a settlement. The metes and bounds description in the deed for Parcel Two describes the perimeter of these four contiguous assessing parcels without defining them as separate and distinct.<sup>4</sup>

From a historical perspective, it was in January, 1876, that an 1875 “Plan of Ocean View Cliffs” by John H. Mullin (the “Mullin Plan”) was recorded in the Dukes County Registry of Deeds. This plan, which shows the area where Parcel One and Parcel Two (and some neighboring parcels) are now located, does not define the subject assessing parcels, the two settled parcels or Parcel One or Parcel Two. Rather, it defines the boundaries of numerous contiguous camp-ground parcels, which, for the most part, are only 50-by-100 feet in size. Various roads, including Ocean View and Menamsha Avenues, are also shown on this plan. According to the Mullin Plan, the 8 Ocean View Avenue assessing parcel is composed of 21 contiguous camp-ground lots (numbered 92 through 112) which are configured in the shape of the number “7,” and the 6 Menamsha Avenue assessing parcel is composed of 13 such lots (numbered 16 through 28) which extend, side-by-side, in the shape of a long, thin ruler. Both of the subject assessing parcels are only 1 camp-ground parcel (or 100 feet) in depth.<sup>5</sup> The two settled parcels, which form the rest of Parcel Two but are not subject to these appeals, are each approximately 1.38 acres in size and each contains 12 contiguous camp-ground lots configured as 2 rows of 6 lots, in the shape of an approximately 200-by-300 foot rectangle.

In September, 1993, David Brown acquired both Parcel One, the registered land, and Parcel Two, the unregistered land, from Katama Kyles Properties, Inc. for \$2,050,000. The description of Parcel Two in this deed is the same perimeter description contained in the deed from Mr. Brown to the appellant. In December, 1985, Katama Kyles Properties, Inc. acquired Parcels One and Two from the estate of Margaret Jones Purvis for \$1,088,500. The description of Parcel Two in this deed is the same perimeter description as the one contained in the deeds from Katama Kyles Properties, Inc. to Mr.

---

<sup>4</sup> Portions of several paper streets that appear on the 1875 Plan of Ocean View Cliffs discussed in greater detail, *infra*, are also included within the perimeter description. While these streets are not delineated in the deed, the assessors nonetheless use them to help distinguish the four assessing parcels from one another.

<sup>5</sup> There is one exception to this statement with respect to the 8 Ocean View Avenue assessing parcel. The exception is where the property forms the bend in its 7-shape.

Brown and from Mr. Brown to the appellant.

Ms. Purvis acquired title to Parcel Two by deed from George Coffin dated December, 1965 for "consideration paid" (the "Coffin deed"). The Coffin deed appears to be the first deed to assemble the 58 camp-ground lots from the Mullin Plan into a single tract of land, using the perimeter metes and bounds description which is later referred to, in the aforementioned deeds, as Parcel Two. The Coffin deed does not mention Parcel One or any of the smaller camp lots that become part of Parcel One. The Coffin deed does, however, refer to Plan 11887A which was likely prepared in the 1920s in connection with the assemblage of other camp-ground lots for registered Parcel One. There are no additional deeds in the record reflecting how Ms. Purvis acquired title to the registered parcel termed Parcel One.

The Coffin deed for Parcel Two also contains, among other things, numerous conditions and restrictions which prohibit the construction of any building within 50 feet of the enveloping boundary -- that is, the perimeter -- of Parcel Two. There is a similar restriction for the construction or use of cesspools or septic systems. The evidence does not reveal any amendments or modifications to these restrictions. The Coffin deed also provides that the restrictions "shall remain in effect for a period of ninety-nine (99) years from the date hereof," which extends the effective period to 2064.

In September, 1993, apparently in conjunction with Katama Kyles, Inc.'s sale of Parcel Two -- along with Parcel One -- to Mr. Brown, Douglas Hoehn, a professional land surveyor, prepared a plan of land for Mr. Brown, which not only defined Parcel One and Parcel Two, but also labeled the four assessing parcels and private ways that comprise Parcel Two, delineated the relevant camp-ground lots and the private ways shown on the Mullin plan, and traced a narrow right-of-way meandering through Parcel Two to property owned by an unrelated abutter. This plan was never recorded, and although the appellant used it as a chalk, it was not admitted into evidence.

For all of the fiscal years at issue, the subject assessing parcels were located in a residential "R60" zone, which requires a minimum of 1.5 acres for a buildable parcel. Setbacks are 50 feet for the front yard and 25 feet for the back and side yards. All lots created after 1985 must have a minimum 50 feet of frontage on a street. The Zoning By-laws define "street" as "a public way or a way, having in the opinion of the Planning Board, sufficient width, suitable grades and adequate construction to provide for the proposed use of the land abutting thereon or served thereby."

The property record cards and Ms. Resendes' testimony reveal that the assessors

use a two-line land assessment model for assessment purposes. After accounting for an approximately 1.5-acre primary building site in the first line, any additional land is valued in the second line at \$25,000 per acre, and then adjusted for various factors. If the 6 Menamsha Avenue assessing parcel were to be valued using only the second line land valuation with the same adjustments which the assessors had used in the actual first-line land valuation, its second-line land value would be \$123,750. The evidence, however, does not establish that the 6 Menamsha Avenue assessing parcel would or should necessarily be valued and assessed for this amount if considered unbuildable.

### **Discussion and the Board's Ultimate Findings**

#### **(1)**

The appellant urges the Board to consider and value the two subject assessing parcels, along with the two settled parcels, as part of a single tract of land, termed Parcel Two. The appellant claims that, for assessment purposes, Parcel Two should be valued as a single primary lot with the remainder regarded as excess land. The predominant reason upon which the appellant relies for deeming the four assessing parcels a single tract of land is the perimeter description of Parcel Two contained in a series of deeds beginning in 1965. Based on all of the evidence, its subsidiary findings, and reasonable inferences drawn therefrom, the Board finds that the appellant failed to prove that the assessors were obliged to value and assess the subject assessing parcels as part of a single tract of land, termed Parcel Two.

First, from a conveyancing standpoint, none of the deeds conveying Parcel Two refers to any plan actually depicting Parcel Two. The only relevant plan of land on record and in evidence is the 1875 Mullin Plan which shows camp-ground lots along with actual and paper streets. Because no plan depicting Parcel Two is on record in the appropriate Registry and for the reasons discussed below, the Board finds that the appellant did not sufficiently demonstrate that the camp-ground lots had been properly assembled into one new parcel. The Board also finds that the appellant failed to demonstrate that it no longer retains the right to convey even individual camp-ground lots that it owns in accordance with the Mullin Plan.

Second, there is little, if any, evidence to establish that the appellant's or any of its predecessors' actual use of the assessing parcels that comprise Parcel Two indicates a use consistent with the appellant's single-parcel theory. A representative or partner of the appellant never testified, Mr. Crimmins had no first-hand knowledge, and Ms. Resendes' testimony was silent on this issue. If such a single use could have been established, the

Board finds that it would be a factor that it could consider for valuation purposes.

Third, the assessors elected to value Parcel Two as four separate assessing parcels, two of which are the subject of these appeals. The assessors used what appear to be actual and paper streets shown on the Mullin Plan as assessing parcel demarcation lines or borders. Because of these streets, the apparent vitality of the Mullin Plan, and the lack of evidence on the use to which the appellant and its predecessors have put Parcel Two, the Board finds that neither the camp-ground lots, nor the assessing parcels have necessarily merged for valuation purposes, notwithstanding common ownership. The assessors must value property according to its highest and best use, and they may make reasonable assumptions and determinations in that regard. In the present appeals, the assessors determined, consistent with the Mullin Plan, that the appellant could convey or develop the camp-ground lots as four separate primary parcels, which the assessors defined as four separate assessing parcels.

Lastly, the parties settled the appeals relating to two of the four assessing parcels that comprise Parcel Two, leaving appeals relating only to the remaining two subject assessing parcels. If, *arguendo*, the Board were to find that the appellant's proposition of valuing Parcel Two as a single assessment parcel were correct, based on the existing record, the Board would be unable to determine a reliable value for the two subject assessing parcels and an appropriate abatement. The absence of the two settled parcels, which are not subject to these appeals but nonetheless comprise the remainder of Parcel Two, precludes the Board from being able to reliably value Parcel Two and then allocate values to, or separately value, the two subject assessing parcels.

Based on all the evidence, its subsidiary findings, and reasonable inferences drawn therefrom, the Board further finds that the 8 Ocean View Avenue assessing parcel, which is 2.45 acres in size and has a small area, at the bend in its 7-shape, that is more than one hundred feet in depth and more than 50 feet from the perimeter boundary of Parcel Two, is a buildable lot, as even Mr. Crimmins seemed to concede. The Board also finds, however, that the appellant established that the 6 Menamsha Avenue assessing parcel, which is 1.5 acres in size and in the shape of a ruler, is not a buildable lot without a waiver of deed and possibly zoning restrictions because it is dimensionally substandard. The Board therefore finds that the assessors, by valuing the 6 Menamsha Avenue assessing parcel as a buildable lot, have erred. The Board finds, under the circumstances here, that this assessing parcel is more appropriately valued as an unbuildable lot. But, the Board also finds that the appellant did not establish a value for this assessing parcel as

an unbuildable lot. Neither Mr. Crimmins' nor Ms. Resendes' testimony nor the exhibits provide adequate evidence in this regard. The appellant did not introduce evidence from a real estate valuation expert or a partner or representative of the appellant on this or any valuation question. Consequently, the Board finds that it is unable to determine a reliable value different from the presumptively valid assessed value for this assessing parcel.

Based on the adjusted values that Ms. Resendes derived in her appraisal report, she concluded that the assessments for the 8 Ocean View Avenue assessing parcel were appropriate. The Board, however, did not find the properties that she selected for her comparable sales analyses to be particularly comparable to the 8 Ocean View Avenue assessing parcel. Her gross adjustments for these properties, not including any modifications for time, totaled between 70% and 95%, and even this range may not be adequate to account for their apparent differences with the 8 Ocean View Avenue assessing parcel. Consequently, the Board finds that Ms. Resendes' adjusted values are not reliable indicators of the 8 Ocean View Avenue assessing parcel's value for the fiscal years at issue.

(2)

Mr. Crimmins is an attorney who testified that he specializes, at least to some extent, in conveyancing. The Board did not qualify him as an expert in these appeals because he lacked the requisite independence and his testimony concerned a question of law for which expert testimony was unnecessary. The Board nonetheless allowed him to testify conditionally about the relevant deeds, plans, zoning, and assessment parcel configuration. The Board considers Mr. Crimmins's opinions or interpretations of the facts and evidence to be merely argument, and the Board therefore finds them to be persuasive only to the extent that the Board also finds facts from the available evidence proving them. Otherwise the Board accords them no evidentiary weight.

**Conclusion**

In conclusion, the Board finds that the appellant did not prove that the assessors were obliged to value and assess the subject assessing parcels together with the two settled parcels, as a single assessing parcel -- Parcel Two. The Board also finds that while the evidence supports the conclusion that the 8 Ocean View Avenue assessing parcel is a buildable lot, it also establishes that the 6 Menamsha Avenue assessing parcel is not. However, the appellant did not provide the Board with adequate evidence upon which to rely to merge it into the 8 Ocean View Avenue assessing parcel or otherwise or to value the 6 Menamsha Avenue assessing parcel as an unbuildable lot. The appellant

introduced virtually no relevant valuation evidence for the subject assessing parcels. Accordingly, the Board finds that the appellant failed to meet its burden of proving that the subject assessing parcels were overvalued for the fiscal years at issue. The Board, therefore, decides these appeals for the appellee.

## OPINION

### (1)

The assessors have a statutory and constitutional obligation to assess all real property at its full and fair cash value. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth; art. 10 of the Declaration of Rights; G.L. c. 59, §§ 38, 52. *See Coomey v. Assessors of Sandwich*, 367 Mass. 836, 837 (1975)(citations omitted). Fair cash value means fair market value, which is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

The appellant has the burden of proving that the property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974)(quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayer[] . . . prov[es] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984)(quoting *Schlaiker*, 365 Mass. at 245).

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

In the present appeals, the appellant attempted to demonstrate that the assessors should not have separately valued the subject assessing parcels as two buildable lots, but should instead have valued them as part of a larger parcel that had one primary building site and excess land. The Board found, however, that the appellant failed to adequately demonstrate that the assessors should have treated the subject assessing parcels as part of Parcel Two. The Board found that there was no recorded plan depicting Parcel Two, and there was essentially no evidence relating to the use of the subject or settled assessing

parcels or Parcel Two. Consequently, the Board found no persuasive evidence to support a finding that the affected camp-ground lots, defined in the Mullin Plan, had been properly assembled into one new parcel. Further, on this record, it appears that the appellant retains the right to convey even individual camp-ground lots that it owns in accordance with the Mullin Plan. *See Siddharth v. Reid*, 21 Mass. L. Rep. 715 (2006) (“The crucial inquiry . . . is whether the lot[s].retain[] separate identit[ies].”).

In addition, the assessors elected to value Parcel Two as four separate assessing parcels, two of which are the subject of these appeals. The assessors used what appear to be actual and paper streets shown on the Mullin Plan as assessing parcel demarcation lines or borders. Because of these streets, the apparent vitality of the Mullin Plan, and the lack of evidence on the use to which the appellant and its predecessors have put Parcel Two, the Board found that neither the camp-ground lots, nor the assessing parcels have necessarily merged for valuation purposes, notwithstanding common ownership. The assessors must value property according to its highest and best use, and they may make reasonable assumptions and determinations in that regard. *See Irving Saunders Trust v. Assessors of Boston*, 26 Mass. App. Ct. 838, 843 (1989). In the present appeals, the assessors determined, consistent with the Mullin Plan, that the appellant could convey or develop the camp-ground lots as four separate primary parcels, which the assessors defined as four separate assessing parcels. *See Town of Lenox v. Oglesby*, 311 Mass. 269, (1942)(holding that “[t]here is no hard and fast rule to be applied universally to guide assessors in determining whether parcels of land were to be assessed separately or together”; it is essentially a question of fact). Based on all of the evidence, its subsidiary findings, and reasonable inferences drawn therefrom, the Board finds and rules that the appellant failed to prove that the assessors should have valued the subject assessing parcels as part of a larger parcel that had one primary building site with the remainder considered excess land.

In determining a property’s fair cash value, it is important initially to consider all uses to which the property was or could reasonably be adapted on the relevant assessment dates. *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authy.*, 335 Mass. 189, 193 (1956); *Irving Saunders Trust*, 26 Mass. App. Ct. at 843. The goal is to ascertain the maximum value of the property for any legitimate and reasonable use. *Id.* The Board found that the evidence supporting the assessor’s determination regarding the highest and best use of the 8 Ocean View Avenue assessing parcel as a buildable lot was credible and substantial; however, the Board also found that the evidence did not support

such a determination regarding the 6 Menamsha Avenue assessing parcel. Rather, the Board finds and rules that the 6 Menamsha Avenue assessing parcel would be better valued as not buildable as a matter of right.

Real estate valuation experts, the Massachusetts courts, and this Board rely primarily upon three approaches to determine a property's fair cash value: income-capitalization, sales comparison, and depreciated reproduction or replacement cost. *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 362 (1978). "The board is not required to adopt any particular method of valuation." *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449 (1986). The fair cash value of property may often best be determined by recent sales of comparable properties in the market. See *Correia*, 375 Mass. at 362; *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929). Actual sales generally "furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller." *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 469 (1981); *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554, 560 (1971). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. See *McCabe*, 265 Mass. at 496. "A major premise of the sales comparison approach is that an opinion of the market value of a property can be supported by studying the market's reaction to comparable and competitive properties." APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 297 (13<sup>th</sup> ed., 2008). When comparable sales are used, however, allowance must be made for various factors which would otherwise cause disparities in the comparable prices. See *Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. "Comparative analysis of properties focuses on similarities and differences that affect value. . . . [T]he appraiser adjusts for any differences." THE APPRAISAL OF REAL ESTATE at 297, 307.

The appellant introduced little affirmative evidence of the subject assessing parcels' fair cash values as of the relevant assessment dates. The appellant offered no opinions of fair cash value of its own through representatives or partners, and it did not introduce testimony or appraisal reports from real estate valuation expert witnesses proposing fair cash values for Parcel Two or the subject assessing parcels for the fiscal years at issue. The appellant's limited valuation submissions consisted of equivocal

testimony from Ms. Resendes and data on property record cards. From this information, the Board is not able to ascertain a value for an unbuildable lot like the 6 Menamsha Avenue assessing parcel.

The assessors submitted an appraisal report prepared by Ms. Resendes into evidence, which used a comparable-sales approach to value the 8 Ocean View Avenue assessing parcel for the fiscal years at issue. The Board found, however, that the magnitude of the adjustments applied to the purportedly comparable properties that Ms. Resendes used in her report strongly suggested that the properties were not comparable to the 8 Ocean View Avenue assessing parcel. “[E]xcessive adjustments ‘raise serious questions regarding initial comparability.’” *The May Department Store Co. v. Assessors of Newton*, Mass. ATB Findings of Fact and Reports 2009-153, 191 (quoting *The Trustee of the Charles Cotesworth Pinckney Trust v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2007-621, 630-31). The Board therefore finds and rules that the properties chosen for the Resendes’ comparable-sales analysis were not comparable and the values derived from them were unreliable.

The Board is not required to believe the testimony of any particular witness or to adopt any particular method of valuation that a witness suggested. Rather, the Board can accept those portions of the evidence that the Board determines has more convincing weight. *Foxboro Associates*, 385 Mass. at 683; *New Boston Garden Corp.*, 383 Mass. at 473; *Board of Assessors of Lynnfield v. New England Oyster House, Inc.*, 362 Mass. 696, 701-702 (1972). In evaluating the evidence before it in these appeals, the Board formed its own independent judgment that the fair cash value of the subject assessing parcels could not be reliably ascertained. See *General Electric Co.*, 393 Mass. at 605; *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984). Accordingly, the Board finds and rules that the appellant did not overcome the presumed validity of the assessments.

The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 72 (1941). “The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the board.” *Cumington School of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 605 (1977).

(2)

The Board found that, at all relevant times, Mr. Crimmins was an attorney who

testified that he specialized, at least to some extent, in conveyancing. The Board did not qualify him as an expert in these appeals for several reasons. First, it was established on *voir dire* that Mr. Crimmins had worked and continues to work with appellant's attorney as co-counsel on matters litigated and currently before the Board concerning assessments of other properties on Martha's Vineyard and Edgartown. *See generally Turners Falls, L.P. v. Assessors of Montague*, 54 Mass. App. Ct. 732, 738 (2002)("[an expert witness must not be] a party or an agent for the party that employ[s] the expert . . . [or] under the control of the party . . . [because the expert must] testif[y] impartially to assist the trier of fact about matters not in common knowledge."). On this basis, the Board rules that Mr. Crimmins's on-going association with appellant's counsel called his independence into question. *See Haynes v. Assessors of Middleton*, Mass. ATB Findings of Fact and Reports 2011-143, 188 (finding and ruling that the testimony and appraisal report submitted by a real estate valuation witness who was also acting as appellant's agent "were imbued with bias which adversely impacted her credibility and rendered her estimates of value less reliable."). *Cf. Pappas v. Assessors of Ipswich*, Mass. ATB Findings of Facts and Reports, 1997-599, 629-30 (ruling that, in that case, a real estate valuation witness's testimony was not tainted or biased because she had demonstrated to the Board that she was no longer acting as that appellant's agent and did not have a potential interest in that case).

Second, the witness was called to offer an opinion regarding whether, as a matter of law, the two subject assessing parcels coupled with the two settled parcels should be valued and taxed as a single assessing parcel. The Board is capable of determining this issue without the aid of an expert witness. *See HON. PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE* 382 (6<sup>th</sup> ed. 1994)("[E]xpert testimony may be essential in some areas; in others it may not be necessary although appropriate. In these latter situations the discretion of the trial judge seems to be given great weight on the question of the propriety of such evidence.").

Even agreeing with Mr. Crimmins concerning the conveyancing history of the parcels, the Board determined, based on, among other things, the lack of evidence as to use, the absence of a recorded plan depicting Parcel Two, the apparent vitality of the Mullin Plan, the appellant's likely retained ability to convey individual camp-ground lots, and the discretion given to assessors in drawing parcel lines, that the appellant failed to prove that the subject assessing parcels, along with the two settled parcels, were merged into a single parcel for purposes of valuation and assessment.

Finally and as a result of its findings and rulings regarding Mr. Crimmins's status as a non-expert witness, the Board considers any of Mr. Crimmins's testimony that contains opinions or interpretations of the facts and evidence to be merely argument, and the Board therefore finds them to be persuasive only to the extent that the Board also finds facts from the available evidence proving them. Otherwise the Board rules that they are entitled to no evidentiary weight.

**Conclusion**

In conclusion, the Board finds and rules that the appellant failed to prove that the assessors were obliged to value and assess the subject assessing parcels together with the other two assessing parcels, which the parties previously settled and are not part of these appeals, as a single assessing parcel, termed Parcel Two. The Board also finds and rules that the evidence supports a finding that the 8 Ocean View Avenue assessing parcel is a buildable lot, but the 6 Menamsha Avenue assessing parcel is not. However, the appellant did not provide the Board with adequate evidence upon which to rely to value this latter assessing parcel as an unbuildable lot or to merge it into the 8 Ocean View Avenue assessing parcel or otherwise. The appellant introduced virtually no relevant valuation evidence relating to the subject assessing parcels. Accordingly, the Board rules that the appellant failed to meet its burden of proving that the subject assessing parcels were overvalued for the fiscal years at issue.

The Board, therefore, decides these appeals for the appellee.

**THE APPELLATE TAX BOARD**

By:

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

**A true copy,**

**Attest:**

\_\_\_\_\_  
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**SUSAN J. LEFAVER v.**

**BOARD OF ASSESSORS OF  
THE CITY OF NORTH ADAMS**

Docket No. F306880

Promulgated:  
June 7, 2011

ATB 2011-489

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 Board of Assessors of the City of North Adams (“assessors”) to abate a tax on certain real estate in North Adams assessed to Susan J. Lefaver (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2010.

Commissioner Mulhern (“Presiding Commissioner”) heard this appeal under G.L. c. 58A, § 1 and 831 CMR 1.20 and issued a single-member decision for the appellant.

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.

*Susan J. Lefaver, pro se*, for the appellant.  
*Thomas Manuel, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of exhibits and testimony offered at the hearing of this appeal, the Presiding Commissioner made the following findings of fact.

On January 1, 2009, the appellant was the assessed owner of an improved parcel of real estate located at 690 State Road in North Adams (“subject property”). For fiscal year 2010, the assessors valued the subject property at \$147,000 and assessed a tax thereon, at a rate of \$12.44 per \$1,000, in the amount of \$1,828.68. In accordance with G.L. c. 59, § 57C, the appellant paid the tax due without incurring interest, and in accordance with G.L. c. 59, § 59, the appellant timely filed an Application for Abatement with the assessors on January 26, 2010. The assessors denied the appellant’s abatement application on March 17, 2010, and on June 1, 2010, the appellant seasonably filed an appeal with the Appellate Tax Board (“Board”). On the basis of these facts, the Presiding Commissioner found and ruled that the Board had jurisdiction to hear and decide this appeal.

The subject property, which faces State Road, a major thoroughfare also known as

Route 2, consists of a 0.453-acre parcel of real estate improved with a two-family home containing 2,159 square feet of finished living area. The dwelling, which is in average condition, has eight rooms divided between two units, one of which has two bedrooms, and the other, one bedroom. Each unit has a kitchen and a full bath. The dwelling's exterior is clad in wood shingles, and it has an asphalt roof.

The appellant argued that the subject property had no monetary value. The appellant based her conclusion almost exclusively on her belief that contamination affecting the properties at 700 and 708 State Road, which are contiguous parcels separated from the subject property by a street known as Chantilly Avenue, had spread to the subject property, rendering it valueless.

The appellant submitted various documents to support her argument, certain of which indicated that the property at 708 State Road, a former gas station currently operating as an auto repair shop, had been contaminated by gasoline leakage from a storage tank in the early 1990s. Other documents relating to 708 State Road included a copy of a letter dated August 9, 2009, to the Massachusetts Department of Environmental Protection ("DEP") from Norfolk-Ram, an engineering firm involved with environmental testing and remediation efforts at the property. The letter referenced a "Response Action Outcome Report" relating to 708 State Road ("RAO") dated February 8, 2006, that Norfolk-Ram had prepared after completion of post-remediation sampling at the property.<sup>1</sup> The RAO, which was combined with a "Release Abatement Measure Report" to form a single document, discussed in detail testing and remediation activities performed at 708 State Road and concluded, based on several considerations, that "a 'Condition of no Significant Risk' to public safety exist[ed] at the Site [then] and into the foreseeable future."

The appellant also submitted a copy of a report dated December 14, 2009, from the engineering firm of Tighe & Bond to DEP detailing "site assessment activities performed in response to a historical release of chlorinated solvents" from the drycleaners at 700 State Road. The report described placement of several "monitoring wells" and noted detection of vinyl chloride in a monitoring well "approximately 60 feet from a . . . residential property listed at 690 State Road."<sup>2</sup> The report also stated that "additional assessment would be required to evaluate the potential for indoor air quality impacts from vapor intrusion into

---

<sup>1</sup> The August 2009 letter stated that it did not address migration of tetrachloroethylene, a drycleaning solvent, from 700 State Road, the former site of a drycleaning establishment.

<sup>2</sup> Vinyl chloride is a by-product of tetrachloroethylene.

the buildings” at 708 State Street and the subject property.

In a memorandum to the Mayor of North Adams, the city’s Chief Administrative Officer (“CAO”) described “any contamination or clean-up activity” at 708, 700 and 690 State Road. Regarding contamination at and emanating from 700 State Road, the CAO stated:

[DEP] supervised investigative work performed between October 2009 and February 2010. The data from this work showed that although the contamination was moving away from the property, it was also naturally degrading. One of the sampling wells located on Chantilly Avenue contained vinyl chloride<sup>3</sup>. . . . Because this product has the potential for vapor intrusion, indoor air samples were collected from the LeFaver household at 690 State Road on February 16-17, 2010. No contaminants associated with the documented contamination were detected in the indoor air samples. Based on these findings, [DEP] has no current plans for additional assessment or clean-up activity related to the [drycleaners’] site at this time.

As for 708 State Road, the CAO stated:

[DEP] monitored a release of gasoline from a leaking underground storage tank to soil and groundwater in September, 1993. Two underground storage tanks were removed and contaminated soil has been removed from the parcel. A DEP "Response Action Outcome" (RAO) statement was submitted . . . closing that site . . . [DEP] performed a "screening level" audit of the RAO in October 2009 and no further action was taken by [DEP] following that review.

The memorandum made no reference to activity at the subject property beyond its description of air sample testing performed during February of 2010.

Based on the record before it, the Presiding Commissioner found that the properties at both 700 and 708 State Road had been and to some degree remained contaminated. However, the evidence presented also indicated that remediation had been performed at 708 State Road, and that there was no ongoing or contemplated DEP action at either 700 or 708 State Road. Absent additional data or an expert opinion, neither of which was provided, the Presiding Commissioner could not determine if there remained contamination issues at 700 or 708 State Road which posed any risk to public safety or diminished the value of these properties, let alone the subject property. Moreover, the Presiding Commissioner found that the appellant provided insufficient evidence to establish that the subject property had been contaminated. Indeed, the only direct evidence

---

<sup>3</sup> This appears to be the vinyl chloride that Tighe & Bond noted had been detected near the subject property.

relating to contamination of the subject property, the air samples tested during February of 2010, pointed to the opposite conclusion.

The appellant also argued that contamination of the subject property resulted in denial of her applications for home equity loans which otherwise would have been approved. In support of this argument, the appellant submitted a "Statement of Credit Denial" from the Hoosac Bank dated July 14, 2009, which stated that the appellant's request for a line of credit had been denied "based on disclosed potential for hazardous contamination that has not been officially determined." The denial statement also explicitly stated, however, that the appellant herself disclosed the "potential for hazardous contamination." The Presiding Commissioner therefore found that the credit denial, which resulted from the appellant's own unsubstantiated beliefs, was of little probative value.

Finally, the Presiding Commissioner found that the appellant presented no evidence to establish that the subject property suffered a diminution in value resulting from the contamination at 700 and 708 State Road or from the operation of the auto repair shop at 708 State Road, which the appellant claimed violated local zoning laws. Given this finding and the appellant's failure to demonstrate contamination of the subject property, the Presiding Commissioner found and ruled that the appellant failed to offer persuasive evidence that the subject property's assessed value exceeded its fair cash value on the relevant assessment date.

Notwithstanding the foregoing, the Presiding Commissioner found that evidence provided by the assessors indicated that the subject property was overvalued for fiscal year 2010. In particular, the assessors submitted property record cards for nine purportedly comparable properties in the area. Of these, the Presiding Commissioner found that six of the properties, each of which featured a two-family dwelling, were comparable to the subject property.<sup>4</sup> The properties were in similar condition, their finished living areas ranged from 1,788 square feet to 2,944 square feet and, with the exception of one significantly larger property, their parcel sizes from 0.11 acres to 0.26 acres. The properties' average sale price was \$128,500. Taking into account various differences between these properties and the subject property and, in particular the subject property's location on a busy thoroughfare, the Presiding Commissioner derived an indicated value for the subject property of \$125,000 for fiscal year 2009. Thus, the Presiding

---

<sup>4</sup> The assessors presented one other multi-family property for consideration, but the Presiding Commissioner excluded this property from his analysis based on the property's inferior condition.

Commissioner found and ruled that the fair cash value of the subject property was \$22,000 less than its assessed value of \$147,000.

Accordingly, the Presiding Commissioner issued a decision for the appellant in this appeal and ordered an abatement in the amount of \$273.68.

### OPINION

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

The appellant has the burden of proving that property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)).

In the present case, the Presiding Commissioner found and ruled that the appellant’s evidence failed to establish that the subject property had a lower value than its assessed value for fiscal year 2010. While the appellant revealed that there was contamination at 700 and 708 State Road, she did not demonstrate ongoing contamination issues that posed a risk to public safety, nor did she establish that any form of contamination had spread to her property. Finally, the appellant did not present evidence to establish that the value of the subject property had been diminished as a result of contamination at 700 and 708 State Road or the operation of an auto repair shop at 708 State Road.

Notwithstanding the appellant’s failure to establish the subject property’s lower value, the Presiding Commissioner, relying on the entire record, found and ruled that the assessed value of the subject property exceeded its fair cash value for fiscal year 2010. *See, e.g., General Electric Co. v. Assessors of Lynn*, 393 Mass 591, 599-600 (1984).

As with decisions of the Board, the Presiding Commissioner’s “determination must be made ‘upon consideration of the entire record.’” *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981) (quoting *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966), quoting from G.L. c 30A, § 14 (8) (State Administrative Procedure Act)). Further, the Presiding Commissioner is “entitled to ‘select

the various elements of value as shown by the record and from them form . . . [his] own independent judgment.” *General Electric Co.* 393 Mass. at 605 (quoting *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984))(additional citation omitted).

The fair cash value of property may be determined by recent sales of comparable properties in the market. Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date generally contain probative evidence for determining the value of the property at issue. *Graham v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2008-321, 400 (citing *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929)), *aff’d*, 73 Mass. App. Ct. 1107 (2008). When comparable sales are used, allowances must be made for various factors which would otherwise cause disparities in the comparable properties’ sale prices. See *Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082.

Consistent with the cited authority, the Presiding Commissioner considered evidence submitted by the assessors relating to six multi-family properties in the area, which the Presiding Commissioner found were comparable to the subject property. The record indicated the properties’ condition, finished living areas, sale prices, and parcel sizes. The Presiding Commissioner took into account various differences between the properties and the subject property, with emphasis on the subject property’s location on a busy thoroughfare, and derived an indicated value for the subject property of \$125,000 for fiscal year 2010. Thus the Presiding Commissioner found and ruled that the subject property’s assessed value exceeded its fair cash value by \$22,000.

Accordingly, the Presiding Commissioner issued a decision for the appellant in this appeal and ordered an abatement in the amount of \$273.68.

**APPELLATE TAX BOARD**

By: \_\_\_\_\_  
**Thomas J. Mulhern, Commissioner**

**A true copy,**

Attest: \_\_\_\_\_  
**Clerk of the Board**

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CHARLES & MARGARET ZIERING v.

BOARD OF ASSESSORS OF  
THE TOWN OF CONCORD

Docket No. F298606

Promulgated:  
October 22, 2010

ATB 2010-925

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, Board of Assessors of the Town of Concord (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of Concord, owned by and assessed to the appellants 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 a revised decision for the appellants.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32. The revised decision is promulgated simultaneously herewith.

*David J. Martel*, Esq. for the appellants.  
*Kevin D. Batt*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2007, the appellants were the assessed owners of a certain parcel of real estate located at 263 Simon Willard Road in Concord (“subject property”). For the fiscal year at issue, the assessors valued the subject property at \$4,491,200 and assessed a tax thereon, at the rate of \$10.72 per \$1,000, in the total amount of \$48,851.76.<sup>1</sup> The appellants timely paid the tax in full without incurring interest. On April 17, 2008, the appellants timely applied to the appellee for an abatement, claiming that the subject property was overvalued. The appellee denied the appellants’ request on May 22, 2008. The appellants seasonably filed their petition with the Board on August 20, 2008.

---

<sup>1</sup> This amount includes a Community Preservation Act assessment of \$706.10.

Accordingly, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Concord is a desirable suburban community. The subject property is in the Nashawtuc Hill neighborhood, which is one of the premier neighborhoods in Concord. Nashawtuc Hill is surrounded on three sides by rivers, and vehicular access is limited by a few entry points into the neighborhood. As a result of this limited access, the neighborhood is quiet and private, yet it is also located within a short distance of the village area of Concord, so the neighborhood also offers the convenience of access to retail establishments and commuter rail service to Boston. The Nashawtuc Hill neighborhood includes historic estates developed in the nineteenth century, scenic vistas, a sledding hill, and open space.

The subject property consists of a 4.573-acre parcel of real estate, which is actually comprised of two contiguous parcels – a 2.61-acre lot improved with the subject home, which the appellants purchased in 1994 for \$1,100,000 (“improved lot”), and a 1.96-acre vacant lot, which the appellants purchased in 1995 for \$500,000 (“extra lot”). The appellants combined these two parcels by means of a recorded deed in 2003.<sup>2</sup> The improved lot and the extra lot are thus assessed to the appellants as one lot.

The subject property is improved with a two-and-one-half-story, wood-frame, Colonial-style home that was originally built in 1911 but was substantially renovated in 1997. According to the property record card on file with the assessors, the subject home contains 5,932 square feet of above-grade living space and has thirteen rooms above grade, including five bedrooms, as well as four full bathrooms and one half bathroom. As part of the 1997 renovation, the kitchen was updated with maple flooring, granite countertops, a commercial-grade stove, and two commercial-grade dishwashers. In addition to the formal dining and living rooms, the subject home includes a library with a built-in bookcase and fireplace, and a family room with a vaulted ceiling, cherry paneling, cherry, walnut and maple flooring, a fireplace, and a spiral stairway to a second level balcony area. The attic is also finished, yielding 454 square feet of living space, which includes one of the five bedrooms and an office, as well as one of the four full

---

<sup>2</sup> The appellants transferred both the improved lot and the extra lot to themselves for consideration of one dollar by means of a deed recorded on December 22, 2003 at the Middlesex South District Registry of Deeds.

bathrooms and one fireplace.<sup>3</sup> The subject home also includes a partial basement with an additional 2,745 square feet of finished area below grade, which includes two additional rooms - a mahogany-paneled in-home theater and a recreation room - as well as a wine cellar.<sup>4</sup> Other amenities include air conditioning in a portion of the subject home, radiant in-floor heating in all living areas, eight fireplaces total, and a detached two-and-one-half-car garage, which includes a second-floor storage area with one of the eight fireplaces. Finally, the subject property also includes porches, a patio, and an in-ground Gunitite pool with granite surround and stone walls, and a pool house containing slightly less than 800 square feet with a vaulted ceiling, wood finish walls and ceiling, granite floor, radiant heating and a full bathroom.<sup>5</sup>

The appellants argue that the subject assessment exceeds the fair cash value of the subject property. They contend that the total fair market value of the subject property is \$3,665,000, which includes an opinion of value of \$3,100,000 for the 2.61-acre improved lot and \$565,000 for the 1.96-acre extra lot. The appellants presented their case through the testimony of Charles Ziering, an owner of the subject property, and James Marchant, whom the Board qualified as a real estate valuation expert.

Mr. Ziering testified that, on December 26, 2006, the appellants made a so-called “grant of restriction” in favor of a neighbor who lives across the street from the extra lot. The grant of restriction bound the appellants not to “build or locate any buildings or structure (other than fences)” on the extra lot for a ten-year period, which expires in January, 2017. The appellants received no monetary consideration for the grant of restriction. The extra lot conforms in all respects to the requirements of the Concord Zoning By-law for a single-family structure. Mr. Ziering explained that his motive for granting the restriction was to maintain the extra lot as a buffer area to protect the appellants’ privacy.

Mr. Ziering testified that on November 30, 2007, the appellee sent him a letter explaining their opinion that the grant of restriction had no impact on the subject assessment. Mr. Ziering contended that, because the 10-year restriction rendered the extra lot unbuildable, there would be no market for the extra lot and therefore, the extra lot should have been assessed as surplus land.

---

<sup>3</sup> The 454 square feet of living space in the attic is included in the 5,932 square foot gross living area calculation, and the attic bedroom is included in the total room count.

<sup>4</sup> The 2,745 square feet of below-grade living space in the basement is not included in the 5,932 square foot gross living area calculation, and the two basement rooms are not included in the total room count.

<sup>5</sup> The full bathroom in the poolhouse is not included in the bathroom count for the subject home.

Next, Mr. Marchant testified to the value of the subject property. Mr. Marchant completed separate appraisal reports to value the 2.61-acre improved lot and the 1.96-acre extra lot. To value the improved lot, Mr. Marchant performed a comparable-sales analysis using eight purportedly comparable properties in Concord.<sup>6</sup> Seven of the properties were within 1.24 miles of the subject property and the eighth property was 3.02 miles away. Three of the comparable-sales properties were located in the same neighborhood as the subject property, while an additional three comparable-sales properties were situated on Monument Street, which is located about one mile away from the subject property. The comparable-sales properties ranged in size from 0.49 acres to 4.59 acres and were improved with homes ranging in gross living area from 3,386 square feet to 7,283 square feet. Mr. Marchant used 5,478 square feet as the measurement for the living space contained within the subject home; he did not consider the 454-square-foot area of the finished attic, nor its two rooms and one full bathroom, in his room and bathroom counts.

Mr. Marchant applied adjustments to his comparable-sales' prices. He did not make adjustments for time of sale, because the comparable sales occurred between 2005 and 2007, during which time, in Mr. Marchant's opinion, the market values in Concord were relatively stable. Some of Mr. Marchant's adjustments included a \$50 per square foot adjustment for differences in living area, and a \$20,000 adjustment for the finished basement. He also adjusted \$10,000 for the full bathrooms and \$5,000 for half bathrooms, \$2,000 per fireplace, and \$15,000 for the in-ground pool and poolhouse. After applying his adjustments, Mr. Marchant's comparable properties' adjusted-sale prices ranged from \$2,659,900 to \$3,353,600. Based on his comparable-sales analysis, Mr. Marchant concluded that the fair market value of the 2.61-acre improved lot was \$3,100,000 for the fiscal year at issue, which fell towards the mid-range of the adjusted-sale prices derived from his comparable-sales analysis.

Mr. Marchant next completed a "Restricted Use Report of an Appraisal of an Unimproved Residential Lot" for the extra lot. In his report, Mr. Marchant stated that the highest and best use of the extra lot was as a vacant residential site suitable for development. Using the same comparable-sales analysis for the improved lot,

---

<sup>6</sup> Mr. Marchant also developed a cost approach to valuing the subject property, but he believed that the comparable-sales approach to value is the most reliable indicator of value for the subject property, and therefore, he used the cost approach as a check on the value which he obtained through the comparable-sales approach.

Mr. Marchant estimated the value of the extra lot, without the grant of restriction, to be \$1,100,000. Mr. Marchant then accounted for the 10-year restriction on development. Based upon historical data and analysis of what he anticipated in the future, Mr. Marchant estimated the extra lot's appreciation over the 10-year period, and estimated that the market value of the extra lot would be \$1,553,720 by Year 10, at which point it would no longer be encumbered. Mr. Marchant then discounted back to the effective valuation date by applying a discount rate of 9.0 percent and adding the real estate tax rate for the fiscal year at issue (\$10.72 per thousand) to compensate for the tax burden on the subject property throughout the 10-year holding period, which yielded a total discount rate of 10.7 percent. Applying this discount rate to the estimated value of the extra lot in Year 10, Mr. Marchant determined a present value of \$565,826 for the extra lot as encumbered by the 10-year grant of restriction. Adding \$565,826 to Mr. Marchant's fair market value of \$3,100,000 for the 2.61-acre improved lot yielded an opinion of fair market value of \$3,665,826 for the total 4.573-acre subject property.

The appellee presented its case-in-chief through its witness, John Neas, whom the Board qualified as an expert in real estate valuation. Like Mr. Marchant, Mr. Neas considered the values of the improved lot and the extra lot separately. To value the improved lot, Mr. Neas performed a comparable-sales analysis using seven purportedly comparable properties. Five of these comparable-sales properties were also used in Mr. Marchant's comparable-sales analysis – 350 Musketaquid Road, 444 Monument Street, 116 Monument Street, 295 Musterfield Road, and 214 Monument Street. The comparable-sales properties on Musketaquid Road and Musterfield Road are located in the same neighborhood as the subject property, while the properties on Monument Street are located in a different but, in the opinions of both Mr. Neas and Mr. Marchant, equally prestigious neighborhood in Concord.

Mr. Neas' adjustments differed from those of Mr. Marchant, particularly his adjustment of \$200 per square foot, versus Mr. Marchant's adjustment of \$50 per square foot, for difference in living space; the experts also differed in their adjustment for number of fireplaces, with Mr. Neas adding an additional \$10,000 for each fireplace versus Mr. Marchant's adjustment of \$2,000 for each fireplace. Mr. Neas also added a higher \$150,000 adjustment for the subject property's pool and poolhouse, while Mr. Marchant testified that, based on his data, a pool and pool house are very often not selling points, since many buyers are not attracted to such amenities, so their presence actually

narrows the scope of potential buyers. Finally, Mr. Neas adjusted by a 5% rate of appreciation for differences in time of sale between the subject and his comparables. After adjustments, Mr. Neas' comparable sales yielded a range of \$2,800,000 to \$3,600,000. Mr. Neas chose a final value of the subject property, without the extra lot, of \$3,500,000, which was at the higher end of his range of adjusted-sale values.

To value the 1.96-acre extra lot, Mr. Neas considered two alternative approaches: (1) ignoring the grant of restriction as not a material encumbrance, and (2) treating the grant of restriction as a material encumbrance. Under the first approach, Mr. Neas considered sales of fourteen residential lots in Concord, ranging in size from 20,000 square feet (about 0.46 acres) to 4.674 acres and in price from \$335,000 to \$1,825,000, which occurred during 2006 and 2007. He then selected five lots, which he deemed to be more similar to the subject extra lot; these sales yielded sales prices ranging from \$740,000 to \$1,225,000. Mr. Neas then performed paired-sales analyses to make adjustments for location and lot size. Mr. Neas concluded that the value of the extra lot, without considering the encumbrance, should be \$1,000,000. Adding \$1,000,000 to the \$3,500,000 value for the 2.61-acre improved lot yielded a total value of \$4,500,000 for the subject property.

Under the second approach of considering the extra lot's encumbrance, Mr. Neas calculated the extra lot at a "discounted rate," but he claimed that the encumbered extra lot brought a value of "enhancement" to the 2.61-acre improved lot. To support this contention, Mr. Neas presented three examples of paired sales. Mr. Neas' first example compared the properties known as Lot 1 Pope Road, with 2.44 acres, which sold for \$545,000 in April, 2007, and Lot A/A1 Pope Road, with 3.7 acres, which sold for \$622,500 in May, 2007. Mr. Neas' second example compared Lot 3A Powder Mill Road, with 2.0454 acres, which sold for \$650,000 in October, 2006, and Lot 1 Macone Farm Lane, with 2.97 acres, which sold for \$740,000 in January, 2006. Finally, Mr. Neas' third example compared 168 Nashawtuc Road, with twelve rooms, including five bedrooms as well as four full bathrooms and one half bathroom, which sold for \$2,220,000 in March, 2007, and 1643 Monument Street, a newer home which borders Estabrook Woods, with twelve rooms, including five bedrooms as well as three full bathrooms and one half bathroom, which sold for \$2,479,000 in September, 2005. Mr. Neas contended that, based on his comparisons, the grant of restriction on the extra lot results in a 10% increase to the \$3,500,000 value of the improved lot, for an

“enhancement value” of \$350,000. He added this to the values of the 2.61-acre improved lot and a discounted \$550,000 value for the 1.96-acre extra lot for a total value of \$4,400,000 for the 4.573-acre subject property.

Mr. Marchant contended that Mr. Neas’ three paired-sales-analysis examples did not support Mr. Neas’ claim that the differences in selling prices could be accounted for by the presence of adjacent open space. Instead, Mr. Marchant contended that other factors, like location and the quality of the home at 1643 Monument Street, actually accounted for the differences in sales prices without considering the possible impact of any abutting vacant land.

On the basis of all of the evidence, the Board made the following ultimate findings of fact. With respect to the valuation of the improved lot, the Board found Mr. Marchant’s first six comparable-sales properties, five of which Mr. Neas also used, to be the most comparable to the subject property. The Board found that, overall, Mr. Marchant’s adjustments were more persuasive than Mr. Neas’ adjustments; however, the Board found that some of Mr. Marchant’s adjustments were not appropriate. The Board instead applied the following adjustments to these comparable-sales properties: \$100 per square foot for differences in living area; \$50 per square foot for the poolhouse; and \$10,000 for the pool. With these adjustments, Mr. Marchant’s comparable-sales properties yielded adjusted sales prices ranging from \$2,686,300 to \$3,632,048. On the basis of all of the evidence of record, the Board determined that the fair cash value of the 2.61-acre improved lot was \$3,300,000.

With respect to the extra lot, the Board found that Mr. Marchant’s method of discounting the fair cash value of the lot to compensate for the grant of restriction was erroneous. As Mr. Ziering candidly testified, his motive for granting the restriction was to protect the privacy of his improved lot. The Board found that the grant of restriction on the extra lot was gratuitous and benefited the appellants. Therefore, as will be further explained in the following Opinion, the Board found that the privately imposed grant of restriction has no effect on the extra lot’s fair cash value for tax purposes. The Board instead adopted Mr. Neas’ credible analysis by which he valued the extra lot without consideration of the grant of restriction and his opinion of \$1,000,000 as the fair cash value for the extra lot.

On the basis of its findings, the Board thus found that the fair cash value of the entire 4.57-acre subject property was \$4,300,000. Because this value is less than the

assessed value of the subject property for the fiscal year at issue, the Board issued a revised decision for the appellants abating \$2,080.40 of tax.<sup>7</sup>

### OPINION

The assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38. Fair cash value is defined as the price on which a willing seller and a willing buyer will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956). The appellant has the burden of proving that the property has a lower value than that assessed. “The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.” *Schlaiker v. Assessors of Great Barrington*, 365 Mass. 243, 245 (1974) (quoting *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47, 55 (1922)). “[T]he board is entitled to ‘presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the contrary.’” *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 598 (1984) (quoting *Schlaiker*, 365 Mass. at 245). In appeals before this Board, a taxpayer “‘may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation.’” *General Electric Co.*, 393 Mass. at 600 (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)).

Generally, real estate valuation experts and the Massachusetts courts rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. *Correia v. New Bedford Redevelopment*, 375 Mass. 360, 362 (1978). “The board is not required to adopt any particular method of valuation.” *Pepsi-Cola Bottling Co. v. Assessors of Boston*, 397 Mass. 447, 449 (1986).

Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date generally contain probative evidence for determining the value of the property at issue. *Graham v. Assessors of West Tisbury*, Mass. ATB Findings of Fact and Reports 2008-321, 400 (citing *McCabe v. Chelsea*, 265 Mass. 494, 496 (1929)), *aff’d* 73 Mass. App. Ct. 1107 (2008). When comparable sales are used, however, allowances must be made for various factors which would otherwise cause disparities in the comparable-sales properties’ sale prices. See *Pembroke Industrial Park*

---

<sup>7</sup> This amount includes a *pro rata* portion of the Community Preservation Act assessment in the amount of \$30.74.

*Co., Inc. v. Assessors of Pembroke*, Mass. ATB Findings of Fact and Reports 1998-1072, 1082 (and the cases cited therein); APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 307 (13<sup>th</sup> ed., 2008) (“After researching and verifying transactional data and selecting the appropriate unit of comparison, the appraiser adjusts for any differences.”).

On the basis of all of the evidence, the Board found that Mr. Marchant’s first six comparable-sales properties, five of which Mr. Neas also used, were the most comparable to the subject property. The Board found that, overall, Mr. Marchant’s adjustments were more persuasive than Mr. Neas’ adjustments. However, the Board found that some of Mr. Marchant’s adjustments were not appropriate, namely, the adjustments for differences in square-foot living space and the adjustment for the subject property’s pool and poolhouse. The Board rejected Mr. Marchant’s adjustments for these and instead applied adjustments of \$100 per square foot for differences in living area, \$50 per square foot for the poolhouse, and \$10,000 for the pool. On the basis of these adjustments, the Board found that the fair cash value for the 2.61-acre improved lot was \$3,300,000.

With respect to the extra lot, the Board was not persuaded by Mr. Marchant’s valuation method, which was based on the premise that the grant of restriction should reduce the property’s fair cash value. In making its ruling on this matter, the Board was guided by the long-standing principle that real estate is assessed on its fee-simple value; that is, “its value as a unit and not upon the interest therein of the person assessed.” *Paine v. Assessors of Weston*, 297 Mass. 173, 174 (1937). For example, in determining fair cash value, assessors are not required to reduce the fee-simple value of real property to account for below-market leases. *Donovan v. City of Haverhill*, 247 Mass. 69, 72 (1923) (“We do not think a determination of the fair cash valuation of real estate requires the assessors to make such a deduction [for the surrender value of a below-market lease].”). See also, *Sisk v. Assessors of Essex*, 426 Mass. 651, 654 (1998) (“[W]e have previously rejected a taxpayers’ argument that a lease constituted an encumbrance that diminished the property’s value for tax assessment purposes.”)(citing *Donovan*, 247 Mass. at 71); accord *Pepsi-Cola Bottling Co.*, 397 Mass. at 450.

The Supreme Judicial Court has recognized the difference, for tax valuation purposes, between privately imposed restrictions “intended for the personal benefit of [the grantor],” *Lodge v. Swampscott*, 216 Mass. 260, 263 (1913), and those that are governmentally imposed. In general, the former are “merely contractual” and thus “cannot affect the method of taxing the real estate.” *Crocker-McElwain Co. v. Assessors*

*of Holyoke*, 296 Mass. 338, 350 (1937) (citing *Hamilton Manuf. Co. v. Lowell*, 274 Mass. 477, 480-81 (1931)). By contrast, “[i]f property is known to be subject to . . . a governmentally-imposed restriction affecting . . . its earning power, that fact should be considered in any determination of its fair cash value.” *Boston Edison Co. v. Assessors of Watertown*, 387 Mass. 298, 304, (1982). Examples of governmentally imposed restrictions which assessors may rightly consider in determining fair cash value include: income from leases subject to rent-control restrictions (*Community Dev. Co. v. Assessors of Gardner*, 377 Mass. 351, 354-55 (1979)); a utility company’s governmentally imposed income restrictions (*Montaup Electric Co. v. Board of Assessors of Whitman*, 390 Mass. 847, 852 (1984)); and the separate valuation of property subject to a coastal wetlands restriction under G.L. c. 130, § 105, an inland wetlands restriction under G.L. c. 131, § 40A, or a conservation restriction under G.L. c. 184, § 31. *See also, Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee*, 379 Mass. 420, 422 (1980) (“[R]estrictions on the use of property may reduce its value below that which would be appropriate in the absence of such restrictions.”) (citing *Lodge*, 216 Mass. at 263); *see also Parkinson v. Board of Assessors of Medfield*, 398 Mass. 112, 116 (1986)).

Under the facts of the instant appeal, the appellants gratuitously granted a restriction to their neighbor, which benefited the appellants by securing privacy for their home, a privacy which they already enjoyed by virtue of their ownership of the extra lot. Whatever agreements or other arrangements which may have been made between the appellants and their neighbor concerning the restriction have no bearing on the valuation of the extra lot for tax purposes. *See Paine*, 297 Mass. at 177 (quoting *Milligan v. Drury*, 130 Mass. 428, 430 (1881)) (“In making an assessment the ‘assessors were not obliged to inquire into the private contracts between the parties.’”). On this record, the appellants failed to establish that their granting of the restriction at issue in this appeal had an adverse impact on their use and enjoyment of the subject property. The Board therefore found and ruled that the grant of restriction had no bearing on the fair cash value of the subject property for real estate tax purposes. To rule otherwise would allow appellants to artificially depress the value of their property by creating an illusory restriction which has no effect on their use and enjoyment of the subject property, a result in conflict with the above-cited authorities. The Board thus rejected Mr. Marchant’s analysis and instead adopted Mr. Neas’ credible analysis whereby he disregarded the grant of restriction and determined that \$1,000,000 was the fair cash value of the extra

lot.

On the basis of its findings, the Board calculated a total value of \$4,300,000 for the entire 4.57-acre subject property. Accordingly, the Board issued a revised decision in favor of the appellant abating the real estate taxes on the subject property in the total amount of \$2,080.40.<sup>8</sup>

**APPELLATE TAX BOARD**

**By:** \_\_\_\_\_  
**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

**Attest:** \_\_\_\_\_  
**Clerk of the Board**

---

<sup>8</sup> See *supra*, note 7.

Leicester School Committee v. Town of Leicester et al.

Opinion No.: 113510, Docket Number: 2010-01396-D

SUPERIOR COURT OF MASSACHUSETTS, AT WORCESTER

27 Mass. L. Rep. 467; 2010 Mass. Super. LEXIS 289

October 22, 2010, Decided

October 26, 2010, Filed

**JUDGES:** [\*1] Richard T. Tucker, Justice of the Superior Court.

**OPINION BY:** Richard T. Tucker

**OPINION**

**FINDINGS, RULINGS AND ORDER FOR JUDGMENT**

The plaintiff, Leicester School Committee (School Committee) seeks in its Complaint injunctive and declaratory relief as well as relief in the form of mandamus against the defendants Town of Leicester (Town), the Leicester Town Accountant, Sandra Buxton (Buxton or Town Accountant), and the Leicester Treasurer and Tax Collector, Deborah J. Kristoff (Kristoff or Treasurer). The gravamen of this action is the School Committee's attempt to use funds available from its Fiscal Year 2010 budget towards prepayment of special education services (SPED), including summer school tuitions for Leicester special needs students during Fiscal Year 2011. The School Committee states that such prepayment of services is explicitly within their power and authorization under *G.L.c. 40, § 4E* and *G.L.c. 71, § 71B*.

The Town, through its Treasurer and Town Accountant have refused to appropriate said funds as sought and argue that prepayment is inappropriate in that the School Committee has never submitted bills or vouchers as are statutorily required for the payment of any public bill. Moreover, the Town [\*2] maintains in its memorandum that prepayment would violate the "clear and overarching statutory requirements relating to the payment of bills within fiscal years and ordering unexpended funds to return to the General Fund to be further appropriated by the voter/tax payer." Lastly, having no shortfall in its budget, the Town argues that the School Committee certainly cannot demonstrate irreparable harm as it was granted full appropriation for its Fiscal Year 2011 budget at the May 2010 town meeting.

The amount in issue of the anticipated prepayment is estimated to be \$ 419,624.82 and represents a significant amount, both in relation to the School Committee's overall operation, as well as the general finances of the Town.

Trial was held before me sitting without a jury on August 18 and August 19, 2010, after which the parties

were granted until September 10, 2010 for submission of additional memoranda. Trial testimony was submitted by the Leicester Superintendent of Schools, Paul Soojian, the Director of Finance and Operations, Christine Johnson, the Leicester Town Accountant, defendant Sandra Buxton and the Leicester Town Administrator Robert Lee.

Upon the testimony that I find to be credible, [\*3] the review of the exhibits offered at trial and the oral arguments and written memoranda of counsel for the parties, I find and rule as follows.

**FINDINGS OF FACT**

I make the following findings of fact generally, reserving additional specific findings for the discussion of the issues:

(1) the School Committee is obligated to provide special education services for its special needs students pursuant to *G.L.c. 71B* (STIPULATED BY BOTH PARTIES);

(2) the School Committee is a member of the Southern Worcester County Educational Collaborative, which was created pursuant to *G.L.c. 40, § 4E* and *G.L.c. 71B* to provide special education programs and services for its members (STIPULATED BY BOTH PARTIES);

(3) the Southern Worcester County Collaborative Board ("Collaborative Board") determines the overall administrative and program costs and the mandated contributions of each Member Town and District, including the School Committee. The Collaborative Agreement requires the School Committee to pay its proportionate share of program costs and its equal share of administrative costs annually. The School Committee must have its annual share paid as follows: (1) twenty-five (25%) percent on or before July 1; [\*4] (2) fifty (50%) percent on or before October 1; (3) seventy-five (75%) percent on or before January 1; and (4) one hundred (100%) percent on or before April 1 (STIPULATED BY BOTH PARTIES);

(4) in addition, the School Committee is required to pay program costs to the Collaborative Board for a summer session for special needs students, extending from July 1 through August 31 annually. The School Committee must pay program costs for the summer session on or before July 1 (STIPULATED BY BOTH PARTIES);

(5) Aside from the \$ 203,000.00 that the School Committee agreed to return to the Town's General Fund at the end of Fiscal Year 2010, the School Committee's Fiscal Year 2010 budget currently has between \$ 352,807.00 and \$ 464,440.00 remaining in unexpended and unencumbered funds, depending upon whether \$ 109,633.00 in so-called Circuit Breaker reimbursements are charged to a special education appropriated line item or placed in a special education revolving fund. The School Committee intended to use these unexpended funds from its Fiscal Year 2010 budget toward prepayment of special education services in Fiscal Year 2011 (STIPULATED BY BOTH PARTIES);

(6) On June 7, 2010, the School Committee [\*5] voted to authorize the expenditure from available funds in its Fiscal Year 2010 budget to prepay special education services for Fiscal Year 2011 (STIPULATED BY BOTH PARTIES);

(7) Any unspent and unencumbered amounts remaining in the School Committee's Fiscal Year 2010 budget will be returned to the Town's General Fund, in the absence of the Order entered by the Court on June 30, 2010 (STIPULATED BY BOTH PARTIES);

(8) Amounts transferred to the Town's General Fund cannot be expended absent an appropriation by town meeting, the Town's local legislative and appropriating body (STIPULATED BY BOTH PARTIES).

(9) The School Committee budgets for Fiscal Year 2010 and Fiscal Year 2011 were fully funded and approved at the corresponding May town meetings prior to the start of each fiscal year.

(10) The tax rates are set by the Town based on the actual operating expenses incurred during the fiscal year period.

(11) In the past three fiscal years, prepayment of School Committee obligations were permitted: in Fiscal Year 2009 - \$ 17,000.00 in prepayments; in Fiscal Year 2008 - \$ 340,000.00 in prepayments; and in 2007 - \$ 156,000.00 in prepayments.

(12) In December of 2009 the Town and its departments [\*6] had numerous discussions regarding budget cuts and fiscal restraints resulting from the downturn in the economy. At discussions with the School Committee it was agreed that the School Committee would return \$ 203,000.00 to the Town from its Fiscal Year 2010 budget in an effort to combat an anticipated Town deficit and avoid layoffs. No agreement was made at that time that in exchange for this \$ 203,000.00 being returned to the Town, the School Committee could prepay services to be provided in Fiscal Year 2011 from funds remaining from the Fiscal Year 2010 budget.

(13) At the June 2, 2010 meeting, the Leicester Board of Selectmen voted to direct the Town Accountant and Town Treasurer not to approve prepayment of SPED summer services if such requests did not comply with the Department of Revenue regulations relating to there being a vendor contract in existence requiring prepayment and there being no prepayment of services which would result in the payment of more than four quarters of services for any student within a single fiscal year.

(14) In regard to the prepayments in issue, the Town Accountant requested of the School Committee supporting written contracts to determine whether prepayment [\*7] was required by the vendors in said contracts.

(15) The contracts of the vendors for Summer SPED Services did not contractually require prepayment.

(16) All of the bills in question relate to the prepayment from funds from the Fiscal Year 2010 School Budget for services to be provided in Fiscal Year 2011 (after 7.1.10). The payment of all these bills was funded in the Fiscal Year 2011 School Committee Budget approved at town meeting in May 2010.

(17) Although the bills for the prepayment of SPED summer services were submitted after the due date for the receipt of all final Fiscal Year 2010 bills by the School Committee, this was not an unusual occurrence nor the reason for the disapproval of the prepayments by the Town and Town Accountant. Prepayment of bills was disapproved based upon (1) the Town's belief that payment in one fiscal year for services to be provided in a later fiscal year violates Department of Revenue regulations; (2) the Town was not provided with the contracts of vendors providing summer services that required prepayment; and (3) the Town claimed not to be able to discern whether prepayment would result in payment of more than twelve months (four quarters) of services [\*8] in any one fiscal year for any student in violation of Department of Revenue regulations.

#### DISCUSSION: RULINGS OF LAW AND ORDER FOR JUDGMENT

The School Committee maintains that its authority to prepay for SPED services is set forth by statute, *G.L.c. 71, § 71D*, and by the case law as set forth in *School Committee of Wilmington v. Town Accountant of Wilmington*, 19 Mass. App. Ct. 964, 473 N.E.2d 1146 (1985). Section 71D of Chapter 71 of the General Laws provides:

*Section 71D.* A school committee of any city, town, or regional school district may authorize the prepayment of tuition for a period not exceeding three months to any approved private school or approved pro-

gram source which a student is attending under the provisions of chapter seventy-one B, and the city, town or regional school district treasurer shall be required to approve and pay such monies in accordance with the authorization of the school committee.

While the statute appears to expressly permit the prepayment of three months of tuition for *Chapter 71B* students (students with special needs), the Town argues that it does not expressly permit the prepayment for services to be received in a future fiscal year. The School Committee argues that crossing [\*9] the fiscal year boundaries is implicit in the authorization of prepayment of services and that the statute clearly does not restrict when such prepayments may be made.

The Town further argues that *G.L.c. 71, § 34* provides that "no . . . town shall be required to provide more money for the support of the public schools than is appropriated by vote of the legislative body of the . . . town." Since the approval of the Fiscal Year 2011 School Committee budget includes the payment of the billing for these Fiscal Year 2011 services, their prepayment with Fiscal Year 2010 funds results, it is alleged, in a violation of *section 34*. Additionally, *G.L.c. 41, § 56* permits the approval for payment of bills by the Town for services if "the services were actually rendered to or for the town as the case may be . . ." Lastly, the defendants rely on an advisory opinion rendered by the Department of Revenue that the annual operating budget of a town is intended to pay that fiscal year's operating expenses, not expenses attributable to obligations of a prior or subsequent year:

We don't think there is a right to encumber funds from one fiscal year's budget to pay SPED bill of the following fiscal year. [\*10] *Ch.71 § 71D* allows the prepayment of up to 3 months worth of tuition to SPED providers, which creates an exception to the general rule of *Ch.41, § 56* that bills cannot be paid before goods have been delivered or services provided. That prohibition could raise serious cash-flow problems for some SPED providers which *§ 71D* allows a municipality to avoid. *Nothing in § 71D suggests that it is intended to allow transfers between different fiscal years' budgets, or to authorize the payment of more than 12 months worth of SPED tuition for any student.*

End-of-fiscal year encumbrances are used to insure that appropriation balances

for goods or services for which the town has not yet been billed in the current fiscal year remain available to pay those obligations. In the case of prepayments of SPED tuitions under *§ 71D*, if the *contract* with the SPED vendor does not require a prepayment by June 30, *there is no basis for encumbering*, because the services relate to the following fiscal year. In such a case, the schools can make the contract before June 30 based upon the following year's appropriation. *Ch.71 § 49A, § 71D* only becomes relevant if the payment is due before July 1, which could not be [\*11] done under the authority of *§ 49A*. (Emphasis original.)

DOR Opinion as set forth by Daniel J. Murphy, Tax Counsel, Bureau of Municipal Finance Law, August 12, 2009.

Despite these statutory and regulatory provisions, the case law interpreting a school committee's right to prepayment for services had decidedly gone against the Town's position. In *School Committee of Wilmington v. Town Accountant of Wilmington, 19 Mass.App.Ct. 964, 473 N.E.2d 1146 (1985)*, the Appeals Court upheld a Superior Court judge whose order declared that the school committee was "authorized to spend sums appropriated for its fiscal year 1983 budget on items which will be used by the . . . schools in later fiscal years . . ." *Id. at 964*. If purchase orders were delivered to the Town Accountant during the 1983 Fiscal Year it shall be charged to Fiscal Year 1983 even though the purchase orders were for materials to be used in Fiscal Year 1984. *Id. at 964-65*. The *Wilmington* court expressly held that such a result was consistent with *G.L.c. 71, § 34*. Although *§ 34* provides that towns are not required to provide more funding of schools than is appropriated by the vote of the legislative body of the town, the *Wilmington* court emphasized [\*12] the statute's additional provision that said vote of the legislative body shall establish only the total appropriation for the public schools "but may not limit the authority of the school committee to determine expenditures within the total appropriation."

Historically, school committees generally "have enjoyed the authority to use funds appropriated for school purposes as they see fit 'even to the extent of diverting sums specifically allocated in the budget from one use to another.'" *Id. at 704* citing *Fitchburg Teachers Ass'n v. School Committee of Fitchburg, 360 Mass. 105, 108, 271 N.E.2d 646 (1971)*; *Collins v. Boston, 338 Mass. 704, 708-09, 157 N.E.2d 399 (1959)*.

Statute 1980, c. 580, commonly known as "Proposition 2 1/2," changed the historical fiscal autonomy of

school committees and limited school committees funding to that which was appropriated by the local appropriating authority, which change is now reflected in *G.L.c. 71, § 34. Superintendent of Schools v. Mayor of Leominster*, 386 Mass. 114, 115, 434 N.E.2d 1230 (1982). School committees retain, however, "the authority to determine expenditures within the total appropriation." *Id. at 119* citing *School Comm. of Boston v. Boston*, 383 Mass. 693, 705, 421 N.E.2d 1187 (1981).

In the instant [\*13] action I find that, notwithstanding the opinion of the Department of Revenue, nothing in the case law or the provisions of *G.L.c. 71, § 71D* prohibits the Leicester School Committee from making prepayment from Fiscal Year 2010 funds for services that will be received and completed during the first three months of Fiscal Year 2011. In doing so the School Committee is exercising its broad authority to determine expenditures from its Fiscal Year 2010 budget. Not being prohibited by law, I find and rule that the Leicester School Committee may prepay with funds from the Fis-

cal Year 2010 budget up to three months of SPED services or tuition to be received during Fiscal Year 2011.

#### ORDER FOR JUDGMENT

Judgment shall enter in favor of the plaintiff, the Leicester School Committee as follows:

A mandatory injunction shall enter ordering the Town of Leicester, acting through its Town Accountant, Town Treasurer and Tax Collector to make prepayments for special education services received during the first three months of Fiscal Year 2011 using funds available from the School Committee Fiscal Year 2010 budget, which funds were the subject of a preliminary injunction dated June 30, 2010 as modified by [\*14] order dated August 18, 2010.

Claims for all other relief sought are dismissed.

DATED: October 22, 2010

Richard T. Tucker

Justice of the Superior Court

SUPERIOR COURT OF MASSACHUSETTS, AT WORCESTER

27 Mass. L. Rep. 591; 2010 Mass. Super. LEXIS 339

December 20, 2010, Decided

December 23, 2010, Filed

**PRIOR HISTORY:** *Richardson v. Blackstone Bd. of Selectmen*, 2010 Mass. Super. LEXIS 93 (Mass. Super. Ct., Apr. 13, 2010)

**JUDGES:** [\*1] John T. Lu, Justice of the Superior Court.

**OPINION BY:** John T. Lu

**OPINION**

*MEMORANDUM OF DECISION AND ORDER ON MOTION FOR OFFSET OF DAMAGE AWARD*

I. INTRODUCTION

Following a non-jury trial, the plaintiffs, heirs of the former landowners (Heirs), established a collective one-half interest in a fifteen-acre parcel of land, which on December 9, 2003, the Town of Blackstone (Town) took by eminent domain. As compensation for the taking, the court awarded the Heirs half of the fair value of the property or \$124,000. The Town now moves pursuant to *G.L.c. 79, §44*, to offset the amount of the award for unpaid real estate taxes on the property.

Where the court is not aware of any authority directly on point, the court determines that the Heirs are responsible for the entire unpaid real estate tax bill, not just that portion attributable to their half of the value of the land, and the court determines that the Heirs are likewise responsible for interest on the unpaid taxes.

II. DISCUSSION

From 1984 until the taking, the Town assessed real estate taxes on the property to "owners unknown" in accordance with *G.L.c. 59, §11*. At the time of the taking, the Town held a tax lien on the property in the principal amount of outstanding [\*2] taxes, \$51,238.66, plus \$75,875.83 in statutory interest. The Heirs contest the amount owed on two grounds. First, they argue that half of the unpaid taxes should be credited against the half of the taking award that belongs to the heirs of James Paine. Second, they argue that the offset should be

limited to the principal amount only and should not include accrued interest.

As to their first argument, the Heirs do not dispute that the Town has authority to collect one hundred percent of the outstanding taxes from any one of several owners where property is held in common. See *G.L.c. 60, §56*; *Curtiss v. Inhabitants of Sheffield*, 213 Mass. 239, 245, 100 N.E. 365 (1913).

They also acknowledge that there is a right of contribution against co-owners in the event the full tax liability is offset against their award. See *Fiske v. Quint*, 274 Mass. 169, 173-74, 174 N.E. 196 (1931); *Ratte v. Ratte*, 260 Mass. 165, 168, 156 N.E. 870 (1927). The Heirs argue, however, that it would be inequitable to require them to pursue a contribution claim where the Town can offset half of the tax liability from the remaining portion of the taking award, which the Heirs contend will escheat to the Commonwealth pursuant to *G.L.c. 200A* [\*3] if it goes unclaimed.

The Heirs rely on *Eldredge v. Selectmen of Brewster*, 18 Mass.App.Ct. 502, 507, 468 N.E.2d 286 (1984) ("The taking authority is bound to part with the award . . . either to a party proving entitlement to the award . . . or to the Commonwealth under *G.L.c. 200A*"). Although *Eldredge* supports the proposition that the Town must account for the unpaid portion of the taking award, it does not address the possibility of apportioning tax liability under *G.L.c. 79, §44A*, as the Heirs propose. In the absence of some authority that directly supports the Heirs' position, the court concludes that the Town may offset the full amount of the tax liability against the Heirs' award, leaving the Heirs with a right of contribution. This court is not entitled to dispense with the requirement that, as the Heirs suggest, they amend their complaint or pursue a separate action to recover the value of funds held by the state treasurer on behalf of the heirs of James Paine. The Heirs' argument has some merit, but in the absence of some authority for the plaintiff's position the court is unwilling to adopt it.

The Heirs' second argument, that accrued interest should be excluded from the tax liability, also [\*4] lacks support. The Heirs contend that

pursuant to *G.L.c. 59, §77*, the Town should issue a "corrected" tax bill now that the actual owner has been determined. *Section 77*, however, applies only where an assessment "is invalid by reason of error or irregularity," and in this case, the assessments were valid. The Board of Assessors could not determine the owner of the property through the exercise of reasonable diligence and the Department of Revenue authorized the Town to assess the property to owners unknown. See *G.L.c. 59, §11* (para. 3); *Hardy v. Jaeckle*, 371 Mass. 573, 580, 358 N.E.2d 769 (1976) (summarizing statutory requirements for the assessment of real estate taxes to owners unknown). Given the validity of the assessment, the Town is entitled to collect the amount of its unpaid lien, including accrued interest, pursuant to *G.L.c. 79, §44A* and *G.L.c. 60, §93*. *Section 44A* provides that prior to the payment of a taking award, the collector of taxes is entitled to be paid the amount of "any lien for taxes, assessments or other charges, which is extinguished by such taking." The court construes the term "other charges" as used in the statute to include charges for interest. *General Laws c. 60, §93* [\*5] parallels *G.L.c. 79, §44A*, in that it provides a statutory setoff procedure. See *Decota v. Stoughton*, 23 Mass.App.Ct. 618, 619-21, 504

*N.E.2d 672, 505 N.E.2d 721 (1987)* (remedy provided under *G.L.c. 60, §93* is cumulative of other tax collection remedies). *Section 93* requires a municipality to "withhold payment of any money payable to any person from whom there are then due taxes . . . to an amount not to exceed the total of the unpaid taxes, assessments, rates and other charges, with interest and costs."

Nothing in the facts of this case suggests to the court that it should adopt the Heirs' position, which would amount to a discount on the Heirs' real estate taxes.

### III. ORDER

The defendants' motion for offset of the plaintiffs' damage award for unpaid real estate taxes (paper #39) is *ALLOWED*. The defendants are entitled to offset the plaintiffs' award by the amount of unpaid taxes, interest and charges, totaling \$127,114.49, as set forth in the affidavit of the Treasurer for the Town of Blackstone.

John T. Lu

Justice of the Superior Court

DATED: December 20, 2010

