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

**Current Developments  
in  
Municipal Law**



**2012**

**Appellate Tax Board Cases**

**Book 2A**

**Amy A. Pitter, Commissioner  
Robert G. Nunes, Deputy Commissioner**

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# APPELLATE TAX BOARD CASES

## Book 2A

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**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**AMB FUND III v.**

**BOARD OF ASSESSORS OF  
THE CITY OF BOSTON**

Docket Nos.:F286004, F289174,  
F297264, F300445

Promulgated:  
November 17, 2011

**ATB 2011-969**

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 Board of Assessors of the City of Boston (“assessors” or “appellee”), to abate real estate taxes assessed on certain real property located in Boston, assessed to appellant AMB Fund III (“AMB” or “appellant”), under G.L. c. 59, § 11 for fiscal years 2006, 2007, 2008, and 2009 (“fiscal years at issue”).

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

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

*John M. Lynch, Esq. and Stephen W. DeCoursey, Esq. for the appellant.  
Anthony M. Ambriano, Esq. for the appellee.*

**FINDINGS OF FACT AND REPORT**

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

**I. Introduction**

At issue in these appeals was the taxability of certain real property owned by the Massachusetts Port Authority (“Massport”) and leased to the appellant during the fiscal years at issue. The appellant was a limited liability company organized under the laws of the State of Delaware. On January 22, 2004, the appellant acquired a leasehold interest in a property known as the International Cargo Port, located at 88 Black Falcon Avenue in Boston (“subject property”). The subject property is located in South Boston in an area known as the Commonwealth Flats, which is an area consisting of former tidal lands that were filled-in and developed in the nineteenth and twentieth centuries. The subject property consists of approximately 10.52 acres of land improved with several buildings with a total rentable area of 376,267 square feet. It is also improved with 555 parking

spaces.

The appellant acquired its leasehold interest from International Cargo Port – Boston, L.L.C. (“ICP”), which had previously leased the subject property from Massport. The appellant in turn subleased the subject property to numerous tenants, all but three of which were for-profit businesses. The appellant’s three non-profit tenants were A Better Chance, which was a non-profit educational organization, the United States Customs Service, and United States Representative Stephen F. Lynch, who sublet office space at the subject property.

## II. Jurisdiction and Procedural History

For the fiscal years at issue, the assessors valued and assessed taxes on the subject property as set forth in the following table:

<b>Fiscal Year</b>	<b>Assessed Valuation</b>	<b>Tax Rate</b>	<b>Total Taxes Assessed</b>
2006	\$29,203,000	\$30.70	\$896,532.10
2007	\$31,973,500	\$26.87	\$859,127.95
2008	\$35,059,500	\$25.92	\$908,742.24
2009	\$35,059,500	\$27.11	\$950,463.05

The appellant paid the real estate taxes assessed on the subject property without incurring interest. The appellant thereafter timely filed Applications for Abatement with the assessors. The following chart contains the dates of filing of the Applications for Abatement, the dates on which they were denied by the assessors, and the dates of filing of the appellant’s appeals with the Board.

<b>Fiscal Year</b>	<b>Abatement Application Filed</b>	<b>Abatement Application Denied</b>	<b>Petition Filed</b>
2006	2/1/06	3/29/06	6/27/06
2007	2/1/07	3/05/07	6/05/07
2008	2/1/08	4/01/08	6/26/08
2009	2/2/09 <sup>1</sup>	2/27/09	5/26/09

The appellant subsequently filed amended petitions with the Board on February 24, 2009. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

The appellant’s primary claim in these appeals was that the subject property was

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<sup>1</sup> Under G.L. c. 59, § 59, the appellant’s Application for Abatement would have been due on February 1, 2009. However, February 1, 2009 was a Sunday. When the last day of a filing period falls on a Saturday, Sunday or legal holiday, the filing is still considered timely if it is made on the following business day. G.L. c. 4, § 9.

exempt from taxation. It originally asserted several grounds for its exemption claim (“exemption claim”), but later conceded that St. 1956, c. 465, § 17 (“Section 17”) which is a section of Massport’s enabling act (“enabling act”), alone controlled the taxation of the subject property, and abandoned its other arguments for exemption.

The appellant additionally sought an abatement on the ground that the assessed value of the subject property exceeded its fair cash value for the fiscal years at issue (“valuation claim”). By Order dated February 4, 2009, the Board bifurcated the appellant’s valuation and exemption claims for hearing, with the hearing of the exemption claim to proceed first.

The Board issued an Order in which it found that the subject property was taxable during the fiscal years at issue. Subsequently, the parties submitted a Stipulation in which they resolved the valuation issue by agreeing that the assessed value of the subject property did not exceed its fair cash value for each of the fiscal years. The parties also requested that the Board enter a decision in these appeals. Having made its finding that the subject property was subject to tax, and because the parties stipulated that the subject property was not overvalued for the fiscal years at issue, the Board issued decisions for the appellee in these appeals.

### **III. The Exemption Claim**

#### **A. The Creation of Massport and its Acquisition of the Subject Property**

Massport was created by Chapter 465 of the Acts and Resolves of 1956 in order to consolidate multiple transportation facilities under the direction of one, self-supporting body politic and corporate. These transportation facilities included Logan Airport, Hanscom Field, the Mystic River Bridge, the Sumner Tunnel, and facilities previously held by the Port of Boston Commission. By the terms of the enabling act, Massport would not take title to these properties until it had issued revenue bonds to fund its property acquisitions. Thus, Massport did not take title to these properties until 1959. The enabling act also granted Massport the power to acquire additional properties in the future.

The subject property was part of a parcel of land conveyed by the Commonwealth to the United States by deed dated April 23, 1918. Following its determination that the parcel was surplus land, the United States conveyed the parcel, including the subject property, to Massport by deed dated August 11, 1988. On May 20, 1999, Massport leased the subject property to ICP under a ground lease with a 50-year term. On January

22, 2004, ICP assigned its entire leasehold interest in the subject property to the appellant. The appellant held the leasehold interest in the subject property from January 22, 2004 through the fiscal years at issue.

The subject property was not taxed from 1918 to 1988, while it was owned by the United States. It was also classified as exempt by the assessors from the time of its acquisition by Massport in 1988 through 2004. Lowell Richards III, Chief Development Officer for Massport, testified at the hearing of these appeals that the appellant was not identified by Massport as a tenant responsible for payment of property taxes during the fiscal years at issue. The appellant also introduced lists and other records maintained by Massport showing that the appellant was not identified by Massport as a tenant responsible for the payment of property taxes during this time period. In 2005, the assessors reclassified the subject property as non-exempt property and began assessing taxes thereon.<sup>2</sup>

#### **B. Section 17 of the Enabling Act**

As originally enacted, Section 17 provided, in relevant part, that:

[L]ands of the Authority, except lands acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one, situate in that part of the city called South Boston and constituting a part of the Commonwealth Flats, and lands acquired by the Authority which were subject to taxation on the assessment date next preceding the acquisition thereof, shall, if leased for business purposes, be taxed by the city or by any city or town in which the said land may be situated to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee[.]

The property “acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one” was a parcel of land then known as the Castle Island Terminal Facility (“Castle Island Terminal”).<sup>3</sup> The Castle Island Terminal was located in South Boston, within the Commonwealth Flats. Prior to 1951, the Castle Island Terminal had been exempt from property taxes because it was owned by the United States. St. 1951, c. 705, which authorized the acquisition of the Castle Island Terminal by the Port of Boston Authority, continued this exemption by expressly prohibiting the City of Boston (“City”) from assessing property taxes on that

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<sup>2</sup> The assessors issued an omitted real estate tax bill to the appellant for fiscal year 2005, but the taxes assessed for that fiscal year were later abated in full pursuant to a settlement agreement between the parties. Therefore, the appellant’s tax liability for fiscal year 2005 is not at issue in these appeals.

<sup>3</sup> The evidence indicated that it is now known as the Conley Marine Terminal.

property, even if it was leased for business purposes. St. 1951, c. 705, § 2. Thus, Section 17 carved out two exceptions to the general exemption from tax for Massport-owned properties. Under the first exception (“first exception”), Massport properties located within the Commonwealth Flats, except for the Castle Island Terminal, would be taxable if leased for business purposes, and under the second exception (“second exception”), properties that were taxable prior to their acquisition by Massport would be taxable if leased for business purposes.

Minor amendments were made to Section 17 by St. 1978, c. 332, § 2, although its text remained substantially the same. As amended, it provided, in pertinent part:

[L]ands of the Authority, except lands acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one situated in that part of the city called South Boston and constituting a part of the Commonwealth Flats, and lands acquired by the Authority which were subject to taxation on the assessment date next preceding the acquisition thereof, shall, if leased for business purposes, be taxed by the city or by any city or town in which the said land may be situated to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee[.]  
G.L. c. 91, App. § 1-17.

As can be seen by comparing Section 17 as originally drafted and as amended by St. 1978, c. 332, § 2, the only change made by the amendment was the removal of a comma after “fifty-one” and the addition of the letter “d” to the word “situate.”

### **C. The Taxation of the Subject Property**

The issue in these appeals was primarily one of statutory interpretation. The appellant contended that the subject property was not taxable under Section 17, either as originally enacted or as amended, because its first exception, the appellant argued, applied to only those properties located in the Commonwealth Flats that Massport took title to in 1959, and not properties acquired later, like the subject property. It was the appellant’s position that the subject property was not located in the “part” of the Commonwealth Flats referred to in Section 17, because that “part” referred to only the properties acquired by Massport in 1959. In other words, the appellant interpreted Section 17’s first exception to have both a geographic and temporal limitation.

The appellant’s argument regarding the first exception was based largely on the legislative history of the enabling act, including earlier drafts of the enabling act that were not enacted and the following recommendation from the Special Commission:

The city of Boston claims the right to tax the state-owned Commonwealth Flats in South Boston whenever they are leased for business purposes, the tax being assessed to the lessee and the right to enforce collection being limited to rights against the lessee and the leasehold interest only. . .

A question has recently been raised, however, as to whether Boston still has the right to tax Commonwealth Flats which are under the jurisdiction of the Port of Boston Commission, and the matter is being litigated in the courts.

Your Commission recommends that the city of Boston be allowed to continue to tax in the limited manner referred to those areas of the flats which it had the right to tax *at the time of transfer* (exclusive of Commonwealth Pier No. 5) to the recommended Massachusetts Port Authority. (Emphasis added).

The appellant asserted that the legislative history of the enabling act, including the Special Commission's recommendations, make it clear that Section 17's first exception was intended to apply only to those properties located in the Commonwealth Flats that Massport took title to in 1959. The appellant also pointed to the language of Section 17's second exception as additional support for its construction of the first exception. According to the appellant, the Legislature's use of the phrase "lands of the Authority" in the first exception indicated its intent to limit the application of the first exception to those properties transferred to Massport via the enabling act, while the Legislature's use of the phrase "lands *acquired by* the Authority" in the second exception indicated its intent to address properties acquired by Massport thereafter. (Emphasis added).

In further support of its argument, the appellant introduced evidence, including the testimony of Mr. Richards and various records maintained by Massport, indicating that Massport did not consider or treat the subject property as being among its taxable Commonwealth Flats properties. Similarly, the appellant argued, the assessors themselves had classified the subject property as exempt from the time it was acquired by Massport in 1988 through 2004. The appellant pointed to these facts as further evidence that the subject property was exempt from tax under Section 17.

The appellant also pointed to the Payment In Lieu of Taxes ("PILOT") agreement entered into between the City and Massport in 1978.<sup>4</sup> Under the terms of the PILOT agreement, Massport was to make annual payments to the City which would reflect both

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<sup>4</sup> The PILOT agreement was amended and restated in 1995.

Massport's reliance on City services and the benefits derived by the City from Massport's services. The PILOT agreement also stated that Massport's annual payment would be adjusted in proportion to any new or additional taxes levied by the City on Massport properties. The parties stipulated that payments made by Massport under the PILOT agreement were not reduced during the fiscal years at issue despite the fact that the assessors assessed taxes on the subject property. The appellant proffered this fact as further evidence that the assessors improperly assessed taxes on the subject property for the fiscal years at issue.

Lastly, the appellant contended that the subject property was not taxable under Section 17's second exception, which applies to properties that were taxable prior to their acquisition by Massport, because the subject property was previously exempt from tax as property of the United States.

The Board was not persuaded by the appellant's evidence or by its statutory interpretations. The assessors' prior classification of the subject property as exempt, the PILOT agreement, and Massport's opinion concerning which of its properties were taxable by the City were not persuasive indicators of whether the subject property was exempt from tax during the fiscal years at issue, and the Board therefore gave that evidence little weight. Similarly, and as discussed further in the Opinion below, the Board found that the appellant's arguments regarding Section 17's first exception were contrary to the plain language of the statute and relevant legal precedent, and the Board therefore rejected those arguments.

On the basis of all of the evidence, the Board found that Section 17's first exception applied to all properties located within the Commonwealth Flats, other than the Castle Island Terminal, if leased for business purposes, and not just to those properties that Massport took title to in 1959. The Board additionally found that the subject property was located in the Commonwealth Flats for the purposes of Section 17 and that it was leased for business purposes. Although three of AMB's sub-lessees were government or non-profit entities, the Board found that the subject property was leased for business purposes because AMB was a for-profit entity which leased the subject property for its business purposes.

Having found that the subject property was located within the Commonwealth Flats and leased for business purposes, the Board therefore found that the subject property was taxable by the City under Section 17. Because the Board concluded that the

subject property was taxable under Section 17's first exception, it found that Section 17's second exception did not control the outcome in these appeals.

Based on the foregoing subsidiary facts, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was exempt from tax during the fiscal years at issue. Having resolved the exemption claim in favor of the assessors, and because the parties stipulated that the assessed value of the subject property did not exceed its fair cash value for the fiscal years at issue, the Board issued decisions for the appellee in these appeals.

### OPINION

All property, real and personal, situated within the Commonwealth is subject to local tax unless expressly exempt. G.L. c. 59, § 2. Exemptions from taxation are a privilege, and statutes granting such exemptions are strictly and narrowly construed. *See e.g. Milton v. Ladd*, 348 Mass. 762, 765 (1965); *see also Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 717 (1944) (“Exemption from taxation is a matter of special favor or grace.”). Statutes specifying the tax treatment of particular property supersede more general tax statutes. *See Cabot v. Assessors of Boston*, 335 Mass. 53, 63-65 (1956). In the present appeals, the Board found that the specific statute at issue, Section 17, did not exempt the subject property from tax.

As originally enacted, Section 17 provided, in pertinent part, that: lands of the Authority, except lands acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one, situate in that part of the city called South Boston and constituting a part of the Commonwealth Flats, and lands acquired by the Authority which were subject to taxation on the assessment date next preceding the acquisition thereof, shall, if leased for business purposes, be taxed by the city or by any city or town in which the said land may be situated to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee[.]

The property “acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one” was a parcel of land then known as the Castle Island Terminal. The Castle Island Terminal had previously been exempt from taxes because it had been owned by the United States. St. 1951, c. 705, which authorized the acquisition of the Castle Island Terminal by the Port of Boston Authority, continued this exemption by expressly prohibiting the City from assessing property taxes on that property, even if it was leased for business purposes. St.

1951, c. 705, § 2. Thus, Section 17 provided that Massport properties located within the Commonwealth Flats, except for the Castle Island Terminal, and Massport properties that were taxable prior to their acquisition by Massport, would be taxable to lessees thereof if leased for business purposes.

Minor amendments were made to Section 17 by St. 1978, c. 332, § 2, although its text remained substantially the same. As amended, it provided, in pertinent part, that:

[L]ands of the Authority, except lands acquired by the commonwealth under the provisions of chapter seven hundred and five of the acts of nineteen hundred and fifty-one situated in that part of the city called South Boston and constituting a part of the Commonwealth Flats, and lands acquired by the Authority which were subject to taxation on the assessment date next preceding the acquisition thereof, shall, if leased for business purposes, be taxed by the city or by any city or town in which the said land may be situated to the lessees thereof, respectively, in the same manner as the lands and the buildings thereon would be taxed to such lessees if they were the owners of the fee[.]

It was the appellant's contention in these appeals that the exceptions to the general exemption from tax for properties owned by Massport contained in Section 17 were not applicable to the subject property. The appellant argued that the first exception contained in Section 17 – both as originally enacted and as amended by St. 1978, c. 332, § 2 – did not apply because it applied only to properties located within the Commonwealth Flats that Massport took title to in 1959. Additionally, the appellant argued that the second exception did not apply because the subject property was not taxable prior to its acquisition by Massport.

The Board disagreed with the appellant's argument concerning the first exception. Much of that argument was based on the legislative history of the enabling act, but the Board found and ruled that the appellant's use of legislative history to buttress its argument was misplaced. Inquiries into a statute's legislative history may be made only when the words of the statute are ambiguous. See *Welch v. Sudbury Youth Soccer Assoc., Inc.*, 453 Mass. 352, 355 (2009) (“Where . . . the language of a statute is clear and unambiguous, it is conclusive as to the intent of the Legislature.”). The Board found no ambiguity in the language of Section 17. Moreover, assuming *arguendo* that such an ambiguity existed, the Board found that the legislative history cited by the appellant – the Special Commission's recommendations - failed to support its argument. The Special Commission noted that the “city of Boston claims the right to tax the state-owned Commonwealth Flats in South Boston whenever they are leased for business purposes,”

and went on to recommend “that the city of Boston be allowed to continue to tax in *the limited manner referred to* those areas of the flats which it had the right to tax *at the time of transfer.*” (Emphasis added). The appellant asserted that this piece of legislative history reflected the Legislature’s intention that Section 17’s first exception apply to only those properties transferred to Massport in 1959. On the contrary, the Board found and ruled that the “limited manner referred to” by the Special Commission was the City’s ability to tax properties within the Commonwealth Flats only if leased for business purposes.

Furthermore, the Board was not persuaded by the appellant’s argument that the Legislature’s use of the phrase “lands of the Authority” signified its intent to limit the application of the first exception to only those properties that Massport took title to in 1959, while the Legislature’s use of the phrase “lands acquired by the Authority” in Section 17’s second exception signified its intent to address all properties acquired by Massport after 1959. Had the Legislature wished to so limit the scope of Section 17’s first exception, it presumably would have done so in a more direct manner. *See Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 461 (2007). Further, the Board found that the Legislature’s use of the term “lands acquired by the Authority” in Section 17’s second exception was not used to distinguish those lands from the properties referred to in Section 17’s first exception. Rather, it was apparent from its context within the statute that the phrase “lands acquired by the Authority” was meant to describe properties which, in the hands of the previous owner, had been taxable by the City, and, but for the second exception, would have been exempt when acquired by Massport.

Moreover, it was evident from the statutory language that Section 17 was intended to maintain the status quo regarding the City’s ability to tax certain properties, i.e., properties located within the Commonwealth Flats which the City previously had the authority to tax and properties which it had the authority to tax in the absence of Massport ownership. For example, the City had been precluded from taxing the Castle Island Terminal, even if leased for business purposes, prior to the creation of Massport and the passage of the enabling act. The Castle Island Terminal was not a property the City had had the authority to tax prior to the passage of the enabling act, and it was therefore expressly carved out of Section 17’s first exception. This was not the case for the subject property and other properties located within the Commonwealth Flats, which the City had long had the authority to tax prior to the creation of Massport. The Board

therefore found and ruled that the plain language of the statute reflected the Legislature's intent to maintain the City's ability to tax properties located in the Commonwealth Flats if leased for business purposes. Accordingly, the Board rejected the appellant's argument regarding Section 17's first exception because it was contrary to the legislative intent of the statute as reflected by its plain language.

In addition, the appellant's argument must fail because it ignores two Massachusetts Appeals Court holdings to the contrary. In *Boston v. U.N.A. Corporation, et al.*, 11 Mass. App. Ct. 298, 299-300 (1981), the Appeals Court considered an issue nearly identical to the issue raised in these appeals, which involved property owned by Massport and located within the Commonwealth Flats on a parcel of land known as Commonwealth Pier 5. The property at issue in that case, which involved fiscal years 1970 and 1971, was leased for business purposes, and after the City assessed taxes on the property, the lessees brought suit challenging the assessments. The lessees in that case claimed that § 17 did not give the City the authority to assess taxes on the property. In making this claim, the lessees emphasized Section 17's legislative history, including the Special Commission's recommendation, which explicitly excluded Commonwealth Pier 5 from the properties to which the first exception would apply. *Id.* at 301. The Special Commission's recommendation regarding Commonwealth Pier 5, however, was not included in the final version of the statute. Like the Board in the present appeals, the Appeals Court gave no weight to the legislative history cited by the taxpayers in that case because it concluded that the "plain language of § 17[] permits no other reading than that parts of [Commonwealth] Pier 5 which are leased for business purposes are taxable by the city to the lessee." *Id.*

Similarly and more recently, in *Cape Cod Shellfish & Seafood Company, et al. v. Boston*, Mass. App. Ct., No. 08-P-364, Memorandum and Order under Rule 1:28 (April 3, 2009), the Appeals Court considered whether property owned by Massport and located within the Commonwealth Flats on property known as the Fish Pier was taxable by the City when it was leased for business purposes. The facts presented in that case were substantially similar to those presented in *U.N.A. Corporation*, but involved later fiscal years, such that the Appeals Court in *Cape Cod Shellfish & Seafood Company* construed § 17 as amended by St. 1978, c. 332, § 2. Nevertheless, the Appeals Court held that "the clear language of [] § 17, the case of *Boston v. U.N.A. Corp.*, *supra*, construing that provision, the rules of statutory construction, and other provisions of [the General Laws],

all indicate that the city may tax the leasehold interests of the plaintiffs.” *Cape Cod Shellfish & Seafood Company*, Mass. App. Ct., No. 08-P-364, Memorandum and Order under Rule 1:28 (April 3, 2009) at 6.

In so holding, the Appeals Court noted that the City “has had the authority to tax the area known as the Commonwealth Flats if leased for business purposes as far back as 1904, pursuant to St. 1904, c. 385.” *Id.* at 2-3, citing *Boston Fish Mkt. Corp. v. Boston*, 224 Mass. 31, 34 (1916). Thus, it expressly rejected the taxpayers’ claim in that case that the “retooling of the statutory scheme” called for a different result. *Id.* at 3. Likewise, the Board rejected the appellant’s argument that Section 17’s first exception did not apply to the subject property. The Appeals Court has had the opportunity to construe Section 17 both as originally enacted and as amended, and in both instances, it held that properties located within the Commonwealth Flats, other than the Castle Island Terminal, were subject to tax if leased for business purposes.

Following the guidance of the Appeals Court in both *U.N.A. Corporation* and *Cape Cod Shellfish & Seafood Company*, and the plain language of the statute, the Board found and ruled that Section 17 permitted the City to tax the subject property. Because the Board found that the subject property was taxable by the City under Section 17’s first exception, it found and ruled that Section 17’s second exception did not control the outcome in these appeals.

Finally, in an effort to bolster its statutory interpretation, the appellant pointed to the fact that both the assessors and Massport had long considered the subject property exempt from tax, even though it was leased for business purposes. However, the assessors’ failure to assess a tax is not determinative of whether the subject property was exempt from tax under § 17. “Statutory authority (like an easement in land) is not subject to atrophy or abandonment merely from nonuse.” *Polaroid v. Commissioner of Revenue*, 393 Mass. 490, 496 (1984). A “[taxing authority’s] expertise in tax matters might . . . bring the [taxing authority] to the conclusion that a prior interpretation of a statute or regulation was wrong and should be changed.” *Gillette Co. v. Commissioner of Revenue*, 425 Mass. 670, 678 (1997) (quoting *Commissioner of Revenue v. BayBank Middlesex*, 421 Mass. 736, 741-42 (1996)). “When a prior determination has been proved wrong, a taxpayer’s reliance on the error will not prevent the [taxing authority] from correcting a mistake of law and assessing a tax that is otherwise due.” *Gillette Co.*, 425 Mass. at 678, (citing *Commissioner of Revenue v. Marr Scaffolding Co.*, 414 Mass.

489, 494-95 (1993); *John S. Lane & Son v. Commissioner of Revenue*, 396 Mass. 137, 141-42 (1985)). Likewise, Massport’s opinion that the subject property was exempt from tax was not dispositive on this point. Accordingly, the Board placed little weight on this evidence because it was not a persuasive indicator of the subject property’s taxability during the fiscal years at issue.

Similarly, the Board was not persuaded by the appellant’s arguments regarding the PILOT agreement. The PILOT agreement provided that payments by Massport under the agreement would be reduced by “new or additional tax payments” made to the City. The parties stipulated that the payments made under the PILOT agreement by Massport were not reduced on account of the taxes assessed on the subject property and paid to the City, but this fact provided no support for the appellant’s position that the subject property was exempt from tax. The plain language of Section 17 and the applicable legal precedent established that the subject property was taxable during the fiscal years at issue, and the Board so found and ruled.

### **CONCLUSION**

On the basis of all of the evidence, the Board found and ruled that Section 17’s first exception applied to all properties located within the Commonwealth Flats, other than the Castle Island Terminal, if leased for business purposes, and not just to those properties that Massport took title to in 1959. Additionally, the Board found that the subject property was located in the Commonwealth Flats for the purposes of Section 17 and that AMB was a for-profit entity which leased the subject property for its business purposes. Having found that the subject property was located within the Commonwealth Flats and leased for business purposes, the Board found and ruled that the subject property was taxable by the assessors under Section 17.

Based on the foregoing, the Board found and ruled that the appellant failed to meet its burden of proving that the subject property was exempt from tax during the fiscal years at issue. Because the parties stipulated that the assessed value of the subject property did not exceed its fair cash value for the fiscal years at issue, the Board issued decisions for the appellee in these appeals.

### **THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**DANBEE REAL ESTATE CO., LLC v.  
LAKESIDE RETREATS, LLC**

**BOARD OF ASSESSORS OF  
THE TOWN OF PERU**

Docket Nos.: F294429, F294430,  
F294960

Promulgated:  
May 7, 2012

**ATB 2012-618**

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 Peru (“assessors” or “appellee”), to abate taxes on certain real estate located in the Town of Peru owned by and assessed to Danbee Real Estate Co., LLC (“Danbee”) and certain real estate owned by and assessed to Lakeside Retreats, LLC (“Lakeside”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2009.

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

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

*Dennis M. LaRochelle*, Esq. for the appellants.

*Ellen M. Hutchinson*, Esq. for the appellee.

**FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact. On January 1, 2008, Danbee was the assessed owner of two parcels of real estate located in the Town of Peru: the parcel identified as Assessors Map 26, Parcel 50 (“Parcel 26-50”), and the parcel identified as Assessors Map 26, Parcel 4 (“Parcel 26-4”) (collectively, “the subject properties”). Parcel 26-50, which consisted of 121.43 acres of land, was located at 101 West Main Road, to the south of Route 143 in Peru. It extended from Route 143 in a southerly direction to Lake Ashmere, with extensive frontage on Lake Ashmere. Parcel 26-4, which consisted of 119.67 acres, was located at 94 West Main Road, across Route 143 from Parcel 26-50. Danbee sought recreational land classification for 33.7 acres of Parcel 26-50 and for 9.4 acres of Parcel 26-4, and it sought forest land classification for the remaining 198 acres of Parcels 26-50 and 26-4.

On January 1, 2008, Lakeside was the assessed owner of the parcel of real estate identified as Assessors Map 22, Parcel 21 (“Parcel 22-21”). Parcel 22-21 consisted of 15.02 acres of land located along Route 143. Lakeside sought forest land classification for the entire 15.02 acres of Parcel 22-21.

### **Forest-Land Classification Appeals**

Docket No. F294429 pertains to Danbee’s application for classification of 198 acres of Parcels 26-50 and 26-4 as forest land. Docket No. F294430 pertains to Lakeside’s application for classification of the entire 15.02 acres of Parcel 22-21 as forest land. On April 3, 2007, Danbee and Lakeside each timely submitted to the State Forester a forest management plan and application seeking to have 198 acres of both Parcels 26-50 and 26-4 and all of Parcel 22-21 classified as forest land pursuant to G.L. c. 61, § 2. On August 21, 2007, the State Forester timely certified both Danbee’s and Lakeside’s forest management plans. By applications dated September 27, 2007, Danbee and Lakeside sent the assessors the approved forest management plan as evidence of the forest land certification. In accordance with G.L. c. 61, § 2, the applications were to be filed with the assessors “prior to October first.” The last day prior to October first was Sunday, September 30, 2007.

On Monday, October 1, 2007, the Town Clerk received and signed for a package properly addressed to the assessors which contained Danbee’s and Lakeside’s applications for forest land classification. However, because the assessors did not have business hours on Monday or Tuesday, they did not pick up the applications until Wednesday, October 3, 2007. By Notices of Action dated December 19, 2007, the assessors notified Danbee and Lakeside of their December 10, 2007 decisions to deny both classification applications. The reason listed on both notices was “untimely filed.” On January 17, 2008, Danbee and Lakeside each filed an Application for Modification of the appellee’s disallowance of the original applications, together with supporting documentation. On January 18, 2008, Danbee and Lakeside filed separate appeals with the State Forester. The appellee has failed to act on the Modifications, and the State Forester has failed to act on the appeals. By separate Petitions Under Formal Procedure, Danbee and Lakeside both appealed the appellee’s failure to act on the applications for forest classification.

By Order dated January 6, 2010, the Board denied the appellee’s Motion to Dismiss. Where, as here, the deadline for filing falls on a Sunday or legal holiday, the

deadline is the following business day.<sup>1</sup> The fiscal year 2009 applications for forest classification were received by the Town Clerk on October 1, 2007, and were therefore timely filed. As the Board stated in its January 6, 2010 Order: “The assessors’ lack of daytime business hours on October 1, 2007 and their failure to pick up the applications, either through lack of business hours or otherwise, until October 3, 2009, is of no jurisdictional consequence.”

However, there is nothing in Chapter 61 or elsewhere that authorizes the appellants’ appeals to the Board. Because the State Forester has granted the appellants’ applications for classification, they have no reason to appeal from the State Forester decision. The assessors, instead of filing an appeal to the State Forester requesting removal of the lands from classification, simply refused to treat the subject properties as forest land because they believed the appellants’ paperwork was filed untimely. There is, however, no right of appeal from the assessors’ decisions in Chapter 61; rather, appeals under Chapter 61 concern decisions of the State Forester or the use of the properties. The Board thus ruled that it lacked subject matter jurisdiction to hear and decide these appeals.

### **Recreational-Land Classification Appeal**

Docket No. F294960 pertains to Danbee’s application for the classification as recreational land of 33.7 acres of Parcel 26-50 and 9.4 acres of Parcel 26-4, for a total of 43.1 acres. On October 1, 2007, the appellee timely received Danbee’s application dated September 27, 2007 seeking recreational-land classification for the 43.1 acres of the subject properties. *See* G.L. c. 61B, § 3.<sup>2</sup> On December 19, 2007, the appellee mailed to Danbee a Notice of Action notifying Danbee that on December 10, 2007 the appellee had disallowed the application on the basis that the 43.1 acres were “Non-qualifying.” On February 14, 2008, Danbee filed an Application for Modification of the appellee’s disallowance of its recreational-land classification application, and on April 10, 20078, Danbee submitted a Supplemental Appendix to the Application for Modification. The appellee failed to act on the Application for Modification. On May 14, 2008, Danbee seasonably filed a Petition Under Formal Procedure with the Board. On the basis of these

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<sup>1</sup> *See* G.L. c. 4, § 9; *see also CFM Buckley/North, LLC v. Assessors of Greenfield*, Mass. ATB Findings of Fact and Reports 2007-220, 223, n. 2; *Holt v. Assessors of West Springfield*, Mass. ATB Findings of Fact and Reports 2010-946, 948, n. 1.

<sup>2</sup> Pursuant to G.L. c. 61B, § 3, an application for certification as recreational land must be submitted to the assessors “not later than October first” of the year preceding the tax year at issue.

facts, the Board found that it had jurisdiction over the recreational-land classification appeal.

Danbee presented its case-in-chief through the testimony of its witnesses, Vickie Donahue, Esq., counsel for Danbee, and Mark Toporoff, the Co-Director of “Camp Danbee,” a summer camp that operates at the subject properties. Danbee also presented its fiscal year 2010 tax bills and maps for both parcels at issue.

The subject properties were used eight weeks of the year for the operation of Camp Danbee. Mr. Toporoff explained that employees of Camp Danbee had one week of orientation and the girls attended the camp for weeks two through eight. As indicated on the map submitted by Danbee, there was a large area of improved land, which Mr. Toporoff explained was called the “Campus.” The Campus was located on the south side of Route 143 and extended south to Lake Ashmere. A second area of improved land was located southeast of the Campus. Both the Campus and the smaller improved area of Parcel 26-50 were improved with multiple buildings, including: residential cabins containing full bathroom facilities where the girls stayed for their seven-week session; several buildings for activities, including the dance, gymnastics and fine arts buildings; the dining hall; and administration and maintenance buildings. Parcel 26-50 was further improved with numerous athletic fields, including: softball and multipurpose fields; athletic courts for tennis, basketball and volleyball; swimming pools; and a waterslide at the edge of Lake Ashmere along with bleacher seating. Mr. Toporoff testified that a portion of Parcel 26-50 along Lake Ashmere was used by Camp Danbee for evenings of traditional camping, which he explained meant eating and sleeping under the stars. The map for Parcel 26-50 did not delineate the proposed recreational land or otherwise detail where the area sought to be classified as recreational land, as opposed to forest land, was located.

According to the map of Parcel 26-4, this parcel was improved with several horse-riding facilities, including stable and barn buildings and corrals, which were also used by Camp Danbee. As with the map for Parcel 26-50, the map for Parcel 26-4 did not delineate the proposed recreational land or otherwise detail where the area sought to be classified as recreational land, as opposed to forest land, was located.

Attorney Donahue testified to her involvement in filing the application for recreation-land classification for the subject properties. She explained that the application was completed by Dan Zankel in his capacity as President of Campground,

LLC, which was the sole member of Danbee, and that she reviewed the application prior to its filing. The application for classification of the subject properties as recreational land was submitted by the appellee as evidence in these appeals. This application, signed “[u]nder the pains and penalties of perjury,” indicated that the subject properties were not open to the general public but instead were restricted, as specified on the application, to “private individuals.” Attorney Donahue stated that she reviewed this application and she testified that, at the time, she saw no mistakes or problems with it. Attorney Donohue testified that she since came to believe that this portion of the application was erroneous. Danbee did not present Mr. Zankel as a witness in these appeals.

Next, Mr. Toporoff testified to the use of the subject properties, primarily the use by Camp Danbee. He testified that Camp Danbee was a full-season<sup>3</sup> summer overnight camp for girls between the ages of 8 and 15 that offered a wide range of activities, including: sports such as tennis, basketball, soccer, sand volleyball, swimming, softball, lacrosse, field hockey, archery and gymnastics; dance; theater; and arts and crafts. Camp Danbee also provided the opportunity for the girls to travel during their seven-week session, with the older girls traveling by plane to California for a week and the younger girls traveling by bus to places like Cape Cod and Montreal for a week. During the fiscal year at issue, approximately 310 girls attended Camp Danbee, and the tuition was approximately \$9,700 for the seven-week session.

In an attempt to overcome the evidence of restricted access to the subject properties, Mr. Toporoff testified to other uses of the subject parcels. In addition to Camp Danbee activities, the parcels at issue were used for one week each year for the operation of America’s Camp, a non-profit program providing a week of camp at no cost to any child who had lost a parent as a result of the September 11, 2001 terrorist attacks. Mr. Toporoff did not have first-hand knowledge of precisely how America’s Camp functioned, as he was not directly involved in that program. However, Mr. Toporoff stated that he was involved in renting out the subject properties. He claimed that other uses of the subject parcels included: the use of Danbee’s tennis courts by a local regional public high school; the rental of the property by the Peru fire department for its annual picnic; rentals of the property to non-profit organizations, including educational and religious groups, for camp outings and retreats; Red Cross lifeguard training primarily for the staff of Camp Danbee but also open, at no cost, to members of

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<sup>3</sup> Mr. Toporoff explained that, except for a small percentage of girls from the Dominican Republic who had to depart early for school, the campers attended Camp Danbee for the entire seven-week period.

the community; the use of the grounds to members of the community for hunting during the winter season; the use of the tennis courts by a few individual members of the community; and the use of the grounds to members of the community to watch Camp Danbee's annual fireworks display.

However, Mr. Toporoff freely admitted that, during the seven-week period that the girls from Camp Danbee were present at the subject properties, which constituted the majority of his time at the subject properties, access to the subject properties was greatly restricted. As he explained:

Well, when the campers are there, we have total coverage of the kids. Safety is the number one issue. So the only way onto the camp is through the main entrance or from the lake. And so we have staff with campers all the time. Anybody who comes to the camp checks in at the office from the outside.

Mr. Toporoff also admitted that there was a "No Trespassing" sign at the entrance of Parcel 26-50, again, primarily because "[w]hen we run the camp, we are responsible for all those children. That is the focus of what we do, and we don't want people coming in while we're in charge of these kids." There was a "No Trespassing" sign at the entrance to the facility and no evidence was produced to indicate that the sign was taken down when the camp was not in session. In fact, Mr. Toporoff further testified that during the winter months, that front-entrance roadway was barricaded by a "locked chain," presumably to prevent outsiders from "driving down through into camp and getting stuck" in the snow, although Mr. Toporoff stated that the caretaker regularly plowed the roads at the parcel.

Moreover, the Board found that the subject properties' improvements were only enjoyed by participants in the private program run by Camp Danbee. Even though Mr. Toporoff testified to the other uses of the subject properties aside from the two-month use by Camp Danbee, the uses he cited primarily constituted private rentals of the properties for fees. While he attempted to prove that the subject properties were open to the public, he mentioned mere isolated instances of public usage by people who happened upon the property on their own, not as the result of public postings at the subject properties. To the contrary, postings of "No Trespassing" signs and chains at the subject properties fostered a sense of exclusion and privacy, rather than invitation, onto the subject properties. As for the one-week usages by America's Camp and by the American Red Cross, which was primarily geared towards employees of the appellant with only a few

outside participants, the Board found those to be isolated *de minimus* uses rather than a consistent and substantial usage by a non-profit organization.

Mr. Toporoff's efforts to establish public usage were not persuasive, since his involvement with, and thus his knowledge of, the subject properties stemmed from his duties as Co-Director of Camp Danbee, a seasonal camp operated for only eight weeks a year. The Board found more credible on the issue of the subject properties' usage the statement on the application for recreational land classification by Mr. Zankel as President of the sole member of Danbee, stating that the subject properties were restricted to use by "private individuals," as well as Attorney Donahue's testimony that she had reviewed the recreational-land-classification application and that, in her opinion, it contained no errors or problems.

The Board thus found that on the basis of the evidence of record in these appeals, Danbee failed to meet its burden of proving with sufficient evidence that the subject properties were open to the public.

Further, the Board found that neither map delineated the portion of the subject properties that Danbee sought to be classified as recreational land. Danbee sought to have the subject properties classified as either recreational or forest land. Assuming, for purposes of these appeals, that the improved portions that were used by Camp Danbee were the portions intended for classification as recreational land, the maps of the subject properties indicated that numerous buildings were constructed on portions of the subject properties that were used by Camp Danbee -- including activity facilities and residence halls as well as barns, stables and athletic fields -- as part of the main Campus and the other smaller campuses of Camp Danbee. As testified to by Mr. Toporoff, these many facilities offered a wide variety of activities for the girls enrolled at Camp Danbee. The Board thus found that the subject properties did not fall under the first category of property entitled to recreational-land classification under G.L. c. 61B, § 1, because they were not held in a wild, open, pastured, landscaped or forest condition, but rather, were heavily improved with buildings and athletic fields.<sup>4</sup>

Land may also be classified as recreational land if it is used for "recreational use," as that term is specifically defined by G.L. c. 61B, § 1, and is open to the public or to

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<sup>4</sup> The first prong of G.L. c. 61B, § 1 requires that recreational land be "retained in substantially a natural, wild, or open condition or in a landscaped or pasture condition or in a managed forest condition under a certified forest management plan approved by and subject to procedures established by the state forester in such a manner as to allow to a significant extent the preservation of wildlife and other natural resources. . . ."

members of a non-profit organization. First, the maps of the subject properties that were submitted by Danbee made no reference to hiking trails or picnicking areas that were available for public use. While there were isolated areas of the subject properties that were devoted to some of the recreational uses specified in § 1 – camping, horseback riding, swimming, and some degree of hunting during the off-camp season -- there were also numerous portions of the subject properties that were devoted to uses specifically excluded by the statute, namely, any sport normally undertaken in a gymnasium or similar structure. The Board thus found that the subject properties were not used for “recreational use” as specifically defined by § 1.

Second, Danbee made no showing that it was a non-profit organization. Moreover, as discussed previously, the uses of the subject properties by groups which were non-profit organizations, like America’s Camp and the American Red Cross, were *de minimus*. The Board thus found that the subject properties did not fall under the second category of property entitled to recreational-land classification under G.L. c. 61B, § 1.

Therefore, the Board found that Danbee failed to meet its burden of proving that the subject properties qualified for recreational status for the fiscal year at issue. Accordingly, the Board issued a decision for the appellee in Docket No. F294960.

## OPINION

### Forest-Land Classification Appeals

In their forest-land classification appeals, the appellants claimed to be aggrieved by the assessors’ disallowances of their applications for forest land classification for 2009, despite the certification by the State Forester of their forest management plans. The appellants cite G.L. c. 61, § 2, which provides in pertinent part as follows:

Except as otherwise herein provided, all forest land, parcels of not less than 10 contiguous acres in area, used for forest production shall be classified by the assessors as forest land upon written application sufficient for identification and certification by the state forester. Such application shall be accompanied by a forest management plan. ***The state forester will have sole responsibility for review and certification with regard to forest land and forest production . . .*** Upon receipt of such certified application, the board of assessors shall, upon a form approved by the commissioner of revenue, forthwith record in the registry of deeds of the county or district in which the parcel is situated, a statement of such classification which shall constitute a lien upon the land for taxes levied under the provisions of this chapter . . . . ***When in judgment of the assessors, land which is classified as forest land or which is the subject of an application for such classification is not being managed under a***

*program, or is being used for purposes incompatible with forest production, or does not otherwise qualify under this chapter, the assessors may, on or before December first in any year file an appeal in writing mailed by certified mail to the state forester requesting a denial of application* or, in the case of classified land, requesting removal of the land from such classification.

(emphasis added). As described above, the structure for forest-land appeals under § 2 is as follows: the State Forester, in his discretion, classifies the land as forest land; next, the assessors are to abide by the State Forester's certification and record a statement of certification; then, if the assessors do not agree with the certification, they may appeal to the State Forester.

In the instant appeal, the assessors did not file an appeal with the State Forester but instead simply refused to treat the subject properties as forest land. The appellants then filed their petitions with the Board requesting that the Board enter an order requiring the appellee to comply with G.L. c. 61, § 2, including requiring the appellee to file the requisite statements of classification with the Registry of Deeds of Berkshire County. However, under § 2, the "sole responsibility for review and certification" of real estate as forest land is with the State Forester. All appeals regarding classification of land as forest land -- including whether such land is being properly managed or "does not otherwise qualify under chapter 61" -- must be filed with the State Forester. The State Forester, in his discretion, "may deny the owner's application, may withdraw all or part of the land from classification, or may grant the application, imposing such terms and conditions as he deems reasonable to carry out the purpose of this chapter." If either the owner or the assessors are aggrieved by this decision, § 2 creates a right of appeal to the State Forester, who must then convene a panel to conduct a hearing and render a decision. The owner or assessors may then file an appeal of the panel's decision to the Superior Court or the Board. Accordingly, the Board ruled that the appellants were not aggrieved by any decision of the State Forester or a panel convened by the State Forester under § 2. On this basis, the Board found and ruled that it lacked subject matter jurisdiction over the appeals pertaining to the failure of the appellee to certify the subject properties as forest land.

### **Recreational-Land Classification Appeal**

In Docket No. F294960, Danbee appealed from the refusal of the appellee to classify as recreational land 33.7 acres of Parcel 26-50 and 9.4 acres of Parcel 26-4, for a total of 43.1 acres of the subject properties. In its consideration of this appeal, the Board

is guided by the longstanding principle that “statutes granting exemptions from taxation are strictly construed. A taxpayer is not entitled to an exemption unless he shows that he comes within either the express words or the necessary implication of some statute conferring this privilege upon him.” *Animal Rescue League v. Assessors of Bourne*, 310 Mass. 330, 332 (1941) (citations omitted).

For the fiscal year at issue, the requirements for recreational classification of land were detailed in G.L. c. 61B, § 1 (“§ 1”), which provided two distinct categories of land to be classified as recreational land. The first category provided as follows:

Land not less than five acres in area shall be deemed to be recreational land if it is retained in substantially a natural, wild, or open condition or in a landscaped or pasture condition or in a managed forest condition under a certified forest management plan approved by and subject to procedures established by the state forester in such a manner as to allow to a significant extent the preservation of wildlife and other natural resources, . . . .

The 43.1 acres for which Danbee sought recreational-land classification were not subject to a “certified forest management plan.” Further, the 43.1 acres contained numerous improvements that were used for the operation of Camp Danbee -- including soccer, softball and volleyball fields, dining and residence halls, and buildings used for dance, gymnastics and fine arts. The Board found and ruled that the presence of these many facilities precluded the 43.1 acres of the subject properties from being “retained in substantially a natural, wild, or open condition or in a landscaped or pasture condition.” Accordingly, the Board found and ruled that the subject properties did not qualify as recreational land under the first category of the § 1 definition.

For classification under the statute’s second category of recreational land, § 1 provided as follows:

Land not less than five acres in area shall also be deemed to be recreational land which is devoted primarily to recreational use and which does not materially interfere with the environmental benefits which are derived from said land, ***and is available to the general public or to members of a non-profit organization*** including a corporation organized under chapter one hundred and eighty.

***For the purpose of this chapter, the term recreational use shall be limited to the following:*** hiking, camping, nature study and observation, boating, golfing, non-commercial youth soccer, horseback riding, hunting, fishing, skiing, swimming, picnicking, private non-commercial flying, including hang gliding, archery, target shooting and commercial horseback riding and equine boarding.

***Such recreational use shall not include . . . any sport normally undertaken in a stadium, gymnasium or similar structure.***

(emphasis added). As detailed above, the second category of recreational land required both that the land be reserved for “recreational use,” as specifically defined, and that it be “available to the general public or to members of a non-profit organization.” As explained below, the Board found that the subject properties failed to meet either prong of this definition.

First, Danbee failed to prove the proper usage of the 43.1 acres of land. Under § 1, “recreational use” is a defined, limiting term which includes only those activities specifically enumerated, while specifically excluding certain other activities. While there were isolated areas of the subject properties that were devoted to some of the specified recreational activities -- camping, horseback riding, swimming, and some degree of hunting during the off-camp season -- there were numerous and significant portions of the subject properties that were devoted to uses that were specifically excluded from the statute as sports undertaken in a gymnasium or other structure, namely, the gymnastics and dance buildings. Additionally, the arts building housed an activity that not only was not a sport, but was undertaken in an indoor structure similar to a gymnasium, and thus likewise did not fit within the statute’s specifically enumerated items of outdoor recreational activities. *See Banushi v. Dorfman*, 438 Mass. 242, 244 (“In considering the language of the statute, the doctrine of *ejusdem generis* is applicable: ‘Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”) (quoting 2A N.J. Singer, Sutherland Statutory Construction § 47.17, at 273-274 (6th ed. rev. 2000))(also citing *Powers v. Freetown-Lakeville Regional Sch. Dist. Comm.*, 392 Mass. 656, 660 n.8 (1984)).

The appellant contended that its operation of Camp Danbee qualified as a recreational use because the activities of the camp in their entirety qualified as “camping,” an item specifically enumerated in § 1. However, the Board noted that each of the other items specifically enumerated in the definition of “recreational use” -- including nature observation, horseback riding, fishing and skiing -- was specifically an outdoor activity; in fact, as discussed above, any indoor activity that normally occurred in a gymnasium or other similar structure was to be specifically excluded from being a “recreational use.” The Supreme Judicial Court has declared that “[t]he general and

familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Industrial Finance Corp. v. State Tax Commissioner*, 367 Mass. 360, 364 (1975) (quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934)). Because the operation of Camp Danbee as a whole incorporated a host of activities that were not specifically enumerated in the statute, and even activities which occurred within specifically excluded indoor improvements, the Board found and ruled that the operation of Camp Danbee did not constitute “camping” as that term was used in the statute and, accordingly, did not qualify as a specifically enumerated “recreational use” for purposes of §1.

Second, the appellant also failed to prove that the subject properties were open to the public or to members of a non-profit organization. Danbee did not demonstrate that it was a non-profit organization. Moreover, while Mr. Toporoff believed that America’s Camp was operated by a non-profit organization, the camp was operated at the premises for only one week a year. Likewise, the American Red Cross training operated for only one week a year, and it was primarily geared towards training Camp Danbee employees, with only a few outsiders. The Board found these to be incidental, *de minimus* uses that did not constitute a sufficient public usage of the subject properties. See *Marshfield Rod & Gun Club v. Assessors of Marshfield*, Mass. ATB Findings of Fact and Reports 1998-1130, 1137 (denying the charitable exemption to a property operated by an organization when “occupation for charitable purposes was merely incidental”).

Moreover, the Board found that Mr. Toporoff’s testimony attempting to establish public uses was mainly a recitation of primarily private rentals for fees of the properties, together with a few isolated instances of public usage by people who happened upon the property on their own, not as the result of public postings at the subject properties. Ultimately, Mr. Toporoff’s efforts to establish public usage were not persuasive, since his involvement with, and thus his knowledge of, the subject properties stemmed from his duties as Co-Director of Camp Danbee, a seasonal camp operated for only eight weeks a year. The Board found more credible the application statement by Mr. Zankel, stating that the subject properties were restricted to use by “private individuals,” and Attorney Donahue’s statement that she found “no errors” with the application.

“Favorable tax treatment of land available only to a select few, as opposed to the general public, has consistently been denied.” *Cape Cod Five Cents Savings Bank and William R. Enlow, Trustees, et al. v. Assessors of the Town of Harwich, et al.*, Mass. ATB Findings of Fact and Reports 2009-659, 679 (finding that the golf course, which was open only to members of a private club and patrons of a particular hotel, was not open to the general public or members of a non-profit organization within the meaning of § 1 and therefore did not qualify as recreational land) (citing *Brookline Conservation Land Trust v. Assessors of Brookline*, Mass. ATB Findings of Fact and Reports, 2008-679, 699-700; *Wing’s Neck Conservation Foundation, Inc. v. Assessors of Bourne*, Mass. ATB Findings of Fact and Reports 2003-329, 343, *aff’d*, 61 Mass. App. Ct. 1112 (2004)). On the basis of the evidence of record, the Board found and ruled that Danbee failed to meet its burden of proving that the subject properties were open to the public or used by members of a non-profit organization.

**Conclusion**

With respect to Docket Nos. F294429 and F294430, the appeals pertaining to forest-land classification, the Board found and ruled that it lacked subject-matter jurisdiction and accordingly issued decisions for the appellee.

With respect to Docket No. F294960, the appeal pertaining to recreation-land classification, the Board found that the subject properties’ many facilities precluded a finding that the 43.1 acres of the subject properties were “retained in substantially a natural, wild, or open condition or in a landscaped or pasture condition.” The Board further found that the subject properties were not sufficiently devoted to “recreational uses” as specifically defined in G.L. c. 61B, § 1, nor were they sufficiently open to use by the public or members of a non-profit organization. Therefore, the Board found and ruled that the subject properties did not qualify as recreational land under the § 1 definition. Accordingly, the Board issued a decision 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**

**INDEPENDENT CONCRETE v.  
PUMPING CORPORATION**

**BOARD OF ASSESSORS OF  
THE TOWN OF WAKEFIELD**

Docket No. F300394

Promulgated:  
October 20, 2011

**ATB 2011-896**

This is an appeal under the formal procedure pursuant to G.L. c. 60A, § 2 and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Wakefield (“assessors” or “appellee”) to abate excise on certain motor vehicles in Wakefield owned by and assessed to Independent Concrete Pumping Corporation (“ICPC” or “appellant”) under G.L. c. 60A, § 1 for 2008.

Commissioner Mulhern heard this appeal. He was joined in the decision for the appellee by Chairman Hammond and Commissioners Scharaffa, Egan, and Rose.

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

*Joseph P. Dever, Esq. and Frederick W. Riley, Esq. for the appellant.  
Thomas A. Mullen, Esq. for the appellee.*

**FINDINGS OF FACT AND REPORT**

On the basis of the testimony and documents entered into evidence in this appeal, the Appellate Tax Board (“Board”) made the following subsidiary findings of fact.

At all times relevant to this appeal, ICPC was a Massachusetts corporation with its principal place of business in Wakefield, Massachusetts. It was an owner and operator of mobile concrete pumping equipment. A mobile concrete pump consists of a pump unit and boom equipment integrated into a truck chassis. The truck engine supplies power for the pumping equipment, which receives wet concrete from a separate concrete mixing truck. The wet concrete travels through the jointed pipeline attached to the boom and down to its ultimate location within a construction site.

During the periods relevant to this appeal, ICPC owned and operated a fleet of approximately 28 mobile concrete pumps; two such pumps – identified as Truck Number 112 (“Truck No. 112”) and Truck Number 113 (“Truck No. 113”) are the subject of this appeal (together, “Truck Nos. 112 and 113” or the “subject property”).

On February 9, 2009, the assessors issued 2008 motor vehicle excise bills to the appellant for the subject property. The assessors valued Truck No. 112 at \$27,200 and assessed an excise thereon, at the rate of \$25 per \$1,000, in the total amount of \$680. The assessors valued Truck No. 113 at \$108,800 and assessed an excise thereon, at the rate of \$25 per \$1,000, in the total amount of \$2,720. On February 10, 2009, the appellant filed two Applications for Abatement with the assessors, and those abatement applications were denied by vote of the assessors on February 24, 2009. The appellant filed an appeal with the Board on May 22, 2009. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The excise at issue in this appeal is imposed by G.L. c. 60A, § 1, which imposes, with certain exceptions not relevant here, an excise in the amount of \$25 per \$1,000, on “every motor vehicle and trailer registered under chapter ninety, for the privilege of such registration.” The principal issue in this appeal was whether Truck Nos. 112 and 113 were properly classified by the assessors as motor vehicles. General Laws c. 60A, § 1 does not contain its own definition of the term “motor vehicle,” but instead defines the term by reference to G.L. c. 90, § 1, which provides the following definition:

[A]ll vehicles constructed and designed for propulsion by power other than muscular power including such vehicles when pulled or towed by another motor vehicle, **except** railroad and railway cars, vehicles operated by the system known as trolley motor or trackless trolley under chapter one hundred and sixty-three or section ten of chapter five hundred and forty-four of the acts of nineteen hundred and forty-seven, vehicles running only upon rails or tracks, **vehicles used for other purposes than the transportation of property and incapable of being driven at a speed exceeding twelve miles per hour and which are used exclusively for the building, repair and maintenance of highways or designed especially for use elsewhere than on the travelled part of ways,** wheelchairs owned and operated by invalids and vehicles which are operated or guided by a person on foot; provided, however, that the exception for trackless trolleys provided herein shall not apply to sections seventeen, twenty-one, twenty-four, twenty-four *I*, twenty-five and twenty-six . . . .” (emphasis added).

The assessments at issue in this appeal arose after years of internal debate among the assessors and following extensive correspondence by the assessors with the Massachusetts Department of Revenue (“DOR”). The evidence showed that on at least three occasions between 1994 and 2001, the DOR responded to inquiries posed by the assessors regarding the taxability of the appellant’s mobile concrete pumpers. In response to each inquiry, the DOR informed the assessors of its opinion that mobile

concrete pumpers are motor vehicles and as such are subject to the motor vehicle excise imposed by G.L. c. 60A, § 1.

The assessors likewise sought the opinion of the Massachusetts Registry of Motor Vehicles (“RMV”) as to the proper classification of mobile concrete pumpers. The RMV responded that in its opinion, mobile concrete pumpers were “special mobile equipment,” defined by G.L. c. 90, § 1 as

motor vehicle[s] which [are] principally designed to conduct excavations or lift building materials at a public or private construction site and [are] operated on a way for the sole purpose of transportation to or from said construction site and [have] a gross vehicle weight of at least twelve thousand pounds. This definition shall not include a motor vehicle which is designed to carry passengers, or any load, on a way.

However, the RMV took no stance on the taxability of mobile concrete pumpers. In fact, in its response to the assessors, the RMV explicitly deferred to the DOR on matters of taxation.

Despite the DOR’s advice, the assessors did not assess motor vehicle excise on the subject property until 2008.<sup>1</sup> Evidence entered into the record indicated that there was significant internal debate among the assessors as to the proper course of action. Ultimately, as something of a test case, the assessors voted to assess motor vehicle excise on just two of ICPC’s 28 mobile concrete pumpers, Truck Nos. 112 and 113. Because the assessors were uncertain whether the excise should be based on the value of the truck chassis alone or the value of the truck chassis as improved by the pump and boom equipment, they assessed excise on the value of the truck chassis alone for Truck No. 112 and on the value of the truck chassis as improved by the pump and boom equipment for Truck No. 113.

Three witnesses testified at the hearing of this appeal. Testifying for the assessors was Paul Faler, who is a member of the assessors. Mr. Faler’s testimony primarily focused on the series of events leading up to the assessment of the subject property, including the aforementioned correspondence between the assessors and the DOR. Testifying for the appellant were William Heinz, a 25-year employee of ICPC who, at the time of the hearing, was serving as its Controller, and Thomas Anderson, a former member of the Board of Directors of the American Concrete Pumping Association who

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<sup>1</sup> There was evidence that the assessors voted to issue a motor vehicle excise bill to ICPC in 2001, but the excise so assessed was later abated and the bill was rescinded.

was, for over 25 years, the Chief Operating Officer of Schwing America Corporation, which is a manufacturer of mobile concrete pumpers like the subject property.

Both Mr. Heinz and Mr. Anderson testified about the construction and procurement of mobile concrete pumpers such as the subject property. The assembly of a mobile concrete pumper begins with a Mack truck chassis. Certain elements of the truck are then removed to facilitate the integration of the pump and boom equipment, which is firmly welded onto the truck chassis such that it becomes a complete, integrated unit. Both Mr. Anderson and Mr. Heinz testified that the mobile concrete pumpers are purchased as complete, integrated units. They additionally testified that once a mobile concrete pumper is assembled, it cannot be disassembled without causing substantial damage to the component parts, including the truck chassis. Mr. Anderson also testified that, after the removal of the pump and boom equipment, the truck chassis could only be sold for scrap.

Mr. Heinz testified that ICPC's operators drive the concrete pumpers from one of ICPC's four garage sites to the designated construction site, where the operator pumps concrete at the direction of the customer. Upon the completion of each job, the operator drives the concrete pumper back to the garage site. There was no dispute between the parties that ICPC's mobile concrete pumpers can and do regularly travel safely at speeds well in excess of twelve miles per hour. The evidence showed that they often travel at highway speeds.

The appellant advanced several arguments in support of its position, but the Board found none of them persuasive. The appellant's primary argument was that its mobile concrete pumpers, including the subject property, were not motor vehicles subject to the excise imposed under G.L. c. 60A, § 1 because they were not "motor vehicles" but instead were "special mobile equipment" as defined by G.L. c. 90, § 1. The appellant argued that mobile concrete pumpers are not merely truck chassis outfitted with pumping equipment. It contended that although the assembly of a mobile concrete pumper begins with a truck chassis, the significant structural alterations made thereto transformed the units into something other than "motor vehicles" for purposes of the excise.

The appellant's argument failed because it ignored the relevant statutory language. The only exception from the definition of "motor vehicles" contained in G.L. c. 90, § 1 that the subject property could possibly have qualified for is the exception for "vehicles used for other purposes than the transportation of property and incapable of

being driven at a speed exceeding twelve miles per hour and which are used exclusively for the building, repair and maintenance of highways or designed especially for use elsewhere than on the travelled part of ways.” However, the evidence showed that the subject property could and did travel safely at speeds far greater than twelve miles per hour. In fact, the evidence showed the appellant’s mobile concrete pumpers often traveled at highway speeds. The Board thus found that the subject property was not among the categories of vehicles carved out of the statutory definition of “motor vehicles.”

Furthermore, the evidence offered by the appellant to support its arguments failed to provide that support. The appellant offered into evidence various items of correspondence issued by the RMV and the DOR, as well as a manual published by the DOR entitled “Motor Vehicle & Trailer Excise Manual.” The “Motor Vehicle & Trailer Excise Manual” indicated that “special mobile equipment” is not subject to the motor vehicle excise and should instead be taxed as personal property. However, in a written response to an inquiry made by the assessors regarding this statement, the DOR clarified the statement to mean only that special mobile equipment that is not also a “motor vehicle” as defined by G.L. c. 90, § 1 is not subject to the motor vehicle excise and should be taxed as personal property. In that same item of correspondence, the DOR reiterated its previously-articulated opinion that mobile concrete pumpers are “motor vehicles” subject to the motor vehicle excise. Further, the items of correspondence from the RMV merely served to confirm that agency’s opinion that the appellant was eligible to receive “owner-contractor” plates for its mobile concrete pumpers because, in the RMV’s opinion, mobile concrete pumpers were “special mobile equipment.” The Board found that this opinion had no bearing on the taxability of the subject property. In fact, in a letter dated December 18, 2001, the RMV declined to opine on the taxability of mobile concrete pumpers, and instead explicitly deferred to the DOR on that matter. The Board therefore found that this evidence was not probative of the subject property’s taxability.

Similarly unpersuasive was the appellant’s attempt to use a 1985 Internal Revenue Service (“IRS”) Letter Ruling, issued to a different taxpayer, to support its contention that mobile concrete pumpers are not subject to the excise imposed by G.L. c. 60A, § 1. As discussed more fully in the Opinion below, the Board found that the applicable legal authority at issue in that Letter Ruling differed materially from the

statutes at issue here, and the Board therefore rejected the appellant's attempt to liken the federal excise to the motor vehicle excise imposed by G.L. c. 60A, § 1.

In sum, though several types of vehicles are carved out of the statutory definition of "motor vehicles," the Board found that the subject property was not among them. The Board further found that G.L. c. 60A, § 1 contained no express or implied exemption for the subject property. Accordingly, on the basis of all of the evidence, the Board found that Truck Nos. 112 and 113 were subject to the excise imposed by that statute. Because the Board found that Truck No. 112 and Truck No. 113 were motor vehicles, it did not reach a secondary issue presented in this appeal, which was, in the event that Truck No. 112 and Truck No. 113 were not motor vehicles, whether they were exempt from taxes on personal property as the appellant's "stock in trade."

The appellant additionally asserted that Truck No. 112 was "primarily garaged" in Greenville, New Hampshire. The Board inferred that the appellant was impliedly asserting that Truck No. 112 was not subject to the excise assessed by the assessors because under G.L. c. 60A, § 6, the excise is to be imposed by the municipality in which the motor vehicle is "customarily kept," although the appellant did not expressly articulate that argument. To the extent that the appellant intended to make such an argument, the Board found that the evidence did not support its claim. The only evidence offered by the appellant on this point was a statement made by Mr. Heinz during his deposition that Truck No. 112 was garaged in New Hampshire. Although Mr. Heinz testified at the hearing of this appeal, he made no similar assertion at the hearing.

Moreover, a sales log for Truck No. 112 was entered into evidence, and that log showed that Truck No. 112 was used primarily for projects in Massachusetts. It was also used for projects in New Hampshire and Vermont, but not as frequently as it was used in Massachusetts. The appellant offered no insurance documents indicating that Truck No. 112 was garaged or insured in New Hampshire, nor did it offer evidence indicating that Truck No. 112 was registered in New Hampshire. Rather, the appellant repeatedly indicated at the hearing of this appeal that both Truck No. 112 and Truck No. 113 had been issued owner-contractor license plates by the RMV. Based on all of the evidence, the Board found that the record did not support the appellant's assertion that Truck No. 112 was garaged primarily in New Hampshire. Accordingly, the Board found that Truck No. 112, like Truck No. 113, was subject to the motor vehicle excise tax imposed by G.L. c. 60A, § 1.

Lastly, the appellant claimed that it was entitled to an abatement of the excise because the excise was based on an incorrect valuation of the subject property. G.L. c. 60A, § 1, imposes the excise, at a rate of \$25 per \$1,000, and for the purpose of the excise, the value of each motor vehicle is:

deemed to be the value, as determined by the commissioner, of motor vehicles or trailers of the same make, type, model, and year of manufacture as designated by the manufacturer, but not in excess of the following percentages of the list price established by the manufacturer for the year of manufacture, namely: --

In the year preceding the designated year of manufacture 50%

In the year of manufacture 90%

In the second year 60%

In the third year 40%

In the fourth year 25%

In the fifth and succeeding years 10%.

G.L. c. 60A, § 1. The appellant offered no evidence of overvaluation, nor did it offer evidence demonstrating errors in the assessors' valuation methodology. The evidence showed that Truck Nos. 112 and 113 were both 2006 Schwing mobile concrete pumps. Each had a manufacturer list price of \$349,000. For Truck No. 112, the assessors based the excise on only the value of the truck chassis, which they valued at \$27,200. Accordingly, they assessed a total excise of \$680. For Truck No. 113, the assessors based the excise on the value of the truck chassis as improved by the pumping equipment. Accordingly they valued Truck No. 113 at \$108,800, and assessed an excise thereon in the total amount of \$2,720.

As an initial matter, pursuant to G.L. c. 60A, § 1, the motor vehicle excise is based on a vehicle's manufacturer list price, as reduced by the appropriate percentage indicated in the statute. Nothing in the language of the statute indicated that property such as the subject property should be assessed based on the value of only a component part – a truck chassis – rather than the motor vehicle's list price, as reduced by the appropriate percentage. To the extent that the assessors assessed excise for Truck No. 112 on only the value of its truck chassis, then Truck No. 112 was undervalued, not overvalued.

With respect to Truck No. 113, the evidence showed that it was a 2006 motor vehicle with a manufacturer list price of \$349,000. Under the terms of G.L. c. 60A, § 1, the excise for Truck No. 113 for 2008 should have been based on 40% of its manufacturer list price, which was \$139,600. The assessors valued Truck No. 113 at

\$108,800, which was less than 40% of its manufacturer list price. Once again, the evidence showed that, if anything, the subject property was undervalued, not overvalued, by the assessors. The Board therefore rejected the appellant's claim that the subject property was overvalued.

On the basis of all of the evidence and its subsidiary findings of fact, the Board found that the appellant failed to meet its burden of proving that it was entitled to an abatement. The Board therefore issued a decision for the appellee in this appeal.

### OPINION

General Laws c. 60A, § 1 imposes an excise, with certain exceptions not relevant here, in the amount of \$25 per \$1,000, on "every motor vehicle and trailer registered under chapter ninety, for the privilege of such registration." The issue in this appeal was whether Truck Nos. 112 and 113 were "motor vehicles" as defined by G.L. c. 90, § 1. On the basis of all of the evidence, the Board found and ruled that the subject property came within the definition of "motor vehicles" set forth in the statute.

G.L. c. 90, § 1 provides the following definition of "motor vehicles":

[A]ll vehicles constructed and designed for propulsion by power other than muscular power including such vehicles when pulled or towed by another motor vehicle, **except** railroad and railway cars, vehicles operated by the system known as trolley motor or trackless trolley under chapter one hundred and sixty-three or section ten of chapter five hundred and forty-four of the acts of nineteen hundred and forty-seven, vehicles running only upon rails or tracks, **vehicles used for other purposes than the transportation of property and incapable of being driven at a speed exceeding twelve miles per hour and which are used exclusively for the building, repair and maintenance of highways or designed especially for use elsewhere than on the travelled part of ways**, wheelchairs owned and operated by invalids and vehicles which are operated or guided by a person on foot; provided, however, that the exception for trackless trolleys provided herein shall not apply to sections seventeen, twenty-one, twenty-four, twenty-four *I*, twenty-five and twenty-six. The definition of "Motor vehicles" shall not include motorized bicycles. (emphasis added).

Here, there was no dispute that the appellant's mobile concrete pumpers, including Truck Nos. 112 and 113, could and did travel safely at speeds exceeding twelve miles per hour. In fact, the evidence indicated that they often traveled at highway speeds. Because the subject property did not fit within any of the categories of vehicles carved out of the statutory definition, the Board found and ruled that they were "motor vehicles" as defined

by G.L. c. 90, § 1. The Board further found and ruled that the subject property was not among the categories of vehicles exempted from the excise imposed by G.L. c. 60A, § 1.

The appellant's arguments to the contrary were unavailing. The appellant's main contention was that Truck Nos. 112 and 113 were not subject to the motor vehicle excise because they were not "motor vehicles" but instead were "special mobile equipment" as defined by G.L. c. 90, § 1. That section defines "special mobile equipment" as

motor vehicle[s] which [are] principally designed to conduct excavations or lift building materials at a public or private construction site and [are] operated on a way for the sole purpose of transportation to or from said construction site and [have] a gross vehicle weight of at least twelve thousand pounds. This definition shall not include a motor vehicle which is designed to carry passengers, or any load, on a way.

Owner-contractors who own special mobile equipment may be entitled to receive special registration plates under G.L. c. 90, § 5, which permits the issuance of special registration plates to the following categories of owners: (1) manufacturer; (2) dealer; (3) repairman; (4) recreational vehicle and recreational trailer dealer; (5) boat and boat trailer dealer; (6) farmer; (7) owner-contractor; (8) transporter; and (9) person involved in the harvesting of forest products as defined by the regulations of the registry of motor vehicles. G.L. c. 90, § 5.

However, the Board found and ruled that the issuance of such plates was not dispositive of the issue presented in this appeal. While Chapter 90 defines "motor vehicles" and sets forth the parameters for registration and operation of motor vehicles, it is G.L. c. 60A, § 1 which imposes the motor vehicle excise, and thus the terms of that statute dictate whether the subject property is subject to the motor vehicle excise. As discussed above, the Board found that G.L. c. 60A, § 1 contained no express or implied exemption for the subject property. Rather, the exemptions enumerated in that statute were limited to vehicles owned by certain categories of individuals or entities, such as disabled veterans, former prisoners of war, and charitable organizations. Of the nine categories of individuals eligible to receive special plates under G.L. c. 90, § 5, it is noteworthy that G.L. c. 60A, § 1 exempts only three of them – farmers, manufacturers, and dealers – from the motor vehicle excise.<sup>2</sup> It is apparent from the statutory scheme that not all of the vehicles eligible to receive special registration plates under G.L. c. 90, § 5 are likewise exempt from the motor vehicle excise under G.L. c. 60A, § 1; vehicles

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<sup>2</sup> Motor vehicles owned by motor vehicle dealers are not completely exempt from the excise under the statute, but are instead taxed at a reduced rate.

which are “special mobile equipment” under G.L. c. 90, § 1 and therefore eligible for special registration plates under G.L. c. 90, § 5 may be – and in this case are – “motor vehicles” subject to the excise under G.L. c. 60A, § 1. As the subject property fell within the definition of “motor vehicles” provided by G.L. c. 90, § 1 and was not within the class of vehicles exempted by G.L. c. 60A, § 1, the Board found and ruled that it was subject to the motor vehicle excise. In making its argument, the appellant relied in part on various items of correspondence issued by the RMV and the DOR as well as a manual published by the DOR entitled “Motor Vehicle & Trailer Excise Manual.” The Board found that none of these items supported the appellant’s position. The DOR’s “Motor Vehicle & Trailer Excise Manual” indicated that “special mobile equipment” is not subject to the motor vehicle excise and should instead be taxed as personal property. However, in a written response to an inquiry by the assessors regarding this statement, the DOR clarified the statement to mean only that special mobile equipment that is not also a “motor vehicle” as defined by G.L. c. 90, § 1 is not subject to the motor vehicle excise and should be taxed as personal property. In that same item of correspondence, the DOR reiterated its previously-articulated opinion that mobile concrete pumpers are motor vehicles subject to the motor vehicle excise. Additionally, the items of correspondence from the RMV merely served to confirm that agency’s opinion that the appellant was eligible to receive “owner-contractor” plates for its mobile concrete pumpers because, in the RMV’s opinion, mobile concrete pumpers were “special mobile equipment.” The Board found that this opinion had no bearing on the taxability of the subject property. In fact, in a letter dated December 18, 2001, the RMV declined to opine on the taxability of mobile concrete pumpers, and instead explicitly deferred to the DOR on that matter. Similarly unpersuasive was the appellant’s attempt to use a 1985 IRS Letter Ruling, issued to a different taxpayer, to support its contention that mobile concrete pumpers are not subject to the excise imposed by G.L. c. 60A, § 1. That letter ruling pertained to the federal excise on “highway vehicles,” defined under Treas. Reg. § 48.4061(a)-1(d)(1) as “any self-propelled vehicle, or any trailer or semitrailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions but does not include a vehicle described in section 48.4061(a)-1(d)(2).” Although the IRS determined that mobile concrete pumpers fell into the general definition of “highway vehicles,” it also determined that they fell into the express exception provided by § 48.4061(a)-1(d)(2)(i), which exempted from the excise

vehicles that consist of chassis with machinery or equipment permanently mounted thereto, and which engage in construction, manufacturing processes or the like, provided that the chassis serves only as a means of mobility and power source and, by reason of its design, the chassis could not, without substantial structural modification, be used as a vehicle to carry loads other than its specialized equipment or machinery. Not only did the definition of “highway vehicle” differ from the definition of “motor vehicle” at issue here, but, unlike in the present appeal, vehicles such as mobile concrete pumpers were expressly exempted. As discussed above, the Board found and ruled that the relevant statute contained no such exemption for the subject property, and the Board therefore rejected the appellant’s attempt to liken the federal excise to the motor vehicle excise imposed by G.L. c. 60A, § 1.

Additionally, under G.L. c. 60A, § 6, the excise is to be imposed by the municipality in which the motor vehicle is “customarily kept.” G.L. c. 60A § 6. The appellant asserted that Truck No. 112 was primarily garaged in New Hampshire, and the Board inferred from this assertion that the appellant impliedly argued that Truck No. 112 was not subject to the excise assessed by the assessors. However, the appellant offered no insurance records, registration information or other documentary evidence indicating that Truck No. 112 was garaged primarily in New Hampshire. To the contrary, the evidence indicated that Truck No. 112 was registered in Massachusetts and used most frequently in Massachusetts. The Board therefore found and ruled that there was insufficient evidence in the record to support the appellant’s assertion, and accordingly, it rejected the appellant’s implied argument.

Lastly, the appellant claimed that it was entitled to an abatement of the excise because the excise was based on an incorrect valuation of the subject property. G.L. c. 60A, § 1 imposes the excise, at a rate of \$25 per \$1,000, and for purposes of the excise, the value of each motor vehicle is:

deemed to be the value, as determined by the commissioner, of motor vehicles or trailers of the same make, type, model, and year of manufacture as designated by the manufacturer, but not in excess of the following percentages of the list price established by the manufacturer for the year of manufacture, namely: --

In the year preceding the designated year of manufacture 50%

In the year of manufacture 90%

In the second year 60%

In the third year 40%

In the fourth year 25%

In the fifth and succeeding years 10%.

G.L. c. 60A, § 1; *see also Lily Transportation Corp. v. Assessors of Medford*, 427 Mass. 228, 230 (1998). The appellant offered no evidence of overvaluation, nor did it offer evidence demonstrating error in the assessors' valuation methodology. The excise for Truck No. 112 was based solely on the value of its truck chassis, an amount much lower than its manufacturer list price. The Board found and ruled that there was nothing in the statutory language requiring the assessors to base the excise on the value of a motor vehicle's chassis alone rather than the applicable percentage of manufacturer list price. *See DePesa v. Assessors of Norwell*, Mass. ATB Findings of Fact and Reports 2004-484, 491 (ruling that motor vehicle excise was properly based on value of entire motor home, not on chassis alone, exclusive of coach). With respect to Truck No. 113, the evidence likewise showed that the assessors based the excise on a value lower than the value derived by using the formula designated in the statute. The evidence showed that, if anything, the subject property was undervalued, not overvalued. The Board therefore found and ruled that the appellant did not prove that the subject property was overvalued.

The burden of proof is upon the taxpayer to make out its right as a matter of law to abatement of the tax. *Schlaiker v. Board of Assessors of Great Barrington*, 365 Mass. 243, 245 (1974). A taxpayer claiming exemption from taxation must show clearly and unequivocally that it comes within the terms of the exemption. *Town of Milton v. Ladd*, 348 Mass. 762, 765 (1965). In the present appeal, the Board found and ruled that the appellant did not establish that the subject property was exempt from the excise imposed by G.L. c. 60A, § 1, nor did it prove that the subject property was overvalued. The Board therefore found and ruled that the appellant did not meet its burden of proving its right to an abatement of the excise. Accordingly, the Board issued 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**

**MUHAMMAD M. ITANI, TRUSTEE v.  
OF THE MAPLE REALTY TRUST**

**BOARD OF ASSESSORS OF  
THE TOWN OF ROCKLAND**

Docket No. P012815

Promulgated:  
November 22, 2011

**ATB 2011-994**

This matter consists of sixty-nine Petitions for Late Entry (“PLEs”) filed under G.L. c. 59, § 65C and 831 CMR 1.05. The PLEs were precipitated by the failure of the Board of Assessors of the Town of Rockland (“assessors”) to act on applications to abate taxes on real estate located in Rockland owned by and assessed to Muhammad M. Itani and Bisher I. Hashem, Trustees of the Maple Realty Trust (“appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2010 and the appellant’s failure to file appeals to the Appellate Tax Board (“Board”) within three months of the deemed-denial dates of the appellant’s abatement applications as required by G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65.

Chairman Hammond (“Presiding Commissioner”) heard the PLEs at a Board motion session and subsequently issued a written order denying them.

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.

*Thomas J. Filipek, Esq.* for the appellant.  
*Debra Krupczak*, assessor, for the appellee.

**FINDINGS OF FACT AND REPORT**

On January 1, 2009, the appellant was the assessed owner of sixty-nine parcels of real estate located in the Town of Rockland (collectively “subject properties”). Table 1 lists the street addresses of the individual properties which comprise the subject properties.

**Table 1**

<b><u>Saw Mill Lane Properties</u></b>				<b><u>Corn Mill Way Properties</u></b>			
3	5	6	7	1	2	3	4
8	9	10	11	5	6	7	8
12	13	14	15	9	10	11	12
16	17	18	19	13	14	15	16
20	21	22	23	17	19	23	24

24	25	26	27		25	27
28	29	30	31			
32	33	34	35			
36	37	38	39			
40	41	42	43			
44	45	46	48			
50	52	54				

For fiscal year 2010, the assessors valued seventeen of the Saw Mill Lane properties at \$133,300, fourteen at \$133,500, fifteen at \$133,700, and one at \$133,900, and assessed taxes thereon, at a rate of \$14.39 per \$1,000, in the respective amounts of \$1,918.19, \$1,921.07, \$1,923.94, and \$1,926.82. The assessors valued four of the Corn Mill Way properties at \$133,300, eight at \$133,500, and ten at \$133,700 and assessed taxes thereon, at a rate of \$14.39 per \$1,000, in the respective amounts of \$1,918.19, \$1,921.07, and \$1,923.94. On or about December 31, 2009, Rockland’s Collector of Taxes sent out the town’s actual real estate tax bills. In accordance with G.L. c. 59, § 57C, the appellant timely paid the taxes assessed on the subject properties without incurring interest.<sup>1</sup>

On February 1, 2010, in accordance with G.L. c. 59, § 59, the appellant timely filed sixty-nine Applications for Abatement with the assessors for the subject properties. Because the assessors did not act on the applications within three months of their filing, they were deemed denied pursuant to G.L. c. 58A, § 6<sup>2</sup> and G.L. c. 59, §§ 64 and 65.<sup>3</sup> On May 5, 2010, within ten days after the deemed-denial date, in accordance with G.L. c. 59,

<sup>1</sup> When the real estate tax on the property is \$3,000 or less, timely payment is not a prerequisite to the Board’s jurisdiction. *See* G.L. c. 59, §§ 64 and 65.

<sup>2</sup> G.L. c. 58A, § 6 provides, in pertinent part, that:

Whenever a board of assessors, before whom an application in writing for the abatement of a tax is pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of three months from the date of filing such application, it shall then be deemed to be denied, and the taxpayer shall have the right, at any time within three months thereafter, to take any appeal from such denial to which he may be entitled by law, in the same manner as though the board of assessors had in fact refused to grant the abatement applied for.

<sup>3</sup> G.L. c. 59, § 64 similarly provides, in pertinent part, that:

Whenever a board of assessors, before which an application in writing for the abatement of a tax is or shall be pending, fails to act upon said application, except with the written consent of the applicant, prior to the expiration of three months from the date of filing of such application it shall then be deemed to be denied and the assessors shall have no further authority to act thereon.

G.L. c. 59, § 65 provides, in pertinent part, that:

A person aggrieved as aforesaid with respect to a tax on property in any municipality may, subject to the same conditions provided for 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.

§ 63,<sup>4</sup> the assessors sent notice to the appellant that the applications had been deemed denied on Monday, May 3, 2010.<sup>5</sup> The assessors presumably relied on G.L. c. 4, § 9 (“[W]hen the day or last day for the performance of any act . . . falls on Sunday or a legal holiday, the act may . . . be performed on the next succeeding business day.”) and G.L. c. 41, § 110A (treating Saturday as a holiday) in extending the deemed-denial date under G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65 from Saturday, May 1, 2010 to the next business day, Monday, May 3, 2010.

Contrary to G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65, the appellant did not file appeals with the Board within three months of even the May 3, 2010 purported deemed-denial date. Rather, on September 29, 2010, almost two months after the date required by G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65, the appellant filed sixty-nine PLEs seeking leave to file appeals for the subject properties late because there had been “ongoing negotiations with the Town” and the appellant believed that “the appeal period had not been triggered.”<sup>6</sup>

On the basis of these facts and assertions and in consideration of the relevant statutory sections, the Presiding Commissioner found that the assessors had timely sent the deemed-denial notices under G.L. c. 59 § 63 to the appellant but the appellant had nonetheless failed to timely file his appeals within three months of the deemed-denial date, thereby depriving the Board of jurisdiction under G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. The Presiding Commissioner further found that the appellant was not eligible for the additional two-month’s relief within which to file his appeals under G.L. c. 59, § 65C because the assessors had timely sent the notice required by G.L. c. 59, § 63 to the appellant. Moreover, the Presiding Commissioner found that continuing

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<sup>4</sup> G.L. c. 59, § 63 provides, in pertinent part, that:

Assessors shall, within ten days after their decision on an application for an abatement, send written notice 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.

<sup>5</sup> G.L. c. 59, § 63 provides, in pertinent part, that “[s]aid notice shall indicate . . . the date the application is deemed denied.”

<sup>6</sup> G.L. c. 59, § 65C provides, in pertinent part, that:

If a person has, by reason of the failure of the board of assessors to act upon an application for abatement, a right of appeal to the appellate tax board under section sixty-five but the board of assessors failed to send written notice of such inaction to the applicant within ten days as provided in section sixty-three and by mistake or accident such person fails to enter such appeal in said board within the time prescribed by section sixty-five, said board, upon petition filed within two months after the appeal should have been entered, and after notice and hearing, and upon terms, may allow such person to enter his appeal.

negotiations with and by the assessors did not excuse the appellant's failure to timely file his appeals or estop the assessors from denying their timeliness.

In making these findings, the Presiding Commissioner recognized that the information statutorily required for inclusion in the notice of decision under G.L. c. 59, § 63 was not compromised and the appellant was not prejudiced here by the deemed-denial date being listed on the notice as Monday, May 3, 2010 instead of the actual deemed-denial date of Saturday, May 1, 2010. The appellant did not timely file his appeals within three months of even the Monday, May 3, 2010 date. The Presiding Commissioner further recognized that G.L. c. 4, § 9 and G.L. c. 41, § 110A do not apply to extend the deemed-denial date from Saturday, May 1, 2010 to Monday, May 3, 2010. These two remedial statutes only apply when "the performance of any act" is required. The manifestation of a deemed-denial date does not require "the performance of any act"; it occurs by operation of law. Accordingly, the Presiding Commissioner found that G.L. c. 4, § 9 and G.L. c. 41, § 110A do not apply here.

On this basis, the Presiding Commissioner found that the appellant did not timely file his appeals and the appellant was not entitled to invoke the additional two-month's relief under § 65C. Accordingly, the Presiding Commissioner ordered that the PLEs be denied.

### **OPINION**

G.L. c. 58A, § 6 and G.L. c. 59, §§ 57-65C contain the statutory requirements for invoking the Board's jurisdiction to appeal a municipal tax assessment on real estate. *See generally Eastern Racing Ass'n v. Assessors of Revere*, 300 Mass. 578 (1938). While the appellant met some of the statutory prerequisites for invoking the Board's jurisdiction - those regarding payment and the timely filing of his abatement applications - he did not timely appeal the deemed denials of his abatement applications within the three-month period prescribed by G.L. c. 58A, § 6 and G.L. c. 59, §§ 64 and 65. Because of his omission, he filed PLEs with the Board requesting an extra two months within which to file his appeals with the Board pursuant to G.L. c. 59, § 65C. In accordance with § 65C, the Board may allow a PLE and sanction the filing of an appeal late, if it finds, among other things, that "the board of assessors failed to send written notice of such inaction [in accordance with G.L. c. 59, § 63] to the applicant within ten days" of the deemed-denial date.

Here, the Presiding Commissioner found that the assessors had complied with § 63 and sent the requisite notices of decision to the appellant within ten days of the deemed denial date - May 1, 2010. The Presiding Commissioner further found that while the listing of Monday, May 3, 2010 as the deemed-denial date instead of Saturday, May 1, 2010 was incorrect, it did not impact the legitimacy of the notices of decision because it did not compromise the substance of the statutorily required information or prejudice the appellant. The Presiding Commissioner recognized that the Board would simply and reasonably calculate the three-month appeal period as running from this later date. *See Boston Communications Group, Inc. v. Assessors of Woburn*, Mass. ATB Finding of Fact and Reports 2011-780, 788-89 (finding and ruling that when a notice of decision under § 63 is lacking, the Board will use a reasonableness standard in evaluating the appropriate time for appeal).

The Presiding Commissioner contrasted the notice of decision in the present matter with the one in *Stagg Chevrolet, Inc. v. Board of Water Commission of Harwich*, 68 Mass. App. Ct. 120 (2007) in which that notice of decision under G.L. c. 59, § 63 “fail[ed] to include statutorily required information regarding the appellate process.” *Id.* at 121. The Court in *Stagg Chevrolet, Inc.* affirmed the Board’s allowance of an additional two months within which to file an appeal because: that notice “[completely] lacked critical [appeal] information”; the remedy crafted by the Board was “easily ascertained by both parties”; and it “provide[d] some redress.” *Id.* at 126. Here, the statutorily required deemed-denial date was included in the notice of decision but it was simply improperly advanced an additional two days. Under these circumstances, the Presiding Commissioner found and ruled that the most appropriate and reasonable remedy would be to calculate the three-month appeal period from this later date. *See Boston Communications Group, Inc.*, Mass. ATB Finding of Fact and Reports 2011 at 788-89 (using a reasonableness standard to rectify any harm caused by a defective notice of decision); *cf. General Dynamics Corp. v. Assessors of Quincy*, 388 Mass. 24, 31 (1983)(“We will not attribute to [the assessors] the intention of misleading taxpayers”). Even by this measure, the appellant missed the requisite filing deadline by almost two months.

Finally, the Presiding Commissioner found and ruled that continuing negotiations with and by the assessors did not excuse the appellant’s failure to timely file his appeals or estop the assessors from denying their timeliness. *See Franklin County Realty Trust*

*v. Assessors of Greenfield*, 391 Mass. 1018 (1984)(affirming the Board’s dismissal of a taxpayer’s late filed appeals and rejecting the taxpayer’s estoppel argument which was premised on “the assessors’ continued [] consider[ation] [of] [taxpayer’s] application after the expiration of the appeal period.”).

For these reasons, the Presiding Commissioner found and ruled that the appellant was not entitled to invoke the additional two-month’s relief under G.L. c. 59, § 65C and, therefore, ordered that his PLEs be denied.

**THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**SCOTT E. KAMHOLZ & v.  
KAREN LEVINE KAMHOLZ**

**BOARD OF ASSESSORS OF  
THE CITY OF NEWTON**

Docket No. F298824

Promulgated:  
January 25, 2012

**ATB 2012-15**

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 City of Newton (“assessors” or “appellee”) to abate a supplemental tax assessed on certain property owned by and assessed to Scott E. and Karen Levine Kamholz (“appellants”) under G.L. c. 59, § 2D for fiscal year 2008 (“fiscal year at issue”).

Chairman Hammond heard this appeal and was joined by Commissioners Scharaffa, Egan, Rose, and Mulhern in the decision for the appellants.

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

*Scott E. Kamholz, pro se*, for the appellants.  
*James Shaughnessy*, assistant assessor, for the appellee.

## FINDINGS OF FACT AND REPORT

Based on the agreed statement of facts, testimony, and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

On January 1, 2007, S.Z. Realty LLC (“SZR”) was the assessed owner of a 0.34-acre parcel of land improved with a single-family residence located at 377 Cherry Street in Newton and identified as parcel 33024-0017 for assessing purposes. The assessors valued 377 Cherry Street as of January 1, 2007 at \$513,700 for the fiscal year at issue.

On July 5, 2007, SZR recorded a Condominium Master Deed in the Middlesex South Registry of Deeds and legally converted the dwelling located at 377 Cherry Street into two condominium units: the subject property, with an address of 375 Cherry Street (the “subject property”) and 377 Cherry Street. On June 29, 2007, six days prior to the recording of the Master Deed, SZR was issued an occupancy permit for the subject property. On July 31, 2007, SZR sold the subject property to the appellants for \$860,000. On June 20, 2008, the assessors gave notice to the appellants of a supplemental tax pursuant to G.L. c. 59, § 2D (the “Notice”). The Notice reflects that the assessors took the following steps in calculating the supplemental tax:

1. determined a value for the subject property prior to its establishment as a condominium of \$256,900 (roughly one-half of the \$513,700 original assessed value of the 375 Cherry Street single-family residence);
2. determined a value of \$774,000 for the subject property after conversion to a condominium unit;
3. determined that the value of the subject property had increased by \$517,100 (\$774,000 - \$256,900);
4. applied the fiscal year 2008 tax rate of \$9.70/\$1,000 to the \$517,100 increase in value to determine a supplemental tax for the entire fiscal year of \$5,015.87;
5. determined that the supplemental tax should be applicable for the entire fiscal year (365 days) and therefore the pro rata amount of the supplemental tax was the full \$5,015.87;
6. added a Community Preservation Act Surcharge of 1 percent (\$50.16) to the supplemental tax to arrive at a total supplemental tax due of \$5,066.03

Appellants timely paid the supplemental tax without incurring interest and timely filed an abatement application with the assessors on July 18, 2008. The assessors denied the appellants' abatement application on August 4, 2008 and the appellants filed their appeal of the denial with the Board, postmarked on November 3, 2008.<sup>1</sup> Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The appellants did not challenge the assessors' valuation of the subject property. Rather, the appellants' sole argument was based on the fact that they did not take title to, and therefore did not occupy, the subject property until July 31, 2007. Accordingly, the appellants argued that the supplemental tax could not be levied under G.L. c. 59, § 2D(a)(2) because that statute expressly applies only in instances where occupancy of the property takes place between January 1 and June 30. The appellee, on the other hand, interpreted the statute to apply in instances where an occupancy permit is issued between January 1 and June 30.

For the reasons discussed more fully in the following Opinion, the Board found and ruled that the plain language of § 2D establishes a supplemental tax with two components: 1) a pro rata tax for the fiscal year in which the improvement takes place and an occupancy permit is issued; and 2) a pro forma tax for the succeeding fiscal year where "the occupancy" takes place between January 1 and June 30.

With regard to the first component, an occupancy permit for the subject property was issued on June 29, 2007, the day before the end of fiscal year 2007. The appropriate supplemental tax calculation would first determine the fiscal year 2007 tax on the increased value of the subject property resulting from any new construction by multiplying the increase in value by the fiscal year 2007 tax rate and then determine the pro rata amount by multiplying the fiscal year 2007 tax on the increased value by the fraction  $1/365$ .<sup>2</sup>

Although the occupancy permit was issued in fiscal year 2007, the assessors did not compute a fiscal year 2007 supplemental tax. At the hearing of this appeal, the assistant assessor testified that no fiscal year 2007 supplemental was calculated because

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<sup>1</sup> The appellants' petition was mailed in an envelope postmarked November 3, 2008 which was received by the Board on November 5, 2008. Where, as here, the Board receives a petition after the expiration of the three-month appeal period, the date of postmark is deemed to be the date of filing. G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 & 65. Accordingly, the Board found and ruled that the filing date of the petition was deemed to be November 3, 2008 and therefore the appellants' appeal was timely.

<sup>2</sup> The allocation fraction has as its numerator the number of days remaining in the fiscal year and as the denominator the total number of days in the year.

there was only one day left in the fiscal year and the amount of the tax was de minimis. Instead, using the occupancy permit date of June 29, 2007, the assessors assessed a fiscal year 2008 supplemental tax based on the fiscal year 2008 tax rate and the fraction 365/365.

The Board found and ruled that the statute did not authorize the assessment of the supplemental tax at issue. First, a necessary precondition for the imposition of a § 2D(a) supplemental assessment is that the subject real estate must be “improved in assessed value by over 50 percent *by new construction.*” The record in the present appeal is devoid of any evidence of construction on the subject property. Instead, the only change in the subject property to account for its increase in value that is reflected in the record was its legal conversion into a condominium unit. Because § 2D provides for a supplemental tax only where the increase in assessed value is due to new construction, the Board found and ruled that the subject assessment was not authorized by the statute.

Moreover, the subject assessment is also invalid because the assessors failed to follow the statutory language in assessing the supplemental tax. The pro rata component of the § 2D supplemental tax is applicable to the fiscal year in which the occupancy permit is issued, in this case fiscal year 2007. The assessors assessed no pro rata assessment for fiscal year 2007. The fact that there was only a short time remaining in the fiscal year does not mean that the assessors can ignore the clear requirements of the statute.

The assessors purported to assess a pro rata supplementary tax for the year succeeding the fiscal year in which the improvement was made and the occupancy permit was issued. However, it is the second component of the § 2D supplemental tax that applies to the year following the issuance of an occupancy permit, in this case fiscal year 2008. Section 2D provides that the supplemental tax for the succeeding fiscal year is applicable only where “the *occupancy* taxes place between January 1 and June 30.” (emphasis added). There was no evidence of record concerning the occupancy of the subject property between January 1 and June 30; although an occupancy permit was issued on June 29, there is no indication in the record that the subject property was occupied prior to the appellants’ purchase of the property on July 31, 2007. Accordingly, there was no basis to assess a tax for the “succeeding fiscal year” based on the record in this appeal.

Accordingly, the Board issued a decision for the appellants in this appeal and granted an abatement in the amount of \$5,066.03.

### OPINION

Under G.L. c. 59, § 2D(a), whenever any real estate “improved in assessed value by over 50 per cent by new construction” is issued an occupancy permit after January 1 in any year, the owner must pay as a supplemental tax an amount that reflects what “would have been due for the applicable fiscal year” if the property were so improved on the January 1 “assessment date for the fiscal year in which the occupancy permit issued.”

As a threshold matter, § 2D authorizes the assessors to impose a supplemental tax only where the increase in assessed value of the subject property results from “new construction.” The term “construction” is not defined in the statute, but statutory language, when clear and unambiguous, must be given its ordinary meaning. *Bronstein v. Prudential Ins. Co. of America*, 390 Mass. 701, 704 (1984). Where the language of a statute is “plain, it must be interpreted in accordance with the usual and natural meaning of the words.” *In re Valuation of MCI Worldcom Network Services*, 454 Mass. 635, 650 (2009)(quoting *Household Retail Services, Inc. v. Commissioner of Revenue*, 448 Mass. 226, 229 (2007)).

There is nothing ambiguous about the word “construction” in § 2D; it plainly means the erection or physical alteration of a building or other structure. *See, e.g.* BLACK’S LAW DICTIONARY 355 (9TH ED. 2009) (defining “construction” to mean the “act of building by combining or arranging parts or elements.”).

In the present appeal, there was no evidence that any new construction took place on the subject property. The record did not contain evidence of any new building, remodeling or other physical alteration of the subject property; the only change was the conversion of a single-family residence into two separate condominium units. Although the Master Deed creating the condominium and the occupancy permit issued for the subject property were introduced into evidence, neither those documents nor any testimony provided evidence of any new construction. Although the legal conversion of the property into condominium units may have increased the value of the subject property, that increase was not due to “new construction” and, therefore, § 2D did not authorize the subject assessment.

In addition, the assessors’ application of § 2D to the facts of this case was flawed. The amount of the supplemental tax under §2D(a)(1) and (2) is computed as follows:

- (1) A real estate tax based on the assessed value of the improvement for the fiscal year in which such improvement and issuance of an occupancy permit occurred allocable on a pro rata basis to the days remaining in the fiscal year from the date of the issue of the occupancy permit to the end of the fiscal year; and
- (2) A real estate tax based on the assessed value of the improvement for the succeeding fiscal year where the occupancy takes place between January 1 and June 30 of any year.

The statute authorizes two types of supplementary taxes: a pro rata supplementary tax under § 2D(a)(1) (“pro rata tax”) for the fiscal year during which an occupancy permit is issued and a pro forma supplementary tax under § 2D(a)(2) (“pro forma tax”) for the succeeding fiscal year.<sup>3</sup> *See also* Massachusetts Department of Revenue’s Information Guideline Release (“IGR”) 03-209. The pro rata tax allows assessors to capture the increase in value from new construction for the remaining part of the fiscal year after an occupancy permit is issued; the pro forma tax allows assessors to value property for the fiscal year after the occupancy permit issues as if it were so improved on the relevant valuation date, provided that the occupancy takes place between January 1 and June 30.

The reason that the occupancy date is limited to the period between January 1 and June 30 – the second half of any fiscal year -- is that there would be no need for a pro forma assessment where the improvement and occupancy occur during the first half of a fiscal year, between July 1 and December 31: when the improvement is made and the occupancy permit is issued in the first half of the fiscal year, a pro rata assessment would be assessed for the remainder of the fiscal year in which the occupancy permit issued and, since the improvement would be already in place as of January 1 – the mid-point of the current fiscal year and the valuation date for the succeeding fiscal year – the value of the improvement is included in the assessment for the succeeding fiscal year without the need of a § 2D pro forma tax.

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<sup>3</sup> In addition to the supplemental tax authorized by G.L. c. 59, § 2D, there is another statutory mechanism for assessors to reach the value of new construction between January 1 and June 30. *See* G.L. c. 59, § 2A (a). Section 40 of Chapter 653 of the Acts of 1989 (“Ch. 653”), amending G.L. c. 59, § 2A (a), allows cities and towns to assess “buildings and other things erected on or affixed to land” between January 2 and June 30. *See also* IGR 90-401. However, § 2A requires that the city or town accept its provisions to be effective. The parties in this appeal stipulated that Newton has not adopted § 2A and therefore that method of supplemental assessment is not at issue in this appeal.

In the present appeal, because an occupancy permit for the subject property was issued on the second-to-last day of fiscal year 2007, § 2D (a)(1) authorizes a pro rata tax for fiscal year 2007, provided the other requirements of the statute were met. However, the assessors did not assess a fiscal year 2007 pro rata tax, since they determined that the supplemental tax amount for the one day remaining in the fiscal year was de minimis. Regardless of the size of the pro rata tax for fiscal year 2007, however, it is the only pro rata tax under § 2D that can be assessed because it is the fiscal year during which the improvement was made and the occupancy permit was issued. The assessors' purported assessment of a pro rata tax for fiscal year 2008 is therefore invalid.<sup>4</sup>

Further, the assessors could not assess a pro forma tax for fiscal year 2008 on the facts of this appeal. The pro forma assessment under § 2D(a)(2) is based on "the assessed value of the improvement for the *succeeding* fiscal year *where the occupancy takes place between January 1 and June 30 of any year.*" (emphasis added). The pro forma assessment therefore deals with the fiscal year following the fiscal year during which the improvement to real estate is made and the occupancy permit is issued and treats the improvement as having been made on the January 1 assessment date.

However, unlike the pro rata tax computation under § 2D(a)(1), the pro forma tax computation under § 2D(a)(2) refers to the date of "occupancy" not the issuance of an occupancy permit. Moreover, in § 2D(a) and (b) there are multiple references to the issuance of an occupancy permit; the only part of § 2D which refers to the date of "occupancy" is the pro forma tax computation under § 2D(a)(2).

In interpreting a statute, the words used by the Legislature must be given effect. *See Mass. Broken Stone Co. v. Town of Weston*, 430 Mass. 637, 640 (2000)(rejecting effort to substitute alternative words for the plain words of the statute because the "Legislature did not say subdivision shown or lot shown, it said 'land shown.'"). Moreover, when construing a statute, it is presumed "that the Legislature intended what the words of the statute say." *Mass. Care Self-Ins. Group, Inc. v. Mass. Insurers Insolvency Fund*, 458 Mass. 268, 275 (2010).

In the present appeal, there is no evidence concerning the occupancy of the subject property at any time prior to the appellants' purchase of the unit on July 31, 2007.

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<sup>4</sup> The assessors' failure to assess a supplemental tax for fiscal year 2007 and their calculation of the fiscal year 2008 supplemental tax as reflected in the Notice showing that the assessors used 365 as the number of days from the issuance of the occupancy permit to June 30 and a pro rata fraction of 365/365 indicate that the assessors assessed a pro rata supplemental tax for fiscal year 2008.

Although an occupancy permit was issued on June 29, 2007, there is nothing to indicate, in the absence of evidence of actual occupation, that the date of issuance of an occupancy permit should be deemed to be the date of “occupancy” for purposes of § 2D. The Legislature certainly could have referred to the issuance of an occupancy permit in § 2D(a)(2) as it did throughout the rest of § 2D, but chose not to; § 2D must be interpreted according to the words the Legislature chose to use and it cannot be presumed that it meant to say something else. See *Bronstein*, 390 Mass. at 704; *Mass. Care Self-Ins. Group, Inc.*, 458 Mass. at 275.

It is not clear why the Legislature would require actual occupancy, as opposed to the issuance of an occupancy permit, to trigger the pro forma tax, considering the administrative difficulty it creates for assessors who must determine when there is an actual occupation of property. However, it is clear that the Legislature explicitly used the phrase “occupancy takes place” in subsection (a)(2) in contrast to the other references in § 2D to the issuance of an occupancy permit. It is not for the Board, however, to speculate as to possible legislative intent or to ignore the plain words of the statute, much less assume that the legislative language was a mistake. See *CFM Buckley/North LLC, et al v. Assessors of Greenfield, et al*, 453 Mass. 404, 409 (2009)(ruling that the court “cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction”). Changing statutory language and addressing administrative difficulties are proper subjects for legislative action and are not part of the Board’s function to interpret the relevant statutory language.

Based on the foregoing, the Board issued a decision for the appellants in this appeal and granted a full abatement in the amount of \$5,066.03.

**THE APPELLATE TAX BOARD**

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

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

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**MASSACHUSETTS YOUTH v.  
SOCCER ASSOCIATION, INC.**

**BOARD OF ASSESSORS OF  
THE TOWN OF LANCASTER**

**ATB 2012-660**

These are appeals under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the Town of Lancaster (“assessors” or “appellee”) to abate taxes and exempt certain real estate located in the Town of Lancaster owned by and assessed to Massachusetts Youth Soccer Association, Inc. (“MYSA” or “appellant”) under G.L. c. 59, §§ 11 and 38, for fiscal year 2009 (“fiscal year at issue”).

Commissioner Mulhern heard these appeals. Chairman Hammond and Commissioners Scharaffa, Egan and Rose 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.

*Donna M. Truex, Esq.* and *Joshua Lee Smith, Esq.* for the appellant.  
*Ellen M. Hutchinson, Esq.* for the appellee.

**FINDINGS OF FACT AND REPORT**

On July 1, 2008 (“determination date”), the relevant date for qualification for the exemption under G.L. c. 59, § 5, Third (“Clause Third”) for the fiscal year at issue, MYSA was the assessed owner of two parcels of real estate located at 0 Old Union Turnpike and 512 Old Union Turnpike in Lancaster (collectively, “subject property” or “complex”).

The subject property consists of 142.17 acres of land improved with a soccer complex that includes a total of sixteen fields, comprised of eleven grass fields and five synthetic fields. Pursuant to a marketing and sponsorship agreement that MYSA entered into with Citizens Bank of Rhode Island (“Citizens Bank”) on May 18, 2006 (“sponsorship agreement”), the subject property is identified as “Citizens Bank Fields at Progin Park.” Located on the subject property is an approximately 5,000-square-foot main office building, which is used for administrative offices and meeting rooms, as well as staging and storage areas for tournaments and other events. In addition, there are two accessory buildings that have storage, office, and concessions areas, as well as bathroom facilities. There are also six lightning-protection shelters located throughout the subject property.

For the fiscal year at issue, the assessors valued the subject property and assessed

taxes thereon as follows.

<b>Docket No.</b>	<b>Location</b>	<b>Assessed Value</b>	<b>Tax Rate/\$1000</b>	<b>Tax Assessed</b>
F299524	512 Old Union Tpke	\$2,576,100	\$14.84	\$38,229.32
F299525	0 Old Union Tpke	\$ 33,600	\$14.84	\$ 498.62

In accordance with G.L. c. 59, § 57C, the appellant paid the taxes due without incurring interest and, on January 20, 2009, in accordance with G.L. c. 59, § 59, the appellant timely applied to the assessors for a full abatement of the taxes based on its claim of exemption for the subject property under Clause Third.<sup>1</sup> The assessors denied both of the appellant’s abatement applications, and the appellant seasonably filed petitions with the Appellate Tax Board (“Board”). The pertinent filing and denial dates are set forth in the following table.

<b>Docket No.</b>	<b>Abatement Application Filed</b>	<b>Abatement Application Denied</b>	<b>Appeal Filed with Board</b>
F299524	01/20/2009	02/05/2009	04/23/2009
F299525	01/20/2009	02/05/2009	04/23/2009

Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

The appellant presented its case-in-chief through the testimony of Carl J. Goldstein, treasurer of MYSA, and Michael Singleton, associate executive director and also director of coaching of MYSA. The appellant also offered into evidence numerous exhibits, including: MYSA’s Articles of Organization, its Restated Articles of Organization, its Constitution and Bylaws dated May 12, 2009, and its Mission Statement; several aerial photographs of the subject property; a copy of the marketing and sponsorship agreement with Citizens Bank; a sample facility-use agreement; a sample membership form; and two coaching manuals. The appellant’s primary contention for fully abating the real estate taxes assessed on the subject property was that, at all relevant times, the appellant was a charitable educational organization entitled to the Clause Third charitable exemption for the subject property, which it claimed to use in furtherance of its stated charitable purpose.

For their part, the assessors did not offer any witnesses but did submit into evidence the requisite jurisdictional documents, the appellant’s answers to the assessors’ interrogatories, MYSA’s Constitution and Bylaws dated February, 2007, a copy of

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<sup>1</sup> The appellant also timely filed its Form 3 ABC and its Form PC for the fiscal year at issue.

MYSA's President's Handbook, and also printouts from MYSA's website describing the TOPSoccer ("TOPS") and GOALS programs.

Based on the testimony and documentary evidence, the Board made the following findings of fact.

At all relevant times, MYSA was a Massachusetts non-profit corporation organized in 1977 under the provisions of G.L. c. 180 "to foster, encourage, develop and promote the game of soccer among youth in the Commonwealth of Massachusetts." The appellant was granted federal tax-exempt status under Internal Revenue Code ("Code") § 501(c)(3), on September 1, 1981. In January, 2008, the appellant filed Restated Articles of Organization, pursuant to G.L. c. 180, § 7, which re-defined the corporate purpose simply "to foster, develop, encourage and promote the game of soccer." The appellant's Constitution, as amended in February, 2007, states that the appellant's purpose is to "foster, encourage, develop and promote the game of soccer." The appellant's fiscal year 2009 Form 3ABC, filed with the assessors, states that the appellant's primary purpose is to "provide[] services for affiliated local independent soccer clubs and promote[] the game of soccer" in Massachusetts.

MYSA has approximately 180,000 registered player members and more than 25,000 registered adult volunteer members. Individuals become members of MYSA indirectly by registering with their local soccer organizations and paying the requisite registration fee. In turn, the local organizations register their entire membership, including all adult volunteers, and pay MYSA \$11.00 per person. The \$11.00 membership fee is used by MYSA for the following: \$3.00 for insurance for organization officials and excess medical coverage for players; \$3.00 toward the payoff of the mortgage on the subject property; \$1.00 to U.S. Youth Soccer; \$1.00 to Region 1;<sup>2</sup> and \$3.00 toward MYSA overhead costs. MYSA's membership is comprised of more than 427 separate soccer organizations which, according to the testimony, "administer their own local programs." Membership in MYSA is not a pre-requisite or requirement for soccer teams or leagues in the state. Moreover, Mr. Singleton testified that although MYSA's services may make it "easier" for local organizations, MYSA's services are not essential for children to play organized soccer. The vast majority of member games are held at the local level, not at the subject property.

At all relevant times, MYSA also generated revenue from various other sources,

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<sup>2</sup> The record does not contain a description or definition of "Region 1."

including advertising and sponsorship agreements, tournaments, coaching programs, camps and clinics, and field rentals. Pursuant to the sponsor agreement with Citizens Bank, MYSA received \$600,000 for the construction of the soccer fields located at the subject property. In exchange, MYSA granted to Citizens Bank the naming rights for the fields and also listed Citizens Bank on the sponsor page of MYSA's website with Citizen Bank's logo and a direct link to its website.

During the relevant time period, MYSA hosted at the subject property several tournaments, including the State Cup, the Tournament of Champions, the Kohls Cup and the Columbus Day Tournament. The State Cup is open only to premier-level teams. Teams wishing to compete in this tournament, which takes place in the spring, must submit an entry form by September 1 of the previous year and pay an entry fee. In 2008, a total of 281 teams entered the tournament and paid entry fees ranging from \$460 to \$510 per team; only the final eight teams in each age group played at the subject property. The Tournament of Champions is for local "travel" teams. In 2008, 188 teams played in this tournament and each of the ten eligible leagues, members of MYSA, paid \$475 per team. All elimination games were played at the local level and only the "bracket" winners played at the subject property. The one-day Kohls American Cup and Columbus Day Tournament are fee-based recreational tournaments played at the complex, and they are open to any affiliate of MYSA.

MYSA also offered four different levels of coaching courses: the G course, which is "designed to give the beginner coach an introduction to the game of soccer"; the F course, which begins to "present the coach with more of the development of player's individual and team skills"; the E course, which "focuses on game tactics, strategy and specific coaching for goalkeeper skills"; and the D course, which "provides the committed coach with a modern, advanced approach to comprehensive player and team development for older aged players." Although the courses were taught by MYSA instructors, the G, F, and E courses were conducted at local sites using local coordinators, and the D course was held at regional sites. No courses were conducted at the subject property. Course fees ranged from \$30.00 to \$300.00. The course handbooks in evidence indicate that the vast majority of the instruction dealt with soccer skills, techniques, and strategies. In addition, MYSA offered, for a fee, on-field training and specialty clinics for coaches of affiliated organizations.

During the relevant time period, MYSA ran the District Select Program ("DSP")

for adolescents who wanted to continue playing soccer during the summer; the entry fee was \$115. MYSA formed teams from each county in Massachusetts, who then played one another. Games were not played at the subject property. MYSA also operated the Olympic Development Program (“ODP”), to “identify and train the ‘best of the best’ players in the state.” Interested players were required to “try-out.” Those chosen were placed on a pool team and required to pay a \$250 registration fee. Pool teams practiced at various indoor facilities, not owned by MYSA, from January through March. Eventually, the pool teams were narrowed down. The paired-down teams paid MYSA \$1,000 to participate in the program and practiced once per week at the subject property from April through June.

At various times, MYSA also rented the fields at the subject property to both affiliated and non-affiliated organizations, such as Bain Capital, the Bancroft School, and various adult soccer and Frisbee leagues, teams, and associations. MYSA operated both day and overnight camps at the subject property and at other locations. MYSA allowed some teams from Lancaster to use some of the fields for no charge. Other than for the above uses, including tournaments, DSP and ODP play, field rentals, clinics and camps, and the use by some Lancaster teams, the subject property is not “open” to the public.

Mr. Singleton suggested that MYSA donated a substantial amount of time and services by providing opportunities for adolescents not otherwise able to play a sport. He testified that MYSA supports TOPS, a community-based program that focuses on providing soccer opportunities for youths with disabilities. Although MYSA encouraged all of its affiliated organizations to structure a TOPS program, MYSA itself did not play a part in the operations of the TOPS program. MYSA participated in the GOALS summer camps program, which helps to coordinate soccer camps in urban communities throughout Massachusetts. MYSA hires and trains college students to work at the GOALS camps, which are located at various inner-city locations. MYSA also offered some players the opportunity to participate in certain programs or events at reduced fees.

Based on the foregoing, and to the extent it is a finding of fact, the Board found that the appellant failed to meet its burden of proving that it was a charitable organization occupying the subject property for charitable purposes under Clause Third. In particular, the appellant failed to demonstrate that it was organized and used the subject property for traditional charitable purposes or to further an accepted charitable purpose under Clause Third.

The Board found that, at all relevant times, MYSA was a voluntary association of more than 400 separate and independent soccer organizations, organized and operated to enhance and promote the game of soccer within the Commonwealth. There was no specific mention of an educational purpose in any of the organizational documents offered into evidence by the parties. Rather, these documents consistently state a purpose of promoting and developing the game of soccer. Additional corporate documents, such as MYSA's Mission Statement and the statements which outlined MYSA's involvement with the TOPS and GOALS outreach programs, consistently state that MYSA is dedicated to "promoting and enhancing the culture of soccer" or to simply "promote the game of soccer." While the appellant contended that the promotion of soccer at least implies an educational purpose, the Board disagreed. Promotion and development of a game does not fit easily within the concept of "education" which, as the cases discussed in the following Opinion attest, involves developing and expanding the mind and heart.

Accordingly, the Board found that MYSA failed to demonstrate that its promotion of the game of soccer was a traditional or an accepted charitable purpose under Clause Third. The Board therefore found that MYSA was not organized for charitable purposes under Clause Third.

From an operational standpoint, each affiliated organization operated its own program independently, despite its relationship with MYSA, and the vast majority of these organizations' games were played at the local level. While MYSA also offered several coaching courses and clinics, most were for a substantial fee, were held off site, and dealt primarily with soccer skills and technical aspects of the game. The Board found that while these courses may have offered to the participants some small educational benefit, any educational component was minimal compared to the primary focus of the courses which was to promote the game of soccer through the development of soccer skills and techniques. Further, the fact that the courses and clinics were not held at the subject property underscores the fact that MYSA did not occupy the subject property in furtherance of an educational or charitable purpose.

The Board further found that MYSA's primary purpose for offering various tournaments and summer camps at the subject property was to promote the game of soccer, often for only elite players. In making this finding, the Board also found that, under the circumstances here, even the free use of some of the fields by some of Lancaster's soccer teams was consistent with MYSA's primary mission of promoting the

game of soccer, as was any reduction in fees charged for a player's or team's enrollment in a MYSA sponsored event. MYSA's use of the subject property, therefore, was consistent with its corporate mission – to promote the game of soccer. Consequently, the Board concluded that MYSA was not an organization whose mission or use of the subject property was predominantly educational or charitable under Clause Third; rather, the Board determined that MYSA's primary purpose, functions, and operations were to promote the game of soccer and its use of the subject property corresponded to that non-charitable purpose.

On the basis of these findings of fact, the Board found that the subject property was not owned and occupied by a charitable organization in furtherance of a charitable purpose under Clause Third. As a result, the Board found and ruled that the subject property was not exempt under Clause Third. The Board therefore issued a decision for the appellee in these appeals.

### OPINION

Clause Third provides in pertinent part that “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” is exempt from taxation. There is no dispute here that MYSA owns the subject property. Therefore, to qualify for the exemption, MYSA must prove that (1) it is a charitable organization and (2) it occupies the subject property in furtherance of its stated 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)).

The burden of establishing entitlement to the charitable exemption lies with the taxpayer. *New England Legal Found. v. Boston*, 423 Mass. 602, 609 (1996). “Any doubt must operate against the one claiming an exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms.” *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 257 (1936). “Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.” *Mass. Med. Soc’y v. Assessors of Boston*, 340 Mass. 327, 331 (1960) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 718 (1944)).

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.

*Harvard Community Health Plan v. Assessors of Cambridge*, 384 Mass. 536, 544 (1981) (quoting *Mass. Medical Soc’y*, 340 Mass. at 332).

In *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729 (2008), the Supreme Judicial Court offered a new “interpretive lens” through which to view Clause Third exemption claims. See *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703 (2009). Specifically, *New Habitat* “conditions the importance of previously established factors<sup>3</sup> on the extent to which ‘the dominant purposes and methods of the organization’ are traditionally charitable.” *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 703 (quoting *New Habitat*, 415 Mass. at 733). In other words, “[t]he closer an organization’s dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in [the] interpretation 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.” *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 705.

The court in *New Habitat*, quoting language from a mid-nineteenth century case, characterized the “traditional objects and methods” of a Clause 3 charity as follows:

“A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either *by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.*”

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<sup>3</sup> The previously established factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay[;] whether it charges fees for its services and how much those fees are[;] whether it offers its services to a large or ‘fluid’ group of beneficiaries and how large and fluid that group is[;] whether the organization provides its services to those from all segments of society and from all walks of life[;] and whether the organization limits its services to those who fulfill certain qualifications and how those limitations help advance the organization’s charitable purposes.” *New Habitat*, 451 Mass. at 732-33 (citations omitted).

*New Habitat*, 451 Mass. at 732 (quoting *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867) (emphasis added).

The Board found that MYSA's purposes and activities did not constitute traditionally charitable objects or methods. During the relevant time period, MYSA offered various fee-based coaching classes, clinics and camps for adults and youths who wished to improve their soccer coaching skills and play. MYSA argued that through its numerous coaching, training and educational classes, MYSA teaches coaches, referees and administrators skills that are important to the development of the mind, body and spirit of youths, including issues of nutrition, physical fitness, gender and child development.

Although promoting the game of soccer and the proper instruction of coaches and players may have some benefit, it cannot be said that MYSA's activities "bring the minds or hearts [of persons] under the influence of education or religion," "reliev[e] their bodies from disease, suffering or constraint," "assist[] them to establish themselves in life," or "otherwise lessen[] the burden of government." *Id.*

MYSA's purported "educational" activities fall far short of the educational activities found to be "charitable" under Clause 3. "[A]n educational institution of a public charitable nature falls within" the exemption provided by Clause 3. *Lasell Village, Inc. v. Assessors of Newton*, 67 Mass. App. Ct. 414, 419 (2006) (quoting *Cummington Sch. of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 602, (1977)). In order to be exempt under Clause 3, the educational institution: (1) must "make a contribution to education;" and (2) education or the advancement of education must be its "dominant activity." *Id.* at 603.

A contribution to education may include providing a general benefit to society. See, e.g., *Boston Symphony Orchestra*, 294 Mass. at 255 (recognizing that fulfilling a general purpose to educate the public in the knowledge of music might well be charitable by advancing the culture); *Molly Vanum Chapter, D.A.R. v. Lowell*, 204 Mass. 487, 493 (1910) (recognizing preservation of historical data concerning Revolutionary War for education of the public is a charitable purpose); *Massachusetts Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24, 27 (1886) (recognizing education of public on issues of animal cruelty as charitable).

A contribution to education may also include providing education to a relatively small class of individuals as long as those receiving the benefit are drawn from an

indefinite class of persons. *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 539 (1956) (recognizing that seminary for training of priests that provided study of theology, Scripture and Latin, although not a specific benefit to the public at large, was charitable because education provided to an indefinite class of persons who change from year to year); *Assessors of Boston v. Garland School of Home Making*, 296 Mass. 378, 386-89 (1936) (ruling that providing education in the principles of home making -- including courses on psychology, home nursing, literature, drama and current events -- “is clearly educational” and, although not of benefit to the public at large, had a benefit to an indefinite class of persons).

MYSA’s promotion of the game of soccer and providing classes on soccer coaching, skills and techniques do not qualify as a “contribution to education.” Although the instruction of coaches, referees, and administrators may touch on subjects like nutrition, fitness, and child welfare, the clear focus of the instruction is on the technical aspects of the game, a subject that cannot reasonably be considered to be of benefit to the public. Further, even assuming that the individuals MYSA trained comprised an “indefinite class” -- a proposition for which the appellant offered no evidence -- disseminating information concerning the coaching and techniques of a sport is not “education” in any sense recognized in the above-cited cases.

Moreover, on this record, the training offered was not the dominant purpose of MYSA. Rather, the Board found that MYSA’s dominant purpose was to promote the game of soccer and any “educational” activities were minimal and at best ancillary to its primary purpose. See *Lasell Village*, 67 Mass. App. Ct. at 421-22; *Harvard Community Health Plan*, 384 Mass. at 544. Accordingly, for all of the above reasons, the Board ruled that the activities and methods of MYSA were not traditionally charitable under the relevant case law.

However, notwithstanding the ruling that MYSA’s activities and methods were not traditionally charitable, it may still have qualified for the Clause 3 exemption, but “the more remote the objects and methods are from traditionally charitable purposes and methods [including education] the more care must be taken to preserve sound principles and to avoid unwarranted exemptions from the burdens of government.” *New Habitat*, 451 Mass. at 733 (quoting *Boston Chamber of Commerce*, 315 Mass. at 718); see also *Mass. Med. Soc’y.*, 340 Mass. at 331-32.

In the present appeal, MYSA was organized as a charitable corporation pursuant

to G.L. c. 180 to “foster, encourage, develop and promote the game of soccer” in the Commonwealth and was granted tax-exempt status pursuant to Code § 501(c)(3). Although an organization’s § 501(c)(3) status is a factor in determining whether the organization is charitable for purpose of the Clause Third property tax exemption, it is not dispositive. *Harvard Community Health Plan*, 384 Mass. at 536. The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. It “must prove that it is in fact so conducted that in actual operation it is a public charity” not a mere pleasure, recreation or social club or mutual benefit society. *Jacob’s Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313 (1946) (citing *Little v. Newburyport*, 210 Mass. 414, 415 (1912); see also *Marshfield Rod & Gun Club v. Assessors of Marshfield*, Mass. ATB Findings of Fact and Reports 1998-1130.

Classification as a charitable organization ultimately depends upon the language of its charter or articles of association, constitution and by-laws, and upon the objects which it serves and the method of its administration, that is, “upon the declared purposes and the actual work performed.” *Mass. Med. Soc’y.*, 340 Mass. at 328 (citing *Garland School of Home Making* 296 Mass. at 384). An institution will be classified as charitable “if the dominant purpose of its work is for the public good and the work done for its members is but the means adopted for this purpose.” *Id.* at 332. If, however, the dominant purpose of its work is to benefit the members, such organization will not be classified as charitable, even though the public will derive an incidental benefit from such work. *Id.* On the facts of this appeal, it is clear that the dominant purpose of MYSA’s work is to benefit its members and any benefit derived by the public is at best incidental.

An important factor to be considered in determining if 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.” *Home for Aged People in Fall River v. Assessors of Fall River*, Mass. ATB Findings of Fact and Reports 2011-370, 400 (quoting *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)). “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 Massachusetts Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 102 (2001) (quoting *Assessors*

*of Springfield v. Cunningham Foundation*, 305 Mass. 411, 418 (1940)). The Board found, however, that MYSA failed to prove how its actions “advance[d] the public good, thereby relieving the burdens of government to do so.” *Home for Aged People*, Mass. ATB Findings of Fact and Reports at 2011-403. While it may be that the sport of soccer is popular and there may be some laudable benefits, both socially and personally, derived from participating in organized soccer activities, no burden of government is alleviated and no other charitable purpose is achieved.<sup>4</sup> “Thus, although many activities and services are commendable, laudable and socially useful, they do not necessarily come within the definition of ‘charitable’ for purposes of the exemption.” *Western Massachusetts Lifecare*, 434 Mass. at 103. See also *Skating Club of Boston v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2007-193, 211 (ruling that the property of a figure skating club with a mission “to foster good feeling among its members and promote interest in the art of skating” and whose activities focused on developing elite skaters was not entitled to the Clause Third exemption).

On the basis of all of the evidence and its findings and rulings, the Board ultimately found and ruled that the appellant failed to meet its burden of proving that it was a charitable organization for purposes of Clause Third and that it occupied and used the subject property in furtherance of a traditional or an otherwise accepted or acceptable charitable purpose within the meaning of Clause Third.

Accordingly, the Board issued a decision for the appellee in these appeals.

**THE APPELLATE TAX BOARD**

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

A true copy,

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

<sup>4</sup> The appellant directed the Board’s attention to a 1994 case decided by a three-judge panel of the Kansas Court of Appeals, with one member dissenting, *The Most Reverend Ignatius J. Strecker, Archbishop for the Archdiocese of Kansas City in Kansas v. J. Mark Hixon, Shawnee County Appraiser (“Strecker v. Hixon”)*, 20 Kan. App. 2d 489 (1994). The majority held that a 2.8-acre tract used exclusively as a soccer field qualified for an educational-use exemption under Kansas law. The case is readily distinguishable from the present appeal because the Kansas soccer field was owned by a religious organization, was open to the public, and there was no charge for using the field. In addition, the majority opinion relied on a broad definition of “educational use” ostensibly authorized by the Kansas Supreme Court in an earlier case, *National Collegiate Realty Corp. v. Board of Johnson County Comm’rs*, 236 Kan. 394 (1984). By contrast, no such broad definition is consistent with Massachusetts law, which requires strict construction of exemption statutes. See *Massachusetts Med. Soc’y* 340 Mass. at 331. Finally, the Board found more persuasive the observation of the dissent in *Strecker*: “[t]here is nothing inherently “educational,” . . . in playing soccer on a vacant lot in Topeka.” *Id.* at 494.

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**MOHONK EDUCATIONAL AND v.  
NEUROPSYCHOLOGICAL  
FOUNDATION, INC.<sup>1</sup>**

**BOARD OF ASSESSORS OF  
THE TOWN OF MOUNT WASHINGTON**

Docket No. F308032

Promulgated:  
June 13, 2012

**ATB 2012-737**

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 Mount Washington (the “assessors” or the “appellee”) to abate taxes on certain real estate located in Mount Washington and owned by and assessed to Mohonk Educational and Neuropsychological Foundation, Inc. (the “appellant” or “Mohonk”) for fiscal year 2010.

Commissioner Mulhern heard this appeal. Chairman Hammond and Commissioners Scharaffa, Egan, and Rose 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.

*Marc C. Lovell, Esq., for the appellant.*  
*Elisabeth Goodman, Esq., for the appellee.*

**FINDINGS OF FACT AND REPORT**

On January 1, 2009, the relevant date for valuation and assessment, and on July 1, 2009, the relevant date for qualification for the exemption under G.L. c. 59, § 5, Third (“Clause Third”), for fiscal year 2010, the appellant was the assessed owner of six mostly contiguous parcels of land in Mount Washington (collectively, the “subject property” or the “subject parcels”). The subject parcels contain a total of approximately 174.28 acres and are vacant except for several dilapidated and uninhabitable improvements. The subject parcels range in size from 2.009 acres to 120.000 acres. For fiscal year 2010, the assessors identified, valued, assessed, and taxed the subject parcels as summarized in the following table.

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<sup>1</sup> The Petition Under Formal Procedure and virtually all of the underlying jurisdictional documents and pleadings refer to the appellant as “Mohonk Educational and Neuropsychological Foundation, Inc.” The corporation’s Articles of Organization, however, recites “[t]he exact name of the corporation” as “Mohonk Education and Neuropsychological Foundation, Inc.” To avoid confusion, the appellant will continue to be referred to herein as “Mohonk Educational and Neuropsychological Foundation, Inc.”

<b>Property Location</b>	<b>Assessing Map/Lot</b>	<b>Assessed Value</b>	<b>Tax Rate per \$1,000</b>	<b>Tax Assessed</b>
Off West Street	3/2	\$ 70,000	\$6.63	\$ 464.10
Bash Bish Falls	3/3	\$ 541,300	\$6.63	\$ 3,588.82
Bash Bish Falls	3/3A	\$ 87,500	\$6.63	\$ 580.13
West Street	3/7	\$ 140,100	\$6.63	\$ 928.87
West Street	3/7A	\$ 119,600	\$6.63	\$ 792.95
West Street	3/7B	\$ 119,600	\$6.63	\$ 792.95

On December 31, 2009 and on May 3, 2010, the Tax Collector for Mt. Washington mailed the town's first-half and second-half actual tax bills, respectively. In accordance with G.L. c. 59, § 57, the appellant paid the taxes due without incurring interest. On January 27, 2010, in accordance with G.L. c. 59, § 59, the appellant timely applied to the assessors for a full abatement of the taxes assessed based on its claim of exemption for the subject property under Clause Third.<sup>2</sup> On April 3, 2010, the assessors denied the appellant's abatement applications, and on June 24, 2010, the appellant seasonably filed a petition that joined all of the subject parcels with the Appellate Tax Board (the "Board"). Based on these facts, the Board found and ruled that it had jurisdiction over this appeal.

The appellant presented its case-in-chief through the testimony of Dr. David Singer, the appellant's President, and the introduction of four documents: a copy of the appellant's Articles of Organization; a brochure describing the appellant's programs; a copy of a February 1, 2003 letter from the assessors to the taxpayers of Mount Washington; and a copy of a November 4, 2005 letter from the members of the town's Selectboard to the residents and property owners of Mount Washington. The assessors objected to the admission of the two letters, primarily on the grounds of relevancy. After allowing the documents to be marked, *de bene*, and after hearing all of the evidence and the parties' arguments, the Presiding Commissioner found that the 2003 and 2005 letters were irrelevant to the Board's determination of the subject property's eligibility for the Clause Third exemption for fiscal year 2010 and sustained the assessors' objection. More specifically, the Presiding Commissioner determined that the 2003 letter was written and disseminated well before the relevant time period and the 2005 letter was not even from the assessors or attributable to them. Furthermore, only one of three present members of the assessors was a member of the board at the time of the 2003 letter. Moreover, and

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<sup>2</sup> Prior to the sending of the first-half actual tax bills, the appellant had applied for an exemption for the subject property under Clause Third and had timely filed its Forms 3ABC and PC.

most importantly, neither letter provided the Board with any information or assistance for evaluating the subject property's eligibility for the Clause Third exemption for the fiscal year at issue.

In defense of the assessors' determination that while the appellant may have been a charitable organization, it did not occupy and use the subject property in furtherance of its or any charitable purpose for the fiscal year at issue, Victoria Torrico and Dorothy Bonbrake, both members of the assessors, testified for the assessors. The assessors also introduced numerous exhibits, including: the necessary jurisdictional documents; the appellant's Application for Statutory Exemption; an affidavit from Eleanor Dawson Lovejoy, the Board of Health Agent for Mount Washington, with copies of certain state public health regulations setting the minimum standards for recreational camps for children attached; a copy of the assessors' map of Mount Washington highlighting the location and boundaries of the subject parcels; a copy of the appellant's 2008 Federal tax return; and several photographs of the improvements on the subject property. At the request of the Board, the assessors later submitted the appellant's Form 3ABC.

Based on this evidence, the Board made the following findings of fact.

According to the appellant's Articles of Organization, Mohonk was organized in August, 2000 under G.L. c. 180 "to engage in charitable and educational activities that reflect IRS 501C functions and any other lawful purpose under Chapter 180 of the Massachusetts General laws." In its Application for Statutory Exemption and in its Form 3ABC, the appellant more specifically defines its mission as "develop[ing] and apply[ing] practical brain-based educational and therapeutic techniques in traditional and outdoor settings. This was developed for both regular and special needs children and incorporates individual students' learning styles, learning disabilities and attention deficit disorders." The appellant further claims in its Application for Statutory Exemption that it uses the subject property "to further its exempt purpose" as a "camp."

In its undated brochure, the appellant refers to the subject property as the "Mohonk nature center" and claims that it "has regularly scheduled educational and recreational programs for children, families, or community organizations." Mohonk further asserts in its brochure that the subject property offers "hiking trails, ski trails, camping sites, and swimming facilities." In addition, the brochure maintains that the subject property "is . . . used by community groups, families and individuals for public use at no cost" and may be used with or without reservations. The Board found,

however, that other, more compelling, testimonial evidence from both Dr. Singer and the assessors' witnesses established that these descriptions of the subject property's uses represented at best potential future, as opposed to real, contemporary uses.

The Board further found that Dr. Singer's testimony did little to delineate the appellant's or the public's use of the subject property during the relevant time period. Rather, his testimony verified that, as of the relevant time period, the subject property was barely used by the appellant or anyone else, if it was used at all. Dr. Singer testified that the appellant had no children under clinical treatment as patients, and, in fact, had no current clients. Although Dr. Singer maintained that the purpose of the subject property was to provide recreational opportunities for the appellant's students, he was unable to identify when, how, or even if any students actually used the subject property during the relevant time period and was unable to describe any programs offered by the appellant or anyone else that utilized the subject property. Moreover, Dr. Singer admitted that the appellant had never used the subject property as an overnight camp for students, despite what was alleged in the appellant's exemption application. In addition, Dr. Singer confirmed that the appellant did not use the subject property for offices, employee or officers' residences, storage, or any other administrative or corporate purpose, essentially establishing that the appellant did not maintain a physical presence on the subject property beyond mere ownership. Dr. Singer was unable to specify when, how, or even if the public used the subject property during the relevant time period. In sum, Dr. Singer was only able to allege that the appellant used the subject property in furtherance of the appellant's charitable purpose in some generalized but unspecified ways.

The assessors' witnesses verified the decrepit state of the two small camp-style improvements on the subject property and their inadequate kitchen and sanitary facilities. Like Dr. Singer, the assessors' witnesses also could not identify any actual affirmative use of the subject property either by the appellant or the public during the relevant time period. The affidavit of Mt. Washington's Board of Health Agent confirms that the appellant never applied for a permit to operate a children's camp on the subject property. The state public health regulations for operating children's camps attached to the affidavit clearly indicate that the facilities on the subject property were woefully inadequate and would not have been in compliance with applicable regulations during the relevant time period.

Based on all of the evidence, the Board ultimately found that the appellant failed to demonstrate that it occupied and used the subject property in furtherance of its charitable purpose for the fiscal year at issue. Because of the Board's ultimate finding with respect to occupancy and use, it was not necessary for the Board to determine if the appellant was a charitable organization as that term is used in Clause Third. The assessors did not contest this prong of the Clause Third requirements, and the Board assumed, but only for argument's sake, that the appellant complied with this Clause Third requirement. The assessors' primary focus was on the appellant's failure to occupy and use the subject property in furtherance of its or indeed any charitable purpose.

The Board found that the appellant admitted that it did not use the subject property for any of its programs or for any of its students or clients during the relevant time period and it did not occupy the subject property for any administrative or other corporate purpose. Dr. Singer acknowledged that the appellant did not have any students or clients during the relevant time period and that the appellant did not otherwise affirmatively use the subject property. Moreover, the Board found that the appellant did not show that the public or any other charitable organization utilized the subject property for any Clause Third charitable purpose during the relevant time period. It appeared to the Board that the appellant exercised very little oversight of the subject property during the relevant time period and, therefore, could not show how it was used, if at all. The Board found that the appellant's occupancy and use of the subject property during the relevant time period consisted of nothing more than mere ownership. These underlying findings led the Board to the inexorable conclusion that the appellant failed to demonstrate that it occupied and used the subject property in furtherance of its or any charitable purpose. As a result, the Board decided this appeal for the appellee.

### **OPINION**

Clause Third provides in pertinent part that "real estate owned by . . . a charitable organization and occupied by it or its officers for the purposes for which it is organized" is exempt from taxation. There is no dispute here that the appellant owns the subject property. Therefore, to qualify for exemption, the appellant must prove that (1) it is a charitable organization and (2) it occupies the subject property in furtherance of its stated charitable purpose. 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)).

The burden of establishing entitlement to the charitable exemption lies with the taxpayer. *New England Legal Found. v. Boston*, 423 Mass. 602, 609 (1996). “Any doubt must operate against the one claiming an exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms.” *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 257 (1936). “Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command.” *Mass. Med. Soc’y v. Assessors of Boston*, 340 Mass. 327, 331 (1960) (quoting *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 718 (1944)).

An organization will be considered a charitable organization for 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.”

*Harvard Community Health Plan v. Assessors of Cambridge*, 384 Mass. 536, 544 (1981)(quoting *Mass. Medical Soc’y*, 340 Mass. at 332). In the present appeal, the Board assumed, but for argument’s sake only, that the appellant was a charitable organization for Clause Third purposes. The assessors did not contest this requirement under Clause Third, and the Board did not need to reach it given its findings and rulings regarding the appellant’s occupancy and use of the subject property.

Property owned by a charitable organization is exempt under Clause Third if it is occupied and used by the charitable organization to further its charitable purpose. See *Jewish Geriatric Services, Inc.*, Mass. ATB Findings of Fact and Reports at 2002-351. Occupancy for purposes of Clause Third means use of the property for the purpose for which the charitable organization is organized. See *Babcock v. Leopold Morse Home for Infirm Hebrews and Orphanage*, 225 Mass. 418, 421 (1917); *Emerson v. Trustees of Milton Academy*, 185 Mass. 414, 418 (1904). “So long as [the charitable organization] act[s] in good faith and not unreasonably in determining how to use the real estate of the corporation, [its] determination cannot be interfered with by the courts.”

*Emerson*, 185 Mass. at 415. Moreover, in the context of educational institutions, the range of uses that have qualified property for exemption is broad. See *Bridgewater State College Foundation v. Assessors of Bridgewater*, Mass. ATB Findings of Fact and Reports 2010-76, 87, rev. on other grounds, 79 Mass. App. Ct. 637 (2011).

In this appeal, even assuming for argument's sake that the appellant is a charitable educational institution does not broaden the appellant's occupancy and use of the subject property enough to qualify the subject property for the Clause Third exemption. The Board found that neither the appellant, the public, nor any other charitable organization occupied and used the subject property in furtherance of a charitable purpose. The Board found that the appellant's occupancy and use of the subject property consisted of mere ownership, and the Board ruled that mere ownership is not enough to fulfill the occupancy and use requirement under Clause Third. See *Town of Milton v. Ladd*, 348 Mass. 762, (1965)("[Under Clause Third], the occupation and use rather than the record title [is] determinative of the question of whether particular real estate is exempt.").

In reaching its decision in this appeal, the Board was not required to believe the testimony of any particular witness. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Assocs. V. Board of Assessors of Foxborough* 385 Mass. 679, 683 (1982); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *Assessors of Lynnfield v. New England Oyster House, Inc.*, 362 Mass. 696, 701-702 (1972). "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).

On the basis of all of the evidence and its subsidiary findings and rulings, the Board ultimately found and ruled that the appellant failed to meet its burden of proving that it occupied and used the subject property in furtherance of its or any other charitable purpose within the meaning of Clause Third.

Accordingly, the Board decided this appeal for the appellee.

**THE APPELLATE TAX BOARD**

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

A true copy,

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



**THE COMMONWEALTH OF MASSACHUSETTS**

**Appellate Tax Board**

*Leverett Saltonstall Building, Government Center  
100 Cambridge Street  
Boston, Massachusetts 02202*

(617) 727-3100  
(617) 727-6234 FAX

**Docket Nos. F298001-F298007 (FY2008)  
F302371-F302377 (FY 2009)  
F307611-F307617 (FY2010)  
F310647-F310653 (FY2011)**

**ROMAN CATHOLIC ARCHBISHOP  
OF BOSTON, a CORPORATION SOLE  
Appellant**

**BOARD OF ASSESSORS OF THE  
TOWN OF SCITUATE  
Appellee**

**ORDER**

As agreed by the parties and ordered by the Appellate Tax Board (the “Board”), the Board bifurcated the hearing of these appeals into two phases: (1) an exemption phase and (2) a valuation phase. A hearing on the exemption phase was held on September 21, 2011, at which the Board heard testimony from three individuals<sup>1</sup> and received into evidence documents offered by both parties. On the basis of this evidence, the Board now makes the following findings and rulings with respect to the exemption issue:

1. Appellant Roman Catholic Archbishop of Boston (the “RCAB”), a Corporation Sole, organized under Chapter 506 of the Acts of 1897, is a religious organization that owns seven parcels of real estate in the town of Scituate (the “subject properties”). One of the parcels, 27-31 Hood Road, is improved with the St. Francis X. Cabrini Parish Church (the “Church”), as well as the Parish center/gymnasium and parking lot. Another one of the parcels, 78 Mann Hill Road, is improved with a parsonage or rectory. The remaining five parcels are not improved with any buildings. The Board of Assessors of

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<sup>1</sup> Both parties issued subpoenas to two of these witnesses, Mr. and Mrs. Rogers, who are self-described “Vigilers” as defined, *infra*.

Scituate (the “assessors”) assessed real estate taxes on the subject properties for fiscal years 2008 through 2011 (the “fiscal years at issue”) as summarized in the following two tables:

<u>Address</u>	<u>Assessors' Parcel</u>	<u>Improvements (if any)</u>	<u>FY2008 (\$)</u>	<u>FY2009 (\$)</u>
27-31 Hood Road	28-23-4F	Church, Parking Lot & Parish/Gym	3,239,600	2,082,700
78 Mann Hill Road	22-11-6	Rectory	598,000	604,500
0 Hatherly Road	28-22-12F	None	204,500	186,400
0 Hatherly Road	28-22-10	None	204,100	186,000
0 Hatherly Road	28-22-6	None	102,800	92,300
0 Mann Hill Road	27-7-2	None	109,100	77,300
Rear Mann Hill Road	27-7-1	None	81,800	77,300

<u>Address</u>	<u>Assessors' Parcel</u>	<u>Improvements (if any)</u>	<u>FY2010 (\$)</u>	<u>FY2011 (\$)</u>
27-31 Hood Road	28-23-4F	Church, Parking Lot & Parish/Gym	2,026,700	1,984,700
78 Mann Hill Road	22-11-6	Rectory	561,600	529,500
0 Hatherly Road	28-22-12F	None	171,400	155,400
0 Hatherly Road	28-22-10	None	171,000	156,000
0 Hatherly Road	28-22-6	None	84,800	77,300
0 Mann Hill Road	27-7-2	None	68,300	66,800
Rear Mann Hill Road	27-7-1	None	68,300	66,600

2. Prior to fiscal year 2006 during RCAB’s ownership, the assessors did not tax the Church and the subject properties and considered them exempt from real estate taxes under G.L. c. 59, § 5, cl. 11 (“Clause 11”)<sup>2</sup> and G.L. c. 59, § 5, cl. 3 (“Clause 3”).<sup>3</sup>

<sup>2</sup> Clause 11 provides in pertinent part that the following property shall be exempt from taxation: Houses of worship owned by, or held in trust for the use of, any religious organization . . . and each parsonage so owned, or held in irrevocable trust, for the exclusive benefit of the religious organizations, . . . but such exemption shall not . . . extend to any portion of such house of religious worship appropriated for purposes other than religious worship or instruction. The occasional or incidental use of such property by an organization exempt from taxation under the provision of 26 USC Sec. 501(c)(3) of the Federal Internal

RCAB's appeals of the fiscal year 2006 and 2007 real estate tax assessments have been resolved and are not before the Board. With respect to the fiscal years at issue, RCAB appeals from the assessors' denials of RCAB's applications to grant exemptions from real estate taxation for the subject properties under Clause 11 or, as more recently averred in its amended petition, Clause 3.

3. On October 5, 2004, RCAB issued a so-called "Order of Suppression" which is a decree by RCAB under the authority of Roman Catholic Canon Law that dissolved St. Francis X. Cabrini Parish (the "Parish"), as of October 29, 2004. In furtherance of the Order of Suppression, RCAB successfully secured and closed the Parish center/gymnasium and the rectory but was unable to secure and close the Church because, on October 26, 2004, a group of parishioners (the "Vigilers") entered the Church without RCAB's permission and seized and occupied it.<sup>4</sup> Despite RCAB's repeated demands to the Vigilers for them to vacate the Church, they continue to occupy it. The Vigilers do not use or occupy any other portions of the subject properties except for occasional use of the parking lot. As of October, 2004, RCAB ceased providing religious worship, instruction, and related activities to the parishioners at the Church and stopped using the subject properties for religious worship, instruction, or related activities. RCAB continues to pay for the utilities and any real estate taxes associated with the Church and subject properties.

4. On December 15, 2005, the Vigilers established a non-profit organization, recognized under Internal Revenue Code § 501(c)(3), called The Friends of St. Francis X. Cabrini, Inc. ("The Friends"). The Articles of Organization state that "[t]he purpose of The Friends . . . is to be a vital, loving and effective faith community, inspired by the Holy Spirit and committed to the spiritual enrichment of its parishioners through the teachings of our risne [sic.] lord and savior, Jesus Christ." Notwithstanding the stated purposes in its Articles of Organization, the undisputed testimony establishes that the

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Revenue Code shall not be deemed to be an appropriation for purposes other than religious worship or instruction.

<sup>3</sup> Clause 3 provides in pertinent part that the following property shall be exempt from taxation:  
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.

<sup>4</sup> According to the uncontroverted testimony offered at the hearing by one of the Vigilers, Jon Rogers, a Vigiler was able to gain access to the Church through an entrance that had been inadvertently left unsecured. In the words of Mr. Rogers: "[RCAB] changed [the locks] that Tuesday [instead of waiting until Friday as promised] in an absolute underhanded attempt to keep us out. Unfortunately [for RCAB] as they changed the locks [on] the doors, they had bungee-corded one of the emergency fire bars open."

primary purpose of The Friends is to prevent RCAB from securing the Church and to cause RCAB and the Vatican to re-open the Parish as a fully functioning parish. In furtherance of this purpose, the Vigilers' dominant and near exclusive use of the Church consists of them occupying and guarding the Church despite the express demands of RCAB for them to leave and permanently vacate the Church. The Friends are not otherwise engaged in charitable activities as an organization even though individual Vigilers may perform some charitable acts on their own.

5. The relevant Form 3 ABCs filed by RCAB with the assessors for the fiscal years at issue state, under the penalties and pains of perjury, that the Church and the subject properties were not leased to or used by any other organization. There is no lease, trust or other such agreement between RCAB and the Vigilers or The Friends with respect to the subject properties.

6. In addition to their aforesaid dominant use of the Church, the Vigilers or The Friends conduct a 45-minute lay-lead service at the Church on Sundays. According to the undisputed testimony, these services do not qualify as official Roman Catholic religious services or masses. No priest officiates at these services, and no description of the services was offered. RCAB and/or the Vigilers' former Parish priest have labeled the Vigilers' or The Friends' actions as being, among other things, "illegal, immoral, sinful, and heresy." The testimony also describes the lay-lead services and any other uses as "miniscule" compared to the Vigilers' and The Friends' dominant use.

7. According to the undisputed testimony, the Friends have exhausted multiple levels of appeals within the Roman Catholic Church hierarchy to overturn the Order of Suppression. These appeals include petitions to the Congregation of Clergy and the Vatican Signatore. The testimony further indicates that the Friends have another appeal to re-open the Parish that is "underway."

8. Based on these subsidiary findings, the Board finds that, for the fiscal years at issue, RCAB is a religious organization which owns the Church and the subject properties but no longer occupies or uses them for religious worship or instruction or for related purposes. The Board further finds and RCAB concedes that RCAB does not hold the Church or the subject properties in trust for the Vigilers or The Friends. The Board also finds that neither The Friends nor the Vigilers are religious organizations as that term is used in Clause 11. They do not formally participate in any recognized, authorized, or sanctioned Roman Catholic religious activity, and any religious activity that occurred at

the Church is incidental to their dominant and near exclusive purpose: to occupy and guard the Church so that RCAB cannot regain possession and to advocate for the Church's re-opening as part of a sanctioned Roman Catholic parish. Accordingly, and insofar as it may be question of fact, the Board finds that the Church and the subject properties do not qualify for the Clause 11 exemption because neither the Church nor the subject properties are used for religious worship, instruction, or related purposes within the meaning of Clause 11. Rather, RCAB essentially does not use the Church or the subject properties at all, and the Vigilers' and The Friends' dominant use of the Church is as unauthorized occupiers and guards.

9. The Board also finds that The Friends' dominant purpose – to occupy and guard the Church as part of a plan to re-open the Parish against the wishes of RCAB – is not a charitable purpose for purposes of Clause 3. Accordingly, and insofar as it may be a question of fact, the Board finds that the Church and the subject properties do not qualify for the Clause 3 exemption.

10. In making its ultimate findings that the Church and the subject properties are not exempt from real estate taxes for the fiscal years at issue under Clause 11 or Clause 3, the Board was guided by well-established legal principles, including those pertaining to: (a) RCAB's burden of proof; (b) the applicability of the exemption under Clause 11; and (c) the applicability of the exemption under Clause 3.

(a) *Burden of Proof* - "Statutes granting exemptions from taxation are to be strictly construed." *Children's Hospital Medical Center v. Board of Assessors of Boston*, 388 Mass. 832, 838 (1983). "A taxpayer is not entitled to an exemption unless he shows that he comes within the express words" of the statute granting the exemption. *Animal Rescue League v. Assessors of Bourne*, 310 Mass. 330, 331 (1941). "Exemption from taxation . . . must be made to appear clearly before it can be allowed." *Springfield Young Men's Christian Ass'n v. Assessors of Springfield* 284 Mass. 1, 5 (1933). The taxpayer has the burden of establishing its entitlement to an exemption. *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 731 (2008). Any doubt must operate against the one claiming a tax exemption." *Boston Symphony v. Assessors of Boston*, 295 Mass. 248, 257 (1935).

With these legal principals in mind, the Board rules that RCAB failed to demonstrate that, for the fiscal years at issue, the use or non-use to which it and The

Friends or Vigilers put the Church and the subject properties fell within the parameters for granting exemption under Clause 11 or Clause 3.

(b) *Clause 11* - “[T]he exemption from [real estate taxation] was intended only for houses owned by or held in trust for, religious organizations that occupy and use them for worship.” *Evangelical Baptist Benev. & Missionary Soc. v. City of Boston*, 204 Mass. 28, 31 (1910). “The purpose of [Clause 11] was to exempt from taxation ordinary church edifices, owned and used in the usual way for religious worship.” *Id.* “Real estate held by . . . religious institutions is not exempted from taxation unless used and appropriated for their distinctive purposes.” *Burr v. City of Boston*, 208 Mass. 537, 543 (1911). The religious use contemplated under Clause 11 must be the organizations’ “dominant” use of the subject properties. *Assessors of Boston v. Lamson*, 316 Mass. 166, 173 (1944). To qualify for the exemption under Clause 11, “the real estate itself must be occupied by the religious organization or its officers, for those purposes.” *Trustees of Chapel of Good Shepard v. City of Boston*, 120 Mass. 212, 213 (1876). The Clause 11 exemption does “not extend to separate [areas] used for purposes exclusively secular.” *William T. Stead Mem’l Ctr. of NY v. Town of Wareham*, 299 Mass. 235, 239 (1938).

In the present appeals, the Board found that RCAB terminated all official religious activity on the subject properties as of October, 2004. RCAB secured all of the improvements on the subject properties except for the Church which RCAB attempted to secure but did not because of the Vigilers’ occupation. RCAB effectively ceased occupying and using the subject properties for religious worship and instruction as of that time.

The Board further found that the dominant use of the property by The Friends or Vigilers, who occupied and used the Church and the subject properties thereafter, was not for religious worship or instruction. Rather, their use consisted primarily of occupying and guarding the Church so that RCAB could not regain possession, and attempting to influence RCAB and the Vatican to re-open the Church as part of a fully functioning parish. The other parcels which comprise the subject properties were essentially unused for any purposes and were not used for any purposes connected to religious worship or instruction.

On this basis, the Board rules that the Church and the subject properties were not occupied and used for religious worship or instruction as required under Clause 11, and they, therefore, are not entitled to the exemption from real estate taxes under Clause 11.

(c) *Clause 3* - “The exemption provided in [Clause 3] is available . . . if a charitable organization owns real estate and occupies it for its corporate purpose, or allows another charitable organization to occupy it for its purpose.” *Board of Assessors of Hamilton v. Iron Rail Fund of Girls Clubs of America, Inc.*, 367 Mass. 301, 306 (1975). In these appeals, the Board found that RCAB was not using or occupying the property for its charitable purpose; rather, the Order of Suppression and the other actions with respect to the Church and the subject properties demonstrated that RCAB no longer intended to use the Church and the subject properties for any purpose other than their eventual sale.

Moreover, notwithstanding its purpose stated in its Articles of Organization, The Friends’ actual use of the Church and the subject properties - - to occupy and guard the Church in order to advance its cause of re-opening the Parish against the wishes of RCAB - - was not shown to be a recognized charitable purpose or one that is considered to be traditionally charitable in nature. *See New Habitat, Inc.* 451 Mass. at 732-33. It is the actual use to which the charitable organization puts the property that is dispositive for purposes of determining eligibility for exemption under Clause 3. *See Meadowbrooke Day Care Center, Inc. v. Board of Assessors of Lowell*, 374 Mass. 509, 511-12 (1978); *Cummington School of Arts, Inc. v. Board of Assessors of Cummington*, 373 Mass. 597, 603-05 (1977); *Town of Milton v. Ladd*, 348 Mass. 762, (1965); *Fisher School v. Assessors of Boston*, 325 Mass. 529, (1950).

On this basis, the Board rules that, for the fiscal years at issue, the Friends was not a charitable organization for purposes of Clause 3 and that its occupation of the Church was not a charitable purpose within the meaning of Clause 3. Accordingly, the Board rules that RCAB is not entitled to the exemption under Clause 3 for the Church and the subject properties.

11. Having found and ruled that the Church and the subject properties are not eligible for or entitled to the benefits of the real estate exemptions under Clause 11 or Clause 3, the exemption phase of the bifurcated hearing of these appeals is completed. The Board hereby ORDERS the parties to attend a status conference on Tuesday, January 31, 2012 at 10:00 am at the Board’s offices in Boston, MA to determine an appropriate discovery and trial schedule for the valuation phase of these appeals.

**APPELLATE TAX BOARD**

*Thomas W. Hammond, Jr.*, Chairman

*Frank J. Scharaffa*, Commissioner

*James D. Rose*, Commissioner

*Thomas J. Mulhern, Commissioner*  
*Richard G. Chmielinski, Commissioner*

Attest: *Steven Douglas*, Assistant Clerk of the Board  
Date: December 16, 2011 (Seal)

**COMMONWEALTH OF MASSACHUSETTS  
APPELLATE TAX BOARD**

**ROUTE 16 LAND DEVELOPMENT v.  
CORP.**

**BOARD OF ASSESSORS OF  
THE TOWN OF MILFORD**

Docket No. F310500

Promulgated:  
June 13, 2012

**ATB 2012-751**

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 appellee to abate taxes on certain real estate in the Town of Milford owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal year 2011.

Commissioner Scharaffa heard the appellee’s motion to dismiss this appeal under G.L. c. 59, § 38D (“§ 38D”). Chairman Hammond, and Commissioners Rose and Egan joined him in allowing the motion and deciding this appeal 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.

*James L. Roberti, Esq.*, for the appellant.  
*Kenneth W. Gurge, Esq.*, for the appellee.

**FINDINGS OF FACT AND REPORT**

At all material times, the appellant, Route 16 Land Development Corp. (the “appellant”) was the owner of a certain parcel of commercial real estate located at 324 East Main Street in the Town of Milford (the “subject property”).

In January, 2010, the Board of Assessors for the Town of Milford (the “assessors” or the “appellee”) sent to the appellant, by first class mail, a request for income and expense information under § 38D (the “first § 38D request”) for purposes of establishing the fair cash value of the subject property for fiscal year 2011. The first § 38D request included a cover letter explaining the information sought and a reference to § 38D, as

well as an information request form approved by the Commissioner of Revenue. This request sought lease and expense information concerning the subject property during calendar year 2009 to establish the fair cash value of the subject property as of January 1, 2010, the valuation date for fiscal year 2011. The information was requested early in calendar year 2010 to provide the assessors sufficient time to establish the fair cash value of the property prior to the sending of the fiscal year 2011 actual tax bill. The assessors received no response to the first § 38D request.

On March 18, 2010, the assessors sent a second § 38D request (the “second § 38D request”), which they titled “Final Request.” The second § 38D request contained a recitation of relevant language from § 38D, including, “[f]ailure of an owner or lessee of real property to comply with such request within sixty (60) days after it has been made shall bar him from any statutory appeal . . . .”

The assessors valued the subject property at \$1,555,200 and assessed a tax thereon, at the rate of \$26.05 per \$1,000, in the amount of \$40,512.96. The appellant timely paid the tax and filed an abatement application with the assessors on January 20, 2011, which they denied on January 25, 2011. The appellant seasonably appealed to the Appellate Tax Board (the “Board”) on February 25, 2011.

The assessors maintained that they received no response to either the first or the second § 38D request, and that, as a result of the appellant’s failure to provide the requested information, they were prejudiced in their ability to determine the actual fair cash value of the subject property for fiscal year 2011. Accordingly, the assessors filed with the Board a motion to dismiss the appeal for failure to comply with § 38D. The Board held an evidentiary hearing at which the principal of the appellant, Kevin T. Cody, Sr., and Priscilla Hogan, Assessor and Administrator for the Town of Milford, each testified. On the basis of their testimony and additional evidence admitted during the evidentiary hearing, the Board found the following facts.

The appellant did not contest that the information sought was “reasonably required” for the assessors to determine the actual fair cash value of the subject property for fiscal year 2011. Further, Mr. Cody admitted that he received the second § 38D request for fiscal year 2011 and claimed to have completed and returned the form to the assessors as requested. Mr. Cody testified that he mailed the completed form along with a cover letter dated March 31, 2010 to the assessors’ office. He further testified that he annually responds to the assessors’ § 38D request by mailing a completed § 38D request

back to the assessors, and has never had a prior issue concerning the assessors' receipt of the completed § 38D request. The appellant, however, failed to provide any corroborating evidence to support his testimony that he completed and returned the second § 38D request for the fiscal year 2011, or, for that matter, any other § 38D request for any other fiscal year.

In contrast, the assessors' witness, Ms. Hogan, credibly testified that the assessors had not received any response to either the first or the second § 38D request for fiscal year 2011. Furthermore, Ms. Hogan credibly testified that of the § 38D requests sent to the appellant for each of the prior four years, only one had been completed and returned to the assessors. A print-out of the payment history for the appellant's real estate tax account confirmed that the appellant was charged the statutory \$50.00 fee for failure to respond to a § 38D request for three of the prior fiscal years shown on the account.

Based on all the evidence and its determination of the credibility of the witnesses, the Board found that the appellant's claim that it had timely completed and returned the second § 38D request for fiscal year 2011 to the assessors was unsubstantiated and therefore unreliable. Specifically the Board found that: the appellant likely received the first § 38D request and admitted that he received the second § 38D request; the appellant failed to respond to either the first or the second § 38D request; the requested information was reasonably required by the assessors to determine the actual fair cash value of the subject property for the fiscal year at issue; to the extent relevant to these proceedings, the assessors were prejudiced by the appellant's failure to provide the assessors with the requested information; and the appellant's failure to respond to either the first or the second § 38D request was not due to reasons beyond its control. On this basis, the Board allowed the assessors' motion to dismiss this appeal for the appellant's unjustifiable failure to respond to either of the assessors' valid § 38D requests. Accordingly, the Board decided this appeal for the appellee.

### **OPINION**

At all material times, § 38D provided in pertinent part:

A board of assessors may request the owner or lessee of any real property to make a written return under oath within sixty days containing such information as may reasonably be required by it to determine the actual fair cash valuation of such property. Failure of the owner or lessee to comply with such request within sixty days after it has been made shall bar him from statutory appeal under this chapter,

unless such owner or lessee was unable to comply with such request for reasons beyond his control.

Accordingly, when an owner fails to respond within sixty days to a written request from the assessors for information reasonably required by the assessors to determine the fair cash value of the property at issue, the owner's right to appeal an assessment to this Board is foreclosed unless the owner was unable to comply for reasons beyond the owner's control. *See, e.g., Marketplace Center II Limited v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2000-258, 276-77 ("*Marketplace Center II*"), *aff'd*, 54 Mass. App. Ct. 1101, 1107 (2002); *Forty-Four – 46 Winter Street, LLC v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2005-656, 661 ("*Forty-Four-46 Winter Street*"); and *Herman Banquer Trust v. Assessors of Boston*, Mass. ATB Findings of Fact and Reports 2005-664, 671 ("*Herman Banquer Trust*").

There is no dispute in this appeal that: (1) the appellant received the second § 38D request; (2) the information sought by the assessors on the first and the second § 38D request was reasonably required by them to determine the actual fair cash value of the subject property for the fiscal year at issue; and (3) to the extent it may be relevant, the assessors were prejudiced by the appellant's failure to provide the assessors with the requested information. *See, e.g., Marketplace Center II*, Mass. ATB Findings of Fact and Reports 2000 at 276-77; *Forty-Four-46 Winter Street*, Mass. ATB Findings of Fact and Reports 2005 at 661-62; and *Herman Banquer Trust*, Mass. ATB Findings of Fact and Reports 2005 at 671-72.

The appellant argued, however, that he completed the second § 38D request for fiscal year 2011 and timely mailed it along with a cover letter dated March 31, 2010 to the assessors' office. In support of his assertion, the appellant testified that he had mailed a similar form in prior years, and none of them had ever been returned to him. The appellant, however, failed to offer any credible corroborating evidence that he completed and mailed either the first or the second § 38D request for the fiscal year at issue or for any prior fiscal year. The assessors successfully contested the appellant's assertions by providing credible testimony and other evidence that they had not received any reply from the appellant for the fiscal year at issue and that of the four § 38D requests sent to the appellant over the prior four fiscal years, the assessors had only received one response.

Although the appellant testified that he completed and mailed the second § 38D request for fiscal year 2011 on March 31, 2010, the Board ultimately found the appellant's unsubstantiated testimony to be unconvincing. One of the Board's primary functions is to evaluate the credibility of a witness' testimony. *See, e.g., Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977) ("The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board."); *Bayer Corp. v. Commissioner of Revenue*, 436 Mass. 302, 308 (2002) ("[W]e have consistently ruled that the assessment of the credibility of witnesses is a matter of the board.") (citing *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 43 n. 6 (1997)). Given the lack of evidence substantiating the appellant's claims coupled with the credible evidence submitted by the assessors, the Board found the appellant's testimony to be unavailing.

On this basis, the Board granted the assessors' motion to dismiss under § 38D and decided this appeal for the appellee.

**THE APPELLATE TAX BOARD**

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

A true copy,

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