

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DAVID G. WALKER, TRUSTEE,
DACOS REALTY TRUST

v. THE BOARD OF ASSESSORS
OF THE CITY OF NEWTON

Docket Nos. F272164
F277634

Promulgated:
December 10, 2007

These are appeals under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate in the City of Newton owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal years 2004 and 2005 ("fiscal years at issue").

Commissioner Egan heard these appeals. Commissioners Scharaffa, Rose, and Gorton joined Commissioner Egan in the decisions for the appellee.

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

Matthew A. Luz, Esq. for the appellant.

Angela Smagula, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits introduced at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

On January 1, 2003, and January 1, 2004, David G. Walker, Trustee of the Dacos Realty Trust ("appellant") was the assessed owner of an improved parcel of real estate located at 232 Boylston Street in the City of Newton ("subject property").¹ The appellant purchased the subject property on July 22, 1999, for the sum of \$1,400,000. By the end of 2000, the building had been substantially renovated at a cost of nearly \$500,000.

For the fiscal years at issue, the Board of Assessors of Newton ("assessors") valued the subject property and assessed taxes thereon as follows.

Docket No.	Fiscal Year	Assessed Value	Tax Assessed
F272164	2004	\$1,379,700	\$26,992.04
F277634	2005	\$1,605,200	\$28,925.70

The appellant paid the assessed taxes without incurring interest and timely filed applications for abatement with the assessors. The assessors denied the appellant's applications, and the appellant seasonably

¹ Boylston Street is also known as "Route 9" in Newton.

filed petitions with the Board. The pertinent filing and denial dates are set forth in the following table.

Docket No.	Abatement Application Filed	Abatement Application Denied	Appeal Filed with Board
F272164	1/27/04	3/24/04	4/15/04
F277634	1/11/05	4/7/05	4/19/05

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

The appellant contested the assessments in the present appeals primarily through the testimony of his real estate valuation expert, Donald J. Griffin, a certified real estate appraiser. The appellant also submitted exhibits into evidence, including Mr. Griffin's summary appraisal report for fiscal year 2004 and a two-page letter drafted by Mr. Griffin, which purported to address the subject property's fiscal year 2005 valuation. In support of the fiscal year 2004 assessment, the assessors relied on the testimony of their valuation expert, Allan S. Cohen, a certified real estate appraiser and assistant assessor for Newton, and Clint Schuckel, Newton's City Traffic Engineer. The assessors introduced various documents into evidence including Mr. Cohen's summary appraisal for fiscal year 2004. The assessors declined to present any evidence relating to fiscal year 2005.

The subject property consists of a 15,100 square-foot parcel of real estate, roughly rectangular in shape, that adjoins Route 9 in the Chestnut Hill Section of Newton. Its location is highly desirable for a retail establishment, as it is in the immediate vicinity of a substantial retail presence which is surrounded by an affluent residential community. The numerous retail establishments located within several hundred yards of the subject property are anchored by the Chestnut Hill Mall, the Atrium Mall, and the Chestnut Hill Shopping Center. The malls feature many prestigious retailers including Bloomingdales, Barney's New York, Brooks Brothers, and Tiffany & Co.

The subject property's parcel is improved with a two-story, wood-frame building containing approximately 5,489 square feet of finished space, 1,250 of which are ground level and primarily below grade.² The area surrounding the building is appealingly landscaped, and provides parking for seventeen vehicles.

The building's exterior is painted masonry and wood, has substantial curb appeal, and is in very good condition.

²Mr. Griffin's appraisal report contains sketches of the building which incorporate his measurements. These measurements indicate 4436 square feet of space on the building's first and second floors, 197 square feet more than the figure used by Mr. Griffin in his valuation calculations. In his testimony, Mr. Griffin acknowledged the discrepancy, but stated simply that he chose to adopt the figure contained in the assessors' records relating to the building's square footage.

The building's interior finish is of high quality, and its mechanical systems are fully updated. The first floor is occupied by David & Company, an upscale retail jewelry store.³ The store features high ceilings, indirect lighting, an office, and a vault which remains from the building's prior use as a bank. A short stairwell leads down from the first floor past what was previously a teller's drive-through window and then continues to the finished ground floor. The ground floor has resilient flooring, rooms for staff use, and a kitchen area.

The building's second floor is occupied by a dental practice which leased the premises as shell space in 2000.⁴ The space was built out at the expense of the dentist, and contains examining rooms, the dentist's office and a break room. The primary access to the dental practice is via an elevator installed by the appellant. The elevator travels directly to the second floor from a ground floor entrance which opens, on grade, to the building's exterior and has access to the building's parking lot.⁵

³ David & Company is operated by David G. Walker, the principal owner of David & Company, Inc., which leases the subject property from the appellant. The lease, which was not introduced into evidence, was not represented by the appellant as arms-length or reflecting market value.

⁴ This lease is a ten-year sublease executed under the master lease between the appellant and David & Company, Inc.

⁵ The elevator provides only keyed access to the first floor to enhance the jewelry store's security.

Mr. Griffin testified that he inspected the subject property and its location, and researched market sales of comparables properties. After considering this and other relevant information, Mr. Griffin determined that the subject property's highest and best use was its existing complying use as mixed retail and professional office space.

As part of his initial review of the subject property, Mr. Griffin compared the subject property's assessment per-square-foot of gross building area to those of several other commercial properties located on Route 9 in the vicinity of the subject property. In his summary appraisal report, Mr. Griffin stated that these comparative calculations lead him to believe that the subject property was "over-assessed." This analysis, however, failed to make any adjustments for building size or condition even though the properties chosen for comparison varied substantially from the subject property in these respects. Further, Mr. Griffin did not include the Atrium Mall in his assessment comparison, a premier retail property on Route 9 located substantially closer to the subject property than some of the properties examined by Mr. Griffin. Ultimately, in his testimony, Mr. Griffin acknowledged that his

assessment analysis had no relevance to his final appraisal valuation.

Mr. Griffin also incorporated a statement in his summary appraisal and testified regarding the purchase price for the subject property. He stated that the sum paid by the appellant in 1999, \$1,400,000, reflected the subject property's value to the appellant, an atypical buyer seeking to establish his distinctive jewelry business. He concluded that the price did not "reflect a fair cash value that [could] be replicated in the market on a regular basis." Mr. Griffin failed to offer any evidentiary support for this conclusion, however, or demonstrate that the sale was not an arms-length transaction at market price. Neither did he account for the effect of the major renovations performed on the subject property subsequent to its purchase, including their impact on the effective age of the building.

To arrive at his opinion of value for fiscal year 2004, Mr. Griffin performed income-capitalization and sales-comparison analyses, which yielded indicated values of \$896,000, and \$933,000, respectively. Mr. Griffin's income-capitalization analysis commenced with identification of six purportedly comparable properties. Mr. Griffin made adjustments for these properties' lease

terms relative to those of the subject property's second floor tenant, and for building location and size. After adjustments, he arrived at an average per-square-foot rental sum which he applied to the subject property's first floor rental area. He assigned a rental value for the second floor of 75% of the value applied to the first floor, and 35% for the ground floor. He then integrated these sums to arrive at potential gross income for the subject property, from which he subtracted a five percent vacancy and collection allowance to calculate effective gross income.

Mr. Griffin's operating expense estimation was not based on market data. Rather, he arrived at an expense estimation of 18.5% of effective gross income based on limited information relating to the subject property, primarily from calendar year 2001. In his testimony, Mr. Griffin characterized the expense information he utilized as "somewhat sketchy." In fact, the sole expense Mr. Griffin possessed relating to the subject property for 2002, the year he acknowledged was most relevant to the fiscal year valuation at issue, was an insurance expense.⁶

⁶ The appellant had provided expense information to the assessors for 2002, but for reasons not disclosed during the proceedings before the Board, had not provided the same information to Mr. Griffin.

Mr. Griffin also failed to substantiate the elements of his capitalization rate with relevant market data. Mr. Griffin relied primarily on a band-of-investment approach and PricewaterhouseCooper's Korpacz Real Estate Investor Survey national market reports ("Korpacz reports") relating to "strip shopping centers" and "suburban offices" to derive his capitalization rate. Mr. Griffin's band-of-investment analysis assumed a seven percent mortgage interest rate, a seventy percent loan-to-value ratio, and a twenty percent return on equity. These yielded a base capitalization rate of 11.6 percent which, when combined with a tax factor of 1.937 percent, yielded a total capitalization rate of 13.537 percent. However, Mr. Griffin failed to offer any market evidence to support his chosen mortgage interest rate or return on equity.⁷

The Board found that the appellant did not establish that the Korpacz reports were an appropriate reference to be applied to the building constructed on the subject property. The information gleaned by Mr. Griffin from the reports was generalized with regard to the type of properties it addressed, and offered broad ranges for capitalization rates. Further, the information used by

⁷ In contrast, Mr. Cohen offered specific examples of local bank rates at relevant times to support his chosen mortgage rate, which was significantly lower than the rate employed by Mr. Griffin.

Mr. Griffin was national in scope, and failed to incorporate any region-specific data. Thus, the Board found that Mr. Griffin's capitalization rate was speculative.

In sum, given the various deficiencies present in Mr. Griffin's analysis, the Board found that his income-capitalization approach could not be relied upon to establish the subject property's fair cash value.

For his comparable-sales analysis, Mr. Griffin chose six properties located in Newtown within approximately five miles of the subject property, whose sale dates ranged from August of 2001 to December of 2004, and sale prices from \$650,000 to \$1,112,500. The buildings ranged in size from approximately 2,465 square feet to 7,313 square feet, and the parcels on which they were situated from 7,841 square feet to 14,870 square feet. Mr. Griffin made adjustments for physical characteristics, dates of sale, and location.⁸

Particularly important were Mr. Griffin's adjustments for location. Acknowledging that the subject property's location contributed significantly to its value, Mr. Griffin made location adjustments based on population demographics and traffic flow. The Board found, however, that the foundation for these adjustments was fatally

⁸ Mr. Griffin's time adjustment incorporated an annual appreciation rate of five percent.

flawed. Mr. Griffin's calculations began with the premise that the traffic flow on Route 9 in front of the subject property was approximately 25,000 cars per day. In fact, the flow, as demonstrated through testimony and supporting documentation provided by Newton's traffic engineer, Mr. Schuckel, was approximately twice that amount. This miscalculation rendered Mr. Griffin's traffic flow adjustment incorrect by a factor of two, thereby artificially reducing Mr. Griffin's valuation.

Mr. Griffin's calculation of traffic flow for his chosen comparables was also flawed. More specifically, two of the four locations from which Mr. Griffin's data was derived, Route 20 and Beaver Street, are in the City of Waltham. Moreover, Mr. Schuckel presented publicly-available reports of traffic flow for locations closer and more relevant to the traffic flow in front of certain of Mr. Griffin's comparables than the data sources chosen by Mr. Griffin. In more than once instance, these reports reflected traffic levels lower than those used by Mr. Griffin in his calculations. Thus, the Board found that Mr. Griffin's adjustment for location, a major component of his comparable-sale analysis, was wholly unreliable.

The Board also found that certain of the properties chosen by Mr. Griffin were not comparable to the subject

property. In particular, sale number 6 was a Victorian-style house that contained professional offices and sale number 1 was a mixed residential and office property. The Board found that these properties were dissimilar to the subject property in crucial respects, including physical characteristics and use, and thus were not comparable to the subject property.

Finally, Mr. Griffin made inconsistent adjustments in his analysis for building size, incorporating adjustments for two properties that were smaller than the subject property, but none for a property that was substantially larger. Thus, the Board found that Mr. Griffin's comparable-sales analysis was not reliable and did not support the appellant's claim of overvaluation.

Mr. Griffin did not perform an appraisal of the subject property for fiscal year 2005. Rather, he submitted a two-page letter advocating extrapolation of his 2004 indicated value to 2005, assuming certain factors and application of "an overall tax increase limited to 2.5% allowed under proposition 2½." In his testimony, however, Mr. Griffin conceded that proposition 2½ was not relevant to market value. Further, the Board found that Mr. Griffin failed to incorporate relevant data relating to fiscal year

2005 which was necessary to establish the subject property's fair market value.

In defense of the assessors' fiscal year 2004 valuation, Mr. Cohen also performed sales-comparison and income-capitalization analyses. Mr. Cohen placed the greater emphasis on the sales-comparison approach, identifying five properties he considered comparable to the subject property and performing an analysis which yielded an indicated value of \$1,427,000. The properties chosen by Mr. Cohen were all located in Newton within approximately five miles of the subject property. Their sale dates ranged from February of 2002 to November of 2003, and sale prices from \$750,000 to \$2,350,000. The buildings' sizes varied from approximately 1,872 square feet to 7,182 square feet, and the parcels on which they were situated from 3,458 square feet to 15,100 square feet.

Like Mr. Griffin, Mr. Cohen made adjustments to his chosen comparables for several factors including location and condition. However, Mr. Cohen's sales-comparison analysis was distinct from Mr. Griffin's in certain respects. In particular, Mr. Cohen made consistent adjustments for building size, while Mr. Griffin did not. Further, Mr. Cohen's adjustments for location were not undermined by the flawed traffic flow calculations as

Mr. Griffin's were. Finally, the Board found that Mr. Cohen established the comparability of the subject property and his chosen comparables, having demonstrated sufficient similarity in their physical and locational attributes, as well as their usage, and dates and terms of sale.

Having considered the entire record, the Board found that Mr. Cohen's sales-comparison analysis was the best available evidence for estimating the value of the subject property for fiscal year 2004. Not only did the record contain sufficient evidence of comparable sales to support use of a sales-comparison method, but Mr. Cohen established comparability of his chosen comparables relative to the subject property and made appropriate adjustments to their sale prices.

For the reasons discussed above, the Board also found that Mr. Griffin's valuation methodologies were not sufficiently reliable to establish the fair cash value of the subject property or to undermine the contested assessment for 2004. With regard to fiscal year 2005, the Board found the appellant's evidence inadequate, and therefore insufficient to demonstrate overvaluation of the subject property.

On this basis, the Board found that the appellant failed to sustain his burden of proving that the subject property's assessed value exceeded its fair cash value for the fiscal years at issue. The Board, therefore, decided these appeals for the appellee.

OPINION

"All property, real and personal, situated within the commonwealth . . . shall be subject to taxation." G.L. c. 59, § 2. The assessors are required to assess real estate at its fair cash value determined as of the first day of January of each year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

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

"[T]he [B]oard is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayer[] sustain[s] the burden of proving the contrary.'" **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 598 (1984) (quoting **Schlaiker**, 365 Mass. at 245). In appeals before this Board, a taxpayer "'may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation.'" **General Electric Co.**, 393 Mass. at 600 (quoting **Donlon v. Assessors of Holliston**, 389 Mass. 848, 855 (1983)).

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

Regardless of which method is employed to determine fair cash value, the Board must determine the highest price a hypothetical willing buyer would pay to a hypothetical

willing seller in an assumed free and open market. **Irving Saunders Trust v. Board of Assessors of Boston**, 26 Mass. App. Ct. 838, 845 (1989). The validity of a final estimate of market value depends to a great extent on how well it can be supported by market data. See THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE, 134 (12th ed., 2001).

The income-capitalization method "is frequently applied with respect to income producing property." **Taunton Redevelopment Associates v. Assessors of Taunton**, 393 Mass. 293, 295 (1984). In applying this method, the income stream used must reflect the property's earning capacity or market rental value. **Pepsi-Cola Bottling**, 397 Mass. at 451. Imputing rental income to the subject property based on fair market rentals from comparable properties is evidence of value if, once adjusted, they are indicative of the subject property's earning capacity. See **Correia v. New Bedford Redevelopment Authority**, 5 Mass. App. Ct. 289, 293-94 (1977), *rev'd on other grounds*, 375 Mass. 360 (1978); **Library Services, Inc. v. Malden Redevelopment Authority**, 9 Mass. App. Ct. 877, 878 (1980) (rescript). It is the earning capacity of real estate, rather than its actual income, which is probative of fair market value. **Assessors of Quincy v. Boston Consolidated Gas Co.**, 309 Mass. 60, 64 (1941). After accounting for

vacancy and rent losses, net-operating income is obtained by deducting the landlord's appropriate expenses. **General Electric Co.** 393 Mass. at 610. The expenses should also reflect the market. **Id.**

The Board found that the income-capitalization approach, while theoretically appropriate for valuation of the subject property, was not applied by Mr. Griffin in a manner which carried sufficient probative weight to establish the property's fair cash value. Assuming, *arguendo*, that the comparables chosen by Mr. Griffin were appropriate and his adjustments for certain factors were reasonable, the Board nonetheless found that Mr. Griffin's methodology remained substantially flawed. In particular, Mr. Griffin arbitrarily assigned the subject property's second floor space a rental value of 75% of the first floor's, and the ground level a rental value of 35%. While it is reasonable to allow for variation in rental value among the three levels, such substantial and unsupported variations do not support Mr. Griffin's ultimate indicated value.

Mr. Griffin also arrived at an expense estimation of 18.5% of effective gross income without demonstrating that the percentage was reflective of the market, and based his estimation solely on limited information relating to the

subject property, which he characterized in his testimony as "somewhat sketchy." Further, for all his income calculations, Mr. Griffin chose to employ the subject property's rentable square footage as reflected in Newton's records, and not the area derived from his own measurements, which exceeded Newton's figures.

Finally, the Board found that Mr. Griffin's capitalization rate was speculative. Mr. Griffin's band-of-investment approach was based on a seven percent mortgage interest rate and a twenty percent return on equity, which Mr. Griffin failed to demonstrate reflected market conditions. Similarly, the content of the Korpacz reports was far too generalized to support Mr. Griffin's chosen capitalization rate. Based on the cited deficiencies in Mr. Griffin's analysis, the Board found that Mr. Griffin's income-capitalization approach could not be relied upon to establish the subject property's fair cash value.

"[S]ales of property usually furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller."

Foxboro Associates v. Board of Assessors of Foxborough, 385 Mass. 679, 682 (1982). Sales of comparable realty in the same geographic area and within a reasonable time of

the assessment date contain credible data and information for determining the value of the property at issue. **McCabe v. Chelsea**, 265 Mass. 494, 496 (1929). When comparable sales are used, however, allowance must be made for various factors which would otherwise cause disparities in the comparable prices. See **Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke**, Mass. ATB Findings of Fact and Reports 1998-1072, 1082. "Adjustments for differences are made to the price of each comparable property to make that property equivalent to the subject in market appeal on the effective date of the opinion of value." APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE at 430.

The Board found that the appellant's sales-comparison analysis was flawed. Mr. Griffin's location adjustment, a substantial component of his analysis, incorporated a traffic flow estimate for the subject property which was incorrect by a factor of two, resulting in underestimation of the subject property's value. Moreover, the data used to calculate the traffic flow for his comparable properties was not reliable, likely compounding the inaccuracy of Mr. Griffin's location adjustment.

The Board also found that certain of the properties cited by Mr. Griffin were not comparable to the subject property, and that Mr. Griffin failed to make consistent

adjustments in his analysis for building size. Thus, the Board found that the appellant's sales-comparison methodology was not reliable.

In contrast, the Board found that the comparable-sales analysis submitted by Mr. Cohen provided substantial and credible evidence to support the fiscal year 2004 assessment, which further diminished the persuasiveness of the appellant's evidence. Having established the comparability of his chosen sale properties with the subject property, Mr. Cohen made appropriate adjustments to the comparables for physical characteristics and location. Thus, the Board found that the assessors introduced sufficient evidence of comparable sales to support the fiscal year 2004 assessment.

With regard to fiscal year 2005, the Board found that the appellant's evidence of value was woefully inadequate. An appraiser's two-page letter, virtually devoid of relevant market data and premised in part upon standards ultimately acknowledged to be irrelevant, was clearly legally insufficient to sustain the appellant's burden.

Finally, Mr. Griffin's statements regarding the \$1,400,000.00 purchase price paid by the appellant for the subject property in 1999 were not persuasive. Mr. Griffin failed to offer any evidentiary support for his conclusion

that this sum exceeded the fair cash value of the subject property. In fact, no evidence before the Board indicated that the sale was anything but an arm's-length transaction at market price. Moreover, the substantial renovations completed by the appellant prior to the end of 2000 likely increased the subject property's value. Finally, the Board noted that the evidence presented did not indicate a downward trend in Newton real estate values from the date the appellant purchased the subject property to the relevant assessment dates. To the contrary, Mr. Griffin's own sales-comparison analysis, which covered much of the relevant timeframe, incorporated a five percent market appreciation rate. These facts and findings, taken together, further undermine the appellant's assertion that the subject property was overvalued.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 683; *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 473 (1981); *Assessors of Lynnfield v. New England*

Oyster House, Inc., 362 Mass. 696, 702 (1972). "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the [B]oard." ***Cumington School of the Arts, Inc. v. Assessors of Cumington***, 373 Mass. 597, 605 (1977).

Cognizant of these principles, the Board selected the most probative evidence in the record regarding the subject property's valuation for the fiscal years at issue. In this regard, the Board found that the sales-comparison methodology presented by Mr. Cohen provided reliable evidence of the subject property's value for fiscal year 2004. The Board further found that the approaches employed by the appellant were flawed, and not sufficiently reliable to constitute affirmative evidence of the subject property's fair cash value for the fiscal years at issue. Thus, the Board found and ruled that the appellant did not meet his burden of proving that the subject property was overvalued for fiscal year 2004 or fiscal year 2005.

On this basis, the Board decided the present appeals
for the appellee.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr. Chairman

A true copy,

Attest: _____
Clerk of the Board