COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

MAIN STREET PROPERTY, INC.	**BOARD OF ASSESSORS OF THE TOWN OF WAYLAND**
Docket Nos. F278181, F283235	Promulgated: April 28, 2008

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on real estate located at 35 Main Street in the Town of Wayland, owned by and assessed to appellant under G.L. c. 59, §§ 11 and 38, for fiscal years 2005 and 2006.

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

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

Matthew A. Luz, Esq., for the appellant.

Mark J. Lanza, Esq., for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2004 and January 1, 2005, the relevant assessment dates for fiscal years 2005 and 2006 ("fiscal years at issue"), Main Street Property Inc. ("appellant"), was the assessed owner of 4.925-acre parcel of real estate in the Town of Wayland improved with two, two-story, retail/office buildings, with a total leasable area of 47,238 square feet ("subject property").

For fiscal year 2005, the Board of Assessors of the Town of Wayland ("assessors") valued the subject property at $4,874,800 and assessed a tax thereon, at the rate of $12.58 per thousand, in the amount of $61,324.98. Appellant paid the tax due without incurring interest. Appellant timely filed its abatement application with the assessors on January 24, 2005. The application was deemed denied on April 24, 2005, and on May 9, 2005, appellant timely filed an appeal with the Appellate Tax Board ("Board").

For fiscal year 2006, the assessors valued the subject property at $5,094,400 and assessed a tax thereon, at the rate of $12.54 per thousand, in the amount of $63,883.78. Appellant paid the tax due without incurring interest. Appellant timely filed its abatement application with the assessors on January 6, 2006. The application was deemed denied on April 6, 2006. On April 25, 2006, appellant timely filed an appeal with the

Board. On the basis of these facts, the Board found that it had jurisdiction over these appeals.

The Town of Wayland is located in Eastern Massachusetts and is bordered by Sudbury and Framingham on the west, Natick on the south, Concord and Lincoln on the north, and Weston on the east. Wayland has a total area of 15.91 square miles. It is located seventeen miles west of Boston and is serviced by Interstate 90 (the “Masspike”) and State Route 9 (“Route 9”); both highways run in an east/west direction. The local highway network also includes State Routes 20, 27, 30, and 126.

The subject property is located at the intersection of Main Street (Route 27) and Commonwealth Road (Route 30). Access to the property is made via curb cuts from each of these main roadways. The site is also situated at a four-way traffic light. There is 274.31 feet of frontage along the easterly side of Main Street, 485.06 feet of frontage along the southerly side of Commonwealth Road, and 47.70 feet at the corner of Main Street and Commonwealth Road. The site is reported to be level at grade with Commonwealth Road and above the grade of Main Street in its northwest corner and slops downward in the area that fronts along Main Street. Utilities available include municipal water, gas and telephone, and there is an on-site septic system.

The two multi-tenant, retail/office buildings located on the parcel were constructed in stages during 1960, 1968, and 1986. The buildings are wood and masonry frame over a concrete foundation. The roofs are partially flat with rubber membrane and partially pitched with an asphalt shingle cover. The exteriors are a mix of facades which include brick, concrete panel, stone, and vinyl siding. The interior finishes include suspended acoustical tile ceilings, carpet or ceramic tile floor covers, and sheetrock walls with plaster and paint, with some walls covered with wallpaper. The lighting throughout is fluorescent panel, fluorescent strip, and recessed lighting fixtures.

Building 1 has approximately 26,692 square feet of gross floor area. The first floor layout allows for occupancy by five retail tenants occupying spaces ranging from 800 square feet to 14,500 square feet. The first floor includes Donelan’s Supermarket, the anchor tenant for this building. The second floor is accessed from two interior staircases and is subdivided into eight suites which range in size from 350 to 1,850 square feet. There are two lavatories in the common area of the first floor, two lavatories in the common area of the second floor, and three lavatories in the space occupied by Donelan’s Supermarket.

Building 2 has a gross floor area of 17,546 square feet with a layout similar to that of Building 1. The first floor has four retail units and one office unit ranging in size from 800 to 6,000 square feet. The anchor tenant is Brooks Drugs which is located on the first floor.[1] The second floor is subdivided into eight office suites, ranging in size from 300 to 1,000 square feet. There are two lavatories in the ground floor common area, two lavatories in the second level common area, and two lavatories in the first floor retail space occupied by Brooks Drug.

The two buildings have a combined total leasable area of 43,238 square feet, of which 32,685 square feet (74.5%) consists of retail space and 11,185 square feet (25.5%) consists of office space. Mechanics to both buildings include gas-fired HVAC units to each of the rental units. Both structures contain full wet-sprinkler fire protection. The site has parking for approximately 274 vehicles.

Appellant presented its case through the testimony of its commercial real estate valuation expert, Eric Wolff, and the introduction of his summary appraisal report. Based on his education and experience, the Board qualified Mr. Wolff as an expert witness in the field of real estate valuation. In his

[1] Since the hearing of this appeal, Brooks Drugs has been bought by RiteAid Pharmacy.

appraisal report, Mr. Wolff primarily relied on the income capitalization methodology to estimate the value of the subject property for the fiscal years at issue.

To estimate the subject property's potential gross income, Mr. Wolff began by reviewing the subject property's rent rolls for fiscal years 2005 and 2006. To determine whether the rents referenced in the rent rolls were consistent with market rates, he reviewed retail rents in properties he considered to be comparable in Framingham and office rents in properties he determined were comparable in Framingham and Sudbury. He offered no market rental data for property in Wayland. Based on his research, Mr. Wolff projected a market rent of $18.00 per square foot, triple-net, for 18,185 square feet of the retail space. Mr. Wolff testified that the remaining 14,500 square feet of retail space occupied by Donelan's Supermarket is a very large space that had not been updated for many years and, therefore, a lower rent of $11.00 per square foot, triple-net, was more appropriate. For the office space, Mr. Wolff projected a market rent of $20.00 per square foot, gross, for fiscal year 2004, and $21.00 per square foot, gross, for fiscal year 2005. In total, he calculated a potential gross income ("PGI") of $710,530 for fiscal year 2005, and $721,715 for fiscal year 2006.

Mr. Wolff noted that the tenants in a triple-net leasing situation are responsible for all operating expenses of the building, excluding those associated with its management and structural maintenance. Therefore, to reflect the tenants' responsibilities, Mr. Wolff added expense reimbursements as reported by the landlord of $34,827 and $48,482, respectively. Mr. Wolff noted that during the fiscal years at issue the subject property had a zero vacancy. However, Mr. Wolff reported that local real estate brokers informed him that the vacancy rates for retail and office space similar to the subject property were in the range of five to ten percent. He also researched industry published market surveys for the Wayland area which listed office space vacancy rates ranging from eighteen to twenty percent and retail space vacancy rates ranging from five to six percent. Based on his research and the subject property's performance, Mr. Wolff concluded that a five percent vacancy rate, for both office and retail space, would be appropriate for both fiscal years. Applying the five percent vacancy rate to his potential gross income plus reimbursements, Mr. Wolff calculated an effective gross income ("EGI") of $708,089 for fiscal year 2005 and $731,687 for fiscal year 2006.

Next, Mr. Wolff deducted a management expense of six percent of EGI, replacement reserves of five percent of PGI, and commissions of one percent of PGI. He also deducted for insurance, utilities, repairs and maintenance, landscaping, snow removal, trash removal, cleaning, and legal and accounting expenses. According to Mr. Wolff, he used the actual figures provided by the landlord. Notably, Mr. Wolff used the same figures for these eight expenses for both fiscal years. Mr. Wolff's total expenses, which included the eight identical expenses as well as management, reserves and commissions, were $356,956 for fiscal year 2005, and $359,726 for fiscal year 2006. Subtracting the expense totals from the subject property's EGI for each fiscal year, Mr. Wolff calculated net operating incomes of $351,133 and $371,961 for fiscal years 2005 and 2006, respectively.

Mr. Wolff formulated his base capitalization rate using a band-of-investment approach which reflected the cash flow requirements for each segment of capital. He also researched capitalization rate ranges for "non-investment" grade rental and office properties published in industry surveys such as the *Price-Waterhouse Coopers-Korpacz* report. He then added the applicable tax factor, 1.258% for fiscal year 2005 and 1.254% for fiscal year 2006, which resulted in an overall rounded capitalization rate of 10.25 percent for both fiscal years.

Finally, Mr. Wolff estimated the subject property's value by dividing the respective net income by the overall capitalization rate, at $3,425,000 for fiscal year 2005 and $3,630,000 for fiscal year 2006. Mr. Wolff's income capitalization methodology is summarized in the following table.

	Fiscal Year 2005	Fiscal Year 2006
Income		
Retail 14,500 sf @ $11 both years	$159,500	$159,500
Retail 18,185 sf @ $18 both years	$327,300	$327,300
Office 11,185 sf @ $20 FY 2005	$223,700	
Office 11,185 sf @ $21 FY 2006		$234,885
Potential Gross Income (PGI)	**$710,530**	**$721,715**
Reimbursement of Expense	$ 34,827	$ 48,482
Less: Vacancy/Collection (5%)	- $ 37,268	- $ 38,510
Effective Gross Income (EGI)	**$708,089**	**$731,687**
Expenses		
Management Fee (6% EGI)	$ 42,485	$ 43,901
Replacement Reserve (5% PGI)	$ 37,268	$ 38,510
Insurance	$ 56,455	$ 56,455
Utilities	$ 34,945	$ 34,945
Repairs & Maintenance	$106,273	$106,273
Landscaping	$ 16,322	$ 16,322
Snow Removal	$ 14,162	$ 14,162
Trash Removal	$ 9,815	$ 9,815
Cleaning	$ 13,479	$ 13,479
Legal & Accounting	$ 18,647	$ 18,647
Commissions (1% PGI)	$ 7,105	$ 7,217
Total Expenses	$356,956	$359,726
Net Operating Income	**$351,133**	**$371,961**
Base Cap Rate	9.00%	9.00%
Tax Rate	1.25%	1.25%
Overall Capitalization Rate	10.25%	10.25%
Estimate of Value (Rounded)	**$3,425,000**	**$3,630,000**

Mr. Wolff also included a sales-comparison analysis, but did not rely on the value derived from it, given the nature of the subject property and the deficiencies of his chosen comparables.

In support of their assessment, the assessors attempted to offer the testimony of Mr. Harald Scheid. Appellant challenged Mr. Scheid’s qualification to testify on the grounds that he was not a licensed appraiser in the Commonwealth of Massachusetts or a member of the assessors, and did not participate in the valuation of the subject property for the years at issue. The

Board agreed with appellant and ruled that Mr. Scheid was not qualified to testify as an expert valuation witness or to otherwise offer an opinion of value in these appeals. The assessors declined to offer Mr. Scheid as a fact witness, but presented their case through the testimony of Molly Reed, assistant assessor for the Town of Wayland. Ms. Reed offered into evidence property record cards, a purported rent roll for the subject property, and an income valuation sheet prepared by CLT universal system on behalf of the Town of Wayland. The assessors offered no further evidence.

Based on the evidence presented, the Board agreed with appellant's expert that the income capitalization approach was the appropriate method to use in valuing the subject property for the fiscal years at issue. The Board found, however, that Mr. Wolff's analysis was flawed in several respects and was, therefore, unreliable.

The Board found that Mr. Wolff's projected rental rates and vacancy rates were supported by reliable market data and were reasonable. With respect to the operating expenses, however, the Board found that Mr. Wolff's analysis contained several anomolies. First, Mr. Wolff purportedly used the actual expenses as reported by the landlord. He did not, however, show that these expenses were reflective of the market. Further, Mr. Wolff's operating expenses were identical for both years despite the fact that several of his expense categories, including utilities and repairs and maintenance, would be expected to fluctuate from year to year. Therefore, the Board found that their authenticity and reliability were questionable.

Moreover, the Board recognized that the underlying assumption of Mr. Wolff's analysis was that the retail space, which accounted for approximately seventy-five percent of the total leasable space, would be rented on a triple-net basis, with expenses paid by the tenants. The Board found, however, that in his analyses, Mr. Wolff's tenant reimbursements fell far below seventy-five percent and amounted to approximately ten percent of total expenses for both fiscal years. Therefore, the Board found that by understating revenue and overstating expenses, Mr. Wolff in essence deducted for the expenses twice and understated the subject property's net operating income. Moreover, the Board found that Mr. Wolff failed to explain whether or not taxes were included in his tenant reimbursement figures and, if so, in what amount. Consequently, the Board found that Mr. Wolff failed to establish that the full tax factor for the fiscal year at issue should have been included in his capitalization rate.

Finally, based on the information contained in Mr. Wolff's appraisal report, which identified the subject property as being in average physical condition with no major deferred maintenance, the Board found that Mr. Wolff’s capital reserves calculated at five percent of PGI were excessive.

Because appellant offered no reliable evidence of expenses for the subject property, a critical element in valuing the property under the capitalization of income approach, and because appellant offered no other credible analysis or evidence of value, the Board ruled that appellant failed to meet its burden of proving overvaluation in these appeals. Accordingly, the Board issued decisions for the appellee in these appeals.

OPINION

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

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to ascertain the fair cash value of property: income capitalization; sales comparison; and cost of reproduction. ***Correia v. New Bedford Redevelopment Authority,*** 375 Mass. 360, 362 (1978). “The Board is not required to adopt any particular method of valuation.”

Pepsi-Cola Bottling Co. v. Assessors of Boston, 397 Mass. 447, 449 (1986). Regardless of which method is employed to determine fair cash value, the Board must determine the highest price which 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 largely depends on how well it can be supported by market data. 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). Under this approach, a valuation figure is determined by dividing net operating income by a capitalization rate. ***Board of Assessors of Brookline v. Buehler,*** 396 Mass. 520, 522-23 (1986). The net income figure is computed by deducting operating expenses from gross rental income. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 609 (1984).

In applying the income-capitalization 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, the rents 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); ***AVCO Manufacturing Corporation v. Assessors of Wilmington,*** Mass. ATB Findings of Fact and Reports 1990-142. 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). Vacancy rates must also be market based when determining fair cash value. ***Donovan v. City of Haverhill,*** 247 Mass. 69, 71 (1923).

After accounting for vacancy and rent losses, the net operating income is obtained by deducting the landlord's appropriate expenses. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 610 (1984). The expenses should reflect the market. ***Id.*** Real estate taxes are not considered operating expenses for purposes of determining net operating income. ***Alstores Realty Corporation v. Assessors of Peabody,*** 391 Mass. 60, 70 (1984). "The expense of local taxation turns on the very point in dispute, the fair cash value of the property. Logically, therefore, income should be capitalized before taxes." ***Assessors of Lynnfield v. New England Oyster House,***

Inc., 362 Mass. 696, 700 n.2 (1972). *See also*, ***Board of Assessors of Lynn v. Shop-Lease Co., Inc.,*** 364 Mass. 569, 572 (1974) (property's net operating income is determined before real estate taxes). Real estate taxes are accounted for by use of an effective tax factor in the capitalization rate. ***Taunton Redevelopment,*** 393 Mass. at 295.

The capitalization rate should consider the return necessary to attract investment capital. ***Taunton Redevelopment***, 393 Mass. at 295. The "tax factor" is a percentage added to the capitalization rate "to reflect the tax which will be payable on the assessed valuation produced by the [capitalization] formula." ***Assessors of Lynn v. Shop-Lease Co.,*** 364 Mass. 569, 573 (1974). "Logically, therefore, income should be capitalized before taxes 'with the capitalization rate increased to yield the return the investor expects plus the amount of local taxes payable.'" ***Alstores,*** 391 Mass. at 70 n. 19, *quoting* ***New England Oyster House, Inc.*** 362 Mass. at 700 n. 2.

Generally, in multiple tenancy properties like the subject property, it is appropriate to add a tax factor to the capitalization rate because the landlord is assumed to be responsible for paying the real estate taxes, and the tenants' contribution toward the real estate tax is included in the landlord's gross income. ***Taunton Redevelopment***, 393 Mass. at 295-96; *see also* ***General Electric Co.***, 393 Mass. at 610. If, however, the tenants' tax payments are not included in gross income then the tax factor must be proportionately reduced. ***Alstores,*** 391 Mass. at 69. In the present appeal, the Board found that appellant failed to prove what amount, if any, of tax payments were paid to appellant by the tenants and included in appellant's reimbursement figures. Accordingly, the Board found that appellant failed to establish that it was entitled to the full tax factor in calculating his overall capitalization rate.

The Board is entitled to presume that the assessment is valid until the taxpayer sustains his or her burden of proving otherwise. ***Schlaiker v. Board of Assessors of Great Barrington,*** 365 Mass. 243, 245 (1974). Accordingly, the burden of proof is upon the taxpayer to make out his or her right as a matter of law to an abatement of the tax. ***Id.*** The taxpayer must demonstrate that the assessed valuation of his or her property was improper. *See* ***Foxboro Associates v. Board of Assessors of Foxborough***, 385 Mass. 679, 691 (1982). In appeals before this Board, a taxpayer "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation." ***General Electric Co.***, 393 Mass. at 600, (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)).

“The [B]oard [can] accept such portions of the evidence as appear to have the more convincing weight. The market value of the property [can] not be proved with mathematical certainty and must ultimately rest in the realm of opinion, estimate, and judgment . . . . The [B]oard [can] select the various elements of value as shown by the record and from them form . . . its own independent judgment." ***Assessors of Quincy v. Boston Consolidated Gas Company***, 309 Mass. 60, 72 (1941). *See also,* ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984); ***New Boston Garden Corp. v. Board of Assessors of Boston***, 383 Mass. 456, 473 (1981); ***Jordan Marsh Co. v. Assessors of Malden***, 359 Mass. 106, 110 (1971).

In the present appeals, the Board found that Mr. Wolff’s income capitalization analyses were flawed. First, the Board found that Mr. Wolff failed to substantiate his operating expenses with reliable market data. In addition, despite the fact that several of his expense categories would be expected to fluctuate from year to year depending on usage, Mr. Wolff used the identical figures for both years, calling into question their accuracy and reliability. Further, in his analyses, Mr. Wolff made the assumption that seventy-five percent of the property would be rented on a triple net basis with the tenants responsible for payment of the operating expenses. Based on this assumption, the Board found that appellant’s tenant reimbursement should have been significantly higher than reported by Mr. Wolff, thereby increasing the subject property's net operating income.

Based on the foregoing facts, the Board found that appellant failed to meet its burden of proving that the subject property was overvalued for fiscal years 2005 and 2006.

Accordingly, the Board entered 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