COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

23 WEST BACON CORPORATION v. BOARD OF ASSESSORS OF THE TOWN OF PLAINVILLE

Docket Nos.: F224327-328 (FY 1995)
F233313-314 (FY 1996) Promulgated:
September 12, 2000

These are appeals under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate real estate taxes assessed under G.L. c. 59, § 38 for fiscal years 1995 and 1996.

Chairman Burns heard these appeals and was joined in the decision for the appellant by former Chairman Gurge, Commissioner Scharaffa, and former Commissioner Lomans.

These findings of fact and report are made pursuant to requests by both parties under G.L. c. 58A, § 13 and 8.31 CMR 1.32.

Stephen D. Clapp, Esq. for the appellant.

John P. Lee, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 1994 and January 1, 1995, the appellant, 23 West Bacon Corporation ("23 West Bacon"), was the assessed owner of two neighboring parcels of land in Plainville that the Board of Assessors ("Assessors") described as parcel 109 and parcel 110 on map 12. Parcel 109 contains approximately five and one-half acres of land and is improved with a multi-story wood frame and concrete block industrial facility. Parcel 110 contains approximately four acres and is improved with a four-thousand-square-foot metal building. The two parcels combined have functioned as a manufacturing complex for Whiting & Davis Company, Inc. ("Whiting & Davis") since the turn of the nineteenth century ("subject property").

Over the years, Whiting & Davis used many hazardous substances in its manufacturing processes. It utilized a lagoon system for disposal of these hazardous wastes. In the early 1980s, the state's predecessor to its Department of Environmental Protection ("DEP"), the Department of Environmental Quality Engineering ("DEQE"), issued an order for the closure of the lagoons. As part of the closure procedure, monitoring wells were installed on the property to ascertain any adverse effects on groundwater. The wells revealed significant levels of TCE, trichloroethylene, and vinylchloride and DCE, dichloroethylene, all of which exceeded applicable standards.

The subject property is situated directly on West Bacon Street. The neighborhood is primarily industrial with a variety of light-manufacturing concerns. In addition, a cemetery and an oil storage facility are located on the south side of West Bacon Street. The town public works facility is located to the rear of the subject property. The subject also borders a small pond to the northeast. The Ten-Mile River runs through the subject and drains into the pond on the opposite side of West Bacon Street. Routes 1, 1A, and 106 are all located within a short distance from the neighborhood, and they provide access to Interstate Routes 495 to the north and 295 to the south. The subject is connected to town water and sewer services and has full access to all public utilities.

The subject property is located in a Watershed Protection Overlay District with portions further located in a Flood-Plain Overlay District. These overlay districts influence new development and uses that may impact negatively the ground water or the ability of the area to accommodate floodwaters.

The subject property is also located in an "IC" or Controlled Industrial zoning district, although a small portion of parcel 109 is in a "CB" or General Commercial district. The appellant uses this small 20,000-square-foot portion as a parking lot. The minimum land area in the IC zone is 50,000 square feet with a minimum lot width and road frontage of 150 feet. The minimum front and rear set back requirements are thirty feet, while the side requirement is twenty feet. The maximum building coverage is 45,000 square feet with a maximum of 90,000 square feet of floor area exclusive of basement space. There is a two-story height restriction in this zone as well as a twenty-percent open space requirement. The uses allowed in the IC zone include wholesaling, agricultural, business, offices, parking, printing, and public uses. Other uses, such as industrial, restaurant, business retail, bulk storage, and warehouse require are allowed by special permit. The subject property has been utilized as a manufacturing facility and, as of the relevant assessment dates, was considered a legal non-conforming use.

In both fiscal years 1995 and 1996, the Assessors valued lots 109 and 110 at $2,136,900 and $245,400, respectively. In fiscal year 1995, the Assessors assessed real estate taxes, at a rate of $13.92 per $1,000, in the corresponding amounts of $29,745.65 and $3,415.97. In fiscal year 1996, the Assessors assessed real estate taxes, at a rate of $14.59 per $1,000, in the corresponding amounts of $31,327.01 and $3,580.39. The appellant timely paid its real estate taxes for both parcels in both fiscal years at issue in these appeals.

The appellant also seasonably filed its applications for abatement ("AA") with the Assessors and petitions with this Board as summarized in the following table.

Docket Number	Fiscal Year	Parcel Number	Tax Bill Mailed	AA Filed	AA Denied or Deemed Denied	Petition Filed
F224327	1995	109	10/14/94	11/14/94[1]	11/21/94	02/07/95
F224328	1995	110	10/14/94	11/14/94[1]	11/21/94	02/07/95
F233313	1996	110	10/02/95	10/26/95	01/26/96	04/10/96
F233314	1996	109	10/02/95	10/26/95	01/26/96	04/10/96

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

The appellant presented its case through the testimony of four witnesses, including a geologist specializing in groundwater contamination, a former president of Whiting & Davis, an accountant who handled the subject property for the appellant, and an expert real estate appraiser. In defense of the assessed values on the subject property, the Assessors presented the testimony of an expert real estate

[1] At the time of these appeals, G.L. c. 59, § 59 required that applications for abatement be filed with the Assessors within thirty days of the sending of the tax bill. Because the month of October has thirty-one days, thirty days from the October 14th mailing of the tax bills is November 13th. However, in 1994, November 13th fell on 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. Accordingly, the Board found that the appellant timely filed its applications for abatement on Monday, November 14, 1994.

appraiser whose primary experience was in mass appraisals. Both parties introduced numerous exhibits.

The appellant's first witness was Raymond Johnson, a geologist and licensed Massachusetts site professional. At the time of the hearing, he had considerable experience in testing groundwater and soil contamination sites, analyzing the data, recommending remediation approaches, and estimating the costs association with various remediation methods. However, he was not an engineer. Mr. Johnson first became involved with the subject property in 1983, when he assisted in a groundwater-monitoring project that was instituted in conjunction with the closure of the lagoons. Tests from the monitoring wells revealed elevated levels of TCE, DCE, and vinylchloride compounds as well as abnormal pH readings, all related to releases of contaminants from the lagoons.

In 1987, a consent order was negotiated between Whiting & Davis and DEQE. This post-closure order required Whiting & Davis to implement an assessment program. The assessment program utilized many wells at various locations throughout the subject property and, by 1993, determined the flow and extent of contaminants both on and off the property. Because contaminated parts of the subject property were located within a well-head protection area that surrounds public supply wells, DEQE imposed more stringent drinking water standards on Whiting & Davis.[2] Because of these standards, Mr. Johnson testified that from 1993, continuous groundwater monitoring and maintenance of the closed lagoons would be necessary for the next thirty years at a cost of approximately $12,000 to $13,000 per year. Mr. Johnson also predicted that design and implementation costs, to cleanup the contaminated groundwater, would probably be incurred over a period of seven or eight years in the amount of $500,000.

In addition, Mr. Johnson testified that he had evaluated dozens of contaminated or possibly contaminated properties for potential buyers. He observed that buyers were less likely to buy properties with groundwater contamination as opposed to those with just soil contamination issues because cleanup costs for soil removal and disposal were more readily ascertainable and predictable. Mr. Johnson further testified that, according to state law, liability for environmental cleanup costs could be imposed on buyers of contaminated properties.

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[2] Mr. Johnson testified that the standards for TCE, DCE, and vinylchloride were five parts per billion, seventy parts per billion, and two parts per billion, respectively. The assessment detected levels of TCE and DCE on the subject property in excess of 1,500 parts per billion and levels of vinylchloride approaching several hundred parts per billion.

The appellant also called Frank Montie to testify. Whiting & Davis and later 23 West Bacon had employed Mr. Montie from 1972. He started as a production manager and eventually became the president of the Whiting & Davis in 1987. Mr. Montie related that, during his tenure, Whiting & Davis manufactured jewelry, metal-mesh handbags and ring-mesh safety products. Consequently, the company was involved in metal plating, polishing, and lacquering operations. Mr. Montie further testified that the lagoons were established to settle out sludge and heavy metals produced in Whiting & Davis' manufacturing processes.

Mr. Montie also recited the history surrounding the sale of the manufacturing company in 1991. According to Mr. Montie, the owners of Whiting & Davis sold its assets to WDC Holdings which continued the manufacturing operations at the Plainville site until 1995. However, the buildings and land were not sold as part that transaction. Instead, 23 West Bacon held onto the real estate and leased it to WDC Holdings under a triple net lease for $2,500 per month for the first six months and then $10,000 per month until 1995. As part of the sale, the sellers provided some of the financing and even furnished WDC Holdings with an indemnification agreement for the contamination issues. In

1995, WDC Holdings relocated the manufacturing company to an industrial park in North Attleboro.

Mr. Montie further testified that, after WDC Holdings moved out, the appellant was unable to lease the subject property to a single user instead leasing portions of it to smaller concerns. Most of these leases were for two- to five-year terms at $2.50 to $4.25 per square foot. Vacancies existed. He further noted that all of the potential purchasers of the property wanted at least an $800,000 indemnification agreement for possible contamination liability.

The appellant called Peter Tetreault as its expert real estate appraiser. Mr. Tetreault described the subject property as being composed of two parcels, one 5.3 acres and the other 3.77 acres, that together function as a unit. The larger parcel is improved with a large, approximately one-hundred year old concrete mill building with about 107,282 square feet of space and two small garages or shed-type buildings. The mill building has about 53,816 square feet of space in its lower level, 47,416 square feet of space in its main level, and 6,050 square feet of office space in its upper level. The lower level functions more like a main level because of its elevation, large windows, and proliferation of natural light. The building is in good condition for its age but is not handicapped accessible. The two other wood storage buildings on the larger parcel have areas of approximately 4,032 and 2,850 square feet. The larger parcel is bisected by the Ten-Mile River, leaving about three usable acres. About 105,000 square feet of the smaller parcel are used for parking, but it is also improved with an unheated 40 foot by 100 foot corrugated metal building. About a third of the smaller parcel contains a ball field that, at the time of the hearing, was used by the local Little League.

Because of the subject property's size and the market's dearth of large single tenants, Mr. Tetreault decided that, as of the relevant assessment dates, the two lot's highest and best use was to remain combined as a multi-tenanted, mixed-use facility, joining office space with light manufacturing and research and development. His study indicated that other properties in the area had succeeded in this way. And, in fact, at the time of the hearing in these appeals, that is how the subject was being used. However, as pointed out in the Assessors' counsel's cross-examination of Mr. Tetreault, the subject property was still being used as a manufacturing facility as of January 1, 1994 and January 1, 1995, although the transition was foreseeable. Notwithstanding this use, Mr. Tetreault determined that the subject would and could be better utilized as a multi-tenanted mixed-use property, which it later was.

In estimating the value of the subject property for the fiscal years at issue, Mr. Tetreault first valued the property as clean and then factored the contamination issues into his valuation. Mr. Tetreault relied primarily on two articles published in the *Appraisal Journal* for help in devising his valuation methodology for the contaminated property.[3] He also considered other articles[4] and the Appraisal Standards Board's Advisory Opinion AO-9 regarding "Responsibility of Appraisers Concerning Toxic or Hazardous Substance Contamination."[5]

Mr. Tetreault relied principally on the income-capitalization approach to estimate the value of the subject property during the fiscal years at issue. He ruled out the cost approach because of the age of the property, the difficulty in determining accrued

[3] Peter J. Patchin wrote both of these articles, which were admitted as exhibits in these appeals. One article is entitled "Valuation of Contaminated Properties" and was published in the January 1988 issue of the *Appraisal Journal*. The other article is entitled "Contaminated Properties – Stigma Revisited" and was published in the April 1991 issue of the *Appraisal Journal*.

[4] Another article that was admitted as an exhibit in these appeals was Bill Mundy's "Stigma and Value" published in the January 1992 issue of the *Appraisal Journal*.

[5] According to the Appraisal Foundation, Advisory Opinions are issued to illustrate the applicability of the Uniform Standards of Professional Appraisal Practice to specific situations.

depreciation, and the unliklihood that investors would consider a cost approach. He used the sales-comparison approach only as a check on the value derived from his income-capitalization methodology because the sale prices of the comparable properties required so many adjustments. He considered the income-capitalization approach the most appropriate method to use under the circumstances present in these appeals because investors would rely on it for this type of income-producing property.

In his sales-comparison approach, Mr. Tetreault found four sales of older industrial facilities or mill buildings in the general area of the subject property that he considered reasonably comparable to the subject. He adjusted all but one of them upward to account for such differences as size, location, condition, age, site value, and functional utility. His sales-comparison analysis, which considered the subject property as clean, not contaminated, produced an overall sales-price range of $8.29 to $8.79 per square foot. He selected $8.50 per square foot as the most appropriate sales price for the subject property. This price produced a rounded market value of $1,005,000 for the subject property, as clean, for both of the fiscal years at issue in these appeals.

Mr. Tetreault's first step in his income-capitalization approach was to estimate the market rent that the property could generate if divided into individual rentable units. He measured the buildings' combined area at 118,164 square feet. After evaluating five purportedly comparable properties in his rental analysis and relying on four of them, he estimated the market rent for the subject property at $2.75 per square foot, for a total potential gross income of $324,951. Mr. Tetreault calculated his effective gross income of $276,208 by applying a vacancy rate of fifteen percent to his potential gross income. His vacancy rate included a ten-percent vacancy-and-credit-loss factor and another five-percent factor to account for unrentable space such as hallways and staircases.

In calculating his total overall expenses at $149,823, Mr. Tetreault considered the subject's actual expenses but primarily relied on expenses derived from his study of similar properties in the market. He estimated fixed expenses for insurance at $27,500 and operating expenses for heat, electric, water and sewer, janitorial services, legal and accounting services, repairs and maintenance, rubbish removal, snow removal and yard maintenance, advertising, rental fees, and miscellaneous costs, at a total of $107,323. He placed his reserves for replacement at $15,000, or approximately $0.13 per square foot, which, he alleged, was equivalent to other older mill buildings in the area. Mr. Tetreault then calculated his net-operating income at $126,386 by subtracting his total overall expenses from his effective gross income. He then rounded this amount to $126,400.

To finally estimate the subject property's value, as clean, using his income-capitalization technique, Mr. Tetreault divided his net-operating income by his total capitalization rate. He developed his eleven-percent overall capitalization rate by considering a loan-to-value ratio of seventy percent, a twenty-year amortization period, a 10.5% interest rate, an equity yield rate of 12.5%, a five-year holding period, and no change in the value of the subject property. Mr. Tetreault then added a tax factor to reach his total capitalization rate of 12.39%. In this way, he estimated the value of the subject property, as clean, as of both January 1, 1994 and January 1, 1995, at $1,020,013, which he rounded to $1,020,000. Mr. Tetreault's income-capitalization methodology is summarized in the following table.[6]

[6] The Board noted minor computational errors in both this table and the succeeding one that manifested themselves in Mr. Tetreault's estimated values. However, his rounded values were unaffected.

POTENTIAL GROSS INCOME		
118,164 square feet @ $2.75 psf	$	324,951
TOTAL GROSS POTENTIAL INCOME	**$**	**324,951**
Vacancy, rent loss, common area loss (15%)	($	48,743)
EFFECTIVE GROSS INCOME	**$**	**276,208**
FIXED EXPENSES		
Insurance	**($**	**27,500)**
OPERATING EXPENSES		
Heat	($	20,000)
Electric	($	25,000)
Water/Sewer	($	2,500)
Janitorial Services	($	2,000)
Legal & Accounting	($	2,500)
Repairs/Maintenance	($	28,500)
Management	($	16,573)
Rubbish	($	2,500)
Snow Removal/Yard Maintenance	($	2,500)
Advertising	($	1,500)
Rental Fees	($	3,000)
Other: Miscellaneous & Contingency	($	750)
TOTAL OPERATING EXPENSES	**($**	**107,323)**
RESERVES	**($**	**15,000)**
NET OPERATING INCOME (Rounded)	**$**	**126,400**
CAPITALIZATION RATE		
Base Rate		0.1100
Tax rate		0.01392
TOTAL CAPITALIZATION RATE		**0.1239**
ESTIMATED VALUE AS CLEAN		**$ 1,020,013**
ROUNDED VALUE AS CLEAN		**$ 1,020,000**

Mr. Tetreault then further adjusted his income-capitalization approach to account for the contamination on the subject property. He first added $12,500 in monitoring and engineering costs to the expense statement. This addition increased his total expenses to $162,323, while concomitantly reducing his net operating income to $113,900. He then divided this amount by a capitalization rate that was based on an equity yield rate, on the assumption that a bank would not finance the property but a purchaser might pay cash for it. He chose the 12.5 equity yield rate that he used in formulating his capitalization rate for valuing the subject property, as clean, and then increased it to 17.5% to account for the property's contamination and the added investment risk associated with it.

More specifically, Mr. Tetreault augmented this new capitalization rate by three percent to account for the added risk before clean up, another one percent to account for the stigma to the property even after clean up, and yet another one percent for the illiquidity or inability to mortgage the property.[7] He upwardly adjusted this rate by the tax rate of 0.01392, resulting in a total capitalization rate of 0.1889. Mr. Tetreault then estimated the value of the subject property, as contaminated, at $602,901, by dividing his new net

[7] Mr. Tetreault defined stigma as the perception of a defect in property because of contamination that adversely affects value.

operating income by his new total capitalization rate. He rounded this figure downward to $600,000. Mr. Tetreault analysis in this regard is summarized in the following table.

ORIGINAL NET OPERATING INCOME	**$ 126,400**
Monitoring and Engineering Costs	($ 12,500)
ADJUSTED NET OPERATING INCOME	**$ 113,900**
NEW CAPITALIZATION RATE	
Original Equity Yield Rate	0.12500
Adjustments for Risk, Stigma, & Illiquidity	0.05000
Tax Factor	0.01392
NEW TOTAL CAPITALIZATION RATE (Rounded)	**0.1889**
NEW ESTIMATED VALUE	**$ 602,901**
NEW ROUNDED VALUE	**$ 600,000**

Mr. Tetreault then further adjusted the new rounded value of the subject property downward to account for clean up costs. He considered the most probable cost of the clean up at $500,000, and the time for the initiation of the remediation efforts at somewhere beginning within the next fifteen years or so. He further recognized that there was no clean up plan in existence during the fiscal years at issue or even thereafter. Relying on these assumptions, he calculated that $285,000 set aside in a sinking fund during the relevant time period at 7.5% compound interest per year for a clean up that would begin in about 7.5 years would grow to the $500,000 amount needed for remediation.

On this basis, Mr. Tetreault estimated the value of the subject property, as contaminated, on both January 1, 1994 and January 1, 1995, at $600,000 less the $285,000 needed for clean up, which equals $315,000.

Following Mr. Tetreault's testimony, the appellant called Timothy Carpenter, a staff accountant for William H. Darling, CPA, a public accounting firm. Mr. Carpenter performed accounting services for 23 West Bacon Corporation including services related to the subject property, such as the preparation and filing of tax returns, the collection of rents, and the payment of bills. He had personal knowledge of the finances related to the subject property during the relevant time period. He testified that the expenses used by Mr. Tetreault in his income-capitalization approach compared favorably with the actual expenses incurred by the subject property during that same time period. He also prepared a schedule of the actual rents in 1996. They averaged $2.76 per square foot and supported Mr. Tetreault's selection of market rent in his income-capitalization approach.

In defense of the assessments, the Assessors called Harold Mendoza, an experienced real estate appraiser and President of Appraisal Consultants of New England, a company that performs mass appraisals, using the CAMA system, for various Massachusetts municipalities, including Plainville. He conducted the mass appraisals for Plainville during the time period relevant to these appeals. According to Mr. Mendoza, the Assessors established the values on the subject lots on the basis of his appraisals.

Mr. Mendoza valued lot 109 and lot 110 for both of the fiscal years at issue in the amounts of $2,136,900 and $245,400, respectively. He acknowledged that the description of the subject property presented by Mr. Tetreault was accurate. But, it was his opinion that the highest and best use of the subject property was as a single-tenanted manufacturing or industrial facility.

Mr. Mendoza relied on both cost and income-capitalization approaches to value the subject property as of January 1, 1994 and January 1, 1995. He testified that he also examined comparable sales. His cost approach produced a value of $2,136,900 for lot 109, while his income-capitalization methodology resulted in a value of $2,230,000. In his income-capitalization approach, he first calculated lot 109's income by multiplying that part of the subject's rentable area, which he determined was 106,429 square feet, by what he considered the net market rent of $2.75 per square foot. He then adjusted that figure downward by twenty-percent to reflect lot 109's expenses. He subsequently divided this net-income amount by a 10.5% capitalization rate, resulting in an estimate of value of $2,230,000 for lot 109. He also described in his testimony a second income-capitalization approach in which he used a gross rent of $3.25 per square foot, a vacancy and credit loss rate of ten percent, expenses of approximately sixteen percent, and a capitalization rate of 12.5%, including a tax factor. Based on this second approach, he estimated the value of lot 109 at $2,100,000.

Similarly, with respect to lot 110, Mr. Mendoza used a gross rent of $4.00 per square foot for 4,000 square feet of rentable space, along with a vacancy and credit loss rate of five percent, for an effective gross income of $15,200. He then deducted his operating expenses, which totaled approximately fifteen percent, resulting in a net-operating income of $12,920. He again divided the net-operating income by a capitalization rate of 12.5% that included a tax factor, and, in this way, estimated the value of lot 110 at $239,300 as of January 1, 1994 and January 1, 1995. Mr. Mendoza also applied a cost approach to estimate the value of lot 110 at $245,400 on those same two assessment dates. In placing their assessments on the subject property during the fiscal years at issue, the

Assessors actually relied on the estimates of value derived from the cost approach, and not the income approach.

Finally, Mr. Mendoza admitted that neither he nor the Assessors considered the possibility of contamination when valuing the subject property during the fiscal years at issue. Mr. Mendoza testified that they simply were unaware of the issue. He also admitted during cross-examination that if they had been aware of contamination on the property, they probably would have taken it into account in valuing the property. He recounted one other instance where the Assessors had accounted for contamination in their assessment of a neighboring property.

After considering all of the evidence, including the testimony and the exhibits, as well as reasonable inferences drawn therefrom, the Board found that the highest and best use for the subject lots during the fiscal years at issue in these appeals was as one multi-tenanted, multi-use, income-producing property. Even though the Board recognized that the property had been owner occupied and used by essentially one tenant for even a few years beyond the sale of the business, once the business moved to another facility in March, 1995, the property became multi-tenanted. As of January 1, 1994, it was reasonably foreseeable that the subject property's highest and best use was as a single multi-tenanted, multi-use facility.

In consideration of its finding on the subject's highest and best use as a single multi-tenanted and multi-use income-producing property, the Board further found that the most appropriate method for estimating the value of the subject property was the income-capitalization approach. Both parties' expert real estate appraisers also used an income-capitalization approach to estimate the value of the subject property for the fiscal years at issue. The Board also found that the income-capitalization approach is an appropriate methodology for taking contamination issues into consideration. The Board agreed with the appellant's expert appraiser's approach for valuing contaminated property first "as clean" and then, with suitable adjustments, "as contaminated."

In calculating the subject property's potential gross income, the Board adopted, as an admission, the square footage suggested by the appellant's expert appraiser, which is 118,164 square feet. This amount exceeded the square footage suggested by the Assessor's expert appraiser. The Board chose $3.25 per square foot as the most appropriate market rental amount. The actual rentals ranged from $2.50 to $4.25, and the rental figure selected by the Board fell within the range of these actuals. The Assessors' expert appraiser also used $3.25 per square foot for the vast majority of the property based on his analysis of the market, whereas the appellant's expert appraiser used an overall rental rate of $2.75 per square foot. Accordingly, the Board determined that the subject property's potential gross income for both of the fiscal years at issue was $384,033.

The Board chose a vacancy and rent-loss rate of fifteen percent for both of the fiscal years at issue. This was the same rate suggested by the appellant's expert appraiser for a multi-tenant use. The Board further found that this rate was appropriate given the subject property's evolution from a single tenant state to a multiple tenant situation. After subtracting $57,605 from the property's gross potential income to account for the vacancy and rent loss, the Board determined that the effective gross income for both of the fiscal years at issue was $326,428.

For expenses, the Board adopted some of the appellant's expert appraiser's recommendations, used some actual amounts, and, for some of the expenses in common between the parties' expert appraiser's income-capitalization approaches, found reasonable estimates between them. In all categories, the Board used, in its opinion, the most appropriate stabilized amounts under the circumstances. For both of the fiscal years at issue, the expenses, including reserves, totaled $129,149 or approximately forty percent of the effective gross income. The Board found the net-operating income of $197,279 for both of the fiscal years at issue by subtracting the expenses from the effective gross income.

The Board accepted the 10.50% capitalization rate recommended by the Assessors' expert appraiser as the most appropriate one to use for both of the fiscal years at issue under the circumstances. Based on Plainville's tax rates for the fiscal years at issue, the Board then added tax factors of 0.01392 for fiscal year 1995 and 0.01459 for fiscal year 1996. Accordingly, the total capitalization rates used by the Board in its income-capitalization approach were 11.89% and 11.96%, respectively. For each of the fiscal years at issue, the Board then divided the net-operating income by the corresponding total capitalization rate to determine its estimates of the subject property's value as clean for the fiscal years at issue. For fiscal year 1995, the Board estimated the value of the subject property as clean at $1,659,201. For fiscal year 1996, the Board estimated the value of the subject property as clean at $1,649,490. A summary of the Board's income capitalization approach for valuing the subject property as clean is contained in the following table.

POTENTIAL GROSS INCOME	
118,164 square feet @ $3.25 psf	$ 384,033
TOTAL GROSS POTENTIAL INCOME	**$ 384,033**
Vacancy, rent loss, common area loss (15%)	($ 57,605)
EFFECTIVE GROSS INCOME	**$ 326,428**
EXPENSES	
Insurance	($ 25,099)
Heat	($ 20,000)
Electric	($ 25,000)
Water/Sewer	($ 1,400)
Janitorial Services	($ 2,000)
Legal & Accounting	($ 2,500)
Repairs/Maintenance (5%)	($ 16,300)
Management (6%)	($ 19,600)
Rubbish	($ 2,500)
Snow Removal/Yard Maintenance	($ 2,500)
Advertising	($ 300)
Rental Fees	($ 3,000)
Miscellaneous	($ 750)
TOTAL EXPENSES	**($ 120,949)**
RESERVES	**($ 8,200)**
NET OPERATING INCOME	**$ 197,279**
CAPITALIZATION RATE FOR FY 1995	
Base Rate	0.1050
Tax rate	0.01392
TOTAL CAPITALIZATION RATE FOR FY 1995	**0.1189**
ESTIMATED VALUE AS CLEAN FOR FY 1995	**$ 1,659,201**
CAPITALIZATION RATE FOR FY 1996	
Base Rate	0.1050
Tax Rate	0.01459

TOTAL CAPITALIZATION RATE FOR FY 1996	**0.1196**
ESTIMATED VALUE AS CLEAN FOR FY 1996	**$ 1,649,490**

With respect to the contamination on the subject property and its effect on the subject's value, the Board agreed with the appellant's expert appraiser and found that the monitoring obligations memorialized in the consent order were likely to continue into the foreseeable future. Accordingly, the Board found that these costs were continuous expenses that should be considered in its income-capitalization methodology. In previous fiscal years, these costs had ranged between $12,500 and $14,000. However, with no more site assessment costs on the horizon, the Board quantified and stabilized these continuous monitoring costs at approximately $10,000 per year. The Board also added one percent to the total capitalization rate to reflect the increased risk connected to the ownership of and *possible* future costs associated with this contaminated property. The Board noted that there were no existing orders to remediate the property, either presently or prospectively. The Board also found that the appellant's estimate of the potential cost of remediation was not supported by engineering studies or other appropriate verifications. There was no clean-up plan in place. The possibility and amount of future cleanup costs were largely conjecture. Consequently, the Board recognized the risk, but not the inevitability of remediation.

Moreover, the Board did not further increase the capitalization rate for stigma and illiquidity, like the appellant's expert had done, because neither stigma nor illiquidity were proven adequately in these appeals. The property was not a Superfund site, and there was no evidence that it had been or would be the subject of widespread adverse publicity. Furthermore, the appellant did not prove that this facility was neither saleable nor mortgageable. There was no evidence from experts in those fields and little actual experience in the subject property. At all relevant times, the subject was a viable income-producing property despite the known presence of contamination. Accordingly, the Board found that, during the fiscal years at issue, it did not suffer from such stigmatization or illiquidity that further adjustments to the capitalization rate, or components of that rate, were necessary. In sum, the Board accounted for the contamination on the subject property during the fiscal years at issue by including $10,000-per-year monitoring costs in the expense category of its income-capitalization methodology and by adjusting its capitalization rate upward by one percent to account for the increased risk connected to the ownership of and *possible* future costs associated with this contaminated property. A summary of the Board's methodology in this regard is contained in the following table.

ORIGINAL NET OPERATING INCOME	**$ 197,279**
Monitoring and Engineering Costs	($ 10,000)
ADJUSTED NET OPERATING INCOME	**$ 187,279**
NEW CAPITALIZATION RATE FOR FY 1995	
Original Total Capitalization Rate	0.1189
Adjustment for Risk	0.0100
NEW TOTAL CAPITALIZATION RATE FOR FY 1995	**0.1289**
NEW ESTIMATED VALUE FOR FY 1995	**$ 1,452,901**
NEW ROUNDED VALUE FOR FY 1995	**$ 1,450,000**
NEW CAPITALIZATION RATE FOR FY 1996	
Original Total Capitalization Rate	**0.1196**
Adjustment for Risk	**0.0100**
NEW TOTAL CAPITALIZATION RATE FOR FY 1996	**0.1296**
NEW ESTIMATED VALUE FOR FY 1996	**$ 1,445,054**
NEW ROUNDED VALUE FOR FY 1996	**$ 1,450,000**

On this basis, the Board decided these appeals for the appellant and granted abatements in the amounts of $12,977.62 and $13,602.26 for fiscal years 1995 and 1996, respectively. Because the Board treated both lots as one facility, the Board found one value for each fiscal year, which the parties were then to apportion between the two parcels by agreement. The bases of the Board's computations are set forth in the following table.

Fiscal Year	Location	Assessed Value	Tax Assessed	Fair Cash Value	Over-Valuation
1995	23 West Bacon	$2,382,300	$33,161.62	$1,450,000	$932,300
1996	Same	$2,382,300	$34,757.76	$1,450,000	$932,300

OPINION

The principal issue in these appeals is whether the subject property was overvalued in fiscal years 1995 and 1996. Included in this analysis is the effect of environmental contamination on fair cash value. The Board relied upon the following principles in deciding these appeals.

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). Accordingly, fair cash value means fair market value. ***Id.*** 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 reproductions. ***Correia v. New Bedford Redevelopment Authority***, 375 Mass. 360, 362 (1978).

The Board ruled that the direct capitalization of net income attributable to the subject property is the best method of determining fair cash value in these appeals. Use of the income-capitalization method is appropriate when reliable market data are not available. ***Assessors of Weymouth v. Tammy Brook Co.***, 368 Mass. 807, 811 (1975); ***Assessors of Lynnfield v. New England Oyster House***, 362 Mass. 696, 701-702 (1972); ***Assessors of Quincy v. Boston Consolidated Gas Co.***, 309 Mass. 60, 67 (1941). "[T]he introduction of evidence concerning value based on [reproduction or replacement cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods." ***Correia,*** 375 Mass. at 362.

When employing the income-capitalization technique, evidence of the rental value of property has long been considered relevant. However, the earning capacity rather than the actual income from the property is more probative in ascertaining potential gross income. ***Boston Consolidated Gas Co.***, 309 Mass. at 64. 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, 609 (1984).

The capitalization rate applied should reflect the return on investment necessary to attract investment capital. ***Taunton Redevelopment Association v. Assessors of Taunton***, 393 Mass. 293, 295 (1984). 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 of income approach].” ***Assessors of Lynn v. Shop-Lease Co.***, 364 Mass. 569, 573 (1974).

Government restrictions may have an impact on fair cash value. ***See, e.g., Parkinson v. Assessors of Medfield***, 398 Mass. 112, 116 (1986)(conservation restriction); ***Boston Edison Co. v. Assessors of Watertown***, 387 Mass. 298, 304 (1982)(rate-base restriction); and ***Community Development Co. v. Assessors of Gardner***, 377 Mass. 351, 354-355 (1979)(Federal rent regulation). Proven environmental contamination may also affect the fair cash value of property. ***Reliable Electronic Finishing Co. v. Assessors of Carver***, 410 Mass. 381, 382-83 (1991); ***Woburn Services, Inc. v. Assessors of Woburn***, 19 Mass. App. Tax Bd. Rep. 170, 184 (1996). The Board ruled here that the subject property’s contamination and monitoring costs affected its fair cash value.

Traditional appraisal techniques, which are appropriately modified to account for the effects of environmental contamination are satisfactory for determining a property’s fair market value. ***Westling v. County of Mille Lacs***, 512 N.W.2d 863, 866 (Minn. 1994). The presence of environmental contamination and the concomitant costs of governmentally mandated monitoring may reduce the fair market value of the property even though the property remains capable of being used as intended.

See ***Woburn Services, Inc. v. Assessors of Woburn***, 19 Mass. App. Tax Bd. Rep. at 184-85 (and the cases cited therein, including ***Almor Corp. v. County of Hennepin***, 1996 WL 112634 (Minn. Tax); ***Westling v. County of Mills Lacs***, 543 N.W.2d 91, 92 (Minn. 1996); and ***Bisson v. Eck***, 40 Mass. App. Ct. 942 (1996)). Accordingly, the effects on value caused by environmental contamination must be recognized by this Board when proven. The Board found and ruled here that the appellant introduced sufficient evidence to prove a negative effect on the subject property's value caused by environmental contamination and, therefore, accounted for the negative effect in these appeals by expensing certain mandated monitoring costs and by upwardly adjusting the capitalization rate.

"[The Board can] accept such portions of the evidence as appear[s] 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 board [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 Co.***, 309 Mass. at 72. See also ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984); ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 473 (1981); ***Jordan Marsh Co. v. Assessors of Malden***, 359 Mass. 106, 110 (1971).

CONCLUSION

The burden of proof is upon the appellants to establish their right as a matter of law to an abatement of the tax. ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974). "By holding that the assessment is entitled to a presumption of validity, we are only restating that the taxpayer bears the burden of persuasion of every material fact necessary to prove that its property has been overvalued." ***General Electric Co. v. Assessors of Lynn***, 393 Mass. at 599. 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." ***Id.*** at 600.

The Board found and ruled here that, upon all of the evidence, the appellant met its burden of proving that the fair cash value of the subject property was adversely affected by environmental contamination during the fiscal years at issue. Accordingly, the Board granted appropriate abatements in these appeals.

APPELLATE TAX BOARD

By:___________________________
Abigail A. Burns, Chairman

true copy,

Attest:_______________________
Clerk of the Board