

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

SALEM TRADERS WAY REALTY, LLC v. BOARD OF ASSESSORS OF
THE CITY OF SALEM

Docket Nos. F283418, F283419
F288941, F288943

Promulgated:
January 15, 2009

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 in the City of Salem, owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38, for fiscal years 2006 and 2007.

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

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

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

Francis Kulik, assessor, and *Deborah Jackson*, assistant assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 2005 and January 1, 2006 ("the relevant valuation dates"), Salem Traders Way Realty, LLC ("appellant"), a subsidiary of Fafard Real Estate Development ("Fafard"), was the assessed owner of two contiguous parcels of unimproved real estate located at 45 Traders Way and 40 First Street (collectively "subject properties"), in the City of Salem.

For fiscal year 2006, the Board of Assessors of Salem ("assessors") valued 45 Traders Way and 40 First Street at \$601,400 and \$1,498,800, respectively, and assessed taxes thereon, at the rate of \$21.33 per thousand, in the corresponding amounts of \$12,827.86 and \$31,969.40. Salem's Collector of Taxes mailed the fiscal year 2006 actual tax bills on December 30, 2005. In accordance with G.L. c. 59, § 57C, the appellant timely paid the taxes assessed without incurring interest.

On January 17, 2006, in accordance with G.L. c. 59, § 59, the appellant timely filed its abatement applications with the assessors, which were deemed denied on April 17, 2006. Subsequently, on May 2, 2006, the appellant seasonably filed its appeals with the Appellate Tax Board ("Board"). On the basis of these facts, the Board found and ruled that it had jurisdiction over the fiscal year

2006 appeals.

For fiscal year 2007, the assessors valued 45 Traders Way and 40 First Street at \$657,000 and \$1,592,700, respectively, and assessed taxes thereon, at the rate of \$20.48 per thousand, in the corresponding amounts of \$13,455.36 and \$32,618.50. Salem's Collector of Taxes mailed the fiscal year 2007 actual tax bills on December 29, 2006. In accordance with G.L. c. 59, § 57C, the appellant timely paid the taxes assessed without incurring interest.

On January 9, 2007, in accordance with G.L. c. 59, § 59, the appellant timely filed its abatement applications with the assessors, which were deemed denied on April 9, 2007. Subsequently, on May 31, 2007, the appellant seasonably filed its appeals with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction over the fiscal year 2007 appeals.

The subject properties are vacant lots, which are generally rectangular in shape. Forty-five Traders Way contains 2.17 acres of land situated on the northeast side of Traders Way. Forty First Street is a corner lot with 6.78 acres of land situated at the northeast side of Traders Way and the northwest side of First Street. The lot's eastern boundary is encumbered with utility and

driveway easements. No evidence was offered to show that the easements hinder the utility of the site.

The subject properties are located in the southwest portion of Salem, just off Route 107 (Highland Avenue), which is a divided two-lane highway that serves as the primary connector road joining Salem and Lynn. Accessibility to Route 107 is good as a result of various intersections that facilitate movement of a relatively high volume of traffic. Route 107 also joins with various secondary roads allowing travel in all directions.

There are a variety of uses in the immediate neighborhood of the subject properties, including retail and service, residential, and industrial properties. To the north of the subject properties is a retail shopping center; to the west there is a Home Depot; to the east there is an apartment building; and to the south there is a condominium development. Street improvements within the area include: paved roads; some sidewalks; granite, concrete, and asphalt berm curbs; storm drains; streetlights; and overhead electrical and telephone wires. Utilities include municipal water and sewer, gas, electricity, and telephone service.

In support of its contention that the subject properties were overvalued for fiscal years 2006 and 2007

("fiscal years at issue"), the appellant offered into evidence the testimony of Mr. James McLaughlin, chief engineer for Benchmark Engineering, which is owned by Fafard. Mr. McLaughlin has a Bachelors Degree in civil engineering and a Master's Degree in business administration. He is a registered professional engineer and also a licensed construction supervisor. He has worked for Fafard since 1985 and during that time has been involved in the permitting and design of a number of projects abutting the subject properties. Fafard assigned Mr. McLaughlin the task of reviewing the costs of developing a mixed-use project on the subject properties.

Mr. McLaughlin testified that the subject properties contain a fair amount of rocky ledge and that the properties have a significant upward slope from First Street to the existing shopping center on Highland Avenue. He further testified that to develop the subject properties would require substantial drilling and blasting and building significant stonewalls. He estimated that to prepare the subject properties for development would require ledge excavation of about 48,000 cubic yards at a cost of \$15.10 to \$20.07 per cubic yard.

The appellant also offered the testimony and appraisal report of Mr. Donald J. Griffin, a certified real estate appraiser. Based on his education and experience, the Board qualified Mr. Griffin as an expert witness in the field of real estate valuation. Mr. Griffin determined that the highest and best use of the subject properties was for industrial development.

To arrive at his opinion of value for the subject properties, Mr. Griffin relied on the sales-comparison approach. He chose six sales located in Salem, Ipswich and Woburn. Sales number one and number two are industrial-zoned land located in the immediate area of the subject property. Sale number one is a 4.40-acre parcel, which sold on June 15, 2001 for \$930,000, or \$211,364 per acre. The purchaser subsequently built a 64,312 square-foot warehouse on the parcel. Sale number two is a 4.00-acre parcel, which sold on October 24, 2006 for \$500,000, or \$125,000 per acre. This property, which also has ledge, is used as an open storage yard.

Mr. Griffin also cited two sales of older properties in Salem, which he used to extract land values. Sale number three is a 1.94-acre parcel of industrial-zoned land improved with a 21,616 square foot warehouse built in 1961. The property sold on October 14, 2003 for \$965,000. To

derive his extracted land value, Mr. Griffin simply determined the percentage of the most recent assessment, which was attributable to the land. He then applied that percentage to the sale price to calculate an extracted land value of \$548,000, or \$282,474 per acre.

Sale number four is a 2.02-acre, industrial-zoned lot improved with a four-story, mill-type building with approximately 90,000 square feet of gross building area and also a smaller building with 5,000 square feet of gross building area. This property sold on December 17, 2003 for \$640,000. Mr. Griffin testified that while conducting his research for the appraisal of the subject properties he learned that the larger building was going to be torn down. Therefore, for purposes of his analysis, he considered this sale to be primarily a land sale with only a usable 5,000 square-foot building. He then estimated the value of the smaller building and deducted that value from the sale price to arrive at an extracted land value of \$507,000, or \$250,990 per acre.

Sale number five is a 3.19-acre lot located in Ipswich. The property sold on March 25, 2004 for \$490,000, or \$153,605 per acre. In his analysis, Mr. Griffin made an upward adjustment of twenty percent for the inferior location and also an upward adjustment of twenty percent

for the property's irregular shape and small amount of frontage, to calculate an adjusted per-acre value of \$215,047.

Finally, sale number six is a 5.50-acre general industrial-zoned lot located in Woburn. The property sold on May 7, 2004 for \$350,000, or \$63,636 per acre. This sale is similar to the subject properties in that it has a large amount of ledge. In his analysis, Mr. Griffin made an upward adjustment of one-hundred percent to account for the property's topography and also an upward adjustment of one-hundred percent to account for the property's inferior location, resulting in an adjusted sale price of \$190,909.

Based on these sales, Mr. Griffin determined that the subject properties had a fair market value, before adjustments, of \$225,000 per acre, or \$488,000 for 45 Traders Way and \$1,526,000 for 40 First Street. Based on estimates provided by Fafard, Mr. Griffin noted that the cost to remove the ledge and to prepare the subject properties for multi-family and retail development ranged from \$650,000 to \$975,000, and the cost to prepare the sites for commercial and industrial development ranged from \$1,177,362 to \$1,769,941. Because of the significantly higher cost to prepare the site for commercial or industrial use, Mr. Griffin concluded in his appraisal

report that the highest and best use would be to develop the subject properties for multi-family and retail uses, in direct contradiction of his opinion expressed at the beginning of his report that the subject properties' highest and best use was for industrial development. He then prorated the cost to remove the ledge between the two sites, based on their proportionate acreage, and allocated \$198,000 to remediate 45 Traders Way and \$615,000 to remediate 40 First Street. Finally, Mr. Griffin deducted this expense to calculate the subject properties' fair market values of \$290,000 for 45 Traders Way and \$910,000 for 40 First Street.

In support of their assessment, the assessors relied on the testimony of Mr. Francis Kulik, assistant assessor for Salem. Mr. Kulik offered into evidence the deed for 209 Highland Avenue. The property is a 4.88-acre parcel of land which abuts both Highland Avenue and First Street and is in very close proximity to the subject properties. Mr. Kulik testified that although the subject properties do not abut Highland Ave, they are set back only about one hundred yards. Mr. Kulik further testified that the purportedly comparable property has a very similar topography and, like the subject properties, appears to require extensive site preparation. This property sold on

October 30, 2003, only fourteen months prior to the assessment date of January 1, 2005, for \$1,925,000, or \$394,467 per acre. The assessors offered no further evidence.

Based on the evidence presented, the Board found that the appellant failed to meet its burden of proving that the subject properties were overvalued for the fiscal years at issue. The Board found that Mr. Griffin's appraisal was flawed and, therefore, lacked reliability. First, at the beginning of his report, Mr. Griffin maintained that the highest and best use of the subject properties was for industrial development. In his sales-comparison analysis, however, Mr. Griffin concluded that the highest and best use would be to develop the parcels for multi-family and retail use. Mr. Griffin made no attempt to reconcile this contradiction.

Second, Mr. Griffin failed to establish comparability between the subject properties and his chosen comparables. Comparable sales number two, number five and number six required significant adjustments ranging from forty to two-hundred percent. The Board found that these properties were not comparable to the subject properties.

Third, comparable sales number three and number four were improved land sales which Mr. Griffin used for

extracted land values. The Board, however, found that Mr. Griffin's methodologies were flawed. For comparable sale number three, Mr. Griffin calculated his extracted land value simply by applying the land component percentage of the comparables' assessed value to the sale price. However, he did not provide any market evidence to demonstrate that the comparable property's land and building assessment allocation was indicative of the property's fair market value.

For comparable sale number four, Mr. McLaughlin excluded a building from his calculations based on his understanding that the purchaser intended to demolish the structure. He did not, however, provide supporting evidence to show that the building was in fact torn down subsequent to purchase. Therefore, the Board found that Mr. McLaughlin's comparable sales number three and number four were not reliable indicators of land value.

Further, comparable sale number one occurred more than three and four years prior to the relevant valuation dates, yet Mr. Griffin made no adjustment for time of sale.

In contrast, the Board found that the sale of the property located at 209 Highland Avenue for \$1,925,000, more closely reflected the subject properties' fair market value. The Board found that this property, which also

abuts First Street, is located in very close proximity to the subject property and has a very similar topography with noticeable ledge. Further, the sale occurred within a reasonable period of time from the relevant valuation dates and amply supports the assessed values of the subject properties for the fiscal years at issue.

Based on the evidence presented, the Board found and ruled that the appellant did not meet its burden of proving that the subject properties had been overvalued for fiscal years 2006 and 2007. Accordingly, the Board issued decisions for the appellee in these appeals.

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

In appeals before this Board, a taxpayer "may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation." **General Electric Co.**, 393 Mass. at 600 (quoting **Donlon v. Assessors of Holliston**, 389 Mass. 848, 855 (1983)). Actual sales "generally furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller." **Foxboro Associates v. Assessors of Foxborough**, 385 Mass. 679, 682 (1982); **New**

Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 469 (1981); *First National Stores, Inc. v. Assessors of Somerville*, 358 Mass. 554, 560 (1971). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. *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 in the elements of comparison are made to the price of each comparable property The magnitude of the adjustment made for each element of comparison depends on how much that characteristic of the comparable property differs from the subject property." APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 322 (13th ed., 2008).

In the present appeals, the appellant's appraiser valued the subject properties using the sales-comparison analysis. The Board, however, found that Mr. Griffin's analysis was flawed. First, Mr. Griffin's report contained contradictory statements as to the subject properties' highest and best use. Further, the Board found that

Mr. Griffin's chosen comparable properties were not comparable to the subject properties as evidenced by the wide range and high degree of adjustments, ranging from forty percent to two-hundred percent. Further, his failure to adjust comparable sale number one, which sold more than three and four years prior to the relevant valuation dates, renders this sale lacking in probative value.

The Board further found that comparable sales number three and number four, improved land sales, which Mr. Griffin used for a land value extraction, were not reliable. "To apply the extraction method, an estimate of the depreciated cost of the improvements . . . is deducted from the total sale price of the property to arrive at the land value." THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (13th ed., 2008) 366. For comparable sale number three, Mr. Griffin erroneously calculated the extracted land value based on the property's land component assessment applied to the sale price without providing supporting market data. For comparable sale number four, Mr. Griffin excluded a building from his calculations but did not provide supporting evidence to show that the purchaser in fact demolished the building after the purchase.

Based on the evidence presented, the Board found and ruled that the appellant did not meet its burden of proving

that the subject properties were overvalued for fiscal years 2006 and 2007. Accordingly, the Board issued decisions for the appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board