COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

472 MAIN STREET REALTY TRUST v. BOARD OF ASSESSORS OF THE TOWN OF WAKEFIELD

Docket Nos. X291509 – FY 2001
X293795 – FY 2002
F267255 – FY 2003

Promulgated:
March 28, 2005

These are appeals filed under the informal procedure for fiscal years 2001 and 2002 and filed under the formal procedure for fiscal year 2003, pursuant to G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes assessed on real estate located in the Town of Wakefield owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38.

Commissioner Egan heard these appeals and was joined in a decision for the appellee by then-Chairman Burns and Commissioners Scharaffa, Gorton, and Rose.

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

Robert Gaines, Esq. for the appellant.

Thomas Mullen, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

Based on testimony and exhibits offered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

At all times relevant to these appeals, 472 Main Street Realty Trust ("appellant"), was the assessed owner of three contiguous parcels of real estate located at 460-466 Main Street, 460-466 "Rear" Main Street, and 472 Main Street, Wakefield, Massachusetts (collectively "subject properties"). The parcels are identified on the assessors' plans as Lot 6I, Lot 6J and Lot 6B, respectively.

For fiscal years 2001, 2002 and 2003, the Wakefield Board of Assessors ("assessors") valued the subject properties and assessed taxes thereon, as follows.

Fiscal Year	Parcel	Assessed Value	Tax Rate	Tax
2001	6B 468-472 Main	$317,900	$25.72	$8,176.39
2001	6I 460-466 Main	$252,500	$25.72	$6,494.30
2001	6J 460-466 Rear	$261,100	$25.72	$6,792.65
2002	6B 468-472 Main	$424,100	$22.42	$9,508.32
2002	6I 460-466 Main	$270,100	$22.42	$6,055.64
2002	6J 460-466 Rear	$393,500	$22.42	$8,822.27
2003	6B 468-472 Main	$424,100	$23.30	$9,881.53
2003	6I 460-466 Main	$270,100	$23.30	$6,293.33
2003	6J 460-466 Rear	$393,500	$23.30	$9,168.55

The appellant timely paid all taxes due. For the fiscal years at issue, the appellant filed a separate abatement application for each of the three parcels. All of the abatement applications were either denied or deemed

denied.[1] Subsequently, for each of the three fiscal years at issue, the appellant timely filed a single appeal with this Board grouping together the three contiguous parcels. Based on these facts, the Board found that it had jurisdiction over these appeals.

The properties at issue in these appeals are located at 460-472 Main Street, Wakefield, Massachusetts. Main Street is a busy, two-lane road which passes through downtown Wakefield. Properties near the subject properties are primarily commercial in use; the Wakefield Junior High School and the American Civic Center are also located diagonally across from the subject properties. Angled parking is available on Main Street in front of the subject properties.

[1] The appellant timely filed three separate abatement applications, for fiscal year 2001, on January 15, 2001. On March 7, 2001, the assessors sent written notice to the appellant stating that the abatement application for 472 Main Street was denied by the assessors on January 15, 2001, nearly two months earlier. Pursuant to General Laws c. 59, § 63, "assessors are required to send written notice to a taxpayer applying for an abatement **within ten days** of the assessors' decision on an application." (Emphasis added). G.L. c. 59, § 63. Although the assessors did send written notice of the denial, they failed to do so within the ten-day statutory requirement. On the basis of the assessors' failure to adhere to the statutory requirement of § 63, the Board found and ruled that the assessors' denial dated January 15, 2001, was null and void. The Board further found and ruled that the fiscal year 2001 abatement application for 472 Main Street was, therefore, *deemed denied* on April 15, 2001, three months from the date of filing. The appellant then had three months from the deemed denial date to file an appeal with the Board, July 15, 2001 in this case. See G.L. c. 59, §§ 64 and 65. The appellant filed its petition with the Board on May 29, 2001, well within the statutory time period.

The three parcels sit on a site that is rectangular in shape and level, and which has a total land area of 19,216 square feet with 160.16 feet of frontage on Main Street. Two of the parcels front on Main Street, while the third is located behind these parcels and is accessible by a curb cut on Main Street. All of the parcels were originally owned by Ruderman's Furniture ("Ruderman's"). Each is improved with a structure, built at different times, and used by Ruderman's for different aspects of its retail furniture business. Each of the improvements is now leased to third parties who operate different and unrelated types of businesses.

The parcel located at 460-466 Main Street, Lot 6I, is improved with a masonry and brick, one-story building. Originally built in 1940, the building has a gross area of 3,420 square feet with a full basement. The main floor of the building is now occupied by a restaurant, and the basement is used for storage. There is parking for four or five cars to the rear of the restaurant.

Located behind the above parcel is 460-466 Main Street "Rear," Lot 6J, which is improved with a three-story building containing a total area of 9,180 square feet. Constructed in 1984 by Ruderman's to inventory and upholster furniture, the structure has no windows. Ceiling

clearance on the first floor is twelve feet while clearance on the upper floors is eight feet. Currently, the first floor is occupied by Cleary Woodworking and is used for light assembly work. A portion of the second floor, which has no heat or ventilation, is used by Cleary Woodworking for storage. The third floor has remained vacant since 1989 when the appellant purchased the property. The building also has a loading dock with a steel overhead door. Access to the building is by a curb-cut on Main Street and a twelve-foot wide right of way over parcel 6I.

The third parcel, 468-472 Main Street, Lot 6B, is improved with a one- and two-story structure that was initially constructed in 1900. The rear, two-story wood-frame addition was built in 1948. This parcel is rectangular in shape and fronts on Main Street and runs back slightly past the rear lot line of Lot 6J. The front of the first floor, fronting on Main Street, has three retail units which are occupied by Saville Hair Design, J&J Healthfoods and Persepolis Rugs. There is a common hallway located to the rear of the units, behind which there is an area used for storage by J&J Healthfoods. The partial basement, located beneath the front portion of the structure, is used for storage by Persepolis Rugs. The second floor has 6,793 of vacant storage space.

The appellant argued that the three structures and parcels are an "interconnected, interdependent, *mixed-use structure*," which should be valued as a single entity and which has a fair market value less than the three parcels' combined assessed values. (Emphasis added). To support its opinion of value, the appellant offered the testimony and appraisal report of Ronald V. Patton. Mr. Patton is a Massachusetts Certified Real Estate Appraiser. On the basis of his education and experience, the Board qualified Mr. Patton as an expert witness in real estate valuation.

Mr. Patton determined that the subject parcels were "integrated" and "function as one property" and, therefore, valued the subject properties as a "single entity." Mr. Patton noted that the properties' original owner, Ruderman's, purchased the parcels and built the structures over a period of years, making additions throughout, and, therefore, the properties functioned well for Ruderman's as a single property.

Mr. Patton testified that the second floor of the retail building located at 468-472 Main is only accessible through the building located at 460-466 "Rear" Main. On cross examination, however, he testified that he was not aware of any reason why the current owner could not construct a means of access from the first to the second

floor of 468-472 Main. Mr. Patton also testified that the lot line of Parcel 6J "appears to be conterminous with the restaurant parcel, meaning that the canopy and staircase to the basement of the restaurant encroaches on Parcel 6J." Therefore, "without Parcel 6J, Parcel 6B [the restaurant] has no ability to load and unload, and no second means of egress out of the restaurant building." Mr. Patton also testified as to the "loading capabilities" of the retail establishments located at 468-472 Main and the fact that to use the rear loading dock, the tenants of 468-472 Main must encroach on Parcel 6J, 460-466 "Rear." Mr. Patton testified on cross-examination, however, that he had done no survey work and, therefore, was not certain as to where property lines touched or whether the property line for 468-472 included the adjacent alleyway, possibly offering an alternative means for deliveries.

Mr. Patton concluded that if the appellant attempted to convey the parcels to separate owners, the prices would have to be "severely discounted" to reflect the lack of utility and that such a transaction would "never" take place. Therefore, he concluded, the properties could not function independently under separate ownership and should be valued as a "single entity."

To calculate an estimate of value for the single entity, Mr. Patton used the income capitalization approach. In his analysis, Mr. Patton used the cumulative square footage of the three properties, separated into "retail space," which also included the restaurant, and "light assembly & storage space." Based on a review of five retail leases, including Persepolis Rug, which is located in one of the buildings at the subject property, Mr. Patton calculated a market rent of $15.00 per square foot for a "base retail unit" in Wakefield, defined as a unit with 1,500 square feet, 40 feet in depth and 37.5 feet in width. He then compared each of the retail spaces of the subject property, including the restaurant, to this "base retail unit" to estimate their respective market rent. As for the vacant space on the second floor of 468-472 Main, Mr. Patton assigned a value of $3.00 per square foot.

Similarly, Mr. Patton reviewed five leases of light assembly/warehouse space, including the lease for 460-466 Rear. The leases ranged from $6.00 per square foot to $7.23 per square foot, with an average of $6.77 per square foot. On the basis of these values, together with the recent capital improvements of 460-466 Rear, Mr. Patton concluded that $8.00 per square foot was an appropriate market rent for the subject assembly space. Based on the

existing lease of $3.09 per square foot for the second floor storage space at 460-466 "Rear," Mr. Patton concluded that $3.00 per square foot was the appropriate market rent for all storage space, including that at 468-472 Main. For the third floor of 460-466 "Rear" Mr. Patton assigned a market rent of $1.00 per square foot. He provided no explanation.

He then totaled these figures to calculate the subject property's potential gross income for 2001. He allowed a vacancy of five-and-a-half percent for the retail space, fifteen percent for the light assembly, and ninety percent for the storage space, to calculate the subject property's effective gross income. Based on historical figures provided by the owner for 1999 through 2001, Mr. Patton deducted amounts for the stabilized operating expenses, to calculate the subject property's net operating income as a single entity.

Lastly, Mr. Patton applied a capitalization rate of eleven-and-a-half percent, based on the rate reported by PricewaterhouseCoopers, LLP, for "non-institutional grade strip shopping centers" and a tax fact or of 2.572, to calculate an overall capitalization rate of 13.742 percent. Applying this to his calculated net operating income, Mr. Patton estimated the subject property's fair market

value, if valued as a single entity, at $1,087,700 for fiscal year 2001.

He used the above income approach to estimate values for fiscal years 2002 and 2003, with some adjustments. He increased market rents, based on the Consumer Price Index, by two-and-a-half percent for each year; he increased the retail vacancy rate to seven percent and seven-and-four-tenths percent, respectively; and, he increased the stabilized operating expenses in accordance with the actual increase for the relevant years in question. Lastly, the capitalization rate remained constant throughout the years at issue. The tax factor decreased to 2.242 for fiscal year 2002, and increased to 2.330 percent for fiscal year 2003. Mr. Patton calculated a fair market value for the subject property, as a single entity, for fiscal years 2002 and 2003, of $786,000 and $798,000, respectively.

In addition to its claim that the subject property was overvalued based on the income capitalization approach, the appellant also argued that there were flaws and errors in the assessors' method of valuation thereby diminishing its reliability and accuracy. Mr. Patton testified that on the assessors' property record cards for the three parcels, there were improper descriptions of the improvements, inaccurate building square footage, and that there were

errors and inconsistencies in the assigned land values. Mr. Patton's only testimony as to the effect of these errors, however, was that they would "reduce the values." He conceded on cross-examination that he did not quantify or provide an analysis of the negative effect that these errors would have on the subject properties' fair market values.

With respect to the inconsistencies in land values, Mr. Patton noted that for fiscal years 2002 and 2003, the unit assessed value for 460-466 "Rear," $19.96, was more than the unit assessed value for 468-472 Main, $16.58. In his opinion, this did not make sense since the latter property has visibility from Main Street, something which the property in the rear does not. Also, he testified that since the subject parcels are so similar in size, 5,472 and 7,920 square feet, respectively, they do not warrant such a large discrepancy in unit values.

Mr. Patton further noted that, according to the property record cards, the land value for 460-466 Main decreased from fiscal year 2001 to fiscal year 2002. He testified that this was "illogical" to him and that he would "suggest that the market for retail land would not support a downward adjustment." The appellant offered no

further evidence. The assessors rested on their assessment.

On the basis of the evidence presented, the Board found that the appellant failed to meet its burden of proving that the subject parcels were overvalued. First, the appellant failed to establish that the highest and best use of the subject properties was a combined "multi-purpose," multi-parcel, use. The Board found, contrary to the appellant's contention, that the subject parcels, each used for a different purpose, were not so "integrated" and did not "function as a single entity" so as to be viewed as a single entity for valuation purposes. Although contiguous and with somewhat attached buildings, each of the three parcels has a separate and distinct use: a restaurant, retail space, and light industrial and warehouse space. Also, each of the buildings has its own entrance and each has its own, separate utilities.

The Board further found that to the extent portions of one building are accessible only through a building situated on a different parcel, and that accessibility for loading and unloading as well as egress from the rear of the restaurant is limited, the proper remedy for impediments of this nature is a reduction to the affected parcels' individual fair market value. The remedy is not,

as the appellant argued, simply to group the parcels together and value them as a "single entity." Furthermore, although the negative attributes of the parcels may ultimately result in a reduced selling price, this is not, in itself, a justification to value the parcels as a "single entity." Lastly, as the appellant's expert conceded, there is no known legal impediment to the three parcels being sold individually. Based on the evidence presented, the Board found that the subject parcels should not be valued as a "single entity" but, instead, should be valued as three separate parcels.

In addition, even if the Board were to agree with the appellant's expert that the parcels should be valued together under a single-owner, multi-use model, the valuation analysis offered by the appellant was seriously flawed. For example, although the appellant's expert claimed to have made adjustments to his "base market rent" to arrive at a market rent for each retail space located at the subject property, he failed to offer any evidence to support his adjustments. Further, Mr. Patton failed to offer any market data for the rental value assigned to the restaurant space nor did he establish that the market rent for general retail space is relevant to market rent for restaurant space. In addition, he derived his

capitalization rate not from the market for similar properties but from a report concerning strip shopping centers. Simply put, his analysis failed to accurately reflect the market for the varying uses of the subject parcels.

Finally, although the appellant's appraiser testified as to perceived errors and flaws in the assessors' assessment, he failed to quantify the dollar effect of these inaccuracies and inconsistencies and how they related to the properties' fair market value. Further, despite his claim that it was "illogical" to think that the market for retail land would have a downward adjustment, Mr. Patton's own calculations of the property's fair market value, as a whole, decreased in value by more than sixteen percent from their 1989 cumulative purchase price.

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

OPINION

"A person aggrieved by the refusal of assessors to abate . . . *a tax on a parcel* of real estate, may, within three months after receiving notice of the assessors' decision on an application for abatement . . . appeal therefrom by filing *a complaint* with the clerk of the

county commissioners . . . "(emphasis added). G.L. c. 59, § 64. A person aggrieved as aforesaid with respect to a tax on property in any municipality may, subject to the same conditions provided for an appeal under section sixty-four, appeal to the appellate tax board by filing a *petition* with such board . . . ." G.L. c. 59, § 65. No petition, however, shall relate to an assessment on *more than one parcel* of real estate, "*except where the board shall specifically permit otherwise.*" G.L. c. 58A, §§ 7, 7A.

At issue in these appeals are three contiguous parcels of real estate valued and assessed as separate parcels. At the local level, the appellant filed a separate application for abatement for each of the three parcels for each fiscal year at issue. For each fiscal year, the assessors issued three separate notices of denial. On appeal to this Board, the appellant filed a single appeal for each fiscal year, grouping together the three contiguous parcels.

At the hearing of these appeals, the appellant argued that by allowing the appellant to file a single appeal for the three parcels, the Board was, itself, "treating the parcels as a single property for valuation purposes." Such a conclusion by the appellant, however, is wrong. The statutes which give the Board discretion to allow the

filing of a single petition for multiple parcels are "designed to simplify (and to reduce the cost of) a review of real estate tax assessments." ***Phifer v. Assessors of Cohasset,*** 28 Mass. App. Ct. 552, 555 (1990). However, joinder of parcels on a single petition has no impact on the issue of valuation. The appeal to the Board is from the refusal of the assessors to abate "a tax on a parcel" of real estate. A taxpayer can attempt to prove that the tax on a parcel is excessive by showing that its highest and best use is as part of a multi-parcel amalgamation and that the value allocated to a parcel is higher than its assessed value. However, in order to prevail on such an approach, the taxpayer must first establish that the highest and best use of the parcel is its use in conjunction with other parcels.

"Prior to valuing the subject propert[ies], [the] highest and best use must be ascertained, which has been defined as the use for which the property would bring the most." ***Tennessee Gas Pipeline Co. v. Assessors of Agawam,*** 26 Mass. App. Tax Bd. Rep. 226, 234 (2000)(citing ***Conness v. Commonwealth,*** 184 Mass. 541, 542-43 (1903); ***Irving Saunders Trust v. Assessors of Boston,*** 26 Mass. App. Ct. 838, 843 (1989) and the cases cited therein). A property's highest and best use must be legally permissible,

physically possible, financially feasible, and maximally productive. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE at 305-308 (12th ed., 2001). *See also* ***Skyline Homes, Inc. v. Commonwealth,*** 362 Mass. 684, 687 (1972). In determining the property's highest and best use, consideration should be given to the purpose for which the property is adapted. APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE at 315-16 (12th ed., 2001); ***Tennessee Gas Pipeline Co.,*** 26 Mass. App. Tax Bd. Rep. at 235.

In the present appeals, the Board found that the appellant failed to prove that the highest and best use of each of the three parcels was as a multiple-use property. Although originally developed by Ruderman's for use in its business, the parcels now contain three distinct uses. Under the circumstances in these appeals, the most accurate method to value the parcels is to value each parcel according to its use and compare that value with the individual parcel's assessed value.

The mere qualification of a person as an expert does not endow his testimony with any magic qualities. ***Boston Gas Co.,*** 334 Mass. at 579. "The board [is] not required to believe the testimony of any particular witness but it [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 . . . (citations omitted)." ***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.***, 383 Mass. at 473; ***Jordan Marsh Co.***, 359 Mass. at 110.

The burden of proof is upon the appellant 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). "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. 591, 599 (1984). 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 (quoting ***Donlon v. Assessors of Holliston,*** 389 Mass. 848, 855 (1983)).

In the present appeals, the Board found and ruled that, upon consideration of all of the evidence, the

appellant did not meet its burden of proving that the subject properties were overvalued for fiscal years 2001, 2002 and 2003.

Accordingly, the Board issued a decision for the appellee.

APPELLATE TAX BOARD

By:_____
Nancy T. Egan, Member

A true copy,

Attest:_____
Asst. Clerk of the Board