COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

CHARLES & MARGARET ZIERING v. BOARD OF ASSESSORS OF THE TOWN OF CONCORD

Docket No. F298606 Promulgated: October 22, 2010

This is an appeal 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, Board of Assessors of the Town of Concord ("assessors" or "appellee"), to abate taxes on certain real estate located in the Town of Concord, owned by and assessed to the appellants under G.L. c. 59, §§ 11 and 38, for fiscal year 2008.

Commissioner Egan heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Mulhern joined her in a revised decision for the appellants.

These findings of fact and report are made pursuant to a request by the appellants under G.L. c. 58A, § 13 and 831 CMR 1.32. The revised decision is promulgated simultaneously herewith.

David J. Martel, Esq. for the appellants.

Kevin D. Batt, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

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

On January 1, 2007, the appellants were the assessed owners of a certain parcel of real estate located at 263 Simon Willard Road in Concord ("subject property"). For the fiscal year at issue, the assessors valued the subject property at $4,491,200 and assessed a tax thereon, at the rate of $10.72 per $1,000, in the total amount of $48,851.76.[1] The appellants timely paid the tax in full without incurring interest. On April 17, 2008, the appellants timely applied to the appellee for an abatement, claiming that the subject property was overvalued. The appellee denied the appellants' request on May 22, 2008. The appellants seasonably filed their petition with the Board on August 20, 2008. Accordingly, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

Concord is a desirable suburban community. The subject property is in the Nashawtuc Hill neighborhood,

[1] This amount includes a Community Preservation Act assessment of $706.10.

which is one of the premier neighborhoods in Concord. Nashawtuc Hill is surrounded on three sides by rivers, and vehicular access is limited by a few entry points into the neighborhood. As a result of this limited access, the neighborhood is quiet and private, yet it is also located within a short distance of the village area of Concord, so the neighborhood also offers the convenience of access to retail establishments and commuter rail service to Boston. The Nashawtuc Hill neighborhood includes historic estates developed in the nineteenth century, scenic vistas, a sledding hill, and open space.

The subject property consists of a 4.573-acre parcel of real estate, which is actually comprised of two contiguous parcels – a 2.61-acre lot improved with the subject home, which the appellants purchased in 1994 for $1,100,000 ("improved lot"), and a 1.96-acre vacant lot, which the appellants purchased in 1995 for $500,000 ("extra lot"). The appellants combined these two parcels by means of a recorded deed in 2003.[2] The improved lot and the extra lot are thus assessed to the appellants as one lot.

The subject property is improved with a two-and-one-half-story, wood-frame, Colonial-style home that was

[2] The appellants transferred both the improved lot and the extra lot to themselves for consideration of one dollar by means of a deed recorded on December 22, 2003 at the Middlesex South District Registry of Deeds.

originally built in 1911 but was substantially renovated in 1997. According to the property record card on file with the assessors, the subject home contains 5,932 square feet of above-grade living space and has thirteen rooms above grade, including five bedrooms, as well as four full bathrooms and one half bathroom. As part of the 1997 renovation, the kitchen was updated with maple flooring, granite countertops, a commercial-grade stove, and two commercial-grade dishwashers. In addition to the formal dining and living rooms, the subject home includes a library with a built-in bookcase and fireplace, and a family room with a vaulted ceiling, cherry paneling, cherry, walnut and maple flooring, a fireplace, and a spiral stairway to a second level balcony area. The attic is also finished, yielding 454 square feet of living space, which includes one of the five bedrooms and an office, as well as one of the four full bathrooms and one fireplace.[3] The subject home also includes a partial basement with an additional 2,745 square feet of finished area below grade, which includes two additional rooms - a mahogany-paneled in-home theater and a recreation room - as well as a wine

[3] The 454 square feet of living space in the attic is included in the 5,932 square foot gross living area calculation, and the attic bedroom is included in the total room count.

cellar.[4] Other amenities include air conditioning in a portion of the subject home, radiant in-floor heating in all living areas, eight fireplaces total, and a detached two-and-one-half-car garage, which includes a second-floor storage area with one of the eight fireplaces. Finally, the subject property also includes porches, a patio, and an in-ground Gunite pool with granite surround and stone walls, and a pool house containing slightly less than 800 square feet with a vaulted ceiling, wood finish walls and ceiling, granite floor, radiant heating and a full bathroom.[5]

The appellants argue that the subject assessment exceeds the fair cash value of the subject property. They contend that the total fair market value of the subject property is $3,665,000, which includes an opinion of value of $3,100,000 for the 2.61-acre improved lot and $565,000 for the 1.96-acre extra lot. The appellants presented their case through the testimony of Charles Ziering, an owner of the subject property, and James Marchant, whom the Board qualified as a real estate valuation expert.

[4] The 2,745 square feet of below-grade living space in the basement is not included in the 5,932 square foot gross living area calculation, and the two basement rooms are not included in the total room count.
[5] The full bathroom in the poolhouse is not included in the bathroom count for the subject home.

Mr. Ziering testified that, on December 26, 2006, the appellants made a so-called "grant of restriction" in favor of a neighbor who lives across the street from the extra lot. The grant of restriction bound the appellants not to "build or locate any buildings or structure (other than fences)" on the extra lot for a ten-year period, which expires in January, 2017. The appellants received no monetary consideration for the grant of restriction. The extra lot conforms in all respects to the requirements of the Concord Zoning By-law for a single-family structure. Mr. Ziering explained that his motive for granting the restriction was to maintain the extra lot as a buffer area to protect the appellants' privacy.

Mr. Ziering testified that on November 30, 2007, the appellee sent him a letter explaining their opinion that the grant of restriction had no impact on the subject assessment. Mr. Ziering contended that, because the 10-year restriction rendered the extra lot unbuildable, there would be no market for the extra lot and therefore, the extra lot should have been assessed as surplus land.

Next, Mr. Marchant testified to the value of the subject property. Mr. Marchant completed separate appraisal reports to value the 2.61-acre improved lot and the 1.96-acre extra lot. To value the improved lot,

Mr. Marchant performed a comparable-sales analysis using eight purportedly comparable properties in Concord.[6] Seven of the properties were within 1.24 miles of the subject property and the eighth property was 3.02 miles away. Three of the comparable-sales properties were located in the same neighborhood as the subject property, while an additional three comparable-sales properties were situated on Monument Street, which is located about one mile away from the subject property. The comparable-sales properties ranged in size from 0.49 acres to 4.59 acres and were improved with homes ranging in gross living area from 3,386 square feet to 7,283 square feet. Mr. Marchant used 5,478 square feet as the measurement for the living space contained within the subject home; he did not consider the 454-square-foot area of the finished attic, nor its two rooms and one full bathroom, in his room and bathroom counts.

Mr. Marchant applied adjustments to his comparable-sales' prices. He did not make adjustments for time of sale, because the comparable sales occurred between 2005 and 2007, during which time, in Mr. Marchant's opinion, the

[6] Mr. Marchant also developed a cost approach to valuing the subject property, but he believed that the comparable-sales approach to value is the most reliable indicator of value for the subject property, and therefore, he used the cost approach as a check on the value which he obtained through the comparable-sales approach.

market values in Concord were relatively stable. Some of Mr. Marchant's adjustments included a $50 per square foot adjustment for differences in living area, and a $20,000 adjustment for the finished basement. He also adjusted $10,000 for the full bathrooms and $5,000 for half bathrooms, $2,000 per fireplace, and $15,000 for the in-ground pool and poolhouse. After applying his adjustments, Mr. Marchant's comparable properties' adjusted-sale prices ranged from $2,659,900 to $3,353,600. Based on his comparable-sales analysis, Mr. Marchant concluded that the fair market value of the 2.61-acre improved lot was $3,100,000 for the fiscal year at issue, which fell towards the mid-range of the adjusted-sale prices derived from his comparable-sales analysis.

Mr. Marchant next completed a "Restricted Use Report of an Appraisal of an Unimproved Residential Lot" for the extra lot. In his report, Mr. Marchant stated that the highest and best use of the extra lot was as a vacant residential site suitable for development. Using the same comparable-sales analysis for the improved lot, Mr. Marchant estimated the value of the extra lot, without the grant of restriction, to be $1,100,000. Mr. Marchant then accounted for the 10-year restriction on development. Based upon historical data and analysis of what he

anticipated in the future, Mr. Marchant estimated the extra lot's appreciation over the 10-year period, and estimated that the market value of the extra lot would be $1,553,720 by Year 10, at which point it would no longer be encumbered. Mr. Marchant then discounted back to the effective valuation date by applying a discount rate of 9.0 percent and adding the real estate tax rate for the fiscal year at issue ($10.72 per thousand) to compensate for the tax burden on the subject property throughout the 10-year holding period, which yielded a total discount rate of 10.7 percent. Applying this discount rate to the estimated value of the extra lot in Year 10, Mr. Marchant determined a present value of $565,826 for the extra lot as encumbered by the 10-year grant of restriction. Adding $565,826 to Mr. Marchant's fair market value of $3,100,000 for the 2.61-acre improved lot yielded an opinion of fair market value of $3,665,826 for the total 4.573-acre subject property.

The appellee presented its case-in-chief through its witness, John Neas, whom the Board qualified as an expert in real estate valuation. Like Mr. Marchant, Mr. Neas considered the values of the improved lot and the extra lot separately. To value the improved lot, Mr. Neas performed a comparable-sales analysis using seven purportedly

comparable properties. Five of these comparable-sales properties were also used in Mr. Marchant's comparable-sales analysis – 350 Musketaquid Road, 444 Monument Street, 116 Monument Street, 295 Musterfield Road, and 214 Monument Street. The comparable-sales properties on Musketaquid Road and Musterfield Road are located in the same neighborhood as the subject property, while the properties on Monument Street are located in a different but, in the opinions of both Mr. Neas and Mr. Marchant, equally prestigious neighborhood in Concord.

Mr. Neas' adjustments differed from those of Mr. Marchant, particularly his adjustment of $200 per square foot, versus Mr. Marchant's adjustment of $50 per square foot, for difference in living space; the experts also differed in their adjustment for number of fireplaces, with Mr. Neas adding an additional $10,000 for each fireplace versus Mr. Marchant's adjustment of $2,000 for each fireplace. Mr. Neas also added a higher $150,000 adjustment for the subject property's pool and poolhouse, while Mr. Marchant testified that, based on his data, a pool and pool house are very often not selling points, since many buyers are not attracted to such amenities, so their presence actually narrows the scope of potential buyers. Finally, Mr. Neas adjusted by a 5% rate of

appreciation for differences in time of sale between the subject and his comparables. After adjustments, Mr. Neas' comparable sales yielded a range of $2,800,000 to $3,600,000. Mr. Neas chose a final value of the subject property, without the extra lot, of $3,500,000, which was at the higher end of his range of adjusted-sale values.

To value the 1.96-acre extra lot, Mr. Neas considered two alternative approaches: (1) ignoring the grant of restriction as not a material encumbrance, and (2) treating the grant of restriction as a material encumbrance. Under the first approach, Mr. Neas considered sales of fourteen residential lots in Concord, ranging in size from 20,000 square feet (about 0.46 acres) to 4.674 acres and in price from $335,000 to $1,825,000, which occurred during 2006 and 2007. He then selected five lots, which he deemed to be more similar to the subject extra lot; these sales yielded sales prices ranging from $740,000 to $1,225,000. Mr. Neas then performed paired-sales analyses to make adjustments for location and lot size. Mr. Neas concluded that the value of the extra lot, without considering the encumbrance, should be $1,000,000. Adding $1,000,000 to the $3,500,000 value for the 2.61-acre improved lot yielded a total value of $4,500,000 for the subject property.

Under the second approach of considering the extra lot's encumbrance, Mr. Neas calculated the extra lot at a "discounted rate," but he claimed that the encumbered extra lot brought a value of "enhancement" to the 2.61-acre improved lot. To support this contention, Mr. Neas presented three examples of paired sales. Mr. Neas' first example compared the properties known as Lot 1 Pope Road, with 2.44 acres, which sold for $545,000 in April, 2007, and Lot A/A1 Pope Road, with 3.7 acres, which sold for $622,500 in May, 2007. Mr. Neas' second example compared Lot 3A Powder Mill Road, with 2.0454 acres, which sold for $650,000 in October, 2006, and Lot 1 Macone Farm Lane, with 2.97 acres, which sold for $740,000 in January, 2006. Finally, Mr. Neas' third example compared 168 Nashawtuc Road, with twelve rooms, including five bedrooms as well as four full bathrooms and one half bathroom, which sold for $2,220,000 in March, 2007, and 1643 Monument Street, a newer home which borders Estabrook Woods, with twelve rooms, including five bedrooms as well as three full bathrooms and one half bathroom, which sold for $2,479,000 in September, 2005. Mr. Neas contended that, based on his comparisons, the grant of restriction on the extra lot results in a 10% increase to the $3,500,000 value of the improved lot, for an "enhancement value" of $350,000. He

added this to the values of the 2.61-acre improved lot and a discounted $550,000 value for the 1.96-acre extra lot for a total value of $4,400,000 for the 4.573-acre subject property.

Mr. Marchant contended that Mr. Neas' three paired-sales-analysis examples did not support Mr. Neas' claim that the differences in selling prices could be accounted for by the presence of adjacent open space. Instead, Mr. Marchant contended that other factors, like location and the quality of the home at 1643 Monument Street, actually accounted for the differences in sales prices without considering the possible impact of any abutting vacant land.

On the basis of all of the evidence, the Board made the following ultimate findings of fact. With respect to the valuation of the improved lot, the Board found Mr. Marchant's first six comparable-sales properties, five of which Mr. Neas also used, to be the most comparable to the subject property. The Board found that, overall, Mr. Marchant's adjustments were more persuasive than Mr. Neas' adjustments; however, the Board found that some of Mr. Marchant's adjustments were not appropriate. The Board instead applied the following adjustments to these comparable-sales properties: $100 per square foot for

differences in living area; $50 per square foot for the poolhouse; and $10,000 for the pool. With these adjustments, Mr. Marchant's comparable-sales properties yielded adjusted sales prices ranging from $2,686,300 to $3,632,048. On the basis of all of the evidence of record, the Board determined that the fair cash value of the 2.61-acre improved lot was $3,300,000.

With respect to the extra lot, the Board found that Mr. Marchant's method of discounting the fair cash value of the lot to compensate for the grant of restriction was erroneous. As Mr. Ziering candidly testified, his motive for granting the restriction was to protect the privacy of his improved lot. The Board found that the grant of restriction on the extra lot was gratuitous and benefited the appellants. Therefore, as will be further explained in the following Opinion, the Board found that the privately imposed grant of restriction has no effect on the extra lot's fair cash value for tax purposes. The Board instead adopted Mr. Neas' credible analysis by which he valued the extra lot without consideration of the grant of restriction and his opinion of $1,000,000 as the fair cash value for the extra lot.

On the basis of its findings, the Board thus found that the fair cash value of the entire 4.57-acre subject

property was $4,300,000. Because this value is less than the assessed value of the subject property for the fiscal year at issue, the Board issued a revised decision for the appellants abating $2,080.40 of tax.[7]

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). The appellant has the burden of proving that the 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 board 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)

[7] This amount includes a *pro rata* portion of the Community Preservation Act assessment in the amount of $30.74.

(quoting ***Schlaiker***, 365 Mass. at 245). In appeals before this Board, a taxpayer "'may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation.'" ***General Electric Co.,*** 393 Mass. at 600 (quoting ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 855 (1983)).

Generally, real estate valuation experts and the Massachusetts courts rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproduction. ***Correia v. New Bedford Redevelopment,*** 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).

Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date generally contain probative evidence for determining the value of the property at issue. ***Graham v. Assessors of West Tisbury,*** Mass. ATB Findings of Fact and Reports 2008-321, 400 (citing ***McCabe v. Chelsea,*** 265 Mass. 494, 496 (1929)), ***aff'd*** 73 Mass. App. Ct. 1107 (2008). When comparable sales are used, however, allowances must be made

for various factors which would otherwise cause disparities in the comparable-sales properties' sale prices. *See* ***Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke,*** Mass. ATB Findings of Fact and Reports 1998-1072, 1082 (and the cases cited therein); APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 307 (13th ed., 2008) ("After researching and verifying transactional data and selecting the appropriate unit of comparison, the appraiser adjusts for any differences.").

On the basis of all of the evidence, the Board found that Mr. Marchant's first six comparable-sales properties, five of which Mr. Neas also used, were the most comparable to the subject property. The Board found that, overall, Mr. Marchant's adjustments were more persuasive than Mr. Neas' adjustments. However, the Board found that some of Mr. Marchant's adjustments were not appropriate, namely, the adjustments for differences in square-foot living space and the adjustment for the subject property's pool and poolhouse. The Board rejected Mr. Marchant's adjustments for these and instead applied adjustments of $100 per square foot for differences in living area, $50 per square foot for the poolhouse, and $10,000 for the pool. On the basis of these adjustments, the Board found

that the fair cash value for the 2.61-acre improved lot was $3,300,000.

With respect to the extra lot, the Board was not persuaded by Mr. Marchant's valuation method, which was based on the premise that the grant of restriction should reduce the property's fair cash value. In making its ruling on this matter, the Board was guided by the long-standing principle that real estate is assessed on its fee-simple value; that is, "its value as a unit and not upon the interest therein of the person assessed." ***Paine v. Assessors of Weston***, 297 Mass. 173, 174 (1937). For example, in determining fair cash value, assessors are not required to reduce the fee-simple value of real property to account for below-market leases. ***Donovan v. City of Haverhill***, 247 Mass. 69, 72 (1923) ("We do not think a determination of the fair cash valuation of real estate requires the assessors to make such a deduction [for the surrender value of a below-market lease]."). ***See also***, ***Sisk v. Assessors of Essex***, 426 Mass. 651, 654 (1998) ("[W]e have previously rejected a taxpayers' argument that a lease constituted an encumbrance that diminished the property's value for tax assessment purposes.")(citing ***Donovan***, 247 Mass. at 71); *accord* ***Pepsi-Cola Bottling Co.***, 397 Mass. at 450.

The Supreme Judicial Court has recognized the difference, for tax valuation purposes, between privately imposed restrictions "intended for the personal benefit of [the grantor]," ***Lodge v. Swampscott***, 216 Mass. 260, 263 (1913), and those that are governmentally imposed. In general, the former are "merely contractual" and thus "cannot affect the method of taxing the real estate." ***Crocker-McElwain Co. v. Assessors of Holyoke***, 296 Mass. 338, 350 (1937) (citing ***Hamilton Manuf. Co. v. Lowell***, 274 Mass. 477, 480-81 (1931)). By contrast, "[i]f property is known to be subject to . . . a governmentally-imposed restriction affecting . . . its earning power, that fact should be considered in any determination of its fair cash value." ***Boston Edison Co. v. Assessors of Watertown***, 387 Mass. 298, 304, (1982). Examples of governmentally imposed restrictions which assessors may rightly consider in determining fair cash value include: income from leases subject to rent-control restrictions (***Community Dev. Co. v. Assessors of Gardner***, 377 Mass. 351, 354-55 (1979)); a utility company's governmentally imposed income restrictions (***Montaup Electric Co. v. Board of Assessors of Whitman***, 390 Mass. 847, 852 (1984)); and the separate valuation of property subject to a coastal wetlands restriction under G.L. c. 130, § 105, an inland wetlands

restriction under G.L. c. 131, § 40A, or a conservation restriction under G.L. c. 184, § 31. *See also*, ***Mashpee Wampanoag Indian Tribal Council, Inc. v. Assessors of Mashpee***, 379 Mass. 420, 422 (1980) ("[R]estrictions on the use of property may reduce its value below that which would be appropriate in the absence of such restrictions.") (citing ***Lodge***, 216 Mass. at 263); *see also* ***Parkinson v. Board of Assessors of Medfield***, 398 Mass. 112, 116 (1986)).

Under the facts of the instant appeal, the appellants gratuitously granted a restriction to their neighbor, which benefited the appellants by securing privacy for their home, a privacy which they already enjoyed by virtue of their ownership of the extra lot. Whatever agreements or other arrangements which may have been made between the appellants and their neighbor concerning the restriction have no bearing on the valuation of the extra lot for tax purposes. *See* ***Paine***, 297 Mass. at 177 (quoting ***Milligan* v. *Drury***, 130 Mass. 428, 430 (1881)) ("In making an assessment the 'assessors were not obliged to inquire into the private contracts between the parties.'"). On this record, the appellants failed to establish that their granting of the restriction at issue in this appeal had an adverse impact on their use and enjoyment of the subject property. The Board therefore found and ruled that the grant of

restriction had no bearing on the fair cash value of the subject property for real estate tax purposes. To rule otherwise would allow appellants to artificially depress the value of their property by creating an illusory restriction which has no effect on their use and enjoyment of the subject property, a result in conflict with the above-cited authorities. The Board thus rejected Mr. Marchant's analysis and instead adopted Mr. Neas' credible analysis whereby he disregarded the grant of restriction and determined that $1,000,000 was the fair cash value of the extra lot.

On the basis of its findings, the Board calculated a total value of $4,300,000 for the entire 4.57-acre subject property. Accordingly, the Board issued a revised decision in favor of the appellant abating the real estate taxes on the subject property in the total amount of $2,080.40.[8]

APPELLATE TAX BOARD

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

A true copy,

Attest:_____
Clerk of the Board

[8] See ***supra***, note 7.