

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

96 ROCKPORT RD., LLC
ANDREW D'AVANZO, MANAGER

v.

BOARD OF ASSESSORS OF
THE TOWN OF WESTON

Docket No. F325301

Promulgated:
August 11, 2016

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 Weston (the "assessors" or the "appellee"), to abate a tax on certain real estate located in Weston owned by and assessed to 96 Rockport Road, LLC (the "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2014 (the "fiscal year at issue").

Commissioner Chmielinski heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Good joined him in the decision for the appellee.

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

Andrew D'Avanzo, pro se, for the appellant.

Eric Josephson, assessor, for the appellee.

FINDINGS OF FACT AND REPORT

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

On January 1, 2013, the appellant was the assessed owner of a 113,256-square-foot parcel of vacant real estate located in Weston at 96 Rockport Road (the "subject property").

For the fiscal year at issue, the assessors valued the subject property at \$1,082,600 and assessed a tax thereon, at the rate of \$12.73 per \$1,000, in the total amount of \$14,156.76, inclusive of a Community Preservation Act surcharge. Although the appellant's third and fourth quarter tax payments were paid late, the appellant paid an amount in excess of 75% of the average of its assessed property taxes for the preceding three fiscal years at issue by Monday, February 3, 2014¹ as well as 100% of the average of its assessed property taxes for the preceding three fiscal years at issue by the May 1, 2014 due date. Therefore, late payment of the appellant's third and

¹ The due date for payment of third quarter taxes is typically February 1st, but in 2014, that date fell on a Saturday. General Laws, c. 4, § 9 and G.L. c. 41, § 110A, provide, in pertinent part, that "when the day, or last day, for the performance of any act . . . required by statute" falls on a Saturday, Sunday, or legal holiday, it may be performed on the next succeeding business day.

fourth quarter tax bill was not an impediment to the Board's jurisdiction. G.L. c. 59, §§ 64 and 65.²

On Monday, February 3, 2014, in accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application with the assessors. On April 29, 2014, the assessors granted a partial abatement, reducing the assessed value of the subject property to \$829,600. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed an appeal with the Board on July 29, 2014. On the basis of these facts, the Board found and ruled that it had jurisdiction over the instant appeal.

Mr. D'Avanzo acquired the subject property in 1992. At that time, he commenced efforts to procure the proper permits and approvals necessary to build a home on the subject property. Although the evidence showed that he received at least some of these approvals, he did not build a home on the subject property at any time prior to the relevant date of valuation in this appeal.

The evidence indicated that the appellant also made efforts to sell the subject property, but was unable to do so. According to the Mr. D'Avanzo, his inability to attract a buyer was due to topographical and environmental issues - specifically, significant amounts of ledge and proximity to

² Under G.L. c. 59, §§ 64 and 65, the accrual of interest for the fiscal year at issue is not a jurisdictional impediment where a taxpayer has timely paid an amount equal to or greater than the average of the taxes assessed for the three years preceding the fiscal year at issue.

wetlands - which made the prospect of building on the subject property complicated and costly. Documents entered into the record, including the subject property's record card and other documents from the Town of Weston as well as documents from the Massachusetts Department of Environmental Protection, confirmed the existence of these topographical and environmental concerns. Notwithstanding these issues, the appellant applied for, and received, a building permit for the subject property from the Town of Weston on June 7, 2013.

It was the appellant's contention that the assessors erroneously valued the subject property as a buildable lot when, in his opinion, it was not a buildable lot on the relevant valuation date of January 1, 2013. The appellant contended that the assessors impermissibly took into consideration the building permit issued in June of 2013 in valuing the subject property as a buildable lot as of January of 2013. The appellant's opinion of value for the subject property was \$260,000, which had been its assessed value in the year preceding the fiscal year at issue.

The assessors for their part introduced the testimony of Assessor Eric Josephson along with a substantial amount of documentary evidence, including the relevant jurisdictional documents and other historical documents pertaining to the subject property.

The documents offered by the assessors showed that a building permit was issued for the subject property in 1988, and approval ("Order of Conditions") was given for construction on the subject property by the Department of Environmental Protection in August of 2011. In addition, the assessors introduced a letter from the Town of Weston's Board of Public Health, dated March 20, 2012, stating that Mr. D'Avanzo had been given approval for the installation of a septic system on the subject property with a six-bedroom capacity.

On the basis of all of the evidence, the Board found that the appellant failed to meet his burden of proving that the assessed value of the subject property exceeded its fair cash value as of January 1, 2013. In reaching this determination, the Board rejected the appellant's argument that the subject property was not a buildable lot as of that date as the documentary evidence squarely refuted that assertion.

In making his claim, Mr. D'Avanzo placed considerable emphasis on a letter dated March 22, 2012 from the Town of Weston's building inspector, Robert Morra. In that letter, Mr. Morra responded to Mr. D'Avanzo's request to "confirm that 96 Rockport Road is a buildable lot." The letter stated that the subject property has "the necessary frontage and area" to be considered a lot according to zoning by-laws, and also states that "approvals have been issued by the Conservation Commission

and the Board of Health for this property," but further notes that approval of a building permit is "subject to the applicant receiving all other necessary approvals[.]" It was Mr. D'Avanzo's position that Mr. Morra's failure to unequivocally state in this letter that the subject property was a buildable lot somehow proved that the town did not consider it to be a buildable lot at any time during 2012. The Board rejected this argument, and based on the evidence in its totality, concluded that the assessors did not err in valuing the subject property as a buildable lot for the fiscal year at issue.

The evidence showed that a building permit could, and did, issue for the subject property decades prior to the period relevant to this appeal. Moreover, the evidence showed that during 2011 and 2012, the appellant received the necessary approvals from the Department of Environmental Protection as well as Weston's Board of Public Health for the construction of a home on the subject property. The fact that no building was commenced on the subject property prior to January 1, 2013, or that it might have been costly to proceed with building thereon, did not alter the subject property's status as a buildable lot as of January 1, 2013.

Because the Board concluded that the assessors did not err in valuing the subject property as a buildable lot for fiscal

year 2014, and the appellant offered no other evidence to establish that the assessed value of the subject property, as partially abated, exceeded its fair cash value, the Board found that the appellant failed to demonstrate his entitlement to an abatement. Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

The assessors are required to assess real estate at its fair cash value as of the first day of January preceding the start of the fiscal 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 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). The 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).

In the present appeal, the appellant's primary argument was that the assessors erred in valuing the subject property as a buildable lot for the fiscal year at issue because, according to him, it was not a buildable lot on the relevant date of valuation. However, the Board rejected this argument as it was contradicted by the record. That evidence included documentation showing that the subject property had the necessary dimensional requirements to be considered a buildable lot by the town, and it also showed that a building permit had in fact been issued decades prior to the fiscal year at issue in this appeal.

Moreover, during the period leading up to the relevant date of valuation, the appellant had received several of the necessary approvals to commence building on the subject property. The fact that the appellant did not apply for, or receive, an actual building permit until after the relevant date of valuation does not mean that it was not a buildable lot as of that date. See **Autumn Gates Estates, LLC & Fox Gate, LLC v. Assessors of Millbury**, Mass. ATB Findings of Fact and Reports 2013-822, 850-51 (finding that where there was no legal impediment to procuring building permits, taxpayer's own failure to procure such permits did not mean the lots at issue were not buildable); see also **Nelson v. Assessors of Wilmington**, Mass. ATB Findings of Fact and Reports, 2013-320, 329. Although

the evidence supported the conclusion that the subject property was impacted by various environmental and topographical issues, the existence of these issues did not compel the conclusion that the subject property was unbuildable. See **Said and Jehad Abuzahra, Trustees v. Assessors of Rowley**, Mass. ATB Findings of Fact and Reports 2008-1514, 1519 (finding that property at issue was buildable land despite credible evidence of wetlands and topographical issues).

For the reasons stated above, the Board found and ruled that the appellant failed to meet its burden of proving that the assessed value of the subject property exceeded its fair cash value for the fiscal year at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board