

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**ANIMAL RESCUE LEAGUE OF
BOSTON**

**v. BOARD OF ASSESSORS OF THE
TOWN OF BOURNE**

Docket Nos.
F317304, F317305, F317306,
F319210, F319211, F319212,
F322696, F322697, F322698,
F325779, F325780, F325781

Promulgated:
November 8, 2018

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 Board of Assessors of the Town of Bourne ("appellee" or "assessors") to abate tax on certain real estate located in the Town of Bourne ("Town" or "Bourne") owned by and assessed to Animal Rescue League of Boston ("appellant") under G.L. c. 59, §§ 11 and 38, for fiscal years 2012, 2013, 2014, and 2015 ("fiscal years at issue").

Commissioner Rose heard these appeals. Chairman Hammond and Commissioners Scharaffa, Chmielinski, and Good joined him in the decisions for the appellee in Docket Nos. F317305, F319211, F322698, F325781, F317306, F319210, F322697, and F325779. Chairman Hammond and Commissioners Scharaffa, Good, and Elliott joined Commissioner Rose in the revised decision for the appellant in Docket Nos. F317304, F319212, F322696, and F325780.¹

¹ Commissioner Chmielinski had completed his term prior to promulgation of the revised decision.

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

Mark J. Lanza, Esq. for the appellant.

Robert S. Troy, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

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

I. Introduction

These matters involved three parcels of land owned by the appellant and located in Bourne: 55 Megansett Road ("55 Megansett"), 96 Megansett Road ("96 Megansett"), and 0 Lawrence Island ("0 Lawrence") (collectively "subject properties"). The appellant contended that the subject properties were exempt from real property taxation under G.L. c. 59, § 5, cl. Third ("Clause Third") because it occupied the subject properties for charitable purposes ("Exemption Issue"). Alternatively, if the subject properties were not found to be exempt under Clause

Third, the appellant contended that the assessors nonetheless overvalued the subject properties ("Valuation Issue").

II. Procedural History

The three tables below summarize relevant jurisdictional facts for each of the subject properties:²

0 Lawrence	F317304	F319212	F322696	F325780
Fiscal Year	2012	2013	2014	2015
Assessed Value	\$726,000	\$716,800	\$619,100	\$553,100
Tax Rate	\$9.12/\$1,000	\$9.45/\$1,000	\$9.68/\$1,000	\$10.07/\$1,000
Assessed Tax	\$6,877.83	\$7,034.31	\$6,222.21	\$5,781.06
Tax Timely Paid	Yes	Yes	Yes	Yes
Abatement Application Filed	2/1/12	2/1/13	1/29/14	1/30/15
Abatement Granted or Denied	Denied: 4/4/12	Denied: 2/15/13	Denied: 3/27/14	Denied: 3/13/15
Petition Filed	7/3/12	5/8/13	5/6/14	3/30/15

55 Megansett	F317305	F319211	F322698	F325781
Fiscal Year	2012	2013	2014	2015
Assessed Value	\$2,531,700 (abated from \$3,073,300)	\$2,200,000	\$2,200,200	\$2,003,000
Tax Rate	\$9.12/\$1,000	\$9.45/\$1,000	\$9.68/\$1,000	\$10.07/\$1,000
Assessed Tax	\$23,984.31 (after partial abatement)	\$20,791.89	\$22,112.88	\$20,935.55
Tax Timely Paid	Yes	Yes	Yes	Yes
Abatement Application Filed	2/1/12	2/1/13	1/29/14	1/30/15
Abatement Granted or Denied	Partial Abatement: 4/4/12	Denied: 2/15/13	Denied: 3/27/14	Denied: 3/13/15
Petition Filed	7/3/12	5/8/13	5/6/14	3/30/15

² The assessed tax amounts include applicable Community Preservation Act surcharges and district taxes. The appellant also filed Forms PC and Forms 3ABC.

96 Megansett	F317306	F319210	F322697	F325779
Fiscal Year	2012	2013	2014	2015
Assessed Value	\$1,906,800	\$1,897,200	\$1,896,300	\$1,707,200
Tax Rate	\$9.12/\$1,000	\$9.45/\$1,000	\$9.68/\$1,000	\$10.07/\$1,000
Assessed Tax	\$18,064.26	\$18,618.18	\$19,058.57	\$17,843.81
Tax Timely Paid	Yes	Yes	Yes	Yes
Abatement Application Filed	2/1/12	2/1/13	1/29/14	1/30/15
Abatement Granted or Denied	Denied: 4/4/12	Denied: 2/15/13	Denied: 3/27/14	Denied: 3/15/15
Petition Filed	7/3/12	5/8/13	5/6/14	3/30/15

Based upon these facts, the Board found that it had jurisdiction to hear and decide these appeals. The Board initially bifurcated these matters into two phases: a phase to determine the Exemption Issue and, if necessary, a phase to determine the Valuation Issue if the subject properties were not exempt under Clause Third.

After a hearing on the Exemption Issue for fiscal years 2012 and 2013, the Board ruled that the appellant failed to meet its burden of proving that it was entitled to the exemption under Clause Third.

The Board then commenced a hearing on the Valuation Issue for fiscal years 2012 and 2013. Subsequently, the Exemption Issue for fiscal years 2014 and 2015 and the Valuation Issue for fiscal years 2014 and 2015 were incorporated into this latter phase.

Regarding the Exemption Issue for fiscal years 2014 and 2015, the parties agreed that the attributes and uses of the subject properties had not changed from fiscal years 2012 and 2013 to fiscal years 2014 and 2015, and that any testimony and evidence in the record presented for the earlier fiscal years pertained to the later fiscal years. Regarding the Valuation Issue, the respective appraisers testifying for the parties provided testimony for fiscal years 2012 and 2013. The parties opted to forego additional testimony by their respective appraisers for fiscal years 2014 and 2015, agreeing that the subject properties had no material differences requiring explanation through further testimony for these later fiscal years.

The Board initially issued decisions for the appellee in all of these appeals. On its own motion, the Board is issuing a revised decision for the appellant for Docket Nos. F317304, F319212, F322696, and F325780, concerning 0 Lawrence, contemporaneously with these findings of fact and report.

III. The Subject Properties

The property at 0 Lawrence is an approximately 3.9-acre parcel of undeveloped land held in its wild state, located both in Bourne and in the Town of Falmouth. It consists of a coastal peninsula without improvements or street frontage. The portion of 0 Lawrence located in Bourne has a land area of approximately

2.18 acres.³ The property at 55 Megansett is an approximately 18-acre parcel of land improved with a barn, five corrals, a chicken coop, and three lean-to shelters. The property at 96 Megansett is an approximately 3-acre parcel of land improved with four buildings – a small boat house, a camp counselor’s cottage, an arts and crafts building, and a central meeting area known as Baxendale Hall used for camp activities. But for the boat house, all the buildings have electric and town water services, and are connected to an on-site septic system.

The appellant previously operated a summer camp at the subject properties at which it taught the humane treatment of animals, animal education, and arts and crafts. It also conducted camp activities as part of a program for economically disadvantaged children who attended the camp. The appellant ceased operation of the camp in 2008 due to financial reasons.

IV. The Exemption Issue

The Board found that the appellant failed to establish that it was entitled to a charitable exemption under Clause Third. Clause Third requires the fulfillment of certain requisites to qualify for the exemption, specifically a charitable

³ During the course of the proceedings, the parties disagreed as to the acreage of 0 Lawrence. However, pursuant to an Agreed Statement of Facts entered into at the close of the hearing on these appeals on June 30, 2016, the parties stipulated to the acreage of 0 Lawrence located in Bourne at 2.18 acres of land area. Based upon this stipulated acreage and other factors, the Board issued a revised decision for the appellant concerning 0 Lawrence, as discussed further below.

organization must own the property for which the exemption is sought and must occupy the property for the purposes for which it is organized. While the parties did not dispute – and the Board found – that the appellant owned the subject properties and was a charitable organization under Clause Third, the Board found that the appellant did not occupy the subject properties for its charitable purposes.

The record contained ample proof of the appellant's affiliation with and ultimate acquisition of the subject properties, tracing back to the estate of Esther M. Baxendale. As noted in a judgment of the Plymouth County Probate Court dated December 13, 1977, the appellant had sought authority for "the transfer of property devised and bequeathed to said Animal Rescue League of Boston as successor trustee by said Esther M. Baxendale." The Court further noted that it had "become impractical, and may become impossible, for Animal Rescue League of Boston, as it is trustee under the will and codicils of . . . Esther M. Baxendale, to carry out the charitable purposes of the [Baxendale Memorial] Foundation in its present form." The Court "authorized [the appellant] to distribute the remaining trust property to itself outright, to be restricted to its current use, or such other uses as may be consistent with the charitable purposes manifested in the will and codicils of said Esther M. Baxendale." Subsequently, by a sequence of fiduciary and

confirmatory deeds recorded between 1977 and 1987, the Board found that the appellant acquired as owner, together with other parcels of land not at issue in these matters, the subject properties - 0 Lawrence, 55 Megansett, and 96 Megansett - fulfilling the ownership requisite of Clause Third.

The appellant was organized in 1899 for the purpose of "establishing one or more refuges for and the rescue and relief of suffering or homeless animals and any other charitable or benevolent act for the welfare of animals." Its purpose was later expanded, pursuant to St. 1965, c. 191,⁴ to include holding land for "such purposes and trusts as may be expressed in any deed or instrument of conveyance or gift made to . . . [it]." Robie White, the Chief Financial Officer for the appellant during the relevant time periods, further expounded on the appellant's charitable purpose and activities in his testimony. According to Mr. White, the appellant operates a veterinary clinic, a spay wagon, an animal rescue team, a pet cemetery, three adoption centers, and various animal-centric programs. The Board found the appellant's purpose and attendant operations to

⁴ St. 1965, c. 191 states as follows: "The Animal Rescue League of Boston, a corporation organized under general law, is hereby authorized to hold real and personal estate to an amount not exceeding twenty million dollars, to have and to hold the same upon the terms and for the purposes specified in its certificate of incorporation, agreement of association or certificate of organization as from time to time heretofore or hereafter amended; and also upon such terms and for such purposes and trusts as may be expressed in any deed or instrument of conveyance or gift made to said corporation; provided, the same shall not be inconsistent with the purposes specified in its certificate of incorporation, agreement of association or certificate of organization as from time to time heretofore or hereafter amended."

be sufficient in establishing that it was a charitable organization under Clause Third.

Despite its ownership of the subject properties and its establishment as a charitable organization, the record did not support a finding that the appellant occupied the subject properties for its charitable purpose. Mr. White testified that the appellant had operated the subject properties as a summer camp where children who were not well off could experience the outdoors and participate in arts and crafts, centered around a core of animal education, but he admitted that the summer camp had been suspended prior to the fiscal years at issue "due to financial reasons." Mr. White testified that the appellant incurred various expenses for the subject properties, including utilities, ground maintenance, legal fees, facilities staff, and insurance, but the Board found that these were not expenses specific to a charitable organization occupying property. Mr. White also testified that regular physical inspections occurred at the subject properties and that "no trespassing signs" were placed on the subject properties "in an effort to keep the space as safe as we can." The Board found these facts merely highlighted the appellant's non-use of the subject properties rather than an active appropriation to its charitable purpose.

The appellant also presented the testimony of its Director of Facilities during the relevant time periods, Robert Williams, who stated that he visited the appellant's properties roughly once a month, including the subject properties. He checked to ensure that buildings were secure, and looked for downed or damaged trees to "ensure the safety of anyone that might be on the property walking their animals." Mr. Williams testified that the appellant maintained the subject properties during the relevant time periods, which included trimming growth, making sure roads and pathways were accessible, and cutting the grass on a regular basis, as well as replacing railings, fence posts, and securing doors and windows. Grass maintenance and tree pruning was subcontracted to a landscaper, according to Mr. Williams. In addition, an individual working for Mr. Williams also helped with the maintenance of the subject properties. He noted that the isolation of the area could lend itself to youths occasionally using the subject properties as a hangout, but mostly the subject properties were left alone and neighbors contacted him if there was activity. "I'm pretty well in the know of what's going on down there," he stated. Mr. Williams admitted that no animal-related activities were conducted during the relevant time periods on the subject properties, other than neighbors walking their dogs on the properties. Similar to Mr. White's testimony, the Board found

that Mr. Williams' testimony either highlighted activities that any average property owner would undertake or, counterintuitively, it emphasized the vacancy of the subject properties. As stated by Mr. Williams, "I try very hard to make the place look like it is occupied or not forgotten about." The Board found that if the appellant were actively occupying the subject properties for its charitable uses, its Director of Facilities would not need to try to make the subject properties look "occupied or not forgotten about."

The appellant also attempted to distinguish 0 Lawrence in its analysis of the Clause Third exemption, contending in its Post Hearing Brief that "the actual operation of an animal education summer camp at 0 Lawrence [] has no bearing on the issue of whether the appellant occupies the property for its charitable purpose" because 0 Lawrence is undevelopable and restricted by codicil number five to the will of Esther M. Baxendale to exist as a bird sanctuary. The appellant and the assessors do not dispute that 0 Lawrence is undevelopable property. However, undevelopable property and property existing as a bird sanctuary are not mutually inclusive. The record contained no evidence that the appellant maintained 0 Lawrence as a bird sanctuary and the Board found that, as with 55 Megansett and 96 Megansett, the appellant did not occupy 0 Lawrence as required by Clause Third. Consequently, though the

Board found that the appellant was a charitable organization and owned the subject properties under Clause Third, it did not meet the occupancy requisite of Clause Third and was not entitled to abatements on the Exemption Issue.

V. The Valuation Issue

The Board found that the appellant failed to establish that it was entitled to abatements on the Valuation Issue for 55 Megansett and 96 Megansett, but that it was entitled to abatements for 0 Lawrence in the amount of \$5,638.68 for fiscal year 2012; \$5,750.71 for fiscal year 2013; \$4,907.63 for fiscal year 2014; and \$4,413.93 for fiscal year 2015.

The appellant presented the testimony of John C. Bowman III, an appraiser, in support of its argument on the Valuation Issue, and it also relied upon the will of Esther M. Baxendale and its numerous codicils, as well as various court actions and deeds in the record, for the proposition that the subject properties were restricted in use and therefore limited in value. The assessors presented the testimony of an appraiser, William J. Pastuszek, Jr., as well as the testimony of six individuals employed by the Town during the relevant time periods: Roger Laporte, Inspector of Buildings, Zoning Enforcement Officer, and Alternate Electrical Inspector; Michael Leitzel, Engineer; Brendan Mullaney, Conservation Agent; Terri

Guarino, Health Agent; Donna Barakauskas, Assessor; and Coreen Moore, Town Planner.

In determining the development potential of 55 Megansett and 96 Megansett, Mr. Bowman predominantly relied upon a document entitled "CLE Engineering Site Development Report June 14, 2012" ("CLE Report") and included a copy of the entire CLE Report in his own appraisal report. No individual involved in the preparation of the CLE Report testified in these matters. Mr. Bowman admitted that he had no involvement in the commissioning or preparation of the CLE Report and that he had no knowledge of the professional expertise of any individuals who completed the CLE Report; he was merely provided a copy. As a consequence of his reliance on the CLE Report, the Board did not give weight to Mr. Bowman's testimony concerning valuation of 55 Megansett and 96 Megansett and it found that no other evidence in the record supported a finding for the appellant on the Valuation Issue concerning 55 Megansett and 96 Megansett.

The Board also gave no weight to the testimony of Mr. Pastuszek, the assessors' appraiser, concerning 55 Megansett and 96 Megansett. In his testimony and appraisal report, Mr. Pastuszek valued 55 Megansett and 96 Megansett as a single unit, a wholly impractical valuation for parcels that he acknowledged were valued separately by the assessors. Conversely, the Board found that the assessors' six Town

employees collectively provided credible, relevant, and useful testimony in substantiating the development potential of 55 Megansett and 96 Megansett under applicable Bourne zoning bylaws, conservation restrictions, and deed restrictions.

The Board rejected the appellant's contention that the will of Esther M. Baxendale and its numerous codicils, a final decree of the Supreme Judicial Court entered on October 17, 1951, a judgment of the Plymouth County Probate Court dated December 13, 1977, and various deeds concerning the subject properties, impacted valuation because the use of the subject properties would be limited to charitable purposes pursuant to the will and codicils, the restrictions are perpetual under G.L. c. 184, § 23⁵, and court approval would be needed for any sale. The Board did not find the will and codicils to be so limiting and an impediment to a sale or development as suggested by the appellant. The will and codicils included language permitting the designated trustee to sell land and exert flexibility as needed. For instance, codicil number two recognized the need for flexibility in administering the Baxendale Memorial Foundation created in the will:

And whereas I realize that the needs of the community vary from time to time, and that too rigid provisions may impair the future usefulness of the Trust, I hereby declare that all the specific directions given

⁵ Under G.L. c. 184, § 23, conditions and restrictions upon real property are generally limited to thirty years but for "cases of gifts or devises for public, charitable or religious purposes."

in my said Will shall be regarded as directory and not mandatory, prescribing that they shall be followed so far, and only so far, as in the discretion of the Trustee for the time being they may be consistent with the attainment in the greatest measure of the object and aim of the Trust, both educational and memorial, as set forth in my said Will.

Further, the final decree of the Supreme Judicial Court and the judgment of the Plymouth County Probate Court indicated the courts' willingness to allow sales from property deriving from the estate of Esther M. Baxendale and the Board thus found that a court would more likely permit a sale of the subject properties than sanction the continued unproductive use of the subject properties. Similarly, the Board did not find G.L. c. 184, § 23 to be an impediment to the sale and development of the subject properties, as suggested by the appellant. The Board found that the subject properties were not occupied for charitable purposes during the relevant time periods, as discussed in the above section concerning the Exemption Issue, and so the likelihood that a court would prohibit sale and development based upon G.L. c. 184, § 23 is doubtful.

The Board, however, found that the appellant was entitled to abatements for 0 Lawrence based upon the stipulated acreage of 2.18 acres, which deviated substantially from the 9.38 acres upon which the assessments were made. Neither expert witness produced reliable comparable sales for 0 Lawrence. The Board

noted, however, that both experts suggested values significantly lower than the assessors' assessed values for 0 Lawrence. Even the assessors' witness, Mr. Pastuszek, determined a value of \$560,000, or approximately \$60,000 per acre, for 0 Lawrence, which was significantly lower than the assessed values for 0 Lawrence for three out of the four fiscal years at issue. The Board also found no basis for undevelopable land such as 0 Lawrence to deviate substantially in assessed value from year to year, as occurred here with the subject assessments - ranging from \$726,000 for fiscal year 2012 down to \$553,100 for fiscal year 2015. Consequently, the Board found that the appellant was entitled to abatements for 0 Lawrence based upon both the stipulated acreage and the limited use of the property due to its undevelopable nature.

To calculate the abatements for 0 Lawrence, the Board used the stipulated area of 2.18 acres and applied a per acre value based on Mr. Pastuszek's \$560,000 figure to derive a total value of \$130,800 for each of the fiscal years at issue. Inclusive of applicable Community Preservation Act surcharges and district taxes, the Board found that the appellant was therefore entitled to an abatement of \$5,638.68 for fiscal year 2012, \$5,750.71 for fiscal year 2013, \$4,907.63 for fiscal year 2014, and \$4,413.93 for fiscal year 2015. As a result, the Board issued a revised decision for the appellant in conjunction with these findings of

fact and report for Docket Nos. F317304, F319212, F322696, and F325780.

OPINION

I. Though the Appellant Owned the Subject Properties and Was a Charitable Organization, It Did Not Occupy the Subject Properties for Charitable Purposes and Consequently Was Not Entitled to an Exemption Under Clause Third.

All real and personal property located within the Commonwealth is subject to tax unless such property is specifically exempt by statute. G.L. c. 59, § 2. "Exemption from taxation is a matter of special favor or grace, and will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." **Sylvester v. Assessors of Braintree**, 344 Mass. 263, 264-65 (1962) (citations omitted). "Exemption statutes are strictly construed, and the burden lies with the party seeking an exemption to demonstrate that it qualifies according to the express terms or the necessary implication of a statute providing the exemption." **New England Forestry Foundation, Inc. v. Assessors of Hawley**, 468 Mass. 138, 149 (2014) (citations omitted).

Clause Third exempts from taxation any "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized." See, e.g., **New England Forestry Foundation,**

468 Mass. at 144 (“[A] charitable organization makes a sufficient ‘in-kind’ contribution to the community that its property may be exempt from taxation without offending the notions of fairness and proportionality inherent in the system of taxation in the Commonwealth.”). Consequently, a taxpayer challenging taxation under Clause Third must establish that it owns the property at issue, that it is a charitable organization within the provisions of Clause Third, and that it occupies the property at issue for its asserted charitable purposes.

Here, the parties do not dispute whether the appellant owned the subject properties and whether it was a charitable organization, and the Board found and ruled that the evidence in the record supported the ownership and charitable organization requisites. The various deeds presented in the record established that the appellant owned the subject properties. See ***Collings Foundation v. Assessors of Stow***, Mass. ATB Findings of Fact and Reports 2015-1, 4 (“On October 1, 2010, the Collings transferred ownership . . . to the Foundation. Accordingly, on July 1, 2011 . . . the relevant date of qualification for the claimed exemption under [Clause Third] . . . the Foundation was the assessed owner of the subject property.”). The testimony of Mr. White supported the requisite of Clause Third, that the entity seeking the exemption be a “literary, benevolent, charitable or scientific institution or temperance society

incorporated in the commonwealth." The appellant was founded upon the mission to "establish[] one or more refuges for and the rescue and relief of suffering or homeless animals and any other charitable or benevolent act for the welfare of animals." As testified to by Mr. White, the appellant provides numerous services to fulfill this mission, from operating a veterinary clinic and a spay wagon to a pet cemetery and three adoption centers. See **Assessors of Boston v. The Vincent Club**, 351 Mass. 10, 12 (1966) ("Whether the taxpayer is [a charitable organization] depends upon 'the language of its charter or articles of association, constitution and by-laws, and upon the objects which it serves and the method of its administration.' Or as otherwise expressed, upon the declared purposes and the actual work performed.") (citation omitted).

The Board, however, found and ruled that the appellant failed to establish that it occupied the subject properties "for the purposes for which it is organized" under Clause Third and consequently it was not entitled to an exemption under Clause Third. The occupancy requisite under Clause Third - that the charitable organization's real property must be "occupied by it or its officers for the purposes for which it is organized" - "means something more than that which results from simple ownership and possession." **Babcock v. Leopold Morse Home**,

225 Mass. 418, 421-22 (1917). The Supreme Judicial Court explained that

[i]t signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized. The extent of the use, although entitled to consideration, is not decisive. But the nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficent objects.

Babcock, 225 Mass. at 421-22 ("The meetings of officers or trustees occasionally at the house, and the leaving of some of the furniture there, do not constitute actual occupancy of the building for the purpose of a home."). See also **Thomas Jefferson Memorial Center at Coolidge Point, Inc. v. Assessors of Manchester-by-the-Sea**, Mass. ATB Findings of Fact and Reports 2018-89, 113 (finding that the taxpayer "failed to demonstrate how it occupied the improved parcel to advance patriotism, educate the public in the history of the Early Republic, or maintain historic public buildings during the relevant time period"). "Use of the property need not be exclusively for charitable purposes. . . . 'It is the dominant use of the property which is controlling.'" **Animal Rescue League of Boston, Inc. v. Assessors of Pembroke**, Mass. ATB Findings of Fact and Reports 2000-96, 102 (citations omitted) ("**ARL v. Pembroke**"), *aff'd*, 54 Mass. App. Ct. 1113 (decision under Rule 1:28).

In ***Nature Preserve, Inc. v. Assessors of Pembroke***, the Board found "that the mere existence of the property was not enough to satisfy the statutory requisites. There must be an 'active appropriation' of the property to the stated charitable purposes, which was not found to exist in the present appeal." Mass. ATB Findings of Fact and Reports 2000-796, 809 (citation omitted). See also ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936) (holding that even if the uses of the property were "within the exempting provisions of the statute, the exemption would be lost by reason of the degree of its use by the appellant for non-exempt purposes"). "Other than allowing the accumulation and dumping of degradable debris, appellant offered no evidence to demonstrate that it afforded wildlife a habitat. Appellant also failed to offer any evidence, beyond the existence of a pond, that it protected the watershed." ***Nature Preserve***, Mass. ATB Findings of Fact and Reports at 2000-800. "The Board found that the appellant did not actively appropriate the use of the land to satisfy its stated purposes but relied on a largely passive ownership." ***Id.*** at 2000-810.

In an unrelated case involving the appellant and property in Pembroke, the Board found that the appellant

acquired the subject property in its natural state and maintains it as such. There is no established animal shelter. Neither the home occupied by [the director of

operations] nor the land left in its natural state was open to the public. Indeed, the public was denied access to the property given the prominent display of 'No Trespassing' signs.

ARL v. Pembroke, Mass. ATB Findings of Fact and Reports at 2000-102 (finding that "the appellant did not meet its burden of proving that the subject property was used primarily for its charitable purposes even though it qualifies as a charitable organization").

Turning to the present matter, the appellant failed to establish an "active appropriation [of the subject properties] to the immediate uses of the charitable cause for which the owner was organized." **Babcock**, 225 Mass. at 421-22. As Mr. White testified, the appellant was founded in 1899 with a mission to rescue "domesticated animals and wildlife from cruelty, abandonment and neglect." While the appellant carries out noble services to advance this mission, it did not use the subject properties to carry out these services during the relevant time periods. Mr. Williams admitted that no activities were conducted on the subject properties relative to animals, apart from neighbors using the subject properties to walk their dogs. The evidence did not indicate that members of the general public were invited onto the subject properties, let alone for animal-related activities. Conversely, Mr. White testified that the appellant "put up no trespassing signs in an effort to keep the

space as safe as we can" and Mr. Williams testified that neighbors contacted him in the event any activity was noticed on the subject properties. See **Wing's Neck Conservation Foundation, Inc. v. Assessors of Bourne**, Mass. ATB Findings of Fact and Reports 2003-329, 343 ("[T]he absence of public access to land has consistently proven fatal to a landowner's claim of charitable exemption."), *aff'd*, 61 Mass. App. Ct. 1112 (2004) (decision under Rule 1:28).

In **New England Forestry Foundation**, 468 Mass. at 151, the Supreme Judicial Court "emphasize[d] that public access to the land is not required for a nonprofit conservation organization to qualify for a Clause Third exemption provided that the organization can demonstrate that in practice it is an organization carrying out land conservation and environmental protection activities of the sort whose benefit inure to the public at large." The appellant neither alleged that it was carrying out "land conservation and environmental protection activities" nor claimed to be a nonprofit conservation organization. See **Wing's Neck Conservation Foundation**, Mass. ATB Findings of Fact and Reports at 2003-339 ("A charitable organization which owns and occupies real estate is "not entitled to tax exemption if the property is occupied by it for a purpose other than that for which it is organized.""").

The Board noted that the appellant engaged in certain maintenance activities on the subject properties, such as cutting the grass, trimming vegetation, repairing structures as needed, and performing visits at least monthly to check that the buildings are secure and that no property damage has occurred. The Board also noted that the appellant incurred expenses for the subject properties, such as utilities, ground maintenance, legal fees, facilities staff, and insurance. These activities and expenses are responsibilities that any ordinary property owner would undertake, and do not constitute an occupation of the subject properties for a charitable purpose. The subject properties were essentially vacant, but for the occasional maintenance and security visits, and were not actively appropriated "to the immediate uses of the charitable cause for which the [appellant] was organized." **Babcock**, 225 Mass. at 421-22. Consequently, the Board ruled that the appellant did not occupy the subject properties as required by Clause Third and it was not entitled to abatements on the Exemption Issue.

The Board was unpersuaded by the appellant's reliance on **Bridgewater State University Foundation v. Assessors of Bridgewater**, 463 Mass. 154 (2012) and **Assessors of Hamilton v. Iron Rail Fund of Girls Clubs, Inc.**, 367 Mass. 301 (1975). The appellant relied upon **Bridgewater State University Foundation** for its assertion that Clause Third does not require "physical

occupancy of the subject property owned by the charitable organization itself where the property is used by an affiliated public institution for purposes consistent with the charitable organization's purposes." The appellant concluded that it "is not [therefore] required to physically occupy the property at issue in these appeals in order to qualify for the exemption under Clause Third." However, unlike the situation in **Bridgewater State University Foundation**, 463 Mass. at 154, no organization affiliated with the appellant occupied the subject properties. Save for the occasional visit by Mr. Williams or someone assisting him with maintenance, the subject properties were vacant and unoccupied by anyone.

Similarly, the appellant relied upon **Iron Rail Fund** for the proposition that suspension of the summer camp due to insufficient funds did not invalidate the subject properties' tax-exempt status under Clause Third. The Board did not construe **Iron Rail Fund**, 367 Mass. at 303, as indefinitely grandfathering an exempt purpose where there is no longer an "active appropriation to the immediate uses of the charitable cause for which the owner was organized." **Babcock**, 225 Mass. at 421-22. Several years have elapsed since the appellant occupied the subject properties as a summer camp and the evidence did not establish that there was any intent to operate the summer camp as of the relevant dates. See **ARL v. Pembroke**, Mass. ATB

Findings of Fact and Reports at 2000-101-02 ("The nature of the occupation must 'contribute immediately to the promotion of the charity.'").

The appellant also attempted to distinguish 0 Lawrence from 55 Megansett and 96 Megansett for purposes of seeking the Clause Third exemption, relying upon codicil number five to the will of Esther M. Baxendale and arguing in its Post Hearing Brief that

the actual operation of an animal education summer camp at 0 Lawrence [] has no bearing on the issue of whether the appellant occupies the property for its charitable purpose. This property is, in essence, a sand bar. Due to environmental restrictions, it [is] not buildable. Its restricted and actual use as a bird sanctuary where hunting is prohibited is consistent with and in furtherance of the appellant's charitable and benevolent purpose of providing refuges for animals and constitutes a benevolent act for the welfare of animals. Such use constitutes occupancy of 0 Lawrence [] by the appellant for its charitable purpose.

The appellant and the assessors do not dispute that 0 Lawrence is undevelopable land. However, undevelopable land and property exempt under Clause Third are not mutually inclusive. For example, in ***Anna Harris Smith Conservation Trust, Inc. v. Assessors of Pembroke***, Mass. ATB Findings of Fact and Reports 2015-123, 141, the Board denied a Clause Third exemption where "the Trust offered no evidence that it engaged in meaningful conservation or preservation efforts at the subject property, such as creating an analysis of the wildlife and vegetation

present at the subject property or any sort of long-term maintenance plan for them.”

Similarly here, with its mission of animal welfare as the cornerstone, the appellant relied upon the undevelopable nature of 0 Lawrence as presumptively conducive to attracting wildlife in need of refuge. However, the appellant failed to offer evidence of any wildlife present on this parcel or any efforts on its part to encourage or foster a wildlife refuge. The Board therefore rejected the appellant’s argument; to hold otherwise would encourage every owner of undevelopable property to seek a charitable exemption under the guise of operating a wildlife habitat.

As to the appellant’s contention that 0 Lawrence is restricted by the terms of codicil number five to exist as a bird sanctuary, the record lacked any evidence that a single bird has ever sought refuge on the property or that the appellant made any effort to create or maintain a refuge there. Mere reference to a restriction under a will does not establish evidence of the use or occupancy of property. The appellant provided no evidence that it conducted research or studies on birds, or that it engaged in any analysis of bird populations, migration, feeding, nesting, or sightings. See **Anna Harris Smith Conservation Trust**, Mass. ATB Findings of Fact and Reports at 2015-134 (“As an initial matter, the Trust’s witnesses displayed

only a limited knowledge, at best, of the types of flora and fauna it was allegedly trying to preserve."). These activities would promote rather than defeat the restriction as articulated in codicil number five. The Board therefore found and ruled that the property was not entitled to the Clause Third exemption.

II. The Appellant Did Not Meet Its Burden of Proof in Establishing That the Assessed Values of 55 Megansett and 96 Megansett Were Too High.

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 in a free and open market will agree if both parties are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956).

A taxpayer 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) (quoting *Schlaiker*, 365 Mass. at 245).

In appeals before the Board, taxpayers “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)). Sales of comparable realty in the same geographic area and within a reasonable timeframe 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 2007-321, 400 (citing **McCabe v. Chelsea**, 265 Mass. 494, 496 (1929)), *aff’d*, 73 Mass. App. Ct. 1107 (2008).

The Board need not specify the exact manner in which it arrived at its valuation. **Jordan Marsh Co. v. Assessors of Malden**, 359 Mass. 106, 110 (1971). The fair cash value of property cannot be proven with “mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.” **Assessors of Quincy v. Boston Consolidated Gas Co.**, 309 Mass. 60, 72 (1941). In evaluating the evidence before it, the Board selected among the various elements of value and formed its own independent judgment of fair cash value. **General Electric Co.**, 393 Mass. at 605. “The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are

matters for the board." **Cumington School of the Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977).

In the present matter, the Board gave no weight to the testimony of Mr. Bowman, the appellant's appraiser, in his valuation of both 55 Megansett and 96 Megansett. He primarily relied upon the CLE Report in both his testimony and appraisal report, which the Board found to be unsubstantiated hearsay as no one involved in the preparation of the CLE Report was available to testify. See **Smith d/b/a Solar Fields LLC v. Assessors of Hatfield**, Mass. ATB Findings of Fact and Reports 2014-587, 591 ("Furthermore, as no one from Associated Building Wreckers, Inc. was available to testify, the Presiding Commissioner found the quote of potential demolition costs to be unsubstantiated hearsay and did not give it any weight."). While the Board also disregarded Mr. Pastuszek's testimony concerning 55 Megansett and 96 Megansett due to his impractical joint valuation of both properties, it found the testimony of the appellee's additional witnesses to be credible and useful in substantiating the development potential of 55 Megansett and 96 Megansett and supportive of the original assessments for 55 Megansett and 96 Megansett.

The Board was unpersuaded by the appellant's argument that restrictions in the will of Esther M. Baxendale and its numerous codicils impacted valuation because the restrictions limited use

of the subject properties to charitable purposes, the limitations were perpetual under G.L. c. 184, § 23, and a court order would be needed for any sale. The will and codicils provided the designated trustee with flexibility rather than rigid mandates. The Board found no reason under these circumstances as to why a court would sanction continued unproductive use of the subject properties rather than permitting modifications and sales, especially given that the court actions in the record indicated such a likely disposition. Additionally, the Board did not construe G.L. c. 184, § 23 as the roadblock to sale and development of the subject properties as suggested by the appellant. The provisions of G.L. c. 184, § 23 state in pertinent part that "[c]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes." The subject properties were not even used for charitable purposes during the relevant time periods, and the Board determined that it would consequently be doubtful for a court to prohibit the sale and development of the subject properties based upon G.L. c. 184, § 23.

Regardless of the above, the Board found and ruled that the appellant was entitled to abatements for 0 Lawrence on the Valuation Issue. The parties stipulated to the acreage of 0 Lawrence at 2.18 acres as opposed to the assessed acreage of 9.38 acres. Additionally, the Board noted that both appraisers' suggested values for 0 Lawrence were significantly lower than the assessed values and also that undevelopable property such as 0 Lawrence is not likely to deviate significantly in value over time. See **Seelig v. Assessors of Springfield**, Mass. ATB Findings of Fact and Reports 2005-153, 164-65 ("Based on his comparable sales data, even the assessors' expert suggested lowering the fiscal year 2002 and 2003 assessments by at least \$16,000 each."). Here the assessed values ranged from \$726,000 for fiscal year 2012, down to \$553,100 for fiscal year 2015. To calculate the abatements, the Board derived a per acre value based upon the opinion of the assessors' expert witness and applied it to the stipulated acreage of 2.18 acres to determine a total value of \$130,800 for each of the fiscal years at issue. Inclusive of Community Preservation Act surcharges and district taxes, the Board determined that the appellant was entitled to abatements for 0 Lawrence in the amount of \$5,638.68 for fiscal year 2012; \$5,750.71 for fiscal year 2013; \$4,907.63 for fiscal year 2014; and \$4,413.93 for fiscal year 2015. As a result, the Board issued a revised decision for the appellant in conjunction

with these findings of fact and report for Docket Nos. F317304, F319212, F322696, and F325780.

CONCLUSION

Accordingly, the Board issued a decision for the appellee for Docket Nos. F317305, F319211, F322698, F325781, F317306, F319210, F322697, and F325779, and a revised decision for the appellant for Docket Nos. F317304, F319212, F322696, and F325780, which was issued contemporaneously with these findings of fact and report.

THE APPELLATE TAX BOARD

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

A true copy,

Attest: _____
Clerk of the Board