

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

NORTHSHORE MALL LIMITED
PARTNERSHIP, et al.¹

v.

BOARD OF ASSESSORS OF
THE CITY OF PEABODY

Docket Nos.: F232041 (FY 1995)
F232983 (FY 1996)
F239757 (FY 1997)
F250715 (FY 1998)
F251468 (FY 1999)
F256141 (FY 2000)
F259632 (FY 2001)

Promulgated:
June 16, 2004

These are appeals filed under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the City of Peabody assessed under G.L. c. 59, §§ 11 and 38 for fiscal years 1995 through 2001, inclusive.

Commissioner Gorton heard these appeals. Commissioners Scharaffa, Egan, and Rose, all joined him in the decisions for the appellee.

These findings of fact and report are made pursuant to requests by both parties under G.L. c. 58A, § 13 and 831 CMR 1.32.

¹ The other appellant is the Simon Property Group.

Anthony M. Ambriano, Esq. and Robert J. Gaines, Esq. for the appellants.

John M. Lynch, Esq. and Stephen W. DeCoursey, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On January 1, 1994, 1995, 1996, 1997, 1998, 1999, and 2000, the appellants, Northshore Mall Limited Partnership ("NMLP") and Simon Property Group ("Simon"),² were the assessed owners of the property, known as the "Northshore Mall," located at 210 Andover Street or 0 Northshore Mall Road in the City of Peabody. The Northshore Mall ("Mall") is situated on approximately one hundred and ten acres of land and contains a total of 1,772,453 square feet of gross leaseable area. The Mall is a super-regional shopping center, the largest in New England.³ It is comprised of a main mall building, which contains on its main level

² In August 1999, Simon purchased the Northshore Mall from New England Development ("NED"), the then General Partner of NMLP. Accordingly, NMLP is the appellant for fiscal years 1995 through 2000, and Simon is the appellant for fiscal year 2001. They will be sometimes hereinafter referred to collectively as "appellants."

³ Quoting *Dollars and Cents of Shopping Centers-1997*, Urban Land Institute, Washington, D.C., 1997, page 3, the appellants' valuation expert, Donald P. Bouchard, defined a super-regional shopping center in his valuation report as follows:

A super-regional center offers extensive variety in general merchandise, apparel, furniture and home furnishings, as well as a variety of services and recreational facilities. It is built around three or more full-line department stores of generally not less than 100,000 square feet each. In theory, the typical size of a super-regional center is about 800,000 square feet of gross leaseable area. In practice the size ranges from 600,000 to more than 1,500,000 square feet.

numerous line shops, a food court, and various kiosks, as well as additional retail and storage space in its basement. It has five anchor stores: Lord & Taylor; Filene's; Macy's; J.C. Penney; and Sears. The Mall also contains six freestanding buildings: Barnes & Noble; Bugaboo Creek Steakhouse; Sears Auto Center; Shaw's Supermarket; Toys 'R' Us/Kids 'R' Us ("Toys/Kids 'R' Us"); and a medical office building. There are approximately 7,850 parking spaces on the site.

The subject property on appeal is located on 69.567 acres of the overall Mall site. It contains more than 1.1 million square feet of gross leaseable space⁴ and consists of the main mall building; two of the anchors -- Macy's and Sears -- and two of the freestanding buildings -- Bugaboo Creek and Toys/Kids 'R' Us -- (hereinafter referred to as "subject property" or "subject").⁵ The main mall building consists of one main level plus a basement level. Macy's and Sears contain four and three levels, respectively. The

⁴ The Bugaboo Creek building was completed and first included in the gross leaseable area as of fiscal year 1996, and the basement retail space increased from 131,785 to 146,318 square feet at that time as well. Accordingly, the gross leaseable area was 1,152,931 square feet in fiscal year 1996 but increased to 1,178,303 square feet for all of the other fiscal years.

⁵ Three of the anchor stores: Lord & Taylor, Filene's, and J.C. Penney; and four of the freestanding buildings: Barnes & Noble, Sears Auto Center, Shaw's Supermarket, and the medical office building; are separately assessed and not part of these appeals.

two freestanding buildings are tenant-owned structures on ground-leased sites.

The main mall building's basement level consists of retail stores, a dental office, storage, and the Carmelite Chapel and gift shop. In addition, a health club occupies space in both the basement and main levels. The basement is bisected by a truck tunnel, which provides access to loading docks and storage areas. Some tenants, like Sears, have external docks or rear entry doors on the main level. The Bugaboo Creek and Toys/Kids 'R' Us buildings contain approximately 10,800 and 60,550 square feet of gross building area and were built in 1994 and 1992, respectively. They both occupy their buildings pursuant to ground leases. The Toys/Kids 'R' Us building has two loading docks.

For each of the fiscal years at issue, the Board of Assessors of Peabody ("assessors") valued the subject property and assessed real estate taxes at the rates specified in the following table:

	<u>Assessed Value</u>	<u>Tax Rate Per \$1,000</u>	<u>Tax Assessed</u>
<u>FY 1995</u>	\$176,988,600	\$16.69	\$2,953,939.73
<u>FY 1996</u>	\$181,396,300	\$17.43	\$3,161,737.51
<u>FY 1997</u>	\$181,396,300	\$19.25	\$3,552,742.22
<u>FY 1998</u>	\$218,666,700	\$18.43	\$4,095,504.32
<u>FY 1999</u>	\$218,666,700	\$18.45	\$3,887,200.40
<u>FY 2000</u>	\$218,666,700	\$19.42	\$4,246,507.31
<u>FY 2001</u>	\$227,000,000	\$16.15	\$3,734,631.09

For all of the fiscal years at issue, the appellants timely paid the taxes due. The appellants also timely filed applications for abatement with the assessors and, following their denials, seasonably filed appeals with the Appellate Tax Board ("Board"). A summary of the pertinent jurisdictional information is contained in the following table.

	<u>Actual Tax Bills Mailed</u>	<u>App. for Abate. ("AA") Filed</u>	<u>AA Denied or Deemed Denied</u>	<u>Petition Filed with Board</u>
<u>FY 1995</u>	04/24/95	05/15/95	10/14/95 ⁶	11/02/95
<u>FY 1996</u>	09/28/95	10/05/95	01/05/96	03/26/96
<u>FY 1997</u>	09/26/96	10/10/96	11/07/96	01/29/97
<u>FY 1998</u>	03/26/98	04/09/98	07/09/98	09/11/98
<u>FY 1999</u>	09/30/98	10/19/98	01/19/99	03/31/99
<u>FY 2000</u>	10/04/99	11/08/99	02/08/00	05/05/00
<u>FY 2001</u>	12/28/01	01/30/01	04/30/01	05/11/01

On the basis of these facts, the Board found that it had jurisdiction over all seven of these appeals.

The appellants contested the assessments in these appeals through the testimony of, and documentary evidence submitted through, six witnesses. Robert V. Noone, the chairman of the assessors was the first witness whom the appellants called to testify. Because of his position with the assessors, the Board allowed the appellants' request to declare him a hostile witness. Following Mr. Noone,

⁶ For fiscal year 1995, the appellants and assessors signed a sixty-day written extension of time within which the assessors were to act on the application for abatement. This agreement extended the deemed-denial date commensurately.

several present or former Simon employees testified, including Cynthia Kernan, vice president of leasing for Simon; Mark D. Whiting, manager of the Mall since July 1997; and Gregory Farrington, operations manager and later assistant manager for the Mall from April 1995 through June 1999. In addition, Richard W. Latella, managing director of Cushman & Wakefield's retail industry group, a specialty practice within that firm's valuation advisory group, testified for the appellants. The appellants' primary witness was Donald P. Bouchard, a real estate valuation expert.

For their final witness in their case-in-chief, the appellants sought to call, by subpoena, the assessors' independent valuation expert, Richard J. Dennis. The Board, however, exercised its discretion by quashing the subpoena and sustaining the assessors' objection to Mr. Dennis' involuntary testimony in the appellants' case-in-chief.⁷ The Board found that Mr. Dennis had not been identified as a potential witness for the appellants on their pretrial list of potential witnesses pursuant to the

⁷ Counsel for the assessors submitted an affidavit from Mr. Dennis stating: "If I were required to appear before the [Board] to testify pursuant to the subpoena, I would not be appearing voluntarily." (emphasis in original)

Board's pretrial order in this regard.⁸ The Board also found that the appellants' failure to list Mr. Dennis as a potential witness and their subsequent attempt to subpoena his testimony in their case-in-chief, well after the commencement of the hearing, was in direct derogation of its Revised Order of October 29, 2001. The Board further found that, under the circumstances, allowing Mr. Dennis' testimony in the appellants' case-in-chief would adversely impact the Board's control over this litigation by essentially eviscerating its pretrial order. The appellants did not demonstrate that Mr. Dennis' testimony was necessary for the effective presentation of their appeals or was needed because of some exceptional circumstances. The appellants did not show that the deprivation of Mr. Dennis' testimony was somehow unfair to them, compromised their case, or was in any way unjust. The Board found that the appellants' previous presentation of two experts and numerous other witnesses, reports, documents, and additional demonstrative evidence should

⁸ The Board's Revised Order, dated October 29, 2001, ordered the parties to provide the names of the witnesses expected to be called at the hearing of these appeals, no later than fourteen days prior to the commencement of the hearing. Both parties' initial response to this order was timely provided. The appellants' updated list of potential witnesses, which also failed to identify Mr. Dennis as a potential witness, was filed five days before the commencement of the hearing and several days after the exchange of expert reports.

have been more than adequate for a proper presentation of their case-in-chief. In addition, the Board found that Mr. Dennis' testimony was not appropriate or necessary for rebuttal purposes where the appellee had not yet presented its own case.

Moreover, on the first day of the hearing of these appeals, the presiding hearing officer stated that the test that he would apply, regarding "the appropriateness of any witness testifying" in a party's case-in-chief, was the disclosure of that witness in the party's witness list submitted in accordance with the Board's pretrial order. Counsel for the appellants stated at the time: "That's fine. As long as the Board's order is mutual, I have absolutely no problem." The Board's quashing of the appellants' subpoena and sustaining the appellee's objection to Mr. Dennis testifying were consistent with the approach to which the appellants' counsel previously concurred.

The appellee, despite having identified several potential witnesses, including Mr. Dennis, in their pretrial list, offered no witnesses and rested on the assessment. Prior to the hearing on these appeals, the hearing officer took a view of the subject property and the Mall.

As the first witness to testify in the appellants' case-in-chief, Mr. Noone described the valuation methodology that the assessors used to value the subject property for assessment purposes for the fiscal years at issue, and he explained the derivation of the underlying data. For all of the relevant fiscal years, the assessors used an income capitalization methodology. According to Mr. Noone, the assessors manually calculated the subject property's value and then entered certain manually derived values into their computer software, which then produced, with some additional adjustments by the assessors, the underlying data and values for the property record cards. He also explained that some discrepancies in the square footage that the assessors used for the subject property from fiscal year 1995 to later fiscal years was probably attributable to updated and more precise measurements taken in the field by the assessors.

Ms. Kernan oversees the leasing of eighteen of Simon's New England shopping centers and has primary responsibility for leasing the Mall. She confirmed that the basement-level tenants at the Mall do not pay common area maintenance ("CAM") charges or real estate tax reimbursements, and, despite being obligated under their leases to pay percentage rents, they have not done so over

the years because their sales have not met the necessary thresholds. She characterized the basement space as undesirable to both existing and prospective tenants because of its lack of sight lines, visibility, access, and condition. For these reasons, she claimed that there has been little demand for that space.

In addition, Ms. Kernan described the main mall building as a very long one-level space, which supposedly inhibits the kind of clustering of stores that mall tenants prefer. Consequently, she said that it was sometimes necessary to offer significant monetary inducements to tenants to encourage them to lease or remain at the Mall. She also ventured that the line-tenant roster at the Mall was at all relevant times "cookie cutter" and unspectacular. Ms. Kernan further offered the unsubstantiated claim that per-square-foot sales figures for line tenants at the Mall lagged behind the Burlington and South Shore Malls, and were middling when compared to other Simon malls.

The next witness to testify for the appellants was Mr. Whiting, who had managed the Mall since July 1997, first for the Wellspark Group, which was the managing entity for NED, and later for Simon, following its acquisition of the Mall in August 1999. Mr. Whiting had

been directly responsible for essentially all of the day-to-day operations of the Mall, which also included the formulation of capital and administrative budgets. He had some additional responsibility at the Mall for temporary or specialty leasing as well as permanent leasing. During the relevant time period, the Mall's temporary leasing program consisted of renting common space to push carts and kiosks, and renting short-term vacant line-tenant space when more permanent arrangements could not be consummated. He also assisted with permanent leasing at the Mall by marketing available line space to more local potential tenants.

In his testimony, Mr. Whiting described the different portions of the basement-level space at the Mall. In one part, the space was rented to tenants who paid a reduced rent without any CAM expenses; in another part, the space was utilized for storage; in a third part, the area had been fitted for a children's play area; and, finally, in a fourth area, the space was essentially unfinished and inaccessible to the public. Mr. Whiting also detailed the drawbacks associated with the truck tunnel, which bisected the basement, and his concerns with certain roofing issues.

As part of his responsibilities as manager of the Mall, Mr. Whiting also collected sales data from tenants for analysis and reviewed and approved CAM billings. He

described CAM expenses at the Mall as including utilities, janitorial and security services, repairs and maintenance, insurance, landscaping, and real estate taxes. Mr. Whiting further testified that CAM expenses also included capital repairs, which were billed as they were incurred annually, and capital replacements, which were amortized over an appropriate period of time. Some of the costs incurred by the Mall owners, which were not reimbursed by tenants, included specialty leasing expenses, expenditures for the customer service desk, expenses paid by the landlord for tenant improvements and tenant inducements, and consulting, legal, design, and architectural fees.

The final Mall employee to testify was Mr. Farrington who worked at the Mall from April 1995 to June 1999 as its operations manager and later as its assistant manager. He left the Mall to become the manager of another Simon-owned property located a short distance away, the Liberty Tree Mall in Danvers, Massachusetts. His duties as operations manager at the Mall included developing and managing its budget. His duties as assistant manager included overseeing janitorial, maintenance, security, and customer services functions; assisting in the preparation of the budget; and supervising construction and capital projects. He testified that the main mall building's leaseable area

on the main level remained the same throughout the period that he worked there, while the tenants and the amount of leased space in the basement level changed virtually every year. The space leased in the basement ranged from 96,913 square feet as of January 1, 1994 to 139,254 square feet as of January 1, 1999.

Mr. Latella was managing director of Cushman & Wakefield's retail industry group, which was a specialty practice within the firm's valuation advisory group. It performed between one-hundred-and-fifty and two hundred appraisals of regional and super-regional malls each year. The Board qualified Mr. Latella as an expert to testify within the subject matter contained in his report. In his report and testimony, he included his analysis of anchor lease rents and offered his opinion on appropriate capitalization of income rates for the Mall.

In investigating market rents for anchor stores at what he considered comparable malls, Mr. Latella said that he interviewed real estate executives with several national department store retailers and consulted with major mall owners and developers. He also relied on Cushman & Wakefield's existing database. Mr. Latella explained that the survival of malls depends on the presence of anchor tenants. Consequently, the anchor tenants enjoy a

preferred bargaining position with mall landlords. Because of this leverage, anchor tenants are usually able to negotiate lower rents and occupancy costs compared to other mall tenants. Conversely, anchor tenants recognize the advantages of being part of an integrated retail center at a preferred and competitive location, and these benefits neutralize, at least to some extent, their leverage.

Mr. Latella also claimed that because of the ever-changing retail market, a trend existed toward smaller department and anchor stores with floor plans less than 300,000 square feet, and, in many cases, even below 250,000 square feet. He suggested that these stores prefer their total occupancy costs to fall within the range of 2.5- to 4.0-percent of sales. To help achieve this level, an anchor ordinarily will cap their CAM contributions at no more than \$1.00 per square foot or only contribute to exterior CAM.

Based on his conversations and consultations with industry professionals and his perusal of department store sales, rent, and occupancy-cost data as reported in the Urban Land Institute's *Dollars & Cents of Shopping Centers* ("Dollars & Cents") for the years 1992 through 2001, Mr. Latella opined that department store rent for the period of 1993 through 1997 was relatively stable at a

median price of \$2.71 per square foot, and then increased to \$3.67 per square foot in 2000, but subsequently decreased to \$3.07 per square foot in 2002. From 1993 through 2002, Mr. Latella deemed that the rent-to-sales ratios reported in *Dollars & Cents* were consistent and ranged from 1.52 percent to 2.29 percent. The ratio of occupancy costs to sales ranged from 2.08 percent to 2.79 percent over that same period.

Mr. Latella also averaged data from thirty-eight actual sales of shopping centers in New England and the mid-Atlantic region and from appraisals conducted by Cushman & Wakefield. Using this information, he found a rent-to-sales ratio of 2.57 percent and a total occupancy cost ratio of 3.63 percent. When he focused solely on stores averaging sales of at least \$200 per square foot, the rent-to-sales ratio narrowed to a range of 1.51 percent to 1.69 percent, and the total occupancy-cost-to-sales ratios also narrowed to a range of 2.17 to 2.30.

On the basis of these analyses, Mr. Latella stated that acceptable base rent-to-sales ratios for anchor tenants in regional malls should range from 1.5 to 2.5 percent and total occupancy-costs-to-sales ratios should range from 2.2 to 3.5 percent. He judged that poorly

performing stores usually exhibit higher expense ratios as do stores in higher-end markets where they can generate sales in excess of industry averages.

With respect to the Mall, Mr. Latella identified several functional issues that, in his view, rendered the Mall less attractive to anchor tenants, including the lack of multi-level access between the anchors and the rest of the mall. He testified that anchor tenants would assume that these functional shortcomings would manifest themselves in lower sales productivity, which would necessitate lower rents.

Mr. Latella invoked a "Mall Grading Matrix," which had been developed by Cushman & Wakefield, to correlate his findings regarding mall rents, occupancy costs, and capitalization rates to a mall grade or rank for valuation purposes. Citing the matrix, he "graded" the Northshore Mall a B-plus to A-minus mall based on: occupancy costs⁹ of 1.5 to 2.5 percent of sales for the anchors; total occupancy costs¹⁰ of 2.5 to 3.5 percent of sales for the

⁹ Occupancy costs include the base rent plus any percentage of sales that may be charged.

¹⁰ Total occupancy costs include base rent plus any applicable percentage, as well as CAM and real estate taxes.

anchors; and a capitalization rate in the 9.0 to 10.0 percent range.¹¹

During cross-examination, however, Mr. Latella acknowledged that he had omitted and misapplied certain grading criteria. He admitted that, because he had not received the information, he never graded the subject property for the occupancy percentage for small tenants, which would have placed the subject into the A-plus category for this criterion. He also conceded that he erred in another criterion by equating the Mall with the Square One Mall in Saugus.

Mr. Bouchard, whom the Board qualified as a real estate valuation expert, deemed the Mall's highest and best use, as improved, was its continued use as a super-regional mall. In evaluating the Mall for valuation purposes, he also studied the property's physical and functional condition. In so doing, he identified many areas of what he considered physical and functional obsolescence.

From the physical perspective, Mr. Bouchard asserted that the plumbing infrastructure was old and required added attention, as well as maintenance and repairs. He also noted a number of roofing problems that necessitated an

¹¹ Mr. Latella's rates were leased-fee capitalization rates, derived from sales of malls, most of whose leaseable space was already under various leasing agreement(s).

extensive maintenance program. In addition, the concrete floor beneath the Mall's main level purportedly encountered a higher degree of wear and tear because of the Mall's heavy foot traffic and the unheated truck tunnel below. Mr. Bouchard also expressed concern for the parking lots and electrical panels and Macy's façade, which experienced water migration between its façade and the structural block. Notwithstanding these concerns, Mr. Bouchard still regarded the Mall as being in fairly typical condition.

From a functional obsolescence standpoint, Mr. Bouchard echoed Ms. Kernan's testimony that the layout of the Mall was inconsistent with modern mall standards. He labeled the Macy's and Sears anchor space as obsolete in several ways. First, the size of the buildings was, in his estimation, excessive. Second, the access of the multi-level anchor buildings to the line tenants was limited to only one floor. Moreover, he attributed to the basement level a litany of disadvantages including higher utility costs, distinct security concerns, inefficient design, inferior retail space, excess and difficult-to-rent space, and aspects of super-adequacy supposedly adding unnecessary overhead to mall operations.

In addition, Mr. Bouchard offered a "ring study," supposedly to compare the Mall to other greater-Boston-area

super-regional malls located in Eastern Massachusetts and New Hampshire.¹² He described super-regional malls as "typically . . . contain[ing] approximately one million square feet and 60% of the rentable area is occupied by anchors." His analysis purportedly revealed that the subject Mall was "second-tier," below the South Shore Plaza and the Burlington and Natick Malls, because of location, access, market size, and competition from other reasonably proximate malls. Interestingly, he included the Liberty Tree Mall in this study, which resulted in lowering the subject Mall's grading, but failed to include other similarly inferior malls located near the other super-regional malls in his study. Cross-examination exposed a degree of unaccounted-for selectivity in the choice of malls for inclusion, casting doubt on the objectivity of the measure.

Mr. Bouchard also compared, using a ten-mile ring, what he considered to be some of the more relevant demographic attributes of up to eight of the super-regional malls in the greater Boston area to those of the subject

¹² Mr. Bouchard included in his list of super-regional malls: Mall of New Hampshire, Rockingham Mall, Pheasant Lane Mall, Burlington Mall, Square One Mall, CambridgeSide Galleria, Mall at Chestnut Hill, Natick Mall, South Shore Plaza, Hanover Mall, Independence Mall, Silver City Mall, Emerald Square Mall, and Solomon Pond Mall.

Mall.¹³ According to him, the Mall typically fell in the middle of the pack. The three "first-tier" malls, the South Shore Plaza and the Burlington and Natick Malls, "demonstrate[d] their success" through a sales-per-square-foot volume well in excess of "second-tier" malls like the subject Mall. Mr. Bouchard regarded sales volume as the "bottom line" in regional malls. However, he never quantified in his report the per-square-foot sales volume of the subject Mall. He also asserted that the "high CAM charges," which led to higher occupancy costs for some tenants, as well as the "unique" physical structure of the Mall, further contributed to its second-tier status.

To estimate the value of the subject property, Mr. Bouchard considered cost reproduction, sales comparison, and income capitalization techniques. He disregarded the cost approach because of the Mall's age and the concomitant difficulty in estimating appropriate levels of depreciation from all sources, as well as the lack of comparable land sales. Mr. Bouchard investigated, but did not rely on, the sales comparison approach because sales of super-regional malls invariably involve sales of leased-fee, as opposed to fee-simple, rights in the property,

¹³ These categories included, among others, population, population growth, trade area, daytime employment, various income measures, and education.

which is the standard for local property tax valuations.¹⁴ He also noted that investors in super-regional malls do not ordinarily rely extensively on either cost or sales comparison methodology.

Mr. Bouchard addressed the relevance of the August 1999 portfolio sale of the Mall for determining the subject property's fair market value. He was of the opinion that the sale should be rejected because, among other reasons, the seller allocated the sale amount to the Mall on the basis of financial and tax considerations; the parties included assets in the sale that were not part of the subject property; the consideration for the portfolio transaction was difficult, if not impossible, to quantify; and the transaction involved leased-fee rights. Mr. Bouchard said he was further dissuaded from using the sale for valuing the subject property because the parties to the sale did not prepare a single deed for the Mall property and the transaction included, among other things, a non-compete agreement and non-realty items.

¹⁴ Leased-fee sales are sales of rentable property with leases in place, which, depending on the age and terms of the lease, may not represent market rents as of the relevant valuation dates. The purchase price of such property, therefore, will be affected by the income flow from the existing leases. A fee-simple analysis assumes that the property is leased at current market rates.

In applying his income capitalization methodology, Mr. Bouchard stated that he examined the Mall's income and expense information for calendar years 1994 through 1999, recent leasing activity, industry statistics, and income and expense data from what he characterized as comparable properties to develop an estimate of potential market rents and expenses. He then removed the income and expenses attributable to Mall property not subject to these appeals and items in the operating statements that are not appropriate for real estate valuation.

To determine market rents for line, food-court, and specialty (jewelry and watch stores) tenants, as well as semi-permanent kiosk space¹⁵, Mr. Bouchard posited, based on his review of the subject's leases as well as leases from what he considered comparable malls, that market rents remained stable for the first five fiscal years at issue and then increased slightly, by two and three percent, respectively, over the next two. For line tenant rents, Mr. Bouchard claimed to have examined not only actual rents, but also rents from several other area malls, including Solomon Pond Mall, Emerald Square, and Square One in Massachusetts, and the Mall at Rockingham Park and the

¹⁵ Kiosk space also includes pushcarts.

Mall of New Hampshire in New Hampshire. He said that he performed similar analyses for food court, specialty, and kiosk space. His suggested per-square-foot rents for these categories of tenants are summarized in the following table.

<u>Assessment</u> <u>Date</u>	<u>Fiscal</u> <u>Year</u>	<u>Market Rent</u> <u>PSF</u> <u>Line</u>	<u>Market Rent</u> <u>PSF</u> <u>Food Court</u>	<u>Market Rent</u> <u>PSF</u> <u>Specialty</u>	<u>Market Rent</u> <u>PSF</u> <u>Kiosk</u>
January 1, 1994	1995	\$35.00	\$95.00	\$85.00	\$375.00
January 1, 1995	1996	\$35.00	\$95.00	\$85.00	\$375.00
January 1, 1996	1997	\$35.00	\$95.00	\$85.00	\$375.00
January 1, 1997	1998	\$35.00	\$95.00	\$85.00	\$375.00
January 1, 1998	1999	\$35.00	\$95.00	\$85.00	\$375.00
January 1, 1999	2000	\$35.70	\$96.90	\$86.70	\$382.50
January 1, 2000	2001	\$36.77	\$99.81	\$89.30	\$393.98

To determine the appropriate market rents for basement-level retail tenants, Mr. Bouchard relied almost exclusively on historical data from the subject property because he said that he could not find comparable space at any other super-regional malls. Similar to the other categories of space, he deemed that market rents remained stable for the first five fiscal years at issue and then increased slightly over the next two. A summary of the rents for basement-level space at the Mall is contained in the table below.

<u>Assessment</u> <u>Date</u>	<u>Fiscal</u> <u>Year</u>	<u>Market Rent</u> <u>PSF</u> <u>Line</u>
January 1, 1994	1995	\$15.00
January 1, 1995	1996	\$15.00
January 1, 1996	1997	\$15.00
January 1, 1997	1998	\$15.00
January 1, 1998	1999	\$15.00
January 1, 1999	2000	\$15.30
January 1, 2000	2001	\$15.76

To ascertain market rents for the two out parcels or freestanding tenants, the Toys 'R' Us/Kids 'R' Us retail building and the Bugaboo Creek Steakhouse restaurant building, Mr. Bouchard made separate determinations. For the retail building, he said that he examined leases of similarly sized freestanding buildings located at the same malls that he used for his other comparable rentals. From these sources, he gauged market rents for the two retail components of the building and then figured a weighted rent for the building as a whole. Yet again, he asserted that market rents remained stable for the first five fiscal years at issue. He then increased the rents, by two and three percent, respectively, over the next two fiscal years. A summary of his findings in this regard is contained in the table below.

<u>Assessment Date</u>	<u>Fiscal Year</u>	<u>Toys 'R' Us PSF (45,000)</u>	<u>Kids 'R' Us PSF (15,000)</u>	<u>Weighted Average PSF</u>
January 1, 1994	1995	\$10.00	\$17.00	\$11.75
January 1, 1995	1996	\$10.00	\$17.00	\$11.75
January 1, 1996	1997	\$10.00	\$17.00	\$11.75
January 1, 1997	1998	\$10.00	\$17.00	\$11.75
January 1, 1998	1999	\$10.00	\$17.00	\$11.75
January 1, 1999	2000	\$10.20	\$17.34	\$11.99
January 1, 2000	2001	\$10.51	\$17.86	\$12.34

For the Bugaboo Creek parcel, Mr. Bouchard assertedly examined rents paid at various restaurants in regional malls in the area and considered the actual lease as well. He equated the rents paid by the restaurants located within the comparison malls to the rent paid by this one located outside the mall building. A summary of the suggested rents for the Bugaboo Creek parcel is contained in the following table.

<u>Assessment Date</u>	<u>Fiscal Year</u>	<u>Market Rent PSF</u>
January 1, 1994	1995	\$30.00
January 1, 1995	1996	\$30.00
January 1, 1996	1997	\$30.00
January 1, 1997	1998	\$30.00
January 1, 1998	1999	\$30.00
January 1, 1999	2000	\$30.60
January 1, 2000	2001	\$31.52

The subject property contains two anchor stores, Macy's and Sears. To arrive at an opinion of market rent attributable to these anchors, Mr. Bouchard assertedly examined not only their leases but also leases for anchors

in other regional and super-regional malls and what he termed appropriate leases from Simon Properties' extensive database. From these leases, Mr. Bouchard selected and adjusted the rents from the properties that he deemed the most comparable in terms of market, malls, sales potential and demographics. In making his adjustments for various factors, and selecting what he considered appropriate market rents for the subject anchors, he also said that he weighed information from other sources such as interviews with shopping center managers and leasing personnel from anchor stores and data from *Dollars & Cents*. His adjusted "comparable" rentals indicated a low market rent of \$2.70 per square foot and a high of \$3.32 for the Macy's space. His adjusted "comparable" rentals indicated a low market rent of \$3.29 per square foot and a high of \$5.10 for the Sears space. He claimed that anchor rents were stable from January 1, 1994 to January 1, 1998, but by January 1, 1999, the rents had appreciated two percent, and by January 1, 2000, the rents had increased another three percent.

On this basis and his evaluation of Macy's functional obsolescence, he suggested a market rent for the Macy's space as summarized in the table below.

<u>Assessment Date</u>	<u>Fiscal Year</u>	<u>Market Rent PSF</u>
January 1, 1994	1995	\$3.25
January 1, 1995	1996	\$3.25
January 1, 1996	1997	\$3.25
January 1, 1997	1998	\$3.25
January 1, 1998	1999	\$3.25
January 1, 1999	2000	\$3.32
January 1, 2000	2001	\$3.42

Similarly, he estimated a market rent for the Sears space as summarized in the table below.

<u>Assessment Date</u> <u>oFiscal Year</u>	<u>Fiscal Year</u>	<u>Market Rent PSF</u>
January 1, 1994	1995	\$4.25
January 1, 1995	1996	\$4.25
January 1, 1996	1997	\$4.25
January 1, 1997	1998	\$4.25
January 1, 1998	1999	\$4.25
January 1, 1999	2000	\$4.34
January 1, 2000	2001	\$4.47

Mr. Bouchard next assigned the token amount of \$1.00 per square foot to the basement storage space located in the subject property. Complete summaries of his market rent opinions for the subject property for the fiscal years at issue are contained in the following tables.

Fiscal Years 1995 through 1997

<u>Space Type/Tenant</u>	<u>Area (SF)</u>	<u>1/1/1994</u>	<u>1/1/1995</u>	<u>1/1/1996</u>
Macy's	302,322	\$ 3.25	\$ 3.25	\$ 3.25
Sears	214,480	\$ 4.25	\$ 4.25	\$ 4.25
Line Tenants	339,975	\$ 35.00	\$ 35.00	\$ 35.00
Food Courts	9,242	\$ 95.00	\$ 95.00	\$ 95.00
Kiosks	780	\$ 375.00	\$ 375.00	\$ 375.00
Jewelry Stores	8,754	\$ 85.00	\$ 85.00	\$ 85.00
Basement Retail	146,318	\$ 15.00	\$ 15.00	\$ 15.00
Bugaboo Creek	10,839	\$ -	\$ 30.00	\$ 30.00
Toys/Kids 'R' Us	60,550	\$ 11.75	\$ 11.75	\$ 11.75
Storage/Warehouse	85,043	\$ 1.00	\$ 1.00	\$ 1.00
TOTAL ¹⁶	1,178,303			

Fiscal Years 1998 through 2001

<u>Space Type/Tenant</u>	<u>1/1/1997</u>	<u>1/1/1998</u>	<u>1/1/1999</u>	<u>1/1/2000</u>
Macy's	\$ 3.25	\$ 3.25	\$ 3.32	\$ 3.42
Sears	\$ 4.25	\$ 4.25	\$ 4.34	\$ 4.47
Line Tenants	\$ 35.00	\$ 35.00	\$ 35.70	\$ 36.77
Food Courts	\$ 95.00	\$ 95.00	\$ 96.90	\$ 99.81
Kiosks	\$ 375.00	\$ 375.00	\$ 382.50	\$ 393.98
Jewelry Stores	\$ 85.00	\$ 85.00	\$ 86.70	\$ 89.30
Basement Retail	\$ 15.00	\$ 15.00	\$ 15.30	\$ 15.76
Bugaboo Creek	\$ 30.00	\$ 30.00	\$ 30.60	\$ 31.52
Toys/Kids 'R' Us	\$ 11.75	\$ 11.75	\$ 11.99	\$ 12.34
Storage/Warehouse	\$ 1.00	\$ 1.00	\$ 1.02	\$ 1.05

Mr. Bouchard found that overage rental payments constituted another component of rental income for the subject property. The property's financial records revealed that the actual payments for the fiscal years at issue ranged from a low of \$0.14 per square foot to a high of \$0.82. According to published sources, such as *Dollars*

¹⁶ As of January 1, 1994, the subject property's total leaseable area was 1,152,931 square feet. The basement retail space was only 131,785, and the Bugaboo Creek space was not yet in existence. The total leaseable area increased to 1,178,303 square feet as of January 1, 1995 and thereafter when the basement retail space increased to 146,318 square feet and the Bugaboo Creek Steakhouse was completed.

& Cents, Mr. Bouchard observed that overage revenue for the fiscal years at issue generally ranged from 3.5% to 7.5% of rental revenues. Asserting, however, that this type of income is highly volatile and susceptible to various economic and other external exigencies, as well as some deficiencies in the subject property itself, he testified that an overage rent of three percent was reasonable under the circumstances.

Mr. Bouchard also identified several additional revenue sources including permanent kiosks, pushcarts, temporary leasing of inline stores, and automatic teller machine rentals. He believed that the actual revenue from these sources was high because of an aggressive marketing program and the increasing number of clauses in anchor leases and more recent inline store leases restricting the presence of pushcarts and kiosks. Based on the subject property's experience and data from other malls, Mr. Bouchard estimated this revenue as summarized in the following table.

<u>FY 1995</u>	<u>FY 1996</u>	<u>FY 1997</u>	<u>FY 1998</u>	<u>FY 1999</u>	<u>FY 2000</u>	<u>FY 2001</u>
\$650,000	\$750,000	\$800,000	\$850,000	\$900,000	\$950,000	\$950,000

The final category of revenue that Mr. Bouchard analyzed was what he termed in his report as recoveries.¹⁷ For this analysis, he reviewed the Mall's actual recovery experience along with data contained in *Dollars & Cents*. Placing greater weight on the Mall's actual experience, he used a ninety-three percent recovery rate for all of the fiscal years at issue.

For vacancy and credit loss, Mr. Bouchard claimed that he relied on the subject property's actual rates, rates published in *Dollars & Cents*, and actual occupancy rates for other malls in the area. On this basis, he selected a stabilized vacancy rate of five percent for all of the fiscal years at issue. Mr. Bouchard next compared the subject property's historic expense levels with figures in *Dollars & Cents* and expenses from other local malls. From this exercise, he ventured that while the Mall operated below industry averages on a total square footage basis, the tenants who actually paid CAM charges paid significantly higher amounts than tenants in other malls. He deemed that the subject's actual expenses constituted a reasonable indicator of market expenses. His expense

¹⁷ Mr. Bouchard defined these "recoveries" in his report as representing the tenants' "pro rata share of operating expenses and real estate taxes." In his *pro forma*, Mr. Bouchard referred to "recoveries" as "reimbursements."

categories included maintenance, utilities, security, insurance, and general and administrative (management) costs.¹⁸ These expenses are summarized in the following table.

<u>Fiscal Year</u>	<u>Maintenance</u>	<u>Utilities</u>	<u>Security</u>	<u>Insurance</u>	<u>G&A</u>
1995	\$1,900,000	\$425,000	\$425,000	\$ 95,000	5.0%
1996	\$2,000,000	\$430,000	\$450,000	\$100,000	5.0%
1997	\$2,100,000	\$440,000	\$475,000	\$105,000	5.0%
1998	\$2,200,000	\$460,000	\$500,000	\$112,500	5.0%
1999	\$2,300,000	\$475,000	\$525,000	\$125,000	5.0%
2000	\$2,400,000	\$480,000	\$525,000	\$125,000	5.0%
2001	\$2,400,000	\$492,000	\$543,250	\$128,125	5.0%

Mr. Bouchard also addressed the establishment of several reserve accounts to fund the replacement of structural items, certain tenant improvements (including improvements to anchors that were part of the Mall but not part of the subject property on appeal), and brokerage commissions. His general reserve account addressed the repair or replacement of structural items such as the roof, parking lot, and HVAC system. His common area reserves were for deferred maintenance items and general upgrades to common area space. His tenant improvement reserves were for tenant finish incentives, while his non-subject anchor reserves were for anchor properties that were not part of

¹⁸ Mr. Bouchard concluded that, under the circumstances, neither advertising and promotion expenses, which he considered pass-through costs, nor other or miscellaneous expenses, which he believed were essentially negligible, should be included as operating expenses in his income capitalization methodology.

the subject property but, according to Mr. Bouchard, nonetheless supported it by their presence in the Mall facility. Mr. Bouchard did not include a reserve for leasing commissions because leasing at the subject property was handled in house and, therefore, was already subsumed in management expenses. The following table summarizes his suggested non-operating costs.

<u>Category</u>	<u>Cost/Sq. Ft.</u>	<u>Cost/Year</u>
General Reserves	\$0.50	\$ 589,152
Common Area Reserves	\$0.29	\$ 337,713
Tenant Improvement Reserves	\$1.00	\$ 1,178,303
Non Subject Anchor Reserves	\$0.07	\$ 78,008
Leasing Commissions	\$0.00	\$ 0.00

Mr. Bouchard's final choice of capitalization rates followed a process that purportedly included the use of market surveys, interviews, and mathematical calculations. Mr. Bouchard considered the data contained in publications typically relied upon by investors, analysts, and appraisers, such as the *Korpacz Real Estate Investor Survey* and *Emerging Trends*. These reports were said to indicate that capitalization rates for regional malls were lowest in the early 1990s and almost uniformly increased thereafter. Mr. Bouchard blamed the increasing rates on sluggish sales and rental growth in the industry and increased competition. Information obtained from discussions with Mr. Korpacz, his interview with Mr. Latella, and the data

contained in Cushman & Wakefield's mall sales database provided to Mr. Bouchard by Mr. Latella were also invoked to support these conclusions. Mr. Bouchard also argued that the subject property was not comparable to class A malls but was, rather, a lower grade of investment. Mr. Bouchard recognized that information contained in the industry publications and database resulted from leased-fee as opposed to fee-simple sales and, therefore, necessitated some unspecified adjustment. He nonetheless claimed that the data were useful as a starting point for identifying the general level of capitalization rates and to highlight the trend in the marketplace.

Mr. Bouchard also invoked various mathematical models known as the Band of Investment, Mortgage Equity, and DCR (debt-coverage-ratio) methodology. His report, however, is devoid of any actual calculations in this regard; it contains only empty formulae. He observed that when lower loan interest rates are used in these methodologies, lower capitalization rates usually result. However, in situations like the present appeals, capitalization rates purportedly increase in the face of lower interest rates when accompanied by lower expectations of future benefits, such as flat sales and rents. Mr. Bouchard noted the inconsistency of declining long-term commercial interest

rates and rates on ten-year Treasury securities during the fiscal years at issue with increasing capitalization rates. He assumed, however, that the cost of debt did not decline enough to offset the higher returns sought by investors because of a perception of increased risk.

The following table summarizes Mr. Bouchard's reconciliation of these various sources of data to realize a capitalization rate for each of the fiscal years at issue.

<u>Assessment Date</u>	<u>Fiscal Year</u>	<u>Capitalization Rate</u>
January 1, 1994	1995	9.25%
January 1, 1995	1996	9.50%
January 1, 1996	1997	9.75%
January 1, 1997	1998	9.75%
January 1, 1998	1999	10.00%
January 1, 1999	2000	10.00%
January 1, 2000	2001	10.00%

Finally, Mr. Bouchard considered the concept of business enterprise value (BEV) and its application to super-regional malls generally and the subject property in particular. After a review of current appraisal texts and literature on the subject, he settled on a combination of six factors in large, complex enterprises, such as a super-regional mall, that, in his mind, supported a business or intangible value. His six factors are: operating agreements; mall image, reputation and customer base; established trade name and reputation of anchors; the "agglomeration economics" created by the assemblage of the

anchor tenants and brand-name line tenants; trademarks; and advertising and promotional activities unique to the mall. Mr. Bouchard ventured that the interplay of these factors creates an overall going concern of substantial complexity that includes both real estate and business enterprise value such that the going concern should be valued with these two factors in mind.¹⁹

To estimate the value of the subject property's BEV, Mr. Bouchard suggested two valuation methods. In his first method, he purported to isolate revenues from the property that did not flow directly from the real estate, but, in his view, were attributable to the mall business. He tagged percentage rent receipts and specialty leasing revenues as the income that was generated from the mall business as opposed to the real estate. Mr. Bouchard then capitalized that revenue by fifteen percent to estimate the BEV. Using this methodology, his BEV ranged from \$7,699,000 to \$9,997,000 for the fiscal years at issue, averaging 5.19% of his overall going concern value.

¹⁹ "A going concern is an established and operating business with an indefinite future life. For certain types of property . . . , the physical real estate assets are integral parts of an ongoing business. The market value of such a property . . . is commonly called its *going-concern value*." APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE at 27 (12th ed., 2001).

Mr. Bouchard's second proposed methodology applied a fifteen percent capitalization rate to a management fee of five percent of total revenues in an attempt to capture that portion of the total shopping center value represented by the business enterprise. He compared this approach with one used for other types of real estate such as hotels and nursing homes. Using this methodology, his BEV ranged from \$7,404,210 to \$8,260,335 for the fiscal years at issue, or averaged 4.47% of his overall going concern value. In his final analysis of BEV, Mr. Bouchard selected a stabilized five-percent deduction to the going concern value, which was the approximate seven-year average of his two approaches for determining BEV, as best representing, in his opinion, the BEV for the subject property for the fiscal years at issue.

The following tables, labeled A, B, and C, summarize the income capitalization methodology that Mr. Bouchard employed to estimate the value of the subject property for fiscal years 1995 through 1997, fiscal years 1998 and 1999, and fiscal years 2000 and 2001, respectively.

Table A

		<u>Fiscal Year</u> <u>1995</u>	<u>Fiscal Year</u> <u>1996</u>	<u>Fiscal Year</u> <u>1997</u>
Revenue				
Anchors:				
Macy's	3.25	982,547	982,547	982,547
Sears	4.25	911,540	911,540	911,540
Subtotal		1,894,087	1,894,087	1,894,087
Main Floor:				
Line Tenants	35.00	11,899,125	11,899,125	11,899,125
Food Courts	95.00	877,990	877,990	877,990
Kiosks	375.00	292,500	292,500	292,500
Jewelry Stores	85.00	744,090	744,090	744,090
Subtotal		13,813,705	13,813,705	13,813,705
Other Space:				
Basement Retail	15.00	1,976,775	2,194,770	2,194,770
Bugaboo	30.00	-	325,170	325,170
Toys/Kids 'R' Us	11.75	711,463	711,463	711,463
Storage/Warehouse	1.00	85,043	85,043	85,043
Subtotal		2,773,281	3,316,446	3,316,446
Gross Leaseable Area		1,152,931	1,178,303	1,178,303
Total Base Rent		18,481,072	19,024,237	19,024,237
Percentage Rent	3.00%	554,432	570,727	570,727
Specialty/Misc/ATM		650,000	750,000	800,000
Total Property Revenues		19,685,504	20,344,964	20,394,964
Vacancy	5.00%	984,275	1,017,248	1,019,748
Effect Rental Revenue		18,701,229	19,327,716	19,375,216
Reimbursements	93%	3,561,226	3,717,441	3,849,966
Effect Gross Revenue		22,262,455	23,045,157	23,225,182
Expenses				
Operating Expenses		3,829,275	3,997,248	4,139,748
General Reserves	0.50	576,466	589,152	589,152
Common Area Reserves	0.29	337,713	337,713	337,713
Tenant Improvements	1.00	1,152,931	1,178,303	1,178,303
Non Subj Anchor Res	0.07	78,008	78,008	78,008
Total Expenses		5,974,393	6,180,424	6,322,924
Net Operating Income		16,288,062	16,864,733	16,902,258
Overall Cap Rate		9.25%	9.50%	9.75%
Capitalized Value		176,087,161	177,523,507	173,356,494
Less BEV Allocation	5.00%	8,804,358	8,876,175	8,667,825
Indicated FCV		167,282,803	168,647,332	164,688,670
Rounded		167,300,000	168,600,000	164,700,000

Table B

		<u>Fiscal Year</u> <u>1998</u>	<u>Fiscal Year</u> <u>1999</u>
Revenue			
Anchors:			
Macy's	3.25	982,547	982,547
Sears	4.25	911,540	911,540
Subtotal		1,894,087	1,894,087
Main Floor:			
Line Tenants	35.00	11,899,125	11,899,125
Food Courts	95.00	877,990	877,990
Kiosks	375.00	292,500	292,500
Jewelry Stores	85.00	744,090	744,090
Subtotal		13,813,705	13,813,705
Other Space:			
Basement Retail	15.00	2,194,770	2,194,770
Bugaboo	30.00	325,170	325,170
Toys/Kids 'R' Us	11.75	711,463	711,463
Storage/Warehouse	1.00	85,043	85,043
Subtotal		3,316,446	3,316,446
Gross Leaseable Area		1,178,303	1,178,303
Total Base Rent		19,024,237	19,024,237
Percentage Rent	3.00%	570,727	570,727
Specialty/Misc/ATM		850,000	900,000
Total Property Revenues		20,444,964	20,494,964
Vacancy	5.00%	1,022,248	1,024,748
Effect Rental Revenue		19,422,716	19,470,216
Reimbursements	93%	3,994,116	4,133,616
Effect Gross Revenue		23,416,832	23,603,832
Expenses			
Operating Expenses		4,294,748	4,444,748
General Reserves	0.50	589,152	589,152
Common Area Reserves	0.29	337,713	337,713
Tenant Improvements	1.00	1,178,303	1,178,303
Non Subj Anchor Res	0.07	78,008	78,008
Total Expenses		6,477,924	6,627,924
Net Operating Income		16,938,908	16,975,908
Overall Cap Rate		9.75%	10.00%
Capitalized Value		173,732,392	169,759,082
Less BEV Allocation	5.00%	8,686,620	8,487,954
Indicated FCV		165,045,772	161,271,128
Rounded		165,000,000	161,300,000

Table C

		<u>Fiscal Year</u> <u>2000</u>		<u>Fiscal Year</u> <u>2001</u>
Revenue				
Anchors:				
Macy's	3.32	1,003,709	3.42	1,033,941
Sears	4.34	930,843	4.47	958,726
Subtotal		1,934,552		1,992,667
Main Floor:				
Line Tenants	35.70	12,137,108	36.77	12,501,221
Food Courts	96.90	895,550	99.81	922,416
Kiosks	382.50	298,350	393.98	307,301
Jewelry Stores	86.70	758,972	89.30	781,741
Subtotal		14,089,979		14,512,678
Other Space:				
Basement Retail	15.30	2,238,665	15.76	2,305,825
Bugaboo	30.60	331,673	31.52	341,624
Toys/Kids 'R' Us	11.99	725,692	12.34	747,463
Storage/Warehouse	1.02	86,744	1.05	89,346
Subtotal		3,382,774		3,484,258
Gross Leaseable Area		1,178,303		1,178,303
Total Base Rent		19,407,306		19,989,603
Percentage Rent	3.00%	582,219	3.00%	599,688
Specialty/Misc/ATM		950,000		950,000
Total Property Revenues		20,939,525		21,539,291
Vacancy	5.00%	1,046,976	5.00%	1,076,965
Effect Rental Revenue		19,892,549		20,462,326
Reimbursements	93%	4,261,238	93%	4,371,316
Effect Gross Revenue		24,153,787		24,833,642
Expenses				
Operating Expenses		4,581,976		4,700,340
General Reserves	0.50	589,152	0.50	589,152
Common Area Reserves	0.29	337,713	0.29	337,713
Tenant Improvements	1.00	1,178,303	1.00	1,178,303
Non Subj Anchor Res	0.07	78,008	0.07	78,008
Total Expenses		6,687,143		6,883,515
Net Operating Income		17,466,643		17,950,127
Overall Cap Rate		10.00%		10.00%
Capitalized Value		174,666,431		179,501,274
Less BEV Allocation	5.00%	8,733,322	5.00%	8,975,064
Indicated FCV		165,933,110		170,526,210
Rounded		165,900,000		170,500,000

The following table contains his final estimates of value both with and without BEV deducted for the fiscal years at issue.

<u>Fiscal Year</u>	<u>Assessed Value</u>	<u>Value Without BEV Deducted</u>	<u>Over-Valuation</u>	<u>Value With BEV Deducted</u>	<u>Over-Valuation</u>
1995	\$179,988,600	\$176,087,161	\$3,901,439	\$167,300,000	\$12,688,600
1996	\$181,396,300	\$177,523,507	\$3,872,793	\$168,600,000	\$12,796,300
1997	\$181,396,300	\$173,356,494	\$8,039,806	\$164,700,000	\$16,696,300
1998	\$218,666,700	\$173,732,392	\$44,934,308	\$165,000,000	\$53,666,700
1999	\$218,666,700	\$169,759,082	\$48,907,618	\$161,300,000	\$57,366,700
2000	\$218,666,700	\$174,666,431	\$44,000,269	\$165,900,000	\$52,766,700
2001	\$227,000,000	\$179,501,274	\$47,498,726	\$170,500,000	\$56,500,000

On the basis of all of the evidence, the Board found that the appellants failed to prove that the subject property was overvalued for the fiscal years at issue. The Board found that the appellants failed to expose sufficient flaws or errors in the assessors' valuation methodology to show that the subject property was overvalued. As detailed below, the Board also found that the income capitalization approach used by the appellants' valuation expert, Mr. Bouchard, was flawed in several important respects. By relying upon and incorporating faulty data and assumptions into his analysis, his methodology produced unreliable values. Mr. Bouchard's reliance on data and assumptions, which, in some instances, appeared contrived, also led to doubts about his credibility before the Board. The Board further found that, from the record, it could not discern if the subject property's fair cash value for the fiscal

years at issue should be lower than the assessed values. Accordingly, the Board upheld the validity of the assessments.

In rendering these ultimate findings, the Board first found that the assessors' methodology for valuing the subject property for assessment purposes did not rely on incorrect square footage measurements on the property record cards as suggested by the appellants. Rather, the assessors' methodology started with a value and then backed into these and other figures.²⁰ Under the circumstances, the errors on the property record cards did not prove that the subject property was overvalued because the assessors did not rely on these incorrect figures in their methodology for valuing the subject property.

The Board agreed with Mr. Bouchard's decisions not to use cost reproduction or sales comparison approaches to estimate the value of the subject property, but to instead rely on income capitalization methodology. The Board was also persuaded to attach little weight to the actual sale of the property for purposes of estimating the value of the subject. The Board further concurred with Mr. Bouchard's

²⁰ While the Board was not enamored with the assessors' methodology for estimating the value of the subject property for assessment purposes, it nonetheless found that the errors on the property record cards did not rise to the level of demonstrating that the property was overvalued.

finding that the highest and best use of the subject property was its continued use as part of the Mall.

The Board next found that Mr. Bouchard's income capitalization methodology was unreliable because: (1) his selections of rents for determining the subject property's income were flawed in several important respects; (2) his stabilized vacancy rate was inflated; (3) his deductions for general reserves for replacement and non-subject anchor reserves were inappropriate under the circumstances; and (4) his choices of capitalization rates were overstated. Because the Board found that Mr. Bouchard's income capitalization methodology was flawed, so as to render his values artificially low and unreliable, and that the record did not otherwise demonstrate overvaluation, the Board did not pass on the appropriateness of Mr. Bouchard's deduction for BEV.

(1)

With respect to the rents that Mr. Bouchard used in his income capitalization approach, the Board found that his selection of \$3.25 as the fair market rent for the Macy's anchor space was in error. In his anchor lease analysis, Mr. Bouchard eliminated leases on the higher end of the range without adequate explanation, made inconsistent adjustments to others, and included some

leases from malls that were not comparable to the subject Mall and were located in distant areas, such as Pennsylvania. He also erred by incorrectly stating the amount of rent charged per square foot in one other lease and by essentially ignoring the 1992 amendment to the existing Macy's lease at the subject property, which called for a rent of \$4.02 per square foot for all of the fiscal years at issue through January 2003 when the rent would increase by five percent to \$4.22. Moreover, under this existing lease, Macy's presently pays CAM and tax reimbursements, which Mr. Bouchard understated by over \$450,000. Interestingly, despite appellants' witnesses' testimony about the various inadequacies associated with the Macy's space and the "weakness" of the retail market in the mid-1990s, Macy's retail sales volume at the Mall grew considerably over the fiscal years at issue. Under the circumstances, the Board found that Mr. Bouchard's omissions and faulty assumptions resulted in an artificially depressed rental figure for the Macy's space in his income capitalization methodology for the fiscal years at issue.

In addition, the Board found that the rents that Mr. Bouchard selected for line, food court, kiosk, and jewelry space were unnecessarily depressed. His choice of

rents was skewed toward malls, like the Square One and Solomon Pond Malls, which were inferior to the subject Mall in many respects and to malls, again like the Square One Mall, that are better categorized as regional malls, as opposed to super-regional malls, like the subject. In his study, Mr. Bouchard ignored or eliminated other super-regional malls in Massachusetts, including the Natick and Burlington Malls and the South Shore Plaza, that, in the Board's view, were more comparable to the Mall in terms of either size, location, sales, demographics, or the number and quality of anchor stores, and could have provided better underlying income data to more credibly support his income capitalization methodology. In other words, his selection of primarily non-comparable mall properties from which he derived these types of tenant rents resulted in rental and income data that was lower than appropriate, thereby compromising his methodology and the values derived from it.

With respect to income from kiosk rentals, the Board noted that the Mall's actual experience suggested significantly higher rents than those chosen by Mr. Bouchard for the last three fiscal years at issue in particular. Moreover, the Mall's history of increasing the number of kiosks since Simon's purchase of the property

suggested that their number would not diminish, as Mr. Bouchard asserted, and that the income derived from them would not be reduced.

In addition, the Board found that Mr. Bouchard's selection of a rate of three percent for overage revenues was considerably below the subject property's actual amounts and even the industry range of 3.5 to seven percent, which he stated was "not dissimilar" to the subject property's historical figures in this regard. Once again, the Board found that Mr. Bouchard's selection of the amount of income to use in his income capitalization methodology was unjustifiably lower than the amount of income suggested by an objective reading of the data.

(2)

With respect to the stabilized vacancy rate that Mr. Bouchard used in his income capitalization methodology, the Board found that, on a stabilized basis, it should have been lower than the five-percent rate that he chose because he failed to properly consider the actual vacancy rates associated with the subject property for the fiscal years at issue. In his analysis of the subject property's actual vacancy rates, Mr. Bouchard neglected to consider the vacancy rates associated with the anchor and freestanding buildings, which constitute approximately fifty percent of

the subject property's leaseable area (excluding storage space). This failure led to an inflated view of the subject property's actual vacancy rates for the fiscal years at issue and necessarily resulted in a flawed vacancy-rate analysis. For fiscal years 1997 through 2001, the actual vacancy rates at the subject property were 2.2%, 4.9%, 3.3%, 1.6%, and 0.6% respectively, significantly lower than Mr. Bouchard's stabilized rate. Because of Mr. Bouchard's failure to properly consider these figures, the Board found that the five-percent stabilized vacancy rate that he selected for all of the fiscal years at issue was excessive.

(3)

The Board also found that Mr. Bouchard's deductions for general reserves for replacement and non-subject anchor reserves were inappropriate under the circumstances. With respect to his general reserves for replacement, Mr. Bouchard suggested a deduction of \$0.50 per square foot to cover the costs associated with "capital improvements such as roof, parking lot, and HVAC replacements." The rub here is that the tenants, not the owner, pay these costs. The testimony of Mr. Whiting, the Mall manager, verifies that the roof and parking lot repairs and replacements are billed to and paid for by the tenants, and HVAC and other

common area costs, such as signage, elevators, escalators, and food court furniture are also the responsibility of the tenants. Terms contained in the standard lease form used at the Mall further substantiate this arrangement. Because these expenditures are capital expenses, it is not appropriate to include them otherwise in the subject property's operating expenses and income. Consequently, the Board found that, since the appellants did not pay, and the subject property was not burdened by, these capital costs, Mr. Bouchard should not have included them as deductions in his income capitalization methodology.

Mr. Bouchard also incorporated into his income capitalization methodology a category of reserve termed "non subject anchor reserve." This reserve is, in essence, a deduction for tenant improvements for anchor stores, which are not part of the subject property. His rationale for including this deduction in his methodology is that the subject property "is heavily influenced by the presence of these anchors . . . [and] it is prudent in our view to plan on the likelihood of an owner having to contribute to periodic renovation costs in the way of tenant improvement allowances." The Board found that Mr. Bouchard should not have included this deduction in his methodology where he did not also include in income the CAM charges paid by

these anchors. Quite simply, where Mr. Bouchard does not consider the income benefits derived from these non-subject anchors, he should not include the cost burdens in the form of this deduction.²¹

(4)

Lastly, the Board found that the capitalization rates used by Mr. Bouchard in his income capitalization methodology were excessive. The primary source for the underlying data upon which Mr. Bouchard relied for these rates was a report entitled, "Regional Mall Sales Transaction Trends," which the Mall owner, Simon, had obtained from Cushman & Wakefield, the firm for which Mr. Latella worked. This report summarized, in table form, information regarding mall sales from 1988 through 2000. Mr. Bouchard focused on 217 sales from 1994 through 2000.²²

The Board found that this table included sales of many malls that were not super-regional malls, or even larger regional malls, and, therefore, those properties were not comparable to the subject Mall. Mr. Bouchard acknowledged

²¹ Had Mr. Bouchard valued the Mall property as a whole and then deducted the value of the non-subject property, he might have better approximated and considered his apparent concern here.

²² The Board noted that where the fiscal years at issue here are 1995 through 2001, with the pertinent assessment dates being January 1st of the preceding year, beginning with January 1, 1994, Mr. Bouchard might have been better served by examining sales from calendar years 1993 to 2000, which would have lowered the capitalization-rate data upon which he relied thereby suggesting lower capitalization rates.

that the mall sales contained in the table represented sales of varying types and sizes. Forty-two of the sales contained within the table were for properties that sold for less than \$30 million, with an average capitalization rate of 10.73%. The average mall shop per-square-foot sales for these properties were well below the subject property's sales. By assigning to these transactions weight equal to the other more comparable properties, Mr. Bouchard improperly inflated the capitalization rates that he selected for inclusion in his income capitalization methodology. The table also improperly included ten portfolio sales, notwithstanding Mr. Bouchard's initial assurances to the contrary.

Twenty-three of the sales contained in the table were for prices between \$150 million and \$300 million, the approximate value of Mr. Bouchard's estimate on the low end and of the actual sale price attributed to the Mall at the high end, with the assessments in the middle. The range of capitalization rates from these sales of more comparably valued properties was 7.41% to 8.09%. The average sales per square foot of the line tenants within these twenty-three malls closely approximated the 2000 calendar-year sales of the line tenants (excluding the health club) in the subject property. The Silver City Galleria in Taunton

and the Natick Mall were included in these twenty-three mall sales. The capitalization rates associated with their sales in 1995 were 8.31% and 8.04%, respectively. On this basis, the Board, while recognizing some of these properties' incongruities, found that, at least in a general way, these sales were the more comparable ones for Mr. Bouchard to use to estimate the most appropriate capitalization rates for use in his income capitalization methodology. His failure to focus on these sales and his inclination to include sales of properties that were not comparable to the Mall and were part of portfolio transactions, without any weighting, rendered his analysis flawed.

Finally, the Board found that the Mall's operating performance during the fiscal years at issue placed it more within the "A" than the "B+" or "A-" classification as originally suggested by Mr. Latella and Mr. Bouchard. Using the Korpacz grading criteria contained in Mr. Bouchard's report, the range of capitalization rates reported for "A" malls for the fourth quarter of 1997 and the second quarter of 1999 are between seven and nine percent with averages of 8.15% and 7.85%, respectively. These figures contrast with the 9.25% to ten-percent capitalization rates that Mr. Bouchard selected for use in

his income capitalization methodology, even considering adjustments for leased-fee versus fee-simple rates.

In summary, and on the basis of these subsidiary findings, the Board found that the errors contained on the property record cards relating to the subject property did not significantly impact the assessors' methodology for valuing the subject property for assessment purposes for the fiscal years at issue and did not show that the subject property was overvalued. In addition, and on the basis of the foregoing subsidiary findings, the Board found that Mr. Bouchard's income capitalization methodology was unreliable because: (1) his selections of rents for determining the subject property's income were flawed in several important respects; (2) his stabilized vacancy rate was inflated; (3) his deductions for general reserves for replacement and non-subject anchor reserves were inappropriate under the circumstances; and (4) his choices of capitalization rates were overstated.

On this basis, the Board ultimately found that the appellants failed to prove that the subject property was overvalued for the fiscal years at issue. The Board further found that, from the record, it could not discern if the subject property's fair cash value for the fiscal years at issue should be lower than the assessed values.

Accordingly, the Board upheld the validity of the assessments and decided these appeals for the appellee.

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). Accordingly, fair cash value means its fair market value. ***Id.***

"Prior to valuing the subject property, its 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***, 2000 A.T.B. Adv. Sh. 859, 874 (Docket Nos. 202135 and 205673, October 19, 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.**, 2000 A.T.B. Adv. Sh. at 875. In the present appeals, the appellants' valuation expert determined that the continuation of the subject property's existing use as part of a super-regional commercial shopping center constituted its highest and best use. The assessors did not challenge this determination. On the basis of this as well as other evidence, the Board found and ruled that the subject property's highest and best use was its continued existing use.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization, sales comparison, and cost reproductions. See **Correia v. New Bedford Redevelopment Authority**, 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), but the income capitalization method "is frequently applied with respect to income-producing property such as [a] shopping mall." **Taunton Redev.**

Assocs. v. Assessors of Taunton, 393 Mass. 293, 295 (1984). Use of the income capitalization method is appropriate when reliable market sales data are not available. **Assessors of Weymouth v. Tammy Brook Co.**, 368 Mass. 810, 811 (1975); **Assessors of Lynnfield v. New England Oyster House**, 362 Mass. 696, 701-702 (1972); **Assessors of Quincy v. Boston Consolidated Gas Co.**, 309 Mass. 60, 67 (1941).

In the present appeals, the appellants' valuation expert, Mr. Bouchard, considered the August 1999 sale of the Mall for \$266 million, but did not rely on it to value the subject property.²³ He believed that the sale price was an unreliable gauge of the market value of the subject property for the fiscal years at issue. This opinion was based on the facts that the sale of the Mall was part of a portfolio sale which included a number of other leased-fee mall properties; the sale price recited for the Mall was apparently a one-sided accounting allocation; the overall consideration for the portfolio transaction was difficult, if not impossible, to quantify; and the sale of the subject property was an undelineated part of the sale of the Mall as a whole. See **New Boston Garden Corp. v. Assessors of**

²³ The appellants sought to strike from the record the documents relating to this sale because of their purported incompetence and irrelevance. The Board denied the appellants' request because it found that these documents were competent and relevant to the proceedings and issues at hand.

Boston, 383 Mass. 456, 469 (1981); *Jordan Marsh Co. v. Assessors of Malden*, 359 Mass. 106, 108 (1971). The assessors did not offer any expert valuation or lay testimony in this regard. While a sale of real estate is presumptively at arm's-length, *Epstein v. Boston Housing Authority*, 317 Mass. 297, 301 (1944), "the burden of proof that the price was fixed by fair bargaining or bidding, and not by some form of compulsion preventing the normal operation of the self interest of buyer and seller, is on the party offering the price." *145 Sumner Avenue, L.P. v. Assessors of Springfield*, 1999 A.T.B. Adv. Sh. 500, 510-11 (Docket No. F249563, October 19, 1999) and *FP Dev., Inc. v. Assessors of Springfield*, 1999 A.T.B. Adv. Sh. 383, 389 (Docket No. F249561, August 30, 1999) (both quoting *Epstein* at 300). The sales price recited on the deed is not conclusive evidence of fair cash value. *Foxboro Associates v. Assessors of Foxborough*, 385 Mass. 679, 682-83 (1982) (rejecting sale price recited in deed where "unilaterally determined by the seller" and not the result of arm's-length negotiation between seller and buyer). Under the circumstances here, the Board accorded little weight to the August 1999 portfolio sale of the Mall. While the Board did not entirely reject the allocated sales price, the Board recognized that the portfolio sale did not provide a

reliable basis for showing that the subject property was appropriately assessed for the fiscal years at issue or for establishing its fair market value.

"[T]he introduction of evidence concerning value based on [cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods." **Correia**, 375 Mass. at 362. The appellants' valuation expert did not use a cost approach here because the age of various parts of the subject property rendered reproduction costs and depreciation estimates speculative and because buyers of this type of property would not ordinarily rely on the cost approach to ascertain market value. The Board agreed with Mr. Bouchard and found and ruled that the cost approach was not an appropriate technique to use to value the subject property for the fiscal years at issue.

The income capitalization method is appropriate for valuing a commercial income-producing shopping center. See, e.g., **Alstores Realty Corporation v. Assessors of Peabody**, 391 Mass. 60 (1984); **Three Shopping Center Assoc. v. Assessors of Swansea**, 2003 A.T.B. Adv. Sh. 213 (Docket No. F254381 and companion appeals, June 6, 2003); **Lilarn Properties Corp. v. Assessors of North Adams**, 1998 A.T.B. Adv. Sh. 474 (Docket No. F225861, May 5, 1998); **Fragar v.**

Assessors of Everett, 1985 A.T.B. Adv. Sh. 133 (Docket No. 109726 and companion appeals, June 21, 1985); **Kimco of New England, Inc. v. Assessors of Leominster**, 1985 A.T.B. Adv. Sh. 11 (Docket Nos. 126636 and 127693, January 11, 1985). The appellants' valuation expert relied on an income capitalization methodology to estimate the value of the subject property. The Board found and ruled that an income capitalization methodology was the most appropriate approach for estimating the value of the subject property for the fiscal years at issue. Under this approach, the property's capacity to generate income over a one-year period is analyzed and converted into an indication of fair cash value by capitalizing the income at a rate determined to be appropriate for the investment risk involved. **Olympia & York State Street Co. v. Assessors of Boston**, 428 Mass. 236, 239 (1998). Net operating income is obtained by subtracting expenses from gross income. **Assessors of Brookline v. Buehler**, 396 Mass. 520, 523 (1986). The capitalization rate should reflect the return on investment necessary to attract investment capital. **Taunton Redevelopment Associates**, 393 Mass. at 295.

In the present appeals, the Board found that Mr. Bouchard's selection of rents was flawed in several important respects. First, with respect to his selection

of rents for the Macy's anchor space, the Board found that his omissions and arbitrary assumptions resulted in artificially depressed rental figures. With respect to his rents for line, food court, kiosk, and jewelry space, the Board found that his choice of rents was more appropriate for malls that were inferior to the subject Mall. Furthermore, with respect to overage revenues, the Board found that Mr. Bouchard's selection of a rate of only three percent was considerably below the actual figures and was even lower than the reported industry range. In drawing these conclusions with respect to rentals, the Board considered the buildings' physical limitations and the shopping center's location and surroundings. The Board also noted that "[t]he use of actual rents is an acceptable method of valuation as long as they adequately reflect earning capacity . . . [and relate] to market rental value." *Pepsi-Cola Bottling Co.*, 397 Mass. at 451 (citations omitted).

With respect to the stabilized vacancy rate that Mr. Bouchard chose to use in his income capitalization methodology, the Board found that it was higher than appropriate primarily because he neglected to consider the vacancy rates associated with the anchor spaces and freestanding buildings when he analyzed the subject

property's historical vacancy rates. Accordingly, the Board ruled that, under the circumstances, his selection of a stabilized vacancy rate was higher than appropriate.

With respect to his deductions for general reserves for replacement and non-subject anchor reserves, the Board found that they were altogether inappropriate. His general reserves category included costs that the tenants, not the property owner, paid. It did not appear that Mr. Bouchard considered the tenants' payments in this regard in his income analysis. Accordingly, the Board found and ruled that he should not have included this category of deduction in his income capitalization methodology. His non-subject reserve category included costs associated with anchor properties that were not even part of the subject property. The Board found and ruled that where he did not include the CAM charges paid by these anchors in his methodology, he should not have included this category of deduction. "The issue of what expenses may be considered in any particular piece of property is for the board." ***Alstores Realty Corp.***, 391 Mass. at 65.

Lastly, the Board found that the capitalization rates that Mr. Bouchard used in his income capitalization methodology were excessive for a variety of reasons. Most importantly, the data upon which he relied included many

mall properties that were inferior to the subject Mall. He neither excluded nor adjusted these properties for obvious differences, and he did not use weighted capitalization rates. Moreover, he never demonstrated to the Board exactly how he utilized certain mathematical models upon which he supposedly relied, and he never shared the underlying data or his assumptions that would be necessary for performing the requisite calculations. The Board also noted that Mr. Bouchard did not use a tax factor to offset the reimbursements for real estate taxes included in the income portion of his methodology.²⁴ See **Alstores Realty Corp.**, 391 Mass. at 69-70; **Irving Sanders Trust**, 26 Mass. App. Ct. at 846; **Three Centers Shopping Centers**, 203 A.T.B. Adv. Sh. at 246.

The mere qualification of a person as an expert does not endow his testimony with any determinative weight. **Boston Gas Co.**, 334 Mass. at 579. "The board [is] not required to believe the testimony of any particular witness." **Boston Consolidated Gas Co.**, 309 Mass. at 72. See also **North American Philips Lighting Corp. v. Assessors**

²⁴ Mr. Bouchard included in the income side of his income capitalization methodology a category entitled tenant "reimbursements." According to his report, this category includes tenants' "pro rata share of operating expenses and real estate taxes." Curiously, he did not use a tax factor with his overall capitalization rate to offset this income when its inclusion would have further lowered his estimate of the subject property's value.

of Lynn, 392 Mass. 296, 300 (1984); *New Boston Garden Corp.*, 383 Mass. at 473; *Jordan Marsh Co.*, 359 Mass. at 110. In these appeals, the Board found and ruled that Mr. Bouchard's methodology was so replete with errors that it was unreliable and essentially without merit.

The Board controls the conduct of the adjudicatory proceeding before it. See generally G.L. c. 58A, §§ 1-14; 831 CMR 1.01 *et seq.* Accordingly, the Board may exercise its discretion to quash subpoenas when appropriate. G.L. c. 58A, § 11 and 831 CMR 1.24. In the present appeals, the appellants sought to call, by subpoena, the appellee's independent real estate valuation expert, Mr. Dennis, as the final witness in their case-in-chief. The Board, however, allowed the appellee's motion to quash the subpoena because, among other reasons, the appellants did not include Mr. Dennis on their witness list, contrary to the Board's pretrial order, and they did not show that his testimony was necessary to properly present their case or for some exceptional circumstances. They also failed to show that his testimony was necessary to prevent some type of unfairness or injustice.

Generally, "an expert witness can be required, without payment of expert fees, to give an opinion already formed." *Ramacorti v. Boston Redevelopment Authority*, 341 Mass. 377,

379 (1960) (citing *McGarty v. Commonwealth*, 326 Mass. 413, 417-18 (1950)). However, “[s]uch discretionary ‘power would hardly be exercised unless . . . necessary for the purposes of justice.’” *Ramacorti* at 379 (quoting *Barrus v. Phaneuf*, 166 Mass. 123, 124 (1896)); see also *Box Pond Associates v. Energy Facilities Siting Board*, 435 Mass. 408, 417 (2001) (“The general rule is that an expert witness . . . who has not been retained by the party seeking his testimony, cannot be required to give an opinion already formed unless ‘necessary for the purposes of justice.’”) (quoting *Ramacorti* at 379). Where the expert is employed by the opposing party, another consideration “is whether in the circumstances it is fair for one party to acquire the expert opinion of one who has already been engaged by his adversary.” *Ramacorti* at 379. Because the Board found, among other reasons, that the appellants did not include Mr. Dennis on their pretrial witness list or demonstrate some exceptional circumstances or show that Mr. Dennis’ testimony was necessary to prevent an unfair or unjust result, and that the appellants “seem to have had no difficulty in obtaining experts of [their] own,” *id.*, the Board exercised its discretion by granting the appellee’s motion to quash the appellant’s subpoena seeking the

involuntary testimony of the appellee's independent real estate valuation expert, Mr. Dennis.

In considering whether, and to what extent, a property is overvalued, the Board may take its view of the premises into account. **Westport v. Bristol County Commissioners**, 246 Mass. 556, 563 (1923); **Avco Manufacturing Corp. v. Assessors of Wilmington**, 1990 A.T.B. Adv. Sh. 142, 166 (Docket No. 148171 and companion appeals, June 27, 1990); **Arthur D. Little, Inc. v. Assessors of Cambridge**, 1982 A.T.B. Adv. Sh. 363, 374 (Docket No. 93625 and companion appeals, October 28, 1982).

The burden of proof is upon the appellants to make out their right as a matter of law to an abatement of the tax. **Schlaiker v. Assessors of Great Barrington**, 365 Mass. 243, 245 (1974). An assessment on a parcel of real estate is presumed valid until the taxpayers sustain their burden of proving otherwise. **Id.** "By holding that the assessment is entitled to a presumption of validity, we are only restating that the taxpayer[s] bear 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, 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." *Id.* at 600 (quoting *Donlon v. Assessors of Holliston*, 389 Mass. 848, 855 (1983)). The mere going forward with evidence is not enough to meet the taxpayers' burden. See *Foxboro Associates*, 385 Mass. at 691. The evidence must be credible and persuasive. *Id.*

In these appeals, the Board found and ruled that while the appellants showed some errors in the assessors' square footage measurements recorded in the property record cards for some of the fiscal years at issue, the assessors did not rely on these measurements in their methodology for estimating the value of the subject property for assessment purposes. Accordingly, the errors were inconsequential and, by themselves, did not prove that the subject property was overvalued.

Upon consideration of all of the evidence, the Board found and ruled that the appellants failed to meet their burden of proving that the subject property was overvalued for fiscal years 1995 through 2001. Therefore, the Board decided all of these appeals for the appellee.

APPELLATE TAX BOARD

By: _____
Donald E. Gorton, III, Member

A true copy,

Attest: _____
Clerk of the Board