

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DURGA, LLC

v.

BOARD OF ASSESSORS OF  
THE CITY OF FITCHBURG

Docket No. F317152

Promulgated:  
December 23, 2014

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7, G.L. c. 59, §§ 64 and 65, and 831 CMR 1.03 and 1.04, from the refusal of the Board of Assessors of the City of Fitchburg ("assessors" or "appellee") to abate taxes on a parcel of real estate in Fitchburg owned by and assessed to Durga, LLC ("appellant") under G.L. c. 59, §§ 11 and 38 for fiscal year 2012.

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

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

*Marco Sandonato*, Esq. for the appellant.

*Kenneth W. Gurge*, Esq. for the appellee.

## FINDINGS OF FACT AND REPORT

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

The property at issue ("subject property") was located at 150 Royal Plaza Drive in Fitchburg and was identified on the assessor's Map as S53, Block 8. The parcel contained 39.19 acres of land improved with three buildings. The first two buildings were connected and together formed a Marriot hotel and an integrated indoor waterpark known as a Coco-Key water resort.

The multi-story hotel building, which contained slightly in excess of 224,000 square feet of finished space, was designed to accommodate 330 rooms, and on the relevant valuation date contained 245 finished rooms. It was built in 1988 employing masonry construction. Exterior finishes included stucco siding as well as a flat-membrane roof. The interior walls and ceilings were primarily drywall and the floors were a combination of carpeting and tile. The building was served by a closed system that provided heat and air conditioning, a bank of four passenger elevators and two service elevators, and a sprinkler system.

The Coco-Key structure, which, as noted, was attached to the hotel, contained approximately 35,000 square feet of finished space and was constructed in 2008. The building

consisted primarily of a single multi-story space that featured four bodies of water, several water slides that extended beyond the building's exterior, and lounge areas.<sup>1</sup> There were also restrooms, dressing areas and rooms located near the main entrance that were rented to patrons as party rooms. Food and beverages, including alcoholic beverages, were available in a restaurant area within the water resort.

The subject property was also improved with a separate 40,100 square-foot single-story building located to the south of the hotel and resort buildings. Constructed in 1990, the building had a steel frame structure, a masonry exterior, and a flat membrane roof. The building featured a single divisible open space with a mezzanine and was suitable for use as a convention center or to host trade or home shows. It had adequate heating, ventilation, air conditioning, electricity and sprinkler systems as well as overhead garage doors for large deliveries.

For fiscal year 2012, the assessors valued the subject property at \$12,324,900 and assessed taxes thereon at the rate of \$21.60 per thousand totaling \$266,217.84. Fitchburg's Office of the Collector of Taxes mailed the fiscal year 2012 actual tax bills on or about December 31, 2011. In accordance with

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<sup>1</sup> The parties did not provide specifics regarding the building's construction and finishes. It was, however, characterized as in average to good condition.

G.L. c. 59, § 57C, the taxes were paid without accrual of interest.

On or about January 4, 2012, in accordance with G.L. c. 59, § 59, the appellant timely filed its application for abatement with the assessors. The assessors denied the application on April 4, 2012 and sent notice of their denial to the appellant the next day. On June 28, 2012, in accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed its petition with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

The appellant asserted that the fair market value of the subject property was \$3,200,000 for fiscal year 2012 and presented its case-in-chief primarily through the testimony and appraisal reports<sup>2</sup> of its real estate valuation witness, Leon J. Boudreau, whom the Board qualified as an expert in commercial real estate valuation. For their part, the assessors submitted cost and depreciation summaries in support of the contested assessment.

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<sup>2</sup> Two appraisal reports were submitted into evidence, one dated March 10, 2012, and the other February 25, 2013. Both reports purported to derive the fair market value of the fee simple interest in the subject property. They differed substantively only with respect to Mr. Boudreau's inclusion of an income-capitalization analysis in the later report. Mr. Boudreau had declined to include an income-capitalization analysis in the earlier report, having deemed it inapplicable because "as of the effective date of [the] appraisal and the preceding two years . . . [the subject property] ha[d] shown a loss, with no positive net income." The record did not reflect the reasons that led Mr. Boudreau to include an income-capitalization analysis in the later report.

Mr. Boudreau stated that he inspected the subject property, investigated the area's real estate market, and researched transfers of what he considered to be comparable properties. Relying on data from his investigation and research as well as other sources, Mr. Boudreau first determined that the subject property's current use was also its highest and best use.

Mr. Boudreau performed a sales-comparison analysis, upon which he placed "the greatest emphasis" in valuing the subject property. The analysis was based on consideration of four sales of "virtually identical properties," each of which contained a hotel and a Coco-Key water resort. The properties, which sold at national auction between March 17, 2011 and April 28, 2011, were located in: Kansas City, Missouri; Waterbury, Connecticut; Cincinnati, Ohio; and Danvers, Massachusetts.

To estimate the fair cash value of the subject property, Mr. Boudreau first divided the sale price of each purportedly comparable property by the number of hotel rooms each property possessed to arrive at a sum reflecting the sale price per room of each property. He then made adjustments to these prices to account for differences in parcel size, location, utility and "other." Having made the adjustments, Mr. Boudreau calculated a final "adjusted sales price [per] room" for the properties, which ranged from \$7,214 to \$15,975, with a mean value of \$12,840 per room. Based on these calculations, Mr. Boudreau

applied a value of \$13,000 per room to the subject property's 245 hotel rooms to derive a value for the subject property of \$3,185,000, which he rounded up to \$3,200,000.<sup>3</sup>

The Board found Mr. Boudreau's comparable-sales analysis unpersuasive. While each of Mr. Boudreau's properties featured a hotel and a Coco-Key water resort, they were geographically disparate. Mr. Boudreau offered only his unsubstantiated opinion in support of the conclusion that the properties' locations were sufficiently similar to the subject property's location to support a finding of comparability. Absent such substantiation, the Board could not find that properties in Missouri, Ohio and Connecticut were comparable to the subject property and suitable for inclusion in Mr. Boudreau's comparable-sales analysis. Further, the highest adjusted per-room value of Mr. Boudreau's comparables was more than twice that of the lowest, a dramatic difference that belied the notion that the properties were comparable to each other let alone to the subject property. Finally, while one property was located in Massachusetts approximately fifty-five miles from the subject property, and the comparability of its location was less inherently suspect,

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<sup>3</sup> Mr. Boudreau's indicated value from his income-capitalization analysis, discussed below, was \$1,630,000. Despite his statement that the comparable-sales analysis was given the greatest emphasis, Mr. Boudreau's reconciled value of \$3,200,000 and his statements during the hearing of this appeal indicated that he gave virtually no weight to the income approach.

Mr. Boudreau offered no substantiating evidence to support a finding of comparability.

Mr. Boudreau's adjustments were also lacking. For example, the parcels of three of Mr. Boudreau's chosen properties were approximately one-fourth the size of the subject property's parcel. Mr. Boudreau made a ten percent upward adjustment to the properties' sale prices to account for these substantial differences without discussion of the attributes of each parcel, the markets in which they were situated, or his rationale underlying the size of the adjustment. The parcel of the fourth property was approximately sixty percent as large as that of the subject property and in that instance Mr. Boudreau, without explanation, made no adjustment for parcel size.

Mr. Boudreau also made a ten percent downward adjustment for location to the sale price of each of his chosen properties based on his determination that the properties' locations were superior to the subject property. These adjustments were based solely on the properties' proximity to interstate highways and Mr. Boudreau's conclusion that the properties were "in more developed areas than that noted at the subject property." While these factors may have affected the value of Mr. Boudreau's properties relative to the subject property, Mr. Boudreau failed to discuss any other aspect of the geographically remote markets

in which the properties were located or to state why his chosen measures, by themselves, justified his adjustments.

Finally, Mr. Boudreau's adjustment for "other," which he made to two properties, was intended to account for the presence of the convention building located on the subject property. In support of his adjustment, and implicitly acknowledging that not one of his chosen properties had a separate structure similar to the convention building on the subject property, Mr. Boudreau made no adjustment to the two properties that "had convention rooms within the hotel structure" and a ten percent upward adjustment to the other two properties that did not. Mr. Boudreau, however, offered no explanation whatsoever for his conclusion that simply termed "convention rooms" in two hotels, the size and utility of which were unspecified, were comparable to the 40,100-square-foot freestanding convention building on the subject property, thereby obviating the need for an adjustment. Moreover, the record does not reflect that the subject property's hotel did not contain "convention rooms." Finally, for the two properties that did not have "convention rooms" within their hotels, Mr. Boudreau failed to articulate any basis for his ten-percent adjustment.

In sum, the Board found that Mr. Boudreau's sales-comparison analysis provided little if any credible evidence of the subject property's fair cash value for the fiscal year at



issue. Purportedly comparable properties that Mr. Boudreau characterized as virtually identical to the subject property were situated in far-flung locales with widely varying values, and no market data were provided to establish comparability with the subject property. The Board found that the absence of such data, standing alone, precluded a finding of comparability. Similarly, Mr. Boudreau's adjustments were made without supporting market data or specifically articulated reasoning. The Board therefore found that even if Mr. Boudreau's chosen properties had been comparable to the subject property, the adjustments could not be relied on to establish the value of the subject property.

The Board also found Mr. Boudreau's income-capitalization analysis substantially flawed. More specifically, Mr. Boudreau chose a \$100.00 average daily rental rate for the subject property's hotel rooms and a vacancy rate of 40% to derive a room revenue projection but provided only a vague unsubstantiated reference to market data in support of his choices. Similarly, Mr. Boudreau employed the subject property's expenses without offering any evidence to demonstrate that the expenses were reflective of the market. Finally, Mr. Boudreau chose a capitalization rate that he stated was based on "the first quarter of 2011 for commercial office and apartment buildings." He failed, however, to cite a single source that

supported his conclusion, and his summary statement lacked any detail as to what he considered to be the relevant market from which to derive a capitalization rate. Given that Mr. Boudreau failed to provide sufficient data or other evidence to substantiate his chosen daily rental rate, vacancy rate, expense percentages, or assumptions underlying his capitalization rate, the Board found that the figures that he used in his income-capitalization approach were unreliable and resulted in a flawed value for the subject property.

The assessors presented what amounted to a rudimentary cost analysis in support of the contested assessment. The analysis consisted simply of historic cost and depreciation figures for the subject property and was not accompanied by expert testimony or any supporting evidence to validate the propriety of its use. The Board therefore gave no weight to the analysis.

After considering all of the evidence and the reasonable inferences drawn therefrom, the Board found and ruled that the appellant failed to demonstrate that the subject property's assessed value exceeded its fair cash value for fiscal year 2012. Accordingly, the Board issued a decision for the appellee in this appeal.

## OPINION

Assessors are required to assess real estate at its fair cash value. G.L. c. 59, § 38; *Coomey v. Assessors of Sandwich*, 367 Mass. 836, 837 (1975). Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both of them are fully informed and under no compulsion. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 549, 566 (1956). Accordingly, fair cash value means fair market value. *Id.*

The appellant has the burden of proving that the subject property had a lower value than that assessed. "The burden of proof is upon the [appellant] to make out [his] right as a matter of law to 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)). Thus, an assessment is presumed valid unless the appellant sustains its burden of proving otherwise. *Schlaiker*, 356 Mass. at 245.

Generally, real estate valuation experts, Massachusetts courts, and the Board rely upon three approaches to determine the fair cash value of property: income capitalization; sales comparison; and cost. *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).

"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**, Mass. ATB Findings of Fact and Reports 2000-859, 875 (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 305-308 (13<sup>th</sup> ed., 2008); see also **Skyline Homes, Inc. v. Commonwealth**, 362 Mass. 684, 687 (1972); **DiBiase v. Assessors of Rowley**, 33 Mass. App. Ct. 928 (1992). In the present appeal, there is no dispute that the subject property's highest and best use was its current use as a combined hotel, water resort and convention center. The Board therefore next looked to the valuation methodologies presented by the appellant in support of its claim of overvaluation.

"[S]ales of property usually furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been willing to pay for the property to a willing seller." **Foxboro Associates v.**

**Assessors of Foxboro**, 385 Mass. 679, 682 (1982). Sales of comparable realty in the same geographic area and within a reasonable time of the assessment date contain credible data and information for determining the value of the property at issue. **McCabe v. Chelsea**, 265 Mass. 494, 496 (1929). Properties are "comparable" to the subject property when they share "fundamental similarities" with the subject property, including location, size, and date of sale. **Lattuca v. Robsham**, 442 Mass. 205, 216 (2004). When comparable sales are considered, adjustments must be made for various differences among the properties which would otherwise cause disparities in the properties' sale prices. See **Pembroke Industrial Park Co., Inc. v. Assessors of Pembroke**, Mass. ATB Findings of Fact and Reports 1998-1072, 1082.

In the present appeal, the appellant sought to establish that the subject property was overvalued primarily through submission of a comparable-sales analysis presented by its real estate valuation expert, Mr. Boudreau. The Board, however, found that Mr. Boudreau's analysis was fatally flawed.

As a preliminary matter, three of Mr. Boudreau's four purportedly comparable properties were located in other states, substantially undermining the assertion that the properties shared fundamental similarities with and were comparable to the subject property. Further, Mr. Boudreau provided no market data

or analysis to support what effectively was his bare assertion that locational and other disparities had no effect on comparability. Taken together, these facts establish that the present appeal is distinct from ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 473 (1981), in which the Supreme Judicial Court held that an unrebutted and corroborated multifactor analysis of the comparability of National Hockey League arenas located throughout the nation could not be ignored. Given Mr. Boudreau's uncorroborated assertions and the lack of relevant analysis, the Board could not find that Mr. Boudreau's chosen properties were comparable to the subject property.

Mr. Boudreau's adjustments also lacked the requisite substantiation as they were made without supporting market data or specifically articulated reasoning. Given the lack of relevant supporting data and the unsubstantiated assumptions made by Mr. Boudreau, the Board ruled that the cited deficiencies corrupted the indicated value that Mr. Boudreau derived from his sales-comparison approach and rendered it unreliable.

The income-capitalization method "is frequently applied with respect to income-producing property." ***Pepsi-Cola Bottling Co.***, 397 Mass. at 449. The income stream used in the income-capitalization method must reflect the property's market earning

capacity or economic rental value. *Id.* at 451. It is the earning capacity of real estate, rather than its actual income, which is probative of fair market value. *Assessors of Quincy v. Boston Consolidated Gas Co.*, 309 Mass. 60, 64 (1941). After accounting for vacancy and rent losses, net-operating income is obtained by deducting the landlord's appropriate expenses. *General Electric Co. v. Assessors of Lynn*, 393 Mass. 591, 610 (1984). Like earning capacity, the expenses should reflect the market. *Id.* Further, the chosen capitalization rate should consider the return necessary to attract investment capital. *Taunton Redevelopment Assoc. v. Assessors of Taunton*, 393 Mass. 293, 295 (1984).

While the income-capitalization method may well have been an appropriate technique to value the subject property, Mr. Boudreau's income-capitalization analysis, which he ultimately appeared to give virtually no weight, was found lacking. More specifically, Mr. Boudreau failed to substantiate both his chosen average daily room rental rate and his vacancy rate. Similarly, Mr. Boudreau employed the subject property's expenses without providing any evidence that the expenses were reflective of the market. Finally, Mr. Boudreau failed to provide market data to establish that his capitalization rate appropriately considered the return necessary to attract investment capital. As with his comparable-sales analysis, the

lack of relevant supporting data and unsubstantiated assumptions evident in Mr. Boudreau's income-capitalization analysis rendered it unreliable.

"[The Board can] accept such portions of the evidence as appear to have the more convincing weight." *Boston Consol. Gas*, 309 Mass. 60, 72 (1941). See also *North American Philips Lighting Corp. v. Assessors of Lynn*, 392 Mass. 296, 300 (1984); *New Boston Garden Corp.*, 383 Mass. at 473; *Jordan Marsh Co. v. Assessors of Malden*, 359 Mass. 106, 110 (1971). "[However] [e]vidence of a party having the burden of proof may not be disbelieved without an explicit and objectively adequate reason.'" *New Boston Garden Corp.*, 383 Mass. at 470-71, (quoting L.L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 607-608 (1965)).



In this appeal, the Board explicitly stated its objectively adequate reasons for disregarding the appellant's evidence and on the basis of the entire record, the Board found and ruled that the appellant failed to demonstrate that the subject property was overvalued for fiscal year 2012.

Accordingly, the Board issued a decision for the appellee in this appeal.

**THE APPELLATE TAX BOARD**

By: \_\_\_\_\_  
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: \_\_\_\_\_  
Clerk of the Board