DOHERTY, WALLACE, PILLSBURY AND MURPHY, P.C.

APPELLATE TAX BOARD UPDATE

A periodic report for property owners, appraisers, assessors and attorneys

February 2014

THE YEAR 2013 IN REVIEW

During 2013 the Appellate Tax Board issued 39 Findings of Fact and Reports involving local property taxation. Most of these decisions involved single family homes but there were several decisions involving more complicated matters and eleven of those have been selected for comment in this issue of the Update. [Complete copies of all decisions are available from the ATB's website: www.mass.gov/atb]

WIND TURBINE

We knew it was going to happen: a case involving a property owner's claim of devaluation due to the proximity of a wind turbine. It happened in Elizabeth L. Andersen v. Falmouth Assessors (August 27, 2013). The property was a contemporary-style four bedroom house assessed for $553,300 in Fiscal Year 2012.

The 1.65 megawatt turbine in question, owned by the Town of Falmouth and located on its landfill was 400 feet tall and a quarter mile from the house. The ATB recited that "the turbine operated both night and day, whenever wind levels were sufficient to facilitate motion." Ms. Andersen claimed that the turbine's rotation emitted low frequency noise which brought with it "loss of sleep, headaches, vertigo, depression, and other physical and mental ailments." Although the owner presented evidence to support those claims, according to the ATB she "did not present evidence which demonstrated that the subject property's proximity to the turbine had a quantifiable negative effect on its fair cash value." There was, for example, no evidence, such as a comparable sales analysis, to support a value below the assessed value.

The assessors brought forward three sales of purportedly comparable properties but the ATB noted that those sales were more than twice as far from the wind turbine as the property at issue. The ATB therefore had no way of knowing the effect that the turbine had on the comparable sale prices or that Ms. Andersen's house would have been similarly affected. The ATB therefore disregarded the testimony on both sides and necessarily concluded that the assessed value should stand.

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The case also featured a rarely-seen jurisdictional twist involving the 2011 appeal. The timely-filed abatement application form included the usual statement that the assessors had three months to act unless the property owner agreed in writing to extend the time. The form further stated that, in the absence of action by the assessors, the application was deemed denied. In this case, the application was deemed denied on June 11, thereby setting an ATB appeal deadline of September 12, 2011 (since September 11 fell on a Sunday). Since the assessors did not send notice of their inaction within 10 days of the deemed denial, the property owner automatically got an additional two months (to November 12) for her ATB appeal. Unfortunately, Ms. Andersen didn't file her appeal until December 12. This lateness, in the eyes of the ATB, may have been caused by Ms. Andersen's reliance on a September 13 notice from the assessors "which cited a deemed denial date of September 13, 2011, over three months after the application was deemed denied…."

The notice went on to state that an appeal could be filed within three months of the deemed denial date, meaning that the deadline would be December 13. The ATB found that the notice "was not only inaccurate and therefore void" but it was also misleading in its statement that the start of the three month appeal period was the alleged September 13 deemed denial date. The ATB recited in its decision that neither party raised this jurisdictional issue during the hearing, leaving the ATB with no choice but to rule that it did not have jurisdiction over the 2011 appeal, notwithstanding the "misleading and inaccurate notice" from the assessors. In other words, the deemed denial date is three months from the abatement-filing date notwithstanding any notice to the contrary from the assessors and the ATB lacks statutory power to show any flexibility.

NO BULKING UP

The year 2013 brought out another case involving the valuation of an undeveloped residential subdivision. Autumn Gates Estates, LLC v. Millbury Assessors (August 28, 2013). This scenario called on the ATB to decide whether the 27 residential lots (plus four held as open space) should be valued individually or as an entire project. The lots had been purchased at a foreclosure sale in August 2008 for about $1.8 Million. For Fiscal Years 2009 and 2011 involved in the decision, the assessed values were about $3.4 Million and $2.7 Million. (For some reason there was no appeal for 2010).

The owner's expert said that having buyers for all 27 lots was "too extraordinary an assumption." He therefore considered the bulk sale of the lots for development as a subdivision to be the highest and best use for Fiscal Year 2009. For Fiscal Year 2011 he claimed the lots should be treated as being held for development "until the market improved." For his valuation methodology, the owner's expert selected the discounted cash flow technique which involves calculating net operating income from the present date and going forward for a certain period of years to identify a net present value. Using this approach, the value for 2009 would be about $1.2 Million and for 2011 just $320,000.

The assessors' expert used a more conventional approach and determined that, after deducting the costs to complete the subdivision, the net value of each of the 21 half-acre lots was about $90,000 and slightly higher for the six larger lots, a total value of about $2.6 Million for 2009. Using the same methodology for 2011, the expert suggested a value of about $1.9 Million.

The ATB had confronted this valuation issue in G. D. Fox Meadow, LLC v. Westwood Assessors (covered in the 2012 Update) when it rejected the bulk valuation approach. This time around the ATB bolstered its conclusion with references to a number of cases from other jurisdictions – from New Jersey to Oregon – in support of its valuation approach and rejection of the discounted cash flow approach. The ATB also concluded that it was inappropriate to consider the actual $1.8 Million sale price because, among other things, it was at a foreclosure sale. At the end of the day the ATB essentially agreed with the valuations proposed by the assessors' expert (which, for 2009, was substantially less than the assessed value).

HARD WORK, NO RELIEF

In terms of a major effort without reward, a 2013 highlight had to be Wuerth Realty Trust, et al v. Edgartown Assessors (Nov. 27, 2013). The case involved five high-end homes (assessed values from about $11 Million to about $16 Million) and one high-end lot (assessed value about $9 Million) on Martha's Vineyard for various fiscal years from 2008 to 2011. The ATB held 4 to 6 day hearings in Boston for each property. (Sadly, for the presiding ATB Commissioner, all the properties were viewed in just a single day on The Vineyard.)

The same expert testified for all six owners and used what the ATB characterized as "a blended or combined, comparable-sales, land-extraction, and cost (assessment) approach." The expert identified 4 to 6 "comparables" then backed-out the assessed value of the improvements and then adjusted the extracted land values for factors such as time, location and view. Once the expert arrived at a land value, he added back the assessed value of the improvements to arrive at the fair cash value of the entire property. The resulting values ranged from a low of about $4.4 Million to a high of $11.7 Million.

A key treatise cited by the ATB states that the land extraction approach "should be used with extreme care and only when lack of market data prevents application of more direct methods and procedures." This rubric prompted the ATB to criticize the expert for relying on this approach "despite not convincingly demonstrating a dearth of market data or that a more traditional sales-comparison approach was incapable of valuing the subject properties…." The ATB noted that the owners could cite no previous precedent where the ATB had adopted "a similar blended technique".

Not only did the ATB fault the expert's methodology, the "vast majority" of the sales on which he relied "lacked basic comparability" to the subjects. Given the ATB's characterization of the expert's methodology as "flawed and unreliable", it was hardly surprising that the ATB found in favor of the assessors on each of the cases.

NOT BY LAND ALONE

Tax bills typically break down the total assessment into an increment attributable to the buildings and an increment attributable to the land. The tax, however, is "one tax" and the challenge for an unhappy taxpayer is to show that the total, not one of the two individual pieces, is excessive. The land-focused lament appeared again in Maura and Gregory Lareau

v. Norwell Assessors (October 30, 2013). The case involved a single-family residence on a parcel of 6.57 acres for Fiscal Years 2011 and 2012.

The assessed values, after taking abatements into account, were $842,400 and $859,200. These values were less than the value of $900,000 set by the ATB for Fiscal Year 2010. The 6.57 acre parcel was comprised of a one-acre main site with the balance being a lowland marsh which the owners claimed was unusable because of conservation restrictions and therefore "only represents a tax liability." The owners particularly took issue with the assessors' allocation of the abatements which they granted for the two years. In Fiscal Year 2011 the value of the dwelling was reduced from $366,200 down to $248,400 while the land value remained stable at $591,000. A similar allocation was made for the 2012 abatement.

In terms of the "big picture," the ATB very simply concluded that the owners had failed to meet their burden of approving overvaluation of the house and land; particularly the ATB found "no merit" to the owners' contention that the 5.57 acres of marshland had no value because it was unusable. The ATB once again made the point that "taxpayers do not conclusively establish a right to abatement merely by showing that their land is overvalued." Very simply, the tax on land and a building is "one tax…although for statistical purposes they may be valued separately."

DRAMA AT THE 50% LINE

You couldn't keep score without a calculator in the case of Truss Engineering Corporation v. Springfield Assessors (October 4, 2013) where personal property had been valued for Fiscal Year 2010 at about $1.1 Million, resulting in a tax of $43,455.25. Unlike a case with real estate tax, only one-half of the personal property tax must be paid prior to the time an appeal to the ATB is taken. On the final day for payment and appeal, the taxpayer paid the city $21,727.63 which was just one cent more than one-half the actual bill. By the date of payment, however, there were accrued interest and fees of $2,227.14. As a result, the amount paid was more than one-half of the amount of the tax but not more than one-half of the total amount due. Based on this discrepancy, the assessors brought a motion to dismiss.

The ATB found that there had been no notice to the taxpayer of the interest and fees which had accrued and which were deducted from the tax payment. The receipt showed no diversion to interest and fees from the total payment. The ATB found that the Truss officer who paid the tax intended to preserve its rights by paying at least one-half the tax, notwithstanding the add-ons of which Truss had no notice. Not only was Truss unaware of the tax collector's allocation of the payment, apparently so were the assessors who continued in their settlement negotiations until they realized that the payment fell short of one-half the tax.

Citing from its prior decisions, the ATB concluded that the right of appeal "cannot be denied by a completely internal governmental action of which the Appellant had no notice" and that "statutes embodying procedural requirements should be construed, when possible to further the statutory scheme intended by the Legislature without creating snares for the unwary." In short, the ATB decided that the receipt which was given to the taxpayer showing that one-half of the tax assessment was paid on the due date "constitutes satisfactory evidence of timely payment for jurisdictional purposes." The ATB commented in a footnote that the assessors, had they been so inclined, could have granted Truss an abatement even if

there had been a jurisdictional flaw for the ATB appeal. Under Chapter 59, Sections 64 and 65, the ATB pointed out, late payment may bar an appeal but does not bar assessors from granting an abatement.

As for valuation, the taxpayer's expert arrived at $415,000 but was not present at the hearing so the ATB gave his conclusion no weight. The assessors' expert also was not present but the ATB adopted her value of $591,990 as an acknowledgment that the assessed value of $1,107,140 was excessive. The reduced amount was also consistent with the valuation of $496,370 for the next fiscal year.

While the ATB decision does smack of so much "inside baseball," the case does show that justice will be done even when a literal reading of the fine print poses a hurdle. Ironically, the property in question could have been totally exempt from tax under Chapter 59, Section 5, Clause 16(3) since the owner was a manufacturing corporation. Unfortunately, the owner had failed to file Form 355-Q which was necessary to receive manufacturing corporation classification from the Department of Revenue.

MORE ON EXEMPTIONS

In addition to the New England Forestry Foundation case, discussed elsewhere in this Update, the ATB handled four other exemption cases, only one of which had a particularly interesting outcome.

Give Them Sanctuary, Inc. v. Monson Assessors (March 11, 2013) involved two parcels of land (assessed for about $180,000) owned by an organization which was formed to "provide shelter and healthy habitat for wild animals, foster health and welfare of the domestic animals, [and] aid abused persons who are in need of sanctuary." Notwithstanding those noble goals, there was testimony at the hearing that the parcels were "vacant, left in a completely natural state with no improvements" and that there was "no evidence of dogs or other animals being provided services…." The ATB concluded that the property was merely conservation land and that the owner "did not actively occupy the subject properties in furtherance of its charitable purposes." The assessors' denial of the exemption was therefore upheld.

Then there was Community Involved in Sustainable Agriculture, Inc. v. Deerfield Assessors (May 28, 2013) which involved a multi-story office building, 70% of which was used by CISA and the rest of which was leased to third party tenants. Among CISA's worthy goals were enhancing the quality and sustainability of agricultural products and education of farmers and consumers on farm-related issues. Members of the organization included retailers, individuals and restaurants as well as farmers.

It was important to the ATB, in denying the exemption, that CISA's objectives included establishing new business markets and strengthening existing business markets for farmers. The ATB called into play its guideline that "more care" is warranted in scrutinizing an exemption case "where the alleged charity operates in the fields of trade and commerce." The ATB went on to conclude that the "dominant purpose" of CISA's work was "to benefit its members by promoting the purchase of locally grown food, and any benefit derived by the public was incidental." The ATB decision has been appealed to the Appeals Court.

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Occupancy of a house was the issue in Sisters of Providence v. West Springfield Assessors (July 17, 2013). The single-family dwelling in question had been used by the Sisters as the dwelling for four of its members. Although those four individuals used the home as their residence, the religious order had a wide-ranging charitable mission. The four residents engaged in many of these charitable tasks on-site and provided administrative support for off-site activities. The ATB concluded that the house was occupied by the Sisters as a group and not by the individual Sisters who lived there and allowed the exemption.

Although Boston's famed South Station is a beehive of commercial activity, that trade and commerce, however, doesn't result in taxable real estate, as the assessors learned in Beacon South Station Associates v. Boston Assessors (March 22, 2013). For Fiscal Years 2009 and 2010 the assessors concluded the property was worth about $53 Million and $39 Million. South Station is owned by the Massachusetts Bay Transportation Authority which leases the property to the appellant. The unhappy ending for the assessors all came down to General Laws Chapter 161A, Section 24 which states that "notwithstanding any general or special law to the contrary" the MBTA and all its real and personal property – including South Station – "shall be exempt from taxation…." That express language in the statute carried the day and the ATB ordered abatements well in excess of $1 Million for each year. The case is now at the Appeals Court.

[**Perhaps in reaction to the ATB decision, legislation was passed, over the governor's veto, effective July 24, 2013, which provides that MBTA property which was leased, used or occupied in connection with a business conducted for profit is taxable to the lessees, users or occupants as if they were the owners of the real estate on January 1.]**

FIVE LAWYERS, FOUR FISCAL YEARS, THREE EXPERTS, TWO PROPERTIES AND ONE HECK OF A DECISION

After what must have been a Herculean effort, the ATB issued a 203-page decision in the valuation case of Twenty & 50 Park Plaza v. Boston Assessors and Saunstar Land Co., LLC v. Boston Assessors (June 12, 2013). Why all the ink? The case involved premier locations; oddly-shaped historic buildings; a renovated hotel; an office building that didn't lend itself to modern amenities such as central air; varied uses within each building such as a four-story restaurant; and a fluctuating market spanning FY2007 through FY2010.

The properties in this thriller were the 15-story Boston Park Plaza Hotel and adjoining 14-story Park Plaza office building built in the 1920's and the Park Plaza Castle and Armory Building, built in the 1890's. The assessed values of the hotel/office building ranged from about $126 Million to about $164 Million and for the Castle/Armory from about $4 Million to $5 Million over the course of the four years in question.

Of course there were dueling experts who predictably clashed on market rental rates, allocation of expenses and of course capitalization rates. Space does not permit repeating the details of those interactions but suffice it to say that the ATB decision is textbook-worthy for a study of the valuation of a big-city hotel and office/retail buildings. When it was all over the ATB found overvaluations of the Park Plaza Hotel/Office to the tune of $9.5 Million to $38 Million. The Castle/Armory was found to be overvalued for just one year, in the amount of $294,500.

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IN THE PIPELINE

The ATB opened the year with its decision in New England Forestry Foundation, Inc. v. Hawley Assessors (January 28, 2013). This case, for Fiscal Year 2010, involved a small town (population 337) and a small tax ($172) but has statewide implications and is now pending in the Supreme Judicial Court.

NEFF is a non-profit corporation, founded in 1944 with asserted charitable purposes which include protection of forest lands and providing information on forest management to property owners and the general public. For ten years, NEFF received favorable tax treatment under Chapter 61 for its 120 acres of forest land but for Fiscal Year 2010 sought full exemption. According to the ATB decision, NEFF owns 41 properties in Massachusetts, covering about 3,000 acres in 30 towns. NEFF asserted that the land was in fact open to the public. The ATB, however, was not persuaded by NEFF's claim of "active management" of the property and found that NEFF had "failed to prove that it had made sufficient effort to inform the public that the subject property was open for public recreation."

Forest management, the ATB concluded, was not a "traditional charitable endeavor" and the ATB was therefore required to determine whether NEFF's ownership and occupation of the property "served a sufficiently large or fluid class of beneficiaries and did not merely benefit a limited class of beneficiaries." The ATB concluded that NEFF came up short in meeting that standard. In fact, the ATB found only one educational event on the property which was a one-time "walk" through the property prior to timber cutting. The walk was available to NEFF members "in the immediate area" and abutters to the property. This educational endeavor, the ATB concluded, "offered on such a limited basis to such a limited class of beneficiaries", was not sufficient in scope such that it could reasonably be considered to be of benefit to the public, and fell short of the standard set in other cases for a finding of educational use.

While NEFF's forest conservation efforts may have been praiseworthy, such efforts in this case did not rise to the level of justifying a full exemption from real estate taxes, the ATB concluded.

ON HIGHER AUTHORITY

There is a legal presumption in favor of the assessed valuation of a piece of real estate. Very simply, this means that the burden of persuasion is on the taxpayer to show that its property was overvalued. This burden shifts, however, under General Laws Chapter 58A, Section 12A, when there has been a decision from the ATB within the previous two years. In such an event, the assessors have the burden of justifying their increase in value over the value determined by the ATB. A question evolving from that scheme was addressed by the Massachusetts Appeals Court in W.A. Wilde Co., Inc. v. Holliston Assessors (84 Mass. App. Ct. 102) (August 8, 2013): what about a case where the ATB makes no "determination" of value but simply allows the assessed value to stand because the taxpayer didn't carry its burden of proof?

In W.A. Wilde, two parcels of land were valued at $8 Million for 2005 and 2006. The owner appealed and the ATB concluded the taxpayer hadn't met its burden and allowed the values to stand. The assessors proceeded to increase the 2007 values by $200,000 and the taxpayer appealed. At the ATB, the taxpayer offered no proof of overvaluation for 2007 and

argued that the burden had shifted to the assessors to justify the increase over 2005-2006. The Appeals Court disagreed with the taxpayer. The ATB's decision "to sustain a presumptively assessed valuation", did not constitute the "determination of fair cash value" contemplated by Section 12A, the Appeals Court said.

The Appeals Court upheld the decision of the ATB in Kamholz v. Newton Assessors, 83 Mass. App. Ct. 1133. The ATB decision, cited in last year's Update, involved the application of Chapter 59, Section 2D and the taxation of new construction after January 1 in a fiscal year.

In a case reminiscent of "the dog ate my term paper," the Appeals Court upheld the ATB in Edward J. Noonan v. Springfield Assessors, 83 Mass. App. Ct. 1125. Mr. Noonan filed his appeal with the ATB one day after the expiration of the three-month appeal period which apparently was during the governor's state of emergency declared for the June 2011 tornado. Mr. Noonan relied on the precedent of the state of emergency declared in connection with the February 1978 blizzard. The effect of the state of emergency declared for that storm was to exclude the period of the emergency (five days in 1978) from the calculation of deadlines. Although the governor declared a state of emergency in June 2011, that declaration, according to the Appeals Court, "did not suspend any business or government operations." Mr. Noonan claimed that the governor's office issued "tweets" which alerted drivers to stay off the road and instructed nonemergency personnel not to report to work on June 2, 2011, apparently the deadline for filing the appeal. As the Appeals Court noted, "even if one or both of these tweets were construed as executive orders pursuant to the Civil Defense Act, the running of the appeals period is not inconsistent with either of them." The Appeals Court therefore upheld the ATB's dismissal of Mr. Noonan's appeal.

GOOD LUCK AND FAREWELL

This issue of the Update would not be complete without bidding adieu to Alan Gold and Steve Douglas, two long-serving and heavily-relied-on Assistant Clerks of the Appellate Tax Board. Their patience, diplomacy and willingness to lend an ear were above and beyond the call of duty. Al ably served the geographically large and diverse communities of both central and western Massachusetts while Steve served Middlesex County, the largest single county in the state. Gentlemen, you will be missed!

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2013 CAPITALIZATION RATE SURVEY			
CASE	TYPE OF PROPERTY	YEAR	ATB % RATE
Star Margit ETR	Industrial Warehouse	2010- 2011	9.25%
Davis Realty Trust v. Avon	Industrial Buildings	2011 2012	9.0% 8.5%
Twenty and 50 Park Plaza v. Boston	Hotel	2007	8.0%
		2008	7.75%
		2009	7.25%
		2010	7.5%
	Office/retail	2007	7.375%
		2008	7.25%
		2009	7.0%
		2010	7.25%
Saunstar Land Co. v. Boston	Restaurant/Exhibition Hall	2007	9.0%
		2008	8.75%
		2009	8.25%