

APPELLATE TAX BOARD UPDATE

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

February 2013

THE YEAR 2012 IN REVIEW

In 2012 the ATB issued 74 Findings of Fact and Reports and of these 69 involved local property tax (there were four Commissioner of Revenue cases and one appeal of a water bill). A dozen of these cases 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.]

FIRST IMPRESSION

The impact of affordable housing restrictions on value was a matter not previously addressed by the ATB until it decided Koppelman v. Amesbury Assessors (October 2). The subject of this precedent-setting decision was a 1,400 square foot condominium unit which had an assessed value of \$227,300 for fiscal year 2011. The owner had purchased the unit in 2006 for \$130,000 when it consisted of only one bedroom and 800 square feet. Using no-interest financing of \$22,400 through the Amesbury Housing Rehabilitation Program, the attic was converted into a bedroom, increasing the unit by about 600 square feet. As a condition of the no-interest financing, the owner was only allowed to charge \$1,028 per month in rent (plus a \$180 utility allowance) and any future rent increases were highly regulated. An additional condition provided that the unit could only be resold as "affordable housing" to families with 80% or less of the median income for the area and, if rented, tenants had to have housing voucher certificates, such as so-called "Section 8" certificates. These restrictions were binding for 20 years even if the no-interest financing were paid off. The ATB noted the restrictions served to "limit the universe of potential renters and buyers": a buyer who would be a landlord had a limited investment return and a buyer who would be an occupant had to meet the income eligibility standard. The assessors argued that the financing paperwork did not in fact impose a maximum sale price. The ATB disagreed and concluded that the fair cash value, after taking the restrictions into account, was \$185,000.

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WORK IN PROGRESS

Interesting scenarios can evolve when real estate is improved during the year, as shown in Griffin v. Holliston Assessors (June 27). Under General Laws Chapter 59, both Section 2A (a local option law) and Section 2D deal with adding value for tax purposes when improvements are made. Since Holliston had adopted the Section 2A local option, the Griffin case analyzed both Sections 2A and 2D. The case involved an owner-occupied industrial office building. An addition was 45% complete as of June 30, 2008 and 100% complete as of June 30, 2009 but a certificate of occupancy was not issued until October 22, 2009. The ATB found that under Section 2A, when improvements are made during the six months after the January 1st valuation date and before the July 1st start of the fiscal year, the value of the property as of June 30 is used to capture the value of those improvements. Thus, for FY2009, Holliston could value the property with the 45% complete addition as of June 30, 2008 and for FY2010 it could use the property value as of June 30, 2009 with the 100% complete addition.

The ATB rejected the taxpayer's contention that Section 2D applied. Section 2D allows assessors to tax the added or pro-rated value of improvements when an occupancy permit is issued after that key January 1st valuation date if: the improvements are from new construction; they increase the property's value by more than 50%; and notice of the tax is given by the assessors. Thus, the taxpayer argued these improvements could only be taxed on a pro-rated basis from the permit date of October 22, 2009 to the end of fiscal year 2010. The ATB found that Section 2A allowed Holliston to capture the value of the improvements as of June 30 for each fiscal year.

The ATB also applied Section 2D in Kamholz v. Newton Assessors (January 25), a factually more complicated case than Griffin. In Kamholz the ATB pointed out that Section 2D only applied to increased value from new construction and didn't apply in this case since the increase in value was from conversion of a house into condominium units. The assessors have appealed the ATB decision to the Appeals Court.

INFORMATION PLEASE

Route 16 Land Development Corp. v. Milford Assessors (June 13) featured a "he said, she said" duel over whether a taxpayer had complied with a Chapter 59, Section 38D income and expense information request. The ATB found the taxpayer lacking in the credibility department and dismissed the case. The assessors sent a 38D request in January 2010 for the purpose of determining the property's fair cash value for fiscal year 2011. The assessors used a form letter and information request approved by the Commissioner of Revenue to comply with Section 38D. After receiving no response, the assessors sent a second Section 38D request to which they also received no response. The assessors then determined fair cash value without the aid of the requested information and, predictably, the taxpayer challenged the resulting valuation.

At the ATB hearing, the assessors moved to dismiss the petition based on the taxpayer's failure to supply the requested information. The taxpayer claimed it had never received the first information request, but acknowledged that it had received the second. The

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taxpayer further claimed that it had timely responded to the second request although it had no proof of the response. The taxpayer went on to assert that it had always complied with the annual information request, but had no proof of that either. In contrast, the assessors' witness "credibly" testified that not only had the taxpayer failed to respond to the information requests at issue, but that it also had a history of not responding. Unlike the taxpayer, the assessors' witness could back up her testimony with a printout showing that the taxpayer had been charged the statutory fee of \$50 for failure to respond to Section 38D information requests in three of the past four years.

LESSONS IN CHARITY

Elite Soccer Camp. A federally tax exempt entity's request for a charitable exemption on its 16-field soccer complex was the issue in Massachusetts Youth Soccer Association, Inc. v. Lancaster Assessors (May 16). The facility was complete with a 5,000 square foot office building along with two accessory buildings providing storage, concession and bathroom facilities. The property was valued at approximately \$2.6 Million resulting in a tax bill of more than \$38,000, so the stakes were high. The Association was organized "to foster, encourage, develop and promote the game of soccer." The fields were used for tournaments, field rentals, clinics and camps, but all for a fee.

The property was not open to the public. In addition to conducting activities right on the property, the Association also provided local coaching clinics to communities and organized leagues, again for a fee. The Association noted that it encouraged the creation of programs for disabled youths and actually participated in soccer camps for inner-city kids by hiring and training college students to work at the camps. Despite all these "feel good" activities, the ATB found that the Association failed in its burden of proving it was a charitable organization using the property for its charitable purposes. Specifically, the ATB found that the promotion of soccer did not serve a charitable purpose; more specifically, it did not serve an educational purpose which traditionally involves "developing and expanding the mind and heart." Further, the ATB found that the primary use of the property was to promote soccer "for only elite players."

No Physical Presence. In Mohonk Educational and Neuropsychological Foundation, Inc. v. Mount Washington Assessors (June 13, 2012) the non-profit owner had as its stated charitable purpose the development and application of "practical brain-based educational and therapeutic techniques in traditional and outdoor settings...for both regular and special needs children..." The owner envisioned using the property at issue for "regularly scheduled educational and recreational programs for children, families or community organizations." Unfortunately, none of these good intentions was ever put into practice. The ATB found that the owner "did not maintain a physical presence on the subject property beyond mere ownership." Very simply, if there were no occupancy and use by the owner, then there could be no exemption under Chapter 59, Section 5, Clause Third.

CAMPS AND RECREATION

Danbee Real Estate Co., LLC & Lakeside Retreats, LLC v. Peru Assessors (May 7) was really three cases in one. The owner ultimately sought Chapter 61 forest land classification for 198 acres of its property and Chapter 62B recreational land classification for another 43 acres that were used as a summer camp. Along the way, a jurisdictional filing

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issue, a forest land subject matter jurisdictional question and a plain old recreational land qualification question all popped up.

The twisted tale started with the owner's obtaining a state forester's certification of the forest management plan. It then filed the approved plan with the assessors, but instead of delivering it to the assessors' office (which was closed), it was left with the Town Clerk's office (which was open), thus creating a question of timely filing. The ATB found that the plan was timely filed because the assessors' office was closed and the assessors' subsequent failure to pick it up from the Town Clerk until after the deadline was of "no jurisdictional consequence."

Next came the subject matter jurisdiction question. Given that the application was timely filed, the next step would have been for the assessors to either file a statement of classification with the Registry of Deeds or to appeal the classification *to the state forester*. Appeals regarding the state forester's classification decision are not filed with the ATB, therefore the ATB had no subject matter jurisdiction. Finally, the ATB was able to sink its teeth into an analysis of the assessors' denial of recreational classification for that portion of the property used as a camp. In a rather anti-climactic substantive end to what had started out as a procedurally-fraught case, the ATB found the assessors' recreational classification denial was justified. The property was used as a \$9,700 per week, per camper, camp and was essentially not open to the general public. Further, soccer, softball and volleyball fields, dining and residence halls and dance, gymnastics and fine arts facilities prevented the property from being kept in "substantially a natural, wild or open condition or in a landscaped or pasture condition." The owner therefore came up short in this key prerequisite for Chapter 61B recreational land qualification.

IT JUST DIDN'T MAKE SENSE

The ATB doesn't get to decide a whole lot of appeals from excessive water bills but the one case decided in 2012 was a classic by the name of Sarah Lemke v. Medfield Water and Sewer Commissioners (February 16). As a procedural matter, under General Laws Chapter 40, Section 42E, water bill abatement applications are subject to the same deadline as real estate tax abatement applications and thereafter appeals to the ATB are covered by Chapter 59, Sections 64 and 65. Nothing seemed amiss when Ms. Lemke received a bill for \$357.33 for the six month period from April 1 through October 1, 2008. Her reaction was justifiably different when she received a bill for \$2,555 for the next six months when the Commissioners claimed she consumed 272,000 gallons of water. After Ms. Lemke visited the town hall, two municipal employees checked out her meter and found everything in order and blamed the high usage on a leaking toilet.

Ms. Lemke never did repair the alleged leaking toilet but nevertheless the water bill for the next six-month period was only \$123 for consumption of 16,000 gallons. Ms. Lemke applied for an abatement and, after a "deemed denial" by the Commissioners, took her case to the ATB. The Commissioners' witnesses testified that they removed Ms. Lemke's meter, brought it back to the water department and determined that it was "working properly." These witnesses stood their ground on the "leaking toilet" theory. Ms. Lemke countered with water bills for the previous 10 years which showed that the bill in question was 3½ times greater than the highest usage during that period. The ATB essentially concluded that the

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Commissioners' defense, to coin a phrase, just didn't hold water. Based on historic usage, the ATB concluded that the appropriate bill was \$602 and gave Ms. Lemke a well-deserved abatement of \$1,954.

NO SETTLEMENT AGREEMENT

The right of a property owner to introduce evidence of a proposed settlement with the assessors was just one of the curious twists in Paul T. Sullivan v. Amesbury Assessors (June 5). The case involved a Federalist-style house built around 1832 which was located in the area of Amesbury's earliest settlements, dating from the 17th Century. For homes in this neighborhood, the assessors, with approval of the Department of Revenue, imposed an "historical" designation which would bring with it a slightly increased valuation rate to account for the fact that homes in historic areas or of historical significance were selling at a significantly higher price than their assessed values.

For obvious reasons, Mr. Sullivan didn't favor the "historical" designation. Six days before the ATB hearing the assessors offered Mr. Sullivan the chance to sign a settlement agreement to lower the assessed value (although the ATB decision didn't disclose what the proposed value was). Mr. Sullivan agreed to accept the offer but only if he could reserve his right to contest before the ATB the effect on value of the "historical" designation which the assessors had used. The assessors rejected Mr. Sullivan's counteroffer so that the original assessment of \$316,200 remained in place.

Mr. Sullivan argued that rather than be designated as "historical" the house should be designated as simply a Cape Cod-style home which should be valued consistently with other so-designated houses in Amesbury. The owner also claimed that the assessors failed to properly consider the home's inferior condition. On the question of condition, the ATB said that the owner presented no evidence to show that the assessment did not take condition into account. Rather, the owner attempted to introduce into evidence the proposed settlement agreement.

The ATB applied well-established rules of evidence to exclude the settlement offer. As a matter of public policy, the ATB noted that settlement evidence is excluded as one way of encouraging litigants to settle their disputes without fear that a settlement proposal would later be used in evidence. Furthermore, settlement offers ought to be excluded because a party may be willing to settle a case even where it has no liability simply in order to avoid the expense of litigation. At the end of the day the ATB upheld the assessors' use of the "historical" valuation designation and, for lack of any probative evidence, rejected the owner's claim that the condition of his property had not been taken into account by the assessors.

FINAL MATTERS

The ATB concluded the year with a case that brought some important valuation principles into play and which had some good news and some bad news for the expert witnesses on both sides. All of this was found in USAA Properties, IV, Inc. v. Chelmsford Assessors (December 5). The property in question was a research and development office building with leasable area of about 300,000 square feet and situated on about 26 acres. The case involved Fiscal Years 2006, 2007 and 2009 where the assessed value ranged from about

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\$15.9 Million to \$20.6 Million. One interesting twist was the building's need for renovations to configure it from single-tenant to multiple-tenant use. This conversion process began in 2005.

The owner's expert primarily relied on the income approach to value with the sales approach as a backup. Using the income approach, the witness arrived at a value and then simply deducted the renovation costs (\$15 Million for 2006 and 2007 and \$6 Million in 2009, when most of the renovations had been completed). The net values ranged from about \$10.5 Million to \$15.7 Million. The expert witness for the assessors gave equal weight to values obtained through the sales and income approaches for 2006 and 2007 but favored the income approach for 2009. Averaging the results in the two approaches for 2006 and 2007 yielded final values for the assessors' expert of about \$17.6 Million and \$20 Million and, using the income approach, about \$24.7 Million for 2009.

In making its decision, the ATB noted that the building was vacant and under renovation in 2005 and 2006 and so actual rents during those years were not available. What's more, the ATB found that there was in fact an active market for vacant buildings at that time so that the sales comparison approach was appropriate for the first two years. The ATB faulted the owner's expert because he used sales of both leased-fee and fee-simple interest in his sales-comparison analyses. This lapse was enough for the ATB to place "no weight" on the sales-comparison analyses. As for the owner's expert's use of the income-capitalization approach, the ATB said that there was "lack of evidentiary support for the renovation costs" which were an important factor in bringing down the expert's opinion of value.

The ATB agreed with the use by the assessors' expert of the sales approach for 2006 and 2007 which resulted in values which exceeded the assessed values, so obviously no abatement was warranted. As for 2009, the Board agreed with both witnesses that the income approach was most reliable. The ATB went on to conclude, however, that neither expert was credible since estimated construction or renovation costs are "generally admissible only through the testimony of an architect, contractor, or engineer...." Since there was no such testimony, the ATB gave no weight to either expert's conclusion. The ATB therefore relied on the presumptive validity of the assessment and found that the assessed value for 2009 did not exceed its fair cash value.

UPROAR IN MATTAPOISETT

No review of 2012 would be complete without some mention of the unhappy taxpayers who virtually laid siege on the local assessors' office in Mattapoisett. These cases (all 25 of them) accounted for about one-third of the total 2012 ATB output. It all started in 2009, when the assessors realized that waterfront properties had been undervalued and the assessors therefore made widespread upward adjustments. As a result, the assessors had to handle more than 400 abatement applications. To take advantage of the discontent, according to the assessors, an attorney and an appraiser advertised in the local newspaper to enlist clients for the appeals. For all of their travail, the assessors were successful in all but one of the ATB decisions and that one decision involved a taxpayer who went forward without a lawyer. The decisions followed a common pattern, with the ATB repeatedly faulting the appraiser for lapses such as "drive-by" views rather than actual inspections, the use of comparable sales from the adjacent town of Marion, using sales which were not truly at

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arm's length and for a failure to specify the "nature and magnitude" of adjustments to the sales, such as they were. The message appears to have gotten through to the homeowners since there were only 120 abatement applications for Fiscal Year 2012 and, after meetings with the assessors, only two went to the ATB.

POT POURRI

Telecomm: Poles and Wires. As all communities in the commonwealth are now aware, 2012 saw the final resolution of the burning question – were poles and wires over public ways taxable for FY2009 and previous years? And the answer from the Appellate Courts was? They were **not** taxable. (For FY2010 forward, the legislature amended the law to make clear that poles and wires over public ways are taxable.)

Comparable Adjustment. To listen to the taxpayers' laments in Robinson and Voltmer v. Wayland Assessors (February 10), one wonders how they could live in the house. There was defective plumbing in the wash bowl drain, deficient copper tubing, windows that weren't airtight, poor drainage from the septic tank site and topographical problems leading to periodic flooding. The recitation kind of brings to mind the line from a tune by the Credence Clearwater Revival that "when the taxman comes to the door, it looks like a rummage sale." The owners' put-down of their own home was all for naught since the ATB found that the assessed values (\$336,300 for 2009, \$350,000 for 2010) were on target. The ATB noted that property should be viewed as whole, not in separate land and structure components. As for the comparable sales, the ATB once again found itself with a taxpayer who failed to adjust for differences. The assessors put on no case and the ATB agreed that the taxpayers simply didn't carry their burden.

ON HIGHER AUTHORITY

In Bridgewater State University Foundation v. Bridgewater Assessors, we saw the rare, but always fun to watch, judicial double flip. The ATB's decision in February 2010 was overturned in 2011 by a decision from the Appeals Court (79 Mass. App. Ct. 637), only to be flipped again in 2012 by the Supreme Judicial Court (463 Mass. 154). The pivot point for all these twists and turns was the "occupation" requirement for the charitable exemption. As previously reported in the Update, the case involved the exempt status of four properties owned by the Foundation but devoted to University purposes. Without question, the Foundation-owner was a charitable entity organized and operated exclusively for the benefit of the University, another unquestionably charitable organization. In direct contravention to a literal reading of Chapter 59, Section 5, Clause Third, the Foundation did not exclusively occupy the property, rather it allowed the University to occupy part or all of its various properties. The ATB, and ultimately the Supreme Judicial Court, found that the University's use of the property was "fully congruent" with the purpose of the Foundation so that denying the exemption would thwart the legislative intent of the statute.

The year 2012 also saw another chapter in the long-running story of Boston Gas Company v. Boston Assessors involving valuation of the personal property at the company's Commercial Point facility. As previously reported in the Update, in 2009 the ATB upheld the validity of the personal property assessments for 2004 (which was to be used as a "test case") of about \$223 Million. On appeal in 2011, the Supreme Judicial Court (458 Mass. 715) remanded the case to the ATB for consideration of three specific aspects of the

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ATB’s analysis in valuing the personal property. As reported in last year’s Update, the ATB did consider the case again and once more upheld the assessed values. Once again, Boston Gas appealed and in 2012 the Appeals Court concluded that the ATB had adequately addressed the three valuation points on which the SJC had expressed some concern. The most important of these points was the ATB’s adoption of the income capitalization approach. In its computation of operating expenses, the ATB had approved the inclusion of property taxes actually incurred by Boston Gas, rather than use of a tax factor. The SJC told the ATB to look again at this departure from the ATB’s “preference in prior decisions” to use the tax factor rather than the taxes actually paid. The Appeals Court concluded that the ATB had in fact justified the use of the actual property taxes paid.

In Black Rock Golf Club v. Hingham Assessors (reported in the 2011 Update) the ATB issued an extended decision involving valuation of a private golf course. Resolution of the case necessarily involved choosing between dueling expert witnesses. The Club was awarded an abatement and the assessors appealed. In 2012 the Appeals Court (81 Mass. App. Ct. 408) vacated the ATB’s decision and remanded the case to the ATB for further consideration of its treatment of the testimony of the assessors’ witness. The Appeals Court noted that in the appeal, the assessors effectively challenged the ATB’s adoption of Black Rock’s valuation methodology. At the same time, the Appeals Court said that the assessors had not demonstrated the incorrectness of the ATB’s rejection of their own income capitalization rationale. The Appeals Court sent the case back to the ATB to provide the assessors with a further opportunity to develop their valuation methodology.

The availability of an exemption for private entities which leased land owned by the Massachusetts Port Authority was the issue in AMB Fund III v. Boston Assessors reported in last year’s Update. The ATB held that the exemption (found in General Laws Chapter 59, Section 5, Clause Second) was not available since the land was “leased for business purposes.” The Appeals Court (in a 2012 “unpublished” decision) upheld the ATB’s determination that the exemption was not available.

2012 CAPITALIZATION RATE SURVEY			
CASE	TYPE OF PROPERTY	YEAR	ATB % RATE
Smith & Baker v. Weymouth	Auto Dealership	2010	9.0%
		2011	9.5%
Silvestri v. Lowell	Mixed Commercial - Residential	2008	11.5%
540 Taunton, LLC v. Taunton	Single Tenant Office Building	2010-2011	9.93%
LVF Newport Ave, LLC v. Quincy	Eight Story Office Building	2010	7.4%
		2011	7.5%