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APPELLATE TAX BOARD UPDATE

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

February 2012

THE YEAR 2011 IN REVIEW

There were 38 full decisions issued in 2011 by the Appellate Tax Board involving real estate tax and personal property valuations. As usual, there was no shortage of cases involving single family homes but there were also cases involving less-seen properties such as mobile home parks; property suffering from beach erosion; facilities seeking charitable exemptions, and even mobile concrete pumping equipment.

HAVE SOME EXEMPTIONS

A Matter of Occupancy. Under General Laws Chapter 59, Section 5, Clause Third, a charitable exemption is available if the property in question was purchased by the corporation with the intent to use the property for its charitable purpose within two years even if the non-profit did not actually "occupy" the property on the July 1 valuation date. This provision was at the center of Community Care Services, Inc. v. Berkley Assessors (June 29, 2011). On July 1, 2007, Community Care was the owner of a single family residence which it proposed to use for a residential program which would offer behavioral interventions for adolescent girls. In late 2006 Community Care had contracted with an architect and with engineering firms to complete the renovations for a 14-bed facility. The preliminary work included filings with the local Conservation Commission and Board of Health and the Massachusetts Division of Fisheries and Wildlife. On July 1, 2007, the ATB decision stated, Community Care "was proceeding with the preliminary measures necessary for the establishment of the program" on the property. The local building commissioner and zoning officer concluded, however, that as of April 29, 2008 the renovations were not complete and that no occupancy permit had been issued. In deciding the case in favor of Community Care, the ATB found that the organization had in fact "purchased the subject property with the intent to use it in the furtherance of its charitable purpose" and that, as of the determination date, Community Care was "diligently pursuing the preliminary measures that were necessary" to establish the program. Even though no occupancy permit may have been issued as of the key date, the ATB concluded that Community Care did in fact "occupy" the property for purposes of the exemption.

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High Stakes, But No Exemption. A prime piece of land owned by the Massachusetts Port Authority and leased and subleased to private entities was the subject of AMB Fund III v. Boston Assessors (November 17, 2011). The ten-acre site included several buildings with a total rental area of about 376,000 square feet. AMB (the lessee and sublessor) claimed the property should be exempt and for the four years at issue (2006 through 2009) would have recovered close to $4 Million in tax abatements based on assessed values ranging from $29 Million to $35 Million. The parties had stipulated that if the property were not exempt then the Assessors' valuation was correct. The case turned on the legislative history of Massport which was created in 1956 and took title to the property in 1988. The ATB found that the enabling legislation essentially provided that if Massport land were "leased for business purposes" it would be taxable. AMB attempted to take advantage of two possible exceptions to the taxable status of the land, but the ATB rejected both arguments. Interestingly, the Boston Assessors had classified the property as exempt from Massport's date of acquisition in 1988 through 2004. This exempt status was confirmed by the City's and AMB's having entered into a payment-in-lieu-of-tax agreement. Notwithstanding the assessors' previous inconsistent position, the ATB held that the property was in fact subject to taxation. The ATB decision has been appealed to the Appeals Court.

No Exemption. Yet another senior living facility was the subject of an ATB decision during the year. Home for Aged People in Fall River v. Fall River Assessors (May 4, 2011) involved two parcels, one used as a 54-bed licensed nursing home (known as Adams House) and the other as a 68-unit independent-living community (known as Bay View). The case focused on Adams House which did not accept Medicaid recipients and where residents paid a $10,000 admission fee and monthly charges of $8,000. While some Adams House residents did in fact receive subsidized care, those residents were in the minority. The ATB concluded that these financial thresholds limited the range of potential residents and therefore the services "were not accessible to a large and fluid class of people." The ATB concluded that the total facility was dominated by the Bay View independent living units, not Adams House. This dominant purpose prevailed over any charitable function for providing services to the minority of Adams House residents who were not financially well off. The ultimate decision was that the entire facility was not entitled to an exemption from real estate taxes. Nevertheless, the decision included some good news for the owners since the ATB found that, although the facility was not exempt, it was substantially overvalued for the three years in question, resulting in abatements totaling about $90,000.

Closed Churches. An order issued by the ATB on December 16, 2011 in the case of the Roman Catholic Archbishop of Boston v. Scituate Assessors, offered some valuable guidance on the tax status of closed churches. In October of 2004, the St. Francis X. Cabrini parish was dissolved. At that time, the Roman Catholic Archbishop of Boston put a stop to the use of the church for worship and other religious activities, i.e. it ceased to be used for religious purposes. Former parish members, however, began a vigil inside the church. For years going forward, the Archbishop began to file Form 3ABCs in an attempt to exempt the property as owned and occupied by the charitable organization which had been formed by occupants. The Archbishop boldly argued that the vigilers occupied the property for charitable purposes of the Archbishop, even though the Archbishop actively opposed the presence of the vigilers in the building. The ATB found, first, that the church was no longer being used as a house of worship pursuant to Chapter 59, Section 5, Clause Eleventh by

either the Archbishop or the vigilers. Second, the ATB found that the Archbishop did not hold the church building in trust for the vigilers nor were the vigilers, through their non-profit entity, a charitable organization within the meaning of Chapter 59, Section 5, Clause Third. With the church now subject to taxation, the case moved on to the valuation phase of the proceedings.

No Final Answer Yet. The Bridgewater State University Foundation will need help from the Supreme Judicial Court to regain an exemption allowed by the ATB but taken away by the Appeals Court in 2011 (79 Mass. App. Ct. 637). In this case, the ATB had determined that real estate owned by the charitable foundation but used by the university and its students was entitled to an exemption. In the ATB's view, the use by the university was consistent with the supportive purposes of the foundation and equivalent of occupancy by the foundation itself. The Appeals Court read Chapter 59, Section 5, Clause Third strictly: actual use and occupancy by the university simply wasn't the same as use and occupancy by the foundation-owner of the property. The Appeals Court acknowledged the untoward outcome: property owned by the foundation being taxed even though it would be exempt if owned and occupied by the university. The remedy, in the eyes of the Appeals Court, would be for the Legislature to amend the statute. The case is now before the Supreme Judicial Court for further review. Stay tuned.

GOING MOBILE

Excise taxes on mobile concrete pumping equipment were the issue in Independent Concrete Pumping Corporation v. Wakefield Assessors (October 20, 2011). This equipment, frequently seen around large construction sites, was described by the ATB as consisting of "a pump unit and boom equipment integrated into a truck chassis." The unit receives wet concrete from a separate concrete mixing truck and then feeds the concrete through a pipeline attached to the boom and then on to its ultimate location within the construction site.

ICPC owned a fleet of 28 mobile units of which two were the subject of this "test case." One of the units was valued at $27,200 and the other at $108,800. Chapter 60A, Section 1 imposes an excise ($25 per $1,000) for "every motor vehicle and trailer" which is registered under Chapter 90. Chapter 90, Section 1, in turn, defines "motor vehicle" as "all vehicles constructed and designed for propulsion by power other than muscular power…." There are a number of exceptions, including vehicles used for "other purposes than the transportation of property" as long as those vehicles can't travel at more than 12 miles per hour. The ATB concluded that the various components of the equipment were in fact "a complete, integrated unit" which was sold and purchased as such. The ATB also concluded that the units regularly traveled at more than 12 miles per hour. For all these reasons, the units were subject to the excise tax.

GOING MOBILE II

Not one but two mobile home parks were the subjects of ATB decisions during 2011. By far the most substantial case was Chelmsford Mobile Home Park Properties, LLC v. Chelmsford Assessors (June 24, 2011). The park consisted of about 38 acres and 254 site pads plus four cabins and a commercial building used as an office/laundromat. The

assessors had valued the property at $3.9 Million for Fiscal Year 2007 but then realized that they had not previously been valuing the site pads and therefore increased the value to about $11.5 Million for Fiscal Year 2008 and $11.6 Million for Fiscal Year 2009. This dramatic increase caught the attention of the park's owner who claimed that the assessors were actually taxing the manufactured homes themselves which should have been exempt under Chapter 59, Section 5, Clause 36. Over objection from the owner, the ATB concluded that the issues at the hearing should not be limited to an exemption determination but rather the valuation of the property as a whole. The assessors had never, for example, sent any personal property tax bills to individual owners and therefore the only assessments at issue were the value of the real estate for the two fiscal years. Interestingly, the owner called the principal assessor of Chelmsford as a witness who first testified using the income approach for the property based on the average monthly site-pad rental. This methodology derived a value of about $12.4 Million, more than the assessed value.

The assessors called an independent expert to testify using both the income and sales-comparison approaches, ultimately settling on a value of about $10 Million for each year. This witness used about $500 per month per site pad as income, a vacancy rate of 5% and expense ratio of 35% of gross income. He used a capitalization rate of 8.5% plus a tax factor to arrive at his $10 Million value. This approach was essentially adopted by the ATB and resulted in overvaluation of about $1.5 Million for 2008 and $1.7 Million for 2009. In upholding the substantial increase in value, the ATB noted that "the assessors were not bound to continue their failure to assess the value of site pads into perpetuity just because they had erroneously neglected to do so in earlier fiscal years."

A more modest mobile home park case was at issue in Fairlane Home Realty Trust v. Shirley Assessors (September 22, 2011). This was a 2.4 acre park with 40 mobile home units. The total assessed value was about $674,000 of which $290,000 was allocated to the land value and $384,000 to the value of the site pads. The owner's expert testified that the income approach was appropriate and used $215 per month as site pad rental. He used an expense ratio of about 58% of gross income and a capitalization rate of 10.5% to arrive at a value of $320,000 for the park. The assessors used the fair market rent of $350 per site pad, a 30% expense ratio and a 9.5% capitalization rate to arrive at a fair cash value of about $872,000 which was significantly more than the assessed value of $674,000. Based on all the evidence, the ATB concluded that the owner had not proven overvaluation.

EROSION OF VALUES

In the words of the ATB, Plum Island in Newbury is "an approximately 11-mile long barrier island and beach, composed of sand and sediment and formed after the last ice age, some 18 thousand years ago, when the great glaciers receded." About a two-mile stretch of the island is "densely developed" with about 1,200 year-round and seasonal homes and cottages. For these folks "severe coastal erosion" has had dire effects on their property valuations. In a case captioned Christine M. Florio, et al v. Newbury Assessors (June 29, 2011) a half dozen of these owners sought tax abatements, claiming that actual sales proved the assessed values to be excessive for Fiscal Years 2007-2010. They claimed that their properties were not only adversely affected by actual and threatened erosion but also by the high cost of private property insurance as well as the $250,000 limit on government flood insurance and the "stigmas" which arose from the properties' being included in a government report which detailed the erosion problem. These were not inexpensive homes with some

assessed values exceeding $1 Million. The owners claimed that the erosion problems should reduce assessed values by as much as 73 percent.

The ATB decision included a detailed chronology and references to newspaper publicity and other events which arguably impacted values, going back to 2005. Only one of the six owners claimed overvaluation going back to Fiscal Year 2007 (the rest of the cases involved only 2010) and as to 2007-2009 the ATB found that this particular owner simply did not submit sufficient evidence of diminution in value as of the pertinent valuation dates. The ATB did grant all the owners relief for Fiscal Year 2010 based on the ATB's finding that as of the assessment date "conditions on and reported about Plum Island clear the hurdle for a finding that an environmental stigma, in the form of severe erosion and ocean surges coupled with property loss and damage and extensive media reports" existed in the area, thereby "adversely impacting the marketability and value" of the properties.

The ATB did not, however, take the owners' suggestion that the property should be reduced in value based on a percentage of the land area which had been lost through erosion. Rather, the ATB found that 15% was "a sufficient adjustment" to reflect the impact of stigma. The ATB suggested that for future years the assessors "re-determine" the size of each parcel by subtracting the square footage of the actual erosion and then revalue the remaining land using typical valuation approaches Such an approach could not be implemented for the years in question, however, based on the record established at the hearing.

TRACT STARS

A 54-acre parcel, separately assessed and taxed as 13 residential building lots, was the subject of Farmhouse Lane Realty Trust v. Rowley Assessors (April 5, 2011). The tract had initially received approval as 4-lot subdivision but, after acquisition by the current owner, a 13-lot subdivision received local approval. Significant wetland issues, however, impeded development to the point that the approval of the subdivision plan expired. The owner argued that these development difficulties rose to the level that permits would never be obtained and that the property should be assessed "as equivalent in value to conservation land." The assessors acknowledged that the development issues warranted a 30% reduction in value. But it made no sense, the principal assessor argued, to file either the 4-lot or 13-lot subdivision plans in the first place if the property were "completely incapable of being developed." At the very least, the assessor claimed the property could have been developed as single lot. None of the owner's three witnesses, the ATB concluded, established that the property was in fact unbuildable. For the two years at issue, the ATB upheld the assessors' valuation of the property of about $1 Million.

Another large tract was the subject of Tsisssa Inc. v. West Tisbury Assessors (April 4, 2011) which involved a 123-acre parcel valued at about $7.7 Million. The parcel was irregular in shape and consisted mostly of rolling woodlands and local vegetation. It was zoned to allow development as single or two-family dwellings as well as open space and agriculture. One of the owner's experts testified to difficulties in developing the parcel, including the need to obtain approval from the Martha's Vineyard Commission which had its own set of development regulations. The witness also had problems – fatal as it turned out – in deciding the "highest and best use" of the property although he eventually concluded that the appropriate use was division of the tract into a 5-lot subdivision. The ATB, however, found that the proposed 5-lot subdivision was a "purely speculative valuation assumption."

Since the expert had not decided on the highest and best use, he could not testify whether the subdivision plan could "reflect the optimal use of the subject property." Ultimately, the ATB found for the assessors.

RIGID RULES

The various deadlines for seeking real estate tax relief are among the most rigid known to man. A personal property owner learned that lesson the hard way in Boston Communications Group, Inc. v. Woburn Assessors (August 15, 2011). In Fiscal Year 2009 Boston Communications owned personal property valued at about $5.3 Million and dutifully filed an abatement application on January 30, 2009. As required by the personal property appeal statute, Boston Communications only needed to pay at least half the tax before filing any appeal. The assessors voted to deny the abatement application on April 18, 2009 but did not sign and mail the notice of denial until May 1, more than 10 days after the decision. The property owner received the notice on May 2. The owner and the Assessors held a number of settlement discussions which continued into the Fall of 2009. During that time frame the owner needed a building permit for another property in Woburn but its outstanding real estate taxes barred its receiving the permit. Ultimately, on September 30, 2009, the parties entered into an agreement whereby Boston Communications would get its building permit provided that it made monthly payments of the remaining taxes.

The agreement further provided that Boston Communications would file its ATB petition on or before October 16. Boston Communications actually filed the petition on October 19 and the Assessors promptly filed a motion to dismiss.

Boston Communications raised in its defense the theory of "equitable estoppel" – rarely seen in the ATB – in which it essentially claimed that it was duped by the assessors not to timely file an appeal because of the ongoing settlement discussions. The ATB did not agree. First, since the assessors were late in sending their denial notice, the notice was "ineffective" for purposes of starting the three month ATB appeal period. Instead, the ATB found that Boston Communications had a "reasonable time" to file an appeal based on "the most relevant statutory filing standards." In the eyes of the ATB, this meant that Boston Communications had an additional two months after the expiration of the three month deemed denial date in which to take its appeal. That brought Boston Communications to September 30, 2009, almost three weeks before the actual ATB filing on October 19. Second, the ATB concluded it did not have any legal basis to act on "principles of equitable estoppel" and, what's more, there was no evidence that Boston Communications had been induced not to file a timely appeal. Put another way, parties simply cannot agree to confer jurisdiction on the ATB to hear a case when the statutory filing deadline had been missed. At the end of the day Boston Communications missed out on an opportunity to challenge about $129,000 in personal property taxes.

BIG TICKET

Genzyme Corporation v. Cambridge Assessors (April 28, 2011) involved a massive 350,000 square foot, 12-story office building in Cambridge valued from about $114 million in 2005 to $134.5 million in 2009. The building was designed to meet "Green Building Standards" and was one of only 13 buildings in the country to achieve the "platinum level" from the U.S. Green Building Council based on the building's numerous environmentally-friendly features, such as solar panels and use of recycled materials. The building's

"defining interior feature" was its floor-to-roof core atrium which the ATB said was "an integral part of the building's green design." What's more, inside the atrium, which rose the entire height of the building, there was a chandelier-like series of hanging prisms "which distribute natural light throughout the building."

The building was leased in its entirety by the owners to Genzyme which was under an obligation to pay more than 50% of the property taxes and therefore had standing to make the appeal. Given the building's assessed value, taxes ranged from $2.1 million to $2.5 million for the years in question. The expert witnesses on both sides favored the income capitalization approach rather than the sales-comparison approach.

Genzyme's expert used as market rent $35 per square foot for 2005 and upward to $46.50 per square foot for 2009. Importantly, Genzyme's expert concluded that the building's massive interior atrium rendered a large part of the building's area as unrentable office space. The atrium was therefore a "significant drawback" which prompted the expert to decrease his estimates of market rent by 5%. Genzyme's expert used a vacancy factor ranging from 14% to 9%. For expenses, Genzyme's expert used an amount ranging from $7.00 to $8.00 per square foot. As for a capitalization rate, for 2005 he used 7.75%, an amount which gradually decreased to 6.5% for fiscal year 2009. At the end of the day, Genzyme's expert concluded that the value of the property gradually rose from $71.2 million for 2005 to $96.6 million in 2008.

The assessor's expert, on the other hand, used rents ranging from $40 to $50 per square foot without any allowance for the impact of the atrium. This expert's vacancy rate was a straight 5% for all five years, while operating expenses ranged from $6.00 to $6.83. The assessors' expert's opinion of value ranged from $113.7 million in 2005 to $171.2 million in 2009.

As for the ATB, it concluded that the atrium was not the negative factor which Genzyme argued. At the same time, however, the ATB found that Genzyme's estimates of market rent were "more reliable" than the estimates from the assessors. The ATB agreed with the assessors' 5% vacancy rate for the office, non-retail part of the building. On the expense side, the ATB found that Genzyme's numbers were the "most reliable estimates" of operating expenses. The ATB also adopted the capitalization rates suggested by Genzyme's expert as stated above. **[Note that this is the only 2011 case where the ATB selected a capitalization rate.]**

Getting to the bottom line, the ATB concluded that the fair cash value of the facility was about $98 million for 2005, $101 million for 2006, $103 million for 2007 and $129 million for 2008. For 2009, the ATB found that the fair cash value was about $145 million, which in fact exceeded the assessed value of about $134 million. When all was said and done, the ATB's decision resulted in abatements of taxes totaling about $1.45 million. Not a bad day in court for the big biotech company.

OTHER CASES OF NOTE

Two Hats. An effort to help an unhappy property owner came home to bite a key witness in Howard D. Haynes v. Middleton Assessors (March 30, 2011). During cross-examination of an expert witness it came out that the witness had assisted the property owner

in preparing at least two of the three abatement applications and all three of the petitions under formal procedure to the ATB. In fact, the witness had actually signed the abatement applications and attempted to negotiate a settlement on behalf of the property owner and later signed the ATB petitions as "agent" and as the property owner's contact person. In its decision, the ATB found that the witness was in fact acting as the agent of the property owner and compounded that involvement by not disclosing that connection in her appraisal report. The expert had held herself out as an independent fee appraiser and that status, the ATB said, "was compromised by her continuing agency relationship with the Appellant, which created bias." (Notwithstanding those deficiencies on the part of the owner's expert witness, the ATB did grant modest abatements.)

Bulking Up. In GD Fox Meadow, LLC v. Westwood Assessors (June 8, 2011) the ATB dealt with the appropriate valuation of a 19-lot "near turn-key" subdivision which was sold in its entirety for about $10.5 Million but which had an assessed value at the time of about $14.5 Million for Fiscal Year 2009. The individual lot assessments ranged from about $580,000 to $1 Million. The owner argued that the arm's length bulk sale, just three months after the Fiscal Year 2009 valuation date, created a "presumption" that the $10.5 Million sale price was the fair market value. The owner didn't deny that the "retail value" of the individual lots was reasonable if each lot was to be valued separately but that, since the lots were purchased in bulk, they should be valued at their "wholesale value." This argument was undercut by the sale, within a week of the assessment date, of one of the lots for about $900,000. The ATB noted that the lots were being separately marketed to builders or individuals as home sites and that the owner was in the business of selling separate lots for development. The ATB concluded that the highest and best use of the property was as "19 separate retail building lots that were presently being marketed and were currently ready to be sold to and utilized by multiple purchasers at retail prices." No relief was therefore granted to the owner.

ON HIGHER AUTHORITY

In 2011, the Appeals Court reviewed a number of cases previously decided by the ATB. The Appeals Court upheld the ATB in Willowdale, LLC v. Topsfield Assessors, 78 Mass. App. Ct. 767; as well as in MASSPCSCO v. Woburn Assessors, 80 Mass. App. Ct. 398; 145 Sumner Avenue Limited Partnership v. Springfield Assessors, 80 Mass. App. Ct. 1105; and in Corkery v. Canton Assessors, 79 Mass. App. Ct. 1117.

Finally, there's the continuing tale of Boston Gas v. Boston Assessors involving the massive Columbia Point natural gas storage/distribution facility. The 2009 Update first reported the ATB decision which upheld the assessed value of the real estate ($28 Million) and the personal property ($223 Million). Boston Gas appealed and in 2010 the Supreme Judicial Court (458 Mass. 715) remanded the case to the ATB for reconsideration of some highly technical valuation concepts. The ATB did so (April 21, 2011) and again upheld the assessed values. In turn, Boston Gas again appealed so this big case isn't over just yet.