

\$5,283,900), (d) 350 Maine Mall Road, Parcel ID No. 074B/0002+/003+ (#8989) (Total Assessment: \$5,422,700); (e) 350 Maine Mall Road, Parcel ID No. 074B/0003+/003+ (#8990) (Total Assessment: \$530,000); (f) 366 Maine Mall Road, Parcel ID No. 074B/0005+/003+ (#8992) (Total Assessment: \$1,751,300); (g) 150 Philbrook Avenue, Parcel ID No. 074B/0006+/003+ (#8993) (Total Assessment: \$435,300), (h) 269 Maine Mall Road, Parcel ID No. 068+/0000+/005C (#8927) (Total Assessment: \$1,943,000), (i) 0 Philbrook Avenue, Parcel ID No. 075+/0000+/007+ (#9001) (Total Assessment: \$472,600); (j) 0 Philbrook Avenue, Parcel ID No. 067+/0000+/026+ (#8911) (Total Assessment: \$711,200); (k) 0 Philbrook Avenue, Parcel ID No. 067+/0000+/002A (#8881) (Total Assessment: \$428,700); (l) 415 Maine Mall Road, 074+/0000+/009+ (#8977) (Total Assessment: \$6,310,500).

4. On July 26, 2010, the Assessor denied the Petitioners' abatement appeals with respect to the properties identified in Paragraph 3 determining that "no adjustments [were] warranted." In the July 26, 2010 denial letter, the Assessor advised the Petitioners of their right to appeal the denials of the tax abatement petitions to the City of South Portland Board of Assessment Review.

5. On September 22, 2010, GGP filed a timely appeal with the City of South Portland Board of Assessment Review from the Assessor's denials of the tax abatement petitions.

6. The City of South Portland Board of Assessment Review convened a public hearing on GGP's tax abatement appeals and took testimony and considered the evidence on April 26, April 27, April 28 and May 23, 2011. These proceedings were subject to the

terms and provisions of a stenographically transcribed confidentiality order issued in the matter pending in the Cumberland County Superior Court of the State of Maine styled GGP–Maine Mall, LLC v. City of South Portland, CV-11-60.

7. GGP offered no evidence as to the allegedly proper assessed value of three of the properties that were the subject of its September 22, 2010 appeal to the City of South Portland Board of Assessment Review. The properties as to which GGP offered no evidence during the course of the hearings had a total April 1, 2009 assessed value of \$10,205,300 and consists of the following properties: (a) 7 Philbrook Avenue, Parcel ID No. 074B/0000+/001+ (#8985) (Total Assessment: \$1,951,800); (b) 269 Maine Mall Road, Parcel ID No. 068+/0000+/005C (#8927) (Total Assessment: \$1,943,000) and (c) 415 Maine Mall Road, 074+/0000+/009+ (#8977) (Total Assessment: \$6,310,500).

8. In support of its appeal from the denials of the tax abatement petitions, GGP relied principally on the appraisal report of PGH Consulting, LLC and the testimony of David C. Lennhoff, MAI, who was the author of the appraisal report and is a principal of PGH Consulting, LLC. Mr. Lennhoff testified as to his opinion of the value of nine of the 12 parcels at issue.

9. The City of South Portland presented the testimony of the Assessor and an appraisal review prepared by American Valuation Group, Inc. and the testimony of Mark T. Kenney, MAI, who was the author of the appraisal review and is a principal of American Valuation Group, Inc. Mr. Kenney did not testify to any values for the properties at issue but, instead, offered criticisms of the PGH Consulting, LLC appraisal report.

10. In its appeal to the City of South Portland Board of Assessment Review, GGP maintained that the PGH Consulting, LLC appraisal of the nine properties that were the subject of the report demonstrated that the April 1, 2009 assessments for those properties were unsupported, that the April 1, 2009 assessment values overstated the values of the properties resulting in injustice and that the April 1, 2009 assessments were disproportionately high in relation to assessments of similar properties.

11. The record reveals that in October of 2003, GGP, the current owner of the properties for which abatements were sought from the Assessor, purchased the properties for a total of \$265,000,000 and attested to that purchase price in the real estate transfer tax declaration filed with the deed to the properties in the Cumberland County Registry of Deeds.

12. The record further reveals that in August of 2009, four months before the April 1, 2009 assessment date, GGP reported under oath to the U.S. Bankruptcy Court for the Southern District of New York that the value of the Maine Mall properties (consisting of the 12 parcels at issue in the instant appeal) were worth \$270,000,000.

13. A major element of GGP's claims on appeal was that the Assessor improperly failed to consider in connection with the April 1, 2009 assessments the effect on value of realty and non-realty interests. The business enterprise value ("BEV") and total assets of the business ("TAB") theories propounded by Mr. Lennhoff in the PGH Consulting, LLC appraisal report suggest that certain types of real property have substantial components of value that are not tangible property and ought not to be taxed as such.

14. The Assessor and Mr. Lennhoff indicated, either in direct testimony or indirectly through their work, that a large regional shopping mall property like the Maine Mall is valued principally by the “income capitalization” method of valuation, represented by the formula “ $I/R=V$ ”, where “I” represents “net operating income” (or “NOI”); “R” represents “rate of return” (or “cap rate”); and “V” represents “value.”

15. The Assessor testified that when earlier news reports, actual sales data, cap rates and anecdotal evidence in late 2008 and early 2009 started to suggest general decreases in real estate values, she considered, but rejected, the need to make any major adjustments in the City’s assessment valuations for the April 1, 2008 date, but then felt constrained to make downward adjustments for the April 1, 2009 date at issue here based on these considerations and other value criteria.

16. The Assessor testified that she commissioned a cap rate study by Mr. Traub for the April 1, 2009 assessment date. The results were admitted as City Exhibits 8A and 8B. Under the $I/R=V$ formula, as cap rates go down, the property valuation goes up. The Assessor’s Exhibits 8A and 8B show cap rates declining for the period from 1Q03 through 1Q08, when the cap rate decline finally ended, and then started to rise slightly to 1Q09. In particular, on Exhibit 8B (the Korpacz cap rate for regional malls, such as the Maine Mall) shows that the cap rate declined from 7.13% for April 1, 2006; to 6.89% for April 1, 2007; and to 6.68% for April 1, 2008, indicating an increase in property valuation over that time period. Cap rates only began to rise to 6.99% for April 1, 2009, indicating a decrease in property valuation. The Assessor also testified to some increased vacancies in the Maine Mall in late 2008 and early 2009.

17. According to the Assessor's testimony and Exhibits 8A and 8B, despite the increase in the cap rate for April 1, 2009, on an overall basis, the cap rate for regional malls decreased from April 1, 2006 through April 1, 2009 by 2%, indicating a 2% increase ($7.13\% \div 6.99\% = 102\%$) in regional mall property value from 2006 to 2009. The April 1, 2009 valuation data reflect cap rate changes in calendar year 2008 and do not reflect what values might be at the end of the calendar year, December 31, 2009.

18. The Assessor testified on both cross-examination and on re-direct that, because the economic indicators for regional malls continued to fall through 2009, she subsequently lowered the aggregate assessments to \$210,803,500 for the April 1, 2010 assessment date – a further reduction of \$31,451,800 from the April 1, 2009 assessment.

19. Mr. Lennhoff criticized the Assessor's valuation determinations for the April 1, 2009 assessment date under the BEV and TAB theories of valuation as improperly failing to quantify the values of certain types of real property that have substantial components of value and that are not tangible property and ought not to be taxed as such.

20. Mr. Lennhoff's income capitalization approach to value is summarized on the page facing page 68 of the PGH Consulting, LLC appraisal report. That summary contains entries in more than 20 categories, ranging from market rents and vacancies classified by type of tenant (e.g., in-line, junior department stores, anchors, and outparcels) through expense reimbursements, owner's expenses, adjustments for returns

on and of furniture, fixtures, and equipment, start-up costs, and favorable contracts, to produce a net income to real property.

21. Under the BEV and TAB valuation theories advanced by Mr. Lennhoff in his appraisal report, the net income to real property is then divided by a capitalization rate (adjusted for a tax factor) to arrive at a stabilized income. The stabilized income is then adjusted by income lost until stabilization (to compensate for the extraordinary vacancies and the two vacant outparcels) to produce the market value as of April 1, 2009.

22. GGP argued at the hearings that the Assessor failed to consider in the April 1, 2009 assessments that there are a number of “non-realty” components to the overall value of the Maine Mall properties. PGH Consulting, LLC’s appraisal report made significant reductions in value for the same. In reaching the valuation determinations for the nine properties under appraisal in the PGH Consulting, LLC appraisal report, Mr. Lennhoff took deductions in value for “specialty leasing,” for mall “start-up costs” and for “return on and return of favorable contracts.”

23. There was insufficient evidence adduced by GGP at the hearing on the instant appeal that the value of those “non-realty” interests can be determined with any precision, and there was no evidence presented that market participants, *i.e.*, prospective investors in regional shopping malls, would recognize those interests as separable from the value of the real estate. The Assessor was not manifestly wrong in declining to adopt the “specialty leasing,” “start-up costs” and “return on and return of favorable contracts” market value reductions claimed by Mr. Lennhoff in the PGH Consulting, LLC appraisal report.

24. Mr. Lennhoff could not specifically quantify the BEV or TAB component of the Maine Mall property value with regard to its \$270 million purchase price in October of 2003. (Day 2 Tr. at 67, lines 14-17) (“real estate doesn’t sell; it is intertwined with what sells”); (Day 2 Tr. at 69, lines 2-7) (as to intertwined intangibles, “some of it is [real estate]. Some of it isn’t.”); (Day 2 Tr. at 69, lines 21-25) (“it’s very difficult to do and is extremely complex”). This testimony supports the conclusion, which the City of South Portland Board of Assessment Review adopts, that the “specialty leasing,” “start-up costs” and “return on and return of favorable contracts” market value reductions claimed by Mr. Lennhoff in the PGH Consulting, LLC appraisal report are not appropriate on this record because these values are inextricably intertwined with the values of the nine Maine Mall properties under appraisal in the report. The Assessor was not required to adopt the reductions proposed by Mr. Lennhoff in the April 1, 2009 assessments under these circumstances or, put another way, it was not manifestly wrong of the Assessor not to do so.

25. In his appraisal review report, Mr. Kenney of American Valuation Group, Inc. concluded, pursuant to USPAP¹ Standards Rule 3-3(a)(ii), that the PGH Consulting value conclusions were “not credible” and observed that

[b]ased on a thorough review of the appraisal report, the appraiser’s value conclusion is **not appropriate and reasonable** given the data and analyses presented, specifically the report is misleading regarding the real property appraised (exclusion of 3

¹ USPAP, Uniform Standards of Professional Appraisal Practice, is the set of written standards used by the appraisal industry throughout the country and compliance with its provisions is required under Maine law. See 02-298 C.M.R. ch. 240, § 1 (2010).

tax parcels), the less than adequate disclosure of the subject property's prior sales transfer (sale price allocation to "Redevelopment Parcel" and actual cap rate for subject property alone), mistreatment of specialty leasing, deductions for non-realty components (start-up costs and department store incentives) which are in fact part of the realty, faulty retail sales analysis for mall classification purposes, and development of an inappropriate overall cap rate for the subject property based on an erroneous mall classification conclusion.

City Ex. 10 at 11 (emphasis in original).

26. The Board rejects the assertion made by Mr. Kenney that the PGH Consulting value conclusions were "misleading" as to the properties appraised because the report plainly identifies the nine properties under appraisal. It is not a fair criticism of the PGH Consulting appraisal report that it purports to appraise each of the 12 properties that are the subject matter of the instant appeal either individually or in the aggregate. The fact that there was not any evidence offered by GGP as to the valuation of three of the properties involved in the instant appeal is another matter.

27. The Board adopts the criticism of the PGH Consulting appraisal report as to tenant sales and "mall classification" made in the appraisal review report. The analysis of tenant sales is critically important in determining the "mall classification" for determining the appropriate cap rate, which has a significant impact on valuation. First, the PGH Consulting report includes sales figures from retailers with spaces over 10,000 sq. ft. in size. *See* PGH report at 48 and 67. The inclusion of larger sized store spaces, which almost always have lower sales per sq. ft., distorts – and, most importantly, lowers – the sales per sq. ft. number. Mr. Lennhoff included several of these "larger than 10,000 sq. ft. spaces," such as Gap/Gap Kids (16,169 sq. ft.), Forever 21 (26,339 sq. ft.), Sports

Authority (43,326 sq. ft.) and the Chuckie Cheese out-parcel. All of the national retailers and appraisers – including GGP itself – use the under 10,000 sq. ft. categorization for analyzing sales per square foot in their shopping malls. *See* City Ex. 10 (Kenney Report) at App. H (almost all entities reporting, including GGP, look to sales from tenants in spaces under 10,000 sq. ft.); *see also* City Ex. 10 (Kenney Report) at App. G (e-mail responses from Susan Smith that the Korpacz Report she now edits at Price Waterhouse Coopers does not include anchors, junior anchors or out-parcels for this purpose). Furthermore, the actual retail sales numbers for March of 2009 are between \$473/sq. ft. and \$505/sq. ft., *see* PGH Appraisal at “facing” page 44, not the \$384/sq. ft. on which the PGH Consulting appraisal report relies. GGP did not reconcile or account for the \$473.00 and the \$505/sq. ft. figures at the hearing.

28. The Board also adopts the criticism of the PGH Consulting appraisal made in the review appraisal concerning the development of the cap rate for use in the $I/R=V$ formula. On pages 9-11 of the appraisal review, Mr. Kenney writes that if PGH Consulting had been more consistent with the generally accepted practice in analyzing retail sales, and recognized the beneficial features of the Maine Mall, such as its dominant position in the market as a “fortress mall,” and its very stable tenant mix, it would have had to classify the Maine Mall as a grade A+ mall with a much lower cap rate, say 6.5%, rather than the grade B+ classification and the artificially high cap rate of 7.5%. The 6.5% cap rate is more consistent with the actual circumstances of the Maine Mall properties and with the cap rate used by the Assessor based on the work of Mr. Traub.

29. The Board also finds PGH Consulting's treatment of specialty leasing revenues, *e.g.*, income from kiosks and cart rentals and the like, unpersuasive for two reasons. *See* City Ex. 10 at 5-6. First, without explanation, PGH Consulting treats specialty leasing differently in its appraisal report for the 2009 valuation date than it did for the 2006 date, when it simply took a 50% deduction. There was no credible explanation for the difference in treatment of specialty leasing revenues between the 2006 and 2009 valuation dates. The Board is also persuaded that there is no basis for excluding much of this income in rent as part of the real estate. The whole point of the shopping mall construct is to create valuable rentable realty between the anchors stores and then charge high rents based on that "new marketplace." The Board finds that the value of the specialty leasing income is inextricably intertwined with the value of the real estate under these circumstances.

30. The Board agrees with the criticism of the PGH Consulting appraisal report relating to the treatment of start-up costs and capital incentives. Mr. Lennhoff's deduction of amortization for \$15,000,000.00 from NOI is unsupported by record evidence (and, indeed, is inconsistent with the \$10,000,000.00 deduction for NOI applied by PGH for the 2006 valuation challenge). As Mr. Kenney writes, City Ex. 10 at 7 (¶ 7), no prospective purchaser would be concerned with costs already sunken into the property by the seller. The exclusion of this adjustment would add back into the NOI some \$1,888,433, almost \$800,000 more than in the 2006 PGH report. This add-back of NOI, standing alone and using the Assessor's cap rate would yield an increase of approximately \$29,000,000 in additional value.

31. The Board finds that the values determined by the Assessor as of the April 1, 2009 valuation date for each of the 12 properties that are the subject of the instant appeal are fair, reasonable and reflect actual just and fair market values. The Board finds that the Assessor applied and gave appropriate weight to all lawful valuation criteria. The Board also finds that the Assessor did not impermissibly discriminate against the Maine Mall properties in the valuation of these properties when compared to the similar, but distinguishable, properties identified by GGP. These other properties were not regional shopping malls.

Conclusions of Law

32. Under applicable Maine law, the municipal assessment figures are entitled to a presumption of validity. *City of Biddeford v. Adams*, 1999 ME 49, ¶ 13, 727 A.2d 346, 349; *Muirgen Properties, Inc. v. Town of Boothbay*, 663 A.2d 55, 58 (Me. 1995); *Town of Steuben v. Lipski*, 602 A.2d 1171, 1172 (Me. 1992).

33. To obtain tax abatements under Maine law, the Law Court has held that the taxpayer bears the burden of proving that its assessment is “manifestly wrong.” See *Central Maine Power Co. v. Town of Moscow*, 649 A.2d 320, 323 (Me. 1994); *Town of Vienna v. Kokernak*, 612 A.2d 870, 872 (Me. 1992); *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d 384, 393 (Me. 1981). The Law Court has held in these cases that in order to prevail, the taxpayer must prove one of three things:

- (1) The judgment of the assessor was irrational or so unreasonable in light of the circumstances that the property is substantially overvalued and an injustice results;
- (2) There was unjust discrimination; or

(3) The assessment was fraudulent, dishonest or illegal.

Wesson v. Town of Bremen, 667 A.2d 596, 598 (Me. 1995); Muirgen Properties, Inc., 663 A.2d at 58. Only if one or more of these three standards is proven by the taxpayer, is the assessment said to be “manifestly wrong.” GGP conceded at hearing that there is no evidence that the assessment was fraudulent or dishonest and that its challenge to the alleged illegality of the assessments is limited to the first two standards for tax abatements set forth above.

34. The valuations of the three parcels made by the Assessor as of the April 1, 2009 valuation date, as to which GGP offered no appraisal testimony or alternative valuations, must stand on this record. Since there was no credible evidence presented for an alternate assessed valuation, the appeals for those three properties must be denied. *See City of Waterville v. Waterville Homes, Inc.*, 655 A.2d 365, 366 (Me. 1995) (impeachment of assessment alone is insufficient; taxpayer must also provide alternate, credible valuation evidence).

35. Section 701-A of Title 36 of the Maine Revised Statutes requires that all relevant factors be considered in determining just value. Section 701-A is consistent with the rule that “all factors relevant to property value should be considered in the assessment process.” *Glenridge Development Co. v. City of Augusta*, 662 A.2d 928, 931 (Me. 1995) (quoting *Meadowlanes Ltd. Dividends Housing Ass’n v. City of Holland*, 473 N.W.2d 636, 649 (Mich. 1991)). Impeachment of some aspect of the City’s assessment is not sufficient to prove that the assessment is “manifestly wrong.” *See City of Waterville v. Waterville Homes, Inc.*, 655 A.2d 365, 366 (Me. 1995).

36. Maine law recognizes that in those instances where certain property rights are “inextricably intertwined” with the value of real estate, those rights may properly be included in the tax assessment. *See UAH Hydro Kennebec v. Town of Winslow*, 2007 ME 36, ¶ 19, 921 A.2d 146, 152 (Value of an energy power purchase agreement was so intertwined with the value of the real estate in the marketplace view from the prospective of a potential purchaser that it was not error to include the value in the real estate assessment).

37. For purposes of determining whether unlawful discrimination in the tax assessment is present, the challenge must be to the total valuation and not just to either the “land only” component or the “improvements only” component of the assessment. *See Roberts v. Town of Southwest Harbor*, 2004 ME 132, ¶ 4, 861 A.2d 617, 618. While most investors do not care about the breakdown between land and building values, Maine law requires municipal assesses to show values for each separately. 36 M.R.S.A. § 345.

38. The application of the principles of law set forth in Paragraphs 32 through 37 above to the facts and circumstances on the record in the instant appeal leads to the conclusion that the Assessor’s assessments as of April 1, 2009 for the 12 properties at issue are fair, reasonable and reflect actual just and fair market values. The Board finds that the Assessor applied and gave appropriate weight to all lawful valuation criteria. The Board also finds that the Assessor did not impermissibly discriminate against the Maine Mall properties in the valuation of these properties when compared to the similar, but distinguishable, properties identified by GGP.

39. Without considering whether Maine law recognizes the BEV or TAB theories propounded by Mr. Lennhoff and PGH Consulting, LLC, the factual determinations made in Paragraph 38 applying the legal criteria set forth in Paragraphs 32 through 37 above are alone sufficient on this record to uphold the Assessor's April 1, 2009 valuations for the properties at issue and to deny GGP's appeal from those assessments. The Board is generally unconvinced that Maine law recognizes these theories given the valuation principles set forth above, including the rule allowing the value of certain non-realty assets to be included in an overall tax assessment to the extent that the value of that asset is inextricably intertwined with the value of the real estate. *See UAH Hydro Kennebec v. Town of Winslow*, 2007 ME 36, ¶ 19, 921 A.2d 146, 152.


40. The Board notes that other courts and tax authorities across the country have the same misgivings about the BEV and TAB valuation theories. *See RRI Acquisition Co., Inc. v. Supervisor of Assessments of Howard County*, 2006 WL 925212 (Md. Tax Ct. Feb. 10, 2006) (rejection of Mr. Lennhoff's BEV theory as to a hotel property as an "academic construct unsupported by the market"); *Chesapeake Hotel, LP v. Saddle Brook Township*, 22 N.J. Tax 525 (2005) (rejection of Mr. Lennhoff's BEV theory as to a hotel as "not persuasive either for theoretical or empirical reasons."); *Spring Hill, L.P. v Tennessee State Bd. of Equalization*, 2003 WL 23099679 (Tenn. Ct. App. Dec. 31, 2003) (while tax credits for low income housing may be characterized as intangibles, they are not severable from the realty and so are properly considered as part of value of the realty for tax purposes); *see also Glenridge Development Co. v. City of Augusta, supra*.

41. Judicial criticism has been especially harsh when PGH Consulting, LLC's theories are applied to regional shopping malls. See *Miriam Osborne Memorial Home Ass'n v. Assessor of the City of Rye*, 841 N.Y.S.2d 821 (N.Y. Sup. Ct. 2007) (citing with approval *Tarrytown Hill Care Center v. BAR of Assessors of the Town of Greenburgh*, N.Y. Sup. Ct. (Westchester Cty.), Docket No. 14267/98 (Mar. 15, 2004) ("BEV...is not persuasive because it places profits ahead of expenses in a normal sequence of business expenses")); *In re Wolfchase Galleria Ltd. Partnership*, Tenn. State Bd. of Eq. (Shelby Cty. Mar. 16, 2005) (rejecting prior tax assessment decision on the grounds that Mr. Lennhoff's BEV theory of subtracting intangible business assets is not endorsed by the Appraisal Institute, that BEV and TAB are "contrived academic constructs which have been developed to reduce hotel property taxes," and that "buyers and sellers of regional malls do not acknowledge the existence of business enterprise value, but rather proponents of BEV are a very small, but highly vocal, minority of appraisers who are regularly involved in tax appeal cases and ...are papering academic journals with articles on the subject to create the impression that theirs is a widely held belief when it is not..."); *In re Appeal of Winston-Salem Joint Venture*, 551 S.E.2d 450 (N.C. Ct. App. 2001) (appeals court upheld state tax appeal in reliance on testimony of national expert -- Peter Korpacz -- who considered, but rejected, BEV because in his experience regional mall investors do not recognize nor reflect this concept when investing in such properties); *Merle Hay Mall v. City of Des Moines BAR of Review*, 564 N.W.2d 419, 424 (Iowa 1997) (BEV "is not a generally accepted appraisal method...but was designed by a

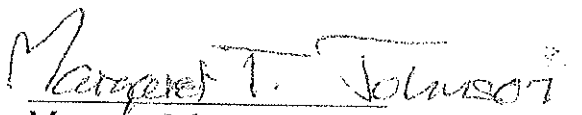
group of shopping center mall owners..." solely for real property tax abatement purposes).


42. The Board concludes that it is more probable than not that the Law Court would not endorse the BEV or TAB theories of valuation in the context of tax abatement cases involving regional shopping malls in the State of Maine in light of existing statutory and Maine case law and the case law of other jurisdictions rejecting these theories when applied to regional shopping malls. Whether or not the Law Court would reject the BEV and TAB theories as to properties like those comprising the Maine Mall that are the subject of the instant appeal, the Board finds that the Assessor applied the existing law to the facts before her in a fair, consistent basis and that the assessments fairly and accurately reflect the just and fair market values of the properties at issue in this appeal. In other words, the reductions for the values of certain assets taken by GGP based on the PGH Consulting, LLC appraisal report under the BEV and TAB theories were inappropriate because all of such values are inextricably intertwined with the value of the real estate, as the Board so finds.

Dated: August 17, 2011


Paul Cloutier, Chairman


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