THE COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

DOCKET NOS. F-316392 (FY 2012)
F-319707 (FY 2013)
F-323782 (FY 2014)

LOWES HOME CENTERS INC.,

Appellant

vs.

BOARD OF ASSESSORS OF THE TOWN OF DARTMOUTH,

Appellee

APPELLEE'S POST HEARING BRIEF

I. INTRODUCTION AND SUMMARY OF THE CASE

This case involves determination of the fair cash value of a 136,369 square foot "big box" retail property operated as a Lowes Home Center in Dartmouth, Massachusetts for fiscal years 2012, 2013 and 2014. The subject property was built in 2004 and has been continuously and successfully operated as a fully occupied, single-tenant retail home improvement center since that time. Lowes, the lessee, is a national credit rated tenant and the Appellant in this case. The current owner, WWW North Dartmouth Subsidiary LLC acquired the property in a leased fee

transaction in September 2008 for $18,299,000. The assessed values in the three years at issue were $14,950,200 (FY 2012), $14,450,000 (FY 2013) and $14,375,700 (FY 2014). Appellant's appraiser's opinions of value for these years ranged between $10.15 and $10.425 million. For the reasons set forth herein, it is Appellee's contention that Appellant has failed to meet its burden of persuasion, *See*, General Electric Co. v. Assessors of Lynn, 393 Mass. 591, 598 (1984), and, therefore, the assessed valuations should be "presumed valid." *Id.* at 607, quoting Foxboro Assocs. v. Assessors of Foxborough, 385 Mass. 679, 684 (1982). *Accord*, Northwest Assocs. v. Assessors of Burlington, 392 Mass. 593, 594 (1984). Alternatively, Appellee contends that the substantial weight of the *credible* evidence presented clearly establishes that the opinions of value of Appellee's expert appraiser more accurately depict the fair cash value of the subject property for the years at issue than do the opinions of Appellant's appraiser.

The basis for the contention that Appellant has failed to meet its initial burden of persuasion stems from its appraiser's adoption of a flawed theory, never accepted in Massachusetts, which corrupted his valuation methodology, effectively caused him to appraise a theoretical property far different from the actual subject property, and created irreconcilable inconsistencies in his approaches to value. While denying that he employed the so-called "Dark Store Theory" (Trial Transcript, Volume I, pages 11 and 76 (hereinafter references to the trial transcript are cited as "Tr. Vol. __, p. __.")), he, in fact, did so. Dark Store Theory is the term coined for the argument by owners and representatives of big box stores that, since fee simple represents unencumbered value, the best comparable sales are vacant big box stores because there is no lease involved. *See*, Exhibit G, "Thinking Outside the Big Box," Fair & Equitable Magazine, Wilmarth and Alesandrini (IAAO, November 2015, Volume 13, Number 11) at 6 (hereinafter referred to as Ex. G). Some, including Appellant's appraiser in this case, have

carried this theory to the extreme by asserting that, even in the income approach to value method, fee simple analysis of big box properties requires them to assume that the property they are valuing will only be leased on a tenancy at will basis with the tenant free to vacate at any time merely by giving a 30-day notice. Tr. Vol. I, pgs. 77-78 & 120.

It is clear from his testimony and report that Appellant's appraiser employed the Dark Store Theory and its corollary, the tenancy at will scenario. Seven of the eight sales utilized in his comparable sales approach were vacant, or 'dark', at the time of sale and the eighth was in the process of becoming vacant and became fully 'dark' shortly after the sale. Ex. 1, pgs. 46-61.

In his income approach discussion he made the following statement. "Proper valuation of this legal interest [fee simple estate] requires the appraiser to assume a 'tenancy at will' rather than a long-term lease encumbering the property." Ex. 1, p. 87. When asked to provide the source of, or support for, this proposition he responded in circular fashion by stating that the definition of fee simple "in no way mentions anything about the lease." Tr. Vol. I, p. 118. He also wrongly opined that the Appellate Tax Board required this tenancy at will assumption because "it says that it has to be a fee simple value." *Id.* at 83. The only other supporting source he pointed to was Appellant's trial attorney who "told us that it's part of common law that you occupy the property with no written lease or lease document…" *Id.* at 118. Following this theory, he further assumed that the subject property, despite its contrary history and status on the valuation dates at issue, would have to be subdivided and become a multi-tenant property. *Id.* at 64-65. Although he felt he could take his comparable rents from properties with long term leases, rent was the only lease term he was willing to utilize. *Id.* at 84. In his analysis, he was unwilling to assume other typical lease terms for a big box property such as lease duration. *Id.* at 84-85. Yet, he admitted that a typical market lease length for a first generation big box store (which the subject is) was twenty

years. *Id.* at 86. In his report he noted that typically properties similar to the subject would have a minimum lease term of 10 years. Ex. 1, p. 84. He was willing to use typical market lease durations for determining his rents, for his calculation of vacancy rates, and for some of his expenses, such as leasing commissions and tenant improvements. Tr. Vol. I, p. 110; Ex. 1, pgs. 85, 96, 104. However, he would not use those same typical market lease provisions in his consideration of risk factors applicable to vacancy and capitalization rates (the latter will hereinafter be referred to as "cap rates"). Tr. Vol. I, pgs. 114-115.

Aside from the obvious inconsistency involved in this approach, the other result which flows from his selective application of market lease terms and his adoption of the Dark Store Theory and tenancy at will assumption is a dramatic overstatement of the risk factors inherent in a theoretical willing buyer – willing seller transaction involving the subject property for valuation purposes. By assuming that the subject property would transact in a tenancy at will situation without assuming a typical market lease duration, he felt it necessary to add a significant risk premium to the cap rate. Ex. 1, pgs. 87-88. He determined that the cap rate applicable to the subject would have to be "well above" the high end of the range of cap rates extracted from market sales. Tr. Vol. I, pgs. 67-68. In fact, he concluded that the cap rate would have to be up to 200 basis points higher than the high end of that range. *Id.* at 68. Similarly, he determined a vacancy rate significantly above the range of rates shown in the published report on which he relied. Ex. 1, p. 83.

None of this makes any sense in the context of the subject property at issue in this case. The subject is a first generation big box retail center. It had been 100% occupied by a single tenant with no history of vacancy since it was constructed. It had a demonstrated ability on all the valuation dates to attract a national credit rated tenant on typical long-term market lease

terms. Appellee submits that if the subject property is not the type of retail property which has a lower than average risk profile for theoretical buyers leading to average or lower market vacancy and average or lower cap rates, then there is no retail property which ever would meet these criteria.

II. APPELLANT'S APPRAISER'S COMPARABLE SALES APPROACH IS FATALLY FLAWED

Appellant's appraiser's comparable sales approach to value is so fatally flawed that it must be rejected. He, himself, gave it no weight in arriving at his value conclusions. Tr. Vol. I, p. 104; Ex. 1, p. 111. A total of eight allegedly comparable sales were considered in this approach covering all three years at issue due to his overlapping use of many of the same sales in multiple years. Ex. 1, pgs. 62-64. All were vacant at the time of sale or immediately thereafter. *Id.* Only two were in Massachusetts. *Id.* Two were grocery stores rather than true big box retail stores. *Id.* All were sales for second or later generation use. None were operating as big box retail stores at the time of sale. Many were purchased to be subdivided for multi-tenant use. Tr. Vol. I, pgs. 92, 95, 96, 98. Several were closed due to poor sales performance or because they failed as retail stores at their locations. Tr. Vol. I, pgs. 88, 97. Seven of the eight required gross adjustments of between 45% and 75% calling into question whether they were truly comparable in the first instance. Ex. 1, pgs. 62-64. Five of the eight involved properties with deed restrictions in place, *Id.*, thereby limiting the field of potential buyers and, as he conceded on cross-examination, rendered them non-fee simple sales. Tr. Vol. I, pgs. 98-99. The ultimate value conclusions he drew from this approach were 30% below the results of his income approach, yet he claimed that

the results of the comparable sales approach "were supportive of" his income approach conclusions. Ex. 1, p. 27.

The reason why the use of vacant former big box store sales are not probative of the value of a successful operating first generation store, such as the subject, is aptly summed up in by the following:

> When a big-box chain abandons a store, its actions indicate there may no longer be market support for that use at that location. Dark stores are typically closed because they were poorly located, had functional issues, or were part of a company bankruptcy or downsizing. Abandoned big-box stores are often occupied by furniture stores, churches, indoor flea markets, or similar second-tier users. Dark store sales usually involve what is commonly called second-generation space. This describes a building whose original tenant has departed and has been replaced with a new user; and often there is a new use for the property. This situation is not exclusive to big-box stores. When unsuccessful grocery stores, drug stores, even corporate headquarters go dark, they are often sold at a fraction of their original cost and converted to a different use.
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> Exhibit G, p. 7.

Sales of failed retail locations or stores that closed due to poor sales performance, especially if they involve deed restrictions, should not be used to value a first generation big box retail store such as the subject. "A failed store usually results in a change of highest and best use and the

placement of deed restrictions almost guarantees it. Adjusting sales for these conditions is difficult if not impossible, and the use of sales with highest and best uses different from that of the subject is improper." Ex. G, p. 13. Deed restricted properties also should not be used in a comparable sales analysis because they involve sales of less than a fee simple interest and limit the universe of potential market participants. Ex. G, p. 7. *See generally*, Exhibit G, pgs. 6-13 and cases cited therein (discussing and citing case law in other jurisdictions regarding the impropriety of using dark store and deed restricted properties in comparable sales analyses of operating big box stores).

None of the sales of vacant, deed restricted, second generation properties used by Appellant's appraiser are remotely comparable to the subject, a successful, continuously operating, first generation retail space. Additionally, the magnitude of the adjustments he was required to make, ranging as high as 75%, indicates the lack of comparability of his chosen properties to the subject. Finally, he, himself, gave "no weight" to his comparable sales approach in arriving at his final value conclusions. For all these reasons, this Board should reject Appellant's appraiser's comparable sales methodology.

III. APPELLANT'S APPRAISER FAILED TO PROVIDE CREDIBLE INCOME APPROACH VALUES DUE TO HIS USE OF UNSUPPORTED AND ILLOGICAL VACANCY AND CAPITALIZATION RATE CONCLUSIONS AND INCLUSION OF OTHER INCONSISTENCIES WHICH RENDER THE ENTIRE APPROACH SUSPECT AND INVALID

Appellant's appraiser did follow generally accepted appraisal methodology in determining the market rent to apply to the subject using his primary lease comparables. Most of the eight primary lease comparables he chose were from appropriately sized and appropriately located big box stores. Ex. 1, pgs. 70-76. All were taken from typical market long-term big box leases and not from atypical short-term leases or tenant at will situations. *Id.* His secondary lease comparables were of little value since seven of the eight properties were approximately one half or considerably less the size of the subject and the eighth involved only an asking rent for a closed former Sam's Club which was demolished and reconstructed as a car dealership. Ex. 1, p. 77. Nonetheless, based on the primary lease comparables his market rent conclusion of $11 per square foot on a triple-net basis appears reasonable. *Id.* at 82.

His reimbursement income figure would be within a reasonable range if not for the fact that he claims to be valuing a property which only will be leased on a tenancy at will basis, since in this scenario there would be no lease requiring the payment of reimbursement income. With respect to his reimbursable expenses, they offset his reimbursement income figure as the subject is rightly being appraised as a triple-net property. However, the same issue exists regarding whether and to what extent operating expenses and insurance would be reimbursable in his assumed tenancy at will scenario. In terms of his non-reimbursable expenses, management and structural reserves generally appear reasonable with the minor exception that he includes an "Administrative" expense as a separate category where that normally would be included within the management expense category in a triple-net analysis.

The major flaw in his non-reimbursable expense analysis is the inclusion of leasing commissions and tenant improvements as above-the-line expenses. This again highlights the major inconsistency flowing from the faulty tenancy at will assumption on which he bases major

components of his income analysis. His premise is that in order to do a fee simple valuation, the subject must be treated as if it only will be occupied on a tenancy at will basis. However, in calculating the amount of leasing commissions and tenant improvements to include as expenses, he assumes a lease term of ten years. Ex. 1, pgs. 85, 96 & 104. The contradiction is obvious. Moreover, it strains credulity to assume that an owner would pay any leasing commission to a broker for procuring only a tenant at will. Similarly, no owner would provide a tenant improvement allowance of $273,380 to a tenant which could vacate the property at any time merely on 30-days notice. Appellant's theory of the case and valuation methodology just doesn't hang together. Adoption of the former negates credible application of the latter. Finally, as noted, Appellant's appraiser took leasing commissions and tenant improvements as above-the-line expenses without following the preferred approach of making a corresponding adjustment to the cap rate. *See*, infra, at 16 (discussing cap rate derivation).

A. There Is No Basis for a Vacancy Rate Conclusion which Significantly Exceeds Published Ranges, Is Contrary to the Subject's Actual History and Lacks Any Credible Market Support

The selection of a market vacancy rate is the first of two major areas of the income approach analysis where Appellant's appraiser's flawed assumptions and methodology lead to incorrect and inconsistent results. He concluded to a market vacancy rate of 15% for all three years at issue. Ex. 1, pgs. 83, 95 & 103. The subject is a single tenant property which has been 100% occupied since its construction and has at all times since and on the three valuation dates

at issue had an actual vacancy rate of 0%. *See, e.g.,* 225 Great Wolf Road, LLC v. Assessors of Littleton, Mass. ATB Findings of Fact and Reports 2016-288, 301 (Promulgated June 28, 2016)(rejecting appellant's vacancy rate as 'excessive' given subject's 0% historical vacancy). Published market sources relied on by Appellee's expert which are more specific geographically and by property size than Appellant's appraiser's source include the Costar 495 South Retail vacancy report showing a market vacancy rate range in the subject's geographic area of 5.6% to 8.2%, Ex. F, p. 28, and the Keypoint Large Store vacancy report showing a market vacancy rate range for properties of the subject's size of between 1.1% and 1.4%. *Id.* Appellant's appraiser chose to use a more general Keypoint report which covered a broader geographic area (all of eastern Massachusetts rather than 495 South) and all sizes of retail properties, not just large stores such as the subject. Ex. 1, p. 83; Tr. Vol. I, pgs. 107-108. Even that report showed a vacancy rate of only 9% which was declining over time. Ex. 1, p. 83; Tr. Vol. I, pgs. 107-108. He disclosed only this report in his appraisal report despite being aware of the more specific Keypoint report covering vacancy in large size stores which he recalled showed vacancy rates "that fluctuated between one and 2 percent during the period we analyzed." Tr. Vol. I, p. 108. He also agreed that single tenant properties generally have a lower vacancy rate than multi-tenanted properties. *Id.* at 109. The only other support for his concluded vacancy rate were three anecdotal stories regarding a vacant furniture store, a bankrupt Building 19 store and a closed former Sam's Club which was converting to a second generation use as a data center. Ex. 1, p. 83. None of these situations are remotely similar to the subject property and certainly one cannot derive a market vacancy rate from individual anecdotal stories.

Despite all the published data that was available directly relevant to the subject's size and location and knowledge of the subject's actual history, Appellant's appraiser opined a vacancy

rate of 15%. This is 67% higher than the published report he consulted, more than double the midpoint of the CoStar 495 South retail report range and almost 10 times higher than the top of the Keypoint large store report. Simply put, his 15% vacancy conclusion is unjustified, unsupported and wrong. It also magnifies the error in his cap rate conclusions by unjustifiably increasing the partial load to his base cap rate for the owner's share of real estate taxes during vacancy periods. *See,* infra, at 16. Appellant's appraiser's vacancy rate conclusion of 15% in all three years at issue lacks credible market or evidentiary support and should be rejected by this Board.

B. Appellant's Capitalization Rates Are Based On Artificial Manufactured Risk Premiums Which Are Directly Contradicted By the Subject's Actual History and Risk Profile and Should Be Rejected By this Board

The second major area where employment of Appellant's appraiser's faulty methodology leads to incorrect results in the income approach is in the selection of appropriate capitalization rates. Appellee's expert relied on two well-recognized sources specific to net leased retail power centers and to Boston area community retail centers, PWC/Korpacz and Integra IRR. Ex. F, p. 29. He also utilized the Band of Investment technique. *Id.* at 29. He did not rely on cap rates extracted from the market due to the lack of sales of comparable single-tenant, first generation big box stores. *Id.* at 29 & 26. He provided back up data on his cap rate sources for the reader of his appraisal report to review. Ex. F, Appendix, pgs. D-1 through D-9. Using these methods he reached base cap rate conclusions within the published ranges shown for the subject's property

type with slight differences from year to year as market conditions changed and cap rates declined with the improving economy. His base cap rate conclusions were 7.5%, 7.25% and 7.0% for the three years at issue, fiscal years 2012, 2013 and 2014, respectively. Ex. F, p. 30. He then loaded these base cap rates based on his reasonable, well-supported and conservative (in light of the Keypoint Large Store Vacancy Report) market vacancy rate conclusions to account for the owner's share of real estate taxes during vacancy. *Id.* Thus, his total cap rate conclusions for FYs 2012, 2013 and 2014 were 7.61%, 7.37% and 7.12%, respectively. *Id.*

To the contrary, it is in the selection of cap rates where application of Appellant's appraiser's faulty theory and methodology has its most glaring effect. The first method he employed was the market extraction method, pointing out that in order to use this method the net income of each property must be known and each property sale from which the rate is extracted must be comparable to the subject. Ex. 1, p. 86. However, he did not show any data or support for the net income from the properties he used and they clearly were not comparable to the subject. Eleven of the twelve sales used were drug stores, none were big box retail outlets, and all twelve were approximately one-tenth the size of the subject property. *Id.* at 87. On the most basic levels of size and use, these properties were not comparable to the subject.

Furthermore, the cap rates extracted from these sales ranged from 5.06% to 9.3%. *Id.* Interestingly, Appellee's expert's base cape rate conclusions were approximately at the midpoint of this range, while Appellant's appraiser's conclusion of 10% for all years exceeds the top of the range. *Id.* at 92, 97 & 105. Appellant's appraiser notes that all the sales from which the rates were extracted were single-tenant, net leased properties (as is the subject); that each was capable of obtaining a tenant on a long-term lease (like the subject); and that it is unusual to find sales of retail properties rented on a month to month basis. *Id.* at 87 (parenthetical information added).

All of these points are contrary to his theory that the subject should be treated as a multi-tenanted property to rent only on a tenancy at will basis. As he states, "[p]roper valuation of this legal interest requires the appraiser to assume a 'tenancy at will'..." where "[a] tenant, regardless of its creditworthiness, can thus vacate the property with a 30 day notice." *Id.* at 87. Therefore, he concludes, the subject would be a "riskier" investment than any of the noted transactions. *Id.* at 87-88.

In laymen's terms, this is poppycock. In legal and appraisal terms, it simply is wrong. When asked to cite a single specific source in support of this proposition, he could only point to the definition of fee simple and to common law as explained to him by Appellant's attorney. Tr. Vol. I, p. 118. While the accepted definition of fee simple requires a property to be valued as if unencumbered, it does not require assumption that the property only can be occupied as a tenancy at will. Rather, it requires the assumption that the property can be leased at typical prevailing market terms on the valuation date at issue. Those typical market terms include not only market rents, but other typical market lease provisions, such as lease length, as well. If this were not the case, then *every* non-vacant property being valued would have to be treated as being 'riskier' than the market average due to its presumed 'at will' status. *Every* property would have to have a risk premium added to the market derived cap rate, even if its history, location and condition demonstrated that it, in fact, was less risky than the market average. By definition, all properties cannot be riskier than average which is the illogical conclusion that flows from Appellant's appraiser's theory. This calls to mind the satirical opening line of the well-known former nationally syndicated radio show, <u>A Prairie Home Companion</u>: "Welcome to Lake Wobegon, where all the women are strong, all the men are handsome, and all the children are above-average." (Garrison Keilor).

For his second method of cap rate derivation, Appellant's appraiser referred to surveys published by RealtyRates.com. Only the fiscal year 2012 selection will be addressed herein, as the points discussed are similarly applicable to the subsequent years as well. At the outset, it should be noted that RealtyRates tends to reflect non-institutional grade properties. Ex. F, p. 29. Appellant's appraiser's national survey of freestanding retail properties included all geographical areas and all property sizes and was not regionally or size focused. Ex. 1, p. 89. He chose not to use other widely available and widely relied upon in the appraisal community published surveys such as PWC/Korpacz and Integra IRR which were used by Appellee's expert and which are more specific to the subject's property type and location. Ex. F, p. 29. Once again, in analyzing the survey he used, Appellant's appraiser assumed the subject would be subdivided into a multi-tenant property. Ex. 1, p. 89. As a result of the faulty unsupported assumption that the subject would be a tenancy at will property and therefore 'riskier' than average, he opined that the cap rate from the survey should be above the average and near the maximum of the reported range. *Id.* His only basis for going above the average and near to the maximum rate shown was the risk inherent in a tenancy at will situation. No other support for this conclusion was given.

The RealtyRates survey range he relied upon for free standing retail properties shows a minimum surveyed rate of 6.3%, an average rate of 10.65% and a maximum rate of 13.26%. *Id.* at 90. These results reflect all free standing retail properties ranging from 'mom & pop' stores to high end institutional grade properties with the only distinction for the type of property, as well as for size, location and the type of tenant which could be commanded in the market, being through the indirect mechanism of minimum, average or maximum reporting in the survey methodology. On the valuation dates and at all times since first constructed, the subject property was an institutional grade, single-tenant, fully occupied property leased by Lowes, a national

credit rated tenant and located in the Boston area market. These factors do not introduce 'leased fee' considerations into the analysis. Instead, they serve to demonstrate the type and quality of tenant the subject property at its location could command on the valuation dates – a market concept. If a property such as the subject, with its occupancy history, location and demonstrated ability to attract a national credit rated tenant, is not the type of retail property which should reflect a cap rate at the minimum, or slightly above minimum, range of cap rates reported by RealtyRates then, Appellee submits, there is no property which could do so.

For his third cap rate derivation method Appellant's appraiser used the Band of Investment Technique. In developing this method he once again used the RealtyRates surveys reflecting national and non-institutional grade properties rather than the more specific and location focused surveys such as PWC/Korpacz and Integer IRR to determine an equity dividend rate which depicts an appropriate return required by an investor for the level of risk undertaken. Ex. 1, p. 91. RealtyRates gave an equity dividend rate range of 7.27% to 15% with an average of 11.06% for free standing retail properties. *Id.* In this analysis he once again employed his faulty thesis that the subject would be subdivided to become a multi-tenant property and would be leased on a tenancy at will basis, thereby making it riskier than average properties. *Id.* As a result of the alleged increased risk, he concluded and used an equity dividend rate of 15% which was above the average and near the maximum. *Id.* Had he recognized the subject for what the evidence showed it was, an investment grade, single-tenant, continuously fully occupied big box property in a favorable Massachusetts location capable of attracting a national credit rated tenant, it would have been apparent that the more appropriate equity dividend to apply to the lower risk subject would be below the average and closer to the minimum of the RealtyRates range of 7.27%. *Id.* at 90.

Additionally, with respect to cap rate derivation, the 'load' applied by Appellant's appraiser to account for the owner's share of real estate taxes during periods of vacancy was too high as a result of his excessive vacancy rate conclusion. *See*, supra, at 11. This 'double whammy' of inflated base cap rates and excessive vacancy based loads flowing from the erroneous thesis that the subject was riskier than average retail properties resulted in clearly excessive total cap rates for the premier, institutional grade subject property at issue in this case. Lastly with respect to cap rates, Appellant's appraiser again, this time by omission, employed a flawed methodology. He chose to take leasing commissions and tenant improvements as above-the-line expenses, Ex. 1, pgs. 85, 93, 96-97, 101, 104 & 109, without making any corresponding adjustment to his cap rates. This Board has noted that proper valuation methodology requires that when these items are taken as above-the-line expenses the cap rates should be reduced to account for the fact that they generally are not treated that way in the investor survey results. *See*, Genzyme Corporation v. Assessors of Cambridge, Mass. ATB Findings of Fact and Reports 2011-280, 304 and 335 (Promulgated May 4, 2011).

Based on the flawed vacancy rate conclusion and unsubstantiated capitalization rate risk premiums, both associated with, and stemming from, the unaccepted and incorrect Dark Store and tenancy at will theories espoused by Appellant's appraiser, Appellant's income approach to value lacks efficacy and credibility and should be rejected. *See, e.g.,* 225 Great Road, LLC, supra, at ATB 2016-300 (rejecting appellant's income approach based on serious flaws affecting efficacy and credibility). It was incorrect to determine a vacancy rate diametrically opposed to the subject's actual history and well above the range shown by credible published market reports, including those used by Appellant's appraiser. It also was error to base capitalization rate conclusions on the addition of artificial risk premiums manufactured through the use of faulty

legal theories and contradicted by evidence of the subject's history and actual market risk profile. As a result, Appellant's income approach provides no basis for determining the subject's fair cash value and therefore should not be relied upon. *See, e.g.*, John & Adele Molinari, Trustees of the GP-Milford Realty Trust v. Assessors of Milford, Mass. ATB Findings of Fact and Reports 2013-1042, 1064 (Promulgated October 28, 2013)(defects in key components of income approach compromised concluded values and required rejection of the method).

IV. CONCLUSION

In these circumstances well-established law and precedent require rejection of Appellant's claims of overvaluation. The assessments are presumed valid until the taxpayer sustains its burden of proving otherwise. Schlaiker v. Assessors of Great Barrington, 365 Mass. 243, 245 (1974). An appellant before the Appellate Tax Board has the burden of persuasion to show its properties were overvalued. General Electric Co. v. Assessors of Lynn, 393 Mass. 591, 598 (1984). Until that burden is sustained, "the valuations made by the assessors will be presumed valid." General Electric, at 607, quoting Foxboro Assocs. v. Assessors of Foxborough, 385 Mass. 679, 684. (1982). *Accord*, Northwest Assocs. v. Assessors of Burlington, 392 Mass. 593,594 (1984). Where, as here, flaws in the appellant's valuation methodology leave the Board unable to "discern if the subject property's fair cash value...should be lower than the assessed value," the Board must rule that appellant has failed to meet its burden of proof. Northshore Mall Limited Partnership v. Assessors of Peabody, Mass. ATB Findings of Fact and Reports 2004-195, 245, *aff'd*, 63 Mass. App. Ct. 1116, (2005). *See also*, 225 Great Road, LLC, supra, at ATB 2016-300 & 301 (finding that appellant failed to meet its burden of proof based on flawed

methodology including treating a single occupant property as multi-tenanted); John & Adele Molinari, Trustees of the GP-Milford Realty Trust, supra, at ATB 1059 (ruling that appellant failed to meet its burden of proving a fair market value less than the assessed value based on flaws in the income approach thereby providing insufficient credible evidence on which to base a fair cash value determination).

V. PRAYER FOR RELIEF

For the foregoing reasons and upon the authorities and evidence cited and discussed, Appellee respectfully requests that this Board find that Appellant has failed to provide substantial credible evidence that the subject property was overvalued and therefore failed to meet its initial burden of persuasion and thus this Board should uphold the presumptively correct assessed values at issue. Alternatively, this Board should rule, based on the weight of the substantial credible evidence presented, that the values determined by Appellee's expert more accurately reflect the fair cash value of the subject property on the valuation dates than do those of Appellant's appraiser.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellee's Post Hearing Brief was served upon Counsel for the Appellant by mailing the same first-class, postage prepaid to Ryan J. Gibbs, Esq. at, The Gibbs Firm, LPA, 2355 Auburn Avenue, Cincinnati, OH 45219 as well as by electronic delivery to Ryan@thegibbs firm.com on September 1, 2017.

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Kenneth W. Gurge, Esq.