

1 TRANSCRIPT OF PROCEEDINGS:

2 THE CLERK: Case Number 15CV6472,
3 Best Buy Stores LP v. City of Wauwatosa.
4 Appearances please.

5 ATTORNEY WILHELMY: Good morning,
6 Your Honor. Thomas Wilhelmy practicing with the
7 law firm of Fredrikson and Byron appearing on
8 behalf of the plaintiff, Best Buy Stores LLC.

9 THE COURT: Good morning.

10 ATTORNEY SEIBEL: Good morning, Your
11 Honor. Amy Seibel appearing on behalf of the City
12 of Wauwatosa. And Ryan Braithwaite will not be
13 appearing today.

14 THE COURT: All right. Good morning.
15 This matter is here on the calendar today for
16 decision. This was a court trial held before this
17 court over a number of dates, beginning --

18 THE CLERK: There's some other
19 parties on the phone.

20 THE COURT: Who is on the phone?

21 THE CLERK: Daniel Deveny.

22 ATTORNEY WILHELMY: Your Honor, I
23 believe arrangements were made for Mr. Deveny and
24 Miss Smith to call in for the hearing.

25 THE COURT: All right. Certainly.

1 And they are again, from Best Buy?

2 ATTORNEY WILHELMY: Mr. Deveny is my
3 colleague at Fredrikson and Byron, the young
4 gentleman who sat next to me. And Miss Smith, who
5 was here for most of the proceedings, not all but
6 95 percent of them, she's the in-house counsel for
7 Best Buy.

8 THE COURT: All right.

9 All right. On the phone please.

10 ATTORNEY SMITH: Hi. Tracy Smith and
11 Katrina Wessbecker from Best Buy.

12 ATTORNEY DEVENY: And also Daniel
13 Deveny, Your Honor, from Fredrikson and Byron.

14 THE COURT: All right. Good morning.

15 ATTORNEY DEVENY: Good morning.

16 THE COURT: I hope you're going to be
17 able to hear me. I can't attest to the quality of
18 our microphones and the quality of the speaker
19 phone, but we'll do our best.

20 As I was saying a moment ago, this is
21 here for a decision on the trial that was held in
22 this courtroom over a period of days that amounted
23 to, I believe eight at least. The matter has been
24 briefed very thoroughly and I want to thank both
25 counsel and their firms for their efforts in the

1 work that they performed and the comprehensive
2 submissions that were made tying in obviously what
3 they thought was pertinent and reflecting on
4 references in the record, including transcript
5 references, as well as many exhibits. Again, I
6 also want to thank counsel for the exhibits that
7 were prepared and utilized during the trial. I say
8 that because the court has gone back and referred
9 to them in developing my decision and obviously
10 relied on the exhibits and the record heretofore.

11 As indicated, this has been briefed
12 extensively. There were pretrial briefs submitted
13 by the parties highlighting what they believed the
14 issues were going to be and what they believed the
15 evidence would show. Opening statements were
16 provided by both sides and closing arguments were
17 made by both sides. The court had the benefit of
18 the transcript as well, and the court has reviewed
19 and considered carefully the briefs post trial
20 submitted by both sides, as well as their proposed
21 findings of fact and conclusions of law.

22 I take the time to mention this
23 because it turned out to be quite an extensive
24 record. The court, in having done this before, and
25 in anticipation of doing this again involving other

1 cases, can't emphasize enough how important it is
2 to adhere to the anticipated court schedule.
3 Really through no fault, I guess, other than the
4 parties' wish to be thorough, really this matter
5 carried on probably for a few days longer than it
6 should have. The court will accept responsibility
7 for that, but nevertheless, it just made the record
8 extend itself.

9 I know I commented on it during the
10 trial. I did not in any way mean to address it
11 personally to the parties, because I know both
12 sides are represented by excellent counsel, and as
13 I said, they were trying to be thorough. However,
14 very often in doing on that, regardless of how good
15 the lawyer, there is redundancy, and sometimes you
16 can beat a dead horse to death. And as result of
17 this, this has been extended, efforts have been
18 made to schedule this hearing sooner, a transcript
19 had to be typed, and then the briefs were
20 submitted. The point being anticipating if and
21 when an appellate court is going to review this, I
22 wanted to give some context for the length
23 involved. Perhaps it's just the nature of these
24 cases, but it did take a great deal of time for the
25 court to go through the record and obviously to

1 give deference to both sides' arguments.

2 The court is not going to receive any
3 additional oral argument at this point because of
4 the extensive record and the opportunities that
5 counsel have had to argue this. I guess if there
6 is a point that one of you wish to make which feel
7 must be said, I'll give you that opportunity as a
8 courtesy to do that, but I'm prepared to proceed.
9 I can assure you I've read your briefs, I've
10 examined the record, I've also gone through my
11 notes which I took very carefully during trial, and
12 there are folders of exhibits, some more key than
13 others. So before I get into the decision, is
14 there anything either one of you wish or feel you
15 must say? Mr. Wilhelmy?

16 ATTORNEY WILHELMY: No, Your Honor.

17 ATTORNEY SEIBEL: No, Your Honor.

18 THE COURT: All right.

19 All right. The court notes that this
20 is a property tax assessment case that was
21 commenced pursuant to Wisconsin Statute under
22 Section 74.37 of the Wisconsin Statutes, where the
23 plaintiff, Best Buy, has asserted a claim of
24 excessive assessment for two years in question,
25 2015 and 2016, looking at the fair market value of

1 the Best Buy retail store, that I'll refer to as
2 the subject property, which is located at 2421
3 Mayfair Road in Wauwatosa, Wisconsin. Again, for
4 the years as of January 1, 2015, and as of January
5 1, 2016.

6 The court, from the testimony in the
7 record, finds that the store is approximately just
8 short of 48,000 square feet, 47,901 square feet,
9 with an additional 57,000 plus square foot of an
10 attached parking garage. It sits on approximately
11 four acres of land with frontage along Mayfair Road
12 between North Avenue and roughly Burleigh in
13 Wauwatosa in Milwaukee County. Wauwatosa assessed
14 the property at \$8,695,800 for the years 2015 and
15 2016. It is that assessment that the plaintiff
16 maintains is excessive. They have exercised their
17 right under Wisconsin law and the statute
18 referenced.

19 In reviewing this case the court,
20 pursuant to Section 70.49(2) of the Wisconsin
21 Statutes, must give presumptive weight to the
22 assessment. To overcome the presumption the owner
23 must present significant contrary evidence or a
24 challenge will be rejected. The court can cite to
25 a number of Wisconsin cases that set that out, one

1 of which is *Adams Outdoor Advertising Limited v.*
2 *the City of Madison* at 294 Wis. 2d 441. Also the
3 *Xerox Corporation v. Wisconsin Department of*
4 *Revenue*, an older case, at 114 Wis. 2d 522 at page
5 528. In effect, another way to put it as it was
6 stated there, the owner's evidence must compel or
7 show the conclusion that the assessor valuation's
8 was incorrect and hence excessive.

9 The plaintiff, in their submissions,
10 presented testimony from Michael MaRous. His
11 appraisal and opinion concluded that the property
12 should be valued at \$5,750,000 for the years 2015
13 and 2016. The City has relied primarily upon the
14 work done by William Miller. They've also relied
15 on another expert, Doctor Thomas Hamilton. And the
16 plaintiff also has submitted evidence and testimony
17 from Mr. Lennhoff.

18 The court, in going back over the
19 testimony of those individuals, notes that they
20 were well prepared. The court considered the
21 reports submitted, the testimony that they
22 presented, and their reference and reliance on
23 obviously the numerous exhibits that led them to
24 their conclusions for which they gave to a
25 professional certainty. The court was impressed

1 with these witnesses. The court finds that they
2 were all experienced in this area. They've
3 testified in other cases.

4 The court only references that
5 because it's part of the record because the court
6 considered their testimony in this case. Each of
7 these cases is to be viewed obviously separately.
8 The facts here are unique to these circumstances,
9 and that is the way the court approached this,
10 applying Wisconsin law, which includes obviously
11 amongst other things, the statutes and the various
12 cases.

13 There are a number of cases in
14 Wisconsin law decided by our Wisconsin Supreme
15 Court that were helpful and have been relied upon
16 by both sides. Both sides, however, have seen this
17 very differently, looking at the same set of facts
18 have come to different conclusions. The court has
19 analyzed this carefully and considered the evidence
20 and the weight of the evidence presented. In that
21 context, I've also considered the credibility of
22 the evidence. And that is not to suggest that this
23 court finds that any of the witnesses here, while
24 the court finding not to be as credible, does not
25 in any way suggest in my decision here that I did

1 not believe them.

2 I know it was a way that they viewed
3 the evidence and presented their opinion based upon
4 how they perceive the facts and how they attempted
5 to apply Wisconsin law and the interpretation of
6 it, including the statutes, as well as case law.
7 And I was impressed by the familiarity that the
8 witnesses had with a number of the cases that were
9 discussed during the trial and that they relied
10 upon. These were not inexperienced witnesses by
11 any means. With that however, the court notes that
12 as the trier of fact here and presiding over this,
13 the court has to weigh very carefully however, the
14 testimony that they present and the evidence that
15 they want the court to rely on. Each side had
16 their own experts, and the court obviously in the
17 context of credibility can't overlook that.

18 Now, the approach here led to some
19 differences between what Mr. MaRous concluded and
20 the value that Mr. William Miller placed on the
21 Best Buy property. Mr. Miller, I believe, set the
22 value at 13,300,000 for 2015, and 13,200,000 for
23 2016. Mr. Miller's of the land alone was
24 \$7,294,500. And those numbers are both greater
25 than Mr. MaRous's opinion and conclusion.

1 The court heard testimony from a
2 number of witnesses in addition to those experts.
3 I've referenced Mr. Lennhoff, but the court also
4 heard testimony from the assessor from Wauwatosa,
5 Shannon Krause. Best Buy called two employees,
6 Miss Kathryn Beine, I believe it's pronounced, I
7 don't mean to mispronounce it, and a Mary
8 Cassellius, both with Best Buy for a number of
9 years that are involved with real estate for Best
10 Buy in different capacities. And they testified
11 concerning somewhat of a background and history
12 leading up to the current Best Buy store on Mayfair
13 Road.

14 It should be noted, and the record
15 reflects, and I so find, that previously Best Buy
16 had a store just north of this location on Mayfair
17 Road. It did move to this location after acquiring
18 the property. Miss Krause testified that she
19 utilized the mass appraisal approach and ultimately
20 came to her conclusions on the assessment for 2015
21 and 2016.

22 The court notes that the manual
23 referenced from Wisconsin was relied upon quite
24 heavily. It is a guideline here and what the
25 witnesses appropriately utilized and was arguably

1 utilized in coming to the assessment. The court
2 viewed this manual, having been familiar with it,
3 but it was referenced in a number of exhibits both
4 by the plaintiff and the defendant. I'm not going
5 to begin to get into the exhibit numbers, the
6 record speaks for itself, and when I refer to the
7 manual, the record and the parties should know
8 which exhibits they're contained in. They've been
9 identified in the record. I don't want to cross
10 reference because I know the plaintiffs have their
11 numbers for a lot of the exhibits, which were also
12 identified by different numbers by the defendants,
13 and I don't want to confuse the two or indicate I
14 overlooked the plaintiff's or the defendant's.

15 The court, in going over this,
16 analyzed carefully the testimony presented by the
17 witnesses referred to. Each of them provided their
18 curriculum vitae, which the court reviewed as
19 exhibits. It was clear to the court that they were
20 very knowledgeable on the subject matter, and they
21 reached opinions based upon how they viewed the
22 evidence, and presented same in their reports and
23 in their testimony.

24 In further reference to the standard
25 of review, the court has alluded to 74.37 of the

1 Wisconsin Statutes. In that context, the court
2 obviously applied that to the facts in evidence in
3 the record. The court has the obligation to weigh
4 the competing evidence, including the presumption,
5 and to determine whether or not the presumed fact
6 is more probable than not. There are a number of
7 ways that the court can say that, but ultimately
8 there is a presumption here at the outset. Failure
9 to provide sufficient persuasive evidence to rebut
10 the presumption that the assessment represents fair
11 market value entitles the municipality the judgment
12 based upon that presumption.

13 The court notes that there is also,
14 as has been referenced in other cases, but the
15 court is familiar with the rule of taxation, that
16 it shall be uniform. The court references the
17 Wisconsin Constitution. I say this because the
18 court has not taken this matter lightly. It
19 represents a significant decision to both parties,
20 Best Buy and their interests, and obviously the
21 City of Wauwatosa and their interests. In that
22 context, in applying the standard of review from
23 the statutes and the case law, and referencing the
24 manual, the court has tried to reach a fair and
25 just decision from the record.

1 The court does make a number of
2 findings here and I will incorporate it and adopt
3 the findings submitted by one of the parties here.
4 The court, in viewing the testimony of both
5 Mr. Miller, Doctor Hamilton, who is a professor at
6 Roosevelt University, Mr. MaRous and Mr. Lennhoff,
7 has weighed that testimony as I would instruct a
8 jury to do, and to apply those factors and
9 consideration that this court is extremely familiar
10 with in the jury instruction. As I indicated, my
11 critique, if any, as it may be described, is not
12 really a critique, it's an evaluation of their
13 testimony and the weight I choose to give it based
14 upon the facts in the record.

15 The court, in drawing an analogy
16 perhaps to simplify this, but not make it
17 simplistic, finds that in effect, when it's all
18 said and done, the plaintiffs were trying to place
19 a round ball or a golf ball in a square hole in the
20 analysis provided by Mr. MaRous. I would describe
21 Mr. MaRous, who I found to be a very good witness,
22 very likable person and very knowledgeable, who,
23 again to draw an analogy, had a very good swing,
24 but very often he overshot the green.

25 The court references, for example,

1 the utilization of what is required in Wisconsin
2 under the three-tier Markarian hierarchy. There is
3 a standard that the parties are to apply in
4 utilizing this, beginning first with tier one.
5 When that is not available moving to tier two. And
6 when that is not available, moving to tier three.
7 Mr. MaRous relied in great part on tier two. He
8 did perform a tier-three analysis as well. This
9 was examined and discussed and testified to as
10 well, I guess in an analysis by Doctor Hamilton.
11 And it was referenced obviously and relied upon in
12 testimony from Mr. Lennhoff.

13 The court finds in this particular
14 case, as is often the case, but particularly here,
15 that despite the knowledge and experience and
16 information that a witness such as Mr. MaRous has,
17 there is a void in not knowing or being as familiar
18 with the particular location and circumstances in a
19 case of this nature. This case is somewhat more
20 unique than others in that regard. I say that
21 because of the nature of that particular location
22 where the subject property is set on Mayfair Road,
23 across from Mayfair mall, and the nature of that
24 shopping area and that street in the overall
25 context of things.

1 Location is referenced and relied
2 upon quite heavily in the various references,
3 statute, the manual, case law and so on. To some
4 extent, I think, and I don't say this in any way to
5 suggest that this is an overriding factor, I'm
6 trying to follow a chronology in this court's
7 analysis that will kind of emphasize and point out
8 some of the problems that the court had with the
9 testimony by the plaintiff's experts. I say this
10 by way of illustration by example in Mr. MaRous's
11 tier-two analysis, and subsequently his tier-three.
12 The comparables reference, which were selected
13 after a good deal of thought and as believed by
14 Mr. MaRous to be appropriate and applicable here,
15 the court finds, in my analysis and in applying the
16 law, really support the court's ultimate
17 conclusion. Those matters relied upon by
18 Mr. MaRous were not, under Wisconsin law,
19 reasonably comparable.

20 I set out by way of example reference
21 to the property on Brown Deer Road, where the
22 Lowe's had been located and the current Walmart is
23 now located. In comparing that or utilizing that
24 as a comparable to the subject property, no matter
25 which way you cut it, no matter how you apply the

1 standards and those tools that Mr. MaRous is well
2 suited to utilize in performing this analysis and
3 evaluation, it was evident to the court that he
4 lacked the knowledge of those properties.

5 When I say the knowledge, I'm talking
6 about, amongst other things but certainly not
7 limited to that, the locations of those properties
8 and the history of those properties. There is no
9 way under any scenario that reasonably the court
10 sees that that Brown Deer situation, and the
11 Oklahoma example he gave, really is comparable
12 under the standard in Wisconsin law to utilize in a
13 tier-two analysis to the subject property. And
14 again, the way I point this out or illustrate it is
15 by way of referencing the location itself.

16 There are other factors in the
17 analysis that the court relies upon as well.
18 Obviously in this situation Mr. MaRous had to
19 adjust the grids to try and account for those
20 differences. And the court gives him credit in his
21 efforts do so. Again, I don't find that he's not
22 being credible, as much as the weight that I give
23 to his ultimate opinion and conclusion. And
24 therein I draw the analogy in to what I referenced
25 earlier, trying to place a golf ball, a round ball,

1 in a square hole.

2 His analysis, in this court's
3 opinion, and I so find, is not as reliable and
4 credible as the analysis used by Mr. Miller coming
5 to the conclusion and opinion that he had. While
6 Mr. Miller's opinion on the assessment is extremely
7 high compared to what the City has assessed the
8 property at, and the conclusion by Mr. MaRous, the
9 court notes that I find his approach and testimony
10 here to be more credible. The court relies on the
11 record and the evidence and exhibits relied upon by
12 Mr. Miller and his approach.

13 The court notes that a great deal of
14 effort has gone into this by both sides regarding
15 their opinion on the assessment. And as indicated
16 just a moment ago, Mr. Miller's assessment is
17 dramatically higher than the assessment of
18 Mr. MaRous. I suppose one could argue that perhaps
19 if one total relies on the accuracy of Mr. Miller's
20 final conclusion, the City has evaluated and
21 assessed this property too low. That is not the
22 case here, and this is not what even the City is
23 asking to do, nor is the court obviously going to
24 reach that conclusion.

25 Mr. MaRous valued the land at 4.2

1 million dollars, or \$24 per square foot. In
2 effect, that is lower than the amount that the Best
3 Buy actually paid for the property. He had four
4 land sales comparables, and as indicated by way of
5 illustration, the court's reference to the Brown
6 Deer property is an example of how this court finds
7 and concludes that the court does not find his
8 opinion credible. There are other reasons. I
9 don't find that the testimony of Mr. Lennhoff in
10 his analysis of Mr. Miller's approach, causes this
11 court to conclude that Mr. Miller's opinion should
12 not be adopted.

13 The court finds the testimony of
14 Doctor Hamilton to be far more persuasive in his
15 analysis of how Mr. MaRous approached this. The
16 court notes obviously the testimony of Mr. Lennhoff
17 is somewhat biased by his opinion and analysis on
18 how he has approached the box stores. There is a
19 debate going on now in this area concerning how the
20 courts should approach the big box stores, and it
21 wasn't more evident than what existed in the
22 testimony of the plaintiff's witnesses.

23 The court also finds that
24 Mr. Miller's testimony on the highest and best use,
25 as corroborated in the analysis by Doctor Hamilton,

1 is more credible here. The approach by Mr. MaRous,
2 in looking at the Best Buy property from a
3 standpoint of being vacant or a property in
4 transition or with lower rents or secondhand
5 property, is just an example of how this court
6 finds that that approach does not apply here when
7 determining the highest and best use. I find
8 Mr. Miller's analysis to be more credible and more
9 on point and supported by Wisconsin law. I also
10 find that the manual was followed in his analysis,
11 as required by the law, and as it was followed and
12 adhered to by Miss Krause.

13 The court further references the
14 testimony of Mr. MaRous and Mr. Lennhoff in their
15 reliance and reference to economic obsolescence,
16 amongst other things, and the obsolescence of the
17 property. I cite these by way of example as
18 illustrative of how I find their testimony not to
19 have been as credible, or to the extent of the
20 weight that I gave their testimony. They rely
21 quite heavily on a number of situations that exist
22 at the subject property. One certainly is the
23 mezzanine, the other is the parking structure. To
24 a lesser extent, access to the loading dock, which
25 has been described and testified to by a number of

1 the witnesses, and how that is a detractor, as well
2 as the positioning of subject property on Mayfair
3 Road and the fact that it is not within the mall
4 itself.

5 The court can address that again by
6 way of example, finding in terms of how I don't
7 find their testimony, while it may be relevant in
8 other fact situations and other cases, is not
9 relevant or as weighty here. The Best Buy store is
10 a standalone store, and true, it is across the
11 street from the Mayfair mall. However, it is
12 important to note, and I don't think enough weight
13 was given by Mr. MaRous or Mr. Lennhoff, to the
14 fact that it was on a street that is directly
15 controlled by an intersection with a stop and go
16 light. It provides easy access both to and from
17 the shoppers at Mayfair mall.

18 Additionally, the access to the store
19 on Mayfair Road and its visibility I think to some
20 extent was overestimated and downplayed by the
21 plaintiff's experts. It is a unique situation, but
22 the court must obviously consider all of this and
23 the particular facts that exist. The parking
24 structure was developed and built to address the
25 parking. The previous store down the road did not

1 have such a structure. While it may have been an
2 additional cost and there may be some maintenance
3 that was referred to, and the court recalls the
4 testimony of the Best Buy employees that testified,
5 that not only do most Best Buys provide lease
6 situations and few are owned, but they don't have
7 parking structures.

8 Here, however, given the location
9 across from the mall, and the fact that the brunt
10 of the business or a large portion of the business
11 and the profitability of Best Buy, as it is with
12 many retail stores, occurs during the holiday
13 season, this structure, in this court's opinion,
14 despite the testimony of Mr. MaRous and
15 Mr. Lennhoff, is not a deterrent. The court notes
16 that during the holiday season, and I reference the
17 Christmas season in particular, it allows for the
18 employees to park on a different level and allows
19 access and parking to the many customers that the
20 store relies upon. This again, by way of analysis,
21 is another factor that the court considered in
22 evaluating the plaintiff's witnesses and their
23 experts.

24 The court, in concluding and in
25 reaching the ultimate ruling that I make, does,

1 accordingly, rely on the findings of fact and
2 conclusions of law submitted by the defendant, the
3 City of Wauwatosa. I adopt those herein as a part
4 of this record and this court's decision, and
5 incorporate them into the court's findings and
6 conclusions.

7 The court, accordingly, finds that
8 the 2015 and 2016 assessments for the Best Buy
9 property as set by the city assessor is not
10 excessive, and therefore, the assessments are
11 sustained. The court orders judgment in favor of
12 the defendant, City of Wauwatosa. So ordered.

13 Miss Seibel, if you will resubmit the
14 findings and proposed order, and obviously provide
15 that to plaintiff's counsel first, the court will
16 review it, and if appropriate, I will adopt it as
17 the order consistent with the court's findings and
18 ruling here.

19 ATTORNEY SEIBEL: Yes, Your Honor.

20 THE COURT: So ordered. Thank you.

21 ATTORNEY SEIBEL: Thank you, Your
22 Honor.

23 THE COURT: All right.

24 ATTORNEY WILHELMY: Thank you, Your
25 Honor.

1 THE COURT: Thank you.

2 ATTORNEY SEIBEL: Your Honor, I

3 believe we're off the record.

4 (Off the record.)

5 THE COURT: This concludes the phone

6 call as well.

7 (End of proceedings.)

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1 STATE OF WISCONSIN)

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3 MILWAUKEE COUNTY)

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5 I, Lori J. Cunico, do hereby certify that
6 I am a Registered Professional Reporter,
7 that as such I recorded the foregoing proceedings
8 later transcribed by me, and that it is true and
9 correct to the best of my abilities.

10

11 Dated this 23rd day of July, 2019, at
12 Milwaukee, Wisconsin.

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15 Electronically signed by Lori J. Cunico, Court Reporter

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