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BY THE COURT:

DATE SIGNED: March 4, 2019

Electronically signed by Judge Marshall B. Murray
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 43

MILWAUKEE COUNTY

JSWD COMMERCE, LLC,

Plaintiff,

v.

Case No. 16-CV-5471

CITY OF MILWAUKEE,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiff, JSWD Commerce, LLC (“JSWD”), filed this action against the Defendant, City of Milwaukee, seeking a partial refund of property taxes paid, alleging the property assessment was excessive. Based on the evidence and testimony presented at the court trial, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Procedural facts and property description.

1. This action was brought by JSWD pursuant to Wis. Stat. § 74.37(3)(d), for a partial refund of property taxes paid on property it owns in the City of Milwaukee. (Complaint, ¶1.)

2. JSWD asserts it is entitled to a partial refund of taxes because the underlying property assessment was excessive. Specifically, it contends the 2015 property assessment of the parcel located at 736-748 North 4th Street in the City of Milwaukee, tax keys 361-0665-100 and 361-0667-000 (collectively referred to herein as the “Property”), was excessive. (Complaint, ¶¶ 1-4.)

3. Pursuant to Wis. Stat. § 70.10, the City values property as of January 1 in each assessment year.

4. For the tax year at issue, 2015, the City assessed the Property at \$4,715,000. (Complaint, ¶ 11; Ex. 43 at 3.)

5. On January 1, 2015, the Property consisted of an office building and an adjacent lot. (Ex. 43 at 24-26.)

6. Construction on the hotel development project began after January 1, 2015. (Ex. 43 at 51; Ex. 27 at 5; Tr. 11.20.18 at 47:12-15.)

7. JSWD filed an objection on May 15, 2015, citing the income approach as its basis for a value of \$2,500,000 for 736 N. 4th St. and \$180,000 for 734 N. 4th St., for a combined value of \$2,680,000. (Ex. 21.)

8. JSWD’s counsel sent a letter to City Assessor Timothy Krystowiak on July 22, 2016, stating that they did not believe the December 2014 sale was a market value sale and that they would “provide additional information that supports [their] opinion of value at a later date.” (Ex. 64.)

9. Gregory Stein testified at the Board of Review on behalf of JSWD, presenting a sales comparison approach to support a value conclusion of \$2,615,000. (Tr. 11.21.18 at 95:17-96:19.)

10. Ultimately, the Board of Review sustained the Property's assessments. (Complaint, ¶¶ 10, 12; Ex. 42; Tr. 11.21.18 at 106:6-7.)

11. A court trial was held from November 19-21, 2019.

II. The December 2014 Sale of the Property was an arms-length transaction.

12. JSWD and the seller, Towne Realty, are both in the commercial real estate business and have experience in the Milwaukee market. (Tr. 11.19.18 at 49:22-50:13, Tr. 11.21.18 at 118:5-11.)

13. The parties to the sale were unrelated parties. (Tr. 11.21.18 at 86:14-18; Ex. 17; Ex. 18.)

14. The sale was negotiated for at least eleven months: from December 2013 through November 2014. (Ex. 7-16; Tr. 11.19.18 at 53:24-61:13.)

15. JSWD's planning included reviews by both its architects and Doug Nysse of Arrival Partners, who became familiar with the condition of the Property prior to purchase. (Tr. 11.19.18 at 36:19-37:2, 78:15-79:3.)

16. JSWD was experienced in hotel development, having developed the Marriott prior to the SpringHill Suites project. (Tr. 11.19.18 at 12:21-13:16.)

17. JSWD also worked with White Lodging, a nationwide hotel management company, to plan the project. (Tr. 11.19.18 at 13:20-14:16.)

18. JSWD filed a Property Assessed Clean Energy (“PACE”) Financing Interest Form on July 10, 2014, stating a current value of the Property at \$3.2 million and expected value upon completion of \$24 million. (Ex. 23.)

19. In 2014, the Property was assessed at \$3,201,000. (Ex. 24.)

20. On December 1, 2014, one month before the January 1, 2015 assessment date at issue in this case, JSWD purchased the Property for \$4.7 million from Towne Realty for the purpose of redevelopment into the upscale hotel, the SpringHill Suites. (Ex. 17, 18.)

21. Upon purchasing the Property, JSWD filed the required Wisconsin Real Estate Transfer Returns (RETR) and disclosed the value of the real estate parcels being transferred as \$4.5 million and as \$200,000.00 for a total of \$4.7 million. (Ex. 17; Ex. 18.)

22. JSWD reported conventional financing on the RETR for the Property. (Ex. 18.)

23. JSWD applied for PACE funding on May 27, 2015, stating a property value of \$28,100,100. (Ex. 26.)

24. PACE is a program administered by the City of Milwaukee which connects commercial property owners with private funding for energy efficiency upgrades, with the loan repayments collected as a special charge on the tax bill. (Ex. 43 at 22, Tr. 11.19.18 at 28:10-23; Tr. 11.21.18 at 80:16-81:2.)

25. As part of JSWD’s PACE application, JSWD submitted an appraisal of the Property by HVS Consulting and Valuation Services. (Ex. 43 at 22; Ex. 20; Tr. 11.21.18 at 81:3-82:10.)

26. HVS’s appraiser opined that as of February 20, 2015, that “the ‘as-is’ market value of the fee simple interest in the Proposed SpringHill Suites... is \$5,800,000.” (Ex. 20 at 2, 6.)

27. JSWD's financing appraisal, indicating a value of \$5.8 million pre-demolition, was an independent determination that the project was feasible. (Ex. 20; Tr. 11.21.18 at 128:12-23.)

28. JSWD obtained various tax credits as part of its redevelopment project. (Ex. 1; Ex. 2; Ex. 3; Ex. 4.)

29. JSWD obtained state historic tax credits through a program that was terminated shortly after JSWD submitted its applications. (Tr. 11.19.18 at 26:22-27:12; Ex. 3.)

30. JSWD reported to the IRS that the adjusted basis of the Property as of December 1, 2014 was \$3,460,200. (Ex. 2 at 2.)

31. Many of the credits and other financing measures were contingent on the developer's performance or were unavailable until after occupancy of the hotel. (Tr. 11.19.18 at 22:9-17, 23:8-24, 31:20-32:16, 84:16-86:19; Exs. 1-4.)

32. JSWD, through its own admissions in the RETRs, PACE application, and other documents it filled out, as well as by the independent appraisal it received, demonstrated that the Property's fair market value was between 3.2 and 5.8 million dollars in December of 2014.

33. At the date of sale, the Property was 65% occupied. (Ex. 43 at 24.)

34. Office tenant US Xchange of Wisconsin, LLC (d/b/a Earthlink Business) signed a new five-year lease with JSWD on September 12, 2014, to commence on the date of closing. (Ex. 25; Tr. 11.19.18 at 83:5-25.)

35. US Xchange of Wisconsin, LLC would remain in the Property during and after hotel renovations, occupying 5,500 square feet of office space, at a cost of \$99,000.00 per year, subject to annual increases. (Ex. 25 at 2; Ex. 33 at 6.)

III. The 2015 Assessment of the Property was properly set under Wisconsin law because it was based on a recent arms-length transaction of the Property.

36. Now-retired property appraiser Thomas Kubusek set the assessment for the Property in 2015. (Tr. 11.20.18 at 129:9-12.)

37. Mr. Kubusek fielded the December 2014 sale of the Property as part of his duties as an assessor for the central business district commercial properties. (Tr. 11.21.18 at 102:8-21; Ex. 48 at 3.)

38. As part of the normal course of business, on February 15, 2015, Mr. Kubusek sent a letter to the buyers, JSWD, requesting more information regarding the sale transaction. (Tr. 11.21.18 at 90:18-91:4; Ex. 46; Ex. 67 at 57:19-58:11.)

39. The Assessor's Office received no response to the February 15, 2015 letter. (Tr. 11.21.18 at 91:5-8; Ex. 67 at 25:1-26:4, 50:4-51:18.)

40. As part of the normal course of business, in response to JSWD's objection, on June 24, 2015 Mr. Kubusek sent letters to JSWD and to its counsel requesting information supporting its opinion of value, but received no response. (Tr. 11.21.18 at 93:5-25; Ex. 47; Ex. 48 at 2; Ex. 67 at 67:5-11.)

41. In the absence of contrary information from the buyer or seller, and based on his review of the sale, Mr. Kubusek concluded that the sale was a valid, market sale. (Ex. 48 at 3; Ex. 67 at 25:1-26:4, 50:4-51:18.)

42. Mr. Kubusek set the assessment based on the sale price and on market analysis. (Ex. 67 at 27:15-28:1; 138:9-11.)

43. He utilized the mass appraisal system to set the assessment, and stated the system rounded the numbers to \$4,715,000. (Ex. 67 at 139:6-14.)

44. The affidavit certifying the assessment roll creates the presumption of correctness under Wis. Stat. § 70.49. (Ex. 45.)

45. Questioned at his deposition regarding the existence of the tax credits and other financing, Mr. Kubusek asserted that had he been aware of those “incentives,” he would not have changed his opinion of value. (Ex. 67 at 62:1-64:7; 65:2-7.)

46. Mr. Kubusek also concluded that the existence of tax credits and other public financing did not affect the sale prices of the first three comparable properties used in his report. (Ex. 67 at 110:4-117:15, 120:11-121:4, 121:11-123:8.)

47. On July 22, 2016, after the filing of the present lawsuit, JSWD’s counsel sent a letter and enclosures to the City’s hotel appraiser, Timothy Krystowiak. (Ex. 64.)

48. The July 22, 2016 letter provided no explanation for JSWD’s belief that the sale price exceeded market value, instead stating that “[w]e are in the process of evaluating the transaction, which we believe involved a purchase price that exceeded the fair market value of the property. We will provide additional information that supports our opinion of value at a later date.” (Ex. 64.)

49. Mr. Kubusek concluded that the sale of the Property was reflective of its fair market value and received no evidence that demonstrated that the sale was not; therefore this Court finds the sale price constitutes valid tier 1 evidence for the purposes of setting the 2015 appraisal of the Property.

50. This Court finds that Mr. Kubusek followed applicable law when he set the 2015 assessment for the Property based upon its recent sale.

IV. Ryan Ranker’s single property appraisal supports Mr. Kubusek’s conclusion that the December 2014 sale was a valid arms-length sale that provides tier 1 evidence of the fair market value of the Property on January 1, 2015.

51. At trial, the City offered the expert testimony of Lead Senior Property Appraiser Ryan Ranker. Mr. Ranker testified in support of the assessed values.

52. Mr. Ranker has been employed with the City of Milwaukee Assessor's Office since July 2005. He is certified as an Assessor 2 by the Wisconsin Department of Revenue. (Ex. 43 at 73.)

53. Mr. Ranker prepared a single-property appraisal for the Property for tax year 2015. (Ex. 43.)

54. In his single-property appraisal, Ryan Ranker valued the Property pursuant to the three-tier assessment hierarchy as required by the Wisconsin Property Assessment Manual ("WPAM") and assessment case law. *See Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶¶ 34-35, 294 Wis. 2d 441, 717 N.W.2d 803. (Ex. 43.)

55. Assessors and appraisers define market value as "the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus." (Ex. 43 at 6; Ex. 27 at 64.)

a. Mr. Ranker concluded that the 2014 sale was tier 1 evidence of the Property's fair market value on January 1, 2015.

56. Mr. Ranker correctly relied on the tier 1 sale of the Property as the most reliable indicator of fair market value, but checked that sale against market sales of comparable properties using the tier 2 sales comparison approach. *See id.* (Ex. 43 at 29.)

57. At the time he issued his report on July 28, 2017, Mr. Ranker had not received any information from JSWD that would refute the City Assessor's determination that the December 2014 sale was a valid market sale. (Tr. 11.21.18 at 90:4-93:25, Tr. 11.20.18 at 141:20-142:12; Ex. 43.)

58. In drafting his report, Mr. Ranker reviewed the following documents and sources: the Property record file, Mr. Kubusek's Board of Review Report, sales reviewed by Mr.

Kubusek, Real Estate Transfer Returns for the comparable sales and the Property, CoStar sale reports, the Board of Review hearing audio recording, a fifth comparable property suggested by Mr. Kubusek, PACE program application, the HVS Appraisal of the Property, and articles from the Business Journal and Journal Sentinel. He then applied his own adjustments in his sales comparison approach. (Tr. 11.21.18 at 84:7-85:22.)

59. Mr. Ranker opined that tax credits and other public grants or financing are common to redevelopment projects, especially of old or historic buildings, and therefore would not constitute atypical motivation. Further, a knowledgeable seller would be aware of the fair market value of the Property and would not be concerned with how potential buyers obtain their financing. In other words, the financing incentives are only enhancements for the buyer and do not affect the sale price. (Tr. 11.21.18 at 115:5-116:3, 135:17-22.)

60. Had he known, at the time he drafted his report, about the loans and tax credits that JSWD applied for he would still have come to a conclusion that the sale was at market value. (Tr. 11.21.18 at 115:5-116:3.)

61. The December 1, 2014 sale of the Property met the criteria for a market value sale (otherwise known as an arm's-length sale) as listed in the WPAM, and therefore is a reliable tier 1 indicator of the fair market value of the Property. (Ex. 28 at 7-8.)

b. Mr. Ranker correctly identified the highest and best use of the Property as a conversion property and analyzed recent sales of comparable conversion properties as confirmation that the sale of the Property was a reliable indicator of its value.

62. When land value exceeds the value of the improvement at a particular site, due to a transitioning of demand and usage in the area, the current use can be considered interim or

obsolete. Such circumstances indicate redevelopment of the site into a higher and better use. (Ex. 43 at 7.)

63. The appraiser is required to determine which of the possible uses the highest and best use is. (Ex. 28 at 7-12.)

64. The determination of “highest and best use” directly affects the ultimate value opinion because it dictates comparable properties, units of comparison, and data that shall be used for any given methodology. (Tr. 11.21.18 at 114:16-24; Ex. 43 at 6.)

65. Downtown Milwaukee has seen an influx of investment, construction, and development. In the immediate vicinity of the Property, the new Milwaukee Bucks arena and numerous ancillary developments are taking place. There is also talk of expanding the Convention Center, located across the street from the Property. (Ex. 43 at 16.)

66. Mr. Ranker testified to the Property’s favorable location as being adjacent to the Convention Center, the second phase of the streetcar line, the theaters and arena to the north, and the train station to the south. (Tr. 11.21.18 at 79:9-16.)

67. From 2008 to 2016, Downtown Milwaukee has seen increased hotel development due to high demand, and particularly redevelopment of existing buildings into apartments and hotels. (Ex. 43 at 17-23; Tr. 11.21.18 at 79:17-80:5.)

68. Hotel development continues today, with the announcement of the Cambria Inn’s development and another hotel proposed for the Johnson Controls site. (Tr. 11.21.18 at 80:6-15.)

69. Mr. Ranker described the downtown Milwaukee development market as a “development boom” and as a stable or growing market across the spectrum of real estate property types. (Tr. 11.21.18 at 83:12-25.)

70. Mr. Ranker concluded that market demand suggested that new hotel supply was expected to be easily absorbed such that redevelopment was the highest and best use. (Ex. 43 at 7-8.)

71. Mr. Ranker correctly determined the highest and best use of the Property to be for development into a multi-family, lodging, or hotel. (Tr. 11.20.18 at 133:23-134:10; Ex. 43 at 7-8.)

72. This Court finds that, as of January 1, 2015, the Property's highest and best use was to convert it to a hotel.

73. Mr. Ranker opined that it would be appropriate to change the classification of the Property to a hotel if development had already begun, based on how much construction or how much renovation had been done. (Tr. 11.21.18 at 110:3-17.)

74. As of January 1, 2015, renovation of the Property had not begun; therefore Mr. Ranker correctly classified the Property as a conversion property rather than a hotel for the purposes of a sales comparison approach. (Tr. 11.19.18 at 144: 15-19; Tr. 11.21.18 78: 6-8).

75. He valued the Property as a conversion project, conversion to its highest and best use from its current use. (Tr. 11.21.18 at 108:4-6.)

76. The purpose of Mr. Ranker's sales comparison approach was to determine whether the sale of the Property conformed to a recent sale of reasonable comparable properties. (Tr. 11.20.18 at 142:22-143:2.)

77. When conducting the sales comparison approach, Mr. Ranker selected valid, arm's-length sales of properties comparable to the Property. He then engaged in a comparative analysis, selected appropriate elements of comparison, and adjusted the comparables' sale price in order to estimate the value of the Property. (*See* Ex. 28 at 7-25-7-29; Ex. 43 at 29-46.)

78. Mr. Ranker chose properties that were purchased for redevelopment and had similar site size, building size, and location as the comparable sales properties. (Tr. 11.21.18 at 118:12-24.)

79. To verify sale information, he reviewed the Assessor's Office records, as Mr. Kubusek and assessor Jim Wiegand had "fielded" or reviewed those sales initially, and reviewed the RETRs and CoStar reports. (Tr. 11.21.18 at 118:25-119:25; Ex. 44; Exs. 50-63.)

80. Four of the five comparable sales Mr. Ranker used were sold in the same year as the Property. (Ex. 43 at 43.)

81. Each comparable was of inferior condition and each had less parking than the Property, which explains in part why they sold for less per square foot. (Ex. 43 at 43, 45, 46; Tr. 11.21.18 at 35:17-47:24, 122:24-124:16.)

82. Four of the sale transactions used by Mr. Ranker in his sales comparison approach included various tax credits and public financing: 135 W. Wells St., 500 N. Water Street, 152 W. Wisconsin and 725 N. Plankinton Ave., and 1300 N. 4th Street. (Ex. 51; Ex. 52; Ex. 54; Ex. 55; Ex. 57; Ex. 58; Ex. 62; Ex. 63.)

83. Mr. Ranker found no need to apply adjustments to those properties for which the buyers received tax credits, WHEDA loans, or WEDC financing. (Tr. 11.21.18 at 23:8-25, 53:11-19, 122:9-23.)

84. Mr. Ranker made no adjustments for the condition of sale for properties that sold as a foreclosure, 135 W. Wells St. and 221 E. Oregon St. Foreclosure sales may be used by assessors as comparable sales if the assessor determines they were market transactions. (Tr. 11.21.18 at 150:9-11, 166:11-167:16; Ex. 43 at 43.)

85. The 2014 sale of 1300 N. 4th Street was found to be valid by assessor Jim Wiegand. (Ex. 63 at CITY 367; Tr. 11.21.18 at 18:4-20.)

86. Under the sales comparison approach, Mr. Ranker derived the following fair market value for the Property: \$4,700,000 (rounded). (Ex. 43 at 46.)

87. This Court finds that the City's sales comparison approach used to defend the Property's assessment was done in compliance with the WPAM and with professionally acceptable appraisal practices.

88. Mr. Ranker's sales comparison approach shows that the December 2014 sale of the Property was a reliable indicator of the fair market value, and supports the original assessment. (Ex. 43 at 43-46; Tr. 11.21.18 at 126:23-127:14, 129:6-10.)

89. Mr. Ranker would not have assessed a conversion property by looking at redeveloped properties and subtracting construction costs because it would be speculative, and because any renovation or construction would be capital improvements that add value to the purchase price. (Tr. 11.21.18 at 64:8-14, 66:6-9, 110:18-4.)

90. This Court finds that Ryan Ranker's testimony was credible, reliable, and his approach was authorized by the WPAM and Wisconsin law.

V. Edward Carow's Testimony did not rebut the presumption that the 2015 assessment was correct.

91. Mr. Carow described in detail the extensive negotiations, his prior hotel development experience, the due diligence prior to purchase, including estimates of income potential, and to the planning process for the hotel. (Tr. 11.19.18 at 12:21-18:13; 15:15-16:6; 43:7-44:18.)

92. Mr. Carow itemized tax credits and financing totaling \$7,473,580 that offset the development costs. (Ex. 1.)

93. While the Property was not publically listed, Towne Realty's intent to sell the Property was made known through conversations among Milwaukee developers including Mr. Carow. (Tr. 11.19.18 at 13:1-11.)

94. The word-of-mouth referral is similar to Mr. Carow's experience with other hotel developments in the City. (Tr. 11.19.18 at 50:25-52:2.)

95. Mr. Carow discussed the construction that went into the completed project, which went above and beyond what would be required to update the building; instead, the Property was renovated to Marriott's brand standards and the specific needs of a hotel. (Tr. 11.19.18 at 37:5-41:5.)

96. Mr. Carow testified that JSWD would not have been interested in purchasing the Property without having obtained the "incentives" described. (Tr. 11.19.18 at 35:21-36:2.) He describe the Property as having "little to no value" without "incentives." (Ex. 1.)

97. However, he could not describe with specificity how Towne Realty would have been influenced by JSWD's financing methods such that Towne Realty would have been able to demand a higher-than-market price for the Property. (Tr. 11.19.18 at 67:4-25.)

98. In addition, when asked why Towne Realty would demand the sale price paid if it was not the fair market price, Mr. Carow responded that he had no idea why.

99. Furthermore, Mr. Carow could not opine as to why the financing appraisal obtained by JSWD reported a value of \$5.8 million.

100. Mr. Ranker and Mr. Carow both agreed that Mr. Carow's testimony describes his determination of investment value, but that a developer does not have the same considerations as an assessor does when determining whether a sale is market value. (Tr. 11.19.18 at 66:8-25; Tr. 11.21.18 at 68:1-23.)

101. This Court finds that Mr. Carow did not provide an opinion of the fair market value of the Property as of January 1, 2015 for the purposes of assessing it. (Tr. 11.19.18 at 66:8-14.)

102. This Court further finds that Mr. Carow failed to demonstrate why he, a knowledgeable market participant and real estate developer, would pay \$4.7 million for a property that was worth \$0.

103. This Court also finds that Mr. Carow did not demonstrate that the December 2014 sale of the Property was not a market transaction.

104. This Court finds that Edward Carow's testimony does not constitute significant contrary evidence rebutting the presumption of correctness of the 2015 assessment; nor did Mr. Carow demonstrate that the City's assessment did not comply with applicable Wisconsin law.

VI. John VanSanten's appraisal did not rebut the presumption that the 2015 assessment was correct.

a. Mr. VanSanten did not properly analyze the December 2014 sale in his appraisal.

105. John VanSanten's appraisal contained a brief reference to the December 1, 2014 sale, but did not contain any analysis as to whether it was a market value sale, nor did he provide any details of the terms of the transaction. (Tr. 11.20.18 at 77:4-80:14; Ex. 27 at 5.)

106. USPAP Standards Rule 1-5(b) requires: "When the value opinion to be developed is market value, an appraiser must, if such information is available to the appraiser in the normal course of business: ... analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal." (Ex. 38 at 21.)

107. USPAP Standards Rule 2-2(a)(8) and Rule 2-2(b)(8) instruct the appraiser to include sale history analysis in the report. (Tr. 11.20.18 at 74:2-13, 76:13-17; Ex. 38 at 21.)

108. The appraisal violates USPAP where it fails to provide any analysis of the December 1, 2014 sale of the subject property. (Tr. 11.20.18 at 77:22-78:1; Ex. 38 at 21; Ex. 39 at 76-78.)

109. The appraisal violates USPAP where it fails to discuss any of the tax credits or financing that, months later, Mr. VanSanten came to believe affected the purchase price. (Tr. 11.20.18 at 78:2-12, 79:12-23; Ex. 38; Ex. 40.)

110. At his deposition on December 6, 2017, Mr. VanSanten first shared his opinion that the December 2014 sale was probably not reflective of market value. (Tr. 11.20.18 at 80:7-24.)

111. Mr. VanSanten had no further details regarding the transaction and the “7 million in incentives” except that he possessed some loan documentation. (Tr. 11.20.18 at 80:25-83:4; 84:9-85:17.)

112. The “\$7 million in incentives” is the only factor that caused Mr. VanSanten to believe the December sale was not a market value sale. This opinion was based only on his “common sense” and “experience.” (Tr. 11.20.18 at 83:5-10, 84:12-88:21.)

113. At his deposition, Mr. VanSanten had no opinion regarding whether the December 2014 transaction was an arm’s-length transaction. (Tr. 11.20.18 at 86:17-22.)

114. At his deposition, Mr. VanSanten had no opinion on whether the financing was unusually favorable and might have affected the purchase price. (Tr. 11.20.18 at 86:23-87:15).

115. This Court finds that Mr. VanSanten did not properly analyze tier 1 evidence of the value of the Property, the December 2014 sale, in his appraisal.

116. This Court further finds that Mr. VanSanten did not demonstrate to the Court that the December 2014 sale was not an arms-length transaction.

b. Mr. VanSanten's appraisal failed to include a relevant analysis of tier 2 evidence regarding the value of the Property.

117. Mr. VanSanten did not conduct an independent sales comparison analysis; while his report contains information regarding sales of operating full service and luxury hotels, the value opinion cited in Mr. VanSanten's sales comparison approach is his conclusion of a *stabilized* hotel's value based on his income approach. (Tr. 11.20.18 at 28:24-29:3, 71:7-22; Ex. 27 at 54.)

118. As of January 1, 2015, the Property was not a hotel. Instead the Property was a conversion property. (Tr. 11.19.18 at 144: 15-19; Tr. 11.21.18 at 78: 6-8, 108:4-6).

119. Recent sale information for comparable properties sold as conversion properties was available to Mr. VanSanten and he failed to analyze it. (Ex. 43 at 29-46.)

120. This Court finds that Mr. VanSanten failed to properly analyze available tier 2 evidence in his appraisal of the Property.

c. Mr. VanSanten's income approach constitutes unreliable tier 3 evidence of the fair market value of the Property.

121. Mr. VanSanten determined the highest and best use of the Property was "conversion of the office improvements for hotel use." (Ex. 27 at 29; Tr. 11.19.18 at 135:10-136:11.)

122. Accordingly, he opined that the Property would be much more valuable as a hotel than as an office building. (Tr. 11.19.18 at 137:2-5.)

123. He incorrectly applied the highest and best use analysis by valuing the Property as if it were a stabilized operating hotel, deducting the construction costs that had yet to be incurred, and deducting the loss of income (“revenue loss”) attributed to the period of time before the hotel would reach stabilization. (Tr. 11.20.18 at 20:23-22:20, 53:2-53:15; Ex. 27 at 2, 31.)

124. Mr. VanSanten testified that based on the market value stated in his final report any person could have purchased the Property, which is located in the commercial business district of downtown Milwaukee, from JSWD for twenty-five cents on January 1, 2015. (Tr. 11.20.18 at 55:16-56:6.)

125. Mr. VanSanten’s appraisal is a retrospective appraisal because the date of value is a date in the past. (Tr. 11.20.18 at 5:22-6:5.)

126. For a retrospective appraisal, USPAP allows appraisers to consider information that post-dates the effective date as “a confirmation of trends that would reasonably be considered by a buyer or seller as of that date” but “in the absence of such evidence, the effective date should be used as the cut-off date for data considered by the appraiser.” (Ex. 30 at 193-194.)

127. Mr. VanSanten’s trial testimony was inconsistent where he agreed on one day that “none of the numbers on page 33 reflect actual income and expenses” and that “there are other pro formas” (Tr. 11.19.18 at 166:4-16) but clarified on another day that the basis for the “Subject Operating Forecast” table on page 33 of the report is the only five-year pro forma entered into evidence, Exhibit 22. (Ex. 27 at 33; Ex. 22; Tr. 11.20.18 at 60:2-22.)

128. Mr. VanSanten possessed no pro-forma predating Exhibit 22. (Tr. 11.20.18 at 62:2-4.)

129. Exhibit 22 contains actual data for partial year 2016 and was created by White Lodging after the SpringHill Suites had been open for some time. (Tr. 11.19.18 at 73:25-74:17.)

130. Mr. VanSanten received Exhibit 22 on April 18, 2017. (Ex. 34; Tr. 11.20.18 at 64:9-21.)

131. Mr. VanSanten adjusted his projections based on actual income data and a discussion of the hotel's actual performance which became available after the SpringHill Suites opened. (Tr. 11.20.18 at 60:23-61:13; 63:8-12; Ex. 22.)

132. Mr. VanSanten admitted that on January 1, 2015, no potential buyer would have seen a drop in hotel occupancy or supply exceeding demand, but they would have seen the additional supply planned. (Tr. 11.19.18 at 151:6-152:1.)

133. While Mr. VanSanten did cite market studies that were available as of January 1, 2015 (Tr. 11.20.18 at 4:23-5:9, 62:18-63:2), he did not assert that the HOST studies could stand alone as the foundation for his income approach.

134. After issuing the drafts, Mr. VanSanten learned from the client that the actual performance of the hotel was less profitable than what was projected in the pro forma. (Tr. 11.20.18 at 36:18-37:11, 64:22-65:1; 65:24-66:19; 95:4-97:1; Ex. 35 at 3-4.)

135. Mr. VanSanten accordingly revised his projections, resulting in a longer time period for stabilization which impacted the value conclusions. (Tr. 11.20.18 at 38:10-14, 65:24-66:19.) Projections were also revised to include lower occupancy and lower RevPAR versus what was initially projected, all information that would not have been known as of January 1, 2015. (Tr. 11.20.18 at 68:17-69:10.)

136. The Court finds Mr. VanSanten's explanation neither credible nor reliable and contrary to generally acceptable appraisal practices in terms of a retrospective appraisal.

137. The projections were reduced between June 5, 2017 and June 6, 2017 based on a mistaken assumption that the hotel was developed based on a pro forma for a full-service Marriott. (Tr. 11.20.18 at 66:20-67:24; Ex. 19.)

138. In fact, the project had been planned as a limited-service or select-service SpringHill Suites from the beginning, and had never been planned as a full-service Marriott. (Tr. 11.19.18 at 69:24-71:25; Ex. 22.)

139. A full-service Marriott has different amenities and features than a limited- or select-service SpringHill Suites. (Tr. 11.19.18 at 52:9-53:14.)

140. Because of that revelation at trial, Mr. VanSanten adjusted his opinion of value at trial up to \$500,000, the value conclusion from his June 5, 2017 draft appraisal. (Tr. 11.20.18 at 40:8-25, 67:4-7)

141. Exhibit 32, the June 5 draft, was not offered into evidence to support Mr. VanSanten's opinion of value, but merely to compare with various drafts. (Tr. 11.20.18 at 125:4-23.)

142. While Mr. VanSanten testified that another reason the preliminary indications of values changed between the drafts was the receipt of actual construction costs paid; the receipt of the actual construction costs paid did not affect the 2015 value because no construction had been completed as of January 1, 2015, meaning that the same construction cost deduction was taken in each draft. (Tr. 11.20.18 at 123:5-11; Ex. 27 at 3; Ex. 31 at 3; Ex. 32 at 3.)

143. Until trial, Mr. VanSanten had been unaware that Earthlink leased 5,500 square feet of office space from JSWD beginning December 1, 2014; he opined that the space was a "closet." (Tr. 11.20.18 at 47:20-48:11; Ex. 25.)

144. Mr. VanSanten did have a copy of the floor plans in his work file. (Tr. 11.20.18 at 49:4-51:10; Ex. 33.)

145. Because the report contains analysis only of a tier 3 income approach, and no analysis of the tier 1 market value sale of the subject, nor any reliable analysis of the tier 2 sales comparison approach, this Court finds that Mr. VanSanten's report neglected to follow the *Markarian* hierarchy.

146. This Court finds Mr. VanSanten's sales comparison approach not credible and not reliable.

147. This Court finds that Mr. VanSanten's appraisal has not provided significant contrary evidence to rebut the presumption of correctness of the City's assessment, or to rebut the single property appraisal analysis of City Assessor Ryan Ranker.

148. This Court also finds that Mr. VanSanten failed to demonstrate that that City failed to follow applicable Wisconsin law in setting the Property's 2015 assessment.

d. Mr. VanSanten's testimony at his deposition casts doubt on his credibility.

149. Mr. VanSanten issued two drafts before submitting his final report on June 6, 2017. (Ex. 31; Ex. 32.)

150. The first draft, dated June 1, 2017, contained an opinion of value for the SpringHill Suites for 2017 of \$25,300,000, which was more than the assessed value of \$15,076,000 for that year, and an opinion of value for 2016 of \$15,100,000, also more than the assessed value of \$13,721,000 for that year. (Ex. 31 at 3; Ex. 36; Ex. 37.)

151. At the December 6, 2017 deposition, Mr. VanSanten claimed he "did not prepare or complete an appraisal for 2017." (Tr. 11.20.18 at 90:22-25.)

152. Further at the December 6, 2017 deposition when asked whether the value for

2017 would be \$10 million higher than the value for 2016, he said he did not know, since he had not done that analysis. (Tr. 11.20.18 at 91:1-10.)

153. The 2017 indication of value in the June 1, 2017 report actually was about \$10 million higher, or \$25,300,000. (Ex. 31 at 3; Tr. 11.20.18 at 91:25-92:9.)

154. Contrary to Mr. VanSanten's deposition testimony that he "did not prepare or complete a valuation for 2017," Mr. VanSanten's June 1 report contains a valuation for 2017. (Ex. 31 at 3; Tr. 11.20.18 at 90:22-25.) This goes directly to Mr. VanSanten's credibility.

155. Additionally, and contrary to Mr. VanSanten's testimony that he did not know whether his 2016 valuation methodology would increase his 2017 value by approximately \$10 million, Mr. VanSanten's June 1 report contains a 2017 value that is approximately \$10 million greater than his 2016 value. (Ex. 31 at 3; Tr. 11.20.18 at 91:25-92:9.) This goes directly to Mr. VanSanten's credibility.

156. The June 1 draft was emailed to Plaintiff's counsel on June 1. (Ex. 41; Tr. 11.20.18 at 92:10-12.)

157. After the first draft, Mr. VanSanten and his colleague, Ryan Korth, were asked to give JSWD's attorney a call. (Ex. 41.)

158. JSWD did not provide Mr. VanSanten with all of the complete and accurate information he needed to complete the SpringHill Suites appraisal until after the first and second drafts were issued. (Tr. 11.20.18 at 32:15-21; 106:24-108:1.)

159. The second draft contained lower value indications for each year. (Ex. 32 at 3.)

160. The final signed version of Mr. VanSanten's appraisal contained even lower values for each year versus the second draft. (Ex. 27 at 3).

161. The 2015 market value of the SpringHill Suites' property was reported in the

drafts as follows: \$1,700,000 on June 1, \$500,000 on June 5, and \$0.00 in the final report dated June 6. (Ex. 27 at 3; Ex. 31 at 3; Ex. 32 at 3.)

162. Coincidentally, JSWD's counsel had not provided the June 1, 2017 draft to the City as of Mr. VanSanten's deposition. (Tr. 11.20.18 at 42:8-43:5.)

163. The circumstances of the reductions in value in the appraisal drafts, as well as Mr. VanSanten's testimony at his deposition of December 6, 2017 that "he did not prepare or complete a valuation for 2017," present issues with Mr. VanSanten's credibility.

164. This Court finds that John VanSanten's testimony is not credible and his appraisal does not constitute significant contrary evidence sufficient to rebut the presumption of correctness of the 2015 assessment.

165. This Court finds that the City has followed the requirements of the law by presenting tier 1 sale analysis and tier 2 comparable sales that support its assessment and JSWD has failed to provide significant contrary evidence that rebuts the presumption in favor of the City's assessment.

CONCLUSIONS OF LAW

166. The present action requires a de novo trial to the court. Wis. Stat. § 74.37; *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, ¶¶ 48-59, 332 Wis. 2d 85, 796 N.W.2d 717.

167. "The circuit court, as the trier of fact, is the ultimate arbiter of the weight and credibility of the evidence and of any reasonable inferences drawn from that evidence." *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 10, 351 Wis. 2d 439, 448, 839 N.W.2d 893, 898.

- I. JSWD has not rebutted the presumption of correctness afforded to the City's assessment; therefore, the Court must dismiss JSWD's tax assessment challenge.**

168. The City's assessments are presumed to be correct and the Plaintiff bears the burden in its case-in-chief of overcoming the presumption of correctness. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 17, 311 Wis. 2d 158, 752 N.W.2d 687. *See* Wis. Stat. § 70.49(2).

169. In order to rebut the presumption of correctness, a taxpayer must present more than contrary evidence; it must "present sufficient evidence to persuade the circuit court that [the assessed value] is probably not the fair market value of the property. *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 10, 351 Wis. 2d 439, 447, 839 N.W.2d 893, 898.

170. Failure to provide sufficient persuasive evidence to rebut the presumption that the assessment represents fair market value entitles the taxing district to judgment based on the statutory presumption. *Id.*, ¶ 10.

171. Pursuant to Wis. Stat. § 70.32(1), "Real property shall be valued by the assessor in the manner specified in the WPAM provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale."

172. The Wisconsin Supreme Court has "interpreted Wis. Stat. § 70.32(1) to set forth a hierarchical valuation methodology for single-property appraisal," which is known as the *Markarian* hierarchy. *Metropolitan Associates v. City of Milwaukee*, 2018 WI 4, ¶ 31, 379 Wis. 2d 141, 905 N.W.2d 784 (citing *State ex rel. Markarian v. City of Cudahy*, 46 Wis. 2d 683, 686 (1970)). "The best information of a property's fair market value is an arm's-length sale of the subject property." *Id.*, ¶ 32. "Examination of a recent arm's-length sale is known as a 'tier 1' analysis." *Id.* "If there is no recent sale of the subject property, the appraiser moves to tier 2, examining recent, arm's-length sales of reasonably comparable properties (the "sales comparison approach")." *Id.*, ¶ 33. "When both tier 1 and tier 2 are unavailable, an assessor then moves to

tier 3.” *Id.*, ¶ 34. “Both the income approach, which seeks to capture the amount of income the property will generate over its useful life, and the cost approach, which seeks to measure the cost to replace the property, fit under the umbrella of tier 3 analysis.” *Id.*

- a. The December 2014 sale of the Property was an arms-length sale and constitutes tier 1 evidence of the Property’s value; therefore setting the assessment based off of that sale was correct.**

173. The best evidence of full value, or tier 1 evidence, is a recent, market value sale of the property. Wis. Stat. §70.32(1); *State ex rel. N/S Assocs. by JMB Grp. Trust IV v. Bd. of Review of Vill. of Greendale*, 164 Wis. 2d 31, 44, 473 N.W.2d 554, 558 (Ct. App. 1991) (“As we have seen, assessment must be based on value, and the best information of value is an arm's-length sale.”)

174. Courts have held that “it is error for an assessor to use other means to assess the value of property in the presence of an arms-length sale.” *Darcel, Inc. v. City of Manitowoc Bd. of Review*, 137 Wis. 2d 623, 629, 405 N.W.2d 344, 347 (1987).

175. The burden to show a sale was not an arms-length sale rests on the taxpayer. *Doneff v. City of Two Rivers Bd. of Review*, 184 Wis. 2d 203, 216, 516 N.W.2d 383, 388 (1994).

176. WPAM lists the elements of a valid sale, or one that results in market value:

- (1) Buyer and seller are typically motivated;
- (2) Both parties are well informed or well advised, and acting in what they consider their own best interests;
- (3) A reasonable time is allowed for exposure in the open market;
- (4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

WPAM p. 9-7 – 9-8.

177. JSWD argued at trial that the sale failed to comply with the first and fifth conditions of an arm's-length transaction (Tr. 11.19.18 at 5:12-6:15).

178. This Court finds that the first condition was met; buyer and seller were typically motivated. The buyer and seller are both commercial real estate businesses with experience in the Milwaukee market. (Tr. 11.19.18 at 49:22-50:13, Tr. 11.21.18 at 118:5-11.) The buyer had an interest in negotiating the lowest possible price, and the seller had an interest in negotiating the highest possible price. (Tr. 11.21.18 at 115:15-24.)

179. This Court also finds that the fifth condition is met, tax credits and other public grants or financing are common to redevelopment projects, especially of old or historic buildings, and therefore, would not constitute atypical motivation. Incentives provided to a buyer by outside sources do not affect the arm's-length transaction analysis. (*Id.*)

180. This Court concludes that the \$4.7 million sale was an arms-length sale that represented the tier 1 evidence of market value of the Property as of January 1, 2015.

181. This Court rejects any assertion from JSWD that the \$4.7 million sale was not a tier 1, arm's-length sale. *See State ex rel. N/S Assocs. by JMB Grp. Tr. IV v. Bd. of Review of Vill. of Greendale*, 164 Wis. 2d 31, 44, 473 N.W.2d 554, 558 (Ct. App. 1991) (“[A] taxpayer contending that a recent sale does not represent the property’s value because the sale was not at arm’s-length has the burden of proving that any circumstance it claims made the sale not an arm’s-length transaction actually affected the price.”). JSWD has offered no evidence in support of its assertion that the sale was not arm's-length—just some vague theory regarding purported incentives—and has offered no evidence that any purported incentives actually affected the \$4.7 million sale price that was negotiated between two sophisticated entities.

182. This Court finds that Mr. VanSanten did not analyze the sale in his appraisal. He merely made passing reference to the December 2014 sale. (Ex. 27 at 5.) Mr. Van Santen's appraisal violates USPAP where it fails to provide any analysis of the recent sale and fails to discuss any of the tax credits or financing that, months later, Mr. VanSanten came to believe affected the purchase price. (Tr. 11.20.18 at 80:7-14; 84:9-87:147.)

183. The Real Estate Transfer Return (RETR) filed with the Department of Revenue has been used by courts as evidence of a property's value. *See N/S Assocs.*, 164 Wis. 2d at 40 n.1.

184. The statute, and the form itself, require that the RETR include the value of the real estate transferred. Wis. Stat. § 77.22(2)(a).

185. The seller pays a transaction tax based on the real property value. Wis. Stat. § 77.22.

186. The Department of Revenue has investigative powers, and there are criminal penalties for intentionally falsifying the values on a return. Wis. Stat. § 77.27.

187. This Court finds that the RETR is an admission by JSWD that the value of the Property at the time of the sale was \$4,700,000. (Ex. 17; Ex. 18.)

188. An appraisal obtained for funding is admissible evidence as a statement of a party opponent. *N/S Assocs.*, 164 Wis. 2d at FN 11; *Rollie Johnson Plumbing & Heating Service, Inc. v. State Dept. of Transp. (Division of Highways)*, 70 Wis. 2d 787, 792-93, 235 N.W.2d 528, 532 (1975) (the trial court found that "an appraisal made in connection with the actual lending of money by a bank may be sufficiently probative of property value to be admissible").

189. This Court finds that JSWD's financing appraisal, indicating a value of \$5.8 million, at a minimum supports that the City's assessed value was not excessive. (Ex. 20.)

190. This Court finds that the December 2014 sale of the Property is tier 1 evidence of its fair market value as of January 1, 2015.

191. This Court finds that the City followed applicable assessment law in setting the Property's 2015 assessment based upon the December 2014 sale.

b. The City properly defended its assessed value by looking to tier 2 evidence of the Property's value.

192. Pursuant to the WPAM, the City derived the fair market value of the Property using mass appraisal, and defended it using single property appraisal, specifically, reviewing the tier 1 evidence of the sale of the Property, as supported by tier 2 evidence; the sales comparison approach. *See* WPAM 7-12, 7-21, 7-40. *See also Nestle USA, Inc. v. Wisconsin Dep't of Revenue*, 2009 WI App 159, ¶ 45, 322 Wis. 2d 156, 776 N.W.2d 589. (See also Ex. 43 at 4, 5.)

193. When conducting the sales comparison approach, Mr. Ranker selected valid, arm's-length sales of conversion properties that were comparable to the Property. He then engaged in a comparative analysis, selected appropriate elements of comparison, and adjusted the comparable properties' sale price in order to estimate the value of the Property. (*See* Ex. 28 at 7-25-7-29; Ex. 43 at 29-46.)

194. This Court finds that Mr. Ranker's sales comparison approach further supports the City's 2015 assessment.

195. This Court finds that the City followed applicable assessment law in setting the Property's 2015 assessment.

II. JSWD has failed to provide significant contrary evidence that the Property's 2015 assessment was excessive.

196. If unable to show that the assessor did not follow Wisconsin assessment law in setting the assessment, JSWD may rebut the presumption of correctness attendant to the City's assessment only if it presents "significant contrary evidence." *Bonstores*, 351 Wis. 2d 439, ¶ 5. Specifically, JSWD must "produce evidence that it is more probable than not that the assessed value is not correct." *Id.*, ¶ 9. However, "the presumption (that the City assessed value is correct) does not disappear simply because contrary evidence exists." *Id.* Stated another way, "the Presumption is not 'overcome' just because contrary evidence (even 'substantial' contrary evidence) is presented." *Id.*, ¶ 6.

197. Mr. VanSanten's testimony and opinions do not constitute evidence that it is "more probable than not that the assessed value is not correct." *See id.*, ¶ 9.

198. First, Mr. VanSanten is not credible—his testimony was on numerous occasions undermined by physical documents that speak for themselves. He testified he did not "prepare or complete a valuation for 2017"; yet, his June 1 report contained an entire valuation for 2017.

199. Second, and notwithstanding the credibility issues, Mr. VanSanten's 2015 valuation is unsupported, contrary to the WPAM, and inconsistent with USPAP by failing to provide a relevant analysis of either tier 1 or 2 evidence.

200. "Only if there has been no arm's-length sale and there are no reasonable comparable sales may an assessor use any of the tier 3 assessment methodologies." *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, ¶ 14, 351 Wis. 2d 439, 839 N.W.2d 893.

201. Contrary to USPAP, Mr. VanSanten's report contains no analysis about whether the \$4.7 million sale was a market-value sale. His current reasoning for why he believes the sale to be not fair market value is inconsistent and not supported by any documentation.

202. The Court also finds Mr. VanSanten did not conduct a sales comparison analysis of conversion properties; while his report contains information regarding sales of operating hotels, the value opinion cited in Mr. VanSanten's sales comparison approach is his conclusion of a *stabilized* hotel's value based on his income approach. (Tr. 11.20.18 at 28:24-29:3, 71:7-22; Ex. 27 at 54.) Mr. VanSanten failed to analyze available recent sales of comparable conversion properties.

203. In short, Mr. VanSanten is not credible and his opinions and testimony do not amount to significant contrary evidence that can rebut the presumption of correctness in favor of the City.

204. This Court finds that Mr. Carow failed to speak to or establish what the property might have sold for on January 1, 2015; therefore it is not significant contrary evidence that can rebut the presumption of correctness in favor of the City.

205. The detail to which Mr. Carow described the extensive negotiations, his prior hotel development experience, the due diligence prior to purchase, and JSWD's ability to take advantage of many government programs and other incentives such as Marriott Key Money to offset development costs, show that JSWD was a knowledgeable buyer that was not taken advantage of by Towne Realty and JSWD would not have paid at \$4,715,000 for a property that was worth \$0.00 at the time of sale.

206. This Court finds that JSWD failed to provide significant contrary evidence and has not rebutted the presumption of correctness attendant to the City's assessment.

CONCLUSION

207. Based on the above, this Court concludes that JSWD failed to rebut the presumption of correctness attendant to the City's assessment.

208. Alternatively, the Court concludes the City's assessment was not excessive.

209. The Court enters judgment in favor of the City.