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BY THE COURT:

DATE SIGNED: May 7, 2021

Electronically signed by William J. Domina
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
CIVIL DIVISION

Broadstone FDT Wisconsin, LLC et al vs. City of Brookfield

CASE NO. 18CV1304

DECISION AND ORDER

Background

This lawsuit involves a challenge to property tax assessments levied by the City of Brookfield in the 2018 tax year. The properties subject to this review are two medical office buildings located at 1350 Sunny Slope Road (Sunny Slope) and at 21700 Intertech Drive (Intertech) within the City of Brookfield. Broadstone FDT Wisconsin, LLC and Broadstone MCW Wisconsin, LLC ("Plaintiffs") are the owners of these properties and are responsible for the payment of the property taxes of Sunny Slope and Intertech. City Assessor Alan Land set the assessments of these properties in 2018 utilizing mass appraisal techniques[1]. The assessments

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[1] Mass appraisal is a technique used by the majority of assessment jurisdictions in the nation whereby an assessor values entire groups of property using systematic techniques and allowing for statistical testing. Here, the City of Brookfield used a mass appraisal technique to value all medical office buildings. The values generated established the assessed values for such group of property in the City between 2014 and 2018. This valuation technique has been deemed valid by the Wisconsin Supreme Court. See Metropolitan Assoc. v. City of Milwaukee, 379 Wis.2d 141, 905 N.W.2d 784 ¶ 40 (2018).

for the 2018 tax year were first established in 2014, and have been utilized every year since. Mr. Land assessed Sunny Slope and Intertech in 2018 at $5,213,000 and $8,219,700 respectively, resulting in the City of Brookfield imposing $84,506.07 in property taxes on Sunny Slope and $133,179 on Intertech. Plaintiffs appealed these assessments to the City's Board of Review, where the assessments were sustained without a hearing. The Sunny Slope property was originally built in 1999 as a drug store and was remodeled in 2005 as a medical office building. Froedtert and the Medical College of Wisconsin (MCW) have occupied the building since 2005. The Intertech property was constructed in 2008 as a medical office building and is occupied completely by Springdale Health Center (a division of Froedtert and the Medical College of Wisconsin). In this action, the City of Brookfield has supported its mass appraisal analysis with single property appraisals, which first relies on a 2013 sale that included the subject properties (portfolio sale) and then proceeds to offer support for its assessment based upon a comparable sales analysis.[2] Likewise, the property owner offered single property appraisals, which disputed the usability of the 2013 sale as a Tier One sale and performed a comparable sale (Tier Two) and income analysis (Tier Three) to challenge the property assessment.

Analysis

This is an action pursuant to Wis. Stat. §74.37(3)(d) for a partial refund of real estate taxes imposed on Plaintiffs Broadstone FDT Wisconsin, LLC and Broadstone MCW Wisconsin, LLC (collectively referred to as "Broadstone") by the City of Brookfield where Broadstone has

[2] Mr. Landretti's reports indicate that "[s]ince there is an arm's-length sale of the subject property and reasonably comparable properties, the cost and income capitalization approaches will not be necessary." In his reconciliation, however, he did opine that the rents established for the subject properties were at market when compared with the rents established at comparable properties.

alleged the assessment for the 2018 tax year was excessive. Broadstone first challenged its property tax assessments in 2014.[3]

A §74.37 action for excessive assessment is a de novo review by the court of the assessment. The Supreme Court has summarized the issue to be determined by the court in a §74.37 claim for excessive assessment by a taxpayer as, "[t]he question on appeal in a Wis. Stat. §74.37 action is not whether the initial assessment was incorrect, but whether it was excessive." Metropolitan Associates v. City of Milwaukee, 2018 WI 4, ¶40, 379 Wis.2d 141. 6. In a §74.37 action, "[t]he 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". For tax assessment purposes real property valuations are governed by WIS. STAT. § 70.32(1) (2017-18), which provides:

> Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under [WIS. STAT. §] 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. In determining the value, the assessor shall consider recent arm's-length sales of the property to be assessed if according to professionally acceptable appraisal practices those sales conform to recent arm's-length sales of reasonably comparable property; recent arm's-length sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

The statute's second sentence is a codification of an assessment hierarchy that was developed under common law. See State ex rel. Campbell v. Township of Delavan, 210 Wis. 2d 239, 256-57, 565 N.W.2d 209 & n.5 (Ct. App. 1997) (citing State ex rel. Markarian v. City of Cudahy, 45 Wis. 2d 683, 686, 173 N.W.2d 627 (1970)). Often cited for its articulation in

[3] The 2014 through 2017 tax year cases are pending in Waukesha County Circuit Court Case Nos. 2015CV1412 and 2016CV1584. Those cases have not been concluded.

Markarian, the hierarchy broadly recognizes that a property's "full value" is best determined with consideration of three sources—or "tiers"—of information: an arm's-length sale of the subject property, recent arm's-length sales of reasonably comparable properties, and all other factors that collectively have a bearing on the property's value. *Metropolitan Assocs. v. City of Milwaukee,* 2018 WI 4, ¶¶31-34, 379 Wis. 2d 141, 905 N.W.2d 784 (citing Markarian, 45 Wis. 2d at 686).

Simply reading the statute might lead one to think that assessors should gather all three tiers of information, consider them, and then make a determination. However, the case law is clear—and a Court is bound to follow them—this "consider everything together" approach is not the law. Instead, the hierarchy's three tiers must be considered in order. A Court does not get to Tier Two if Tier One information is available, and you do not get to Tier Three if Tier Two (or Tier One) information is available. See Metropolitan Assocs., 379 Wis. 2d 141, ¶¶31-34; Great Lakes Quick Lube, LP v. City of Milwaukee, 2011 WI App 7, ¶¶17-18, 331 Wis. 2d 137, 794 N.W.2d 510 (2010). Failure to follow this hierarchy structure "constitutes an error of law." Campbell, 210 Wis. 2d at 259.

Presumption of Correctness

In a Section 74.37 action, the circuit court begins with the presumption that the City's assessment is correct. Wis. Stat. §70.49(2); Bonstores, 2013 WI App 131, ¶ 5. Wisconsin Statute Section 70.49 requires City assessors to attach an affidavit to the assessment roll when they report their conclusion, which is "presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other." Wis. Stat. §70.49(2). The assessment is presumed correct unless the taxpayer presents "significant contrary evidence" or shows that the assessment does comply with Wisconsin law or the principles of the Wisconsin

Property Assessment Manual (the "WPAM"[4]). Bonstores, ¶ 5. See also, Lowes Home Centers LLC v. Village of Plover, Case No. 2019AP0974, 2020 WI App 76, 394 (Ct. App. 2020)(Unpublished). The presumption that the City's assessed value is correct does not disappear simply because contrary evidence exists. Bonstores, ¶ 9. Rather, the Court "retains the obligation to weigh the competing evidence, including the presumption, and to determine whether the presumed fact is more probable than not." *Id.* Failure to provide sufficient persuasive evidence to rebut the presumption that the assessment represents fair market value entitles the City to judgment based on the presumption. *Id.*, ¶ 10.

Additionally, Article VIII, Section 1 of the Wisconsin Constitution, the Uniformity Clause, requires that the "rule of taxation shall be uniform…" Wis. Const. Art. VIII, §1; WPAM 7-10. A taxpayer bears the burden of proving a uniformity violation. Noah's Ark Family Park v. Bd. of Review of the Village of Lake Delton, 210 Wis. 2d 301, 318, 565 N.W.2d 230 (Ct. App. 1997). Pursuant to the Manual's glossary, uniformity is the "constitutional requirement that the taxable property must bear its proportionate share of ad valorem basis taxes. As applied to assessing, a condition wherein all properties are assessed at the same ratio to market value …" (WPAM §G-7.) A tax conforms to the Uniformity Clause if it meets the following standards:

> 1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
> 2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis.
> 3. All property not included in that class must be absolutely exempt from property taxation.
> 4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
> 5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.

[4] Assessments must be set in conformance with the Manual. Wis. Stat. §70.32(1). All references to the Manual are to the 2018 version, and will be abbreviated WPAM.

> 6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property.

Presumption of Correctness Applied

Because a sale of the subject properties occurred in 2013, this Court must strongly consider whether such sales are "arms-length" transactions qualifying as Tier One under the Markarian hierarchy set forth above. In short, if this presumption applies and remains unrebutted, the plaintiff property owner will lose the challenge in this case. If this presumption is rebutted by significant contrary evidence or violates Wisconsin law or the WPAM, then the Court will reach a Tier Two and possibly Tier Three analysis.

The plaintiff property owner argues that this Court should conclude that the presumption of correctness applying to the City's 2018 assessment is rebutted because there is significant contrary evidence that the 2013 sale should not be used as a Tier One analysis due to the fact that the subject properties were included in a "portfolio sale[5]" which involved other properties, without individual property sale valuation. The plaintiff property owner claims that the sale price established in the 2013 portfolio sale was not based on a fee simple analysis of value, but rather, on other factors such as the long-term leases that were in place, tenant credit worthiness and the quality of the tenants business. Thus, the lack of an established individual property sale value at the time of sale, and what the plaintiff property owner appears to argue are value enhancers unrelated to the "sticks, bricks and mud" in a fee simple analysis, should cause this Court to ignore the 2013 sale as available Tier One data. Additionally, the plaintiff property owner argues that the City's assessment is contrary to Wisconsin law or the WPAM because the

[5] A "portfolio sale" of properties is a descriptive term which the parties used during trial to describe the collective sale of multiple properties.

City Assessor used the incorrect square footage on the subject properties when including them in the mass appraisal model (and therefore representing significant contrary evidence rebutting the presumption of correctness). Further, the plaintiff property owner complains that the 2013 sale must be rejected because such sales are not an unusable arm's-length sale of the subject property under professionally acceptable appraisal practices. See Sec. 70.32 (1), Wis. Stats.

2013 Sale of Subject Properties

It is undisputed that the two properties that are the subject to this assessment challenge were sold, along with similar properties, in 2013 for a combined price of $46.5 million. This sale of multiple properties has been described as a portfolio sale. The taxpayer complains that because there was no individual sale price recognized for each of the properties in the portfolio sale (including the two at issue here), there was not a usable "Tier One" transaction that could be used by the assessor to establish the proper property values upon which the City could base its assessment. Further, the taxpayer claims that the sale price of the properties in the portfolio sale included income-stream valuation based upon long-term leases and high credit-value tenants. However, in order to be considered a "Tier One" transaction, all that has to be shown is an arm's-length sale of the subject property. Six conditions must be satisfied for a sale to be considered an arm's-length transaction and therefore adequate evidence of fair market value:

1. It must have been exposed to the open market for a period of time typical of the turnover time for the type of property involved.

2. It presumes that both buyer and seller are knowledgeable about the real estate market.

3. It presumes buyer and seller are knowledgeable about the uses, present and potential, of the property.

4. It requires a willing buyer and a willing seller, with neither party compelled to act.

> 5. Payment for the property is in cash, or typical of normal financing and payment arrangements prevalent in the market for the type of property involved.
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> 6. The sales price must include all of the rights, privileges, and benefits of the real estate. For rental property, this includes both the lessor's and lessee's interests.

Doneff v. City of Two Rivers Bd. of Review, 184 Wis. 2d 203, 211-212, 516 N.W.2d 383, 386-387 (1994).

This Court concludes that the burden of proof is on the challenging taxpayer to prove that a sale is not an arms-length transaction. See e.g., Doneff, 184 Wis. 2d at 216. 516 N.W.2d at 388 (wherein the Wisconsin Supreme Court rejected attempts to shift the burden of proof away from the taxpayer to the government). In setting its assessment, assessors are permitted to use the "best information available" when deciding whether a transaction qualifies as a Tier One event. See Section 70.32(1), Wis. Stats.

The taxpayer in this case does not appear to dispute any of the six conditions as set forth above. Instead, the taxpayer simply says there is no actual evidence of a "sale price" for each of the subject properties because they were contained in a larger collection of properties. This portion of the taxpayer's argument appears to be a claim that there must be some "synergistic" event occurring by gathering properties together that prevents some individual analysis of the sale price of each individual property. To this Court, this seems contrary to the best information available to the City of Brookfield assessor, which would shift the burden of proof away from the taxpayer to the city.

Connected to the portfolio sale in 2013, mandatory Real Estate Transfer Tax Returns were separately filed for each of the six portfolio properties by the parties to that sale with the State of Wisconsin. Related to the two properties that are the subject of this litigation, the State was informed that the Sunny Slope property total value of the real estate transferred was $5,261,000 and the Intertech property total value of the real estate transferred was $8,435,000.

This information was an important part of the City assessor's calculus in the mass appraisal formula used by the City to set the assessed value of the two subject properties. See Trial Exhibits 3 and 4. Included in the filings were statements that the purchases included the transfer of the "full" ownership interest, that there was no retention by the grantor of any property interest and no financing was involved in the transaction[6]. Compare CVS Pharm. Inc. v. City of Appleton, 15AP876 (Wis. Ct. App. 2016) (wherein financing tools such as "lease-back provisions" influenced the market price above fair market value and thereby "did not represent a suitable recent arm's length sale"); Forest Cty Potawatomi Cmty v Twp of Lincoln, 314 Wis.2d 363, 761 N W 2d 31 (Ct. App. 2008) (wherein a portfolio sale containing tangible and intangible components left the assessors conclusion as to a Tier One sale based upon speculation and therefore a Tier One sale was not present). Moreover, the internal statements of the taxpayer clearly demonstrates that Sunny Slope and Intertech were included on the taxpayer's books at a "purchase price" of the same values declared to the State of Wisconsin on the Real Estate Transfer Tax Returns. See Trial Exhibits 30-1; 57.

An arms-length sale occurs where a "sale was made under normal conditions so as to lead to the conclusion that the price paid was that which could ordinarily be obtained for the property." Doneff, supra. Here, in addition to the after-sale declarations by the taxpayer as to its purchase price for the Sunny Slope and Intertech properties, the evidence at trial showed that the properties were marketed through use of an independent broker and that broker represented to the City of Brookfield that the properties were individually priced. See Trial Exhibit 138.

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[6] In this case, the taxpayer is a real estate investment trust which buys and sells income-producing commercial properties. The City makes a substantive argument regarding the legal requirements of REIT's and how they establish its share price based upon the current value of the real estate owned. Therefore, the City proffers that a REIT's statement of purchase value is demonstrable of the fair market value of the real estate assets acquired. The Court agrees the statement of the property owner is relevant to the issue of fair market value but only uses it in so far as it buttresses what this Court has already concluded was an arms-length, Tier One, transaction. The Court declines, therefore, to address the inner-workings of REIT's in this decision.

The property owner also argues that the Court should disregard as a Tier One sale event the sale of the subject properties because the taxpayer-purchaser valued things like the kind of tenant, the length of the existing leases, and the credit-worthiness of the tenants. However, as noted in the list of six factors for an “arms-length” sale, the sales price must include all of the rights, privileges, and benefits of the real estate. “**For rental property, this includes both the lessor's and lessee's interests.”** (Emphasis Added). It strikes this Court, that the plaintiffs wish for municipal assessors to pull apart all aspects of lessor’s and lessee’s qualities when determining whether an arms-length sale has occurred. This seems logically flawed and would lead to a layered industry analysis involving the sale of all properties; commercial, multi-family, etc. It also is well beyond the express language of the law that requires only that an arms-length sale of property is established when there is a full transfer of all “rights, privileges and benefits” of property, lease interests included. The 2013 sale of the subject properties involved the full transfer contemplated by the recognized factors.

This Court finds that the 2013 sale of the subject properties yielded legitimate and usable Tier One sales data. Therefore, the Court finds that the presumption of correctness applies to the City of Brookfield’s use of this data when establishing the assessment for the subject properties.

Tier One Sale…A Rose By Any Other Name….

The Court pauses here to take stock. If the 2013 sale information presents usable Tier One information, how far does the Court now go to determine whether there is “significant contrary evidence overcoming the presumption of correctness”? Our appellate courts have recognized that arguments may exist as to the effect of the statutory language that arm's-length sales are only to be considered "if according to professionally acceptable appraisal practices those sales conform to recent arm's-length sales of reasonably comparable property." § 70.32(1),

Wis. Stats. Notably, that statutory language—which came into effect with 1991 Wis. Act 39—seems to embrace explanations in earlier case law that, when considering Tier One of the assessment hierarchy under § 70.32(1), the mere claim of an arm's-length sale does not foreclose further investigation into the nature of that transaction. Flood v. Lomira, Bd. of Review, 153 Wis. 2d 428, 437-41, 451 N.W.2d 422 (1990). Rather, "an assessor must consider all factors relevant to the sale when determining whether the sale price resulted from an arm's-length transaction and is the best information of full value." *Id.* Likewise, the Property Assessment Manual sets forth conditions defining "market value," and thus highlights the ways in which a sale can be investigated to ensure it was truly at arm's length. Property Assessment Manual at 9-7, 9-8; see also Walgreen Co. v. City of Madison, 2008 WI 80, ¶3, 311 Wis. 2d 158, 752 N.W.2d 687 (affirming that § 70.32(1) requires adherence to the Manual absent conflicting law); See also, Hanning Regency LLC v. Town of Brookfield Bd. of Review, 2019 WI App 48, FN 5, 388 Wis. 2d 476, 934 N.W.2d 581 (Ct. App. 2019)(Unpublished). That said, this Court also recognizes the potential that the clear Markarian hierarchy risks being swallowed by a full credibility assessment of competing claims of what is a professionally acceptable appraisal practice if such claims devolve into a fight over the Tier Two or Tier Three analysis.

To a degree, the Court's concerns are mitigated by the broad statutory admonition established to keep the gamesmanship of assessments to a minimum. Section 70.32(1) states unambiguously that, in setting an assessment, assessors are to use the "**best information available**." The question before this Court is not whether the initial assessment is incorrect but whether it was excessive. Metropolitan Assoc. v. City of Milwaukee, 379 Wis.2d 141, 905 N.W.2d 784 ¶ 40 (2018). "If by any reasonable view of the evidence the assessment is valid, it must be upheld." Clear Channel Outdoor, Inc. v. City of Milwaukee, 374 Wis. 2d 348, 893 N.W.2d 24, ¶ 4 (2017).

The Tier One Sales of the Subject Properties Conform to Recent Arm's-length Sales of Reasonably Comparable Property

As already noted, the Court finds that a Tier One sale of the subject properties occurred and that such properties were individually priced even though they were purchased by the taxpayer with other related properties. In addition to the testimony of the city assessor and the taxpayer, the Court listened to evidence through three primary witnesses on the subject of valuation and professionally acceptable appraisal practices; two from the city and one from the taxpayer. The City offered the testimony of expert appraiser Dominic Landretti, who rendered an opinion (Trial Exhibits 7 and 8) about the valuation of the subject properties utilizing comparisons to other properties, and Dr. Thomas Hamilton (Trial Exhibit 9), who testified regarding professionally acceptable appraisal practices when viewing sales of comparable property. The taxpayer offered the testimony of Robert Watson, who rendered an opinion (Trial Exhibits 1 and 2) as to the valuation of the subject properties using comparisons to other properties selected by him as comparable. Additionally, the Court finds that the City assessor had sufficient information complied regarding contract rents in the City of Brookfield and surrounding communities.

As a general finding, this Court states that the testimonial opinions of Mr. Landretti and Dr. Hamilton was far more credible that that of the taxpayer or its expert, Mr. Watson. For example, Mr. Watson drew comparisons from allegedly comparable properties that, in this Court’s view, contained uses that were different than the subject properties. Mr. Watson included dental offices in his analysis, which appear to this Court to be very different in interior development, making them far less comparable to the subject properties. The Court finds that the observations by Mr. Landretti of the properties chosen by Mr. Watson to use in his comparison to the subjects to be well stated and correct. See Trial Exhibits 7, p. 72 and 8, p. 71.

The inclusion of such far less comparable properties causes this Court to view Mr. Watson's analysis as less about finding a true comparison and more about reaching a conclusion. Consequently, this Court finds that Mr. Watson's opinion stretches credibility. By contrast, Mr. Landretti utilized directly comparable properties, which provided direct medical care. Moreover, almost all of the properties chosen by Mr. Landretti for comparison to the subject properties were occupied by single-tenants. The Court also found Mr. Landretti's testimony in support of his conclusion that the rents enjoyed by the property tax payer at the subject properties were market rents, to be more supported by the factual record than the opinion of Mr. Watson that such rents were above market. Trial Transcript, Day 3, p.99-109. As a result, this Court adopts the proposed Findings of Fact offered by the City at paragraphs 436-608.

Additionally, the Court finds that the City of Brookfield had sufficient information regarding the building square footage of the buildings at issue[7] to utilize a mass appraisal model for medical office building values in the City of Brookfield. Further, the Court finds that the City assessor requested but did not timely receive from the property owner the actual leases and rental rates for the subject property.[8]

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[7] Much has been made about a discrepancy in building square footage for the Intertech and Sunny Slope properties. Indeed, even the internal records of the property owner appear to differ in some respects from the "correct" square footage offered by the plaintiffs at trial. Compare Plaintiffs' post-trial brief at pp. 3-7 and n.3 and Trial Exhibit 30-1. Much of the difference in the Intertech square footage complaint appears to have to do with an external canopy, which should have been included. Regardless, the Court does not find these claims, even if correct, to create an excessive property tax or to constitute significant contrary evidence warranting the rebutting of the presumption of correctness.

[8] The credible testimony at trial demonstrated that the actual leases for the subject property were requested but not produced until after the assessor had set subject property assessments. In fact, the credible testimony showed that the property owner sent the leases by an email sent at 2 a.m. on the morning of the Brookfield Board of Review meeting conducted later that morning. The Court finds this conduct to be a purposeful attempt render the information of limited utility while claiming the righteousness of production.

Conclusion

Based upon these findings, the Court concludes that the City of Brookfield assessor, using the best information available to him, established an assessment that is not overcome by significant contrary evidence contemplated under Section 70.49(2), Wis. Stats. and which is not excessive. Based upon the foregoing analysis, the Court enters the following:

Order

IT IS HEREBY ORDERED that the 2018 property tax assessments of the two subject properties (Intertech and Sunny Slope) by the City of Brookfield are hereby AFFIRMED and the property owners' challenges thereto are hereby DISMISSED.