

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-1085
STATE OF WISCONSIN**

Cir. Ct. No. 03CV006037

**IN COURT OF APPEALS
DISTRICT I**

**STATE OF WISCONSIN EX REL.
WILSON REALTY CO. OF WISCONSIN, INC.,**

PETITIONER-APPELLANT,

v.

**BOARD OF REVIEW FOR THE
CITY OF MILWAUKEE,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CLARE L. FIORENZA, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Wilson Realty Co. of Wisconsin, Inc. appeals from an order which affirmed the City of Milwaukee Board of Review's

assessment of real property. Wilson contends that the assessor violated WIS. STAT. § 70.32 (2001-02)¹ by basing the property assessment on the “cost approach” to valuation instead of the “comparable sales approach” to valuation. Because the statute and case law clearly dictate that the latter approach should be employed before the former, we reverse and remand with directions that the assessment be based on the comparable sales approach to valuation.

BACKGROUND

¶2 Wilson Realty owns the commercial real property located at 6701 West Good Hope Road, Milwaukee, Wisconsin, which is the subject of this case. The property consists of approximately nineteen acres of land, which was vacant when Wilson Realty purchased it in February 2000 for \$570,000. During 2001, Wilson Realty constructed a commercial building containing approximately 89,500 square feet, together with parking and landscape improvements on the property. The total cost for construction was \$4,010,977.

¶3 Approximately 50,000 square feet of the building was completed in conformity with the specifications from Wisconsin Industrial Truck Company, which was the only tenant secured for the building. The truck company used the footage for office, showroom, shop and warehouse space in connection with the sale and servicing of lift trucks. The remaining 39,500 square feet of the building is vacant and has not been finished. The estimated cost to finish that space for another tenant would be \$550,000.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 In determining the value of the property for the 2002 real estate assessment roll, the assessor found the value of the land to be \$570,500 and the improvements to be \$4,011,000, for a total assessed value of \$4,581,500. The assessor used the cost approach and simply added the purchase price of the land to the cost of building on the land. Wilson Realty objected to the assessment. The Board of Review did not make any change based on the objection and, as a result, Wilson Realty requested a hearing before the Board.

¶5 Wilson Realty contends that the value of the property is \$3,450,000. It arrived at this number after hiring an appraiser, Robert Watson of Valuation Services. Mr. Watson conducted a complete appraisal of the property and evaluated it using three different methods commonly used to value real property: the sales comparison approach, the income/capitalization approach, and the cost approach. The values he arrived at under each of the methods are similar: \$3,430,000 under the first, \$3,460,000 under the second, and \$3,330,000 under the third.

¶6 Mr. Watson testified at the hearing and presented this information. He also provided the Board with information regarding the ten comparable sales properties he used in order to adduce the value of the Wilson Realty property. He concluded that a value of \$44.52 per square foot should be applied and that \$550,000 should be subtracted from the calculated value for the unfinished vacant space. Mr. Watson testified that the sales comparison approach was the strongest methodology to use in assessing the value of real property and that there were sufficient comparable sales properties available in order to conduct an assessment using this approach.

¶7 The assessor who originally valued the property for the City was not available at the hearing, but was represented by Ms. Denise Jones. She testified that her colleague who prepared the valuation for the Wilson Realty property, had used the “cost approach” by taking the year 2000 purchase price for the vacant land of \$570,500 and adding the total construction costs of \$4,010,977. She indicated that she did not know whether the assessor had looked at any comparable sales, but there was no evidence indicating he had done so. Ms. Jones, in preparation for the hearing, did engage in a comparable sales analysis and located ten comparable sale properties within the City of Milwaukee. She submitted this information to the Board.

¶8 Using the comparable sales, Ms. Jones valued the Wilson Realty property at \$49.64 per square foot, for a value of \$4,225,938. She did not subtract the \$550,000 for the unfinished vacant space. Ms. Jones also submitted an “income approach” value to the Board for the purpose of the hearing of \$4,153,600. Again, Ms. Jones did not subtract \$550,000 from this figure to account for the vacant portion of the Wilson Realty property.

¶9 During the hearing, Ms. Jones admitted that the properties she submitted constituted comparable sales. However, she testified that it was not reasonable or appropriate to value the Wilson Realty property using the comparable sales approach.

¶10 After the hearing was completed, the Board ruled that the assessor’s valuation of the property by the cost approach was appropriate. Wilson Realty filed a petition for certiorari review with the circuit court, which affirmed the decision of the Board. Wilson Realty now appeals from that order.

DISCUSSION

¶11 In reviewing a certiorari action, our review is limited to whether the Board: (1) stayed within its jurisdiction; (2) acted according to law; (3) acted arbitrarily, oppressively or unreasonably, exercising its will and not its judgment; and (4) made a reasonable determination based on the evidence. *See State ex rel. Geipel v. City of Milwaukee*, 68 Wis. 2d 726, 731, 229 N.W.2d 585 (1975). Here, Wilson Realty contends that the Board did not act according to the law. We agree.

¶12 Both the statutes and case law require assessors to base valuations on comparable sales if sufficient comparable sales are available to review. WISCONSIN STAT. § 70.32(1) provides:

Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual² 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. In determining the value, the assessor *shall* consider recent arm's-length sales of the property ... recent arm's-length sales of reasonably comparable property; and all factors that, according to professionally acceptable

² The assessors manual provides in pertinent part:

There are three traditional approaches to value: the sales comparison approach, the cost approach, and the income approach.

When appraising, the appraiser should consider all available data and the three approaches to value. Then the appraiser should identify the most appropriate approach considering the type of property. For example, appraisers typically use the sales comparison approach in markets where adequate sales exist. They typically use the cost approach in cases of new or special purpose structures or where limited sales or rental data activity exist.

Wisconsin Property Assessment Manual, 7-15.

appraisal practices, affect the value of the property to be assessed.

(Footnote and emphasis added.)

¶13 Case law interpreting this statute has consistently held that the statute sets forth a tri-level hierarchy. The statute essentially codified what is commonly referred to as the “Markarian Hierachy,” based on the seminal case, *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 173 N.W.2d 627 (1970). That is, the assessor must use a recent sale of the property first to assess value. *Id.* at 686. If there was not a recent sale, the assessor then must use recent comparable sales, and the assessor proceeds to the third level only if the first two are not available. *See id.* at 686; *State ex rel. Campbell v. Township of Delavan*, 210 Wis. 2d 239, 256-59, 565 N.W.2d 209 (Ct. App. 1997).

¶14 It is erroneous to assess property using the third level ““when the market value is established by a fair sale of the property in question or like property.”” *Markarian*, 45 Wis. 2d at 686 (citation omitted). Here, the record reflects that the first level was not available—there was no recent sale of the property. There is evidence in the record, however, of recent comparable sales—ten from Mr. Watson, and ten different recent comparable sales from Ms. Jones.

¶15 The City contends that this case falls into a category where there are no comparable sales, and therefore it was appropriate for the assessor to rely on the third level of information. The City points out that the assessor’s manual permits reliance on the “cost approach” when no comparable property is available. The City also argues that the “cost approach” is an appropriate assessment method when the property is “new or [a] special purpose structure[.]” The assessor testified at the hearing that the cost approach was appropriate because there were

no comparable sales available and because the Wilson Realty property contained unique and specialized improvements.

¶16 The record belies the City's position. This record contains evidence suggesting that the original assessor valued the property based solely on the "cost approach." This is an error of law and a violation of both statutory and case law. The statute clearly requires the assessor to determine whether comparable sales exist before proceeding to the third option. *See* WIS. STAT. 70.32(1). Ms. Jones evaluated the Wilson Realty property under the comparable sales approach only *after* Wilson Realty objected to the 2002 real estate valuation.

¶17 In fact, when Ms. Jones did proceed to evaluate the subject property using the comparable sales approach, she was able to locate ten comparable properties. She admitted during the hearing that these transactions were "recent sales" for assessment purposes and "comparable" to the Wilson Realty property. Despite these admissions, Ms. Jones testified that the "cost approach" was still the more appropriate method. The Board and circuit court agreed. This is an error of law. The cost approach to valuation is an appropriate method only when comparable sales do not exist.

¶18 The City argues that the comparable sales were not actually comparable sales because of the unique and specialized nature of the Wilson Realty property. There is some reference to certain improvements within the Wilson Realty property required by the truck company tenant, such as higher ceilings, acid-proof floors, and concrete block partition walls. Wilson Realty used these amenities in support of its argument that these items raised the cost of construction, which improperly inflated the fair market value of the building under the "cost approach."

¶19 We are not convinced that these particular improvements rendered the Wilson Realty building incapable of being compared to recent sales of other similar buildings. When assessing the weight given to comparable sales, there inevitably are deductions and additions assigned to reflect differences in particular characteristics of the comparable sales. No two buildings are identical, which is why “comparable” rather than “identical” recent sales are considered in valuating property. Moreover, Ms. Jones found ten “comparable” properties. The comparable properties were within the City of Milwaukee, warehouse-type buildings with shop and office space, substantially similar in functionality and use, and similar in size. She admitted that these ten properties were recent, comparable sales.

¶20 Based on this information, it was improper to conclude that there were no comparable sales data to use in assessing the value of the Wilson Realty property. Because recent comparable sales existed to assess the value of the subject property, it was an error of law for the assessor to base the assessment on the “cost approach.” Accordingly, we reverse the order of the circuit court and remand to the Board with directions to re-assess the Wilson Realty property using the comparable sales approach.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

