

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2007

David R. Schanker
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. 2007AP330

Cir. Ct. No. 2005CV9402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

THOMAS P. KRUKOWSKI AND NINA A. KRUKOWSKI,

PLAINTIFFS-APPELLANTS,

v.

VILLAGE OF GREENDALE, WISCONSIN, BOARD OF REVIEW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

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

¶1 WEDEMEYER, J. Thomas P. Krukowski and Nina A. Krukowski (Krukowskis) appeal from an order of the Milwaukee County Circuit Court, affirming the 2005 tax assessment levied against their residential property located in the Village of Greendale, Wisconsin.

¶2 The Krukowskis claim that the Greendale Board of Review committed reversible error in the real estate tax assessment of their residential property in the following respects: (1) when it accepted incompetent evidence as a basis for the assessment valuation; and (2) in failing to make adjustments to the valuation for depreciation and obsolescence. Because the evidence that the Board of Review relied upon in arriving at its assessed valuation was competent, and because the factors of depreciation and obsolescence are not proper factors to be utilized in the application of a comparable sales approach to evaluate residential property, we affirm.

BACKGROUND

¶3 The Krukowskis' residential property is located on .694 acres in the Village of Greendale, Wisconsin. They have owned the property since 1987, the year it was built. It consists of a two-story colonial building with stone exterior. Within the living area there are eleven rooms with four bedrooms. It has six and one-half baths, is air conditioned with a full basement, and also includes an outdoor swimming pool and Jacuzzi. The Greendale assessor determined that the fair market value of the property was \$651,200 comprising land value of \$86,000 and improvements of \$565,200, or \$121.62 per square foot. The assessor arrived at this value by using the comparable sales analysis. He compared three similar residential properties to arrive at the value of the Krukowskis' property. The Krukowskis raised two issues before the Board. They argued: (1) that the assessment of \$651,200 should be reduced by \$31,134.72 because of an inaccurate computation of the square footage of the property as 5354 square feet rather than 5098 square feet; and (2) that the assessor failed to consider the age of the building, and its depreciated "fixed assets" and related replacement values of those assets, thereby requiring the assessment to be reduced by an additional \$77,334.

The Board rejected the Krukowskis' claim and accepted the assessor's evaluation. In turn, the Krukowskis sought certiorari review before the circuit court. The circuit court concluded that the assessment was made in keeping with the law. The Krukowskis now appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

¶4 An appeal on certiorari of a Board of Review decision is strictly limited. *State ex rel. N/S Assocs. v. Board of Review*, 164 Wis. 2d 31, 41, 473 N.W.2d 554 (Ct. App. 1991). We review the Board of Review's decision independent of the circuit court's conclusions. *Id.* at 42. We may only consider whether: (1) "the Board 'kept within its jurisdiction'"; (2) "the Board acted according to law"; (3) "the action taken by the Board was 'arbitrary, oppressive or unreasonable' so as to represent 'its will and not its judgment'"; and (4) "the evidence before the Board was such 'that it might reasonably' sustain the assessment." *Id.* (citations omitted).

¶5 If there is a conflict in the testimony respecting the value of the property, the court does not substitute its opinion of the value for that of the Board of Review. When there is a conflict in the testimony, it is the task of the Board to determine the probity and credibility of the witnesses who appear before it. *Rite-Hite Corp. v. Brown Deer Review Board*, 216 Wis. 2d 189, 195, 575 N.W.2d 721 (Ct. App. 1997). "If there is credible evidence before the [B]oard that may in any reasonable view support the assessor's valuation, that valuation must be upheld." *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 662, 242 N.W.2d 681 (1976).

¶6 With these rubrics clearly in mind, we focus our inquiry on whether the assessment was in accord with the pertinent statutory directives. If the assessment was made in compliance with the statute, the assessment must be

upheld, “if there is any evidence to support it.” *State ex rel. Geipel v. City of Milwaukee*, 68 Wis. 2d 726, 732, 229 N.W.2d 585 (1975).

¶7 Real property assessment in Wisconsin is governed by WIS. STAT. § 70.32(1) (2005-06)¹ and the Wisconsin Property Assessment Manual. Section 70.32(1) provides:

70.32 Real estate, how valued. (1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from an 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; ... and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

Additionally, our supreme court held:

The “best information” of such value is a sale of the property or if there has been no such sale then sales of reasonably comparable property. In the absence of such sales, the assessor may consider all the factors collectively which have a bearing on value of the property in order to determine its fair market value. However, it is error to use this method “when the market value is established by a fair sale of the property in question or like property.

State ex rel. Markarian v. City of Cudahy, 45 Wis. 2d 683, 686, 173 N.W.2d 627 (1970) (citation omitted). Reasonable comparable sales refers:

[T]o properties that represent the subject property in age, condition, use, type of construction, location, number of stories, and physical features. The more similar the sold

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

property is to the subject, the more valid is the sale price as an indicator of the value of the subject property. Also, by using similar properties, sales prices need fewer adjustments to arrive at an estimate of value for the subject property.

Joyce v. Town of Tainter, 232 Wis. 2d 349, 361, 606 N.W.2d 284 (Ct. App. 1999) (citing 1 *Property Assessment Manual*, 7-12, 7-13). WISCONSIN STAT. § 70.47(8)(d) provides that the Board: “may and upon request of the assessor shall compel the attendance of witnesses, except objectors who may testify by telephone, and the production of all books, inventories, appraisals, documents and other data which may throw light upon the value of the property.”

¶8 This statute specifically permits the Board to rely on, among other materials, “appraisals, documents and other data which may throw light upon the value of the property.” *N/S Assocs.*, 164 Wis. 2d at 59 n.11.

ANALYSIS

¶9 The Krukowskis’ appeal is based upon two major premises. First they claim that the actions of the Village of Greendale Board of Review were arbitrary and unreasonable so as to represent its will and not its judgment when it accepted the square footage of the assessor for their residential property. Second, the Board failed to act according to law when it made no deduction for depreciation and obsolescence, as represented by the Krukowskis when it considered the sales comparison approach presented by the assessor.

¶10 We shall examine each premise in turn.

¶11 The Krukowskis assert the Board erred in affirming the statements of its assessor regarding the size of the subject property because those statements were not supported by the assessor’s personal knowledge. Rather, the

measurements were made by a member of the assessor's staff. They argue that the issue was not a conflict in evidence between their witness and the assessor. Rather, there was only one witness, theirs, who had the personal knowledge required to testify competently as to the property's square foot area. The statements made by the assessor concerning the square foot area were hearsay, not evidence. The Village argues the Krukowskis confuse the difference between credibility and competence. We reject the Krukowskis' assertion for two reasons.

¶12 To initiate our examination of the square-footage discrepancy and to introduce some clarity to this discussion, from our review of the Board of Review hearing, it is obvious that the external measurements on which 5354 square feet was based was done by a member of the assessor's staff on or about October 4, 2001, not in 2005 as suggested in the Krukowskis' briefs. The sketch and calculation supporting this figure are contained in Exhibit 6, which, together with ten other exhibits, were admitted into evidence without objections. Exhibit 1, in contrast, contains the square-footage calculation compiled by the Krukowskis' expert witness. He first measured the external dimension of the residence. He arrived at a figure of 5098 square feet—a difference of 256 square feet or 5% less than the Village's measurement. Testimony from the Board hearing reveals that the Krukowskis wanted an interior measurement made because they were concerned about the effect the area of the vaulted-ceiling living room, the two story entryway, the front garage, the rear garage, and the porch had on the square foot calculation. The Krukowskis' expert then eliminated these area measurements as not living or useable space from the square footage calculation. With these adjustments, the inside measurement came out to 4,808.9 square feet.

¶13 In the process of performing his duties, the Krukowskis' expert sought out the opinions of community appraisers and assessors to find out if there

were “strict guidelines” as to any procedures used “and for the most part ... found they do outside dimensions....” If however, “living space” is the focus, then inside dimensions would be significant. For that reason, he made both types of measurements for the Board to analyze.

¶14 The village assessor stated that, in performing his duties for the Village of Greendale, he followed the instructions provided in the Wisconsin Property Assessor’s Manual for properly calculating the square footage by measuring exterior dimensions. Chapter 19 of the Manual devoted to “Revaluation” sets forth twelve responsibilities of the assessor when making a field inspection. In addition to inspecting the interior of the building, he or she must: “Measure and inspect the exterior of the building recording the story height and dimensions.” Thus, it was up to the Board in its factfinding capacity to evaluate the different approaches taken in the assessment process and to decide which approach to adopt given the dictates of the Manual. The Board adopted the assessor’s measurements.

¶15 The Krukowskis next challenge the competency of the village assessor’s measurement evidence on the basis that it is “rank hearsay, which is clearly inadmissible to establish the area of the property.” We reject this claim of error for two reasons. First, with the exception of the rules of privilege, the rules of evidence do not apply to administrative hearings. *Bowen v. LIRC*, 2007 WI App 45, 815 n.5, 299 Wis. 2d 800, 730 N.W.2d 164. Second, reviewing the village assessor’s testimony at the Board hearing reveals that his presentation was formulated to explain previously prepared exhibits in the form of documents, pictures, and calculations intended to support his evaluation or refute the square footage measurements of the Krukowskis’ expert. He referred to the measurements which appeared of record on Exhibits 6 and 8. From these

documents he described what areas had been measured and what areas were not measured. As set forth earlier in this opinion, WIS. STAT. § 70.47(8)(d) allows the Board to consider “appraisals, documents and other data which may throw light upon the value of the property.” The statute clearly obviates any hearsay objection. Thus, we reject the Krukowskis’ claim that the original assessor who actually measured the home would have to come to the Board hearing and testify in order for the Board to utilize the 5354 square foot calculation.

¶16 In reaching its decision to uphold the village assessor’s measurement of 5354 square feet for the residence of the Krukowskis, it is abundantly clear from a reading of the recorded deliberations that the Board evaluated the evidence presented by both parties. In this instance, as far as the square footage measurement was concerned, the Board assigned more weight and credibility to the evidence presented by the assessor. In doing so, it discharged its fact-finding function, which is its primary legal duty. Its square footage resolution was neither arbitrary nor unreasonable. The Board’s determination to use the exterior measurement, as was the common practice in the industry, rather than the interior measurement proffered by the Krukowskis’ expert, was not erroneous.

¶17 The Krukowskis’ second claim of the Board’s error relates to its application of the comparable sales approach to valuation and the failure to make certain required adjustments for a reduction in value. More specifically, they assert error in refusing to make adjustments to the property’s assessed value despite uncontradicted evidence of depreciation and obsolescence of the property’s fixed assets; i.e., its roof, HVAC systems, carpeting, built-in appliances and its unique, negative selling points. In sum, they claim that “by failing to consider the relevant and competent evidence presented concerning the property’s age, condition, and characteristics, the Board erred as a matter of law in its

application of the Sales Comparison Approach.” For reasons to follow, we reject this contention.

¶18 As recited earlier, the Krukowskis’ residence was built in 1987 in the Overlook Farms Addition #6 subdivision, Village of Greendale. Since its construction, there has been no resale. Thus, the comparable sales approach was the appropriate method to determine value. *Markarian*, 45 Wis. 2d at 686.

¶19 Exhibit 6 in the record reflects that three sales were proposed as comparable sales. All were located within the Village; the former two in the same subdivision; the latter in a neighboring subdivision. As is obvious from the street addresses, property #1 and #2 are closely located to the Krukowskis’ residence.

¶20 All three have smaller living areas than the subject property. The subject property has 5354 square feet versus property #1, 3813.3, property #2, 3092, and property #3, 4570. The subject property has eleven (11) total rooms as compared to property #1, eight (8), property #2, nine (9), and property #3 ten (10).

¶21 The subject property is made of stone, while the other three are of brick construction. The subject property is a Colonial style as are properties #2 and #3, while property #1 is a Cape Code style home. All have single family residence zoning. Property #1 was built in 1985, property #2 in 1989, and property #3 in 1993. All three properties and the subject property have gas fuel and warm air systems.

¶22 As mentioned in a previous paragraph, property #3 consists of 4570 square feet as compared to 5354 for the subject property and is the closest in size to the subject property. It was built in 1993. In 2003 it sold for \$699,800. Like the subject property, it is a two-story, Colonial style residence, but of brick

construction. It has one less room, and is located on a lot less than half the size of the subject property. Although its characteristics do not match those of the Krukowskis' residence exactly, it sold for \$148,000 more than the challenged assessment of the subject property.

¶23 On August 20, 2003, property #1 sold for \$565,000, on January 30, 2004, property #2 sold for \$550,000, and on August 18, 2003, property #3 sold for \$699,800. With the application of a time adjustment for 2005, their adjusted sales prices would be: \$611,438 for property #1; \$580,468 for property #2; and \$757,548 for property #3.

¶24 During the Board's hearing, the Krukowskis devoted a considerable amount of time challenging the village assessor's failure to take into account the depreciation and obsolescence of fixed assets associated with their property, as well as some of its unique features. The Krukowskis called as a witness a real estate broker who lived on Parkview Road. She testified that the three comparable sales did not involve residences with an outdoor swimming pool and a hot tub, and those features present negative factors for most people who have children. A final witness for the Krukowskis was an employee of Mr. Krukowski who compiled exhibit 2, which was a list of replacement costs for the fixtures of the residence. The results of their cross-examination as well as their direct statements could have been considered evidence by the Board to be examined and assayed under its discretionary powers. The Board could engage in the same exercise as to the direct witness testimony that was presented.

¶25 The village assessor explained to the Board why depreciation and obsolescence were not acceptable standards to be applied in a comparable sales approach to the valuation of a residence. The record demonstrates that no

comparable sales were presented by the Krukowskis to point to a diminution of the value of their residence. The realtor witness presented no testimony to prove any specific decrease in value because of the presence of a hot tub or a swimming pool on the premises, nor did the exhibit listing the replacement cost of certain appliances and fixtures suggest any diminution in the overall value of the property.

¶26 As succinctly stated in the Village's brief, "[n]ot one witness presented by Mr. Krukowski set forth any dollar amount to support a reduction in the fair market value figure reach by the assessor." Consequently, no specific evidence was tendered to the Board to suggest that certain adjustment factors would have an impact on the sales price of the subject property. In the absence of such evidence no adjustments were necessary other than for the time of sale, which was done. Sheer speculation is of no avail. *See 1 Property Assessment Manual* at 8-5.

¶27 In contrast, and contrary to the Krukowskis' assertions, the village assessor, through documentary exhibits, presented evidence that represented the subject property in age, condition, use, type of construction, location, number of stories, and physical features. *Joyce*, 232 Wis. 2d at 361.

CONCLUSION

¶28 It was the function of the Board to decide which of the two opposing calculations would be the square footage measurement of the Krukowskis' residence. Without question, there was competent evidence to support the square footage measurement of 5354 square feet presented by the village assessor. Because there was evidence to support this figure, the square footage determination applied by the Board must be accepted. *Geipel*, 68 Wis. 2d at 732.

¶29 The Krukowskis did not prove that the failure to make adjustments they suggested would have resulted in a reduction in value. They bore the burden of proof to establish that any difference in the cost approach valuation of the property and the comparative sales approach warranted a reduction in the value of their property. This translates into the burden of providing credible evidence to demonstrate the value determined by the assessor was incorrect. *Rosen*, 72 Wis. 2d at 662. They failed to satisfy this burden. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

