COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1272

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

THOMAS J. PIONKE, AND SANDRA J. JANSSEN,

PLAINTIFFS-RESPONDENTS,

V.

TOWN OF DAYTON, JUDITH A. SUHS, TOWN CLERK,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waupaca County: DEE R. DYER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. The Town of Dayton appeals from an order reversing its assessment of property owned by Thomas Pionke and Sandra Janssen. The Town argues that the court: (1) lacked jurisdiction to hear the taxpayers' motion to reduce the assessment following an earlier remand; and (2) erred in (a) reversing

the board's decision, (b) directing that the assessment of the taxpayers' property be set at $148,778, (c) ordering a reassessment of the entire town, (d) finding a uniformity clause violation, and (e) denying the Town's request to present additional evidence at the remand hearing. We conclude that the court had jurisdiction in the matter and did not err in reversing the board and upholding the taxpayers' argument for a $148,778 valuation of their property. We also conclude that the taxpayers did not raise a timely uniformity-clause challenge and that the court erred in ordering a town-wide reassessment. Finally, we conclude that the court properly denied the Town's request to offer new evidence in circuit court. We therefore affirm in part and reverse in part.

The taxpayers own a summer cottage on Lake Minor in the town of Dayton. After receiving notification that their property was being assessed at $184,700 for the tax year 1993, they filed an objection, arguing that they were being over assessed because the assessor used a cost-based method of assessment rather than a comparable sales method, in violation of § 70.32(1), STATS.[1] At the hearing on their objection, they claimed that the fair market value of their property was $148,778, based on: (1) evidence of all sales of property on Dake and Minor Lakes for the preceding twenty-four months; and (2) a "multiple linear sales

[1] Section 70.32(1), STATS., provides:

> Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided ... 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.

regression analysis," which they maintained was an accepted "comparable-sales method of valuation." They also claimed that the assessor's cost-based approach, used in conjunction with a "front-footage schedule" prepared by an outside firm,[2] resulted in an under assessment of all large homes, and an over assessment of all small homes, in the town. The board sustained the assessor's valuation.

The taxpayers sought certiorari review of the board's decision, requesting a reduction of their assessment to a "comparable sales" level, and a further reduction based on general considerations of "uniformity." Pursuant to the parties' stipulation, the taxpayers' objections to their 1994 and 1995 assessments were added to their complaint. The trial court acknowledged the comparable sales method as the preferred method of valuing real property under § 70.32(1), STATS., and remanded the matter to the board to determine whether any "recent arm's-length sales of reasonably comparable property" existed.

At the remand hearing, the Town had its assessor, Lori Lawson, testify regarding the 1995 assessment. She stated that she inspected the taxpayers' property in April 1997, and then, after considering recent sales of four other properties she viewed as comparable, determined that the value of the taxpayers' property as of January 1, 1995 would be "somewhat higher" than the 1993 assessment of $184,700. Lawson submitted an "assessment schedule" reflecting her calculations, and a computer printout of sales in the town from 1989 through 1992 in an attempt to confirm the "front-footage schedule" component of her analysis. The board again sustained the assessor's valuation.

[2] The document purported to value all lakeshore property in the area at a uniform rate of $1,350 per front foot.

The taxpayers then moved the court for "an Order directing the Town of Dayton to reduce [their] 1995 property tax assessment and grant other requested relief pursuant to § 70.47(13), Stats." After a hearing, the court granted the motion, and ordered the board: (1) to assess the taxpayers' property "in accordance with a value resulting from the comparable sales analysis [they] presented"; (2) to further reduce the assessment "to a level enjoyed by the under assessed properties presented by the [taxpayers]"; and (3) to reassess the entire Town of Dayton. The Town appeals.

On certiorari, we review the board's action *de novo*. ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). We accord a presumption of correctness and validity to the board's decision and the issues on review are strictly limited to: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis.2d 468, 475-76, 247 N.W.2d 98, 102-03 (1976).

The Town's first argument, that the court lacked jurisdiction to hear the taxpayers' motion following remand, is dispelled by the plain language of § 70.47(13), STATS., which states:

> [An] appeal from the determination of the board of review shall be by an action for certiorari .... If the court on the appeal finds any error in the proceedings of the board which renders the assessment or the proceedings void, it shall remand the assessment to the board for further proceedings in accordance with the court's determination and ***retains jurisdiction*** of the matter until the board has determined an assessment in accordance with the court's order (emphasis added).

The taxpayers properly appealed the board's May 27, 1995, decision in their certiorari action, and the circuit court remanded the matter to the board. In such circumstances, the court plainly retains jurisdiction until the board determines a proper assessment, and the taxpayers' motion properly invoked that jurisdiction.

The Town next argues that the court erred in reversing the board's decision sustaining the assessor's valuation. The court concluded that Lawson's method of calculating the value of the taxpayers' property was legally erroneous, and it specifically ruled that the board "should have accepted the comparable sales method provided by the [taxpayers] as the only evidence before it upon which [it] could base a legally acceptable assessment."[3] The Town disagrees, contending that the evidence supports Lawson's valuation—which it claims was made based on a comparable sales analysis as required by § 70.32(1) STATS. It maintains that we must, as a result, uphold the assessment. We disagree.

A valuation will be upheld if there is credible evidence before the board which in any reasonable view supports the assessor's valuation. ***Steenberg v. Town of Oakfield***, 167 Wis.2d 566, 572, 482 N.W.2d 326, 328 (1992). An assessor's valuation is presumed correct, and we will not set it aside in the absence of evidence showing that it is incorrect. ***Id.*** If there is conflicting testimony concerning the value of the property, we will not substitute our opinion for that of the board. ***Id.*** These rules, however, assume that the assessor's method of valuation complies with applicable statutes. ***Dempze Cranberry Co., Inc. v.***

[3] We, of course, review the board of review's decision independent of the circuit court's conclusions. ***Steenberg v. Town of Oakfield***, 167 Wis.2d 566, 571, 482 N.W.2d 326, 327 (1992).

Board of Review of the Village of Biron, 143 Wis.2d 879, 884, 422 N.W.2d 902, 904 (Ct. App. 1988). Failure to make an assessment on a statutory basis is an error of law, correctable by courts on certiorari review. ***State ex rel. Markarian v. City of Cudahy***, 45 Wis.2d 683, 686-87, 173 N.W.2d 627, 629 (1970).

The procedure for determining the fair market value[4] of real estate for assessment purposes is embodied in § 70.32(1), STATS. *See* n.1, *supra*. It requires an assessor to value real property either from actual view or by using the "best information" possible. The "best information" is considered to be a recent arm's-length sale of the subject property.[5] ***State ex rel. Campbell v. Township of***

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[4] Fair market value or full value of property is defined as: "[t]he amount it will sell for upon arms-length negotiation in the open market, between an owner willing but not obliged to sell, and a buyer willing but not obliged to buy." ***Darcel v. Manitowoc Review Bd.***, 137 Wis.2d 623, 628, 405 N.W.2d 344, 346 (1987) (quoted source omitted).

[5] The following conditions are necessary for a sale to be considered a "market value" or "arm's-length" transaction:

> 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.
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> 2. It presumes that both buyer and seller are knowledgeable about the real estate market.
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> 3. It presumes buyer and seller are knowledgeable about the uses, present and potential, of the property.
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> 4. It requires a willing buyer and a willing seller with neither party compelled to act.
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> 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.

1 PROPERTY ASSESSMENT MANUAL FOR WISCONSIN, Part 1 at 7-3 (Revised 12/98); *see also* ***Steenberg***, 167 Wis.2d at 573-74, 482 N.W.2d at 328-29.

Delavan, 210 Wis.2d 239, 259, 565 N.W.2d 209, 217 (Ct. App. 1997). When there has been no such sale, "the next step is to use recent arm's-length sales of reasonably comparable property as the basis of the assessment." ***Id.*** at 258-59, 565 N.W.2d at 218; *see also* 1 PROPERTY ASSESSMENT MANUAL FOR WISCONSIN, Part 1 at 7-3 (Revised 12/98).[6] Reasonably comparable sales are competitive properties with characteristics similar to the subject property, which have sold recently on the local market. ***Id***. at 259, 565 N.W.2d at 218. If an arm's-length sale exits, it is error for the assessor to use other means to determine the value of the subject property. ***Darcel v. Manitowoc Review Bd.***, 137 Wis.2d 623, 629, 405 N.W.2d 344, 347 (1987). It is only in the absence of any such sales that the assessor may consider all of the factors which collectively bear on the value of the property in arriving at its fair market value. ***Delavan***, 210 Wis.2d at 259, 565 N.W.2d at 218.

At the remand hearing before the board, Lawson testified as to sales of four properties she said were comparable. Two of them had also been selected as comparable by the taxpayers in their analysis. Then, using what she described as a "very simple sales analysis," Lawson formulated an "assessment schedule" to estimate the fair market value of the taxpayers' property. As indicated, she also submitted a computer printout of property sales in the town from 1989 through 1992 in support of the "front-footage schedule."[7]

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[6] The MANUAL is promulgated by the Department of Revenue pursuant to § 73.03, STATS., and is the primary document defining assessment standards and practices in Wisconsin. *See* ***State ex rel. Campbell v. Township of Delavin***, 210 Wis.2d 240, 258, 565 N.W.2d 209, 217 (Ct. App. 1997).

[7] In its January 20, 1997, decision, the court stated that the Board had acknowledged that there was no data produced in support of the "front footage" schedule used in Lawson's valuation ...."

The taxpayers claim that Lawson's analysis is not based on comparable sales, as required by § 70.32(1), but rather is cost-based. They argue that the two "independent" sales she used in her calculations were neither arm's length nor comparable, and that her analysis was contrary to law. The court agreed and rejected Lawson's valuation, concluding that the taxpayers were "the only parties that used the legally correct method of assessment, that being the comparable sales method." The record satisfies us that the trial court was correct; and, as we have noted, where it appears that the assessor has failed to value property according to law, an assessment based on such value must be set aside.

The only sales used by Lawson not already introduced in support of the taxpayers' own calculations were not comparable. The owner of one of the properties testified that it was not listed for sale, and the MANUAL states that a property "must have been exposed to the open market for a period of time typical of the turnover time for the type of property involved" in order for the sale to be considered a "market value" or "arm's-length" transaction. MANUAL at 7-3; *see also* ***Steenberg***, 167 Wis.2d at 573, 482 N.W.2d at 328. The board apparently disregarded this fact in determining that the sale was arm's-length because the purchaser, as one member said, was a "knowledgeable real estate person" who

would not have bought the property for more or less than its fair market value.[8] This finding is not supported by either the evidence of record or by applicable law. The second parcel either had been divided or, at the very least, had the potential to be subdivided into two separate buildable parcels, prior to its sale. The taxpayers' property, on the other hand, is subject to a deed restriction permanently prohibiting its division.

Nor are we persuaded that Lawson's "assessment schedule" is based on any otherwise acceptable method for assessing real property. Neither Lawson nor the Town has offered any authority supporting her calculations. Indeed, in accepting Lawson's valuation, one board member stated: "As long as the assessor feels that [her] method is correct and being used in a fair and equal manner, I don't see any reason to change it." The board's reasoning is not based on the evidence

[8] At the remand hearing, when the board members were discussing whether the sale of this particular property should be considered arm's length despite the fact it was not sold in the open market, one board member reasoned:

> I know the purchaser of the property, and I know him to be a very knowledgeable real estate person. He has numerous properties, both in the State of Wisconsin and in the area, and I know that he had bought and sold numerous homes in the area. The fact that he bought it from his neighbor and it has not been listed on the open market, I believe would apply if it was less than [a] fair market value purchase, but I don't believe that it is a greater than fair market value purchase because he bought it from his neighbor. And I don't think anyone will argue that it is less than fair market purchase because he bought it from his neighbor. So I would ... suggest that we do look at that property as well as the other properties.
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> ….
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> … I don't believe that the sales were excessive because they were neighbors, nor do I believe that it was less than fair market value because they were neighbors. So I ... think it can still be used in our analysis.

before it, and we agree with the trial court—and the taxpayers—that Lawson's valuation does not comport with § 70.32(1), STATS.

We are also persuaded that the taxpayers provided the board with appropriate evidence of comparable sales. They presented information on all sales on Dake and Minor Lakes for the twenty-four months preceding the hearing, and the Town stipulated that ten of those sales were true arm's-length sales. The taxpayers then used a "multiple linear regression analysis," a method approved by the International Association of Assessing Officers, and listed in the MANUAL as an appropriate vehicle for determining the fair market value of property—and one with an estimated 97% accuracy level. *See* MANUAL, Part 2 at 20-1, 20-9.

The Town next argues that the court erred in directing the board to set the taxpayers' assessment at the specific sum of $148,778, because "it is not the function of the courts to make an assessment of property or to order that an assessment of property be entered at any fixed sum." *See* ***Delevan***, 210 Wis.2d at 265, 565 N.W.2d at 220. The court did not make its own assessment. It simply directed the board "to assess the taxpayers' property in accordance with a value resulting from the comparable sales analysis presented by the [taxpayers]." The Town had been given the opportunity, on remand, to justify its assessment based on the comparable sales method, which it failed to do. Since the only proper comparable sales evidence before the board was that provided by the taxpayers, we see no error in ordering that their property be assessed in conformity with that evidence (which, as indicated, valued the property at $148,778).

The Town next argues that the court erred in finding a uniformity clause violation.[9] The argument has merit. After considering the taxpayers'

[9] The rule of uniformity is embodied in art. VIII, § 1 of the Wisconsin Constitution, which provides in part: "The rule of taxation shall be uniform …." It requires that the method or (continued)

contentions that the Town's cost-based system of assessment unfairly under assessed larger homes, and over assessed smaller homes, the court expressly ruled that the Town had violated the uniformity clause, and ordered the board to not only reduce the taxpayers' assessment "to the level enjoyed by the under assessed properties" but to also reassess all property in the town.

The taxpayers never raised a timely, specific uniformity-clause objection to the Town's overall assessment practices. They alleged in their July 1994 complaint only that the Town had failed to assess their property in accordance with § 70.32, STATS., and the only relief requested was a declaration that the value of their property was $140,000, and a refund of $1,138.08. Nor did they claim a uniformity-clause violation in a subsequent amendment to the complaint or in their arguments to the board. While they did complain generally about a lack of "uniformity" in the Town's assessment practices at the initial hearing before the board, it appears from the record that they raised the question for the limited purpose of showing that the assessor had not followed statutory procedures in assessing their own and other property in the town. The first time they attempted to specifically assert a constitutional violation was in a brief filed with the court in 1996, nearly two years after they filed their initial complaint, and one year after they last amended it.

It is well-established that taxpayers must raise all objections concerning the valuation of their property before the board of review in order to preserve them for appeal. *See* ***Hermann v. Town of Delavan***, 215 Wis.2d 369, 380, 372 N.W.2d 855, 859 (1998). Section 70.47(7), STATS., provides in part that "[n]o person shall be allowed in any action or proceedings to question the amount or valuation of property unless ... written objection has been filed [with the board

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mode of taxing real property be applied uniformly to all classes of property. *See* ***State ex rel. Hensel v. Town of Wilson***, 55 Wis.2d 101, 106, 197 N.W.2d 794, 796 (1972).

of review] and such person ... presented evidence to such board in support of such objections ...." This language has been said to "create[] a condition precedent for 'any action or proceedings,' objecting to the valuation of property." ***Id.*** at 381, 572 N.W.2d at 859. Additionally, we are bound by the general principle that where a method of review is prescribed by statute, that method is exclusive, ***id.*** at 382, 572 N.W.2d at 859; and we note in this regard that chapters 70 and 74 of the Wisconsin Statutes set forth a comprehensive and exclusive scheme for appealing actions by local boards of review. We thus conclude that the taxpayers, by failing to properly raise their uniformity violation claim before the board of review, have waived that issue on appeal. It follows that the court erred in entertaining the issue and in finding a uniformity violation.

It also follows that the court erred in ordering a reassessment of the entire Town of Dayton. In their action, the taxpayers challenged only their own assessments for the years 1993, 1994 and 1995. They never challenged the assessment of the entire town based on a uniformity-clause violation; yet they now urge us to order a town-wide "constitutional assessment" for future years. They are not entitled to such an expansive remedy given the narrow focus of their action. Their only remedy is a reassessment of their own property.

The Town's final argument—that the court erred by not allowing it to present testimony at the motion hearing on "the issue of judicial estoppel"—is dispelled by the well-recognized principle that certiorari review is confined to the record of the proceedings before the agency or board.

> Review on statutory certiorari, like review on common law certiorari, is restricted to the record made before the initial fact finder, unless the statute enlarges the scope of review. Unless the statute directing certiorari review authorizes the court to take evidence, the court may not conduct its own factual inquiry. In short, ***judicial review by certiorari under sec. 70.47(13), Stats., of a board of review's***

> ***determination is limited strictly to the record***, no matter how incomplete or inadequate it may be.

State ex rel. Henker v. Huggett, 114 Wis.2d 320, 323, 338 N.W.2d 335 (Ct. App. 1983) (emphasis added) (internal citations omitted). The court properly rejected the Town's request to present additional evidence at the motion hearing.

We therefore affirm the portion of the court's order directing the board to assess the taxpayers' property at $148,778 in accordance with their comparable sales analysis. We reverse the order insofar as it directs the board to reduce the taxpayers' assessment to "a level enjoyed by the under assessed properties [according to evidence] presented by the taxpayers," and to undertake a reassessment of the entire Town of Dayton.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.