

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**CHARTER NORTHBROOKE BEHAVIORAL
HEALTH SYSTEM, INC.,**

PETITIONER-RESPONDENT,

v.

VILLAGE OF BROWN DEER, BOARD OF REVIEW,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
STANLEY A. MILLER, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. The Board of Review of the Village of Brown Deer appeals from the trial court's order reversing the board's decision to uphold the 1996 assessment of a property owned and operated by Charter Northbrooke Behavioral Health System, Incorporated. The board argues that Charter failed to

establish that the assessor improperly assessed the property, and that the trial court, therefore, erred in reversing the board. We agree. We therefore reverse the trial court's order, and affirm the board's decision upholding the assessment.

BACKGROUND

¶2 In November of 1994, Charter purchased the subject property, along with nine other properties located throughout the United States, from National Medical Enterprises, Incorporated. Charter operates the subject property as a psychiatric facility. In a 1996 property-tax assessment, the assessor for the Village of Brown Deer valued the subject property at a total fair market value of five million dollars. This valuation consisted of land valued at \$850,000 and a building valued at \$4,150,000. Charter filed an objection to the assessment, asserting that the property should have been valued at \$2,400,000.

¶3 The board held a hearing on the objection, and it received testimony from the assessor and from an appraiser that Charter had hired. Charter's appraiser testified that the board should assess the subject property at its November 1994 purchase price, \$2,429,000. The appraiser further testified that the comparable sales approach, the income approach, and the cost approach to valuation all yielded values near the purchase price, and thus supported the conclusion that the purchase price was an accurate reflection of the fair market value of the property. Upon questioning from the board, however, the appraiser testified that Charter purchased the property from National Medical Enterprises as part of a group of ten properties, and that he did not know who decided how to allocate the total purchase price among the ten properties, or how the allocated prices were determined. The appraiser also testified that none of the proposed comparable properties that his firm used in valuing the subject property were

located in Wisconsin, and that he could not testify that the areas in which the properties were located were economically comparable to the location of the subject property; he could only testify that sales of psychiatric facilities had “some consistency” “from a national standpoint.”

¶4 The assessor testified that he did not consider the November 1994 sale of the subject property to be an arm’s-length transaction, and that he, therefore, did not base his assessment on the purchase price of the property. The assessor testified that the property was purchased as part of a group of ten properties, and that he could not consider the purchase price to be a reflection of the fair market value of the property unless he was provided with complete information regarding all of the properties purchased and the amount of the total purchase price that was allocated to each of those properties. He testified that he had not received from Charter any data on this bulk sale, which involved nine properties that were located outside of Wisconsin, throughout the United States. The assessor further testified that there were not any comparable sales in the area that would be indicative of the fair market value of the subject property, and that he did not value the property using an income approach because the property was owner-occupied. The assessor, therefore, based his valuation on considerations of the cost approach to valuation, the original cost of the facility, which was constructed in 1989, and a 1994 appraisal of the property that was commissioned by the former owner. The assessor concluded that these factors yielded a fair market value of approximately five million dollars for the subject property. Additionally, the assessor testified that Charter’s appraiser’s valuation of the property under the cost approach was questionable because the appraiser estimated the cost of replacement of the facility at \$2,720,000, which was about half of the cost of the original construction in 1989.

¶5 The board upheld the assessor's original assessment of Charter's property. Charter then appealed the board's decision to the trial court. The trial court reversed the board's decision and remanded the matter to the board for further proceedings.

DISCUSSION

¶6 This appeal arises by way of statutory certiorari. *See* § 70.47(13), STATS. On appeal by certiorari, we review the record and findings of the administrative board, not the judgment and findings of the trial court. *See State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). Our review is limited to the following questions: (1) whether the board kept within its jurisdiction; (2) whether the board acted according to law; (3) whether the action taken by the board was arbitrary, oppressive or unreasonable so as to represent its will and not its judgment; and (4) whether the evidence before the board was such that it might reasonably sustain the assessment. *See State ex rel. N/S Assocs. v. Board of Review*, 164 Wis.2d 31, 41, 473 N.W.2d 554, 557 (Ct. App. 1991).

¶7 “In the context of property assessment for purposes of taxation[,] the court may determine whether the assessment was made on the statutory basis, for such inquiry involves a question of law.” *State ex rel. Geipel v. City of Milwaukee*, 68 Wis.2d 726, 732, 229 N.W.2d 585, 588 (1975). “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. N/S Assocs.*, 164 Wis.2d at 42, 473 N.W.2d at 557 (quoting *State ex rel. Geipel*, 68 Wis.2d at 732, 229 N.W.2d at 588). There is a presumption that the assessor's valuation is correct, and it will not be set aside in the absence of evidence showing it to be incorrect. *See Rosen*

v. City of Milwaukee, 72 Wis.2d 653, 661, 242 N.W.2d 681, 684 (1976). The burden of producing evidence to overcome the presumption of correctness is on the party attacking the assessment. *See id.*, 72 Wis.2d at 662, 242 N.W.2d at 684.

¶8 Section 70.32(1), STATS., governs the method of assessing real property in Wisconsin.

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 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.

Section 70.32(1), STATS.

“Commonly stated, sec. 70.32 (1) requires real estate to be assessed at its fair market value[,] which has often been defined as the amount the property could be sold for in the open market by an owner willing and able but not compelled to sell to a purchaser willing and able but not obliged to buy.

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. Geipel, 68 Wis.2d at 733, 229 N.W.2d at 589 (citations omitted).

¶9 We conclude that the assessor complied with the statute in assessing Charter’s property, and that Charter did not produce sufficient evidence to

overcome the presumption that the assessor's valuation was correct. As noted, the assessor concluded that because Charter purchased the subject property as part of a package of ten properties, and the parties to the sale could choose how to allocate the purchase price among the ten properties, the sale was not an arm's-length sale, and it thus could not be used to represent the fair market value of the subject property. In order to show that the purchase of the subject property was, in fact, an arm's-length sale for full value, Charter had the burden to prove that the sale met the following conditions:

- “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.
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.”

State ex rel. N/S Assocs., 164 Wis.2d at 43, 473 N.W.2d at 558 (quoted source omitted). Charter failed to present any evidence that the subject property had been exposed to the open market for any period of time prior to its sale as part of the group of ten properties. Charter also failed to present evidence that payment for the property was “typical of normal financing and payment arrangements prevalent in the market for the type of property involved.” Indeed, Charter presented no evidence regarding the financing and payment arrangements. Finally, Charter failed to present evidence that the purchase price allocated to the

subject property was not discounted as a result of the bulk purchase. *See Flood v. Lomira Bd. of Review*, 153 Wis.2d 428, 437, 451 N.W.2d 422, 426 (1990) (“For the sale price to be the best information of full value the sale must be made ‘under normal conditions’ so as to lead to the conclusion that the price paid was that which could ‘ordinarily’ be obtained for that property.”). The board did not err in concluding that Charter failed to show that its recent purchase of the subject property was an arm’s-length transaction for full value.

¶10 The assessor also concluded that there were no comparable sales in the area that would be indicative of the fair market value of Charter’s property. Charter’s appraiser agreed that there were no comparable sales in Wisconsin. Instead, the appraiser testified that sales across the country should be considered because the market for psychiatric facilities was a national market. The appraiser, however, failed to present the board with sufficient information about the other properties to enable the board to determine whether they were truly comparable.

¶11 Whether two properties are reasonably comparable depends on the “degree of similarity between the properties in question.” *Rosen*, 72 Wis.2d at 665, 242 N.W.2d at 686.

Important considerations in determining whether particular property is sufficiently similar to the property being assessed to warrant reliance on its sale price as evidence of market value include its location, including the distance from the assessed property, its business or residential advantages or disadvantages, its improvements, size and use. It is also important to consider the conditions of sale, including its time in relation to the date of valuation, and its general mode and character insofar as they tend to indicate an arm’s-length transaction.

Id.

¶12 Significantly, Charter failed to present any information about the general economic conditions of the locations of the proposed comparable properties. Charter's appraiser conceded that he could not testify that the areas in which the properties were located were economically comparable to the location of the subject property. Further, Charter did not present any evidence about the business advantages or disadvantages of the proposed comparable properties when compared to Charter's property, or about the age or condition of the various properties. Charter also did not present any evidence regarding the conditions of the sales of the various properties that would indicate that those sales were arm's-length transactions. Under these circumstances, the board did not err in refusing to value Charter's property using the comparable sales approach. *See Rite-Hite Corp. v. Board of Review*, 216 Wis.2d 189, 195, 575 N.W.2d 721, 725 (Ct. App. 1997) (“[W]hether the ‘comparable’ properties identified by [the taxpayer’s] expert were sufficiently comparable to the [taxpayer’s] property to be used in arriving at a fair-market value for the [taxpayer’s] property was the [b]oard’s call.”).

¶13 After determining that the fair market value of the subject property was not reflected by the recent purchase price of the subject property, and that there were no recent sales of comparable properties, the assessor properly considered the other factors that “have a bearing on value of the property.” *See State ex rel. Geipel*, 68 Wis.2d at 733, 229 N.W.2d at 589. Specifically, the assessor considered the cost approach to valuation, the original cost of the

property, and a recent appraisal of the property by its previous owner.¹ See *Rite-Hite Corp.*, 216 Wis.2d at 194, 575 N.W.2d at 724 (if the value of the subject property cannot be determined by a recent arm's-length sale of the property or by recent arm's-length sales of reasonably comparable properties, then the assessor may use a cost approach to valuation); *State ex rel. N/S Assocs.*, 164 Wis.2d at 58 & n.11, 473 N.W.2d at 564 & n.11 (the board may properly consider previous appraisals in determining the value of the subject property); accord § 70.47(8)(d), STATS. The cost approach yielded a fair market value of \$5,055,721 for the

¹ Charter asserts that the assessor erred in valuing its property because he failed to consider the income approach to valuation. We disagree. The record reveals that the assessor considered the income approach to valuation of the property, but determined that the income approach would not accurately represent the fair market value of the property because the property was owner-occupied. The board did not err in upholding this determination. See *Rite-Hite Corp. v. Board of Review*, 216 Wis.2d 189, 195 n. 2, 575 N.W.2d 721, 725 n.2 (Ct. App. 1997) (upholding the board's determination that the income approach "was not a useful or appropriate measure of the property's value" when the property was "a single-use owner-occupied building").

Charter also asserts that the board erred in failing to consider economic factors and environmental factors that negatively affected the value of the subject property. See § 70.32(1m), STATS. ("In addition to the factors set out in sub. (1), the assessor shall consider the impairment of the value of the property because of the presence of a solid or hazardous waste disposal facility or because of environmental pollution, as defined in s. 299.01 (4)."). Charter's appraiser testified that the psychiatric industry had become less profitable than it was in the early 1980's, and that psychiatric facilities generally had lower market values as a result of this downward trend. Charter's property, however, was not constructed until 1989, after many of the factors that the appraiser identified as having a negative effect on the industry had already occurred; there is no evidence on the record that Charter's property was valued based on the more favorable conditions that existed prior to its construction. Moreover, Charter's appraiser did not identify any specific detrimental effect on Charter's facility as a result of the general downward trend of the industry. Charter's appraiser also testified that there was a leaking fuel tank on the subject property and that "there [was] some concern for environmental issues." The appraiser further testified that this concern had not yet been resolved, but that some estimates had indicated that "somewhere around \$500,000 may be required to correct this environmental situation." In light of the speculative nature of this testimony, the board did not err in failing to decrease the valuation of the subject property based upon this environmental concern.

subject property.² This value was consistent with the original cost of the property, which included a cost of \$786,330 for the land, and a cost of \$5,196,508 for buildings and improvements. The value yielded by the cost approach was also consistent with the recent appraisal of the property at a value of \$4,900,000.

¶14 The assessor complied with § 70.32(1), STATS., in assessing Charter's property, and Charter failed to satisfy its burden to show that the assessor's valuation was incorrect. The trial court, therefore, erred in reversing the board's decision to uphold the assessment. We reverse the trial court's order, and affirm the board's decision.

By the Court.—Order reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² In calculating the value of Charter's property under the cost approach, the assessor estimated the value of the land and the cost of replacing the structure on the land. The assessor then estimated the amount of accrued depreciation of the existing structure, and subtracted that accrued depreciation from the cost of replacing the structure, to arrive at the present value for the improvements. He then added the value of the land to the present value of the improvements. This methodology conforms to the Wisconsin property assessment manual. See 1 PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS 7-16 (Rev. 12/97).

Charter asserts that the assessor improperly applied the cost approach because he did not consider functional and economic obsolescence in his analysis. Contrary to Charter's assertion, however, the record reveals that the assessor considered these factors in calculating the amount of depreciation of the subject property. The fact that Charter's appraiser would have assigned a different value to these factors does not invalidate the assessor's analysis. See *Rite-Hite*, 216 Wis.2d at 195, 575 N.W.2d at 725 (the board weighs the credibility of the witnesses, and may credit "the assessor's cost-approach methodology over that used by the expert hired by [the taxpayer]").

