COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2627 **Cir. Ct. No. 2006CV62**

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

LANDS' END, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF DODGEVILLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Iowa County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Peterson, JJ.

¶1 PER CURIAM. The City of Dodgeville appeals from an order granting Lands' End's claim of having paid excess property tax. We affirm.

¶2 Lands' End's amended complaint alleged that its property tax payments were excessive for 2005 and 2006 because the assessment was too high. After trial, the circuit court agreed and set a fair market value of $25,000,000. The City appeals.

¶3 The first issue is whether the presumption of correctness of the City's original assessment was overcome. *See* ***Adams Outdoor Advertising, Ltd. v. City of Madison***, 2006 WI 104, ¶25, 294 Wis. 2d 441, 717 N.W.2d 803. The circuit court found that the assessor's method failed to follow the applicable statute, the assessment manual, or case law, and must be disregarded. The court faulted the assessor for having merely updated a 1995 appraisal by using square-foot estimates to assess later expansions, even though reasonably comparable sales were available to him.

¶4 The City argues that the court was wrong because it misunderstood how the assessment was done. According to the City, the assessment was indeed based on comparable sales, because those were the basis for the 1995 assessment, and there is no reason those sales must be excluded from consideration simply due to age. However, nothing in the City's argument establishes that it is a proper assessment methodology for an assessor to use *only* comparable sales that are ten or more years old, which was the practical effect of his methodology. The City does not argue that the assessor was unable to obtain comparable sales of a more recent vintage.

¶5 The next issue is whether the court's finding of the fair market value was clearly erroneous. The City's argument proceeds along this path: the sale of a property in Harvard, Illinois, was "the basis" for the court's valuation; as a matter of law, the Harvard sale cannot be considered as a valid comparable sale

because the highest and best use of the property was unknown, and for other reasons; and the remaining sales that were potentially comparable have flaws that render them insufficient evidence to support the court's valuation.

¶6 As to whether the Harvard sale was "the basis" for the court's decision, this appears to be an overstatement. While the court did write that the Harvard sale was the "single most persuasive comparable offered by either party," and was the only sale the court discussed in detail, it does not appear accurate to say that this was the only basis for its finding. The court also stated that it had "considered and weighed" other comparables offered by the parties, and that its view of these sales tended to favor Lands' End, due to the court's opinion of the superior credibility of its expert.

¶7 We turn next to whether the Harvard sale must be eliminated, as a matter of law, because the highest and best use of the property was unknown. In support of this legal proposition, the City relies only on ***Nestle USA, Inc. v. DOR***, 2009 WI App 159, 322 Wis. 2d 156, 776 N.W.2d 589, review granted (March 9, 2010) (No. 2008AP322). In that case, the parties disputed whether there were recent sales of properties reasonably comparable to Nestle's powdered-milk plant. ***Id.***, ¶36. Nestle argued that there were no comparable sales of powdered-milk plants, and therefore the universe of potentially comparable sales should have been expanded by considering the plant's highest and best use to be as a general food processing plant, rather than specifically as a powdered-milk plant. ***Id.***, ¶31.

¶8 We agreed with the tax commission's determination that the highest and best use was as a powdered-milk plant, because conversion of the plant to a general food processing use would not yield the greatest return for Nestlé in light of the recent investments made to equip the plant for the manufacture of powdered

infant formula. ***Id.***, ¶36. We then made the statement that the City now relies on for the proposition that a sale cannot be comparable if its highest and best use is unknown:

> Given that the property's highest and best use is its current use as a powdered infant formula plant, we agree with the Commission that the general food processing plants cited by Nestlé's appraiser as comparable sales were not "reasonably comparable" to the property under assessment. Because there were no recent sales of properties reasonably comparable to the Gateway Plant, an assessment under the tier-two comparable sales approach would have been contrary to WIS. STAT. § 70.32(1).

Id., ¶37.

¶9 This passage does not support the City's position because the City overlooks the distinction between sales where the highest and best use is *known* to be something other than that of the assessed property, and those sales in which the highest and best use is *unknown*. Nothing in ***Nestle*** creates a rule that excludes, as a matter of law, all properties with unknown highest and best use. Nothing there prevents a valuation from being based in part on a property for which the highest and best use is unknown, if that property otherwise has characteristics similar to the property being valued. Here, the court found that the similarities between the Harvard and Lands' End properties "were striking."

¶10 The City also argues that the Harvard sale cannot be considered comparable for other reasons, such as differences in certain physical characteristics, remoteness from a four-lane highway, and the allegedly "distressed" nature of the sale in Harvard. The City cites no law that these factors eliminate, as a matter of law, a property from being considered reasonably comparable. Instead, we conclude that they go to the weight the court should put

on that property. In this case involving a large corporate campus, no two properties are going to be identical. The City has not established that the court erred by considering Harvard as a reasonably comparable sale.

¶11 The City does not appear to dispute that, if Harvard is accepted as a comparable sale, the court's valuation is supported by sufficient evidence. The City's argument is based on eliminating Harvard from consideration, and then arguing that the other potential comparables are insufficient evidence. We conclude that the court's valuation is sufficiently supported by the Harvard sale, and therefore we need not address the City's analysis of why all the other properties are inadequate to support the valuation.

¶12 The City next argues that the circuit court erred by vacating the original order for this case to be tried to a jury. The City argues that it had a constitutional right to a jury trial and, even if it did not, the court erroneously exercised its discretion by doing so.

¶13 On the constitutional issue, the parties appear to agree that the City's right to a jury trial is measured by whether the statutory cause of action existed, was known, or recognized at common law in 1848, and whether the action was regarded as one at law, not equity, at that time. *See* ***State v. Schweda***, 2007 WI 100, ¶¶20-21, 303 Wis. 2d 353, 736 N.W.2d 49.

¶14 Lands' End argues that the issue was decided in ***Bekkedal v. City of Viroqua***, 183 Wis. 176, 196 N.W. 879 (1924). There, the plaintiff sought a jury trial to challenge a special assessment for street paving. ***Id.*** at 178-81. The court applied a standard similar to ours today: "From an early day it was held that the constitutional provision, preserving inviolate the right of trial by jury, preserves

that right inviolate as it existed at the time of the adoption of the Constitution." ***Id.*** at 192. The court continued:

> The matter of special assessments and reassessments is purely a statutory proceeding, relates to taxation, and there was at common law no right of jury trial. Therefore, unless the statute itself makes provision for a jury trial, the parties are not entitled thereto in a proceeding of the kind now before us.

Id.

¶15 Like ***Bekkedal***, the present case is purely statutory and relates to taxation. The City cites no case law clearly holding that taxation actions included a right to a jury trial. Therefore, we conclude that there is no constitutional right to a jury trial in this case.

¶16 The City argues that the court erroneously exercised its discretion by vacating the stipulation and order for a jury trial. The City argues that public policy favors jury trials and freedom of the parties to contract. The court concluded that jury trials complicate and lengthen proceedings, consume more judicial resources, add to expense, and disrupt juror's lives. The City argues that the court was wrong because, as it turned out, the trial to the court was held on eleven days over the course of a year, and was thus long and expensive. However, these facts occurred after the decision at issue. The court's analysis of jury trials can reasonably be considered accurate, and the City has not persuaded us that the court erroneously exercised its discretion by vacating the order for a jury trial.

¶17 The City next argues that the court improperly considered information outside the record. This argument fails because the court's findings of fact stated that the court had not considered material outside the record and there is no basis in the record for us to reverse that finding.

¶18 Finally, the City argues that the court erred by awarding interest to Lands' End. The City argues that an award of interest is discretionary under WIS. STAT. § 74.37(5) (2007-08).[1] Lands' End responds that the award of interest is mandatory. We assume, without deciding, that interest is discretionary. The City argues that the court erroneously exercised its discretion without giving reasons. It argues that the interest awarded was excessive because the statutory rate is above recent prevailing rates, is punitive in nature, and the size of the interest award was increased by the court's own slow pace of trial.

¶19 Lands' End correctly points out that if a circuit court fails to adequately state reasons, we may independently review the record for support. *See* ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98. Lands' End argues that the point of interest is to make the party whole. We agree. It was not an erroneous exercise of discretion to award interest in the statutory amount.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.