COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2618 **Cir. Ct. No. 2012CV495**

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

SEARS HOLDINGS CORPORATION,

PLAINTIFF-APPELLANT,

V.

CITY OF EAU CLAIRE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Sears Holdings Corporation appeals a judgment upholding the City of Eau Claire's 2011 and 2012 property tax assessments, both of which were based on valuation determinations made by the City's assessor. Sears' only argument on appeal is that the assessor's analysis did not comply with

the dictates of the Wisconsin Property Assessment Manual (the Manual), and therefore the circuit court erroneously accorded the assessments a presumption of correctness. We conclude the assessments sufficiently applied the principles set forth in the Manual, and we affirm.

BACKGROUND

¶2 Sears is an anchor tenant at the Oakwood Mall in Eau Claire, Wisconsin. It uses the leased property as a department store and automotive service center, and it is responsible for paying property taxes on the leased space. In years 2011 and 2012, the City assessed the subject property at $6.6 million. Pursuant to WIS. STAT. § 70.47,[1] Sears appealed the assessments to the City Board of Review, which sustained the amount of the tax bills. Sears then paid each years' property tax and filed claims for excessive assessment with the City, which claims were disallowed. Sears commenced this lawsuit on July 24, 2012, seeking a refund of the allegedly excessive property taxes the City imposed in 2011 and 2012.

¶3 The circuit court held a three-day trial at which the City's long-time assessor, Allen Andreo, testified. Andreo was questioned about his valuation report, which he had presented to the board of review in 2011.[2] Andreo testified

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Sears' appendix purports to contain a copy of Andreo's 2011 assessment report, which was admitted as Exhibit 12 at trial. However, the appellate record includes only a list of the trial exhibits and does not include any of the actual documents. Typically, when the record on appeal is incomplete, "we will assume that it supports every fact essential to sustain the trial court's exercise of discretion." ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). However, the 2011 assessment report was also attached as an exhibit to an affidavit in the record.

that because the subject property had not been sold recently, he valued the property by reference to sales of reasonably comparable properties. Andreo cited four sales of comparable properties in support of his assessments: (1) a Kohl's department store located in an Eau Claire strip mall; (2) a freestanding Kmart store in Eau Claire; (3) a Gordy's grocery store in Eau Claire; and (4) a Kohl's department store located in a strip mall in Onalaska, Wisconsin. Andreo adjusted each sale price to account for differences between the comparable property and the subject property, including adjustments for square footage, type and quality of construction, and condition. Although Andreo acknowledged there were "other comparables that I could have used," he selected those four because they "were local sales and I was following the … Manual which states that the primary criteria [sic] is location when valuing retail property." Andreo stated that while he did find information on anchor store sales elsewhere in the state and nationally, he "didn't think they overcame the local sales in comparability." Two appraisers, William Miller for the City and Joseph Ryan for Sears, also testified.

¶4 The circuit court entered a written decision upholding the assessments. The court first observed that it was statutorily obligated to accord Andreo's assessments a presumption of correctness. It determined Sears had not overcome this presumption because there was neither "significant contrary evidence" nor evidence that Andreo failed to apply the principles set forth in the Manual. The court concluded the "sales comparison approach" applied by Andreo was the proper valuation method, and Andreo's preference for local comparable sales was consistent with the Manual's directive that the "primary factor influencing property values is usually its location." *See* 1 WISCONSIN DEP'T OF REVENUE, WISCONSIN PROPERTY ASSESSMENT MANUAL 2011, 9-5 (rev. 12/08) [hereinafter PROPERTY ASSESSMENT MANUAL]. The court further concluded that

Andreo was a highly credible witness and, although Sears presented evidence that would have supported a different valuation, there was not significant evidence that Andreo's assessments were inaccurate. Sears appeals.

DISCUSSION

¶5 Actions to recover for an excessive assessment are authorized by WIS. STAT. § 74.37(3)(d), which provides that such actions may be commenced after the claimant receives notice that the taxation district has disallowed an excessive assessment claim. "When considering an excessive assessment claim, the circuit court need not defer to any determination made at a previous proceeding before the board of review." ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶5, 351 Wis. 2d 439, 839 N.W.2d 893 (citing ***Allright Props., Inc. v. City of Milwaukee***, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 767 N.W.2d 567). Instead, the circuit court must presume the assessor has correctly assessed the subject property. ***Id.***; *see also* WIS. STAT. § 70.49(2). However, the presumption of correctness does not apply if the taxpayer presents significant contrary evidence or shows the assessment does not apply the principles delineated in the Manual. ***Bonstores Realty One***, 351 Wis. 2d 439, ¶5 (citing ***Adams Outdoor Advert., Ltd. v. City of Madison***, 2006 WI 104, ¶¶25, 56, 294 Wis. 2d 441, 717 N.W.2d 803).

¶6 The sole issue presented in this appeal is whether Andreo's assessments complied with the dictates of the Manual, such that the assessments were entitled to the presumption of correctness.[3] On appeal, we defer to the circuit

[3] Sears does not argue the presumption of correctness should not be applied because it presented significant contrary evidence regarding the subject property's value.

court's findings of fact unless those findings are clearly erroneous. *See* ***id.***, ¶6; ***Allright Props.***, 317 Wis. 2d 228, ¶13. However, we review de novo whether the assessments adequately complied with the applicable statutes and the Manual. ***Bonstores Realty One***, 351 Wis. 2d 439, ¶6; ***Allright Props.***, 317 Wis. 2d 228, ¶13 (citing ***Adams Outdoor Advert.***, 294 Wis. 2d 441, ¶26).

¶7 There is no dispute in this case that the assessor properly utilized the three-tier assessment methodology set out in state law. *See* ***Adams Outdoor Advert.***, 294 Wis. 2d 441, ¶34. The best evidence of a property's value is evidence of a recent arm's-length sale of the subject property. ***Id.*** "If there has been no recent sale of the subject property, an assessor must consider sales of reasonably comparable properties." ***Id.*** If there has not been a recent arm's-length sale of the subject property, and there are no sales of reasonably comparable property, the assessor may proceed to use a third tier of assessment methodologies, including the cost and income approaches. ***Id.***, ¶¶34-35.

¶8 Here, there had been no recent sale of the subject property, so Andreo correctly proceeded to the sales comparison approach. This approach requires the assessor to evaluate recent arm's-length sales of reasonably comparable property to determine the subject property's value. *See* WIS. STAT. § 70.32(1); PROPERTY ASSESSMENT MANUAL, *supra* ¶4, at 7-22 (rev. 12/10). One condition of an arm's-length transaction is that the 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." ***Steenberg v. Town of Oakfield***, 167 Wis. 2d 566, 573, 482 N.W.2d 326 (1992); *see also* PROPERTY ASSESSMENT MANUAL, *supra*

¶4, at 14-8 (rev. 12/10). Sears contends the Kmart sale did not meet this criterion and was therefore not an "arm's-length" sale.[4]

¶9 We conclude that the assessor's reliance on the Kmart sale does not defeat the presumption of correctness as to his assessments as a whole. The requirement that the property be exposed to the open market for a sufficient period exists "to insure that the property is sold for as *high* a price as possible so that the taxing authority is not short-changed by a low price resulting from an owner's rush to sell." ***State ex rel. N/S Assocs. v. Board of Review***, 164 Wis. 2d 31, 47, 473 N.W.2d 554 (Ct. App. 1991). Sears' argument rests on the premise, rejected in ***N/S Associates***, that the Kmart sale was not comparable because the price would have been *lower* had the property been exposed to the open market. Instead, Andreo testified at trial that "typically, not being exposed to the market will reduce the sale price rather than increase it." Despite the City having raised ***N/S Associates*** in its response brief, Sears does not meaningfully address the analysis found in that case, beyond summarily labeling the decision "clearly distinguishable" on the facts. In any event, even if the Kmart sale was an invalid sale of comparable property because it was an "off-market" sale, the fact remains

[4] At trial, Andreo conceded the Kmart property had not been listed for sale, was sold as part of an agreement between an investment group and the owner, and was an "off-market" sale.

that there were three other arm's-length sales Andreo cited in support of his assessments.[5]

¶10 Sears argues that one of these remaining sales, the sale of the Kohl's store in Eau Claire, was also an invalid comparable because it involved the sale of a partial interest. The Manual states that sales of partial interests in real estate "present several complications in the determination of the consideration," most notably the assumption that the sale price of the fractional portion is proportionate to the value of the entire interest. PROPERTY ASSESSMENT MANUAL, *supra* ¶4, at 14-6 (rev. 12/10). As a working rule, the Manual suggests that interests of "less than one-fourth of the whole should be excluded from the sample and the transfer of interests of one-fourth or more carefully examined to make sure that no element of compulsion was involved and that the price of the fractional interest may be imputed to the whole." ***Id.***

¶11 Sears appears to argue the sale of the Eau Claire Kohl's property involved the sale of a partial interest triggering the "careful examination" requirement because Kohl's purchased the property from its landlord and, during its tenancy, had remodeled the property and purchased an additional 20,000 square feet adjacent to the property. However, as the City accurately observes, "[t]he fact that Kohl's bought land adjacent to the property that it had been leasing and added

[5] Sears finds it significant that the Kmart sale was, in its words, "one of the highest weighted sales of the four sales in the assessor's sales comparison approach." In fact, Andreo testified that the "weightings" he assigned to the four sales "were very close so that if they were changed up and down one way or the other by two points, the impact on the value would be very minimal because of the way the weightings work." Andreo stated the sales of the Kmart and Onalaska Kohl's weighed "slightly higher" because the Kmart was closer in size to the Sears store and the Kohl's was the most-recent sale. He continued, "So they're all rated very equally. Could have just as easily have rated them all exactly the same, probably with the exception of the grocery store which I would have … weighted less …."

onto the property it had been leasing does not convert the sale [of the leased property] into a sale of a partial interest." The Manual defines a "partial interest sale" as "the conveyance of a fractional share of a property," such as a one-half interest or a specific interest like "timber, mineral or air rights." ***Id.*** at 14-13 (rev. 12/10). In the case of the Eau Claire Kohl's store, however, the sale was of the fee simple. No rights were reserved by the grantor, and Sears does not claim anyone else had any rights in the property. Contrary to Sears' assertion, the Eau Claire Kohl's sale did not involve the sale of a fractional interest, and we therefore need not determine whether Andreo embarked on a "careful examination" of the transaction.

¶12 Finally, Sears argues the assessments are not entitled to the presumption of correctness because Andreo relied on sales that do not share the same "highest and best use" as the subject property. Sears observes that state law requires reference to sales of "reasonably comparable property," *see* WIS. STAT. § 70.32(1), a mandate it argues required Andreo to use only sales of "mall anchor department stores." Sears argues ***Nestlé USA, Inc. v. DOR***, 2011 WI 4, 331 Wis. 2d 256, 795 N.W.2d 46, supports this interpretation.

¶13 In ***Nestlé***, the plaintiff constructed a special purpose facility designed to meet recently promulgated FDA regulations regarding the production of powdered infant formula. ***Id.***, ¶10. Under Wisconsin law, regardless of the assessment method used, all property must be assessed at its "highest and best use"—the use that, over time, produces the greatest net return to the property owner. ***Id.***, ¶27. A subject property's highest and best use must be: (1) legal; (2) complementary; (3) not highly speculative; and (4) marketable for the specified use. ***Id.***, ¶33. The assessor concluded the property's highest and best use was as a powdered infant formula production facility, and, there having been

no recent sales of reasonably comparable facilities in the United States, proceeded to use the third-tier cost approach to determine the property's value. ***Id.***, ¶¶11-13.

¶14 Nestlé argued there was no market for the property as a powdered infant formula production facility based solely on the fact that neither party could find any instance in which such a facility had been sold in the United States for such a use. ***Id.***, ¶35. Nestlé's appraiser therefore decided the facility's highest and best use was as a generic food processing plant, which, when valued as such under the comparable sales approach, produced a valuation lower than the assessed value by over $7 million. ***Id.***, ¶¶5-6. Our supreme court rejected Nestlé's valuation because the finding that there had been no sales of similar facilities "is *not* analogous to a finding that there is no market for powdered infant formula production facilities." ***Id.***, ¶36.

¶15 ***Nestlé*** limits the category of properties usable under the sales comparison approach, but not to the degree Sears suggests. Determining a property's "highest and best use" *is* a threshold inquiry because it informs the determination of which properties are "reasonably comparable" to the subject property. *See* ***id.***, ¶32. For example, an assessor could not validly claim that rural land used for agriculture is "reasonably comparable" to improved retail property in the middle of a city. But Sears is arguing something different—namely, that ***Nestlé*** also requires that any comparable properties be used for the same narrow purpose as the subject property. In Sears' view, the only "reasonably comparable" sales in this case are those of "anchor department stores attached to a regional mall."

¶16 The statutory principle governing the selection of comparable properties is one of reasonableness. *See* WIS. STAT. § 70.32(1). The Manual

contemplates that comparable properties will be *similar* in use, not necessarily identical or even highly similar:

> Comparable sales refer to properties that are similar to the subject property in age, condition, use, type of construction, location, design, physical features and economic characteristics. The more similar the sold property is to the subject, the more reliable is the sale price as an indicator of the value of the subject property.

PROPERTY ASSESSMENT MANUAL, *supra* ¶4, at 7-22 (rev. 12/10). ***Nestlé*** did nothing to alter or make more restrictive these basic rules governing the sales comparison approach. Rather, ***Nestlé***, for our purposes, stands for the rather unremarkable proposition that "the properties an assessor identifies as 'reasonably comparable' to the subject property for assessment purposes must be reasonably comparable to the subject property's highest and best use." ***Nestlé***, 331 Wis. 2d 256, ¶32.

¶17 The assessments in this case appear to comply with this proposition and with the Manual's rules. The four properties Andreo included in his sales comparison were used for various retail purposes (department stores, a discount store, and a grocery store) at the time of their respective sales. These retail uses may not have been *exactly* the same as that of the Sears store—although the Kohl's department stores are very close—but they were "reasonably comparable" to the highest and best use of the Sears store, and that is all that was required. For that reason, we also reject the related argument that Andreo improperly favored local sales rather than using national sales of properties that may have been more similar to the subject property in use, but would have required an adjustment to account for differences in the local real estate markets.

¶18 Sears appears to argue that the properties used for comparison were not "reasonably comparable" for several other reasons, including differences in their age, type of construction, design, physical features and economic characteristics. However, Andreo made necessary adjustments to the sale price of each comparable property to account for many of these differences. Sears observes that Andreo did not make any adjustments to account for the fact that some of the comparable properties had leases in place at the time of their sales. However, if a contract rent "is at the same level as the market, the leased fee interest has the same value as a fee simple interest" and effectively has no value. PROPERTY ASSESSMENT MANUAL, *supra* ¶4, at 7-33 (rev. 12/10). In this case, Andreo testified that he investigated the terms of each lease and determined the leases did not affect the sale prices of any of the properties.[6]

¶19 In summary, we conclude Sears has not established that the assessor deviated from the Manual in any significant manner. We therefore conclude the circuit court did not err by according the assessor's assessments the presumption of correctness. As there is no argument that Sears presented significant contrary evidence of a lower valuation, we affirm.

By the Court.—Judgment affirmed.

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

[6] Although Andreo acknowledged the parties to a transaction typically would not release copies of specific leases, he would usually be able to obtain the lease terms regarding "the length of the lease, the rent that's being paid, the inception date and when it expires, and whether there are options to renew and the terms of those options as far as escalations or things like that and the responsibility for expenses."