COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2947

Cir. Ct. Nos. 2013CV1546
2013CV1848

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

REGENCY WEST APARTMENTS LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF RACINE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum, and Stark, JJ.

¶1 PER CURIAM. Regency West Apartments LLC ("Regency West") appeals a judgment dismissing its complaint against the City of Racine. Regency West had sought to recover allegedly excessive property taxes paid to the City for the years 2012 and 2013. The circuit court concluded that the assessments were

not excessive and that the presumption of correctness had not been overcome. We affirm.

¶2 Regency West is the developer and owner of property located in Racine. The property consists of nine eight-family apartment buildings, each with four three-bedroom and four two-bedroom units. There is also a community center with a manager's office and community room, and three stand-alone garage structures, each with twelve garages. The apartments were constructed in 2010-11 as Section 42 housing.[1] They were fully leased as of February 1, 2012.

¶3 For the year 2012, the City assessed the property at $4,425,000. This valuation resulted from the application of mass appraisal techniques[2] using an income approach, which seeks to capture the amount of income the property will generate. Because Regency West did not file an objection with the board of review,[3] the City did not develop any other method of valuation for 2012. Regency West filed a timely claim for excessive assessment, which the City denied. Regency West then filed a de novo refund action in the circuit court.

¶4 For the year 2013, the City assessed the property at $4,169,000. This time, Regency West filed an objection with the board of review. In

[1] Section 42 refers to that section of the tax code that provides tax credits to investors who build affordable housing. Investors receive a reduction in their tax liability in return for providing affordable housing to people with fixed or lower incomes.

[2] Mass appraisal techniques are appraisal methods used in communities with large numbers of properties. Commercial properties can be valued by either single property or mass appraisal techniques. ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶14, 351 Wis. 2d 439, 839 N.W.2d 893.

[3] Regency West did not receive a 2012 assessment notice until after the board of review had adjourned. Accordingly, the circuit court concluded that it was not obligated to exhaust board of review objection procedures. The City does not appeal that decision.

preparation for its presentation to the board, the City conducted an individual valuation of the property using a sales comparison approach based upon three comparable properties. As a cross-check, the City also used an income approach. The board upheld the assessment. Regency West filed a timely claim for excessive assessment, which the City denied. Regency West then filed a de novo refund action in the circuit court.

¶5 The circuit court consolidated the 2012 and 2013 actions for trial. It subsequently heard the matter over the course of four days. Regency West presented expert testimony from Scott McLaughlin, who specialized in appraising Section 42 and Section 8[4] properties. McLaughlin criticized the City's assessments and retrospectively appraised the property using an income approach. McLaughlin set the value of the property at $2,700,000 and $2,730,000 for the years 2012 and 2013, respectively.

¶6 The City, meanwhile, presented expert testimony from the assessor who performed the valuation of the property, Janet Scites, and its chief assessor, Ray Anderson, who reviewed and approved her work. The City also presented expert testimony from two outside appraisers, Dan Furdek and Peter Weissenfluh, who had spent most of their careers in the Milwaukee assessor's office. Furdek and Weissenfluh retrospectively appraised the property using several different methods of valuation (sales comparison approach, income approach, and cost approach, which seeks to measure the cost to replace the property). They concluded that the City's 2012 and 2013 assessments were not excessive.

[4] Section 8 is a federally subsidized low income housing/rental assistance program. The name refers to Section 8 of the United States Housing Act of 1937.

¶7 After posttrial briefing, the circuit court rendered a decision acknowledging the subjectivity of the expert witnesses' opinions and the importance of credibility. Ultimately, the court found the City's expert witnesses more credible than Regency West's. The court wrote:

> Based upon the years of experience, knowledge and demeanor, this Court finds the testimony of the City's assessors and experts more credible than that of the plaintiff's expert, Scott McLaughlin. The City's assessors and their experts are very familiar and experienced in valuing property in the Racine and Southeastern Wisconsin area and McLaughlin is not.

¶8 Beyond the question of credibility, the circuit court concluded that the City's assessments complied with the requirements of the Wisconsin Property Assessment Manual (WPAM) and Wisconsin law and were entitled to the presumption of correctness. By contrast, it found errors in the approach of Regency's expert witness, McLaughlin.

¶9 In the end, the circuit court was satisfied that the assessments of the subject property were not excessive and that the presumption of correctness had not been overcome. Accordingly, it dismissed Regency West's complaint. This appeal follows.

¶10 Under WIS. STAT. § 70.32(1) (2013-14),[5] Wisconsin tax assessors must value real property in accordance with WPAM, absent conflicting law. ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶3, 311 Wis. 2d 158, 752 N.W.2d 687. Assessments are presumed correct, *see* WIS. STAT. § 70.49(2), unless they do

[5] All references to the Wisconsin Statutes are to the 2013-14 version.

not conform with WPAM or Wisconsin law, ***Allright Props., Inc. v. City of Milwaukee***, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 767 N.W.2d 567.

¶11 WPAM and Wisconsin law set forth a three-tier system in valuing properties generally. ***Id.***, ¶20; *see also* WIS. STAT. § 70.32(1). A recent arm's-length sale of the property is the best evidence of value, and is the basis for an assessment under tier one. ***Allright Props, Inc.***, 317 Wis. 2d 228, ¶21. If, as in the present case, there has been no recent sale, an assessor must consider sales of reasonably comparable properties, which is the tier two approach. ***Id.***, ¶22. In the absence of comparable sales data, the assessor determines the value under tier three, which permits consideration of "all the factors collectively which have a bearing on value of the property in order to determine its fair market value." ***Id.***, ¶29 (citation omitted). Both an income approach and a cost approach fit into this analytic framework. ***Id***.

¶12 In reviewing a circuit court's decision, we defer to its findings of fact. ***Id.***, ¶13. When more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the fact finder. ***Bloomer Housing Ltd. P'ship v. City of Bloomer***, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309. In particular, it is within the province of the fact finder to determine the weight and credibility of expert witnesses' opinions. ***Id***. Conversely, application of the law to the facts presents a question of law, which we review de novo. ***Allright Props, Inc.***, 317 Wis. 2d 228, ¶13.

¶13 On appeal, Regency West first contends that the circuit court erred in accepting the validity of the City's assessments. Specifically, it complains that (1) the City's use of comparable sales was not reliable and (2) the City's income

approach was flawed by its use of market rates rather than actual expenses, as well as an erroneous capitalization rate. We consider these arguments in turn.

¶14 As noted, in 2013, the City conducted an individual valuation of the property using a sales comparison approach based upon three comparable properties.[6] Two of the comparable properties contained exclusively Section 8 units. The third comparable property contained some Section 42 units; however, the majority of its units were market rate. Regency submits that it was error for the City to rely upon such properties in assessing its Section 42 property. We disagree.

¶15 Nothing in WPAM precludes a sales comparison approach using Section 8 and Section 42 properties as comparable properties. Indeed, WPAM treats all government subsidized properties in the same section. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL 9-44 to 9-54 (2015). This lack of distinction requires experts to determine what is a correct valuation within the appraisal methodology for a particular type of government subsidized property. That is what happened here. The City's assessors opined that the Section 8 properties were sufficiently similar to the Section 42 property because, despite the different restrictions, the rents were essentially the same. The circuit court accepted that conclusion, and we see no error in its decision to do so.

[6] The City's outside appraisers, Furdek and Weissenfluh, also used a sales comparison approach based upon three different properties. Their comparable properties either contained Section 42 units or, in one case, units which were in the process of being converted to Section 42.

¶16 As for the property containing some, but not all, Section 42 units, there is no requirement that the comparable property be identical. Rather, the property need only be "similar." WISCONSIN PROPERTY ASSESSMENT MANUAL 7-23. "Where sales differ from the subject, they are adjusted up or down in an attempt to reflect how the market responds to the various differences." ***Id.*** Here, the City's assessors acknowledged the differences in the property and made adjustments based on that. Again, the circuit court accepted that conclusion, and we see no error in its decision to do so.

¶17 Turning to the City's use of an income approach, Regency West's criticisms are twofold. First, it notes that the City relied on estimated market expenses in its calculations rather than actual expenses, contrary to ***Metropolitan Holding Co. v. Board of Review***, 173 Wis. 2d 626, 628, 495 N.W.2d 314 (1993) (when valuing subsidized housing under an income approach, an assessor should use actual expenses, not estimated market expenses). Second, it asserts that the City's capitalization rate was erroneous, as it was derived from market rate apartments rather than other Section 42 properties.

¶18 We are not persuaded that these alleged flaws are sufficient to undermine the City's assessments. The City's reliance on estimated market expenses in 2012 was reasonable, as Regency West was a new construction and actual expenses were not yet available. Meanwhile, the City's reliance on estimated market expenses in 2013 was immaterial, as the assessment was based on a sales comparison approach. As for the capitalization rate, the City's assessors explained that it was based on new construction of apartment buildings, which

would be inclusive of Section 42 properties.[7] In any event, the validity of the City's approach is supported by the fact that two outside appraisers used several different methods of valuation and concluded that the assessments were not excessive.

¶19 Regency West next contends that the circuit court erred in finding fault in the approach of its expert witness, McLaughlin. Among other things, the court criticized McLaughlin for ignoring the three-tier system for valuing properties and relying solely on an income approach, contrary to ***Bischoff v. City of Appleton***, 81 Wis. 2d 612, 619, 260 N.W.2d 773 (1978) (an assessment of property should not be based on income alone).[8]

¶20 At trial, McLaughlin expressed familiarity with the three-tier system for valuing properties. He said that he did not use a sales comparison approach because he lacked sufficient data to do so. Despite this position, McLaughlin acknowledged having a list of recent sales of Section 42 properties from around the state, which he used to derive his capitalization rate. Moreover, at one point during his testimony, he appeared to indicate that a sales comparison approach

[7] The City's assessors based their capitalization rate on new construction of apartment buildings because "older properties have older issues and you'll see differences in the cap[italization] rates in the market."

[8] The circuit court also faulted McLaughlin for applying a subsidized interest rate, rather than the market mortgage interest rate, in his income approach calculation. This appears to be a misstatement, as McLaughlin's method of calculation did not take into account interest rates. We conclude that this misstatement is of no consequence given the court's other findings and the record as a whole.

was not necessary, even if he had the data he needed to perform it.[9] Thus, it was not unreasonable for the circuit court to question whether McLaughlin truly followed the three-tier system or whether he simply relied on an income approach.

¶21 Regardless of McLaughlin's intent, the circuit court did not believe that an income approach was the only available method of valuation in this case. The court observed, "That four very experienced assessors concluded that the comparable sales approach could be applied here and that comparable properties existed for the sake of comparison is very compelling testimony." Again, we defer to the fact finder's drawing of inferences and weighing of expert witnesses' opinions. ***Bloomer***, 257 Wis. 2d 883, ¶12.

¶22 For these reasons, we are satisfied that the circuit court properly concluded that the assessments were not excessive and that the presumption of correctness had not been overcome. Accordingly, we affirm its dismissal of Regency West's complaint.

By the Court.—Judgment affirmed.

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

[9] McLaughlin was asked whether he would have felt comfortable using a sales comparison approach on the Section 42 properties he found if he had the information he needed. McLaughlin responded, "If I would have known the … restrictions of the different properties, I—I would have felt comfortable, that I might use them, but I don't think that we need to even do a sales comparison approach if we have the cap rate."