

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1343

Cir. Ct. No. 2008CV922

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

THOMAS ELBERT AND KATHLEEN ELBERT,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF ERIN PRAIRIE BOARD OF REVIEW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Thomas and Kathleen Elbert appeal a circuit court order affirming a Town of Erin Prairie Board of Review determination upholding the assessor's valuation of the Elberts' property. The Elberts argue the Board's determination is contrary to law because the Elberts overcame the presumption of

accuracy of the assessment and the assessor failed to present any evidence, and because the Board improperly based its decision on tax equity considerations. We conclude the Board acted contrary to law by rejecting the Elberts' valuation objection due to tax equity concerns, rather than determining whether the assessment reflected the property's fair market value. We therefore reverse and remand and direct the circuit court to remand to the Board for further proceedings. *See* WIS. STAT. § 70.47(13).¹

BACKGROUND

¶2 The Elberts objected to the 2008 assessment of their thirteen-plus acre parcel containing a home and several outbuildings. The assessor valued the land at \$88,500 and improvements at \$376,900, for a total value of \$465,400. Thomas Elbert appeared at the Board hearing and presented evidence of five recently sold properties he believed were comparable to his own. Elbert explained how he made upward and downward adjustments for each of the properties based on their various attributes. He also testified his home was insured for approximately \$241,000 and that he had a total of about \$300,000 to \$350,000 invested in the property. Elbert did not, however, present an independent appraisal or testimony from a professional appraiser. Elbert argued his evidence demonstrated his property was worth no more than \$300,000.

¶3 The tax assessor was also present at the Board hearing, but did not explain how he valued the Elberts' property. He did suggest that none of Elbert's comparables were in fact comparable, but in the same breath acknowledged he

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

was not familiar with any of them. The board members inquired of Elbert about a few of his valuation adjustments for the comparable properties, and noted that comparable sales were the best indicator of value in the absence of a recent sale of the subject property. Yet, the Board members acknowledged the comparable sales approach to valuation was difficult because “we only have 680 residents in the whole township, and ... we don’t have enough sales” The Board also acknowledged several times that home values in the area had dropped considerably.

¶4 The Board never explicitly rejected or accepted Elbert’s valuation evidence or determined whether the assessor’s value was accurate. After the Board members opined it would be unfair to other property owners to adjust the Elberts’ assessed value, the Board voted to “leave the assessment as it stands.”

DISCUSSION

¶5 We review the decision of the Board of Review, not that of the circuit court. *Northland Whitehall Apts. Ltd. P’ship v. City of Whitehall Bd. of Review*, 2006 WI App. 60, ¶13, 290 Wis. 2d 488, 13 N.W.2d 646. In our review, we look for “any error in the proceedings of the board which renders the assessment or the proceedings void.” WIS. STAT. § 70.47(13). We are limited to considering four factors: (1) whether the board acted within its jurisdiction; (2) whether the board acted according to law; (3) whether the board’s action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question. *Northland*, 290 Wis. 2d 488, ¶13.

¶6 The Elberts first argue they overcame the presumption that the assessor’s valuation was correct, because they presented sufficient credible

valuation evidence. See WIS. STAT. § 70.47(8)(h)-(8)(i); *Northland*, 290 Wis. 2d 488, ¶24; *State ex rel. Wisconsin River Power Co. v. Board of Review of Armenia*, 125 Wis. 2d 94, 97, 99, 370 N.W.2d 580 (Ct. App. 1985). The Elberts further argue the Board had no evidence on which it could reasonably rely to determine the assessor's valuation was correct, because the assessor did not explain how he arrived at the assessed value. See *State ex rel. Campbell v. Township of Delavan*, 210 Wis. 2d 239, 264, 565 N.W.2d 209 (Ct. App. 1997); *Northland*, 290 Wis. 2d 488, ¶¶24-26. The Elberts pose an interesting issue given that the pertinent difference between this case and *Northland*, *Campbell*, and *Wisconsin River* is that the property owner here provided lay, rather than expert, valuation testimony. We need not, however, resolve the issue because we reverse on other grounds. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

¶7 The Elberts also argue the Board improperly based its determination on tax equity considerations. We agree. WISCONSIN STAT. § 70.32 requires assessors to assess real estate at its fair market value. *Flood v. Village of Lomira, Board of Review*, 149 Wis. 2d 220, 440 N.W.2d 575 (Ct. App. 1989), *aff'd*, 153 Wis. 2d 428, 451 N.W.2d 422 (1990). WISCONSIN STAT. § 70.47(9), in turn, requires a board of review to examine the evidence before it and “determine whether the assessor's assessment is correct” and, if it is too high or too low, raise or lower the assessment accordingly. The Board here made no finding whether the assessment was accurate.

¶8 The Board consisted of three members. At the conclusion of the hearing, the chairman inquired of the first member, who stated, “Compared to what the other properties in the township is [sic], I don't think we can make a change. We have to treat people equally. (Inaudible) We have to treat everybody

the same.” The chairman then interposed, “Well, you see the problem is if you lowered everybody’s in the township 10 or 20 percent, well, then the remaining townships in the city that paid for the school referendum would get hit harder because they need X dollars.” The chairman then inquired of the other board member, who responded:

I agree. We have that same battle with that same issue with other values of properties. Like you say, you do it for one guy, you have to do it for everybody else. Unless there’s somewhere in here we can find that there’s no dollars that need to be taxed somewhere else to adjust it, but I can’t.

The first board member then moved to “leave the assessment as it stands,” and the three agreed.

¶9 In *Flood*, 149 Wis. 2d at 227-28, we rejected the argument that a property should be assessed above fair market value because the other properties in the village were also over-assessed. Because here the board members affirmed the assessment due to tax equity concerns, the Board’s assessment was not “made in accordance with the statutory mandate.” See *Northland*, 290 Wis. 2d 488, ¶¶14, 23. The Board therefore acted contrary to law and the assessment is void. See *id.*, ¶13.

By the Court.—Order reversed and cause remanded with directions.

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

