COURT OF APPEALS
DECISION
DATED AND RELEASED

October 25, 1995

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3237

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

STATE ex rel.
HAWAZEN ESTABLISHMENT,

Petitioner-Appellant,

v.

TOWN OF LINN, WALWORTH COUNTY, WISCONSIN, and BOARDS OF REVIEW OF TOWN OF LINN, WALWORTH COUNTY, WISCONSIN for 1991, 1992 and 1993,

Respondents-Respondents.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

NETTESHEIM, J. This appeal addresses the property tax assessment of real estate owned by Hawazen Establishment in the Town of

Linn, Walworth County. The Hawazen property is an eighteen-acre parcel located on the shores of Lake Geneva and is comprised of a portion of the former Philip Wrigley estate. The Town assessed the property at $4.25 million for the years 1991, 1992 and 1993. The board of review upheld these valuations on Hawazen's appeal, and the trial court upheld the board's determinations upon Hawazen's judicial review proceedings.[1]

On appeal, although Hawazen raises a variety of issues, we address only two. First, on a procedural basis, we hold that prior circuit court proceedings involving some of the taxable years at issue are not res judicata as to certain of Hawazen's issues. Second, on a substantive basis, we hold that the comparable sales analysis by the town's appraiser is insufficient to support the appraiser's valuation which was adopted by the board of review. We therefore reverse the trial court's order upholding the assessments, and we remand for further proceedings.

BACKGROUND

[1] Hawazen successively challenged the tax assessments for the years at issue as each assessment was made. When Hawazen prevailed in the circuit court as to the 1991 assessment and that matter was remanded to the 1991 board of review, Hawazen's challenge to the 1992 assessment was already underway before the 1992 board of review. Thus, those matters were reviewed in a joint session before the combined boards of review as constituted during those two years.

When Hawazen successfully challenged the determinations of the combined boards and won yet another remand to the boards of review, Hawazen's challenge to the 1993 assessment was underway. Thus, another joint session occurred, this time including the 1993 board of review. To avoid confusion, our decision speaks as if we are reviewing a determination of a single board. In fact, we are reviewing the determinations of three boards of review.

Hawazen purchased the property, comprised of four homes, in 1986 for $1.65 million. Thereafter, Hawazen made various improvements. An indoor swimming pool was added to the main structure in 1987 at a cost of $382,484. A tennis court and surrounding landscaping were added in 1988 at a cost of $44,300. In 1989 and 1990, a building which previously contained a bowling alley and ice cream parlor was razed and replaced with a single-family home at a cost of $237,340. An addition to the main house was completed in 1991 at a cost of $176,870.

In 1990, the Town assessed the parcel at $2,089,500. In 1991, the Town increased the assessment to $3,502,400. Hawazen challenged the 1991 valuation before the board of review, and the board reduced the assessment by $80,200, resulting in an assessment value of $3,422,200 for that year.[2]

Despite the reduction, Hawazen appealed the 1991 valuation to the Walworth County Circuit Court. The circuit court determined that the assessor used an improper method to calculate the 1991 assessment and remanded the case to the board of review.[3]

---

[2] Hawazen does not provide any record cites in its appellant's brief to support the assessment amounts given for 1990 and 1991. The Town does not dispute these amounts, so we rely on them for the procedural background of the case.

[3] The circuit court concluded that the Town had used a multiplier method to assess the property. Under this method, the assessor took the original 1986 purchase price of the property and multiplied it by a factor. The assessor then multiplied the subsequent improvements on the property by factors and totaled those calculated values for a total assessment.

In the meantime, Hawazen had mounted a challenge to the 1992 assessment.[4] On August 18, 1992, the board of review met in joint session to address Hawazen's objections to the 1991 and 1992 valuations. At this hearing, Hawazen called two witnesses: Ronald Anderson, a real estate broker, and James Buchta, a state certified appraiser. Buchta presented four comparable properties in support of his appraisal. He valued the Hawazen property at $3 million at the time of the hearing.

In response, the Town's assessor, Robert Sheldon, testified that he had reevaluated the 1991 assessment of the Hawazen property and that he had also reviewed an appraisal made by the Town's hired appraiser, James Begg, who valued the property at $4.25 million. Despite Begg's higher appraisal, Sheldon determined that the assessments should remain the same as his 1991 valuation, $3,502,400. The board of review ultimately reaffirmed Sheldon's assessment of the property for 1991 and 1992.

Hawazen appealed the assessments for 1991 and 1992 to the Walworth County Circuit Court. Again, the circuit court determined that the Town's assessor used an illegal method to value the property and again remanded the matter to the board of review for further proceedings.

[4] The parties' briefs never expressly tell us the amount of the 1992 assessment. We infer that the assessment was the same as the 1991 assessment because at the ensuing board of review proceedings addressing both the 1991 and 1992 assessments, the assessor testified that he stood by his 1991 assessment and because the board of review reaffirmed Sheldon's assessments of the property for 1991 and 1992.

In the meantime, Hawazen had mounted a challenge to the 1993 assessment.[5] On May 20, 1993, the board of review convened in response to the circuit court's remand as to the 1991 and 1992 assessments and in response to Hawazen's further appeal as to the 1993 assessment. In addition to new testimony, the board of review considered the testimony from the prior hearings. Once again, Anderson and Buchta testified on behalf of Hawazen; and Sheldon and Begg testified on behalf of the Town.

Hawazen's appraiser, Buchta, testified that the fair market value of the property was $3.2 million. Buchta explained that he used the procedure in the Wisconsin property assessment manual to arrive at that figure by comparing four sales of property on Lake Geneva and making adjustments for the differences between them and the Hawazen property.

The Town's appraiser, Begg, testified that the fair market value of the property was $4.25 million. He explained that he used four comparable sales to arrive at this figure. Three of the four properties were recent sales and the other was in the closing process. One of the four sales was for land only.

The Town's assessor, Sheldon, testified that he had not "physically done any reassessment" of the Hawazen property since the 1991 assessment and that he had done nothing to redetermine the value of the property since the circuit court's determination that the 1991 assessment was improper. However, Sheldon also testified that several weeks before the hearing, he had viewed the

[5] Once again, the parties' briefs do not expressly advise us as to amount of the 1993 assessment.

interior construction of the buildings and that, combined with his evaluation of Begg's appraisal, he now agreed with Begg's appraisal of $4.25 million.

At the conclusion of the hearing, the board adopted Begg's appraised value of $4.25 million for the years 1991, 1992 and 1993. Hawazen again appealed to the circuit court. This time the court upheld the board's determinations for all three years. The court saw Hawazen's challenge as one testing the credibility of the witnesses, not one which demonstrated any invalidity as to the method of the Town's valuations. As such, the court concluded that the board of review could reasonably accept Begg's appraisal of the Hawazen property.

Hawazen appeals. We will recite additional facts as we address the appellate issues.

DISCUSSION

On appeal, Hawazen challenges the board of review's adoption of the assessor's valuations. It is important to note at the outset that the assessor's valuations rest on Begg's appraisal. Thus, the parties' arguments focus on that appraisal, as will this decision. Specifically, Hawazen contends that Begg's appraisal method did not comport with the Wisconsin statutes and the Wisconsin property assessment manual.

As its first line of defense, the Town contends that Hawazen's challenges to Begg's comparable sales analysis are barred by the doctrine of res judicata because the circuit court in one of the prior rulings rejected a similar

argument. We disagree for two reasons. First, even in the face of the circuit court's prior ruling, the *later* board of review proceeding which we review *in this case* presents the issue anew. The circuit court's earlier ruling did not address the issue in the context of the proceedings under review here.

Second, and more importantly, res judicata is an equitable doctrine founded on principles of fundamental fairness. *See* ***Desotelle v. Continental Casualty Co.***, 136 Wis.2d 13, 21, 400 N.W.2d 524, 527 (Ct. App. 1986). The circuit court's prior ruling adverse to Hawazen was made in the context of a larger ruling in favor of Hawazen which remanded the case back to the board of review for further proceedings. We conclude that it would be unfair to have required Hawazen to take a further appeal to this court (or perhaps even to the supreme court) when the proceedings on remand might moot the entire issue. Indeed, we even question whether Hawazen could be labeled an aggrieved party with standing to appeal further since it had prevailed on its request in the circuit court for a remand to the board of review.

We hold that the prior circuit court ruling is not res judicata as to the substantive issue before us.

We now move to Hawazen's substantive challenge to the board of review's adoption of the assessor's valuations. An assessor's valuation is presumed correct and will not be set aside in the absence of evidence showing it to be incorrect. ***State ex rel. Brighton Square Co. v. City of Madison,*** 178 Wis.2d 577, 582, 504 N.W.2d 436, 438 (Ct. App. 1993). The findings of the board of review will be upheld if the evidence presented in favor of the assessment

furnishes a substantial basis for the valuation. ***Id.*** Our review is the same as that of the circuit court and is limited to whether the board of review kept within its jurisdiction, whether it acted arbitrarily or in bad faith and whether the evidence before the board could reasonably sustain the assessment. *See* ***State ex rel. Levine v. Board of Review,*** 191 Wis.2d 363, 370, 528 N.W.2d 424, 426-27 (1995). Our function is not to order that an assessment be entered at any fixed sum, but rather to determine from the evidence presented to the board whether the assessment was made on the statutory basis. *See* ***id.*** at 370, 528 N.W.2d at 427. The failure to make an assessment on the statutory basis is an error of law, correctable by the courts on certiorari. ***Brighton Square,*** 178 Wis.2d at 582, 504 N.W.2d at 438; § 70.47(13), STATS.

Article VIII, Section 1, of the Wisconsin Constitution requires that the method of taxing real property must be applied uniformly to all classes of property within the tax district. ***Levine,*** 191 Wis.2d at 371, 528 N.W.2d at 427. Section 70.32, STATS.,[6] seeks to ensure a uniform method of taxation by requiring assessors to assess real estate at its fair market value, using the best

---

[6] Section 70.32, STATS., provides, in part:

> **Real estate, how valued. (1)** 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; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

information the assessor can practicably obtain. ***Levine,*** 191 Wis.2d at 372, 528 N.W.2d at 427.

Fair market value is commonly defined as the amount for which the property could be sold 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. ***Id.*** The best information of such fair market value is:

> a sale of the property or, if there has been no such sale, then the 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.

Id. at 373, 528 N.W.2d at 427-28 (quoted source omitted).

Pursuant to § 70.32(1), STATS., assessors are required to assess real property in the manner specified in the Wisconsin property assessment manual. *See* 1 WISCONSIN DEPARTMENT OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS. The assessment manual makes the following observation regarding real property valuation:

> An assessment is simply an opinion of value. This does not imply, however, that one opinion is necessarily as good as another; there are valid and accurate assessments, and there are invalid and inaccurate assessments. *The validity of an assessment can be measured against the supporting evidence from which it was derived, and its accuracy against the very thing it is supposed to predict/the actual behavior of the market.* Each is fully contingent upon the ability of an assessor to

> document adequate data and to interpret that data into an indication of value.

Id. at 7-1.

Assessors must obtain the fair market value of the property to be assessed using the best information possible. ***Levine,*** 191 Wis.2d at 372, 528 N.W.2d at 427. "The best information of such [fair market] value is a sale of the property or, if there has been no such sale, then the sales of reasonably comparable property." ***Id***. at 373, 528 N.W.2d at 427-28.[7]

In this case, there is no recent sale of the Hawazen property. Thus, the issue focuses on Begg's comparable sales analysis.

The assessment manual details the manner in which assessors correctly value real property using the sales comparison method. *See* WISCONSIN DEPARTMENT OF REVENUE, *supra*, at 7-12 to 7-15. The manual instructs that the assessor should look to the actions of the marketplace to determine what attributes or factors of the properties should be used for comparison and what adjustments should be made for differences. ***Id.*** at 7-13. The manual gives examples of typical factors for comparison and demonstrates how adjustments are made using this approach.

One factor for comparison and adjustment is the time of the sale because the value of real property usually varies over a period of time. ***Id.*** at 7-

[7] In the absence of reasonably comparable 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." ***State ex rel. Levine v. Board of Review***, 191 Wis.2d 363, 373, 528 N.W.2d 424, 428 (1995) (quoted source omitted).

13 to 7-14. Another factor for comparison and adjustment is the location of the property because some buyers and sellers may deem a particular location more valuable than another. ***Id.*** at 7-14. Additional factors for comparison and adjustment are the physical attributes of the property, such as the number of bedrooms and bathrooms, garage size, fireplace, pools, layout of buildings, age and any other physical features that would have an effect on value as judged by the marketplace. ***Id.*** at 7-14.

Hawazen contends that Begg's appraisal failed to properly apply the sales comparison approach.[8] The appraisal lists five properties which Begg

[8] As part of its argument, Hawazen contends that Begg's appraisal is defective because it is presented in a narrative form, whereas Buchta's, in contrast, is presented via the preprinted Uniform Residential Appraisal Report form which lists the comparable properties in a grid format. This form lists seventeen factors of comparison and allows for necessary adjustments, many of which are enumerated in the assessment manual.

The Town argues that although Buchta went "by the book" when appraising the Hawazen property, Begg's narrative form is also acceptable. We agree with the Town that a narrative approach is not prohibited by the assessment manual. The manual indicates that the last step in using the sales comparison approach is to adjust the comparison factors of the comparable sale properties to the subject property. *See* 1 WISCONSIN DEPARTMENT OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS 7-14. We acknowledge that the manual gives an example of a grid format that is usually used "in order to make [the information] clear and easy

used in this analysis. Of those five, one was a listing, not a sale; another was a "[t]entative" sale. This left only three actual sales. Of these three sales, one was a sale of vacant land without improvements. This leaves only two fully completed sales of property with improvements.

However, a more fundamental problem exists with regard to Begg's comparable sales. Other than the vacant parcel, his descriptions of the properties recite only the property location, legal description, lot size, sale date and sale price. Notably absent is any meaningful discussion of how these factors compare to the Hawazen property and what adjustments, if any, they require. More importantly, Begg's appraisal also fails to discuss the quality of construction, the age, condition and size of the buildings, the number and size of rooms and any other physical features or amenities on the comparable properties and how these factors require adjustment, if any, to the Hawazen value. We conclude that Begg's meager characterizations do not rise to the level of a meaningful comparison analysis as envisioned by the assessment manual and as required by § 70.32, STATS.[9]

(..continued)

to understand" by the property owners and board of review. *See* ***id.*** However, the manual does not dictate that assessors must use a grid or line format, and we see no impairment to the valuation process if the appraiser or assessor decides to combine the information in narrative form, so long as it recites the factors necessary for a valid comparison of the properties.

[9] Begg's appraisal does provide this kind of information and comparison as to the vacant parcel

At the May 1993 hearing, the Town's assessor, Sheldon, discounted the significance of reasonably comparable sales, testifying that "You don't do that in the Town of Linn. The value of the property is not necessarily that of how many bedrooms you have, it's … how close you are to the lake." Even if we were to accept this dubious approach, the record does not reveal how such proximity to the lake factored into Begg's comparable analysis. Begg's narrative description of the comparables does not advise on this point.

Moreover, we have already noted that the assessment manual dictates that location is but one of various factors which must be considered when an assessor performs a comparable sales analysis. WISCONSIN DEPARTMENT OF REVENUE, *supra*, at 7-12 to 7-15.

We conclude that Begg's comparable sales analysis fails to satisfy the requirements of the statutes and the assessment manual as to a comparable sales analysis. As such, it does not reflect sufficient data upon which to premise his conclusion that the value of the Hawazen property was $4.25 million for the years at issue. Accordingly, the board's reliance on that appraisal was flawed. We stress that this is not a situation in which we are intruding on the fact-finding function of the board of review and substituting our credibility assessment of Begg for that of the board. Rather, this is a case in which Begg's

(..continued)
because, since that sale, a home has been built on the land. However, the problem with this "comparable" is that the actual sale was of vacant land, not improved land. Thus, the sale was not one of "reasonably comparable property." *See* § 70.32(1), STATS. In addition, the site as now improved has not been the subject of any sale, recent or otherwise. Thus, there is no reliable indication of the value of the parcel as evidenced by its actual sale. *See* ***Levine,*** 191 Wis.2d at 372, 528 N.W.2d at 427.

appraisal method fails to satisfy statutes and the assessment manual *as a matter of law*. We therefore conclude that the evidence before the board does not reasonably sustain the board's assessments of the property for the years at issue. *See* ***Levine,*** 191 Wis.2d at 370, 528 N.W.2d at 426-27.

The Town also argues that "there are no true comparables to the [Hawazen] parcel. … Because of the unique nature of Geneva lake front property, it is virtually impossible to create uniformity in taxation." If this is so, we must rhetorically inquire why Begg engaged in a comparable sales analysis and tendered such to the board. As we have noted, the law provides that absent a recent sale of the subject property, a recent arm's-length sale or sales control the question. ***Id***. at 373, 528 N.W.2d at 427-28. Only in the absence of such sales may the assessor turn to other factors which bear on the valuation question, and it is error to reverse the process.[10] ***Id***. at 373, 528 N.W.2d at 428.

Based on the present state of the record and the Town's reliance on the comparable sales approach (albeit defective), we can only say that the Town's concerns are properly addressed by the adjustment process allowed by that approach. If the Town truly believes that there are no other reasonably comparable sales, then it should jettison this approach and establish Hawazen's value by the alternative method of valuation which considers "all the factors

[10] Begg's appraisal also values the Hawazen property pursuant to a "replacement cost approach," producing a valuation of $4,650,000. However, based on our reading of the board of review proceedings, the Town did not assert this appraisal method as a basis for valuating the Hawazen property. The Town's position is understandable since Begg was also offering comparable sales as a basis for his valuation. As we have noted, in such a setting, the comparable sales method takes priority.

collectively which have a bearing on value of the property." *See* ***id***. (quoted source omitted).

Finally, we address only indirectly one of Hawazen's additional issues because it may recur on remand. Hawazen contends that under the facts of this case, Begg had to be certified as an assessor pursuant to § 70.05(1), STATS. This statute provides that "on and after January 1, 1977, no person may assume the office of town, village, city or county assessor unless certified by the department of revenue under s. 73.09 as qualified to perform the functions of the office of assessor."

Hawazen reasons that Begg had to be certified because the assessments at issue rest entirely on Begg's appraisal, not on any further independent assessment made by Sheldon, the Town assessor, following the circuit court's 1991 remand. Hawazen contends that Sheldon essentially "defaulted" his assessor's duties to Begg.

The premise of Hawazen's argument seems to be that if Begg were certified, this assessment might be salvageable. We disagree. In its opening sentence, § 70.05(1), STATS., provides, "The assessment of general property for taxation … *shall* be made according to this chapter." The statute then goes on to provide that assessors shall be *elected and certified.* It is thus clear that a valid assessment requires, on a threshold basis, the official act of a duly certified *and* a duly elected assessor. If these prerequisites are not satisfied, then there is no valid assessment. Thus, even if Begg were certified, his "assessment" would still be invalid because he is not elected.

In short, while a municipality may employ experts to assist in making assessments, *see* § 70.055, STATS., a valid assessment still requires the official act of a duly elected and certified assessor.

Unfortunately, this already protracted matter must again be remanded for further board of review action. We do not pretend that the valuation of a property such as Hawazen is an easy exercise. However, we do observe that if an assessor follows the statutes and the assessment manual, the likelihood for judicial upset of a board of review determination adopting such a valuation is substantially minimized. We remand to the circuit court with instructions to further remand to the board of review for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.