

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 29, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-2864

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NORTHEAST CORPORATE CENTRE,

PETITIONER-APPELLANT,

V.

BOARD OF REVIEW OF THE CITY OF GLENDALE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Northeast Corporate Centre appeals from the circuit court judgment affirming the City of Glendale Board of Review's dismissal of Northeast's challenge to the property tax assessment of its Glendale property. Northeast argues that the Board improperly denied its challenge to the Board's subpoena duces tecum requiring Northeast to produce income information relating

to its property and to other properties it claimed were comparable. Thus, Northeast argues, the Board's dismissal of its challenge to the assessment, for failure to comply with the subpoena, was improper. We conclude, however, that because the Board had authority to subpoena the information, and because Northeast made no good faith effort to comply with the subpoena, the Board correctly dismissed Northeast's challenge. Accordingly, we affirm.

¶2 Northeast filed its objection to the Board's 1997 assessment of its Glendale property, where two one-story office buildings were located. The Glendale assessor valued the property at \$3,114,000, but Northeast contended that the fair market value, based on sales of reasonably comparable properties, was \$2,087,000. When Northeast declined the Glendale assessor's informal request to submit additional information, the assessor asked the Board to require Northeast to produce additional data. Based on the assessor's request, the Board issued a subpoena duces tecum to Northeast requiring production of the following:

For the subject property and each alleged comparable property, for calendar (or fiscal) years ending in 1994, 1995 and 1996, stated separately, all income, by category, and all expenses, by category, as well as for each year, the gross leaseable [sic] area, and the area leased.

For the subject property, a copy of each lease in effect on January 1, 1997.

Objecting to the subpoena, Northeast refused to produce the information. It maintained that because it had provided information on what it considered sales of reasonably comparable properties, any evidence regarding the income of its

subject property or of the comparable properties was irrelevant and, therefore, inadmissible.¹

¶3 The circuit court concluded that the evidence sought by the subpoena was relevant to determining whether the properties Northeast considered comparable were truly comparable. Further, the court reasoned, even if Northeast might have had a legitimate potential challenge to some of the information requested, it had failed to make a good faith effort to provide *any* of the information. The court explained:

The question is whether or not there was an effort to comply with the subpoena. I think it's significant there was no effort, there is no evidence here on this record of any effort to comply to provide any information whatsoever. There is an argument that the scope of the subpoena was too broad, but there is no evidence of any offer to provide more narrow information.

The requested information would have assisted the Board in determining whether the alleged comparable sales were in fact comparable. Northeast has not demonstrated that the information requested was to be used for any other purpose.

The income data the Board requested about the alleged comparable properties falls within the elements outlined in the Property Assessment Manual which would be used when evaluating comparable properties. The properties presented by Northeast may have been comparable, but Northeast did not give the Board the opportunity to determine that comparable sales existed.

Northeast contends correctly that the Board cannot use other factors for assessment purposes if comparable sales exist. But the Board was attempting to acquire information, [to] determine that the properties were

¹ Northeast also challenged the Board's 1998 assessment which presented the same conflict. The parties stipulated to the consolidation of the two matters in the circuit court, based on the record developed in the 1997 challenge.

comparable. By refusing to comply with the subpoena, Northeast did not allow the Board to accomplish that task. The Board did not have the evidence in front of it to determine comparable sales existed.

So the Court finds the Board acted within the statutory guidelines when it issued the subpoena to Northeast. When Northeast refused to comply, the Board appropriately dismissed Northeast's objection, and thus, affirm[ed] the assessor's valuation of Northeast's property.

We agree.

¶4 This case comes to us as a certiorari appeal pursuant to WIS. STAT. § 70.47(13) (1997-98).² We are required to “review the findings and conclusions of the board, not the judgment and findings of the circuit court.” *ABKA Ltd. Partnership v. Board of Review*, 224 Wis. 2d 551, 556, 591 N.W.2d 879 (Ct. App. 1999). “Review on certiorari is restricted to the record before the board.” *State ex rel. Kesselman v. Board of Review*, 133 Wis. 2d 122, 134, 394 N.W.2d 745 (Ct. App. 1986). In reviewing a challenge to an assessment, we are “limited to whether the board kept within its jurisdiction, whether it acted according to law, 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 (1995). Moreover, “[t]he presumptions are all in favor of the rightful action of the board,” and the party objecting to the board's action has the burden to establish that the board acted contrary to law. *See Kesselman*, 133 Wis. 2d at 127.

¶5 In essence, Northeast is contending that the Board, by subpoenaing irrelevant and/or unavailable information, failed to act according to law. We disagree. WISCONSIN STAT. § 70.47(8)(d), in relevant part, provides that the

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Board “may and upon request of the assessor shall compel ... the production of all books, inventories, appraisals, documents and other data which may throw light upon the value of property.” Further, § 70.47(7)(a), in relevant part, provides:

No person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed *and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board*, under oath of all of that person’s property liable to assessment in such district and the value thereof.

(Emphasis added.) These statutory provisions provided the Board the authority to subpoena the information, and to dismiss Northeast’s challenge for failure to make any good faith effort to produce the data.

¶6 Northeast argues that: (1) the income information about its own property was irrelevant and, therefore, it had no obligation to comply with the subpoena; and (2) the Board could not require it to produce income information about other properties because, typically, such information would be confidential and/or unavailable. These arguments, however, conveniently ignore Northeast’s refusal to make any good faith effort to provide any of the information. As counsel for the Board argued in the circuit court, “there is a vast difference between the suggestion that the taxpayer can’t produce some information ... and a taxpayer who won’t produce any.” Similarly, as the Board now responds on appeal: “While Northeast objected to the scope of the information requested in the subpoena, there is no evidence in this record that it even tried to produce any of the information requested. Rather, Northeast intentionally refused to provide the information.”

¶7 Nevertheless, Northeast insists that case law precludes consideration of income information unless comparable sales information is unavailable. Thus,

in reply, Northeast argues, “If, as the Board contends, the [PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS] requires production of income evidence in order to perform a valuation based on reasonably comparable sales, then the [m]anual contradicts the present state of the law in Wisconsin.”

¶8 Northeast’s reading of the case law is strained, and its assertion is simply incorrect. After all, the Board clearly had authority to require Northeast to disclose income information about its own property in order to determine whether other properties were comparable. See *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 665, 242 N.W.2d 681 (1976) (“‘[R]easonable comparability’ depends upon the degree of similarity between the properties,” and the determination of comparability depends upon factors including “business ... advantages or disadvantages.”).³ Indeed, Northeast concedes that the Board “needed to ask ... whether reasonably comparable sales were available.”

³ For additional discussion regarding the sales comparison approach to valuation, see DEPARTMENT OF REVENUE, STATE OF WIS., 1 PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS, pt. 1, at 7-13 (rev. 12/97), which provides that “[e]conomic characteristics (e.g. operating expenses, lease terms, management, and tenant mix)” are among the “basic elements of comparison [that] should be considered in the sales comparison approach” and instructs the assessor: “For a more detailed discussion of important elements of comparison, review the Appraisal Institute’s *The Appraiser of Real Estate*.” The Appraisal Institute notes that “[b]uyers of income-producing properties usually concentrate on a property’s economic characteristics, most often focusing on the rate of return for an investment made in anticipation of future cash flows,” APPRAISAL INST., THE APPRAISAL OF REAL ESTATE 399 (11th ed. 1996), and further elaborates:

Economic characteristics include all the attributes of a property that affect its income. This element of comparison is usually applied to income-producing properties. Characteristics that affect a property’s income include operating expenses, quality of management, tenant mix, rent concessions, lease terms, lease expiration dates, renewal options, and lease provisions such as expense recovery clauses. Investigation of these characteristics is critical to proper analysis of the comparables and development of a final value estimate.

Id. at 413.

¶9 Contrary to Northeast’s assertion, the Board did not require it to produce income evidence *in order to perform a valuation*, but rather, the Board did so *in order to determine whether the properties were comparable* and, therefore, could support Northeast’s objections. This purpose is entirely consistent with the Board’s authority, under WIS. STAT. § 70.47(8)(d), to require Northeast to produce “data which may throw light upon the value of property,” and, under § 70.47(7)(a), to require Northeast to “present[] evidence” and make “full disclosure” to support its objection.

¶10 Thus, in this appeal, we need not reach Northeast’s intriguing arguments about the proper scope of the Board’s authority to subpoena information relating to other properties if such information might prove to be confidential or unavailable. Northeast does not deny that it failed to make any good faith effort to produce income information about its own property, or to obtain any of the requested information about other properties. Nor does Northeast dispute the Board’s argument that it has authority to dismiss a challenge to an assessment if, in fact, a party has failed to comply with a proper request for information. *See Racine Fire & Police Comm’n v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975) (stating general rule that a legislatively created board has “only those powers which are either expressly conferred or which are, by necessity, to be implied from the four corners of the statute under which it operates”). As the Board argues:

Here, the Board has been given a subpoena power, but no power to hold an objector in contempt for failure to honor a subpoena. The law expressly states that if an objector fails to fully disclose information relevant to determining the value of the subject property, the objection cannot stand. By necessary inference, if the objection cannot stand, the Board has the power and the duty to dismiss an objection when it determines that an objector has failed to honor a

subpoena which requires the production of information relevant to determining valuation.

To this argument, Northeast offers no reply. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶11 Thus, Northeast has failed to carry its burden to establish that the Board acted contrary to law. Accordingly, we conclude that under WIS. STAT. § 70.47(7)(a), (8)(d), the Board properly dismissed Northeast's challenge.

By the Court.—Judgment affirmed.

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

