COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1970 **Cir. Ct. No. 2014CV700**

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

DONALD J. THOMA AND POLK PROPERTIES LLC,

PETITIONERS-APPELLANTS,

V.

VILLAGE OF SLINGER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. Donald J. Thoma and Polk Properties LLC filed this action for certiorari review of a decision of the Village of Slinger Board of Review upholding the assessment of properties in a subdivision owned by Thoma and Polk Properties. The subdivision is subject to a number of restrictive

covenants, including one preventing the land from being used for agriculture. In 2012, as part of the Village's suit to enforce the covenants, a court entered an order prohibiting the properties from being used for agriculture. For the 2014 tax year at issue in this case, the Village assessor reclassified the subdivision as residential for tax purposes. Thoma and Polk insist that the Village board of review (the Board) failed to act according to law when it accepted the assessor's classification; the land, they assert, should have remained classified agricultural. Thoma and Polk also allege that the assessor impermissibly relied upon two sales that were not arm's-length transactions. We affirm.

Background

¶2 Thoma is the sole member of Polk Properties LLC. In 2004, Thoma[1] purchased land in the Village of Slinger intending to develop it into a residential subdivision called Pleasant Farm Estates (the Property). The Property had been previously zoned agricultural. Around 2007, the Property was rezoned as residential, and Thoma entered into a developer's agreement with the Village. Thoma also agreed to a number of restrictive covenants, including one that prohibited the Property from being used for agricultural purposes. Thoma's efforts to sell the lots met with limited success. Only two lots sold: one to a private buyer and the other to Cobblestone Custom Homes—a building company Thoma owns in part.[2]

[1] For the remainder of the opinion, we will refer to both appellants collectively as "Thoma."

[2] The record does not reveal, and Thoma does not specify, how large his ownership interest in Cobblestone is.

¶3 In 2011, the Village brought suit—a separate proceeding than the one here—to enforce the restrictive covenants. The court in that case ordered Thoma to refrain "from causing or permitting the [Property] to be used for agricultural purposes." The litigation was ongoing on the date of the Board hearing.[3]

¶4 Until 2013, the Property had been assessed as agricultural for tax purposes despite being zoned residential. The Village assessor changed that classification to residential for the 2014 tax year and reassessed the value of the Property.

¶5 Thoma filed an appeal with the Board challenging the Property's new residential classification and valuation. At the Board hearing, the assessor explained that he changed the classification as a result of the court order. Based on advice the assessor received from a Department of Revenue (DOR) official, the assessor reasoned the Property should no longer be classified as agricultural for tax purposes because the court order prevented it from being used for agricultural purposes. The assessor also explained that once the Property was classified as residential, he arrived at a valuation by comparing a sample lot on the Property to five comparable sales of similar lots. One of those five comparable sales was the sale of lot 45 of the Property to Cobblestone. The assessor also mentioned a property that sold under duress but did not indicate he used it in his assessment.

[3] In this separate litigation, we recently decided the issue of whether Thoma's experts should have been allowed to testify concerning the drafting and negotiating of the developer's agreement. *See* ***Village of Slinger v. Polk Props., LLC***, No. 2015AP1473, unpublished slip op. ¶1 (WI App Aug. 31, 2016).

¶6 Thoma countered that the Property should remain classified as agricultural. He pointed out to the Board that the land had always been classified as agricultural, and the court order could change when the litigation concluded. Thus, he reasoned, the Property should remain classified as agricultural until the pending litigation was settled.[4] However, Thoma did not present any evidence that the Property had been used for agriculture in 2014. In fact, in response to a direct question from the Board, Thoma admitted to the Board that he was not farming the Property and had no plans to do so. Aside from the order, the only evidence regarding the Property's use was Thoma's somewhat ambiguous assertion that he was "maintaining the ground cover" on the Property in preparation for sale.

¶7 Ultimately, the Board rejected Thoma's arguments and upheld the assessment. After the hearing, Thoma sought certiorari review of the Board's decision. The circuit court upheld the decision of the Board. Thoma appeals.

Discussion

¶8 WISCONSIN STAT. § 70.32 (2013-14)[5] governs the method for valuing real estate.[6] First, the assessor assigns the subject property a base value. Sec. 70.32(1); ***Sausen v. Town of Black Creek Bd. of Review***, 2014 WI 9, ¶15,

[4] Thoma also orally presented evidence of three other sales to support his contention that the Property had been overvalued by the assessor. He did not provide any other evidence of the sales.

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

[6] In addition to complying with statutory mandates, the assessor must follow the *Wisconsin Property Assessment Manual* (hereinafter "WPAM"). WIS. STAT. § 70.32(1). Thoma cites to the WPAM last revised in December, 2012. Thus, we will rely on that version.

352 Wis. 2d 576, 843 N.W.2d 39. Second, the assessor classifies the property under one of eight statutory classes: residential, commercial, manufacturing, agricultural, undeveloped, agricultural forest, productive forest land, and other. Sec. 70.32(2)(a). Third, certain classes of property are "assessed at a percentage of full value." ***Sausen***, 352 Wis. 2d 576, ¶17; *see also* § 70.32(2r) (agricultural land); § 70.32(3) (manufacturing property); § 70.32(4) (agricultural forest land and undeveloped land). Thus, depending upon the classification, the assessor may reduce the initial assessed value of the property. ***Sausen***, 352 Wis. 2d 576, ¶17. Agricultural land is subject to this special treatment. It is "assessed according to the income that could be generated from its rental for agricultural use." Sec. 70.32(1), (2r).

¶9 Once an assessment is made, a property owner may challenge it before the appropriate board of review. *See* WIS. STAT. § 70.47(7)-(8). The board presumes the assessment is correct, and the property owner bears the burden to show the assessment is incorrect. Sec. 70.47(8)(i) ("The board shall presume that the assessor's valuation is correct. That presumption may be rebutted by a sufficient showing by the objector that the valuation is incorrect."). If the board of review renders an adverse decision, the property owner may then seek certiorari review in the circuit court, as Thoma did here. Sec. 70.47(13).

¶10 On appeal, this court reviews the Board's decision, not the circuit court's. ***Sausen***, 352 Wis. 2d 576, ¶5. Our inquiry is confined solely to the record made before the Board. WIS. STAT. § 70.47(13); ***Saddle Ridge Corp. v. Board of Review***, 2010 WI 47, ¶36, 325 Wis. 2d 29, 784 N.W.2d 527. And our review is limited to whether the Board's actions were (1) within its jurisdiction; (2) according to law; (3) arbitrary, oppressive, or unreasonable; and (4) supported by substantial evidence. ***Saddle Ridge***, 325 Wis. 2d 29, ¶6; *see also* ***State ex rel.***

Ruthenberg Annuity & Pension Bd., 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979).

¶11 Although we do not defer to the Board's interpretation of state statutes,[7] we presume that the Board acted according to law and made a correct decision. *See* ***Ruthenberg***, 89 Wis. 2d at 473 (applying presumption to the actions of an annuity and pension board); ***Sausen***, 352 Wis. 2d 576, ¶¶37-38 (explaining the "presumptions are all in favor of the rightful action of the board") (citation omitted). We do not retry the facts; an assessment must be upheld if it can be supported by any reasonable interpretation of the evidence. ***Sausen***, 352 Wis. 2d 576, ¶46. The taxpayer bears the burden to show that the property classification is erroneous. ***Id.***, ¶37. In other words, the burden is on Thoma to show that the Board committed an error, legal or otherwise. Absent that showing, we cannot overturn the Board's decision.

A. The Board Did Not Err by Accepting the Assessor's Classification

¶12 Thoma fails to show how, under the appropriate law, the Board erred by accepting the assessor's classification. Although he made a conclusory assertion that maintaining ground cover was an agricultural use, he did not develop that argument before the Board, and he fails to develop that argument here. Rather, he attempts to recast the issue as a legal one—whether the assessor classified the Property in accordance with the statutes, regulations, and the WPAM. Thoma claims that the assessor impermissibly ignored how the property was actually being used. Specifically, he argues that the court order was

[7] ***Park 6 LLC v. City of Racine***, 2012 WI App 123, ¶6, 344 Wis. 2d 661, 824 N.W.2d 903.

insufficient to warrant changing the Property's classification from previous years. Thoma downplays the nature of the separate litigation, framing it as a conflict between actual use and a nonfinal order in "ongoing litigation." But it is nonetheless a binding court order. Thus, Thoma is really arguing that illegal use in defiance of a court order would still entitle him to an agricultural classification. Of course, this is purely hypothetical because Thoma does not directly claim that he was actually farming the property—which, if he were, would be in contempt of the court order.

¶13 Property must be classified as agricultural if it is primarily used for agricultural purposes. ***Fee v. Board of Review***, 2003 WI App 17, ¶12, 259 Wis. 2d 868, 657 N.W.2d 112; WIS. STAT. § 70.32(2)(c)(1g). "Agricultural use" includes growing crops and activities outlined in subsector 111 Crop Production, set forth in the 1997 version of the North American Industry Classification System (NAICS).[8] WIS. ADMIN. CODE § TAX 18.05(1) (Dec. 2016).

¶14 Although Thoma brings up previous years' classifications in an attempt to bolster his claim that it should not have been changed, our sole inquiry is whether the Board erred in accepting the assessor's classification for the 2014

[8] WISCONSIN STAT. § 70.32 partially defines "agricultural use" as including "the growing of short rotation woody crops, including poplars and willows, using agronomic practices." Sec. 70.32(2)(c)(1i). The section then points to the definition adopted by the DOR. ***Id.*** The DOR in turn defines "agricultural use" as including activities defined "in subsector 111 Crop Production, set forth in the [1997 version of the] North American Industry Classification System (NAICS)." WIS. ADMIN. CODE § TAX 18.05(1) (Dec. 2016).

In addition, the DOR includes activities enumerated in subsector 112 Animal Production of the NAICS, "[g]rowing Christmas trees or ginseng," and "[l]and without improvements subject to a federal or state easement or enrolled in a federal or state program [if certain conditions are met]." WIS. ADMIN. CODE § TAX 18.05(1)(b)-(d) (Dec. 2016). The NAICS classifications under subsector 111 and 112 are reproduced in Chapter 11 Appendix A of the WPAM.

tax year. We see no such error. The record reflects that Thoma denied farming the land in 2014 and repeatedly claimed he was merely "maintaining the ground cover." In fact, he claimed that was the only thing he ever did with the Property. It does not appear, however, that "maintaining the ground cover" would fall under the definition of "agricultural use." At the very least, Thoma makes no argument that maintaining ground cover is agricultural use under the applicable statutes, rules, and guidelines. Therefore, we need not consider this point further.[9]

¶15 On the contrary, the evidence presented to the Board amply supported its conclusion that the Property was not being used for agriculture, and therefore, should not be classified as agricultural. The court order itself was sufficient evidence of whether the property was being used for agriculture, particularly in light of Thoma's admission that he was not farming the land. Thoma's counsel even informed the Board that Thoma would comply with any valid court order, including, presumably, the order prohibiting agricultural use. Although Thoma complains that the Board's reliance on the court order was

[9] "Maintaining ground cover" does not appear in WIS. STAT. § 70.32 or WIS. ADMIN. CODE § TAX 18.05 (Dec. 2016). Subsector 111 enumerates a number of activities including "Hay Farming," but it does not include "maintaining ground cover" or similar language. NAICS subsector 111 Crop Production, https://www.census.gov/eos/www/naics/reference_files_tools/1997/sec11.htm (last visited Jan. 10, 2017).

Thoma does not directly address this definition of agricultural use. Instead, he suggests in conclusory fashion that "his maintenance of the properties had kept the properties as 'agricultural' for tax purposes." But he does not explain what "maintaining the ground cover" entailed or how it qualified as agricultural use under the definition in WIS. STAT. § 70.32 and WIS. ADMIN. CODE § TAX 18.05 (Dec. 2016). Nor does he argue that the court order prohibiting agricultural use somehow still allowed for agricultural use sufficient to warrant an agricultural classification. We may consider such undeveloped arguments conceded, and we do so here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments); ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

improper, we see no reason the Board could not consider it. Nothing in the statutes prohibits relying upon such an order as evidence of actual use, and Thoma does not identify any legal authority to the contrary. Therefore, even if Thoma was correct that illegal use would still entitle him to an agricultural classification, the Board did not err by accepting the assessor's classification because the evidence reasonably supported the conclusion that Thoma was not using the land for agriculture.[10]

B. The Assessor Did Not Rely on Any Improper Sale

¶16 Thoma next complains that the assessor relied on two sales that were not arm's-length transactions as required by the WPAM and the statutes. First, Thoma insists that the assessor relied upon a sale made under duress rather than arm's length. Second, he asserts the assessor improperly used the sale of lot 45 because he was a part owner of the purchaser—Cobblestone Custom Homes. Thoma contends that the transaction was not arm's length because of his ownership in Cobblestone. However, here too Thoma failed to prove his case before the Board.

¶17 As a general rule, an assessor must use arm's-length sales to determine the value of a property. WISCONSIN STAT. § 70.32(1) provides:

> In determining the value, the assessor shall consider recent arm's-length sales of the property to be assessed … recent arm's-length sales of reasonably comparable property; and

[10] Thoma seeks to divert our attention from the totality of the evidence before the Board to certain of the assessor's statements. But we review the Board's decision to affirm the assessment based upon the entirety of the record, not merely the assessor's testimony. And the Board was bound to affirm the assessment unless Thoma showed the valuation was incorrect. *See* WIS. STAT. § 70.47(8)(i). In light of Thoma's equivocation on whether the Property was being used agriculturally, the Board had no reason to think the assessment was incorrect.

> all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

An "arm's-length sale" is an open market sale between (1) a willing seller not obligated to sell and (2) a willing buyer not obligated to buy. ***Flood v. Lomira Bd. of Review***, 153 Wis. 2d 428, 436, 451 N.W.2d 422 (1990). The WPAM provides that transfers under duress—for example, a seller who must sell a parcel in a very short timeframe or face significant economic consequences—should be excluded from consideration because they are not arm's length. WPAM 14-3 through 14-4. Sales between related parties present a similar concern that the price may not reflect the fair market value of the property. WPAM 14-4 through 14-5. Transfers between related parties (corporate or otherwise) may, however, be used so long as they reflect "recent arm's-length sales." WPAM 14-5.

¶18 Thoma contends that the Board erred because the assessor supported and based his valuation in part on a sale made under duress. The record does not support Thoma's reading. Although the assessor mentioned a property that "sold while under duress in January of 2012," nothing in the transcript indicates the assessor used this as a comparable sale. Thoma seems to have taken the assessor's statement out of context. The assessor relied on five comparable sales in the Village of Slinger to support his valuation: lot 45 and four others in the Sherman Heights Subdivision. The assessor went on to explain that there were other recent sales elsewhere in Slinger including twenty-four arm's-length transactions, and the sales prices ranged from $34,000 to $125,000. He clarified that one property in Slinger sold for $30,000, less than any of the prices he outlined, but the sale was under duress and the property was currently listed for $49,900. The property was

never proffered as a comparable sale.[11] This conclusion is reinforced by the assessor's remarks later on at the hearing where he demonstrated a clear understanding that value should be based on arm's-length transactions and that a duress sale is not arm's length. In other words, Thoma makes much of the fact that a sale under duress was cited during the hearing, but we see no evidence it was cited or used improperly to support the valuation.

¶19 Thoma also objects to the assessor's reliance on the sale of lot 45 as a comparable sale. But here again, Thoma bears the burden of showing that this was an error—and specifically, that this was not an arm's-length transaction. Thoma's argument boils down to the bare assertion that he was a part owner in the company that bought the lot, that this was not an arm's-length sale, and therefore it was improperly considered in the valuation. While some sales between related parties may be unreliable because they do not represent market value, not all such sales are unusable according to the WPAM. Thoma fails to identify any portion of the record before the Board to support his claim that the sale price did not reflect the market price. Thoma does not even specify his percentage of ownership in Cobblestone, or that he was the controlling or significant shareholder. Furthermore, the assessor was informed about Thoma's part-ownership, questioned Thoma about it, and testified that this knowledge did not change his

[11] Although the assessor did not specifically identify the exhibit number, he referenced a document containing "an adjustment grid for … one of the subject lots … compar[ing] it with five comparable properties." The assessor further explained that the five comparable lots ranged in sale price from $60,000 to $73,000. Exhibit 6 precisely mirrors this testimony. It contains a grid with one lot marked "subject" and five comparable properties (marked "Comp") with sale prices ranging from $60,000 to $73,000. Although the exhibit lists a property that "sold under duress 1/16/12," this property clearly was not used as one of the five comparable properties. In light of the clarity of exhibit 6 and how closely the assessor's testimony follows it, we see no evidence that the assessor relied on the duress sale.

overall opinion on the value of the Property.[12] Thoma's conclusory assertion that his ownership in Cobblestone rendered the sale unusable is not enough for us to conclude that the Board made an error of law in accepting the assessment.

Conclusion

¶20 We presume the Board acted according to law and Thoma bore the burden of showing otherwise. Because he has failed to meet his burden, we conclude the Board did not err.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[12] The assessor testified that removing lot 45 from the list of comparable properties would only support a higher assessed value. Lot 45 sold for $60,000, lower than any of the other four comparable properties.