COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1580 **Cir. Ct. No. 2013CV317**

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

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100 HARBORVIEW PARTNERS, LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF LA CROSSE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed.*

Before Sherman, Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Property owner 100 Harborview Partners, LLC, challenges the 2012 tax assessment by the City of La Crosse of a commercial building, pursuant to WIS. STAT. § 74.37 (2009-10).[1] The assessment was based on the City assessor's valuation of the building at approximately $5.5 million. A private appraiser hired by Harborview reached a value of approximately $3.4 million. Following a two-day trial, the circuit court upheld the City's assessment, concluding that the assessor's valuation was reasonable and supported by the evidence.

¶2 Harborview argues that the circuit court erred by: (1) applying a presumption of correctness to the City assessor's valuation of the building, pursuant to WIS. STAT. § 70.49; (2) concluding that Harborview failed to overcome the statutory presumption by presenting "significant contrary evidence;" and (3) concluding that Harborview failed to meet its burden of establishing that the assessment was excessive. For reasons set forth below, we affirm.

BACKGROUND

¶3 The parties do not dispute the following pertinent facts, as of 2012, which are taken primarily from the circuit court's written decision and supplemented by the trial transcripts and exhibits produced at the two-day court trial.

¶4 For tax assessment purposes, the property at issue consisted of two parcels: one containing a parking lot and the other a three-story building. The

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

parties agree on the value of the parking lot parcel, and dispute only the value of the building. Both the City assessor and Harborview's appraiser testified that they determined the value of the entire property and then deducted the undisputed value of the parking lot.

¶5 The City assessor testified that he began his determination of the value of the building by assessing the entire property using the "income approach," and then checked this valuation by using the "sales comparison approach." The assessor noted that the income and sales comparison approaches that he used produced similar values.

¶6 Regarding the income approach, the assessor testified that this was the most appropriate method to value the building, because it appeared to him that the properties sold in the available, purportedly comparable sales were not especially comparable to the building. More specifically, he decided to use the direct capitalization method of the income approach. Under the direct capitalization method, net operating income is divided by a capitalization rate. The capitalization method depends on the rental rate for a property, which could be applied here because Harborview leased the building to tenants. As we discuss in more detail below, the parties dispute whether the assessor properly calculated the rental rate for the building.

¶7 Applying the capitalization method, the City assessor first determined the market rental rate for the building to be $16.80 per square foot. He multiplied this market rental rate by the number of square feet to derive a total annual market rent value of $686,599. He then deducted 7.5% as a vacancy allowance and 10% for extra expenses to derive the net annual operating income of $569,721. The assessor divided the net operating income by a capitalization

rate of 9% to arrive at a combined final value for the two tax parcels of $6,330,228. Finally, he subtracted the agreed-upon value of the parking lot, $824,200, to derive the value of the building, rounded, at $5,506,000.

¶8 Harborview presented testimony from an appraiser that it hired. The appraiser also used the sales comparison and income approaches, but derived a combined value for the two parcels of $4,250,000. After deducting the undisputed value of the parking lot, he arrived at a value for the building of $3,425,800.

¶9 As pertinent here, the circuit court made findings and conclusions in a written decision that include the following: the City assessor adhered to the Wisconsin Property Assessment Manual in valuing the building; the assessor appropriately relied on Chapter 15 of the manual (which involves, in pertinent part, instructions for valuing improvements made by tenants to leased property); any inconsistencies in the assessor's conclusions and calculations were not significant and, in any event, any such inconsistencies tended to lower the assessment; the methods used by the assessor and the facts he relied on were sound; the assessor's opinions were entitled to the statutory presumption of correctness; and, even if that presumption had been overcome, the court would not have found that the method of valuation used by Harborview's appraiser was more reliable or accurate than that used by the City assessor. Based on these conclusions and findings, the circuit court upheld the City's assessment. Harborview appeals.

DISCUSSION

¶10 As stated above, Harborview argues that the circuit court erred in three ways: (1) applying a presumption of correctness to the City assessor's valuation of the building, pursuant to WIS. STAT. § 70.49; (2) concluding that

Harborview failed to overcome the statutory presumption by presenting "significant contrary evidence;" and (3) concluding that Harborview failed to meet its burden of establishing that the assessment was excessive.

Legal Standards

¶11 An excessive property tax claim under WIS. STAT. § 74.37 calls for "a new trial," and is "not a certiorari action." ***Metropolitan Assocs. v. City of Milwaukee***, 2018 WI 4, ¶23, 379 Wis. 2d 141, 905 N.W.2d 784 (citations omitted). As a result, "we review the circuit court's determination, not that of the assessor or Board of Review." ***Id.***

¶12 A tax assessment that is challenged pursuant to WIS. STAT. § 74.37 is entitled to a presumption that it was "justly and equitably" made, which means that it is presumed correct. *See* WIS. STAT. § 70.49.[2] However, the presumption does not attach if the assessment "'does not apply the principles'" contained in the manual or if the challenging party presents "'significant contrary evidence.'" ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶17, 311 Wis. 2d 158, 752 N.W.2d 687 (quoted source omitted).

¶13 "Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual ... at the full value which could ordinarily be obtained therefor at private sale." WIS. STAT. § 70.32(1).

[2] We delayed resolution of this appeal pending the release of ***Metropolitan Assocs. v. City of Milwaukee***, 2018 WI 4, 379 Wis. 2d 141, 905 N.W.2d 784, by our supreme court, anticipating that it might shed light on issues in this appeal. As pertinent to this appeal, the supreme court in ***Metropolitan Assocs.*** re-affirmed the strength of the statutory presumption of correctness, pursuant to WIS. STAT. § 70.49(2), given to a tax assessment challenged under WIS. STAT. § 74.37. *See* ***Metropolitan Assocs.***, 379 Wis. 2d 141, ¶50. We discuss the presumption of correctness as it pertains to this case in the body of this opinion.

Harborview contends that the City assessor did not follow directives in § 70.32 and that the circuit court therefore erred under WIS. STAT. § 70.49 by applying the presumption of correctness.

¶14 "Statutory interpretation and application present questions of law that this court reviews independently of the determinations rendered by the circuit court ...." ***Metropolitan Assocs.***, 379 Wis. 2d 141, ¶24 (citation omitted). However, we defer to the circuit court's findings of fact and will not disturb them unless they are clearly erroneous. ***Id.***, ¶25. Moreover, we observe that "[i]t is within the province of the factfinder to determine the weight and credibility of expert witnesses' opinions." ***Id.*** (citation omitted); *see also* ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992) (When circuit court's legal conclusions are "intertwined with the factual findings," "this court will give weight to" circuit court decisions.).

Presumption of Correctness: Following the Manual

¶15 Harborview argues that the circuit court erred in applying the presumption of correctness because the City assessor failed to follow the manual. *See* ***Walgreen Co.***, 311 Wis. 2d 158, ¶17. As we now explain, we reject this argument on the ground that the evidence presented at trial supports the conclusion that the assessor followed the manual. And Harborview provides us with no reason to conclude that we should not give weight to the circuit court's explicit conclusion that the assessor "adhered to" the manual.

¶16 We pause to provide some additional facts, which are necessary to understand Harborview's presumption of correctness argument. The experts on both sides relied on provisions in the manual at trial, and the attorneys on both sides based arguments on manual provisions. In particular, Harborview's

argument is based on its assertion that the City assessor improperly followed chapters 7 and 15 of the manual.

¶17 Chapter 7 contains definitions and provisions, which provide "background in real estate terms and concepts." WISCONSIN PROPERTY ASSESSMENT MANUAL, 7-1 (rev. 12/11).

¶18 As referenced above, Chapter 15 discusses how to value property when the property contains leasehold improvements. *See* ***id.***, 15-10. The manual defines leasehold improvements as "[a]ny alterations, additions or improvements made by a tenant to leased or rented premises which add value to a property are subject to assessment ...." ***Id.***, 15-10.

¶19 With that brief background on the manual, the assessor agreed that chapter 7 contains a provision stating that a proper valuation includes only those rights that a property owner can actually convey to a subsequent owner. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL, 7-7. The assessor explained that, consistent with the chapter 7 provision, he considered the actual rent that Harborview was receiving, and then added to this the value of leasehold interests, which involved applying more specific provisions addressing leasehold interests in chapter 15. According to chapter 15, the assessor must determine the impact that any leases have on the value of a property. This includes the effect of leasehold improvements. ***Id.***, 15-10.

¶20 That background is sufficient to explain our conclusion on this issue, which is that a review of the entire transcript reveals that Harborview now relies on an incomplete summary of the transcript to inaccurately suggest that the assessor admitted that he failed to apply chapter 7 of the manual. In sum, the

transcript reflects a simple, logical application of both chapters 7 and 15, which contain readily compatible provisions as pertinent to the issue here.

¶21 Stepping back, we observe that this argument that we reject is typical of the run of Harborview's manual-violation arguments, which are similarly inaccurate because they rely on out-of-context snippets of the assessor's testimony and fail to undermine our conclusion based on the evidence presented at trial that the assessment complied with the manual, including both chapters 7 and 15, as well as other provisions that we need not explicitly address, given the limited arguments that Harborview offers. We now address those limited arguments.

¶22 Harborview argues that the assessor "violated" the manual by creating an "imaginary" lease rate. However, we agree with the circuit court, which explained that it is not "imaginary" to use market data to determine a market lease rate, which is what the assessor testified that he did. Harborview does not develop a persuasive argument that using market data to determine a market lease rate violates the manual.

¶23 Harborview takes issue with the method the assessor used to calculate market rent. The City assessor used his files to explain how he derived a market rent of $16.51 using the rental rates of comparable properties. He testified that he adjusted the rate upwards slightly, to $16.80, based on additional work. The City was unable to produce a specific document that reflected this additional work, but the assessor was able to provide at least one example from memory explaining, at least in part, why he made the slight upward adjustment, namely, that the building had a prime location on the Mississippi River.

¶24 Harborview contends that discrepancies in the assessor's data, such as this use of a market rate of $16.51, as opposed to $16.80, without the ability to provide a document to support the discrepancy, were "violation[s]" of the manual and that, therefore, the presumption of validity is overcome. To repeat, however, the circuit court explicitly found that (1) these discrepancies and any other inconsistencies in the assessor's beliefs and calculations were not significant, and (2) any such inconsistencies weighed in favor of Harborview. Harborview fails to provide record evidence undermining the court's characterizations of the evidence. For example, the circuit court reasonably explained that it was consistent with the manual for the City assessor to use a market rent rate of $16.80 per square foot, even though this was "not the actual rent that was being paid by the tenants," because the assessor "used the comparable rents in the downtown La Crosse area and the consideration of the impact of the value added by the leasehold improvements." This approach, the court proceeded to explain, is "specifically authorized" by chapter 15 of the manual. Our review of the pertinent manual provisions confirms this conclusion. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL, 15-10.

¶25 Finally, Harborview argues that the assessor improperly accounted for the tenant improvements that were made to the leased areas of the building. This argument relies on the suggestion that the assessor admitted that he failed to apply chapter 7 of the manual, a suggestion that we have already rejected.

¶26 In sum, we conclude that the evidence offered at trial supports the circuit court's conclusion that the assessor followed the manual in arriving at the assessed value of the building. Therefore, the assessment is entitled to the statutory presumption of correctness.

Presumption of Correctness: Significant Contrary Evidence

¶27 As noted above, in addition to demonstrating that an assessor failed to follow the manual, a presumption of correctness may also be overcome if a taxpayer presents "significant contrary evidence" that demonstrates that the assessment is incorrect. "Significant contrary evidence" in this context is evidence showing "that it is more probable than not that the assessed value is not correct." *See* ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App 131, ¶¶5, 9, 351 Wis. 2d 439, 839 N.W.2d 893. Harborview argues that the circuit court here erred in concluding that Harborview failed to overcome the presumption by presenting significant contrary evidence in the form of its appraiser's testimony and the exhibits that the appraiser relied on.

¶28 However, Harborview's significant-contrary-evidence argument is based entirely on its re-assertion that the assessor failed to follow the manual, which we have already rejected, and its assertion that its own appraiser's "opinion of value and his exhaustive analysis" demonstrate that it is more probable than not that the assessor's valuation is incorrect, which the circuit court explicitly rejected.

¶29 Explaining this second conclusion, the circuit court explicitly found that the appraiser's method of valuation was not "more reliable or accurate than" that used by the assessor. When the circuit court assessed the weight to be given to the testimony of each witness, it determined that the valuations of Harborview's appraiser were not deserving of more weight than those of the City assessor. The trier of fact determines the weight to be given testimony. ***Metropolitan Assocs.***, 379 Wis. 2d 141, ¶61 (citing ***Syvock v. State***, 61 Wis. 2d 411, 414, 213 N.W.2d 11 (1973)). "'When the trial court acts as the finder of fact, it is the ultimate arbiter

of the credibility of the witnesses and of the weight to be given to each witness's testimony.'" ***Id.*** (quoted source omitted.)

¶30 Harborview fails to provide us with a basis to conclude that the circuit court clearly erred on this point in its written decision, which detailed the findings of the assessor and explained why the court found the assessor's testimony and methods to be reliable. And, as observed above, the testimony and exhibits presented at trial support the court's findings. Therefore, we conclude that the circuit court's findings were not "against the great weight and clear preponderance of the evidence" and instead supported the court's conclusion to uphold the City's assessment.

Harborview's Burden Of Establishing Excessive Assessed Value

¶31 Harborview asks that we direct entry of judgment based on its appraiser's determination of value, ignoring the value of the property determined by the circuit court and instead accepting its appraiser's conclusions as to the correct valuation. However, this request merely re-purposes the two arguments that we have rejected above. We can discern nothing in these arguments, or any other argument that Harborview may intend to make, that we have not resolved in some fashion above.

CONCLUSION

¶32 For the foregoing reasons, we affirm the decision of the circuit court upholding the City's assessment.

By the Court.—Order affirmed.

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