

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2007

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. 2006AP1874

Cir. Ct. No. 2005CV3104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN EX REL. MARKET SQUARE ASSOCIATES PHASE
I, LLP,**

PETITIONER-APPELLANT,

v.

BOARD OF REVIEW FOR THE VILLAGE OF MENOMONEE FALLS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded.*

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

¶1 SNYDER, P.J. Market Square Associates Phase I, LLP, appeals from a circuit court order affirming the Village of Menomonee Falls Board of

Review decision to uphold the city assessor's property valuation of Market Square's apartment complex. Market Square contends that the methodology used to assess its property was contrary to law and that the Board erred when it affirmed the assessment. Because we conclude that the Board failed to deliberate on the evidence presented, we reverse and remand for further proceedings.

BACKGROUND

¶2 Market Square owns property upon which it built an eighty-eight unit apartment building in the Village of Menomonee Falls. The village assessor valued the Market Square apartments at \$4,325,300. Market Square contested the assessor's report before the Board of Review. As evidence, Market Square submitted a property appraisal estimating a fair market value of \$3,900,000. The appraiser testified before the Board, and explained his methodology in reaching the lower estimate. The village assessor was also present at the hearing where he questioned the appraiser and gave his testimony.

¶3 The transcript of the hearing makes clear that both the appraiser and the village assessor explained their methodology and their conclusions to the board. Market Square's appraiser testified that he used a recent "comparable sales" approach to conclude that the property in question had a fair market value of \$3,900,000. The appraiser explained that because no recent comparable sales had occurred in Menomonee Falls, he searched for properties within the Milwaukee metropolitan area. He found five properties he considered appropriate for comparison: one in the city of Waukesha, two in South Milwaukee, one in Greenfield and one in West Allis. In contrast, the village assessor testified that he limited his search to Menomonee Falls and found no comparable sales for the

Market Square property; therefore, he submitted a report that used an income approach and a cost approach to estimate the value at \$4,325,300.

¶4 The transcript of the Board of Review hearing spans twenty-two pages, with approximately twenty-one pages of witness testimony. After hearing the evidence and receiving the competing valuation reports, the Board chair stated in relevant part:

This Board is charged with presuming that the assessor's valuation is correct. We are directed that by state statute unless there is overwhelming evidence brought forth by the owner that the valuation done by the assessor is incorrect. It is the opinion of this Board that we don't see that. It is our opinion that the two methods presented by the assessor are indeed correct ... and we do not agree with the owner's opinion of a value of \$3,900,000 as of January 1.

The three members of the Board then unanimously voted to sustain the assessor's valuation of \$4,325,300.

¶5 Market Square petitioned the circuit court for certiorari review of the Board's decision. The court concluded that the village assessor's methodology was reasonable and that the Board acted within the law when it accepted the assessor's valuation. Market Square appeals.

DISCUSSION

¶6 Market Square raises several issues for our review. First, it asks whether recently sold properties must be located within the same county as the subject property to be considered "comparable sales" for assessment purposes. It specifically asks whether the information submitted by its appraiser constituted recent comparable sales for assessment purposes. Also, Market Square asks us to review the village assessor's failure to use recent comparable sales in his

valuation. Finally, Market Square submits that the Board employed an improper standard in its review of the evidence.

¶7 In a certiorari action, we review the Board’s decision in the same manner as the circuit court and our review is independent of the circuit court’s decision. *State ex rel. Campbell v. Township of Delavan*, 210 Wis. 2d 239, 254, 565 N.W.2d 209 (Ct. App. 1997). On certiorari, we review the Board proceedings to determine: (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. *Waste Mgmt. of Wis., Inc. v. Kenosha County Bd. of Review*, 184 Wis. 2d 541, 554, 516 N.W.2d 695 (1994).

¶8 We begin with Market Square’s challenge to the Board’s application of the law, which invites our review of the content and process of the hearing. Market Square asserts that the Board employed an improper legal standard by requiring Market Square to provide “overwhelming” evidence that the village assessor’s valuation was incorrect. The reference appears at the close of the hearing evidence where the Board chair stated “unless there is overwhelming evidence brought forth by the owner that the valuation done by the assessor is incorrect,” the Board must accept the assessor’s valuation. However, the proper legal standard is set forth in WIS. STAT. § 70.47(8)(i) (2005-06),¹ which states in relevant part: “The board shall presume that the assessor’s valuation is correct.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

That presumption may be rebutted by a *sufficient showing* by the objector that the valuation is incorrect.” (Emphasis added.) Thus, Market Square’s argument goes, the Board improperly raised the burden for an effective rebuttal.

¶9 Market Square’s primary argument is that the village assessor improperly failed to consider recent comparable sales in reaching his fair market value, and therefore its own appraiser’s report constitutes a sufficient showing of error. It has long been held that the assessor must use the “best information” available to value a property for tax assessment. *See State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 685, 173 N.W.2d 627 (1970). The best information of property value “is a sale of the property or if there has been no such sale then sales of reasonably comparable property.” *Id.* at 686. Only if there has been no recent sale of reasonably comparable property should the assessor resort to “all the factors collectively which have a bearing on value of the property.” *Id.*

¶10 Here, Market Square’s appraiser used what he believed were recent comparable sales to determine fair market value. He testified that the apartment properties he used, though located in other municipalities, were “the best available sales very similar to the subject [property].” The Market Square property included eighty-eight rental units while the comparison properties ranged from twenty to thirty-four units. Market Square’s attorney explained that though the comparable properties had fewer total units, Market Square’s property consisted of five buildings, none larger than twenty four units.

¶11 The village assessor testified that he did not use recent comparable sales in his estimate. He indicated that he limited his search for recent sales to Menomonee Falls. When asked whether property in Waukesha or West Allis, as used by Market Square’s appraiser, would not be comparable, the village assessor

answered, “No comment.” When asked whether he would consider the per unit estimate of the five comparables offered by Market Square to be within a reasonable range, the village assessor replied, “I have no experience in any of these areas.”

¶12 Market Square asserts that it made a sufficient showing that the village assessor did not comply with the *Markarian* hierarchy of “best information” and thus rebutted the presumption of correctness afforded the assessor’s valuation. By raising the burden to “overwhelming evidence,” therefore, the Board did not act according to law.

¶13 The Board responds that the reference by the Board chair to “overwhelming evidence” is not controlling. “Even assuming the chair was relying on an improper standard, there is no indication that the other two Board members used an inappropriate standard in reaching their decision.” Indeed, the Board raises the very concern that we have about its determination. There is no indication that the other two Board members employed any standard at all to the evidence. The record is devoid of any deliberation on the evidence whatsoever.

¶14 Rather, it appears that the Board chair unilaterally rejected Market Square’s position when he made his remark about the lack of overwhelming evidence, and then immediately called for a motion to sustain the village assessor’s valuation. The transcript indicates that, in the course of the entire hearing, there were no questions, no observations, no concerns, in fact no comments whatsoever regarding Market Square’s evidence from the other two Board members. We recognize that deliberation may occur off the record, but here there is no indication that the Board went into closed session. *See Dolphin v. Bd. of Review*, 70 Wis. 2d 403, 413, 234 N.W.2d 277 (1975) (stating that “it is

permissible for the board to go into closed session for the purpose of deliberating”). Interestingly, the Board chair made the following statement:

Any questions the Board may have of the assessor? While we’ve been carefully paying attention to all of the testimony that’s been provided ... the Board does note that – it is of the opinion that the reason we may not see comparable sales – I just have a comment to make. We understand the comparable sales that have been put in front of the Board of Review. I just have one comment relative to that which will go into our wrapup discussion. But I don’t necessarily know if units are 20 and 32 units if that compares to an 88 unit, and perhaps that’s why the assessor didn’t have that direct cost comparison, because there wasn’t anything equivalent for sale in the greater Menomonee Falls area, recognizing that there are differences in communities.

The Board chair invited questions, but no other Board member spoke. The chair mentioned a “wrapup discussion” that never occurred. Finally, the Board chair hypothesized about the assessor’s reasons for neglecting recent comparable sales, but didn’t question the assessor, who was present.

¶15 One of the considerations under our review is whether the Board’s determination “was arbitrary, oppressive or unreasonable, representing its will rather than its judgment.” See *Waste Mgmt.*, 184 Wis. 2d at 554. Though the Board chair offered his opinions cloaked as opinions of the Board, there is nothing in the record to show that the Board determination was not simply a reflection of the Board chair’s will. This is particularly troubling because of the “overwhelming evidence” standard expressed by the chair. Furthermore, where a board disregards competent, unimpeached, and uncontradicted evidence, its determination should be set aside. See *Campbell*, 210 Wis. 2d at 260. From the testimony, it appears the village assessor failed to substantively respond to questions about the appropriateness of the appraiser’s comparable properties.

Regardless, we cannot tell from the record whether the Board simply disregarded the recent comparable sales in the appraiser's report or found them too dissimilar to be persuasive.

¶16 The Board asserts that even if we conclude that the chair "may have acted based on an inappropriate standard, the court must presume the majority of the Board acted appropriately, and must still sustain the Board's decision." We agree that all presumptions we draw are in favor of the rightful action of the Board. *See Waste Mgmt.*, 184 Wis. 2d at 555. We hold, however, that the improper standard cited by the Board chair, together with the failure to deliberate as a Board, rebuts that presumption. The record indicates that the Board did not exercise its judgment, but rather exercised the will of the Board chair. Accordingly, reversal is warranted.

CONCLUSION

¶17 We conclude that the Board's review of Market Square's property assessment was inadequate. First, the Board heard competent, uncontradicted evidence that recent comparable sales were available for the subject property but failed to explain, other than guessing at the assessor's reasoning, why it did not accept the evidence as the "best information" available. Also, the Board chair referenced an improper burden of persuasion for rebutting the village assessor's valuation and the other Board members simply voted in agreement. Finally, the presumption of correctness afforded the Board's determination is rebutted where there is no deliberation of any sort in the record to indicate the Board considered the evidence presented. The record as a whole indicates the Board did not exercise its judgment in this matter. Accordingly, we reverse and remand the matter to the Board of Review for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

No. 2006AP1874(C)

¶18 BROWN, J (*concurring*). It is important to point out that we purposefully do not reach the issues of whether an assessor has a duty to seek comparable sales outside the locale or even whether a property owner can do so in preparation for an assessment review, even though we acknowledge that they are potentially important to the development of the law. Those issues are reserved for another day when a proper record has been made by the Board of Review. A proper record is made when the Board of Review considers the evidence presented to it and explains why or why not the out-of-locale sales presented to it are “comparable.” At present, the record only shows a conclusory, arbitrary statement by the Board chair to the effect that the out-of-locale sales are not equivalent to a sale in the greater Menomonee Falls area because there are “differences in communities.” As the lead opinion points out, that conclusion was the opinion of the Board chair alone and not the Board as a whole. Moreover, the conclusion was made without any evidence supporting it. A better record would make the important legal issues ripe for determination by our Wisconsin courts. I am authorized to state that Judge Neal Nettesheim joins this concurrence.

