



City of West Allis

Matter Summary

7525 W. Greenfield Ave.
West Allis, WI 53214

File Number	Title	Status
2003-0505	Communication	In Committee
Memorandum and Order issued by the Milwaukee County Circuit Court regarding Charles E. Benidt v. City of West Allis, et al.		
Introduced: 8/5/2003		Controlling Body: Administration & Finance Committee

COMMITTEE RECOMMENDATION

place on file

ACTION DATE:	MOVER	SECONDER		AYE	NO	PRESENT	EXCUSED
<u>8-5-03</u>	<u>B X</u>	<u>HC</u>	Barczak	<u>✓</u>			
			Czaplewski	<u>✓</u>			
		<u>X</u>	Kopplin	<u>✓</u>			
			Lajsic	<u>✓</u>			
			Narlock				
			Reinke				<u>✓</u>
			Sengstock				
			Trudell				
			Vitale				
			Weigel				
			TOTAL	<u>4</u>			<u>1</u>

SIGNATURE OF COMMITTEE MEMBER (RECORDER)

[Signature]

Chair

Vice-Chair

Member

COMMON COUNCIL ACTION

place on file

ACTION DATE:	MOVER	SECONDER		AYE	NO	PRESENT	EXCUSED
<u>8-5-03</u>	<u>✓</u>		Barczak	<u>✓</u>			
			Czaplewski	<u>✓</u>			
			Kopplin	<u>✓</u>			
			Lajsic	<u>✓</u>			
			Narlock	<u>✓</u>			
			Reinke	<u>✓</u>			<u>✓</u>
		<u>✓</u>	Sengstock	<u>✓</u>			
			Trudell	<u>✓</u>			<u>✓</u>
			Vitale	<u>✓</u>			
			Weigel	<u>✓</u>			
			TOTAL	<u>8</u>			<u>2</u>



CITY OF WEST ALLIS

WISCONSIN



OFFICE OF THE CITY ATTORNEY

Scott E. Post
City Attorney

July 25, 2003

Common Council
City of West Allis

RE: *Charles E. Benidt v. City of West Allis, et al.*
Circuit Court Case No. 02-CV-011544

Dear Council Members:

Enclosed is a copy of the Memorandum and Order issued by the Milwaukee County Circuit Court in the above-referenced matter. This case was a challenge to the determination by the Board of Review. The court upheld the Board of Review's determination.

Yours very truly,

Scott E. Post
City Attorney

SEP:da
Enclosure
Scott/Corr/Benidt-Bd of Review

cc: Board of Review Members (Encl.)
Charles Ruud (Encl.)
Dorothy Steinke (Encl.)

**STATE OF WISCONSIN
COUNTY**

**CIRCUIT COURT
BRANCH 11**

MILWAUKEE

CHARLES E. BENIDT,

Petitioner,

v.

Case No: 02-CV-011544

CITY OF WEST ALLIS, ET AL.

Respondent.

JUN 20 2003

MEMORANDUM AND ORDER

In his Petition for Writ of Certiorari, Petitioner argues that the assessment violates the Department of Revenue's Property Assessment Manual for Wisconsin Assessors. Petitioner contends that the assessor erred when he used the income approach to valuation instead of the comparative sales approach. Petitioner argues that the assessor's analysis is further flawed because the assessor used the income produced by the tenant of the subject property instead of the income produced by the owner of the property.

Petitioner also contends that the notice of hearing violated the Due Process Clause of the Wisconsin Constitution. Petitioner filed the Objection to Real Property Assessment Form on August 26, 2002. On September 3, 2002, Petitioner received notice that a hearing was scheduled for September 6, 2002, at 10:15 a.m. The hearing was adjourned to September 12, 2002. According to Petitioner, the three-day notice and subsequent six-day adjournment did not allow Petitioner to obtain his own appraisal and properly prepare his argument. As a result, Petitioner argues that he was denied his right to a fair hearing.

SCOPE OF REVIEW:

The scope of certiorari review is restricted to the record before the board. The reviewing court may consider only: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question. *State ex rel. Kesselman v. Board of Review*, 133 Wis. 2d 122, 127 (Ct. App. 1986).

There is a presumption that the assessor's valuation is correct. *State ex rel. Wisconsin River Power Co. v. Board of Review*, 125 Wis. 2d 94, 97 (Ct. App. 1985). This presumption may be overcome with credible evidence that the valuation is incorrect. *Id.* If the presumption is overcome, the question becomes whether credible evidence was presented to the Board that may in any reasonable view support the Board's determination. *Id.*

DUE PROCESS:

This court first considers Petitioner's due process argument. Wis. Stat. art. I, § 1 is substantially equivalent to the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The fundamental requisite of due process of law is the opportunity to be heard. *Milwaukee Dist. Council 48 v. Milwaukee County*, 244 Wis. 2d 333, 356 (2001). This opportunity to be heard must be at a "meaningful time and in a meaningful manner." *Id.*

It is important to reiterate that the scope of certiorari review is restricted to the record before the board. At the hearing, counsel for Petitioner voiced his concern about the short notice for the hearing date:

[W]e received a notice of this hearing approximately two weeks ago. When we got the notice of assessment, we immediately did what we were supposed to do in terms of filing our appropriate notices for appeal. However, the period of time from the time that we received a notice to the time of the hearing did not allow us to have an appraisal of our own done. I contacted four different commercial real estate appraisers and it was an impossibility to get a commercial appraisal of this property in that short of time. The window . . . the earliest I could have had something was December.

Counsel for Petitioner reiterated his concern when questioned about Petitioner's estimated value of the subject property:

BM: How then do you arrive at \$3.2 million as a fair value for the property?
What are you taking into account that arrives at \$3.2 million?

TJP: The improvements and what we thought was a fair value of the land.
Again, we would have liked to have had an appraisal, but we didn't have the time, but we felt that \$3.2 million was a reasonable number.

Although Petitioner raised the issue of short notice, a review of the transcript reveals that Petitioner never asked for an adjournment. Rather, counsel for Petitioner simply stated that he did not have time to get an independent appraisal. Petitioner incorrectly equates the due process requirement of an *opportunity* of a fair hearing with the requirement of a *fair hearing*. Although Petitioner had the opportunity to request an adjournment at the hearing, Petitioner did not do so. Had Petitioner requested additional time and the board denied such request, a respectable argument could be made on due process grounds. However, Petitioner cites no authority that holds that the failure of an administrative body to grant additional time to present a case when no such request is made constitutes a denial of due process. *See State v. Pettit*, 171 Wis. 2d 627, 646 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Accordingly, this court is not persuaded by Petitioner's due process argument.

PROPRIETY OF THE ASSESSMENT METHOD:

Valuation of real estate is governed by section 70.32, Stats, which requires valuation of real estate at its full value. As stated by one court:

A property's full value is defined as its fair market value, or the amount the property will sell for in an arm's-length transaction on the open market between a willing seller not obliged to sell the property and a willing buyer not obliged to purchase it. A recent arm's-length sale of the subject property, or sales of reasonably comparable land, represent the best information with which to determine fair market value. Given evidence of such sales, it is error for an assessor to look to other information to value the property.

* * *

In the absence of such sales, however, an assessor must determine market value from the best information the assessor can practicably obtain, considering all elements which collectively have a bearing on the value of the property.

Such elements, as identified by various decisions of this court, include, among others, cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus, and appraisals procured by the owner.

Given these principles under the mandate of section 70.32(1), Stats., the following rules have been developed with respect to the specific use of income generated from real estate as a basis for valuing that property: (1) Evidence of net income may be utilized in order to show the fair market value of a parcel of land, but only in the absence of a recent arms-length sale of the property or sales of reasonably comparable property. (2) Income may never be the sole basis for an assessment of property.

Waste Management v. Kenosha County Bd. of Review, 184 Wis. 2d 541, 556-557 (1994) (citations omitted).

In this case, the record indicates that the assessor considered the sales of other properties. However, the assessor testified that the subject property is "by far the largest than any of the properties that have sold." (The subject property is listed at 6.44 acres, compared to 2.20, 3.178, 3.819, 2.451, 1.000, and 1.489 acres for the other properties that were considered). The "comment" section of one of the assessor's exhibits indicated further differences in the other properties ("Gravel paved – no fencing, cash to seller"; "Easement thru bowling lane prioperty (sic)"; "Development approved for add' 10K sq.

ft"; "Cash to seller.""). A reasonable view of the evidence supports the proposition that the other properties are not reasonably comparable.

Petitioner apparently views the other properties as "reasonably comparable" because they, like the subject property, all are self-storage facilities. Whether properties are reasonably comparable depends on the "degree of similarity between the properties in question." *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 665 (1976).

Important considerations in determining whether particular property is sufficiently similar to the property being assessed to warrant reliance on its sale price as evidence of market value include its location, including the distance from the assessed property, its business or residential advantages or disadvantages, its improvements, size and use. It is also important to consider the conditions of sale, including its time in relation to the date of valuation, and its general mode and character insofar as they tend to indicate an arm's-length transaction.

Id.

At the hearing, Petitioner submitted that his lease with the tenant could be an impediment to the sale of the property. However, Petitioner did not submit any evidence as to whether the other properties had similar leases. Petitioner also pointed out that he only owns the land and not the business, and that he therefore he cannot sell the business. Significantly, Petitioner has not presented any information about (1) the general economic conditions of the locations of the other properties; (2) the business advantages or disadvantages; (3) the general economic conditions of the locations of the other properties; or (4) the conditions of the sales of the other properties. In other words, Petitioner did not present the board with sufficient information about the other properties

to enable the board to determine whether the other properties were truly comparable. See *Charter Northbrooke Behavioral Health Sys. v. Village of Brown Deer*, 231 Wis. 2d 719 (Ct. App. 1999). Petitioner did not meet his burden of showing that the assessor's valuation method is incorrect.

The method used by the assessor is similar to the method used in *Waste Management v. Kenosha Rev. Bd.*, 184 Wis. 2d 541 (1994). As the court stated:

[W]e conclude that the board and the Assessor did not act in contravention of Wisconsin assessment law by relying on the income approach, along with other methodologies, to value the two parcels of land containing the Pheasant Run landfill. Since Waste Management had owned the site since 1980, there had been no recent sale of the land at the time of the 1990 assessment. Nor does the record suggest that reliable data could be derived from sales of reasonably comparable property. Although the Assessor analyzed sales of four other Wisconsin landfills in his 1991 updated appraisal, he concluded that the land involved in those sales was not sufficiently comparable to the Pheasant Run site to provide a reliable basis for valuing the site. One of Waste Management's experts also presented an appraisal based on data from the same four sales. Despite the fact that both Waste Management's expert and the Assessor utilized the same information, their value estimates based on "comparable" sales diverged by some \$ 21 million. Moreover, another Waste Management expert concluded that the market approach was not useful in this case. Given this record, in this case the board had reason to doubt the reliability of the market approach and could reasonably conclude that it and the Assessor could look to other elements, including the cost approach and the income generated by the site, in valuing the property.

Id. at 558-559. In light of *Waste Management*, the board did not err in adopting the income approach.

The next issue becomes whether the assessor erred when he used the income produced by the tenant instead of the income produced by the owner of the property.

Waste Management sheds light on the issue. The objector in *Waste Management* argued that any assessment under the income approach must be based not on the owner's actual income but on the income the owner could generate by leasing the property to another operator. *Id.* at 560. "Only the use of such 'rental' income, *Waste Management*

argue[d], is allowable under the income approach and only rental income will exclude business value generated by the owner from an assessment of the underlying real estate.”

Id. at 561. The court disagreed.

The court pointed out that an assessor uses the net income approach is used to convert the future benefits likely to be derived from real estate into an estimate of present market value. *Id.* The court also noted that the Manual recognizes that the income approach “can be useful in that it represents the way investors think when they buy and sell income property in the market.” *Id.* As the court ultimately concluded:

Wisconsin law does not preclude an assessor from using owner-operator income to value real estate in circumstances in which no stream of rental income exists. [The Wisconsin cases allowing consideration of income in valuation of real estate for tax purposes do not limit income to rental income although the facts of the cases seem to involve rental income.] On the contrary, the Property Assessment Manual for Wisconsin Assessors appears to anticipate the use of owner-operator income with respect to owner-occupied and operated real property when insufficient market data exists to provide a reliable basis for extrapolating a market lease rate.

Id. at 562-563. Although there is a lease provides rental income, the assessor discounted any reliance on the lease because it was not an arm’s-length lease. Under the circumstances, the business value of the property can properly be used in assessing the property. *See id.* at 563 (citing *State ex rel. N/S Associates v. Greendale Board of Review*, 164 Wis. 2d 31 (Ct. App. 1991)). This court finds that neither the Board nor the assessor erred in using the income produced by the operator instead the rental income by the tenant.

It is important to note that Petitioner’s testimony as to the value of the subject property is limited. Petitioner “felt that the value that was previously assessed was a fair value for \$3.2 million [because] [i]t represented numbers we felt were within the

perimeters." Petitioner's counsel added that the \$3.2 million figure represented "[t]he improvements and what we thought was a fair value of the land." Petitioner failed to satisfy his burden of producing evidence to rebut the presumption of correctness.

ORDER

Based upon and in light of the foregoing, and a full review of the record and the arguments of the parties as set forth in their briefs, IT IS ORDERED that the decision of the City West Allis is hereby AFFIRMED.

Dated at Milwaukee, Wisconsin this 20th day of June, 2003.



BY THE COURT:

Honorable Dominic S. Amato
Circuit Court Judge
Branch 11

JUN 20 2003