COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1776 **Cir. Ct. No. 01 CV 3688**

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

STATE OF WISCONSIN EX REL.
RONALD COLLISON,

PETITIONER-APPELLANT,

V.

CITY OF MILWAUKEE BOARD
OF REVIEW,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Ronald Collison appeals from the circuit court order affirming the City of Milwaukee Board of Review, which sustained the 1999 and 2000 property tax assessments of Collison's property. Collison argues that the

court erred in concluding that the Board's findings and determinations were in accordance with Wisconsin law. He contends that the City's use of its Environmental Contamination Standards (ECS) was arbitrary, in violation of uniformity standards, and not in accordance with the Wisconsin Property Assessment Manual, as required by WIS. STAT. § 70.32(1).[1]

¶2 We conclude that although Collison has presented an intriguing theory challenging the City's use of the ECS, his argument fails here because the record establishes that the Board considered not only Collison's failure to comply with the ECS requirements, but also his failure to submit other evidence sufficient to carry his burden to prove that his property was contaminated. Accordingly, we affirm.

I. BACKGROUND

¶3 The facts are undisputed. For many years, Collison owned Milwaukee land on which a dry cleaning facility was located. On May 13, 1999, he entered a formal objection to the 1999 assessment of the property, contending that it was incorrect because of "[p]ossible [e]nvironmental [c]ontamination." For reasons unrelated to such possible contamination, the Board of Assessors changed the assessment from $110,000 to $79,000. On May 9, 2000, Collison entered a formal objection to the 2000 assessment, contending that it was incorrect because it did not "take into consideration any environmental liabilities." For reasons related, in part, to the cost of removing four underground storage tanks from the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

property, the Board of Assessors changed the assessment from $79,000 to $65,300. Collison appealed both years' assessments to the Board of Review.

¶4 Before the Board of Review, Collison argued that the City, by requiring the submission of a "Phase II Audit"[2] as specified by the ECS, was preempting the presentation of proof of contamination in any other manner and, in so doing, was effectively supplanting Wisconsin's statutory assessment standards. On appeal, Collison renews his argument and further contends that he provided powerful evidence of contamination, albeit not in the form of a Phase II ECS report.

II. DISCUSSION

¶5 On appeal from a circuit court order on a *certiorari* challenge to an administrative board's decision, we do not review the conclusion of the court; rather, we review the record before the board and its decision. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 845 n.6, 440 N.W.2d 348 (1989). We must uphold a board's decision if it is supported by any reasonable view of the evidence. *See* ***State ex rel. Geipel v. City of Milwaukee***, 68 Wis. 2d 726, 731, 229 N.W.2d 585 (1975).

¶6 Reviewing its decision, we may only consider: (1) whether the board acted within its jurisdiction; (2) whether the board acted according to law; (3) whether the board acted in an arbitrary, oppressive or unreasonable manner

[2] At various points in the record and appellate briefs, the parties also refer to a Phase I audit or report. In this appeal, however, the parties do not attach any significance to the distinction between a Phase I requirement and a Phase I and II requirement. For convenience, therefore, we, like the parties for the most part, will simply refer to "Phase II."

reflecting its will rather than its judgment; and (4) whether the evidence was such that the board might reasonably bring the order or determination into question. ***Id.*** Moreover:

> In the context of property assessment for purposes of taxation[,] the court may determine whether the assessment was made on the statutory basis, for such inquiry involves a question of law…. If the proper basis was used, however, and the valuation was not made arbitrarily or in bad faith, the reviewing court must sustain the valuation if there is any evidence to support it.

Id. at 732. "In determining whether there is enough evidence to sustain the assessment, '[t]he presumptions are all in favor of the rightful action of the Board.'" ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 335, 603 N.W.2d 217 (1999) (citation omitted).

¶7 In the event of conflicting testimony, we will not substitute our view for that of a board of review. ***Steenburg v. Town of Oldfield***, 167 Wis. 2d 566, 572, 482 N.W.2d 326 (1992). In fact, a board's "mere errors of judgment as to the preponderance of the evidence" would not be enough to overturn a board's decision; instead, we would "review the evidence only so far as to ascertain if there is a reasonable ground to believe that the decision is the result of honest judgment, in which case the decision cannot be disturbed." ***State ex rel. Boostrom v. Board of Review***, 42 Wis. 2d 149, 155, 166 N.W.2d 184 (1969).

¶8 Finally, WIS. STAT. § 70.47(8)(i) provides: "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." *See also* WIS. STAT. § 70.47(16)(a) ("determinations made by the board acting within its powers shall be prima facie correct"). Clearly, therefore, under these standards, Collison had high hurdles to clear. We conclude that he failed to clear

them; his evidence was insufficient to rebut the presumption that that assessor's valuations were correct.

¶9 WISCONSIN STAT. § 70.32(1) provides, in part, for a uniform method of taxation requiring property to be "valued by the assessor in the manner specified in the Wisconsin property assessment manual … from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor[e] at private sale." The statute also requires that the assessor, "[i]n determining the value, … shall consider … all factors that, according to professionally acceptable appraisal practices, affect the value of the property." ***Id.*** Further, under WIS. STAT. § 70.32(1)(m), "the assessor shall consider the impairment of value of the property because of the presence of … environmental pollution." *See also* WIS. STAT. § 299.01(4) (defining "environmental pollution," in part, as "the contaminating or rendering unclean or impure the … land … or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to … life"); 1 WISCONSIN PROPERTY ASSESSMENT MANUAL FOR WISCONSIN ASSESSORS at §§ 8-26 (1999) (requiring assessors to "consider the affect of contamination on the value of real estate").

¶10 According to the statement of the Assistant City Attorney to the Board of Review at Collison's hearing, in 1994, the City adopted the ECS "to provide an orderly process by which taxpayers could substantiate their requests for an adjustment in valuation due to proven contamination." The ECS, a copy of which is included in the record on appeal, states that it "provide[s] information and guidance concerning the effect of environmental contamination on the valuation of property for assessment purposes," and "discusses types of impact on value and

lists numerous consideration of which the assessor should be aware." Among the ECS provisions underlying Collison's challenge are:

- "Unproven [environmental contamination] problems must be treated as unknown costs."

- "**The minimum level of acceptable substantiation [of contamination] will be a comprehensive Phase [II] Audit, setting forth (among other pertinent information) the type, level and source of contamination and the suggested method or methods for remediation."**

- "Without this [Phase II] information, property must be valued as if uncontaminated."

(Emphasis in original.)

¶11 Collison points out that the statutes do not provide for an evidentiary requirement such as the one these provisions would seem to mandate; that WIS. STAT. § 70.32(1)(m) simply requires an assessor to "consider the impairment of value of the property because of the presence … of environmental pollution" without setting an evidentiary prerequisite as to the manner in which such impairment is proven. Although Collison's argument is strong, it misses the mark in his case because, despite the persistent efforts of the Assistant City Attorney to preclude Collison from presenting evidence of contamination in any way other than through a Phase II report, the Board did consider Collison's other evidence of contamination.

¶12 Near the beginning of the hearing on Collison's challenge to the assessments, the Board chairman invited Collison, "[T]ell the Board of Review why you object" to the assessment[s]. But when Collison's first witness, a real

estate consultant, uttered the word "contamination" in his first sentence, the Assistant City Attorney objected. Repeatedly, the Assistant City Attorney maintained that Collison could not present *any* evidence of "contamination" in the absence of a Phase II report and interrupted Collison's attempts to present evidence. Fortunately, the attorney for the Board of Review asked that Collison at least have the opportunity to make his presentation and that the chairman "withhold a final ruling on [the Assistant City Attorney's objection] until we see[3] … until we see what it is." (Footnote added.)

¶13 Although the chairman initially sustained the Assistant City Attorney's objection, and although the chairman, at several subsequent junctures, reiterated that ruling, the full record establishes that Collison's presentation was not cut off. While acknowledging and sometimes sustaining the Assistant City Attorney's objections, the chairman, on four occasions, indicated that he was taking Collison's evidence under advisement.

¶14 Even after the chairman indicated that he would take the evidence under advisement, the Assistant City Attorney persisted in his objections. Ultimately, however, he also left the door open for evidence of contamination presented through means other than a Phase II report. Questioning the assessor, the Assistant City Attorney asked, "[T]o your knowledge has Mr. Collison ever, via a Phase II report *or any other method*, verified the existence of actual contamination on or beneath this property?" (Emphasis added.) The assessor

[3] And remarkably, at this point, the Assistant City Attorney even interrupted the Board of Review attorney, stating, "That is exactly my objection." Here, and throughout the balance of the hearing, the repeated objections are somewhat troubling. We caution the Assistant City Attorney to understand that artful attorneys can clearly make their objections and preserve their legal claims without pointlessly repeating objections that only disrupt the proceedings.

answered, "No." The Assistant City Attorney then asked, "Has Mr. Collison provided you with *any documentation* of anything other than speculation and conjecture as to the existence of any contamination?" (Emphasis added.) The assessor answered, "Not to the existence of contamination, no." And near the end of her testimony, the assessor added that Collison had not substantiated his claim of contamination by "bring[ing] in any Phase II study *or anything* as required by our office." (Emphasis added.)

¶15 While the record leaves much to be desired, and while the chairman never explicitly clarified his ruling on the evidentiary issue, the Board of Review's written decision establishes that the Board did indeed consider the evidence the chairman had taken under advisement. The decision specifically refers to the "sworn testimony" Collison and his real estate consultant offered and, among its factual findings, clarifies that its determinations were based on more than the absence of a Phase II report:

> The taxpayer did not present an environmental engineering analysis to show that the property contained environmental contamination. The taxpayer testified that he has not performed either a Phase I or a Phase II environmental analysis on the property. Instead, the taxpayer testified that it is his belief that environmental contamination has occurred on neighboring property that may have migrated below the soils onto his property. The taxpayer also testified that there are four underground storage tanks located on the subject property, three of which contain drycleaning fluid, and one of which contains fuel oil, although there was no testimony or other evidence to show that the tanks have leaked or are leaking. The taxpayer testified that his property has been placed on a "do not acquire" list, by the City of Milwaukee, which he testified was due to risks associated with possible environmental contamination.

¶16 Further, the Board's final "[d]etermination[s]" do not even mention the ECS or Collison's failure to provide a Phase II report. Instead, specifically invoking the correct statutory standards, the determinations state, in part:

> Pursuant to § 70.32(1), Wis. Stats., real property must be valued in the manner specified in the Wisconsin Property Assessment Manual.
>
> ….
>
> The Board finds that the taxpayer's evidence of value is not reliable and does not conform to the valuation methods specified in the Wisconsin Property Assessment Manual. The taxpayer failed to meet his burden to prove his conjecture that the subject property contains environmental contamination. Moreover, even as to the contamination that the taxpayer suspects exists, the taxpayer failed to show any basis for determining the clean-up costs of the same, if any. Any reduction to the market value or assessed value of the subject property on this evidence would be pure speculation.
>
> The City's assessment was made on the best information available and the assessment method used was an appropriate method.
>
> The taxpayer failed to provide evidence that rebuts the presumption of accuracy granted by law to the Assessor's decision.

¶17 Nevertheless, Collison maintains that he introduced "ample evidence to demonstrate that the property [was] contaminated." He contends that "the best evidence may be the fact that [he] was willing to let the City relieve him of the property by foreclosing its property-tax lien," but that the City "refused to accept the property because of the liability associated with the contamination." Thus, he argues, although he is unable to "give the property away to the City, the Board still insists that a willing buyer would pay $65,300 for it and that [he] should pay taxes on the property accordingly." We are not convinced.

¶18 Collison's arguments ignore two critical aspects of his own expert's testimony before the Board of Review. First, Collison's expert conceded that while he believed the property was contaminated, "We do not have soil samples." Second, attempting to counter an assertion that Collison had done absolutely nothing to establish that the property was contaminated, Collison's expert testified that Collison had "gone to the extent of contacting an environmentalist and getting an idea of what the budget's going to be to correct this problem." Needless to say, failing to present soil samples or comparable evidence, and merely "contacting an environmentalist" fall far short of presenting compelling evidence of contamination. Thus, the record supports the assessor's testimony that Collison failed to present "any evidence" of contamination.

¶19 Moreover, as the assessor explained, the fact that Collison's property was on the City's "do-not-acquire" list due to *possible* contamination did not prove that the property was contaminated.

> [Assistant City Attorney]: What is your understanding of the "do not acquire" list?
>
> [Assessor]: It was a way of insuring that the city wouldn't obligate the … citizens of Milwaukee by incurring properties that would have to be remedated and put an excess burden on the citizens.
>
> [Assistant City Attorney]: Does the presence of a property on this "do not acquire" list constitute any confirmation that it's contaminated?
>
> [Assessor]: No, there wasn't [sic] any studies done specifically on any of the properties. They really just looked at the history of the use of those properties [on the do-not-acquire list].

¶20 Unquestionably, Collison was able to point to numerous factors strongly suggesting the likelihood of contamination on his property. The

property's fifty-year history as a dry cleaning facility, its presence on the City's "do not acquire" list, the opinion of the City's own environmental consultants that the property probably was contaminated, the presence of four underground tanks containing hazardous substances and the evidence of leaks from the tanks in the 1970's are not insignificant. Collison, however, failed to take any additional step—whether by Phase II audit or otherwise—to confirm or document the suspected contamination.[4] Thus, he failed to rebut the presumption that assessor's 1999 and 2000 valuations of his property were correct. *See* WIS. STAT. § 70.47(8)(i).

By the Court.—Order affirmed.

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

[4] Interestingly enough, Collison fails to acknowledge (and the City fails to point out) that the City's modification of the 2000 assessment apparently related not only to the removal of the storage tanks, but also to the cost of a Phase II report. According to the Key Engineering Group proposal to Collison, the cost for removing the underground tanks *and* providing a Phase II assessment would have been $13,703.

In his brief to this court, Collison incorrectly claims that Key "estimated the cost of a Phase II environmental report at anywhere between $10,000 and $200,000." The record establishes, however, that Key presented that estimate "for additional services" should "subsurface impacts [be] identified" during the Phase II audit.

By reducing the 2000 assessment by $13,000, the City, in effect, took into account the cost of obtaining a Phase II audit that, in turn, might have supported Collison's ultimate claim.