

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2010

A. John Voelker
Acting 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 Nos. 2009AP3122
2009AP3123**

**Cir. Ct. Nos. 2008CV2747
2008CV2749**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**No. 2009AP3122
BONSTORES REALTY TWO, LLC,**

PLAINTIFF-APPELLANT,

V.

CITY OF RACINE BOARD OF REVIEW,

DEFENDANT-RESPONDENT.

**No. 2009AP3123
J.C. PENNEY COMPANY, INC.,**

PLAINTIFF-APPELLANT,

V.

CITY OF RACINE BOARD OF REVIEW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Bonstores Realty Two, LLC and J.C. Penney Company, Inc. (collectively appellants) appeal from an order affirming the City of Racine Board of Review's decision upholding the city assessor's valuation of the Boston Store and Penney store in the Regency Mall for the 2008 tax assessment. The appellants argue that the Board arbitrarily disregarded their evidence rebutting the presumption of accuracy and then acted contrary to law by not holding the assessor to the proper burden of proof to support the assessment. We conclude that the appellants did not meet their initial burden of producing evidence that the assessment is incorrect or unlawful. We affirm the order of the circuit court.

¶2 The Boston Store was assessed at \$12,100,000. The assessment was based on the comparable sales approach, including the 2006 sale of the same Boston Store for \$13,600,000. The appellants presented evidence that the true fair market value of the Boston Store was \$4,800,000. The appellants' expert appraiser, Michael Kelly, opined that the 2006 sale of the Boston Store was not an arms-length transaction as it was a financing device.

¶3 The Penney store was assessed at \$12,600,000. The assessment was also based on the comparable sales approach and the 2006 Boston Store sale was one of the comparable sales. The appellants presented evidence that the true fair market value of the Penney's store was \$5,600,000.

¶4 Our review is of the Board's and not the circuit court's decision. *Anic v. Board of Review*, 2008 WI App 71, ¶8, 311 Wis. 2d 701, 751 N.W.2d 870.

The applicable standard of review is well defined:

Our review is strictly limited to whether (1) “the Board ‘kept within its jurisdiction’”; (2) “the Board ‘acted according to law’”; (3) “the action taken by the Board ‘was arbitrary, oppressive or unreasonable’ so as to represent ‘its will and not its judgment’”; and (4) “the evidence before the Board was such ‘that it might reasonably’ sustain the assessment.”

We lack jurisdiction to disturb the Board's findings and determinations except when the Board acts in bad faith; exceeds its jurisdiction; or fails to make the assessment on the statutory basis. We also can set aside the action of the Board if it “excluded from consideration evidence entitled to consideration or if the assessor based his [or her] valuation on improper considerations or went upon a false assumption or theory in determining the amount.”

A challenger to a property tax assumption has an uphill battle; the assessor's valuation is presumed to be correct. The challenger can only overcome the presumption by showing that the assessment is not supported by substantial evidence or the assessor's methods do not comport with statutory and administrative code requirements. If the challenger overcomes the presumption of correctness, the question we must answer is “whether credible evidence was presented to the board that may in any reasonable view support the board's determination.”

If there is a conflict in the testimony respecting the value of the property, the court does not substitute its opinion of the value for that of the Board of Review. When there is a conflict in the testimony, it is the task of the Board to determine the probity and credibility of the witnesses who appear before it. “If there is credible evidence before the board that may in any reasonable view support the assessor's valuation, that valuation must be upheld.”

Id., ¶¶8-11 (citations omitted).

¶5 Given our standard of review, we do not find it necessary to set forth the evidence offered by the appellants. Although their expert gave a complete explanation of all three approaches to value—income, comparable sales, and cost—the evidence simply represents a different way to value the property and did nothing to establish that the assessor’s comparable sales approach was not supported by substantial evidence or did not comport with statutory and administrative code requirements. The reasonableness of the competing opinion evidence is not, alone, enough to overcome the presumption of accuracy.

¶6 The use of the 2006 sale of the Boston Store as a comparable sale was questioned. The assessors explained why that sale could be treated as a market value sale: the sale price was consistent with other comparable sales, the rent was consistent with market rents, the lease explicitly stated it was a true lease and not a financing arrangement, a fee simple deed was utilized, and a transfer tax return indicated the sale price. There was substantial evidence to support the use of the 2006 sale as a comparable sale. Again, that the appellants’ expert was of a different opinion did not overcome the presumption of accuracy.

¶7 The Board was not required to adopt the view that the stores’ unique position as anchor stores in a large mall made the comparable sales inadequate. Because of the conflicting testimony, the probity and credibility of the evidence is for the Board to determine. We conclude that the Board kept within its jurisdiction, acted according to law, did not act arbitrarily, and that the evidence supports the decision the Board made.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

