

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 26, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0306

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NORTHPOINTE APARTMENTS
LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v.

BOARD OF REVIEW OF THE
VILLAGE OF BROWN DEER,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Reversed and cause remanded with directions.*

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

PER CURIAM. Northpointe Apartments Limited Partnership appeals from an order of the circuit court, which affirmed the Board of Review of the Village of Brown Deer's decision upholding the 1993 tax assessment. Northpointe claims that the assessment was erroneous because it failed to include all proper expenses. Because the assessment did not include a proper

account for expenses, it was not fixed on a statutory basis. Therefore, we reverse and remand to the circuit court with directions.¹

I. BACKGROUND

Northpointe is a 177-unit apartment complex located in the Village of Brown Deer. Northpointe received notice that its property value for 1993 was \$9,456,500. The assessment ratio of 92% was applied to this figure resulting in an assessed value of \$8,700,000. Northpointe filed an objection to the assessment with the Board. The Board conducted a hearing on August 16, 1993.

The parties agreed that the "income approach" was the proper method to value the property. At the hearing, Northpointe presented testimony from Stuart Nolan, who was a general partner in Northpointe's management company. Nolan testified regarding the actual income and expenses of the property and his analysis of the value of the property. Nolan indicated that his analysis of assessed value differed from the city assessor's value because the city assessor did not deduct for two types of expenses: the cost of rent-free apartments and reserves for replacements. John Curran, the Brown Deer assessor, presented testimony of estimates of income and expenses. Curran did not address Nolan's contention that he did not account for rent-free apartments in calculating the total operating expenses.

The Board affirmed the assessment figure reached by Curran. Northpointe petitioned the circuit court for a writ of certiorari. The circuit court concluded that the assessment was made according to the law and there was substantial credible evidence in the record to support the Board's decision. Accordingly, it affirmed the Board's decision. Northpointe appeals.

II. DISCUSSION

¹ Northpointe also claims that the assessment was erroneous because it: (1) was not made upon the best information; (2) violated the uniformity provision of Art. VIII, § 1 of the Wisconsin Constitution; and (3) was not properly determined in the first instance. Because of our disposition of this case, it is not necessary for us to address these additional claims of error. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

“Appellate review on certiorari is limited to consideration of whether the Board kept within its jurisdiction, acted according to law, or acted arbitrarily or in bad faith, and whether the evidence before the Board was such that it might reasonably sustain the assessment.” *Metropolitan Holding Co. v. Board of Review of Milwaukee*, 167 Wis.2d 134, 147, 482 N.W.2d 654, 660 (Ct. App. 1992), *rev'd on other grounds*, 173 Wis.2d 626, 495 N.W.2d 314 (1993). In addition, failure to make an assessment on a statutory basis is an error of law and correctable by the courts on certiorari. *Garton Toy Co. v. Town of Mosel*, 32 Wis.2d 253, 257-58, 145 N.W.2d 129, 132 (1966). We review the Board's decision independent of the circuit court's conclusions. See *Brighton Square Co. v. City of Madison*, 178 Wis.2d 577, 584, 504 N.W.2d 436, 439 (Ct. App. 1993).

The issue in this case is whether the Board acted according to law and whether the assessment was made on a statutory basis. If the Board did not act according to law, then its decision cannot stand. The law requires assessments to be calculated as specified in the MANUAL.² Section 70.32, STATS. The MANUAL allows assessment calculations to be conducted under an “income approach.” The income approach was apparently employed in the instant case. The MANUAL sets forth eight steps in applying the income approach:

1. Estimate potential gross income;
2. Deduct for vacancy and collection loss;
3. Add miscellaneous income;
4. Determine operating expenses;
5. Subtract operating expenses to derive net income;
6. Select the correct capitalization method;
7. Derive the capitalization rate;
8. Apply the capitalization rate to net income to arrive at a value estimate.

² 1 WISCONSIN PROPERTY ASSESSMENT MANUAL (Rev. 12/87)

MANUAL, 9-7.

Our review of the record reveals that the assessment was not calculated in accord with the MANUAL's eight-step income approach. The testimony indicates that Curran did not account for specific rent-free apartments in determining the operating expenses. Nolan's testimony that Curran's figure on operating expenses did not include the rent-free apartments was uncontroverted. Curran never explained how he reached the expense figure that he used in setting the assessment, he did not claim that he included the rent-free apartments in his expense analysis, and he did not explain why the rent-free apartments were not included in his expense analysis.³

In considering Northpointe's additional claim that reserves for replacement costs were also erroneously excluded, we note that the record does contain Curran's testimony regarding reserves for replacement costs. Based on this testimony, the Board was within its jurisdiction to accept Curran's reserves replacement figures instead of Nolan's. Therefore, we reject Northpointe's argument that reserves for replacements were not properly accounted for in the expense calculation.

Curran's failure to account for rent-free apartments in his figures, however, resulted in an erroneous application of the income method in violation of the law. Because the Board relied on this erroneous calculation, its affirmation of the assessment was not fixed upon a statutory basis and must be set aside. *Boostrom v. Board of Review of Town of Linn*, 42 Wis.2d 149, 156, 166 N.W.2d 184, 188 (1969). Therefore, we reverse the circuit court's decision and remand this case to the circuit court with directions to remand this matter to the Board, instructing the Board to set a proper valuation and assessment based on an appropriate expense figure.⁴

³ The Board argues that Curran included the rent-free apartments expense within his accounting for the vacancy rate. The Board directs us to a certain portion of the record that allegedly supports this contention. We have reviewed this portion of the record as well as the record in its entirety, but are unable to find any evidence to support the Board's contention.

⁴ The Board contends that despite all the proceedings that have taken place, Northpointe cannot maintain the instant action because it failed to comply with the notice provisions of § 893.80(1),

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

(.continued)

STATS. The Board filed a motion seeking summary judgment on this basis in the certiorari action in the circuit court. The circuit court, however, disposed of the case on the merits and did not address this issue.

The Board's argument is based on the supreme court case, *DNR v. City of Waukesha*, 184 Wis.2d 178, 515 N.W.2d 888 (1994), which held that § 893.80(1), STATS., “applies in all actions.” *Id.* at 183, 515 N.W.2d at 890. Northpointe argues that § 70.47(7), STATS., governs the procedures necessary to contest a property tax assessment.

Although we agree with Northpointe that § 70.47(7), STATS., governs property assessment challenges, the *DNR* case held that *all* actions are subject to § 893.80(1), STATS. The analysis of whether Northpointe can maintain this action, however, does not stop with that conclusion. We must also consider whether Northpointe's compliance with § 70.47(7), in essence, satisfied the notice requirements of § 893.80(1).

The objective of § 893.80(1), STATS., is to give the municipality an opportunity to resolve the claim without litigation. *DNR*, 184 Wis.2d at 195, 515 N.W.2d at 894-95. Clearly, this objective is satisfied by the hearing conducted in front of the Board. The Board has the opportunity, via the hearing conducted in accord with § 70.47(8), STATS., to resolve the claim, i.e., the challenged assessment. Accordingly, we conclude that the unique mechanics employed in a hearing challenging a property tax assessment, in essence, satisfy the purpose of § 893.80(1). Therefore, Northpointe's failure to comply with the notice dictates of § 893.80(1) does not preclude it from maintaining this action.