

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 7, 1996

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. 95-2457**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**PARADISE PLACE ASSOCIATES  
LIMITED PARTNERSHIP,**

**Plaintiff-Appellant,**

**v.**

**CITY OF WEST BEND,**

**Defendant-Respondent.**

APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

NETTESHEIM, J. Paradise Place Associates Limited Partnership appeals from a judgment which dismissed its challenge to real estate tax assessments by the City of West Bend for the years 1993, 1994, 1995 and 1996. Paradise challenges the assessment method used by the city assessor

and approved by the City of West Bend Board of Review (the board). We affirm.

### FACTS

Paradise is the owner of a subsidized apartment complex developed pursuant to the low income housing credit program enacted by the Federal Tax Reform Act of 1986, 26 I.R.C. § 42 (1986). As a participant in this program, Paradise must provide low income rental units for fifteen years for which it can receive tax credits up to \$2.5 million over a ten-year period.

For the year 1993, the city assessor used the cost method to value Paradise's apartment complex. This method produced a valuation of \$2,105,500. Paradise filed an objection with the board. At the hearing before the board, Paradise argued that subsidized housing must be assessed pursuant to the income method, not the cost method. Pursuant to the income method, Paradise contended that the value of the property was \$1,011,687.97.<sup>1</sup>

The assessor testified that while he considered using the income method, he ultimately rejected it because it was too "flexible." The assessor explained that the variable cap rates on taxes produce widely disparate valuations under the income method.

The board adopted the assessor's valuation. Paradise appealed to the circuit court. There the parties stipulated that the court's decision would

---

<sup>1</sup> Paradise arrived at this value using a 10% cap rate for the property and a 3.8% cap rate for taxes.

also govern Paradise's subsequent objections for the years 1994 and 1995, since the assessments for those years' methods were based upon the 1993 assessment. The circuit court dismissed Paradise's complaint, concluding that the board acted in accordance with the law. Paradise appeals. In this court, the parties have stipulated that our decision will additionally govern the 1996 assessment to which Paradise has also objected.

#### DISCUSSION

We review the board's decision independent of the circuit court's conclusions. *City of West Bend v. Continental IV Fund*, 193 Wis.2d 481, 485, 535 N.W.2d 24, 26 (Ct. App. 1995). Nonetheless, we value the circuit court's decision on the matter. See *Scheunemann v. City of West Bend*, 179 Wis.2d 469, 475-76, 507 N.W.2d 163, 165 (Ct. App. 1993). As does the circuit court, we “determine, from the evidence presented to the board of review, whether the valuation was made on the statutory basis.” *Rosen v. City of Milwaukee*, 72 Wis.2d 653, 661, 242 N.W.2d 681, 684 (1976).

This inquiry requires that we consider the following factors: (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. *Darcel, Inc. v. City of Manitowoc Bd. of Review*, 137 Wis.2d 623, 626, 402 N.W.2d 344, 345-46 (1987). “If the board of review does not act arbitrarily or dishonestly and the evidence presented before it is

sufficient to furnish any substantial basis for the valuation found by the board, its decision will not be disturbed." *Id.* at 626, 402 N.W.2d at 345.

We begin by presuming that the assessor acted according to the law. "The assessor's valuation of the property is prima facie correct and is binding upon the board of review in the absence of evidence showing it to be incorrect." *State ex rel. Mitchell Aero, Inc. v. Board of Review*, 74 Wis.2d 268, 281, 246 N.W.2d 521, 528 (1976). Thus, the burden of producing evidence that the assessment is incorrect is upon the party challenging the assessment and the presumption survives until it is met by credible evidence. See *Rosen*, 72 Wis.2d at 662, 242 N.W.2d at 684. Therefore, before this court will disturb the board's determination, Paradise must do more than present us with an alternative assessment. Rather, Paradise must establish that the City's assessment was incorrect.

Paradise contends that the assessor did not follow the statutory basis for tax assessment. Section 70.32(1), STATS., sets out the procedure for determining the fair market value of real estate for assessment purposes:

**Real estate, how valued.** (1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale.

Fair market value is commonly defined as the amount for which the property could be sold in the open market by an owner willing and able but

not compelled to sell to a purchaser willing and able but not obliged to buy.

*State ex rel. Levine v. Board of Review*, 191 Wis.2d 363, 372, 528 N.W.2d 424,

427 (1995). The best information of such fair market value is:  
a sale of the property or, if there has been no such sale, then the  
sales of reasonably comparable property. In the  
absence of such sales, the assessor may consider all  
the factors collectively which have a bearing on value  
of the property in order to determine its fair market  
value.

*Id.* at 373, 528 N.W.2d at 427-28 (quoted source omitted).

In this case, the parties agree that there were no recent arm's-length sales of either the subject property or comparable properties from which the assessor could make the assessment. Thus, the assessor was required to: analyze and collectively consider all of the information available which [could] be used to estimate the value of the subject. This would include like sales, a sale of the subject which may not be recent, the cost and income approaches to value, asking prices, options to purchase, outside appraisals of the subject, and the assessments of other comparable properties.

WIS. DEP'T OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WIS. ASSESSORS 7-3 (rev. 12/92; rev. 12/94).

As noted, the debate in this case is whether the assessor should have selected the income method or the cost method.<sup>2</sup> We first observe that the

---

<sup>2</sup> In support of its argument, Paradise refers to a 1994 revision in the WISCONSIN PROPERTY ASSESSMENT MANUAL, which states, "The income approach is the most useful and often the only method for valuing subsidized housing." However, even though the parties have stipulated that our decision will govern the assessments made after these amendments became effective, the specific assessment we are reviewing is that approved at the 1993 board of review proceedings. That

manual does not require that the assessor use one method or the other. Rather, the manual allows the assessor to select and consider those approaches which best inform about the value of the property. In the absence of arm's-length sales, the assessment is proper if the assessor considered the best information available and took into account all of the factors which affect the value of the property. *Waste Management of Wis., Inc. v. Kenosha County Bd. of Review*, 184 Wis.2d 541, 557, 516 N.W.2d 695, 702 (1994).<sup>3</sup>

At the hearing before the board, the assessor explained that while he considered the income method, he ultimately rejected it as too flexible because the cap rates used by assessors and appraisers varied substantially. Thus, the assessor determined that the income method produced “a lot of room for error.”

The facts of this case bear out the assessor's concern. When the assessor learned that Paradise had objected to the assessment on the basis that the income method should have been used, he performed an income method valuation using the rental figures previously supplied by Paradise. The assessor applied a cap rate of 12.44%. This rate was based on a nationally recommended standard of 9.5%, plus the 2.94% used by the City. This analysis  
(..continued)

assessment was based on the manual which did not include the later amendment. Therefore, our decision is based on that previous version of the manual.

<sup>3</sup> In the revised versions of the manual, the section addressing subsidized housing contains instructions as to the applications of both the income and cost approaches. See 1 WIS. DEPT OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WIS. ASSESSORS 9-27 (rev. 12/94); 1 WIS. DEPT OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WIS. ASSESSORS 9-25 (rev. 12/93). The inclusion of instructions for both approaches implies that an assessment using either the cost or income approach is in conformance with the manual.

produced a valuation very close to that obtained by the assessor under the cost method. Paradise, however, used a cap rate of 13.8% in its calculations, producing a valuation of approximately \$1,000,000 less than the assessor's. In its decision, the circuit court noted the parties' "widely divergent assessments based on the CAP rate as well as projections of income."

This record supports the assessor's opinion that the income method is too flexible and leaves too much room for error. Given the presumption of correctness which we accord the assessor's valuation, we hold that the board was entitled to accept the assessor's cost approach.

Paradise further complains that the assessor did not testify as to the exact factors, such as depreciation and the restrictions imposed on subsidized housing, which he took into consideration when he performed his cost method valuation.<sup>4</sup> However, the burden was on Paradise to present evidence that the assessor did not follow the statutory basis for the assessment. Paradise's principal contention was that subsidized housing should be valued by the income method, not the cost method. Paradise did not otherwise contend that the mechanics of the assessor's cost approach were deficient. In the absence of such evidence, the board did not act arbitrarily or exceed its jurisdiction in sustaining the original assessment. See *State ex rel. Collins v.*

---

<sup>4</sup> The manual sets forth the following steps which the assessor must take when applying the cost method: (1) estimate the land value; (2) estimate reproduction or replacement cost of the structure; (3) estimate accrued depreciation; (4) subtract accrued depreciation from the estimate of the cost new to arrive at a present value for the improvements; and (5) add the present value of the improvements to the estimated land value for a total property value. 1 WIS. DEP'T OF REVENUE, PROPERTY ASSESSMENT MANUAL FOR WIS. ASSESSORS 7-16 (rev. 12/92).

*Brown*, 225 Wis. 593, 594, 275 N.W. 455, 456 (1937) (the assessor's valuation is prima facie correct and will not be set aside in the absence of evidence showing it to be incorrect).

Paradise also contends that *Metropolitan Holding Co. v. Board of Review*, 173 Wis.2d 626, 495 N.W.2d 314 (1993), requires that property subject to government restrictions be valued using the income approach. We disagree. In *Metropolitan*, both the assessor and the property owner used the income method. The debate turned on whether actual income or estimated market rents should have been used. *Id.* at 628, 495 N.W.2d at 315. *Metropolitan* merely sets forth parameters to be followed when applying the income approach. *Id.* at 631-32, 495 N.W.2d at 316-17. *Metropolitan* did not implicate the cost approach and it does not mandate the use of the income approach over the cost approach when the latter is used. As such, *Metropolitan* does not control.<sup>5</sup>

Paradise next contends that the assessor ignored the income restrictions on the property. However, this argument assumes that the assessor was obligated to use the income method. We have already held that the assessor was entitled to select the cost method and that the board was entitled to respect that choice. Moreover, when the assessor performed an income method valuation,

---

<sup>5</sup> Paradise also relies on *State ex rel. Algoma Housing Co. v. Board of Review*, 166 Wis.2d 675, 480 N.W.2d 786 (Ct. App. 1991), and *Darcel, Inc. v. City of Manitowoc Board of Review*, 137 Wis.2d 623, 405 N.W.2d 344 (1987). However, those cases concern the valuation of property when an arm's-length sale is available; they do not address whether the income approach must be used when valuing property subject to government restrictions. See *Algoma*, 166 Wis.2d at 677, 480 N.W.2d at 787; *Darcel*, 137 Wis.2d at 624, 405 N.W.2d at 344-45. Because there was not an arm's-length sale in this case, these cases have no bearing on this appeal.



after Paradise filed its objection, the assessor used the actual rental figures from the previous year as provided by Paradise. As noted, this method produced a valuation very near that produced by the cost method.<sup>6</sup>

Finally, Paradise contends that the assessment was improper because the board included the value of tax credits in the valuation. We disagree. While some of the evidence and portions of the board's deliberations addressed these credits, the board's ultimate decision was to adopt the assessor's cost method valuation. This method does not utilize tax credits.

We conclude that Paradise failed to meet its burden of proving that the assessment method employed by the assessor was incorrect. There was substantial and credible evidence before the board that the valuation of the property was made on the statutory bases. We agree with the circuit court conclusion that “there is a reasonable ground for belief that the [board's] decision is the result of honest judgment ....” *State ex rel. Mitchell Aero*, 74 Wis.2d at 281, 246 N.W.2d at 528. Accordingly, we affirm the judgment of the circuit court.

*By the Court.* — Judgment affirmed.

Not recommended for publication in the official reports.

---

<sup>6</sup> The assessor testified, “If we did take [economical versus the actual rent] into consideration, and use our cap rates [12.44%], using last year's rents which they furnished us last year; and if we used the low end of these rents that they are receiving ... [w]e'd still come out with a value of \$2,079,600 ....”