



LEGAL ISSUES

RELATING TO COUNTY GOVERNMENT

“Dark Store” Theory Finally Rejected

THE WISCONSIN SUPREME COURT SPEAKS

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Wisconsin’s counties have been closely monitoring the “dark store” property tax assessment issues since the Wisconsin Supreme Court’s *Walgreen Co. v. City of Madison* decision in 2008.¹ In the years following the *Walgreen Co.* decision, municipalities and assessors argued that property owners pushed the limits of the *Walgreen Co.* decision, and big-box property owners argued that assessors were failing to follow state law when not using “dark” or distressed properties as a comparable when making an assessment for an occupied property. The consequences associated with recognizing the “dark store” theory pushed by big-box retailers are severe — a significant decrease in commercial property assessed value has the effect of transferring the property tax burden to residential property owners.²

In *Lowe’s Home Centers, LLC v. City of Delavan*,³ the Wisconsin Supreme Court sided with municipal government and brought clarity to the debate over whether assessors should use a “dark store” as a comparable property when establishing the assessed value of an occupied property. Thanks to a tremendous effort expended by the League of Wisconsin Municipalities, in a unanimous decision, the court struck down retailers’ ability to utilize the “dark store” method of valuation across the board seemingly once and for all.

The *Lowe’s* case assists Wisconsin’s counties, which already face challenges in funding essential county

operations because of the statutory levy limit, by clarifying the use of assessment methods that focus on the highest and best use of commercial property, and that using “dark store” methodology is not acceptable when other, more acceptable methods of valuation exist. The clarification set forth in the *Lowe’s* case will likely result in large retailers being taxed in a more uniform manner in accordance with Wisconsin law. Coincidentally, it may also provide large retailers pause before closing stores and challenging assessments.

► The legal basics of tax assessment in Wisconsin

Valuation of real estate and property tax assessment is governed by Wis. Stat. § 70.32, which requires that property must be valued in the manner specified in the Wisconsin Property Assessment Manual referenced in Wis. Stat. § 73.03(2a).⁴ Wis. Stat. § 70.32(1) also requires assessments be completed “from actual view or from the best information that the assessor can practicability obtain, at the full value which could ordinarily be obtained therefor at private sale.”⁵

The Wisconsin statutes set forth a “hierarchical valuation methodology,” of “best information” in determining a property’s fair market value. The best source of valuation information is a recent arm’s-length sale of the subject property between a willing buyer and a willing seller.⁶ If a recent sale of the subject property has not occurred, then an assessor should use recent arm’s-length sales of “reasonable comparable properties.”⁷ This method

is also known as the “sales comparison approach.” Finally, if neither an arm’s-length sale of the subject property nor an arm’s-length sale of reasonably comparable properties has recently occurred, an assessor may consider all factors collectively that have a bearing on the subject property’s value. These factors include cost, replacement value, income and location.⁸

The “dark store” property tax assessment theory involves comparing the value of large, occupied commercial stores (also known as “big box” stores”) to vacant or “dark” big box stores for purposes of establishing value in a sales comparison approach. Large retailers and other business organizations argue that vacancy is irrelevant when comparing properties for assessment purposes. Most municipalities and assessors reject this approach and argue a property’s occupancy status is a relevant factor in establishing a proper comparison. Municipalities and assessors support this position by citing the Wisconsin Property Assessment Manual’s statement that dark and distressed properties should not be used “as comparable properties unless the subject property is similarly dark or distressed.”⁹

The Wisconsin statutes set forth a process of review if there is disagreement with the final assessed value.¹⁰ An owner or other impacted party¹¹ may file an objection with the assessing municipality’s board of review, which hears evidence and determines whether the assessor’s valuation is correct.¹² An owner who is not satisfied with a board of review’s decision may appeal that decision by filing (a) for certiorari review to the circuit court pursuant to Wis. Stat. § 70.47(13); (b) a written complaint with the Wisconsin Department of Revenue requesting reassessment pursuant to Wis. Stat. § 70.85; or (c) an excessive assessment action pursuant to Wis. Stat. § 74.37.¹³ The three appeal options are distinct proceedings with different legal requirements.

If a property owner files a claim for excessive assessment pursuant to Wis. Stat. § 74.37, the circuit court may conduct its own evidentiary review.¹⁴ The court weighs the evidence presented by both the objector and the taxing authority, and then determines whether the assessment complies with applicable law. The court must give

deference to the municipality’s original assessment, and an objector must present “significant contrary evidence” to overcome the presumption of correctness afforded the original assessment.¹⁵

The “presumption of correctness” prong and whether assessments using “dark stores” as comparable properties were sufficient evidence to overcome the presumption of correctness came to a head in Lowe’s.

► **The Lowe’s case facts**

The owner in Lowe’s filed an excessive assessment action pursuant to Wis. Stat. § 74.37.¹⁶ After the city of Delavan denied Lowe’s claim for excessive assessment, the circuit court conducted a trial at which Lowe’s and the city presented evidence supporting their respective assessment methodology. The city’s assessors utilized the “cost approach” in preparing the original assessment and determined the property’s value to be \$8,922,300. To counter the city’s assessment, Lowe’s presented evidence utilizing the “sales comparison approach,” with its assessment coming in at \$4,600,000. In its methodology, Lowe’s assessor utilized six recently sold properties as comparable properties, all of which were unoccupied and had attributes considered “dark.” Several were also in receivership at the time of sale.¹⁷ Lowe’s argued that its appraisal was “significant contrary evidence” to overcome the presumption of correctness granted to the city’s original appraisal and that the city failed to follow the statutes and the Wisconsin Property Assessment Manual.

► **The Lowe’s decision**

The Wisconsin Supreme Court addressed two questions: (1) whether the trial court properly granted the city’s original assessment a “presumption of correctness;” and (2) whether the trial court properly ignored the “dark” properties used in Lowe’s assessment in determining whether Lowe’s had established “significant contrary evidence” to establish the city’s failure to follow the statutes and the Wisconsin Property Assessment Manual.

The court answered the first question by initially noting

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Lowe’s “argument is incorrect as a matter of both statutory law and logic.”¹⁸ In essence, and in a significant victory to municipal assessment methodology, the court held that the presumption of correctness applies “at the time the assessment is entered into the assessment role,”¹⁹ and the determination of whether the assessment complied with the Wisconsin Property Assessment Manual occurs after the presumption of correctness applies.²⁰ In other words, a reviewing court is required to provide deference to the original assessment prepared by the municipal assessor.

The second question before the Lowe’s court directly challenged the “dark store” theory: whether evidence using “dark store” comparables was “significant contrary evidence” sufficient to overcome the presumption of validity afforded to the city’s assessment, thereby demonstrating that the city’s assessment was excessive.

The Lowe’s court held that an assessment using “dark” or vacant properties as comparable properties was not sufficient evidence to overturn an assessment using occupied comparable properties. Put simply, it is proper to use vacancy as a factor in determining whether a property is comparable for purposes of conducting a sales comparison assessment (i.e., a vacant big box property is likely not comparable to an occupied big box property).

While the Lowe’s court noted that its decision does not create a definitive rule against the use of vacant properties in the assessment of occupied properties, the decision clearly eviscerates the “bright-line,” vacant-as-comparable rule for which big box retailers had advocated.

► Conclusion

While the process of assessing property for taxation purposes may seem mundane, it is critically important for ensuring the equitable distribution of the property tax burden. The Lowe’s case is a notable example of what may be at stake if novel theories of valuation are somehow allowed to take root. Thankfully, the Supreme Court rejected the “dark store” theory and upheld the

commonsense approach to valuation advocated by local governments and municipal assessors.

The WCA thanks the League of Wisconsin Municipalities and its members for organizing the legislative and legal effort to reject the “dark store” theory of valuation, which was no small undertaking. If you have any questions about the Lowe’s case or its impact, please consult with your corporation counsel or feel free to contact the League of Wisconsin Municipalities, the WCA or this column’s authors. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president and CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.

1. Walgreen Co. v. City of Madison, 2008 WI 80.
2. For the past few years, WCA joined with the League of Wisconsin Municipalities and other local government associations in requesting a legislative fix to the “dark store” problem, but the legislation was never able to garner enough support to be passed.
3. Lowe’s Home Centers, LLC v. City of Delavan, 2023 WI 8, reviewing Lowe’s Home Centers, LLC v. City of Madison, 400 Wis.2d 542, 970N.W.2d 568 (unpublished); State ex. Rel Collison v. City of Milwaukee Bd. of Rev., 2021 WI 48, ¶23.
4. See Wis. Stat. § 70.32(1); Lowe’s at ¶27.
5. Wis. Stat. § 70.32(1).
6. Lowe’s at ¶29.
7. Id.
8. See id. at ¶30. The full list of factors referenced by the Wisconsin Supreme Court are 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 produced by the owner.
9. See id., citing 1 Wisconsin Property Assessment Manual 9-12 (2016).
10. See Wis. Stat. § 70.47(7).
11. An objector to a property valuation for assessment purposes does not need to be an owner, and may be a tenant or other party with legal standing to challenge the valuation.
12. See Wis. Stat. § 70.47(7).
13. See Wis. Stat. § 74.37(4)(a).
14. See Bloomer Housing Ltd. Partnership v. City of Bloomer, 2002 WI App 252.
15. Wis. Stat. § 70.49(2); Lowe’s at ¶32.
16. Lowe’s at ¶¶ 9, 31.
17. Id. at ¶20.
18. Lowe’s at ¶34; ¶36.
19. Id. at ¶35, citing Wis. Stat. § 70.49(2).
20. Lowe’s at ¶37.