STATE OF WISCONSIN
SUPREME COURT

REGENCY WEST APARTMENTS LLC,

Plaintiff-Appellant-Petitioner,

v. Case No. 2014AP002947

CITY OF RACINE,

Defendant-Respondent.

On Review of a Decision of the
Court of Appeals, District II
Appeal from Circuit Court of Racine County
The Honorable Gerald P. Ptacek, Presiding
Trial Court Nos. 2013-CV-1546 and 2013-CV-1848

BRIEF OF RESPONDENT

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INTRODUCTION

Four judges have reviewed this matter. The conclusion by the Trial Court, affirmed unanimously by the Court of Appeals, is that the real estate assessments of the City of Racine for Regency West property for 2012 and 2013 were reasonable and not excessive. Four assessors, two of whom were licensed appraisers in the State of Wisconsin, and all of whom have had extensive experience with assessing properties in Wisconsin's largest city, Milwaukee, and in a medium sized community, Racine, for scores of years. These assessors followed the *Markarian* three tier hierarchy in assessing the Regency West property. *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 173 N.W. 2d 627 (1970). The outside assessors performed an independent valuation, supporting the conclusion that the City of Racine's assessments were not excessive. The testimony of the four assessors was expert opinion testimony. Necessarily, as the Trial Court stated: "The opinions provided by all experts in this case are all highly subjective" (App. 18). Plaintiff's expert, Scott McLaughlin, did not follow the *Markarian* three tier hierarch for the assessment of real estate in the State of Wisconsin. His four page report in any event pales in comparison to the detailed retrospective appraisal performed by Daniel Furdek and Peter Weissenfluh (Record 43, Exhibit 119, hereinafter cited "R. 43, Ex. 119").

RESTATED STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Regency West Apartments, LLC (hereinafter cited, "Regency West") overcome the presumption of correctness attaching to the City of Racine's Assessment?

The trial court held that the City of Racine Assessors employed the proper methodology required by case law and the Wisconsin Property Assessment Manual (hereinafter, "WPAM"). The trial court held that the City of Racine Assessors properly followed the three tier approach mandated by the *Markarian* decision by relying primarily on comparable sales, further supported by the third tier income approach to valuation. The City of Racine on both sales analysis and valuation methodology was further supported by the independent retrospective appraisals performed by outside appraisers Daniel Furdek and Peter Weissenfluh. The trial court further held that the four expert witnesses of the City of Racine were more credible than Regency West's sole appraiser witness, Scott McLaughlin (R. 31, p. 10; Appendix 19, hereinafter cited "App. 19"). Thus, the trial court held that the presumption of correctness attaching to the City of Racine's assessments was not overcome. The Court of Appeals affirmed this finding (App. 1-9). The Court of Appeals in particular relied upon deference given to findings of fact of the trial court, and particularly to the weight and credibility of expert witnesses (App. 5).

2. Were the assessments of Regency West property for 2012 and 2013 by the City of Racine excessive?

The trial court held that the assessments were not excessive based upon the trial court's determination of credibility. As noted by the Court of Appeals:

> [T]he validity of the City's approach is supported by the fact that two outside appraisers used several different methods of valuation and concluded that the assessments were not excessive. (App. 8)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City of Racine does not believe oral argument to be necessary. Although the record is large, the overwhelming weight of the evidence of the City of Racine: the testimony of the City of Racine Assessor at the time, Raymond Anderson; the City of Racine Assessor performing the fundamental work underlying the City's valuation, Janet Scites; Daniel Furdek, a certified appraiser and long time experienced municipal assessor; and Peter Weissenfluh, the former City Assessor for the City of Milwaukee, defeat the claim that the City's assessment is "excessive". Publication may be necessary to confirm long standing decisions of the Supreme Court of the State of Wisconsin, in particular *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 173 N.W. 2d 627 (1970) and *Bischoff v. City of Appleton*, 81 Wis. 2d 612, 260 N.W. 2d 773 (1978). Publication would affirm and clarify that simply because a taxpayer may show in some sense that the methodology employed by the assessor of the municipality was flawed does not excuse the taxpayer from presenting significant evidence contrary to the assessment value. Also, even if the taxpayer were to present

evidence that the methodology of the municipality's assessor was flawed and presents contrary evidence of the appropriate assessment value does not relieve the taxpayer of the burden of proof to establish that the assessment was excessive. In the case of the municipality, the municipality need not establish that the assessor was exactly correct, but rather that the assessment was not "excessive". It is the burden of the taxpayer to show that the assessment was "excessive". Conceivably, the municipality could do absolutely nothing more beyond the assessment if the taxpayer does not carry that burden. Publication would be beneficial in demonstrating that the burden of proof in a taxpayer assessment appeal lies with the taxpayer, not the municipality, and also, that in a *de novo* appeal pursuant to § 74.37, both the taxpayer and the municipality have the opportunity and the right to present evidence to establish whether or not the assessment was excessive.

STATEMENT OF THE CASE

A. Nature of the Case and Procedural Status

Regency West commenced the action by a Summons and Complaint asserting the right to a refund pursuant to Wis. Stats. § 74.37 for 2012 taxes, which was based on the January 1, 2012 assessment valuation of Four Million Four Hundred Twenty Five Thousand Dollars ($4,425,000.00) (R. 1 and R. 2). The Plaintiff also asserted a claim of unlawful taxes pursuant to Wis. Stats. § 74.35, which claim was abandoned. An assessment appeal pursuant to Wis. Stats. § 74.37 is *de novo*. The Trial Court therefore does not merely review presentation to

the Board of Review, a *certiorari* review, but makes its own determination. *Bloomer Housing Ltd. Partnership v. City of Bloomer*, 2002 WI App. 252, ¶ 11, 257 Wis. 2d 883, 653 N.W. 2d 309. The ultimate question before the reviewing court is whether the assessment is "excessive," not whether the assessment is exactly correct.

Wis. Stats. § 74.37 requires a contest before the Board of Review as a prerequisite to bringing a § 74.37 claim. Regency West did not contest the 2012 assessment and taxes before the Board of Review. However, the Court denied the City of Racine's Motion to dismiss on this basis, finding that Regency West did not receive the City of Racine's mailed notice of a revised assessment prior to Board of Review.

Subsequently, Regency West brought another action pursuant to § 74.37 seeking to overturn the 2013 assessment of Four Million One Hundred Sixty Nine Thousand Dollars ($4,169,000.00). The two assessment appeals were consolidated by a Stipulation and Order consolidating the actions for purposes of trial (R. 17, p. 2).

Following trial and post-trial briefing, the Trial Court rendered its decision denying the claim of excessive taxation (R. 31, App. 10-21).

Regency West appealed the Trial Court's decision. The Court of Appeals affirmed the decision (App. 1-9). In its decision the Court of Appeals deferred to the Trial Court's findings of fact and noted that when a reasonable inference can be drawn from the evidence, the Court of Appeals must accept the inference drawn

by the fact finder (App. 5). The Court of Appeals also noted it is "within the province of the fact finder to determine the weight and credibility of expert witnesses' opinions." (*Id.*) The Court of Appeals cited the Trial Court's finding:

> That four very experienced assessors concluded that the comparable sales approach could be applied here and that comparable properties existed for the sake of comparison is very compelling testimony (App. 9 and Trial Court Decision at App. 17).

As for the City's approach to the assessment, the Court of Appeals stated, "[T]he validity of the City's approach is supported by the fact that two outside appraisers used several different methods of valuation and concluded that the assessments were not excessive" (App. 8). The Court of Appeals also found grounds to agree with the Trial Court's findings of credibility by noting the apparent unfamiliarity of Regency West's sole expert witness, Scott McLaughlin, with the three tier *Markarian* methodology (App. 8-9).

B. Supplemental Statement of Facts

City Assessor Janet Scites performed the valuation of the Regency West property in 2012 and 2013 (R. 37, p. 134). Janet Scites had overall responsibility for placing assessment values on approximately Seven Thousand Five Hundred (7,500) properties (R. 38, p. 231). Because of the sheer number of properties the City of Racine uses mass appraisal techniques (R. 38, p. 238-Scites; R. 39, pp. 64-65-Anderson). Pete Weissenfluh, the Chief City Assessor for the City of Milwaukee for over twenty-five (25) years, confirmed that mass appraisal techniques are necessarily used in communities with large numbers of properties

(R. 45, p. 129). Mass appraisal is a method of applying values to several hundred properties or several thousand to try to make every property as equitable as possible within each grouping (R. 38, p. 238-Scites; R. 39, pp. 64-65-Anderson).

Using mass appraisal techniques and the best information available to her, Janet Scites valued the Regency West property at Four Million Four Hundred Twenty Five Thousand Dollars ($4,425,000.00) as of January 1, 2012 (R. 38, p. 239; R. 42, Ex. 11). She estimated expenses for the property based upon her experience and used a capitalization rate of Eight and Five-Tenths Percent (8.5%), which reflected market rates (R. 38, pp. 237-238).

When an objection is filed, the objection is heard before the Board of Review. Regency West did not appear before the Board of Review with respect to the 2012 valuation. The Trial Court held that although the City of Racine had mailed the notice of assessment, there was no evidence that Regency West had actually received the notice of the revised 2012 assessment so that appearance before the Board of Review, otherwise a pre-requisite to bringing an action pursuant to Wis. Stats. § 74.37. A Board of Review hearing was not necessary for Regency West's 2012 appeal. Because of the lack of a Board of Review hearing on an objection for the 2012 valuation, the City of Racine Assessors Office did not develop any other method of valuation beyond mass appraisal.

For the mass appraisal valuation used by Janet Scites and the Racine City Assessors Office for 2012, Janet Scites used an income approach (R. 42, Ex. 11). She stabilized expenses to bring the estimated and calculated expenses for

Regency West into line with the Assessor's Office experience with other § 42 properties in the City of Racine (R. 38, pp. 236-237 and R. 39, pp. 5-6). She did the same with respect to the vacancy rate, using a rate consistent with the actual reported rate of three vacancies out of seventy-two (72) units for Regency West (R. 38, pp. 235-236). She used a cap rate based upon the market rate derived from information available to the City Assessor's Office (R. 38, p. 237). Wisconsin law supports the stabilizing of income and expenses when an income approach is employed for valuation. *ABKA Limited Partnership v. Board of Review of the Village of Fontana-on-Geneva-Lake*, 224 Wis. 2d 551, 563-4, 591 N.W. 2d 879 (1999). Regency West's expert Scott McLaughlin conceded that stabilization was appropriate when using the income approach (R. 38, p. 182).

For the January 2, 2013 valuation report, Janet Scites determined that there were three comparable properties to be used for the sale comparison approach to valuation. She placed a value of Four Million One Hundred Sixty Nine Thousand Dollars ($4,169,000.00) on the property as of January 2013 (R. 43, Ex. 12). During trial she explained her choice of comparables, the adjustments she made to the comparables, and relevant Racine market information, further confirming that all comparables were arm's-length sales (R. 38, pp. 243-251; R. 39, pp. 3-5). For verification purposes, she also performed a valuation based on the income approach. She considered the cost approach but did not use it (R. 38, p. 251).

Janet Scites' valuation was reviewed and approved by the City of Racine Chief Assessor, Raymond Anderson (R. 39, pp. 66-69). (See Assessor Raymond

Anderson's signed Assessor's Affidavit for both years (R. 43, Exs. 114 and 115)). Mr. Anderson is a state certified general appraiser, which qualifies him to appraise subsidized housing (R. 39, p. 62).

Witnesses Daniel Furdek and Peter Weissenfluh supported the valuations of the City of Racine for the Regency West property. Mr. Furdek is an expert appraiser whose extensive background in appraisals and municipal assessment is detailed in his resume (R. 43, Ex. 117). Peter Weissenfluh was the City Assessor for the City of Milwaukee for more than twenty-five (25) years with extensive experience with municipal appraisals and reviews (R. 43, Ex. 135). Both oversaw federally subsidized housing in their work as City Assessors (R. 40, pp. 9-11-Furdek; R. 45, p. 129-Weissenfluh).

Mr. Furdek and Mr. Weissenfluh prepared an appraisal report for Regency West properties for the years 2012 and 2013 (R. 43, Ex. 119). That report corroborated that the assessment valuations of the City of Racine Regency West property for both 2012 and 2013 was not "excessive." Mr. Furdek and Mr. Weissenfluh used four different methods of valuing the property, first relying upon the second tier method of valuation, sales comparison, as mandated by the *Markarian* hierarchy (pp. 40-47 of the report) (R. 43, Ex. 119). As a third tier income approach, they valued the property by analyzing both direct capitalization and discounted cash flow (pp. 48-61 of the report).

Finally, they also used a cost approach, which while difficult to apply because of numerous variables, had more validity than the typical case because of

the newly constructed nature of the property and availability of actual construction cost data (R. 40, pp. 90-96; R. 38, p. 227). Mr. Furdek and Mr. Weissenfluh did not consider the tax credits applicable to the Section 42 property (following Wis. Stats. § 70.32(1)(g)). In their cost approach, they deducted the value of the tax credits in determining the value of the property using that third tier approach (R. 40, pp. 93-96; R. 43, Ex. 119, pp. 62-63).

Regency West's expert witness Scott McLaughlin used the income approach in valuing the property in his four page report (R. 43, Ex. 40). He employed no other method of valuation for the property for either year. Nor did he consider other evidence of value, such as insurance, depreciation schedules, etc. He testified that he did not use the sales comparison approach for the Regency West property because of the lack of sales of comparable properties (R. 38, p. 102). Notwithstanding that opinion, he testified to substantial information for fifteen (15) tax credit improved properties sold from August 2010 to March 2013 in his Exhibit 46 (R. 43; R. 38, pp. 116-117). He also used Section 42 information for his capitalization rate opinion (R. 38, pp. 133-4 and 170-1; R. 43, Ex. 46). Obviously, he had substantial information available to him with respect to the sales of these properties which would have presumably permitted a comparable sales approach, with appropriate adjustments.

Although Mr. McLaughlin conceded that stabilization of income and expenses is appropriate when engaged in property valuation using the income approach (R. 38, p. 185), he did not do so in his four page report. Unlike Janet

Scites, Mr. McLaughlin had total access to the financial records of Regency West and in fact had actual income and expenses for 2012. Yet he did not use actual income and expenses for 2012, claiming that such information would not have been available to a potential buyer as of January 1, 2012 so that it was not relevant (R. 38, pp. 182-183). Then without stabilizing 2012 income and expenses, he used that data for his income approach for 2013 notwithstanding the fact that he had actual and budgeted income and expenses for 2013 when he made his valuation, once again relying on his position that a potential buyer would not have that information available so that it was not relevant to the valuation as of January 1, 2013. Both Mr. Furdek and Mr. Lerner testified that while potential buyers would look at budget and actual expenses, they would evaluate income potential on what they believe they can do (R. 40, pp. 22-23; R. 38, pp. 22-23). Actual information confirms what can be done.

In Mr. McLaughlin's income approach to valuation, he used expense figures for Regency West that were extraordinarily inconsistent. He used a payroll expense for 2012 of Forty Six Thousand Five Hundred Ten Dollars ($46,510.00), while for 2013 it was Eighty Seven Thousand Two Hundred Twenty Dollars ($87,220.00), with no explanation for the nearly double expense cost increase. He used advertising expenses of Four Thousand Two Hundred Dollars ($4,200.00) for 2012 and Twenty Seven Thousand Four Hundred Sixty Dollars ($27,460.00) for 2013, even though information in his file indicated that advertising expenses for 2013 were less than Two Thousand Three Hundred Dollars ($2,300.00), as shown

in his document (R. 43, Ex. 100; R. 38, p. 182; information confirmed as correct by Mr. Lerner, R. 38, pp. 31-2). His maintenance costs went from Eighty Nine Thousand Ninety Dollars ($89,090.00) in 2012 to Fifty Three Thousand One Hundred Sixty Dollars ($53,160.00) in 2013. All of the foregoing data is contained in his report (R. 43, Ex. 40).

The capitalization rate that he used in his income approach was based on the cap rates for other Section 42 properties (R. 43, Ex. 46). Although he had used the cap rate of Ten and Five-Tenths Percent (10.5%) for both tax years, he had recently used a cap rate of Nine and Two-Tenths Percent (9.2%) and Nine and Nine-Tenths Percent (9.9%) for Racine subsidized housing (Anderson testimony, R. 40, pp. 3-4). He conceded that he did not know Racine market cap rates (R. 38, p. 181).

Section 42 properties have limitations that affect salability, as is true for all government subsidized property. The WPAM treats all government subsidized properties in the same section (R. 43, Ex. 34, pp. 9-38-46). Mr. McLaughlin admitted that Section 42 properties represent an emerging market (R. 38, pp. 81-83, 193-McLaughlin). This is due in part to the time that has passed since initiation of the program and to the potential renewability of Section 42 properties for rehabilitation purposes (R. 38, p. 26 – Lerner testimony on renewability). Daniel Furdek noted the grant of renewed Section 42 rehabilitation credits for his Bradley Place comparable (R. 45, pp. 113-114).

Regency West's factual statement, which consists of thirteen (13) pages, contains less than one (1) page discussing the opinions, testimony, and exhibits of Daniel Furdek and Peter Weissenfluh. Regency West ignores the seventy (70) page appraisal of Mr. Furdek and Mr. Weissenfluh, instead choosing simply to attack their competence to render an opinion on whether or not the City of Racine's assessments were excessive. That criticism is interesting in view of the fact that these two individuals spent years in the Milwaukee City Assessor's Office (and in the case of Mr. Furdek, in Manitowoc as well), which involved the assessment of government subsidized housing, including Section 42 housing.

The Factual Statement of Regency West also implies criticism of Mr. Furdek and Mr. Weissenfluh for the reason that the Milwaukee Assessor's Office initially used the income approach in assessing subsidized properties. As testified by these two witnesses, the income approach was used initially in the assessment of subsidized housing in Milwaukee based upon mass appraisal principles. Once an objection was made to an assessment, other approaches would be developed, in accordance with the *Markarian* hierarchy, relying primarily upon the comparable sales approach in the absence of a direct property sale (R. 45, pp. 115-116).

Most telling of all, Regency West declines to discuss in its factual statement the comparable sales analysis performed by Daniel Furdek and Peter Weissenfluh for both assessment years. That approach relied upon a comparison with Section 42 properties. (The Court of Appeals noted this significant point in Footnote 6, appearing at App. 6.)

ARGUMENT

I. Regency West Failed to Overcome the Presumption of Correctness Attaching to the City of Racine's Assessment.

A. The Valuation of the City of Racine's Assessor is Presumed Correct.

1. The City of Racine's Assessment Methodology Properly Followed the *Markarian* Three Tier Assessment Methodology.

Courts are required to give presumptive weight to the City of Racine's assessment.

> The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions and proceedings involving such values, be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.
>
> Wis. Stats. §70.49(2).

The Court of Appeals in the case of *Allright Properties, Inc. v. City of Milwaukee*, explained how this presumption is to be applied in an action for excessive assessment under Wis. Stats. §74.37, holding as follows:

> A party that is dissatisfied with an assessment may bring an excessive tax assessment claim under Wis. Stats. §74.37(3)(d). "This is not a certiorari review." *Bloomer Hous. Ltd. P'ship v. City of Bloomer*, 2002 WI App. 252, ¶11, 257 Wis. 2d 883, 653 N.W. 2d 309. Acting pursuant to §74.37(3)(d), the trial court makes determinations concerning excessive tax assessment claims "without giving deference to any determination made at a previous proceeding," including a

> proceeding before the board of review. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶25, 245 Wis. 2d 86, 630 N.W. 2d 141. "The court must only give presumptive weight to the assessor's assessment." *Id.* (citing Wis. Stat. §70.49(2)). The assessor's assessment "'is presumed correct only if the challenging party does not present significant contrary evidence'" and "'[n]o presumption of correctness may be accorded to an assessment that does not apply the principles in the *Property Assessment Manual.*'" *Walgreen*, 311 Wis. 2d 158, ¶17, 752 N.W. 2d 687 (citations omitted; bracketing supplied by *Walgreen*). Stated differently, when a city assessor correctly applies the *Property Assessment Manual* and Wisconsin statutes, and there is no significant evidence to the contrary, courts will reject a party's challenge to the assessment.
>
> *Allright Properties, Inc. v. City of Milwaukee*, 2009 WI App. 46, ¶12, 317 Wis. 2d 228, 239-40, 767 N.W. 2d 567.

To overcome the presumption the owner must present "significant contrary evidence" or a challenge will be rejected. *Adams Outdoor Advertising Ltd. v. City of Madison*, 2006 WI 104, ¶25, 294 Wis. 2d 441, 717 N.W. 2d 803. The owner's evidence "must compel the conclusion that the assessor's valuation was incorrect." *Xerox Corp. v. Wisconsin Dept. of Revenue*, 114 Wis. 2d 522, 528, 339 N.W. 2d 357 (Ct. App. 1983).

Recently, in a case attacking an assessor's classification, the Wisconsin Supreme Court re-emphasized that the presumption applies to the underlying assessment. The Supreme Court, referencing Wis. Stat. §70.49(2) stated:

> Nevertheless, "the underlying assessment still carries a presumption of correctness."

> *Sausen v. Town of Black Creek Board of Review*, 2014 WI 9, ¶30, 352 Wis. 2d 576, 843 N.W. 2d 39.

In addition to overcoming the presumption of correctness, Regency West also has the burden of proof on each and every issue associated with the assessment. The *Sausen* Court stated, "[T]he taxpayer recognizes, as we do that the concept of presumption of correctness and burden of proof are intertwined." *Sausen*, at ¶20. "The concept of a 'presumption' is very familiar in the law, and it is closely related to the concept of a 'burden.'" *Id*.

> [T]he assessment needs no support by evidence in the first instance, but must stand, unless shown to be incorrect by reasonably direct and unambiguous evidence.
>
> *Sausen v. Town of Black Creek Board of Review*, 2014 WI 9, ¶34, 352 Wis. 2d 576, 843 N.W. 2d 39, citing *State ex rel. Giroux v. Lien*, 108 Wis. 316, 317-8, 84 N.W. 422 (1900).
>
> The court has stated that a landowner must overcome "the prima facie presumption in favor of the original *assessment*."
>
> *Sausen*, at ¶36; citing, *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 562, 94 N.W. 359 (1903). (emphasis in original)

Based upon the language in *Sausen*, not only is the City of Racine's assessment afforded the presumption of correctness, but in addition, Regency West has the burden to show if the assessment is not consistent with the law. The Wisconsin Supreme Court addressed how the burden of proof is to be applied

when determining whether a taxpayer has overcome the presumption of correctness afforded an assessment. The taxpayer who objects to an assessment bears the burden of proof to show that the assessment, on any issue, does not follow the law. *Sausen*, ¶¶ 36-38.

Thus, Regency West must not only overcome the presumption of correctness, but also must satisfy the burden of proof on all elements of its claim. The burden of proof does *not* shift to the government. "Conditions set forth in the *Property Assessment Manual* cannot be construed to change long-standing law and create a legal presumption that shifts the burden of proof from a taxpayer to a city." *Doneff v. City of Two Rivers Board of Review*, 184 Wis. 2d 203, 216, 217, 516 N.W. 2d 383 (1994). Instead, the overall burden of proof remains with Regency West. Relying on the testimony of Scott McLaughlin and his four page report, in the face of the evidence of four highly qualified assessors, Regency West failed to carry that burden.

2. The City of Racine Expert Witnesses Correctly Made the Third Tier Income Valuation.

Metropolitan Holding Company v. Board of Review of the City of Milwaukee, 183 Wis. 2d 626, 634, 495 N.W. 2d 314 (1993), held that in an assessment of subsidized property employing the income approach, it is necessary to use actual income and expenses as opposed to market income. Since Regency West was a new construction as of January 1, 2012, actual income and expenses were not available. The Assessor's Office therefore relied upon the experience of

the City of Racine with other Section 42 properties in the City for the expense calculation. Although actual income and expense information was available at the time of trial, Regency West's witness Scott McLaughlin did not use actual information in performing his analysis for 2012, nor did he use information that he had for 2013. (Compare R. 43, Ex. 40, his report, with his document, Ex. 100). He explained that he was not going to use "after-the-fact" information, which he found to be irrelevant to the valuation (R. 38, pp. 182-183). That opinion makes no sense in a *de novo* proceeding, although it may have and probably would have validity in most *certiorari* appeals. In *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 666, 242 N.W. 2d 681 (1976), the Court accepted an assessor's valuation based upon sales that occurred after the valuation date.

The *Metropolitan Holding* holding was limited by *Bloomer Housing Ltd. Partnership v. City of Bloomer*, 2002 WI App 252, ¶ 20 and *Mineral Point Valley Limited Partnership v. Mineral Point Board of Review*, 2004 WI App 158, 275 Wis. 2d 784, 686 N.W. 2d 697, which found that market information was required in developing a capitalization rate on the expense side of the income approach equation. These cases are cited for this proposition in the WPAM at pp. 9-38 – 9-39 (R. 42, Ex. 34). Regency West's witness Scott McLaughlin did not use market rates in determining the appropriate cap rate for his income valuation. The cap rate that the City of Racine used came from market rate information available to the City Assessor's Office (R. 38, p. 239). (Although the lower courts stated this is true only for bond of investment valuation, Mr. Furdek and Mr. Weissenfluh in

fact did perform a discounted cash flow valuation in Exhibit 119 (R. 43, pp. 59-61).

Janet Scites in her income approach stabilized expenses to bring the estimated and calculated expenses for Regency West into line with information available to the Assessor's Office and its experience with other Section 42 properties in the City of Racine (R. 38, pp. 236-237; R. 39, pp. 5-6). She did the same with respect to the vacancy rate, using a rate in fact consistent with Regency West's actual reported rate of three vacancies out of seventy-two (72) units (R. 38, pp. 235-236). Her cap rate was based upon the market rate as mandated by *Bloomer* and *Mineral Point*, based on information available to the Assessor's Office (R. 38, p. 237). Wisconsin law supports the stabilization of income and expenses when using the income approach. Regency West's expert Scott McLaughlin conceded this to be an appropriate principle (R. 38, p. 182). *ABKA Limited Partnership v. Board of Review of the Village of Fontana-on-Geneva Lake*, 224 Wis. 2d 551, 591 N.W. 2d 879 (1999).

Daniel Furdek and Peter Weissenfluh in their report and testimony also performed an income valuation of Regency West property as a cross check on their comparable sales analysis. They stabilized income and expenses (R. 45, pp. 11 and 135-6). According to direct capitalization analysis, they concluded that the property had a value based on an income approach of Three Million Eight Hundred Thirty Thousand Dollars ($3,830,000.00) for 2012 and Three Million Eight Hundred Ten Thousand Dollars ($3,810,000.00) for 2013 (Ex. 119, p. 58).

Using discounted cash flow analysis, the income approach valuation was Three Million Nine Hundred Eighty One Thousand Dollars ($3,981,000.00) for 2012 and Three Million Nine Hundred Seventy Eight Thousand Dollars ($3,978,000.00) for 2013. The income valuations performed by the City of Racine and those performed by Real Estate Appraisals support the valuations of the Regency West property using sales comparison and demonstrate that the assessments of the City of Racine were not "excessive."

B. The Lower Courts Correctly Approved the City of Racine's Assessment Methodology.

State ex rel. Markarian v. City of Cudahy, 45 Wis. 2d 683, 173 N.W. 2d 627 (1970), held that a three tier assessment methodology was to be used to determine the value of real property in the State of Wisconsin. That hierarchy was later codified in the assessment statute. Wis. Stats. § 70.32. The first tier in the hierarchy is an arm's-length sale of the subject property, which is the best evidence of value. There was no such sale for Regency West. One then proceeds to the second tier, consideration of sales of reasonably comparable properties. Only if there are no reasonably comparable sales, does one proceed to the third tier of the assessment methodology, which includes consideration of income, cost, or other evidence of value. If there are sales of comparable properties, the third tier valuation approaches serve as a check on the assessment to avoid an odd result. The Court found that the comparable sales approach was appropriate and should be applied given the opinions and conclusions of four experienced assessors who

had testified at trial (App. 8; R. 31, p. 8). See also *Adams Outdoor Adv. Ltd. v. City of Madison*, 2006 WI 104, ¶¶ 34 and 35, 394 Wis. 2d 441, 717 N.W. 2d 803, discussing the three tier methodology.

The WPAM treats all federally subsidized housing, including Section 8, Section 42 and eight other sections of federally subsidized housing listed at p. 9-38 of the WPAM, in the same section of the WPAM (R. 42, pp. 9-38-9-46). There is no case law or anything in the WPAM to invalidate use of the three tier hierarchy in assessing Section 42 or Section 8 properties. The WPAM emphasizes that all three approaches to value should be used and specifically references Wis. Stats. § 70.32, which incorporates the *Markarian* hierarchy (R. 42, Ex. 34, p. 9-44).

Because the 2012 assessment was not challenged at the Board of Review, the City of Racine Assessors Office based the valuation of Regency West only on mass appraisal techniques utilizing the income approach to value (R. 42, Ex. 11). For commercial properties assessors may use mass appraisal. Peter Weissenfluh, the City Assessor for Milwaukee for more than twenty-five (25) years, confirmed that in communities involving large numbers of properties mass appraisal techniques are used, which necessarily relies heavily on the income approach (R.45, p. 129). If there is a challenge, the assessor for the community involved will then proceed to other techniques of valuation, including a sales comparison approach (R. 45, pp. 115-116 – Furdek).

In 2013, a challenge was made before the Board of Review and Janet Scites prepared a sales comparison analysis and also looked at a cost approach in

addition to the income approach to valuation (R. 42, Ex. 12). Ms. Scites made adjustments to the comparables as required in the sales comparison approach as shown on page 13 of Exhibit 12 (R. 42; R. 37, pp. 135, 140, and 143-4; R. 43, Ex. 61; also defended at R.45, pp. 272-276; R. 39, p. 8). Although she performed a cost analysis, she did not rely upon it (R. 39, p. 4). For the income approach, she stabilized income and expenses based on her knowledge of the Racine Market (R. 45, pp. 275-276). City Assessor Raymond Anderson reviewed the valuations for both 2012 and 2013, affirming the value in his Assessor's Affidavits (R. 43, Exs. 114 and 115). He confirmed that in his opinion the assessments were not "excessive" (R. 40, pp. 6-7).

This is a *de novo* refund action, not a *certiorari* review. Consequently, the Trial Court was not restricted to the record at Board of Review (In fact there was no Board of Review record for 2012). *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, ¶ 45, 332 Wis. 2d 85, 796 N.W. 2d 17. Therefore, additional and subsequent evidence to Board of Review evidence presented at trial is material in determining whether the City of Racine's assessments for Regency West for 2012 and 2013 were "excessive."

The City of Racine presented the testimony and evidence of the City of Racine Assessor Raymond Anderson and the assessor actually performing the ground work for the valuation for Regency West, Janet Scites, which was buttressed by the testimony of two eminently qualified assessors, Daniel Furdek and Peter Weissenfluh. Both Mr. Furdek and Mr. Weissenfluh confirmed the

validity of the methodology used by the City of Racine Assessors Office and also the reasonableness of the market valuation placed upon the Regency West property (see credentials for Daniel Furdek, R. 43, Ex. 117, and for Peter Weissenfluh R. 43, Ex. 135 and R. 45, pp. 121-124). In their report marked as Exhibit 119, Mr. Furdek and Mr. Weissenfluh in great detail arrived at an appraised value for Regency West as of both January 1, 2012 and January 1, 2013, which in each instance was somewhat higher than the City's assessment for both years. They primarily relied upon a comparable sales approach with three comparable properties of subsidized housing. As required when performing a comparable sales analysis, they made adjustments in their grid appearing at pages 41 and 42 of their report.

Mr. Weissenfluh and Mr. Furdek, as well as the City Assessors, rendered the opinion that properties Section 42 units and Section 8 units were sufficiently similar for comparable sales valuation purposes. This opinion was based upon the market reality that rents for the properties were essentially the same (R. 45, pp. 164-5; R. 45, pp. 114-5 and 280; see also R. 40 on overall market sale prices). Janet Scites confirmed that for the Racine market (R. 39, pp. 4-5). Mr. Lerner conceded that the Regency West rents for Section 42 and Section 8 units on the property were the same (R. 38, pp. 7-8).

With respect to Regency West's claims of greater risk for the Section 42 properties compared to Section 8 properties, Mr. Furdek presented irrefuted testimony that his Bradley comparable had a three year waiting list so that vacancy

is not a large risk factor (R. 40, p. 98). Mr. Scites testified that section 42 properties generally have a waiting list (R. 38, p. 236). Mr. Lerner, the representative of Regency West, had to concede that only two (2) or three (3) of the seventy-two (72) units in Regency West were vacant as of February 2012, a vacancy rate of approximately Four Percent (4%) (R. 3, p. 5). He admitted the lease up risk was gone by 2013 (R. 38, p. 7).

As a *de novo* appeal, evidence of comparable sales is material to a determination of whether the assessment in 2012 or well as the assessment in 2013 was "excessive." The Trial Court in a *de novo* review can consider evidence developed after the assessment valuation date. What the market does is the best measure of a property's value.

The WPAM does state that "the income approach may be the most useful method for valuing subsidized housing…." (p. 9-45). The operative word in that quote is "may." The section further states that the income approach may be the most valuable because of the "limited availability of data." Data for federally subsidized housing, including Section 42 properties is increasingly available in light of an emerging market for that type of property (R. 40, p. 47 – Furdek; R. 45, p. 130 – Weissenfluh). The same page of the WPAM in discussing the sales comparison approach indicates that it might be necessary to "to perform a statewide search to find comparable sales." Interestingly, Regency West's witness Scott McLaughlin actually had statewide data for comparable sales of Section 42

properties, but did not use it for a comparable sales analysis (See information in R. 43, Exs. 45 and 46).

The WPAM affirms that compliance with statutes and case law is mandatory (R. 42, Ex. 29, p. 1-1). The WPAM does not and could not overrule the *Markarian* hierarchy or other case law. Moreover, in the introduction to the WPAM the Department of Revenue states,

> Property owners should understand that WPAM was meant to be interpreted in its entirety. Extracting material from one section without understanding how it fits into the other sections can result in misunderstandings. (R. 43, Ex. 108).

Four expert witnesses were of the professional opinion that there were comparable sales of properties sufficiently similar to Regency West to compel use of the sales comparison approach to value. The Trial Court found the opinions of the City's witnesses in this regard "very compelling" (App. 8, R. 31, p. 8). The Trial Court found:

> That four very experienced assessors concluded that the comparable sales approach could be applied here and that comparable properties existed for the sake of comparison is very compelling testimony. (App. 17, R. 31, p. 8; quoted by the Court of Appeals, App. 9)

The Trial Court further found:

> Credibility of the assessors and experts is critical to this analysis. Based upon the years of experience, knowledge and demeanor, this Court finds the testimony of the City's assessors and experts more credible than that of the plaintiff's expert, Scott

> McLaughlin. The City's assessors and their experts are very familiar and experienced in valuing property in the Racine and Southeastern Wisconsin area and McLaughlin is not. (App. 19, R. 31, p. 8, quoted in part by the Court of Appeals, App. 4)

Appellate Courts give great deference to Trial Court findings of witness credibility. Findings of fact by a Trial Court are upheld unless clearly erroneous. Wis. Stats. § 805.17(2); *Lessor v. Wangelin*, 221 Wis. 2d 659, 665-66, 586 N.W. 2d 1 (Ct. App. 1998) holding that witness credibility is a finding of fact. A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W. 2d 615. "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W. 2d 417. The weight and credibility to be given to expert witness opinions are "'uniquely within the province of the fact finder.'" *Bloomer Housing Ltd. P'Ship v. City of Bloomer*, 2002 WI App. 252, ¶ 12, 257 Wis. 2d 883, 653 N.W. 2d 309, quoting *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W. 2d 916 (Ct. App. 1993). The Trial Court's factual finding of greater credibility of the City of Racine witnesses compared to Regency West's one expert is not clearly erroneous.

The only "specialized" treatment that Section 42 property is to be given is described in Wis. Stats. § 70.32(1)(g). The statute prohibits an assessor from considering the effect on the value of the property of any federal income tax

credits. Neither the City Assessor nor Mr. Weissenfluh and Mr. Furdek violated that statute in making a sales comparison valuation.

Regency West asserts in its brief, particularly at page 8, that while the City's four assessors (two of whom are licensed appraisers in Wisconsin) have considerable experience, they are not qualified to assess Section 42 properties (see also argument at pages 23 and 24 of Regency West's brief). This even though Peter Weissenfluh and Raymond Anderson both have overseen the assessment of federally subsidized housing in Milwaukee and Racine, in the case of Mr. Weissenfluh two hundred (200) such properties (R. 45, p. 129). If Regency West's argument is taken to its logical conclusion, this would mean that assessors throughout the State of Wisconsin who have Section 42 properties within their jurisdiction would have to retain an outside "specialist" on Section 42 properties. This would certainly be a boon to Mr. McLaughlin's business, but it would be devastating to assessment practices throughout the State. Would the same requirement apply to the other nine types of federally subsidized housing listed on page 9-38 of the WPAM (R. 42, Ex. 34)? Regency West also argues that Mr. Furdek and Mr. Weissenfluh have not "ever developed, bought, sold or managed a subsidized housing project, nor did they have any special training on assessing subsidized housing." (Page 22 of Regency West's brief). It is unclear how the development or management of a subsidized housing project is a prerequisite credential for an assessor.

C. Regency West Failed to Present "Significant Contrary Evidence" to the City of Racine's Assessment.

1. Scott McLaughlin Violated the Assessment Hierarchy.

Wisconsin Statutes, Wisconsin Case Law, and the WPAM unequivocally establish a hierarchy of valuation methods for assessments, the three tiers or the *Markarian* hierarchy. Wis. Stats. § 70.32(1); *Adams Outdoor Adver. Ltd. vs. City of Madison*, 2006 WI 104, ¶ 34. Evidence of an arm's-length sale of the property in question is the best evidence of fair market value and is considered tier one. Absent a recent sale of the subject sale, sales of reasonably comparable properties must be considered as tier two evidence. Only if there is no arm's-length sale and there are no reasonably comparable sales in the third tier methodology be used. *Adams Outdoor, Id*.

Scott McLaughlin did not adhere to Wisconsin law in arriving at his valuation opinion. He showed ignorance of the three tier approach, testifying that the WPAM requires that the income approach be used as the primary method of valuing government subsidized housing (R. 38, p. 161). Although the WPAM states that the most reliable method of valuing Section 42 properties "may" be the income method, it does not state that the three tier approach is to be ignored in valuing Section 42 property. It could not assert that proposition since there is no case law supporting it.

Scott McLaughlin further displayed his lack of familiarity with the WPAM when he was unable to recognize the WPAM's introduction (R. 43, Ex. 108;

testimony at R. 38, p. 178). Mr. McLaughlin's incorrect approach to the assessment hierarchy is likely due to his lack of experience in this specific field of valuation. He acknowledged he never testified in an assessment challenge of a Section 42 property and has never testified in an assessment challenge of a Section 8 property at trial or deposition (R. 38, pp. 190-192). (See Court of Appeals Decision on this point, App. 8-9.)

Mr. McLaughlin claimed he could not use the sale comparison approach for the Regency West property because of the lack of sales of reasonably comparable properties. However, he had substantial information regarding sales of Section 42 properties shown in his expense comparison of comparable properties (R. 43, Ex. 45), and his tax credit improved sales summary (R. 43, Ex. 46). The sales he listed and analyzed in those exhibits were relatively recent. He clearly had extensive information available to him concerning the sales of these properties which should have permitted him to make adjustments necessary for sales comparison valuation. He declined to do the work necessary beyond his short four page report. He testified there was no need to do a sales comparison (R. 38, p. 175). His only testimony concerning specific comparable sales was limited to his criticism of the selections of sales and adjustments made by City Assessors Ray Anderson and Janet Scites, Appraiser Daniel Furdek and former Milwaukee City Chief Assessor Peter Weissenfluh. (The Trial Court's decision concluded that the properties relied upon by the City of Racine Assessors Office were sufficiently

"similar" to Regency West to allow for a valid comparison). (App. 17, R. 31, p. 8).

2. Scott McLaughlin's Income Approach to Value the Regency West Property is Invalid.

a. Mr. McLaughlin Violated the *Bischoff* Rule.

Mr. McLaughlin compounded the inadequacy of his approach with regard to the mandated hierarchy by incorrectly using the income approach to valuation. In *Bischoff v. City of Appleton*, 81 Wis. 2d 612, 619, 260 N.W. 2d 773 (1978), the Court held that income "cannot be considered as the sole controlling factor in determining value of either real or personal property." The *Bischoff* rule was confirmed in *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶¶ 72-74, 311 Wis. 2d 158, 752 N.W. 2d 687. The *Walgreen* decision noted the absurdity of a result which would follow it, the property is not income producing and only the income approach to valuation was used. If that were to be the situation, the value of the property would default to zero. *Adams Outdoor* also commented on the *Bischoff* rule:

> In this case, we think that would nullify the so-called *Bischoff* rule if we permitted the City assessor to object to all approaches and factors other than an income approach. We think it extraordinary that the assessor rejected out of hand such factors as cost, depreciation, replacement value, and insurance carried.
>
> *Adams Outdoor*, 2006 WI 104, ¶ 55

Even though Mr. McLaughlin represented the property owner, meaning he had available to him contemporary cost information for this newly constructed property, he did not consider cost. He could have determined replacement value from general information available, as well as insurance carried. He did none of that, simply providing a four page report with estimated and some reported income and expense information attached. He admitted he did not apply two methods of valuation (R. 38, p. 175).

Regency West argues at page 42 of its brief that the Courts have upheld sole reliance upon the income approach for subsidized housing. Cases addressing the issue have rendered decisions based upon solely the income approach in instances where both parties have agreed that that is the correct manner of valuation for the property at issuing those cases. See Peter Weissenfluh testimony based on his experience regarding this contention (R. 45, pp. 134-135).

Regency West cites *Northland Whitehall Apts. Ltd. P'ship v. City of Whitehall Board of Review*, 2006 WI App 60, 290 Wis. 2d 488, 713 N.W. 2d 646, as supporting the proposition that an assessor's value on comparable sales for valuation should be rejected. *Northland* rejected an assessor's attempt to use comparable sales for the reason that the sales were not reasonably close in time and were not shown to be arm's-length. The assessor also failed to make any reasonable effort at adjustments of the properties. The *Northland* case is unlike the subject case which involves the Court upholding a comparable sales approach by the Assessor's Office with appropriate adjustments and arm's-length sales

confirmation and similarly detailed adjustments and confirmation of arm's-length sales by Mr. Furdek and Mr. Weissenfluh. The *Northland* case also resulted in a decision that remanded the case to a Board of Review for further deliberations. It did not constitute an outright rejection of the appropriateness of the comparable sales approach to valuation, if reasonable adjustments were made. The City of Racine witnesses used recent sales, confirmed arm's-length transactions, and made reasonable adjustments.

b. Mr. McLaughlin Incorrectly Analyzed Income and Expenses for the Property.

Metropolitan Holding Company v. Board of Review of the City of Milwaukee, 173 Wis. 2d 626, 634, 495 N.W. 2d 314 (1993), held that in an assessment of subsidized property by the income approach, one must use actual income and expenses as opposed to market income. For the City of Racine's Assessor's Office assessment of Regency West for 2012, actual income and expenses were not available since it was new construction. The Assessor's Office therefore relied upon the experience of the City with other Section 42 properties. For the January 1, 2013 valuation, data was available for 2012 and later for most of 2013, supplemented by budget information. Even though actual income and expense information was available, Mr. McLaughlin did not use it for calendar 2012, explaining that it was "after-the-fact" information that was not relevant (R38, pp182-183). As previously noted, in a *certiorari* appeal, that might make

sense, but this is not a *certiorari* appeal. See *Rosen*, 72 Wis. 2d 653, accepting information based upon sales occurring after the valuation date.

Mr. McLaughlin ignored the uncontroverted testimony that only three (3) of the seventy-two (72) units in Regency West were vacant as of February 2012, a rate of approximately Four Percent (4%) (R. 38, p. 5, testimony of Mr. Lerner). Mr. McLaughlin used a Seven Percent (7%) vacancy rate. He also used expense figures for Regency West that varied drastically from 2012 to 2013 for payroll expenses, advertising expenses, and maintenance costs.

Mr. McLaughlin failed to stabilize expenses, a clear necessity when one is dealing with new property having inevitable startup costs. This is demonstrated dramatically with his strange calculations concerning advertising expense. His Exhibit 45 (R. 43) was an expense comparison that he prepared for similar properties that showed advertising expenses ranging from Four-Tenths Percent (0.4%) to One and Three-Tenths Percent (1.3%) and averaging less than One Percent (1%). He did not consider that information in his expense calculation. He failed to account for the actual significant variations in Regency West expense figures from 2012 to 2013. He had to stabilize income and expenses, but failed to do so. See *ABKA Limited Partnership*, 224 Wis. 2d 551, 564. On the other hand, Daniel Furdek explained his stabilization changes made in his income valuation during the trial (R. 45, pp. 15-16). Peter Weissenfluh did likewise (R. 45, pp. 135-136). Janet Scites also stabilized the numbers (R. 39, pp. 5-6).

3. Scott McLaughlin's Four Page Report Failed to Comply with the Uniform Standards of Professional Appraisal Practice (USPAP), as Required by Wisconsin Law.

Wis. Stats. § 458.24 granted authority to the Real Estate Appraisers Board to promulgate rules based in whole or in part upon the Uniform Standards of Professional Appraisal Practice (USPAP). Pursuant to that authority, the Department adopted USPAP in Wis. Adm. Code Chapter SPS 86. USPAP standards impose ethical requirements upon appraisers valuing property. Multiple chapters of USPAP were submitted in evidence: definitions, Standard Two reporting requirements, ethics, record keeping requirements, jurisdictional exception, and scope of work requirements (R. 43, Exs. 101, 102, 103, 104, and 105 respectively as well as USPAP 2012-2013, Ex. 37).

Astonishingly, Mr. McLaughlin testified there is no Wisconsin law requiring USPAP compliance (R. 38, p. 96). Mr. McLaughlin also testified that he did not have to comply with USPAP because his client, Foley & Lardner, did not require compliance (R. 38, p. 97). That opinion ignored the reality that his report was likely to be presented to representatives of the City of Racine for purposes of reviewing the assessment valuations, and if that failed, it was likely going to be presented to the Court for consideration.

Mr. McLaughlin, in any event, was of the interesting opinion that USPAP requirements (mandated by Wisconsin law), such as scope of work, certification, the standard two documentation, compliance, and record keeping were merely

technical and boiler plate (R. 38, p. 225). Although he felt compliance was not necessary, Mr. McLaughlin prepared a "report card" (R. 43, Ex. 47) criticizing Real Estate Appraisals, Inc., claiming lack of compliance in their extensive retrospective appraisal (R. 43, Ex. 119).

His four page report does not define the scope of work, has no certification, and fails to contain the reporting information required. In summary, Standard Two (R. 43, Ex. 102) requires the report to contain sufficient information to be understood, disclose assumptions and conditions, state the type of report, identify intended users, describe scope of work and intended use, describe the information analyzed and the reasoning supporting the analysis, opinions, and conclusions, and be certified. Mr. McLaughlin's report, Exhibit 40, violates USPAP in nearly every way possible.

Mr. McLaughlin's opinion regarding the non-applicability of USPAP is contrary to Wisconsin law. Wis. Adm. Code Section SPS 86.01(1) states:

> Certified and licensed appraisers shall comply with the standards of practice established by ch. 458, Stats., and chapters SPS-86 and the Uniform Standards of Professional Appraisal Practice (USPAP).

SPS 86.01(2) states:

> All appraisals performed in conjunction with federally related transactions and non-federally related transactions shall conform to the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time the appraisals are performed.

Mr. McLaughlin's testimony on USPAP compliance is wrong. His report violates Wisconsin law in failing to meet the needs of the ultimate user of the valuation of his property.

II. Regency West Failed to Prove that the Assessments for the Tax Years at Issue were "Excessive".

The issue before the Courts in a § 74.37 assessment appeal is to determine whether or not the municipal assessment is "excessive". Further, a § 74.37 appeal is a *de novo* refund action, not a *certiorari* review. Consequently, the Courts are not restricted to the record at Board of Review (in fact, there was no Board of Review record for the 2012 assessment). *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, ¶ 45, 332. Wis. 2d 85, 796 N.W. 2d 17. Therefore, additional and subsequent evidence to Board of Review evidence and subsequent to the municipality's actual determination of the assessments is material in determining whether the assessments were "excessive".

At trial, not only did Regency West have the right to present "new" evidence of its contentions concerning the assessments, but the City of Racine had that right as well. It sometimes appears from Regency West's arguments attacking the assessments of the City of Racine that it is mainly concerned about whether the initial valuations of the City Assessor's Office are all that matters. That is not so. The City presented substantial evidence at trial developed after the City imposed the initial assessments. The City presented extensive testimony by two eminently

qualified assessors, Daniel Furdek and Peter Weissenfluh (see credentials for Daniel Furdek, R. 43, Ex. 117; and for Peter Weissenfluh, R. 43, Ex. 135 and R. 45, pp. 121-124).

In their report marked Exhibit 119, Mr. Furdek and Mr. Weissenfluh at great detail arrived at an appraised value for Regency West as of both January 1, 2012 and January 1, 2013. In each instance their conclusion of value was somewhat higher than the City's assessment. As mandated by the *Markarian* hierarchy, they primarily relied upon a comparable sales approach with three comparable properties of subsidized housing, which were Section 42 properties in two instances and in the other a property that was in the process of being converted to Section 42 housing (see Footnote 6 in the Court of Appeals Decision, App. 6). As required when performing a comparable sales analysis, Mr. Furdek and Mr. Weissenfluh made adjustment in their grids, which appear at pages 41 and 42 of their report.

Mr. Furdek in particular was cross-examined at considerable length concerning the comparables employed by Real Estate Appraisals, Inc., his company and that of Peter Weissenfluh. In their adjustment grids, Mr. Furdek and Mr. Weissenfluh removed the non-Section 42 portions of the properties used as comparables from their valuation and adjusted values accordingly. In an eminent domain case, *Leathem Smith Lodge, Inc. v. State of Wisconsin*, 94 Wis. 2d 406, 415, 288 N.W. 2d 808 (1980), the Court approved a sales comparison of components that were comparable to the components of the entity valued. This is

exactly what Real Estate Appraisals did. All three of their properties contained federally subsidized apartment units and were adjusted for differences in location, age, and use with Regency West. (Discussed at great length by Mr. Furdek, R. 40, pp. 40-60).

Powerful evidence of the skill displayed by Real Estate Appraisals, Inc. in making adjustments to the comparable properties was demonstrated in the instance of the comparable three, known as City Square. The City Square property was involved in two back-to-back sales, detailed at R. 43, Exs. 125 and 126. Exhibit 126 shows a sale price of Seven Million Four Hundred Eleven Thousand Dollars ($7,411,000.00), that sale including all the rental units for the property without the commercial portion that had been extracted from the Real Estate Appraisals, Inc. report at page 41. The two transactions shown on Exhibit 127 demonstrate that the initial calculation of Real Estate Appraisals for the non-Section 42 portion of the property was verified by the second sale where all the units were the non-commercial apartments. The non-Section 42 portion of the property used in the Real Estate Appraisals' adjustments was nearly identical to that actually shown in the subsequent sale (described by Mr. Furdek, R. 40, pp. 62-66). As Mr. Furdek said, "this is like hitting a bull's eye at a hundred yards" (R. 40, p. 66).

Mr. Furdek and Mr. Weissenfluh also performed an income valuation of the Regency West property for both years as a cross-check on their comparable sales analysis. They stabilized income and expenses (R. 45, pp. 11 and 135-6). According to direct capitalization analysis, they concluded the value had a value

based on an income approach of Three Million Eight Hundred Thirty Thousand Dollars ($3,830,000.00) for 2012 and Three Million Eight Hundred Ten Thousand Dollars ($3,810,000.00) for 2013 (Ex. 119, p. 58). Using discounted cash flow analysis, the income approach valuation was Three Million Nine Hundred Eighty One Thousand Dollars ($3,981,000.00) for 2012 and Three Million Nine Hundred Seventy Eight Thousand Dollars ($3,978,000.00) for 2013. These values were reasonably close to the actual assessments of the City of Racine and to the comparable sales valuation performed by Real Estate Appraisals.

Although the cost approach to valuation is frequently difficult for subsidized housing, Daniel Furdek and Peter Weissenfluh nevertheless in their report and testimony performed a third tier cost approach valuation (R. 45, pp. 16-19; Ex. 119, pp. 62-63). In this instance, the cost approach carried more than the usual validity because of the recently completed construction of Regency West. Because of the recent construction, particularly good and accurate data was available regarding the costs of construction, as well as the value of the tax credits, which had to be excluded (R. 40, pp. 90-96). Even Regency West's witness Scott McLaughlin had to concede that new construction is the best type of building property to appraise for valuation purposes using the cost method, including valuation of tax credits for exclusion, if one has the appropriate information (R. 38, p. 227). As Regency West's consultant, Mr. McLaughlin presumably would have had full access to detailed cost information, including tax credit information.

In performing its cost approach, Real Estate Appraisals determined the value of the tax credits and deducted that value from the cost of construction (R. 43, Exs. 131-132 and 133; R. 45, pp. 16-19). Real Estate Appraisals determined the discounted value of the credits, which obviously could not be sold for One Hundred Percent (100%) of the value since that would defeat any profit motive. Real Estate Appraisals used a value of Seventy Percent (70%) of the credits to determine their value. The owner's representative Mr. Lerner testified that tax credits will sell for less than face value (R. 37, pp. 227-228). Once the credits have been acquired by an outside party, income will be earned on them over a period of time which has to be reduced to present value. For Regency West, the cost approach, although a third tier approach like the income approach, served as strong validation of the sales comparison approach value of the City of Racine Assessor's Office and of Real Estate Appraisals, Inc. (see Reconciliation of Value at R. 43, Ex. 119, pp. 63-64).

The City's position that the assessments for Regency West for 2012 and 2013 were not "excessive" was sustained by the overwhelming weight of the evidence. The weakness of the testimony and opinions of Mr. McLaughlin fails to sustain Regency West's burden of proof. The Court of Appeals agreed with the sentiment of the trial court that Mr. McLaughlin did not truly follow the three tier *Markarian* system of valuation (App. 8-9). The Court of Appeals recognized that Real Estate Appraisal's valuations supported the conclusion that the assessments were not excessive:

> [T]he validity of the City's approach is supported by the fact that two outside appraisers used several different methods of valuation and concluded that the assessments were not excessive. (App. 8)

CONCLUSION

Overwhelming competent and credible evidence at trial supported the City of Racine's assessment for the property of Regency West for both 2012 and 2013. Even if some sort of argument can be made that the assessments for those years were not exactly correct, there is absolutely no significant contrary evidence to defeat the presumption of correctness of the City Assessors' valuation for 2012 and 2013. Regency West failed to carry its burden of proof. Moreover, there is no evidence that the assessment for either of those years was "excessive." In order for Regency West to prevail, the Court would have to find that the *Markarian* hierarchy does not apply to federally subsidized housing. The Court would also have to overrule the holdings of *Bischoff* and cases following that the sole use of the income approach to valuation for assessment purposes is insufficient, and that it must be supported by other indicators of value, such as cost, depreciation, insurance, etc.

The opinions of assessors and appraisers on property value are just that: opinions. There will inevitably be variation in interpretation of data and the extrapolation of value from data. To reject the opinions of the four assessors, two of whom are certified licensed general appraisers in the State of Wisconsin, would

require the Court to insert itself into their shoes and find that each and every one of them had made drastic errors in judgment in arriving at their opinions, notwithstanding the experience and qualifications that each of them had.

There can be no other result in this case than affirmance of the Court of Appeals decision and Trial Court Judgment. A contrary result would be a disaster for taxpaying homeowners in urban communities, as every Section 42 property owner in the State will claim a unique and special status, exempting them from the *Markarian* hierarchy. Not only will they have received federal largesse, but now will also in effect be supported by the real estate taxes of residential property owners. Municipal assessors will necessarily have to hire outside "experts" who restrict their appraisal work to Section 42 properties. Inevitably, other "unique" types of property will require outside "experts" to support assessments.

The Court must endorse the City of Racine's correct application of the *Markarian* hierarchy and affirm.

Respectfully submitted this 11th day of February, 2016.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) for a brief produced using proportional serif font. The length of this brief is 10,724 words.

Dated this 11th day of February, 2016.

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E-FILING CERTIFICATION

Pursuant to Wis. Stats. § 809.19(12)(f), I hereby certify that the text of the electronic copies of Defendant-Respondent's Brief are identical to the text of the paper copies.

Dated this 11th day of February, 2016.

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CERTIFICATE OF MAILING

I certify that Respondent's Brief was deposited in the United States Mail for delivery to the Clerk of the Supreme Court by first-class or priority mail, or other class of mail that is at least as expeditious, or given to courier for delivery, on February 12, 2016. I further certify that the Brief was correctly addressed and postage was pre-paid.

Dated this 12th day of February, 2016.

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