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In the Supreme Court of Wisconsin

No. 2019AP1987

LOWE'S HOME CENTERS, LLC,
Plaintiff-Appellant-Petitioner,

v.

CITY OF DELAVAN,
Defendant-Respondent,

ON REVIEW OF A DECISION BY THE COURT OF APPEALS, AFFIRMING AN ORDER BY THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DANIEL S. JOHNSON, PRESIDING

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

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INTRODUCTION

The main issue before this Court is whether, for purposes of property tax assessment, sales of vacant property may be considered when determining market value of occupied property (and vice versa). Under Wisconsin law and widely accepted valuation principles, this Court should answer yes.

Although this issue is often highlighted when owners of large retail properties challenge their property tax assessments, this Court's decision will be far-reaching. The legal and valuation principles at issue here apply to all property tax assessments, including residential properties, mom-and-pop stores, and industrial properties.

The court of appeals below concluded that vacant properties, which it labeled "dark," are distressed and thus not comparable to occupied property. This Court should reject that view. Just as the sale of a house is not distressed whenever the seller moves out before closing, the sale of a commercial property is not distressed simply because the seller ceased its business operations before the sale. Market value for property tax purposes does not hinge on whether a property contains an operating business or other occupant.

ARGUMENT

When determining market value of occupied property for purposes of property taxation, sales of vacant properties may be valid comparables.

"[I]t is improper to assess a taxpayer's property at a value that does not equate to what that taxpayer would receive for their property on the open market." *Nestlé USA, Inc. v. DOR*, 2011 WI 4, ¶ 38, 331 Wis. 2d 256, 795 N.W.2d 46. "Real property must be valued in accordance with § 70.32(1), Stats." *Rite-Hite Corp. v. Bd.*

of Rev. of Vill. of Brown Deer, 216 Wis. 2d 189, 193, 575 N.W.2d 721 (Ct. App. 1997). This statute provides that, if the subject property was not recently sold in an arm's-length sale, an assessor must consider "recent arm's-length sales of reasonably comparable property." Wis. Stat. § 70.32(1).

Vacant is not synonymous with distressed. This Court should hold that (1) vacant properties may be reasonably comparable to occupied properties, and (2) sales of vacant properties may be arm's-length.

A. Vacant property may be reasonably comparable to occupied property.

Two well-established rules of property assessment allow vacant properties to be compared with occupied properties: (1) real property is assessed based on its fee simple interest, not business value; and (2) land is assessed based on its highest and best use as if vacant.

First, this Court has reaffirmed "the general principle that real property assessments should not be based on business value." *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 65, 311 Wis. 2d 158, 752 N.W.2d 687. "[A]n assessor's task is to value the real estate, not the business concern which may be using the property." *Id.* (alteration in original) (citation omitted). When assessing the value of real property, "a property assessor's task is to identify the market value of a fee simple interest." *Id.* ¶ 20. "All the rights, privileges, and benefits of the real estate are included in this value." *Id.* (quoting *Wisconsin Property Assessment Manual* 7–4 (2007) [hereinafter "*Manual*"]). But the value of real estate does

not include contractual rights, such as lease rights, because they are not real property rights. *Id.* ¶¶ 48, 66.[1]

Using reasoning consistent with *Walgreen*, the Indiana Tax Court has repeatedly "disavowed the contention that vacant properties cannot be comparable to occupied properties." *Howard Cty. Assessor v. Kohl's Indiana LP*, 57 N.E.3d 913, 918 (Ind. T.C. 2016). As that court explained, "because property taxes apply exclusively to real property (*i.e.*, the land and improvements to the land) and not to intangible business value, investment value, or the value of contractual rights, the use of vacant property comparables can be appropriate." *Meijer Stores Ltd. P'ship v. Boone Cty. Assessor*, 162 N.E.3d 26, 33 (Ind. T.C. 2020).

The Michigan Court of Appeals has reached the same conclusion by also relying on logic consistent with *Walgreen*. That court has held that an assessor may rely on "sales comparables of [properties] that were vacant" when valuing occupied properties. *Lowe's Home Centers, Inc. v. Twp. of Marquette*, Nos. 314111 & 314301, 2014 WL 1616411, at *14 (Mich. Ct. App. Apr. 22, 2014). Such a comparison is proper because an assessor must determine "the fee simple interest of the [occupied] properties *as if they were vacant* and available." *Id.* (emphasis added). Treating an occupied property as vacant is "a proper valuation of the fee simple interest"

[1] This rule against assessing business value has "a narrow exception": an assessor may consider a business's value if it is "inextricably intertwined" with the land. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 63, 311 Wis. 2d 158, 752 N.W.2d 687. For example, growing crops on farmland is inextricably intertwined with the farmland. *State ex rel. N/S Assocs. v. Greendale Bd. of Rev.*, 164 Wis. 2d 31, 55, 473 N.W.2d 554 (Ct. App. 1991).

because a fee simple interest is "sold without a tenant in place—i.e., unoccupied." *Id.* at *10.[2]

The same conclusion applies in Wisconsin because this Court in *Walgreen* recognized that property assessments apply to the fee simple value of real estate, not business value. A bright-line rule against comparing vacant property with property occupied by a business would contravene *Walgreen* by including business value in the assessment of the occupied property. When determining the fee simple value of occupied property, an assessor must value the property as if vacant (unoccupied). In doing so, an assessor isolates a property's taxable real estate value from its non-taxable business value. *Matter of Walmart Stores, Inc.*, 500 P.3d 553, 563 (Kan. Ct. App. 2021). Because a fee simple interest does not include an occupant, comparing occupied property with vacant property makes sense.

Second, the highest-and-best-use rule supports comparing vacant properties with occupied properties. "[T]he properties an assessor identifies as 'reasonably comparable' to the subject property for assessment purposes must be reasonably comparable to the subject property's highest and best use." *Nestlé*, 2011 WI 4, ¶ 32. "A site is valued *as if vacant* and available to be put to its highest and best use, even if the property has improvements on it." *Manual* 12-2 (2022) (emphasis added).[3] Because the highest-and-

[2] Wisconsin allows citations to unpublished decisions from other jurisdictions. *Predick v. O'Connor*, 2003 WI App 46, ¶ 12 n.7, 260 Wis. 2d 323, 660 N.W.2d 1. This brief does not include a copy of this unpublished decision from Michigan because Wis. Stat. § (Rule) 809.23(3) applies only to Wisconsin Court of Appeals decisions. *Id.*

[3] This brief provides hyperlink citations to the 2016 and 2022 editions of the *Manual*.

best-use concept treats property as vacant, occupied property may be comparable to vacant property. *See Lowe's*, 2014 WL 1616411, at *12.

Treating improved property as vacant is well-established and consistent with national standards. *See, e.g.*, *In re Equalization Appeal of Kansas Star Casino, L.L.C.*, 362 P.3d 1109, 1116 (Kan. Ct. App. 2015) ("The highest-and-best-use analysis is performed assuming the Subject Property is vacant."); *Am. Exp. Fin. Advisors, Inc. v. Cty. of Carver*, 573 N.W.2d 651, 661 (Minn. 1998) ("Site value is determined according to the value of the land based on its highest and best use as though vacant." (citing The Appraisal Institute, *The Appraisal of Real Estate* 323 (1996))).[4]

In short, comparing vacant property with occupied property reflects the fee-simple-interest and highest-and-best-use valuation concepts.

B. The court of appeals was wrong to hold that vacant properties cannot be comparable to occupied properties.

The court of appeals below misconstrued *Bonstores Realty One, LLC v. City of Wauwatosa*, 2013 WI App 131, 351 Wis. 2d 439, 839 N.W.2d 893. It stated that "the main point of *Bonstores* [is] that sales of 'dark' properties are simply not appropriate comparables to non 'dark' properties and nothing in [*Bonstores*] suggests that there was a need to inquire into a particular seller's 'duress' in order to reach that conclusion." (Lowe's App. 17.) The court also stated that "*Bonstores* is consistent with the [*Manual*]. Specifically, the [*Manual*] cautions that '[t]he assessor should avoid using sales of improved properties that are vacant ('dark') or

[4] This Court considers uniform appraisal standards and other jurisdictions when interpreting Wisconsin law. *See Walgreen*, 2008 WI 80, ¶¶ 3, 57, 84.

distressed as comparable sales unless the subject property is similarly dark or distressed.'" (Lowe's App. 15–16 (third alteration in original) (quoting *Manual* 9-12 (2016).)

Neither *Bonstores* nor the *Manual* supports a bright-line rule against comparing occupied properties with vacant properties. Again, "vacant" does not equal "distressed."

For starters, the *Manual* is not always binding. The *Manual* applies "absent conflicting law." *Walgreen*, 2008 WI 80, ¶ 3. "[T]he legislature intended that the [*Manual*] conform to, rather than establish, Wisconsin law." *Doneff v. City of Two Rivers Bd. of Rev.*, 184 Wis. 2d 203, 217, 516 N.W.2d 383 (1994). The controlling authorities on property assessment are "common law which accurately reflects the state of the law, and the language of § 70.32(1), Stats., not the [*Manual*]." *City of West Bend v. Cont'l IV Fund Ltd. P'ship*, 193 Wis. 2d 481, 487, 535 N.W.2d 24 (Ct. App. 1995).

The question is whether *Bonstores*, not the *Manual*, is binding on the "dark" property issue. Indeed, the *Manual* cites *Bonstores* for the idea that assessors should not compare "dark" property with occupied property. *E.g., Manual* 13-12 (2022); *Manual* 9-12 (2016).[5]

[5] The *Manual* has broadened its definition of "dark" property, now equating "dark" with "vacant." Previously, the *Manual* stated that "[a] vacant store is considered dark when it is vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another." *Manual* 9-12 (2016). It now provides that "[v]acant or non-operating stores are often referred to as 'dark' stores." *Manual* 13-12 (2022). Even the narrower definition from 2016 is problematic because, as explained below, an assessor should consider why a property was vacant and whether it was for sale during that time.

Bonstores did not hold that vacant properties are never comparable to occupied properties. Rather, it held that Bonstores' expert witness had unreliably used vacant stores as comparable properties because they "were all distressed in one way or another." *Bonstores*, 2013 WI App 131, ¶ 21 (quoting circuit court). For example, some of the properties were bankruptcy auctions. *Id.* The court further noted that Bonstores' expert witness had "confirmed that a store going 'dark' *may* have a significant impact on the property." *Id.* ¶ 22 (emphasis added). The court's discussion of "dark" properties was limited to the facts in that case, including the distressed nature of the allegedly comparable properties. *See id.* ¶¶ 21–22.

This Court should disavow the notion that *Bonstores* held that a sale of vacant property is inherently distressed. As explained below in Section C, an assessor may not consider a distress sale because it is not arm's-length. Distress sales are unreliable when determining the value of properties not distressed, but vacant is not synonymous with distressed. Comparing non-distressed vacant property with non-distressed occupied property can be appropriate because real estate is assessed on its fee simple interest as if vacant.

Contrary to *Bonstores*, the court of appeals below adopted a rule that assumes a building's vacancy *always* substantially affects its market value. (*See* Lowe's App. 15–18.) But it is incorrect to assume that "the vacancy of [a] building shows that the property has poor proven market acceptability and low desirability." *Damon Corp. v. Indiana State Bd. of Tax Comm'rs*, 738 N.E.2d 1102, 1109 (Ind. T.C. 2000). An assessor should instead consider "the reason that the property was vacant . . . or whether the property was on the market during that time." *Id.*

An assessor may also need to consider a vacant property's need for improvements when determining its comparability to other property. A vacant building that needs renovations might not be comparable to a renovated building. *See, e.g.*, *Mays Ctr. Assocs. Corp. v. Rockaway Twp.*, 13 N.J. Tax 431, 440–41 (N.J. Tax Ct. 1993), *aff'd*, 15 N.J. Tax 168 (N.J. Super. Ct. App. Div. 1994). Sometimes vacant properties' renovation costs can be added to their sale prices "to obtain equivalent and comparable sale prices" for the assessed property. *Thomas J. Lipton, Inc. v. Raritan Twp.*, 10 N.J. Tax 202, 209 (N.J. Tax Ct. 1988), *aff'd*, 11 N.J. Tax 100 (N.J. Super. Ct. App. Div. 1989). Wisconsin law recognizes that sometimes "sales prices of similar properties need some adjustments in order to arrive at an estimate of value for a different property." *Joyce v. Town of Tainter*, 2000 WI App 15, ¶ 20, 232 Wis. 2d 349, 606 N.W.2d 284.

The key point, though, is that a property's vacancy does not automatically render it incomparable to occupied property. "Properties used for comparison need not be identical to the subject property but only 'reasonably comparable.'" *State ex rel. Kesselman v. Vill. of Sturtevant Bd. of Rev.*, 133 Wis. 2d 122, 129 n.4, 394 N.W.2d 745 (Ct. App. 1986) (citation omitted). When determining whether a recently sold property is reasonably comparable, relevant factors "include its location, including the distance from the assessed property, its business or residential advantages or disadvantages, its improvements, size and use." *Rosen v. City of Milwaukee*, 72 Wis. 2d 653, 665, 242 N.W.2d 681 (1976). The reasons why a property is vacant—such as its undesirable location or need for improvements—might affect its comparability. But a vacant property may be comparable to an occupied property if they have similar locations, improvements, and other factors. A property's "occupancy" is a relevant factor only if "there has been

no sale of the property in question or of reasonably comparable property." *Id.* at 663; *accord Waste Mgmt. of Wisconsin, Inc. v. Kenosha Cty. Bd. of Rev.*, 184 Wis. 2d 541, 556–57, 516 N.W.2d 695 (1994).

This Court should hold that occupied property may be "reasonably comparable" to vacant property under Wis. Stat. § 70.32(1).

C. Vacant property may be sold at arm's-length.

If the subject property was not recently sold, an assessor must consider "recent *arm's-length sales* of reasonably comparable property." Wis. Stat. § 70.32(1) (emphasis added). The court of appeals below suggested that a sale of vacant property is never arm's-length, reasoning that, "given the inability to generate revenue in a darkened state, such properties are inherently a form of a 'distress sale.'" (Lowe's App. 17 (quoting *Bonstores*, 2013 WI App 131, ¶¶ 21–22).) That bright-line rule does not withstand scrutiny.

An arm's-length sale is "a sale in the open market between an owner willing but not obliged to sell and a buyer willing but not obliged to buy." *Flood v. Vill. of Lomira Bd. of Rev.*, 153 Wis. 2d 428, 436, 451 N.W.2d 422 (1990). Stated differently, "neither party [must be] compelled to act." *Doneff*, 184 Wis. 2d at 212.

"[A] distress sale . . . is not conducted by a willing seller." *Bank of New York v. Mills*, 2004 WI App 60, ¶ 17, 270 Wis. 2d 790, 678 N.W.2d 332. "The distress nature of the sale automatically reduces the price." *Id.* A distress sale thus is not arm's-length. *See State ex rel. Brighton Square Co. v. City of Madison*, 178 Wis. 2d 577, 585–86, 504 N.W.2d 436 (Ct. App. 1993) (suggesting "a distress sale" would not be arm's-length).

Nothing about a property's vacant status inherently means that its owner is compelled to sell. An assessor has an "obligation to determine whether [a] sale was at arm's-length" and must "investigate the circumstances surrounding the sale." *Doneff*, 184 Wis. 2d at 219–20. In doing so, "an assessor must consider all factors relevant to the sale." *Flood*, 153 Wis. 2d at 441. "Only through investigation and comparison can an assessor determine if a sale is truly at arms-length." *Id.* An assessor thus may not assume that a sale was not arm's-length just because the property was vacant. Instead, an assessor should consider such factors as why the property was vacant, how long it was vacant, and how long its owners tried selling it.

Doneff illustrates these points. In *Doneff*, a building was sold after it "had been mostly vacant for ten years, and the building needed major improvements." *Doneff*, 184 Wis. 2d at 209. This Court concluded "that the surrounding circumstances indicated the sale was not at arm's-length." *Id.* at 219. It reasoned that the original owner "had overvalued the property," "the property thereafter failed to sell," the owner "probably came to see the property as a problem and was willing to take any offer for it," "the sale was private, the property was not listed and a real estate agent had not been involved." *Id.* at 220. This Court did not give much, if any, weight to the building's vacancy. *See id.* at 219–20.

Besides being wrong, the court of appeals' categorical rule would produce absurd results. A sale of property must be arm's-length for the sale price to be used when assessing that property's value or using it as a comparable for other property. *Forest Cty. Potawatomi Cmty. v. Twp. of Lincoln*, 2008 WI App 156, ¶ 10, 314 Wis. 2d 363, 761 N.W.2d 31. So, if the sale of vacant property is inherently not arm's-length, an assessor could never rely on that property's sale price when determining its own value or the value

of comparable properties. That result would be nonsensical. Imagine a developer who constructs a commercial office building in a high-demand location and then sells it in a "bidding war" before any tenants move in. That sale would plainly be arm's-length, yet the court of appeals' logic would treat the sale as distressed simply because the property was sold while vacant. That absurd result highlights why this Court should reject the court of appeals' view that a sale of vacant property is inherently distressed.

CONCLUSION

This Court should hold that, for property tax purposes, (1) vacant properties may be reasonably comparable to occupied properties, and (2) sales of vacant properties may be arm's-length.

Dated this 10th day of March 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,981 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of March 2022.

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