



Cities Successfully Defend Against Dark Store Challenges - You Can Too

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While the League’s dark store legislation remains stalled with no clear path forward, a recent string of municipal victories in circuit courts against dark store and *Walgreens*-based assessment challenges may mean a legislative fix is unnecessary. Tax attorneys working for municipalities have found ways to convince judges that the dark store comparables used by thriving big box stores aren’t valid and that the actual rent being paid and recent sale prices of leased commercial space are the best evidence of fair market value.

The cost of defending an assessment against dark store and *Walgreens* challenges can, and often does, lead communities to settle with the taxpayer rather than spend limited resources on litigation. The trouble with settling on a compromise assessed value is that big box stores and other commercial property owners often return the next year and claim the compromise value was too high. A community is then asked to agree to even more reductions from the original assessment.

As the court decisions described below show, a community has a good chance of winning when it chooses to defend an assessment in court. Both the Wisconsin Property Assessment Manual and prior case law favor municipalities when they take on dark store and *Walgreens* arguments, unless the property is a pharmacy. The more often communities choose to litigate, and win, the less inclined big box stores and other commercial properties will be to file

excessive assessment claims. Indeed, a Walmart store in West Bend recently dropped its lawsuit after the city refused to settle and instead chose to defend the assessment in court.

Recent Victories in the Dark Store Battle Zone

Since 2017, municipalities have successfully defended commercial property assessments against dark store and *Walgreens*-based challenges in the following cases:

Debra A. Wolf Investment Trust v. City of Wauwatosa (Milwaukee County Circuit Court – September 20, 2017). This case involved the assessed value of a building built in 2011 and leased to a Firestone automotive store. The city assessed the property at \$3,120,000, reflecting a 2012 sale price of the leased property, while the owner, using the *Walgreens* argument, asserted the value should be \$1,700,000. The owner argued that the property was a “build to suit” property for Firestone and thus the rents charged under the lease were above market levels because the rents were based on the developer’s costs of construction plus a reasonable rate of return. The subsequent investor who purchased the property from the developer argued the sale price did not reflect the true market value of the property because the alleged above-market rents also pushed the sale price above market for the real estate. The court, upholding the city’s assessment, found the 2012 sale of the property was a valid market sale and that Firestone’s rent

reflected market rates for the real estate. Under appraisal practices, rents based on the developer’s costs of construction, together with a reasonable return on those costs, are considered economic rents and are synonymous with market rent. The court further found that the 2012 sale conformed to the sale prices of reasonably comparable properties, which consisted of other Firestone and Tire Plus automotive service centers sold in the market area.

Kohls Value Services, Inc. v. City of Delafield (Waukesha County Circuit Court – March 20, 2019). Kohls Value Services, Inc. used both dark store and *Walgreens* arguments to try to convince the court that the leased property, assessed at \$9.1 million, was worth only \$5.6 million. Kohls presented the sales prices of four vacant and clearly distressed buildings as comparable properties for determining the value of the newer building it was leasing. Kohls also applied a “25% functional obsolescence factor,” arguing that, if it left, the property would be worth much less. The court was unpersuaded. Upholding the city’s assessment, the court also rejected Kohls’ argument that the actual lease rates Kohl’s was paying were above market and should therefore not be considered as evidence of value.

Lowe’s v. Village of Plover (Marathon County Circuit Court – April 9, 2019) Home improvement retailer, Lowe’s, argued that its 2016 and 2017 assessments of \$7.36 million should be cut in half to \$3.73 million. Lowe’s

argued that the value of its occupied stores should compare with the sale prices of empty, vacant big-box stores in other parts of the state. Plover pointed out Lowe’s was an anchor in a successful retail development experiencing low vacancy rates and couldn’t compare the value of its location to empty K-Marts, Targets, or Wal-Marts. The court agreed and upheld the Village’s assessment.

Mayfair Mall, LLC v. City of Wauwatosa (Milwaukee County Circuit Court – May 9, 2019). Although Mayfair Mall’s assessment challenge did not turn on the “dark store” theory directly, the decision is an important example of how cities that defend an assessment in court can win even when the property owner uses high-paid attorneys and experts. Mayfair Mall (“Mall”) argued that the *Walgreens* decision prevented the assessor from considering the actual rents being paid by the 150 plus tenants at the Mall. Instead, the Mall argued that hypothetical rents should be used instead. The court rejected this theory because when rental property such as the Mall sells, the sale price is not based on hypothetical income but rather actual income being received. This was a particularly complex retail assessment case. The trial lasted six weeks and involved dense, complicated testimony from multiple competing national experts in mall property appraisal. The court issued a 34-page

decision in favor of the city, finding that Wauwatosa Assessors Steve Miner and (later) Shannon Krause repeatedly used correct data, scrupulously followed the Wisconsin Property Assessment Manual and Wisconsin case law, and assigned values that were conservatively beneath the Mall’s actual fair market value.

Sherwood Manor VI, LLC v. City of Brookfield (Waukesha County Circuit Court – July 9, 2019). This case involved a multi-tenant medical office building, which the owner had recently purchased for \$7.6 million. The city assessed the property at just over \$7.5 million, based in part on the recent sale price. The taxpayer argued the property’s value was \$4.8 million, claiming the recent sale price did not indicate fair market value because the property was subject to above-market leases, asserting application of the *Walgreens* decision. The court upheld the city’s assessment concluding: 1) the recent arms-length sale of the property established fair market value, 2) the actual rents tenants were paying fell within the range of market rents for medical office buildings, and 3) the property’s lease rents did not include other “creative financing” costs that pushed the leases beyond market rents.

Best Buy v. City of Wauwatosa (Milwaukee County Circuit Court – July 18, 2019). The City of Wauwatosa

assessed a Best Buy store at \$8,695,800, while Best Buy asserted the value should be \$5,750,000 based on the dark store theory. The court noted the assessor utilized mass appraisal and relied heavily on the Wisconsin Property Assessment Manual when determining the assessed value. The court pointed out that the taxpayer’s analysis of comparable sales relied on points of comparison that, under Wisconsin law, were not reasonably comparable and therefore their analysis was less reliable than the city’s analysis. In determining the property’s highest and best use, the taxpayer looked at its property from a standpoint of being either vacant, a property in transition with lower rents, or a second-generation property with a lesser use. The court concluded this approach did not apply in determining the highest and best use of a first-generation property like the Best Buy property at issue and upheld the city’s assessment.

Lowe’s Home Centers, LLC v. City of Delavan (Walworth County Circuit Court – August 12, 2019). The court upheld the city’s assessment of a Lowe’s store and rejected the taxpayer’s use of dark and distressed stores as comparables supporting a lower assessed value. The court noted the Wisconsin Property Assessment Manual (“WPAM”) makes clear that dark or distressed properties

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are not to be used as comparable sales “unless the subject property is similarly dark or distressed.” Five of the six comparable sales Lowe’s used to support their lower value were either vacant or in receivership when sold. Lowe’s also contended the assessor did not follow the WPAM when determining the assessed value – claiming he simply carried the value forward from prior years. The court found that the assessor did, in fact, follow the WPAM by: 1) reviewing sales from Delavan and surrounding areas for potential comparable sales, 2) calculating a new value using the cost approach to determine if the prior value was current, and 3) comparing Lowe’s value to other similar properties for which he had also calculated a new cost approach to determine the legitimacy of the Lowe’s assessed values and to make sure they appeared correct and valid.

Best Practices for Defending an Assessment against Dark Store and Walgreens-based Arguments

As the above cases show, municipalities can successfully defend property assessments when Walmart, Menards, Target, Lowe’s, and other big-box stores go to court seeking reductions in their tax bills. Wisconsin law does not support dark store or *Walgreens* arguments in the contexts raised by the plaintiffs in the above cases. Municipalities and their assessors should follow these best

practices to be in the best position for success in assessment litigation:

1. Adhere to the practices and procedures found in the Wisconsin Property Assessment Manual (WPAM) when determining assessed values. Wisconsin law requires assessors to follow the WPAM and courts have supported assessment work performed in compliance with the WPAM.
2. Annually review local sales evidence, building permits, and published reports to determine if a value adjustment is necessary for a property or property type. This is most important during a non-revaluation year, also referred to as a record maintenance year, when an economic, physical, or functional change may impact a single property or a property type more than other properties in the municipality.
3. Each year require your assessor to create and deliver an Annual Assessment Report (AAR) that describes the scope of the mass appraisal work the assessor performed for the assessment year covered by the report. This report details the assessor’s efforts to review the factors mentioned above to determine what, if any, value adjustments are necessary and for which properties.

4. Wisconsin law permits an assessor to use mass appraisal techniques when valuing properties. The WPAM provides that if an income approach is used to assess rental properties the actual rent being paid can be considered market for mass appraisal purposes.
5. Whenever a property sells in what appears to be an arm’s length transaction, the sale price should be considered in the assessment unless the assessor has a valid reason to ignore the sale price.
6. The sale price reported on a Real Estate Transfer Return (RETR) is valid evidence of a market sale price for the real property. Assessors should carefully consider sales of real estate reported on a RETR.
7. It is not unusual for a commercial property to sell as part of a multi-property transaction, also known as a portfolio sale. According to the WPAM and case law, portfolio sales can be used as market transactions as either a sale of the subject property or as reasonably comparable sales.
8. The WPAM states, and case law supports, that unless there is reliable and accurate sales data for reasonably comparable properties, the sales comparison approach should not be used to value commercial real property.

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9. The WPAM and case law state that sale properties that were dark, vacant or otherwise distressed, or in transition to another use, should not be used as reasonably comparable properties unless the subject property is also similarly, dark, vacant, distressed or in transition.

Taxation 1059

About the Authors:

Curt Witynski, Deputy Executive Director, League of Wisconsin Municipalities, manages the League's lobbying program, representing the League before the Legislature, the governor's office, and state agencies. He writes the *Legislative Bulletin* and *Capitol Buzz* newsletters, organizes legislative material and the Budgeting Toolkit for the League's web page, and answers questions from the media and members about legislation that the League is following. Curt joined the League staff as assistant legal counsel in 1987 and was named Deputy Director in 2000. Contact Curt at witynski@lwm-info.org

Amy R. Seibel, an attorney and CPA with Seibel Law Offices, LLC has successfully represented municipalities across the state in excessive property assessment actions. She has practiced property tax law for over 35 years. She has won decisions at both the circuit court and appellate levels successfully challenging the "dark property theory" as well as promoting the use of actual income and expenses to value an income producing property in the same manner as is done in the real estate investment market. Over the last 18 months the successful litigation has saved municipalities over \$25 million in property tax refund claims. Amy served as one of 12 members of the 2018 Legislative Study Committee on Property Tax Assessments that developed proposed legislation for further consideration by the Wisconsin Legislature. She was recently awarded the *Fair and Equitable Award* by the Wisconsin Association of Assessing Officers "For exceptional service to the citizens of Wisconsin, by conscientious efforts to promote fairness and equity in the assessment and taxation process as legislated by the Wisconsin Statutes." Contact Amy at ars@amylawoffices.com or 414-881-4262.

Rocco Vita is the Director of Assessment Services for the Village of Pleasant Prairie and through intergovernmental agreements he manages the assessment duties for a number of other municipalities in Kenosha County. Rocco is a Past-President of the Wisconsin Association of Assessing Officers (WAAO) and is the current chair of WAAO's Legislative Committee, he has instructed a number of continuing education seminars on a broad range of appraisal and assessment topics, and is a long-time member of the International Association of Assessing Officers (IAAO).

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