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Ding Dong the Dark Store Is Dead

In a decision representing a major victory for Wisconsin municipalities and their taxpayers, the Wisconsin Supreme Court resoundingly rejected a big box commercial retailer's attempt to demonstrate its tax assessment was "excessive" by using sales of dark and distressed properties as "reasonably comparable sales" to determine value. *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8. Significantly, the Court also unequivocally rejected Lowe's contention that earlier decisions, including the Court's 2008 decision involving Walgreens, should be read to say that the statutory presumption that the assessor's valuation is correct does not apply in certain situations. The Court made clear that the presumption of correctness attaches when the assessment is filed along with the assessor's affidavit. If the objector rebuts the presumption with sufficient evidence, the presumption is overcome; that does not mean, however, the assessor's valuation was not presumed to be correct at the outset.

The Court noted that the Wisconsin Property Tax Manual (WPAM) provides the following in the context of using a sales comparison approach to valuation:

- "Comparable sales refer to properties that are similar to the subject property in age, condition, use, type of construction, location, design, physical features and economic characteristics."
- Assessors should use "comparable sales exhibiting a similar highest and best use and similar placement in the commercial real estate market."
- Assessors should not use sales of vacant or distressed properties as comparable sales unless the property being assessed is similarly dark or distressed.

The Wisconsin Supreme Court, deferring to the circuit court's factual finding that the evidence presented by Lowe's was "significantly less credible than that presented by the City," agreed with the circuit court that Lowe's did not provide significant contrary evidence sufficient to overcome the presumption of correctness.

The League's Legal Counsel, Claire Silverman, said "We are very pleased with the Court's decision in this case. Large commercial retailers have engaged in concerted efforts, statewide and nationally, to challenge tax assessments using novel and aggressive theories such as the dark store theory. In Wisconsin they have misconstrued and argued for ever-more expansive readings of the Court's 2008 Walgreens decision. It's incredibly expensive to litigate these cases and owners of big box commercial properties who assert these theories unsupported by the law, like dark store, are trying to pressure local governments to reduce their tax assessments. If the municipality caves, these owners get an unfair tax break, with the difference ultimately being shouldered by home owners and other small businesses. We hope today's court decision brings an end to that practice."

The League of Wisconsin Municipalities participated as amicus in this case, with Attorney Amy Seibel filing a brief on behalf of municipal interests and participating in the oral arguments before the Wisconsin Supreme Court.

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