



## **February Case Law Update** **February 28, 2023**

**A summary of appellate court opinions decided during the month of February affecting planning in Wisconsin<sup>1</sup>**

### ***Wisconsin Supreme Court Opinions***

#### **“Dark Store” Exclusion Upheld**

Throughout the United States, big box retailers like Lowe’s, Walmart, and Menards, have argued for a “dark store” loophole that uses vacant big box properties as comparable for determining the assessed value of occupied stores for property tax purposes. In [Lowe’s Home Centers, LLC v. City of Delavan](#), 2023 WI 8, a unanimous Wisconsin Supreme Court held that the tax assessor for the City of Delavan properly excluded comparable “dark-store” valuations when setting a new property tax rate for a Lowe’s Home Improvement store. The City assessed the value of Lowe’s store at \$8,922,300. Lowe’s challenged the assessment in circuit court.

The court held a three-day bench trial. An expert witness hired by Lowe’s determined that the property had a fair market value of \$4.6 million. Lowe’s expert witness used the sales comparison approach. He compared Lowe’s to six other properties. Three stores were in receivership when sold. The other three stores were vacant for several years before being purchased (“dark stores”). The city’s expert valued the property at \$9.2 million, slightly higher than the assessed value. The City’s expert also used the sales comparison approach but determined it was not appropriate to use “dark” stores or “distressed” properties as comparables and used sales of stores that were occupied and had market-rate leases in place at the time of sale. The circuit court upheld the City’s assessments. Lowe’s appealed the circuit court’s decision, but the Court of Appeals affirmed the trial court’s decision. Lowe’s then petitioned the Wisconsin Supreme Court to review the case and the Supreme Court agreed to review the case.

The Supreme Court’s decision notes that, under Wisconsin law, the assessor’s valuation is presumed to be correct. The presumption can be rebutted if the assessor did not correctly apply the Wisconsin Statutes and the Department of Revenue’s property assessment manual or if the challenger presents significant contrary evidence. The Supreme Court determined that the City followed the manual and Lowe’s did not present significant contrary evidence sufficient to overcome the presumption. The assessment manual allows assessors to use comparable sales for determining assessed values for property tax purposes. Lowe’s expert witness presented properties that were dark or distressed which the Court concluded are not comparable to the Lowe’s store which was occupied. The City’s appraiser presented properties that were all occupied at the time of sale. The Supreme Court found that the circuit court’s decision upholding the assessment was supported by the record.

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<sup>1</sup> Previous updates are available at: <https://wisconsin.planning.org/policy-and-advocacy/case-law-updates/>

The Supreme Court’s opinion notes that the assessment manual does not strictly prohibit the use of vacant properties as comparable to occupied properties. Nonetheless, the Court notes the manual urges that assessors use caution if using dark stores as comparables: “the economics underlying a vacancy may be indicative of a meaningful difference in the circumstances of the properties.”

## ***Wisconsin Court of Appeals Opinions***

### **Claim for Excessive Tax Assessment Dismissed**

Wal-Mart leases property for a store in the City [of Merrill]. The City assessed the at \$9,956,700 for the 2019 tax year. Wal-Mart disagreed with the assessment, believing the Property was worth no more than \$5,138,500. Wal-Mart subsequently filed an objection to the assessment with the Board of Review. The Board, however, determined the Property was correctly assessed and worth \$9,956,700. The matter was scheduled to be heard by the Board, but Wal-Mart failed to appear or present evidence to the Board to support its objection. The Board determined the City properly assessed the property. Walmart commenced this action in circuit court. The City then filed a motion to dismiss Wal-Mart’s complaint, arguing that Wal-Mart had failed to allege that it presented evidence to the Board and under Wis. Stat. § 70.47, presenting evidence to the Board is a statutory condition precedent to filing a complaint. The circuit court granted the City’s motion and dismissed the case. Wal-Mart appealed the decision to the Wisconsin Court of Appeals. The Court of Appeals affirmed the dismissal of the case by the circuit court.

The decision, [Wal-Mart Real Estate Business Trust v. City of Merrill](#), is recommended for publication in the official reports.

## ***U.S. Court of Appeals for the 7<sup>th</sup> Circuit Opinions***

[No planning-related cases to report.]