Chapter 21

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Introduction

Legal

The statutes form a small, but basic part of the overall legal picture of which the assessor must be aware. Once the legislature has passed a law it becomes the responsibility of the judicial branch of government to interpret the legislative intent. These court interpretations and decisions become as important as the statutes, themselves, in guiding the assessor's decision-making process.

The bulk of the *Wisconsin Property Assessment Manual* (WPAM) discusses what the statutes require and how the Department of Revenue (DOR) suggests the law should be interpreted and implemented. This section of the WPAM is intended to be a miniature law library, a resource book where the assessor can easily and quickly review statutory requirements and legal interpretations. The chapter following this one contains a handy reference guide in determining the taxable status of specific property.

The case law in property tax is developed, for the most part, from appeals of Board of Review decisions; first to the circuit court level and finally to the Supreme Court of the State of Wisconsin. Any case which deals with state law and has been decided by the Wisconsin Supreme Court will apply to all areas of the state. Decisions made at the circuit court level and not appealed to the Wisconsin Supreme Court can also be applied to all areas of the state.

When questions of law arise which have no direct applicable court case decisions, the Office of the Attorney General, State of Wisconsin, may write an opinion as to how the law should be interpreted. Previous decisions of the courts are reviewed and the basic concepts of law developed in the past are applied to the present situations. It should be emphasized that these decisions and opinions are based on specific cases or on a specific set of facts. No two cases are exactly alike, and the outcome of any case before the court is based on how well the present set of facts fit the concepts of law the two opposing attorneys develop in their presentations.

The following cases and opinions are either excerpts or summary statements of the concepts of law developed in various decisions. They are meant to provide a partial historical account of relevant assessment cases and opinions to assist assessors in understanding legal concepts, but are in no way meant to be a complete legal reference nor should they be considered superior than cases or opinions contained in other reference sources. While these opinions should help answer some of the questions which may be raised, there will always be legal questions that require the assessor to look to other sources for assistance. The complete case or opinion may be found by looking up the references provided. For example, additional information can be found on the Supreme Court Case: ***Bogue v. Lauglin*, 149 Wis. 271, 136 NW 606 (1912)**, by looking in Volume 149, page 271 of the *Wisconsin Reports* or Volume 136, page 606 of the *Northwestern Report*. The same procedure is followed for Attorney General Opinions; information on **60 Opinion of the Attorney General 19** can be found in Volume 60, page 19 of the bound *Opinions of the Attorney General*. These reference books are available for review at the county courthouse.

Once it is determined that there is a legal question, the assessor should gather as much relevant data as possible concerning the question. While the assessor may look to the Volume 1 legal reference for similar cases or contact the Property Tax District Office for direction, the municipal attorney is the person who should be approached first. The municipal attorney is the best judge of whether the question should be further pursued. If the question is pursued further, it is the municipal attorney who will ultimately have to defend the assessor's decision.

While the cases are grouped under general headings, often the concept of law applies to more than one area. For cross-referencing of specific subjects it would be best to refer to the general index.

NOTE: The Non-Citation Rule, **sec. 809.23(3) Wis. Stats**., regarding unpublished legal cases/opinions states the following:

> "An unpublished opinion is of no precedential value and for this reason may <u>not be cited in any court of this state</u> as precedent or authority, except to support a claim of res judicata [a thing or matter settled by judgment], collateral estoppel [prior judgment between same parties on different cause of action], or law of the case [final judgment of highest court is final determination of parties' rights]" (emphasis added)(bracketed definitions cited from *Black's Law Dictionary*, 5th ed.).

Only the Supplement to the WPAM should contain unpublished cases. Unpublished cases carry only one restriction: they may not be cited in any Wisconsin court unless they meet the above conditions. Unpublished cases can certainly be shared with others for informational purposes with the understanding that they contain no precedential value.

Assessor

The legal opinions and decisions in this section deal primarily with the responsibilities of the individual who holds the office of assessor. Legal questions that concern valuation decisions by the assessor are discussed in later sections.

Liability

According to **sec. 70.50l, Wis. Stats**., an assessor who makes fraudulent valuations shall forfeit to the state not less than $50 but not more than $250. An assessment made in good faith cannot be questioned in a court of equity and the assessor, in such case, is not personally liable for errors in the performance of official duties. ***Lefferts v. Board of Supervisors of Calumet County, 21 Wis. 688 (1867)*** This was a case where the plaintiff alleged that he had been fraudulently over assessed and brought action to restrain the collection of the tax levied and to have the tax declared void. The court said, "We think no considerations of convenience or public policy should counteract or overcome the right of the aggrieved citizen to an injunction, when he rests the application upon the ground of the corrupt and fraudulent conduct of the taxing officers. Errors of judgment in the valuation of the property, when officers are attempting in good faith to discharge their duties, may well be held not to vitiate (invalidate) a tax, although, the effect of such erroneous valuation may be to increase the burdens of a citizen beyond his just proportion.

This doctrine we have frequently recognized. But, we think this rule should not be extended to cover a case where the officers fraudulently make a distinction in the assessment and taxation, with the intention and design of making a party pay more than his just and equal portion of the taxes. We have found no direct authority in support of the proposition that fraud on the part of the officers in assessing and levying taxes, is a good ground for the interference of a court of equity; but, such interference appears to us to be in accordance with sound reason and justice. The absence of authority upon the point may probably be accounted for on the ground that officers have not often been guilty of such misconduct. And, it is hoped that these allegations of fraud in the complaint will be disproved when it comes to a hearing of the case upon the merits.

But it is further contended that these taxing officers, in the discharge of their duties, act judicially, and, therefore, that a court of equity cannot set aside a decision made by them on a subject within their jurisdiction, even when they act corruptly and fraudulently. It is said to be strictly analogous to a case where a judge decides a cause corruptly and from improper motives. But, for such a judicial determination the aggrieved party has his remedy, if it be erroneous, by appeal or writ of error. There are cases which hold that no civil action lies for misconduct or delinquency in the performance of judicial duties however gross … but, it is doubtful whether our statute has not changed even that rule in certain cases… we do not think the acts of taxing officers, whose duties are chiefly of a ministerial character, come within the reason of the rule applicable to strictly judicial officers."

Assessor's need to be aware of changes to the trespass law. "Exercise of duty is a defense to trespass only in areas concerned with protection of the health, safety, morals, or welfare of the people or where specifically authorized by statute. The assessor's duties do not fall within one of these areas." The assessor should follow the procedures of sec. 70.47(7)(aa),

Wis. Stats., which provides that "no person shall be allowed to appear before the Board of Review or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property." The assessor must send a written request by certified mail to view the property. If the request is denied or no answer is received, the assessor should not enter the property but should base the assessment on the best information available – recent sale of the subject or comparable properties, building permits, or previous viewings. The assessor must not view this as an opportunity to "penalize" the property owner for not allowing the assessor to enter the property. The assessor must be able to defend the assessment in relation to the assessment of similar properties. The assessor must still follow the statutory requirement to assess property at its market value.

42 Opinion of Attorney General 126 (1953) "Generally speaking, an official cannot be removed from office for irregularities in the discharge of official duties during a prior term of office."

3 Opinion of Attorney General 737 (1914) A town assessor is not subject to removal under **sec. 1059(a), Wis. Stats**. for having knowingly and willfully undervalued property during a prior term. Section 1059(a) is now sec. 17.14(1), 1(a), (b), (c), (d), (e), (f), (g), & (h), Wis. Stats.

Records Open to Public Inspection

Section 19.31, Wis. Stats., commonly known as the "open records law", took effect in 1983 and states "it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied". This Statute makes it clear that except in unusual circumstances all records must be open to the public. One exception is in the case of confidential information. The real estate transfer return (RETR) is considered to be confidential. Although not all of the information on the RETR is confidential, there is confidential information contained on the RETR thus making it confidential and not subject to public inspection without first redacting the confidential information..

However, from other statutes, Attorney General's opinions, and court cases related to this question, three basic categories or records can be set forth.

1. Records open for inspection at all times.
2. Records not open for inspection under any circumstances.
3. Records open for inspection under certain circumstances.

Category 1 includes the local assessment roll and tax roll. Category 2 would include personal property returns filed by taxpayers, and personal papers of the assessor that have nothing to do with the function of the office. Category 3 is the most difficult category to define. Basically there are three grounds on which a denial may be made:

1. The record requested does not exist.
2. The record exists, but statutes or court decisions prohibit disclosure of all or part of the record. A good example of the latter is a real estate transfer form

- sec. 77.265(9) prohibits release of that part of the form containing Social Security numbers and telephone numbers, so that information must be redacted before the requested forms are produced.

3. The record exists, and no statute or court decision prohibits disclosure, but the custodian determines that the strong public interest in disclosure of the records is outweighed by the public interest favoring nondisclosure.

The assessor should not disclose any information which was given to them with an expressed or implied understanding that the information would be kept confidential. To do so would only handicap the assessor in any future attempts to receive this type of information.

An assessor should be cautious of promising confidentiality to obtain information. If an assessor must promise confidentiality to an informant in order to investigate a civil law violation, the resulting record *may* be protected from disclosure under the balancing test. The test for establishing a valid pledge of confidentiality is demanding.

1. There must have been a clear pledge of confidentiality;
2. The pledge must have been made in order to obtain the information;
3. The pledge must have been necessary to obtain the information; and
4. Even if the first three factors are met, the records custodian must determine that the harm to the public interest in permitting inspection outweighs the great public interest in full inspection of public records.

The following court case lays the groundwork for allowing public access to records.

***State ex. rel. Youmans v Owens*, 28 Wis. 2d 672 (1965)** Although this case does not deal specifically with assessor records, it does set forth the general guidelines that should be followed in determining what records must be open to the public.

The court held that the public has a right to inspect public documents and records except where such inspection would do harm to the public interest. An example of records to which public access can be denied would be records containing information that has been gathered under a pledge that it would be kept confidential. The court stated that in certain limited cases to allow public access would seriously hamper future government efforts to gather information under a similar pledge. However, the court went on to state "public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied".

The court also held that if only inspection of a single record or document is sought, and only a portion of the document was gathered under a pledge of confidentiality, that portion of the document could be blocked out before granting inspection.

Letter from Attorney General (February 5, 2004) to Mr. Grant F. Langley, Milwaukee City Attorney regarding access to manufacturing property reporting forms (MP forms)

Attorney General Peggy Lautenschlager responded in a letter dated February 5, 2004, stating in part:

> "I therefore conclude that, pursuant to Wis. Admin. Code § Tax 12.10, the

local assessor in the assessment district in which manufacturing property is located may have access to manufacturing personal property self-reporting forms (Form MP) filed with DOR by the manufacturer."

Opinion of the Attorney General (August 12, 1986) Due to the rapid growth in the use of computers in the assessment field, the question has arisen as to what information stored on computer tapes and diskettes should be considered public records. This concerns not only the data stored on the tape and diskette but also copies of the tapes and diskettes. Based on the preceding court case and legal opinions, the data on the tapes and diskettes is clearly a public record, unless gathered under a pledge of confidentiality. Regarding copies of tapes and diskettes, the Attorney General's Opinion stated "Therefore, it is my opinion that any agreement to refuse to provide copies of computer tapes, other than those containing computer programs, would be inconsistent with the state's public records law."

***Assessment Technologies of WI, LLC., v Wire Data, Inc.*, United States Court of Appeals for the Seventh Circuit, Case Number 03-2061, November 25, 2003**. The United States Court of Appeals reversed the judgment of the United States Circuit Court with instructions to vacate the injunction and dismiss the copyright claim.

Wire Data wants access to specific property data from three municipalities in southeastern Wisconsin. The municipalities refused to turn over the information claiming they are not allowed to release the information as a condition of their license with Assessment Technologies of WI.

The United States Circuit Court issued a permanent injunction prohibiting Wire Data from attempting to obtain any Market Drive database, digital compilation and derivative work from any person, entity or municipality that uses the copyrighted works identified in the disclosed attachment of users.

In addition to this case, Wire Data has filed suits against Assessment Technology in Wisconsin State courts.
The raw data collected by assessors is not covered by Assessment Technologies copyright.

There are four ways for Wire Data to get the property data without infringing on Assessment Technologies copyright. The municipalities can decide the method to select as to applicable trade secret, open-records, and contract laws.

The municipalities can:

1. Extract the data and place it in an electronic file.
2. Use Microsoft Access to create an electronic file.
3. Allow Wire Data programmers to extract the data from their database.
4. Give Wire Data a copy of the database to extract the data.

***Assessment Technologies of WI, LLC., v Wire Data, Inc.*, United States District Court, Eastern District of Wisconsin, Case Number 01-C-789, March 21, 2003**. The United States District Court, Eastern District of Wisconsin issued a judgment in a Civil Case for Assessment Technologies of WI, LLC.

Wire Data requested electronic or digital copies of real estate information under Wisconsin's Open Records law. The requests were not honored. Wire Data filed separate legal actions in the state courts against three municipalities seeking the release of the records.

Assessment Technologies (Assessment) did not provide the requested information since they believe it is subject to copyright protection. Assessment brought action to prohibit Wire Data from infringing on their copyright.

The issues of the case were:

1. Will providing the information requested by Wire Data infringe on Assessment's copyright?
2. Will providing the information requested by Wire Data misappropriate trade secrets from the Assessment?

The court issued a permanent injunction prohibiting Wire Data from:

- Attempting to obtain any Market Drive database, digital compilation and derivative work from any person, entity or municipality that uses the copyrighted works identified in the disclosed attachment of users.
- It's not a violation to attempt to obtain any database, digital compilation or derivative work from others not listed as users.
- Wire Data may continue its state court "open record" actions provided they don't attack the validity or the original existence of the Market Drive copyright.
- Assessment will provide Wire Data with periodic updates to the user list.

***WIREdata, Inc v Village of Sussex, et al.*, Wisconsin Supreme Court, Appeal No. 2005AP1473, 2006AP174 and 2006AP175, June 25, 2008.**

WIREdata made an open records request to the municipalities for assessment data and was offered the information in paper form. They declined the paper copies and specified that they wanted electronic/digital data. The municipalities referred the request to private contract assessors that they used. Those contract assessors maintained the municipalities' assessment data. The contract assessors denied or delayed response to WIREdata's request, citing access fees and copyright restrictions.

WIREdata then filed a mandamus action against the municipalities alleging that the fees were unreasonable and that they had refused to provide data under the open records law. After federal litigation on the copyright restriction issue, the municipalities subsequently provided WIREdata with PDF files of the data.

After receiving the PDF files, WIREdata made a second request, this time directly to the contract assessors for 'enhanced data' which included very specific data fields to be provided in a very specific format. WIREdata was told by the contractor that a fee would be charged to extract the data in a form that didn't violate the software license agreement. WIREdata claimed the fees were unreasonable and exceeded the cost of providing the data.

With regard to the first record request, the court ruled that 1) The request for mandamus was improperly filed as the municipalities had not yet had an adequate opportunity to respond to the request; 2) the municipalities met their obligation under open records requirements at the point when they supplied WIREdata with PDF files containing the requested information; and 3) WIREdata incurred no fee for the PDF files supplied by the municipalities therefore no violation occurred.

The court went on to state, "In cases where the requests are complex, municipalities should be afforded reasonable latitude in the time frame for their responses so long as the municipality is acting diligently to respond in a timely manner. What constitutes a reasonable time for a response by an authority "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations."

With regard to the second request, the court held that the existence of a contract between a municipality and an independent assessment firm does not confer authority to accept open records requests, therefore WIREdata's second request for 'enhanced' electronic records was not properly filed. The court cautioned that municipalities may not use the existence of a contract to avoid open record requests and reminded the parties that the charge-back to requesters for providing data under open records may not exceed the actual cost incurred to provide the information.

***WIREdata, Inc. v Village of Sussex, et al.*, Wisconsin Court of Appeals, Appeal Nos. 2005AP1473, 2006AP174, and 2006AP175, (2007)** The court ruled: 1) The Villages contracting out collection and maintenance of their assessment information does not mean they relieve themselves of their responsibilities under the open records laws. The municipalities are the responsible authorities, under **sec. 19.36(3), Wis. Stats**., and the private contractors who merely maintain custody of the records are not; 2) Since the Villages and the Appraisers did not raise any objections regarding reasonable limitations as to the records' subject matter and length of time in their initial response, the Court refused to consider them. However, if the Court had considered those objections, it would have found that the information contained in the computer database clearly defined the reach of WIREdata's requests, the programming subcontractor testified that the information could be exported fairly easily and quickly, and that the requests were specific enough as to time and subject matter that the subcontractor was able to offer WIREdata a quote on the costs of responding to the requests; 3) The Villages' failure to promptly respond to WIREdata's requests constituted a denial, authorizing the requester to pursue a mandamus action in order to compel an appropriate response. Also, an offer of compliance with a request that is conditioned on unauthorized fees and terms constitutes a denial of that request; and 4) The open records law itself and the public policy behind the open records law require access to the source material, the material as it is both entered and stored in the database, regardless of its physical form or characteristics. The Villages and Appraisers did not enter the data into or maintain the assessment records in a PDF. WIREdata may request access to the Microsoft database for purposes of examination and copying of the source data, and this request does not require the Villages or their Appraisers to create a new record.

Notice of Changed Assessment

NOTE: **Section 70.365, Wis. Stats**. now requires a notice of changed assessment for any change in value from the previous year.

Marina Fontana et al. v Village of Fontana-on-Geneva Lake, 69 Wis. 2d 736, 233 NW 2d 249 (1975) The taxpayers claimed that they were not given proper notice of an increased assessment as required by **sec. 70.365, Wis. Stats**., even though the increase was in excess of $100.00. The taxpayers were not aware of the increase until receiving their tax bills (after the Board of Review had already adjourned), at which time they brought action against the Village for the recovery of illegal taxes under **sec. 74.35, Wis. Stats**. The Village countered these claims by pointing out that according to the case of *Pelican Amusement Co. v. Pelican, 13 Wis. 2d 585,* any objection to the assessment must begin at the Board of Review.

The court found that the *Pelican* case was decided in 1961 and the later enactment of **sec. 70.365, Wis. Stats**. modified the holding in *Pelican*. The failure of the Village to give the taxpayers the notice of increased assessment effectively waived the obligation of the taxpayer to proceed under the Board of Review requirements of **sec. 70.47(7)(a), Wis. Stats.,** as a prerequisite to commencing suit to recover illegal or excessive taxes under **sec. 74.35, Wis. Stats.**

***James Reese and Kenneth Reese v City of Pewaukee,* 252 Wis.2d 361, 642 N. W.2d 596, 2002 Wis. App. 67 (2002)** The Reeses were not required to proceed before the board of review because one of the "circumstances where an owner is not required to file a §70.47(7), Stats., objection [is] when a town fails to give notice where notice is required under § 70.365, Stats." *Duesterbeck v. Town of Koshkonong*, 2000 WI App 6, ¶19, 232 Wis. 2d 16, 605 N.W.2d 904. That exception is also codified by **sec.74.37(4)(a), Wis. Stats**. The question that remains is what, if any, procedures were the Reeses required to follow to bring this claim of excessive assessment.

Section 74.37(2)(b)(5), Wis. Stats. states that a claim for excessive assessment must be filed by January 31 of the year in which the tax is due. The procedure designed by the legislature allows for the mailing of tax bills in December and the payment of those taxes by the following January 31. That procedure also contemplates that any objections to assessments will be brought before the board of review or filed with the taxation district by January 31 (the same day that the taxes are due). We must conclude that the legislature found the days between receipt of the tax bill and the due date of the taxes sufficient for notice to the taxpayer of the procedures for appeal of the assessment.

Shift From Elected to Appointed Assessor

When a town is changing from an elected assessor to an appointed assessor, they may not terminate the term of the elected assessor until the end of term for which they were elected. An appointed assessor will take office after the end of the term of the elected assessor.

If an elected assessor resigns before the end of their term, the town board shall appoint a replacement for only the balance of the term. If the elected assessor resigns and is

reappointed to the position, the appointment shall expire at the end of the term.

Assessor Holding Another Office

***Otradovec v City of Green Bay*, 118 Wis. 2d. 393 (1984)** An individual was employed as a residential appraiser in the City of Green Bay's assessor's office. This individual was also elected to the City of Green Bay Common Council.

The common council approves the terms and conditions of employment for residential appraisers after agreement with a local union. Since election to the common council, this individual has not been a union member and has abstained from negotiating or voting on this specific contract. In addition, the mayor appoints the city assessor, subject to approval by the common council.

The court ruled that these two positions were incompatible. As a member of the common council, the individual had the power to vote on contracts setting the individual's terms of employment. The individual may also vote on approval of the appointment of the city assessor, in whose office the individual must work. These potential conflicts are substantial and establish the incompatibility of the two positions. That the individual could be permitted to abstain from voting in these areas, does not affect the incompatibility of the positions. It is sufficient that substantial conflict might arise that would be detrimental to the public.

Letter from Attorney General (1977) You have requested any informal advice concerning the following question: May the same person be elected to and lawfully hold the office of town chairman and also serve as the appointed paid certified town assessor in the same town?

I am of the opinion that he cannot. My opinion in this regard rests principally on the general rules governing the incompatibility of public offices. These rules are simply summarized, insofar as applicable here, in **58 OAG 247 (1969**), as follows:

Public offices may be made incompatible by statute or they may be incompatible according to well-settled principles of common law. In some instances, offices which appear to be incompatible because of a possible conflict of duties or power of one over the other as to appointment, supervision, and pay, may be designated as compatible by statute.

Public policy requires, that an office holder discharge his duties with undivided loyalty, therefore, in general terms, two offices are incompatible if there is conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. This might arise, for example, where one office is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.

In towns where the Board is authorized to fix the number of town assessors and assistants that will be appointed, to fix their salaries, and to fix their term of office as well, the offices

of town chairperson and town assessor would clearly be incompatible, since the assessor in such town would, as town chairperson, be voting on such questions as the assessor's own salary and term of office and whether or not tax monies would be expended to provide the assessor with assistant assessors. These duties would present a clear conflict of interest for any person holding both offices.

The provision that all appointive town assessors are subject to removal at any time at the pleasure of the town board emphasizes the subordinate position held by the assessor and the fact that a majority of the members of the Board may dispense with an assessor's services when it feels he or she is not adequately discharging his or her duties as assessor. It cannot be reasonably expected that a town chairman/assessor could discharge such a duty with complete fidelity.

While several statutes would affect the ability of a town chairman to act as town assessor, the principal reason why a town chairman may not simultaneously act as town assessor is because the two offices are incompatible under common law principles.

Opinion of Attorney General 599 (1974) The county assessor or an employee of the county assessor may also hold the office of town supervisor. The electorate or appointing authority has the responsibility to judge on the compatibility of both offices. The county may adopt reasonable regulations concerning outside employment.

Opinion of Attorney General (July 2, 1968) "You have inquired whether the positions of county supervisor and town assessor are compatible so that they may be held by one person at the same time.

I am of the opinion that they are probably compatible. Separate municipalities are involved. There is no specific statutory bar and I am not aware of any conflict of duties which would necessarily bar one person from performing the duties of both positions… In the absence of a specific statutory prohibition or apparent conflict of duties, the question of whether one person should hold both positions is best left to the electors or appointing authorities."

Difference Between Expert Help and Assistants

Assessors should not be the expert help under sec. 70.055, Wis. Stats. This situation would create a conflict of interest and is contrary to the intent of sec. 70.055, Wis. Stats., which makes the assessor and expert help an assessment board for purposes of making assessments. The statutory requirement supports independent judgment on the part of both parties which would be impossible when the assessor is on payroll of, or under contract to, the person or corporation acting as expert help.

Expert help hired under sec. 70.055, Wis. Stats. has an equal official status with the local assessor. Assistants hired under sec. 70.05(2), Wis. Stats. are hired to assist the assessor, they are not considered on an equal status as assessors.

Assessor as De Facto Public Officer

***Karen M. Joyce v Town of Tainter*, Court of Appeals, District III, Case Numbers 99-0324 and 99-1421, (1999)** The Court concluded the assessor acted as a de factor public officer, even if the assessor was not appointed correctly.

Assessor Signing Affidavit

It is the assessor's responsibility to sign the affidavit once the assessment roll is completed. However situations arise which may prevent an assessor from signing the affidavit. One circumstance would be in the case of an elected assessor who is defeated in an election. If the incumbent assessor has not completed the assessment roll prior to the election, he is not permitted to sign the affidavit since he is no longer the assessor. The newly elected assessor should complete the assessment roll, sign the affidavit and defend the assessments at BOR. If the incumbent assessor has completed the assessment roll prior to the election, and signed the affidavit, the incumbent assessor defends the assessments at the BOR under sec. 70.48, Wis. Stats. as an authorized representative of the newly sworn-in assessor, even if it after the election.

The expiration of the assessor's certification will have a different impact on the duties of the assessor depending on when the expiration happens. If the certification expires prior to the assessor completing the assessment roll and signing of the affidavit, the assessor must stop all work on the assessment roll as they are no longer considered to be qualified to perform the duties of the assessor. Section 70.48, Wis. Stats. requires the assessor or their duly authorized representative to attend BOR.

If the expiration of the certification occurs after completion of the assessment roll but before the assessor signs the affidavit, the assessor is not permitted to sign the affidavit and defend the assessments at the BOR.

If the certification expires after the completion of the assessment and signing of the affidavit, but before BOR, the assessor is permitted to defend the assessments at BOR as an authorized representative of the assessor under sec. 70.48, Wis. Stats. The expiration of the assessor's certification does not retroactively affect the assessor's qualifications as the roll was completed and the affidavit signed.

Assessment Roll

Every municipality must have its own assessment roll listing all real and personal property assessable in the municipality that year.

For real property, the assessor enters on the assessment roll, opposite the name of the person to whom assessed... a correct and pertinent description of the real property assessed. It is important that correct descriptions appear on the roll to ensure that the taxpayer pays only taxes on property actually owned.

For personal property, the assessor must make sure that the property is assessed to the proper person since the lien created by the assessment is not on the property itself, but against the owner or person in charge of the property.

Signature on Roll

It is the assessor's responsibility to sign the affidavit once the assessment roll is completed. However situations arise which may prevent an assessor from signing the affidavit. One circumstance would be in the case of an elected assessor who is defeated in an election. If the incumbent assessor has not completed the assessment roll prior to the election, he is not permitted to sign the affidavit since he is no longer the assessor. The newly elected assessor should complete the assessment roll, sign the affidavit and defend the assessments at BOR. If the incumbent assessor has completed the assessment roll prior to the election, and signed the affidavit, the incumbent assessor defends the assessments at the BOR under sec. 70.48, Wis. Stats., as an authorized representative of the newly sworn-in assessor, even if it after the election.

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***Bass v Fond du Lac County*, 60 Wis. 516 (1884)** The court ruled, "The Board of Review and the clerk should see to it that the assessor's affidavit is signed and attached to the roll, for its absence is prima facie evidence of the inequality or injustice of the assessment and shifts the burden of proving it equitable and just to the municipality."

Names on Roll

***Massing v Ames* 37 Wis. 645 (1875)** If names of the owners were known to the assessor and omitted, the assessment is invalid, but the assessor is not chargeable with notice of record title, and if an honest mistake is made the assessment is not void.

Lands Held in Common

Lands held in common should be entered onto the assessment roll. Suggested wording would be something like the following: "The valuation of this property is included in the individual lots … etc." They should not be marked as "exempt" because they are not exempt.

Descriptions

21 Opinion of Attorney General 92 (1932) Section 70.86, Wis. Stats. permits the governing body of any city to adopt a simplified system of describing real property in either the assessment roll and/or the tax roll. But a system whereby only numbers are entered as descriptions in the rolls is of doubtful validity and compliance with **sec. 70.86, Wis. Stats**.

***Austin v Holt*, 32 Wis. 478 (1873)** The description in the tax deed must be accurate enough to convey to the purchaser the precise land which has been bought and no other, and must be sufficiently clear and certain for all purposes of identification, both in support of the tax title and in order that it may not injuriously mislead parties interested in the land; if it fails in this it is void and passes no title.

***Mendota Club v Anderson*, 101 Wis. 479 (1899)** It has been held in some cases that if the description in a tax deed is not certain and complete in itself, the deed is void and cannot be aided by extrinsic evidence. The rule more generally adopted is that such evidence is not admissible to supply defects of uncertainties apparent on the face of the deed or to explain a patent ambiguity.

***Talley v Schlatitz*, 180 Mo. 231** A mere clerical error in a tax deed may be corrected by the proper officer; but not so a defect of substance. In the latter case the proper remedy is to procure the issuance of a new deed; but it must be observed that this remedy cannot be employed to cure a fatal defect in the anterior proceedings. For correcting an incomplete, indefinite or incorrect real estate description see **sec. 75.145, Wis. Stats**.

***Mitchell v Pillsbury*, 5 Wis. 407 (1856)** A variance between the description in the roll and in the deed is immaterial if the land be adequately described in each, although in different language.

***N. Boyington Co. v Southwick*, 120 Wis. 184 (1904)** Describing land in the assessment roll as being in the "original plat" instead of S.E. & O.'s plat, as the fact was, is held not to have been such an error as would void the tax proceedings, where the evidence showed that such plat was the first plat of the city, and was commonly referred to as the original plat in conveyances and former assessments, and that such facts were known to the owner when the tax proceedings were held.

***Brody v Long*, 13 Wis. 2d 288 (1961)** A tax deed is an independent source of title and it is unnecessary to go further back than the assessment which gave rise to the tax sale certificate upon which tax deeds are issued. This same case also said that in construing a tax deed, no part of the description is to be rejected as surplusage.

***Prentice v Brewer*, 17 Wis. 635 (1863)** The "south half" of a quarter section would ordinarily be construed to refer to the government survey, but it may be shown by extrinsic evidence that the parties intended one-half of the area of the quarter. If the description were expressed "according to the government survey" the idea of quantity would be excluded and extrinsic evidence inadmissible.

38 Opinion of Attorney General 600 (1949) Errors in descriptions in the tax roll which do not affect the substantive justice of the tax shall not affect the validity of such tax or assessment. Such errors may be corrected (under **secs. 74.55 and 74.456, Wis. Stats**.) by action brought in circuit court or by an affidavit, correctly describing the lands by the assessor and filed with the treasurer. As an alternative, **sec. 75.25, Wis. Stats**., permits the county Board to cancel the certificate of sale and charge back the tax to the municipality.

***Delorme v Ferk*, 24 Wis. 201 (1869)** A description in a tax deed as "lot 14, block 19, to the Village of Theresa" is sufficient.

***Dolan v Trelevan*, 31 Wis. 147 (1872)** An exception of fifteen acres in the northeast corner of a forty-acre tract is construed to be in a square form.

***Johnson v Ashland Lumber Co.*, 52 Wis. 458, 9 NW 464 (1881)** A tax deed of "lot 3, and northeast quarter of the northwest quarter, less 7 acres, of section 5," was held void for uncertainty of description.

***Morse v Stockman*, 73 Wis. 89, 40 N.W. 679 (1888)** A quitclaim deed describing land as the southeast corner of the southeast fractional part of the north half, etc. without further description as to dimensions, quantity or location is void for uncertainty.

***Orton v Noonan*, 23 Wis. 102 (1868)** Necessary words will not be supplied by intendment, nor will any part of the description be rejected as surplusage in construing the description of land in a tax deed.

***Hobe v Rudd*, 165 Wis. 152 (1917)** Where a tax deed purported to convey an undivided one-half of certain land and it appeared that the grantee owned the other undivided one-half and paid the taxes thereon, the description was held sufficient as to the undivided half on which taxes had not been paid.

***Murphy v Hall*, 68 Wis. 202 (1887)** A description in tax certificates as "part 4 of lot 4 of section 20," in a designated town and range, without referring to said tract or to any book or map made in pursuance thereof, or to any record, plat, or description, is so uncertain as to be fatally defective.

***Curtis v Board of Supervisors of Brown County*, 22 Wis. 167 (1867)** Parol evidence is not admissible to aid or correct an imperfect description. A description of lots in "Arndt's Addition," where there are no such lots therein, is void. The word "second" cannot be supplied.

***Whitney v Gunderson*, 31 Wis. 359 (1872); Whitney v. Morrow, 36 Wis. 438 (1874)** A description of land in a tax deed as the north third of the north half of the "vacant strip", the designation by which it had been commonly known, assessed, etc., is valid.

***Jenkins v Sharpf*, 27 Wis. 472 (1871)** A description of the north twenty feet of a certain lot, held to describe a strip twenty feet wide off the northerly side thereof, of equal width throughout, though the boundary lines of the lot deflected twenty-five degrees from east to west lines, would be sufficient.

***Atwater and Moore v Schneck*, 9 Wis. 160 (1859)** Land described in a contract as being in a certain section, town and range east, but not mentioning any county or state was not held void for uncertainty where both vendor and vendee resided in the state, and one party offered to identify the land by witnesses.

***Simmons v Johnson*, 14 Wis. 523 (1861); City of Janesville v. Markoe, 18 Wis. 350 (1864)** A description of lots by their numbers as designated on the recorded plat of a village is sufficient, although the plat referred to was not acknowledged nor entitled to record. The plat had been recorded.

Correction of Errors

***IBM Credit Corporation (ICC) v Village of Allouez, Paul M. Quigley, Assessor of the Village of Allouez, Village Board of Allouez and Village of Allouez Board of Review*, Wisconsin Supreme Court, 188 Wis. 2d 143 (1994), Docket No. 93-1012, December 6, 1994.**

Appeal from the Wisconsin Court of Appeals: Reversed and remanded. If a personal property tax is erroneously paid on tax-exempt property, and the taxpayer discovers the error after the date that the tax was due, is the taxpayer entitled to a refund under **sec. 70.43, Wis. Stats.,** which provides for correction of a "palpable error," including taxation of exempt property?

In order to recover unlawful taxes under **sec. 74.35(5)(a), Wis. Stats**., a taxpayer must file a claim by January 31 of the year in which the taxes are payable. In this case, the taxpayer did not discover the error until after the January 31 deadline. No claim was filed under **sec. 74.35, Wis. Stats**., instead, the taxpayer filed a claim under **sec. 70.43, Wis. Stats**.

Under **sec. 70.43(2), Wis. Stats**., if an assessor discovers a "palpable error" in the assessment of personal property, it must be corrected. **Section 70.43(1)(c), Wis. Stats.** defines "palpable error" to include "an assessment of property that was exempt by law from taxation at the time fixed by law for making the assessment." The assessment of exempt property in this case is considered "palpable error."

The Village argued it may keep the $214,046 in taxes because **sec. 70.43, Wis. Stats**. provides a procedure for the Village to follow, but does not provide the taxpayer with either a substantive right or a procedure to recover unlawful taxes. The Court, however, disagreed and held that **sec. 70.43, Wis. Stats**. provides the taxpayer with both a substantive right and a procedure to recover unlawful taxes.

Section 70.43, Wis. Stats. was repealed and recreated in a clear response to the decision in ***State ex rel. Fountain v City of Green Bay, 105 Wis.2d 741 (Ct. App. 1981)***. In *Fountain* the court ruled that **sec. 70.43, Wis. Stats**. did not authorize an assessor to recapture or refund erroneously assessed taxes by increasing or decreasing the following year's property tax. In *Fountain*, the court opined that the statute simply provided an administrative procedure for correcting the present year's tax roll. The effect of the amendment of **sec. 70.43, Wis. Stats.,** as shown by its language and legislative history, was to overturn the decision in *Fountain*.

The legislature clearly intended that any correction noted on the previous year's assessment roll would result in the collection of additional taxes or a refund. The court held that this section provides the taxpayer with a substantive right and a procedure to recover unlawful taxes. According to the court, to hold otherwise would render the refund language of the statute useless. It would be an absurd result to limit the taxpayer to **sec**. **74.35, Wis. Stats**. as the sole refund provision.

This interpretation would allow the taxing body greater discretion and time under **sec**. **70.43(3), Wis. Stats**. to recover or refund taxes caused by palpable error whereas taxpayers would be strictly limited to compliance with the January 31 deadline. This result is absurd, unfair and clearly not intended by the legislature. The interpretation advanced by the Village would frustrate the general purpose of the taxing statutes which seek to ensure that taxing bodies collect the correct amount of tax and no more or no less. **Sec. 74.35, Wis**. **Stats.** is not the exclusive method for recovering unlawful taxes. The Court instructed the board to recognize that **sec. 70.43, Wis. Stats.** provides the taxpayer with an alternative remedy for recovering unlawful taxes.

***State ex rel. Fountain v City of Green Bay*, 105 Wis. 2d 699, 314 N.W. 2d 904 (Court of Appeals 1981)** The court held that while **sec. 70.43, Wis. Stats**. provided for the assessor to correct the preceding year's assessment roll for an error in making the assessment, this statute contained no provision to recapture the taxes not collected as a result of this error.

NOTE: **Section 70.43, Wis. Stats**. was repealed and recreated to allow the municipality to collect or refund the taxes caused by a "palpable error." "Palpable error" is defined in the new statute.

Real Property

Legal Definitions of Real Property for Assessments Purposes

Section 70.01, Wis. Stats. provides that, "Taxes shall be levied, under this chapter, upon all general property in this state except such as is exempted therefrom…" Real and personal property, as the words are used in the WPAM are clearly defined by the statutes. As they are defined, they are controlling in all assessments made by the local assessor.

49 Opinion of Attorney General 93 (1960) The assessment of property as of the close of May 1 (now January 1) is not affected by May 1 occurring on a Sunday. The May 1 date is a reference point of time to which the value of a property is fixed. It is not a limitation on when the assessor has to do or be done with the assessments.

28 Opinion of Attorney General 523 (1939) No change in ownership of a property that occurs after May 1 (now January 1) will affect the taxability of the property for that year.

Real Property Defined

Section 70.03, Wis. Stats. defines real property, "The terms 'real property', ' estate', and 'land', when used in Chs. 70 to 79, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto."

Real Property Legal Reference

Court cases and legal opinions concerning real property deal primarily with listing and valuation. The problem of listing (ownership and location) is much easier to solve when dealing with real property rather than personal property. The valuation problem centers on the statutory requirement of determining market value.

Recommended Classification of Items as Real Estate

Land:

Land and natural (not man-made) improvements

Improvements:

- Buildings
- Curbs and gutter
- Electrical wiring and fixtures
- Elevators and conveyor systems
- Fences
- Heating, ventilating and air conditioning system
- Leasehold improvements (not removable)
- Paving
- Plumbing
- Railroad sidings

- Septic systems
- Shelving, racks, bins (not portable)
- Wells

All machinery and equipment installed by the fee owner under the Wisconsin Law of Fixtures should be assessed as real estate.

Satellite dishes, small metal sheds, and above-ground swimming pools that are not attached to the real estate and can be removed without damage to the item or to the real estate are not improvements and are not assessable as real estate.

Omitted Property

According to sec. 70.44, Wis. Stats., property omitted from the previous two year's assessment may be added to the present year's roll. This applies to property completely missed or property which was exempted incorrectly. This does not permit an assessor to increase the assessed value due to an error in valuation of property that was previously assessed. Any property discovered to have been omitted for 2010 after the Board of Review has adjourned, will be assessed and taxed in 2011 as "omitted for 2010".

Land:

If the assessor places a value for the land on the assessment roll, the assessor cannot assess the property for any omitted land. This is true whether or not the assessor has the correct legal description. For example, assume that the legal description includes 40 acres but the assessor only values 38 acres. The assessor cannot assess the 2 acres as omitted property. Similarly, assume that the legal description includes only 38 acres and the assessor discovers that the legal description is incorrect and should include 40 acres. Then the assessor cannot assess the 2 acres as omitted property.

Improvements:

If the assessor places a value for improvements on the assessment roll, the assessor cannot assess the property for any omitted improvements. For example, assume that the assessor places a value on the improvements that includes only the value of the house. Later the assessor discovers that the value of a garage was missed. Since the assessor has placed a value on the improvements, the assessor cannot add the value of the garage as omitted property. To assess omitted improvement value, there must be no value for the improvements on the assessment roll. In addition, the assessor would not be able to assess this garage under Correction of Errors.

24 Opinion of Attorney General 541 (1935) Lands omitted from assessment by a town on the mistaken theory that the land was owned by the federal government and, therefore, exempt, could be assessed by the town as omitted property the next year.

20 Opinion of Attorney General 771 (1931) Land that was omitted from assessment by the city because of a circuit court decision detaching such land from the city, when this decision was later reversed by the Supreme Court, could be assessed by the city as omitted property the next year.

***Bogue v. Laughlin* 149 Wis. 271, 136 NW 606 (1912)** It was held that property omitted from assessment during an individual's lifetime could be assessed to the individual's heirs.

25 Opinion of Attorney General 145 (1936) Taxable lands upon which the tax had been imposed in previous years but which inadvertently were omitted from the 1934 tax roll should have been placed upon the subsequent assessment roll for the 1934 taxes. The assessment when made created a lien for the 1934 taxes which was attached as of August, 1934, to land acquired by the United States of America in April, 1935. The federal government's sovereignty could not be extended so as to destroy the state's right to collect a lawfully levied tax which was justly due and owing.

18 Opinion of Attorney General 193 (1929) Lands owned by the state are exempt from taxation except land which the state is selling on land contract. Failure to pay any interest, principal or tax on such contracted land, voids the contract with land becoming state land and, therefore, exempt from taxation.

***ABKA Limited Ptns. & Abbey Harbor Condo Assoc. v Wisconsin Dept of Natural Resources*, 648 N. W. 2d 854, 2002 WI App. 106, (2002)** The Supreme Court found the following on each of the three issues: 1) The court stated that the filing of an objection to a permit doesn't limit the agency's jurisdiction protecting the rights of the public as required by statute. 2) The Court ruled that the DNR does have jurisdiction to regulate ABKA' s conversion of its marina to a condominium form of ownership. However, the court also concluded that the Administrative Law Judge erred in applying **secs. 703.02(15) and 30.133, Wis. Stats**. to ABKA's condominium project. The court concluded that the attempted conversion of the marina to a condominium was a conveyance of riparian rights in violation of **sec. 30.133, Wis. Stats**. 3) Lastly the court stated that **sec. 703.02(15), of the Wisconsin condominium statutes** require a "unit" to be intended for independent use. The court stated "Wisconsin's definition of a unit reveals no legislative intent to permit a boat slip to be conveyed as a condominium unit. Considering this, and applying the rules and principles from the condominium statutes, we determine that four-by-five-by-six inch lock boxes are not intended for any type of independent use. Rather, they are phantom units that to not meet the statutory definition. Because there are no valid units, there is not a valid condominium conveyance of real property.

The court noted the following about the current condominium statutes. "We note that residential condominium units that provide for the use of boat slips are readily distinguishable from ABKA's lock boxes. Residential units are intended for independent use. Their true purpose, living space for human beings, may readily and accurately be stated in the condominium declaration. Such units would comply with the statutory definition of a *unit*, and would allow for a valid condominium conveyance, that would create common interest ownership in riparian property. Therefore residential units that provide for the use of a boat slip would not contravene statute 30.113."

Where Assessed

Section 70.12, Wis. Stats. describes where real property is to be assessed. "All real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies."

***Wadleigh v Marathon County Bank*, 58 Wis. 546, 17 NW 314 (1883)** When a town assesses for taxation, as part of such town, lands that were not at the time, and never had been a part of or under its jurisdiction, a tax deed for the taxes is void.

***Union Falls Power Co. v Marinette Co.*, 238 Wis. 134, 298 NW 598 (1941)** There is no question that the flowage right appertains not to the land flowed, but to the land upon which the dam is constructed and should be assessed against the land to which it is appurtenant. An easement cannot apply to both the dominant and servient estate. It therefore does not pass upon the transfer of the servient estate.

To Whom Assessed

Real property shall be assessed in the name of the owner, if known by the assessor, otherwise to the occupant thereof, if ascertainable, and otherwise without any name. When the real estate taxes are levied they become a lien upon the property against which they are assessed, superior to all other liens. The courts have interpreted at least two types of ownership. One is the owner of the legal title and the other is commonly referred to as the beneficial or equitable owner. It has been determined that the assessment should be placed against the beneficial owner. Beneficial ownership usually depends on: (1) possession, (2) benefits gained by the possessor of the property, and (3) control of the use or responsibility in case of loss of the property. When it is not physically possible to divide and assess the ownerships separately as real estate, they should be assessed together to the legal title holder of the land. This is especially true in the case of standing timber not owned by the landowner or buildings on leased lands that are assessed as real estate.

***Ritchie v City of Green Bay* 215 Wis. 433, 254 NW 113 (1934)** The court held that a vendee in possession under a land contract was the beneficial owner of the real property. The legal title was in the vendor, the equitable title was in the vendee and possession was in the vendee. The court did not consider itself bound by the legal title owner, but upon the consideration as to who was the owner "for all practical purposes."

***Saddle Ridge Corporation v Board of Review for Town of Pacific*, Wisconsin Supreme Court of Appeals, Appeal No. 2007AP2886, June 18, 2010**

The Wisconsin Supreme Court reversed the circuit court's order, which vacated the board of review's determination affirming a property tax assessment against Saddle Ridge.

Town of Pacific assessed Saddle Ridge for 41 declared and platted undeveloped condominiums. Saddle Ridge contended they were not units "until it is four walls or a cubicle of air or a building."

The Supreme Court held each "unit identified in the condominium declaration is a "unit" for purposes of separate taxation under Section 703.21, Wis. Stats., regardless of whether the unit has been constructed. For purposes of identifying the "unit" as defined in Section 703.21(15), a unit may exist without a building."

***The Saddle Ridge Corp. v Board of Review for Town of Pacific*, Wisconsin Court of Appeals, District IV, No. 2007AP2886, August 27, 2009**

Saddle Ridge had rights to develop 41 condominium units which had not yet been built. The town assessed the declared, unbuilt units to Saddle Ridge as the beneficial owner. Saddle Ridge contended that the undeveloped units are common area until such time as a unit is built. They pointed to the condominium documents which designated all common area to be under the ownership of unit owners, each unit owner having an undivided interest in the common areas. Saddle Ridge concluded that since they didn't own any units, they did not own any of the common area. The circuit court sided with the town.

The appeals court reversed the circuit court decision, ruling that the beneficial ownership test was not relevant due to the Condominium Ownership Act, Chapter 703 Wisconsin Statutes, which specifically addressed ownership of units and common area. The appellate court ruled that Chapter 703, and the condominium documents of the project, carried greater weight than the concept of beneficial ownership.

One appellate judge wrote a lengthy dissenting opinion, stating that the interpretation given by the appeals court produces a nonsensical result wherein developers of a condominium project could avoid paying property taxes for years until a unit was built. He wrote that the term 'unit' applies to those units declared, whether built or unbuilt. The court determined that the decision would not be published.

Pending. The town of Pacific appealed to the Supreme Court to render judgment on the following issues: 1) who is assessable for the fair market value of declared but unbuilt condominium units; 2) Is the property in condominiums assessable to its beneficial owner, just as all other real property is assessable to its beneficial owner; and 3) is the condominium developer the beneficial owner of the declared but unbuilt units that will be built on undeveloped land? Oral arguments will be heard in 2010.

***N. Boyington Co. v Southwick* 120 Wis. 184, 97 NW 903(1904)** The failure of an assessor to assess real estate in the name of the true owner was insufficient to render the assessment void, when the circumstances indicated that the assessor had readily believed that the party assessed was the owner.

***Schmidt v Town of Almon*, 181 Wis. 244, 194 NW 168 (1923)** Where one person owned the land and another the timber standing thereon, both the land and the standing timber were to be assessed against the owner of the land. The timber is to be considered an element that added value to the land.

Valuation

Although tax statutes are strictly construed against the taxing authority, the courts have allowed some departures from strict interpretation. The courts realize that it may not be physically possible to actually view all property as stated in **sec. 70.32, Wis. Stats**. The assessor has to take into account all factors affecting the value of property in making an equitable assessment. While this assessment should be at full market value, it has been held that an assessment may be a fraction of the market value, as long as the same percentage of market value is used for all classes of real estate as well as all items of personal property.

***Waste Management v Kenosha County Review Board*, 184 Wis. 2d 541 (Wisconsin Supreme Court 1994)** The issue in this case involving the tax assessment of a landfill is whether the assessor's use of the income approach required that "business value" be determined and then subtracted from the assessment. Because there was substantial evidence that the business value of the landfill was appended to the property, and not independent of it, the assessment was proper, the Court of Appeals affirmed. The Wisconsin Supreme Court agreed by adding that "such appended value is 'inextricable intertwined' with the land and is transferred to the new owner upon a sale of the land."

Waste Management argued that the Board of Review violated the law by failing to deduct business value. They cited **sec. 70.32(1), Wis. Stats**., which requires assessors to consider all factors that, according to professionally accepted appraisal practices, affect the value of the property to be assessed including information in the WPAM which, according to Waste Management, requires assessors to exclude values of assets other than real property when using the income approach. The Court of Appeals said, "While it is true that the Manual cautions assessors to be 'careful to make sure that only the real estate is being valued and not the quality of management and goodwill,' that statement must be read in the proper context." The Wisconsin Supreme Court determined that this section of the WPAM (chap. 9) "cites the income approach as an appropriate method of valuing a number of different properties, including commercial structures, apartment buildings, hotels, and golf courses."

The WPAM did not dictate a certain procedure for cases where the income capacity is found to be interrelated with the land. The WPAM directs assessors to other texts and treatises when the WPAM's examples do not accurately fit certain specific commercial properties. The assessor followed the advice of those texts which the WPAM does not prohibit, but recommends.

***Allright Properties, Inc. v City of Milwaukee*, Wisconsin Court of Appeals, District 1, Appeal No 2008AP510, March 10, 2009**

Allright owned a paved parking lot near the airport which had 1450 marked spaces. The area was fenced, had a ticket booth, and a 1420 square foot building containing an office and warehouse/garage. The assessed value for Allright's parking facility was greater than that of some nearby airport hotels. Allright appealed to Circuit Court.

Two issues emerged: whether the assessor erred by utilizing the income approach to value the property when it should have used the tier 1 sales comparison method, and, whether the assessor violated the constitution's uniformity clause by assessing Allright's property at a value considerably more per square foot than was applied to other commercial properties along the same street. The value issue was complicated by the sale of the Allright property, after filing the appeal, for a value higher than the city's assessment.

The trial court ruled in favor of Allright on the basis that comparable sales must be used, if available. The appellate court reversed the circuit court's decision because Allright's appraiser admitted that recent sales of comparable parking lots were not available. His method of applying the comparable sales approach was to choose sales of vacant land in the area and then utilizing the cost approach to value the buildings and improvements. Allright's appraiser developed a second value using the income approach. This value was also deemed flawed because the appraiser developed value based on what an owner of real estate elsewhere in the city would charge to rent the property to a parking lot operator, then capitalized the income stream.

The appellate court ruled that the city had correctly followed the WPAM in developing a value using the income approach and considering income that appertained to the land. The city assessor's conclusion that "since most investors purchase commercial property for its income producing potential, the income approach is given the most weight" was correct. The Court also concluded, "When business value is transferable with the underlying real estate, the business value is appended to the real estate rather than attributable to the personal skill and expertise of the owner." Operation of the parking lot is a transferable value that is **inextricably intertwined with the land**, buildings, and improvements thereon.

The court also ruled that case law establishes taxpayers cannot succeed on a uniformity claim by 'selectively picking a few low comparison assessments'. The Court stated, "Uniformity requires that the evaluation and the rate of assessment of all properties be uniform" and referred to **Algoma Housing** where that court determined that "the method of evaluation and the process of assessment, not the dollar amount involved, is where the uniformity requirement is directed".

***Flood v Village of Lomira, Board of Review*, 153 Wis. 2d 428 (Wisconsin Supreme Court 1990)** The Wisconsin Supreme Court affirmed the Court of Appeals by saying "When a seller finances the purchase of real property, **sec. 70.32(1), Wis. Stats**. requires the Board of Review to consider whether the financing terms between seller and buyer affected the price of the real property in determining market value. We also hold that **sec**. **70.32(1), Wis. Stats**. proscribes [prohibits] assessing real property in excess of market value."

Although both parties agreed the sale was an arm's-length transaction, **sec. 70.32(1), Wis**. **Stats**. also states the sale must be "under normal conditions." The WPAM concludes that assessors should use a "cash equivalency adjustment" to ensure that the purchase price is an arm's-length transaction when seller financing reflects the market value of the real property in the same way that the sale price in an arm's-length transaction not involving unique financing arrangements between the seller and buyer reflects market value.

The Wisconsin Supreme Court said that using the "cash equivalency adjustment" does not violate the requirement of the Wisconsin Constitution that taxation shall be uniform and the adjustment is applicable whether the analysis is of the market value of comparable property or the market value of the taxpayer's property.

In determining the additional six percent assessment of the property's market value made by the assessor to reflect the Equalized Value of the property established by the DOR pursuant to **sec. 70.57, Wis. Stats**., the Wisconsin Supreme Court referred to the Court of Appeals ruling in ***State ex rel. Kesselman v. Sturtevant***, *133 Wis. 2d 122, 132* as follows: "We [the Court of Appeals] are aware of no authority in the statutes or the assessment manual for use of equalized value by a local assessor in estimating fair market value of a particular parcel for property tax assessment purposes. The [assessment] Manual, in fact, stresses [that] the equalization is concerned with equity between municipalities, while the local assessor's concern is properly with equity among individual property assessments. The assessor is required to assess property based on fair market value."

***Krukowski v Village of Greendale, Wisconsin, Board of Review*, Wisconsin Court of Appeals, District I Appeal No. 2007AP330, November 14, 2007.**

There were two issues: 1) whether the Board of Review was arbitrary in dismissing the square footage measurements of the property owner's appraiser in favor of the square footage based on measurements taken by the assessor's office, and 2) whether the assessor was in error by failing to adjust the comparable sales for age, condition, and differences in property amenities, namely an in ground swimming pool and an outdoor Jacuzzi.

The court held that the Board was not remiss in upholding the measurements of the assessor in the absence of clear and compelling evidence to the contrary and that the Board had not acted arbitrarily but had, in fact, heard extensive testimony as to the calculation of gross living area. The court also held that comparable sales used by the assessor were similar in age and condition to the property in question and therefore did not require an adjustment for these variables. The Krukowski's demand for a lowered assessment due to obsolescence and depreciation was denied as these factors are irrelevant to the sales comparison method of valuation.

***Mirosalv Anic et al v Board of Review of the Town of Wilson*, Wisconsin Court of Appeals, District II, Appeal No 2007AP761, April 2, 2008.** Assessor examined sales of waterfront property and determined that the two factors affecting value of the land were the waterfront footage and the quality of the beach. Plaintiff claimed this was too formulaic because it neglected to consider excess frontage and excess acreage. The court ruled that the assessor had adequate comparable sales data to show that excess frontage and acreage did not affect value on waterfront properties in this area, and that the assessor was correct in limiting assessment criteria to only those factors shown by comparable sales to have a direct affect value.

***City of West Bend v Continental IV Fund Limited Partnership and Board of Review of the City of West Bend*, Wisconsin Court of Appeals, 193 Wis.2d 481 (Ct.App.1995), District II, Docket No. 94-1913, April 12, 1995.**

Appeal from Wisconsin Circuit Court: Affirmed. Should all interests or only the owner's interest in real estate be assessed?

The WPAM does not control the assessment. Rather, the assessment is first controlled by the common law as set forth in the language of **sec. 70.32(1), Wis. Stats**., and the decisions in ***Darcel, Inc. v City of Manitowoc Bd. of Review, 137 Wis. 2d 623 (1987),*** and in ***Metropolitan Holding Co. v Board of Review, 173 Wis.2d 626 (1993).***

In *Darcel*, the issue before the Wisconsin Supreme Court was whether an assessment was properly based on market rental income when there was a recent arm's-length sale of the property to use as evidence of value. Also, in *Darcel*, the Court held that the sale of the subject was the best evidence and that an encumbrance, such as a long-term lease, would subject all potential buyers to the same decreased use or rent and should be considered as lowering the full market value of the property.

The Board did not err in reducing the tax assessment of Continental to $1,722,000 because this reflects what would be received in a sale of the property based upon the income generated by the lease.

The Court stated that where property is encumbered by a bundle of rights, we must appraise or assess the property at its value using the current value of those bundle of rights. In this case, we cannot speculate as to what the lease rights might bring on the market, but we must accept what the lease is being paid right now under the negotiated lease terms.

The leasehold interests were properly considered as an encumbrance on the property and were not exempted from assessment despite the City's argument that leasehold interests were exempt from assessment under this approach. The language of **sec. 70.32(1), Wis. Stats**. is clear and unambiguous and that the *Darcel* decision was not overruled by the amendment to **sec. 70.32(1), Wis. Stats**.

The City argued that the decision in *Darcel* was reversed by the subsequent amendment of **sec. 70.32(1), Wis. Stats**. According to the City, the amended law provides that an arm's-length sale of property is not to be considered unless it conforms to recent sales of comparable property and therefore an arm's-length sale is not necessarily the best information to determine value. The Court of Appeals concluded that the subsequent legislation did not repeal *Darcel*.

The Court affirmed the Board of Review's reduction in assessed value and held that the actual value of the property was what would be obtained at an arm's-length sale based on the current value of the leases. A petition for review to the Wisconsin Supreme Court was denied on August 20, 1995.

Paradise Place Associates Limited Partnership, a Wisconsin Limited Partnership, c/o Capital Associates v City of West Bend, **Wisconsin Circuit Court, Washington County, Docket No. 94-CV-236, May 23, 1995.** Appeal from Board of Review: Affirmed. The issue in this case is whether or not the assessor considered alternate and appropriate methods of assessment when assessing a federally subsidized property.

The City did not have a valid argument when they said that total cost of the property results in the equivalency of a sale. In other words, the City argued that since the plaintiff bought the land and built on it, the total cost was the same as the sale.

The case did not require the conclusion argued by the plaintiff when they stated that the *Metropolitan Holding* case required the use of the income method in assessing subsidized housing. **(*Metropolitan Holding v Milwaukee Review Board*, 173 Wis. 2d 626,495 N.W. 2d 314 (1993)).** In that case, both the assessor and *Metropolitan Holding* used the income method and the argument was whether to use actual income, as *Metropolitan Holding* asserted, or the estimated market rents which the assessor used. In this case, the issue is whether the income method should be used instead of the cost method.

Case law is clear that the restrictions placed upon subsidized housing must be considered by the assessor in setting the value. The assessor considered both the cost and income methods. The Court held that the Board of Review acted according to law. It considered the information presented including both the cost and income approaches and concluded that the assessor's use of the cost approach was appropriate.

Mineral Point Valley Limited Partnership v City of Mineral Point Board of Review, **Court of Appeals District IV, Appeal Number 03-1857, July 15, 2004** The Court upheld the judgment rendered by the Second District Court of Appeals in the 2002 ***Bloomer Housing*** decision (WL 2016430). Specifically, that the stated contract mortgage (Market) interest rate must be used in the capitalization of income when valuing 515 subsidized housing.

What is the proper interest rate to use in the capitalization of income when valuing a 515 subsidized housing?

The parties agree that the income approach is the most appropriate method to value the property. The assessor for the City of Mineral Point developed his opinion of value for the 515 subsidized housing project using the band of investment method to set the capitalization rate. In the development of the rate he used the subsidized rate of 1% for the mortgage rate in the band of investment rate formula. The property owner felt that the actual contract rate of 8.75% should be used because of the long-term contractual rent restrictions the property is subject to under the FMHA rental assistance agreement.

The court found that this property was subject to the same rent restrictions as those in the Bloomer case. As such, the court turned to the decision in the *City of Bloomer* for guidance on which mortgage rate fairly reflects the unique nature of federally subsidized housing. The court in the Bloomer case found,

> "…the beneficiaries of the subsidy, according to the manual, are the tenants. Nonetheless, the subsidy affects the property's value. Any potential buyer would reasonably consider the subsidy's value when determining the appropriate price. The subsidy, however, is not determinative. It must be weighed with all the other factors."

We conclude that if the market rate was proper in the *City of Bloomer*, the use of a subsidized interest rate here cannot be. Thus, the board of review did not act according to the law when it accepted an assessment using the subsidized rate. Based on the *City of Bloomer*, we conclude that a capitalization rate based on a subsidized interest rate in impermissible, and that a market rate must be used together with "all the other factors influencing value," to produce the fair value of the partnership's real estate.

***Bloomer Housing Limited Partnership v City of Bloomer*, 2002 WL 2016430 Wis. App. 2002**. The Court of Appeals—noting **sec. 74.37(3)(d), Wis. Stats**.—stated that new evidence is appropriate and that the court can enter a judgment if it is in the best interest of the parties. The court considered the City's issues and determined the income approach was the proper method. The court reviewed the differing positions about which mortgage rate was appropriate and sided with Bloomer Housing.

The Appellate Court used the reasoning in the ***Metropolitan Holding Co. v Milwaukee*** case when deciding on the mortgage rate. The ***Metropolitan*** case stated, "By not considering actual income and expenses, the court said, the assessor 'essentially pretended' the property was not hindered by the rent restrictions." The Appellate Court in the Bloomer case refers to the Circuit Court and quotes, "Specifically, the court agreed with Bloomer Housing that the City's assessment 'essentially pretended' the property was not hindered by the governmental restrictions."

The Appellate case states, "The City, however, also relies on ***Metropolitan***, arguing its requirement that assessors use actual income and expenses when valuing subsidized housing means the actual mortgage rate of 1% must be used in calculating the capitalization rate. It argues Bloomer Housing's suggested valuation uses actual figures on the income side of the equation, but then unfairly uses an artificially inflated figure on the other. Thus, the City suggests the trial court erred as a matter of law by not taking the interest subsidy into account."

In response, the Court of Appeals stated "we do not agree with the City's interpretation of ***Metropolitan***." As we understand it, ***Metropolitan*** only addresses the income half of the income approach equation. It does not address the capitalization rate half and we do not read the case as requiring the use of the subsidized mortgage rate. The assessor's responsibility is to determine the "full value" of the property in accordance with the WPAM. The 1999 WPAM required assessors to consider the mortgage terms and conditions, the rents, expenses, and expected yield rate. The assessor's job is to examine all these factors and determine how they affect the value of the property. In this case, these factors are all subject to various governmental restrictions. By establishing the capitalization rate based on the 1% "actual" mortgage rate, the court determined the City's assessment failed to accurately account for these restrictions.

The City also argues the 1% rate is appropriate because the interest subsidy flows to the property, not the tenants. The Circuit Court determined the subsidy flows to the tenants in the form of reduced rents. Although the witnesses offered conflicting testimony on the subsidy's beneficiary, the Court of Appeals determined the Circuit Court's finding is consistent with the WPAM. In its description of sec. 515 housing the WPAM says, "After construction of the project, FmHA may provide a limited distribution owner with mortgage interest subsidies. Tenants receive lower rents as a benefit." The beneficiaries of the subsidy, according to the WPAM are the tenants. Nonetheless, the subsidy affects the property's value. Any potential buyer would reasonably consider the subsidy's value when determining the appropriate price. The subsidy, however, is not determinative. It must be weighed with all the other factors influencing value. Our examination of the record suggests this is exactly what the Circuit Court did. The Circuit Court properly determined that the City failed to consider the effects of all the other restrictions on the property's value when it assessed Bloomer Housings' North Lakeview Apartments.

***S.C. Johnson & Sons, Inc. v Wisconsin Department of Revenue,* Circuit Court, Branch II, Dane County, Docket No. 95-CV-338, October 16, 1995.** Appeal from the Wisconsin Tax Appeal Commission: Affirmed. Should certain property of the Petitioner (property known as "Armstrong Park") that includes recreational facilities be considered "manufacturing property" within the meaning of **secs. 70.995(1) and (2), Wis. Stats**.?

The property of the Petitioner is not "manufacturing property" within the meaning of **sec. 70.995(1), Wis. Stats**. Although **sec. 70.995(1)(a), Wis. Stats**. does not limit manufacturing property to where actual manufacturing takes place, for other structures to qualify as manufacturing property, they must be determined to be warehouses, storage facilities or office structures. The property of the Petitioner is not a warehouse, storage facility or an office structure within the meaning of **sec. 70.995(1)(a), Wis. Stats**. Recreational, child care and meeting facilities, though frequently incorporated into office buildings or manufacturing plants, does not make these facilities automatically manufacturing property as the Petitioner contends. The Petitioner's assertion that recreational, day care, and meeting facilities located on the property at issue constitute "office structures" within the meaning of **sec. 70.995(1)(a), Wis. Stats**. is not substantiated.

The Petitioner's "person-hours" evidence does not establish that the predominate use of the property at issue is in support of its manufacturing property. The Petitioner has not shown that the predominant use of the property is in support of its manufacturing property.

The property fails to qualify as manufacturing property as required within the meaning of **sec. 70.995(2) Wis. Stats**. The Petitioner argued that Armstrong Park's recreational facilities are classified in group 28 of the *SIC Manual* and therefore under **sec. 70.995(2)(k), Wis. Stats**. the property is "deemed prima facia manufacturing property..." and assessment by the department is required under **sec. 70.995(5) Wis. Stats.**

The *SIC Manual* classification merely creates a rebuttable presumption that must be disproven by the DOR that the nonexistence of the presumed fact is more probable than its existence. "Prima facia" means "a fact presumed to be true until disproven by some evidence to the contrary." (Commission ruling, p.7; citing *Black's Law Dictionary*).

The property is not eligible for assessment under **sec. 70.995(5) Wis. Stats**. The DOR met its burden by demonstrating that the Petitioner has failed to meet any of the permissible statutory definitions of property qualifying as manufacturing property, using any standard.

The Court grants summary judgment to the DOR and denied the Petitioner's request for the DOR to assess this property as "manufacturing property."

***Sturgeon Bay Housing Limited Partnership v City of Sturgeon Bay Board of Review*, Wisconsin Circuit Court, Door County, Docket No. 94-CV-173, March 30, 1995**. Appeal from the Board of Review: Affirmed. Was one particular valuation method for federally subsidized housing better than another?

Because this case is a review on certiorari, the Court is concerned with four factors: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its decision was arbitrary, oppressive, or unreasonable; and (4) whether there was evidence before the board that would reasonably support its determination.

From review of the record, the Board acted according to law because they listened to the evidence giving both sides an opportunity to present all the information they wished to show.

The City assessor's use of the cost valuation method was incorrect in that he failed to provide additional factors besides building costs to justify his valuation figure.

The additional expert testimony produced by the City clearly substantiated the value to be $635,000 and since the City's figure is lower, the City's valuation of $624,500 stands. The valuation remained at the figure set by the Board.

***State ex rel. Flint v Kenosha County Review Board* 126 Wis. 2d 152 (1985)** The assessor and the Board of Review must consider the effect of owner financing (cash equivalency) on assessments based on the sales of comparable properties in order to establish the "full value" of the property.

***Wisconsin Department of Revenue v Radtke and Herro*, Dane County Circuit Court, Case No. 79-CV-5952 (April 18, 1980)** The issue presented was whether, in using the income of real estate to arrive at the market value for assessment purposes, such income is to be measured by the rent specified in the lease (contract rent) or by that which the property would command in the marketplace if not subject to lease (economic rent).

While this issue is a novel one as far as Wisconsin case law is concerned, many courts of other states have passed on this issue. The overwhelming majority of these decisions hold that the rent in such situation is to be measured by what the rent would be if the property were not under lease.

In researching the out-of-state decisions, the court made it a point to determine whether the holding might be dependent on an assessment statute that was essentially different from Wisconsin's standard of fair market value. The court was satisfied that none of the out-of-state cases favoring the use of economic rent were dependent upon a statute that set the standard for determining assessed value differently from the Wisconsin standard.

The court believed "that under the court holdings of the great majority of the courts which have dealt with the problem, the Wisconsin Supreme Court, if confronted with the same problem, would hold economic rent rather than actual rent should be utilized in applying the income factor in valuing real property for taxation in a situation similar to the instant one."

***Boorman v. Juneau County,* 76 Wis. 550, 45 NW 675 (1890**) The mere fact that the assessor did not value lands from actual view did not invalidate the assessment.

***City of Janesville v Markoe,* 18 Wis 350 (1864**) It is the duty of the assessor of lands within the corporate limits of a city, to assess them at their true value, whether they are used for farming purposes or subdivided into lots for building purposes.

***State ex rel. Hensel v Town of Wilson,* 55 Wis. 2d 101, 197 NW 2d 794 (1972)** The section of the law providing the method in which a town assessor shall classify real property did not prohibit the assessor from considering that commercially zoned property was actually used for farming.

***Salscheider v City of Fort Howard,* 45 Wis. 519 (1878)** The court stated, "An assessment at a price at which the whole property of the city, if thrown on the market on the day of the assessment would bring in cash, is not the price which could ordinarily be obtained for each parcel at private sale and is not the rule of the statute."

***United States Shoe Corp. v Wisconsin Department of Revenue,* Wisconsin Tax Appeals Commission, Docket No. 93-M-02, March 29, 1995.**

Appeal from the Wisconsin Department of Revenue: Affirmed. In this case, the issue is whether a sale well after the assessment date is appropriate evidence of value.

The only fact in dispute was the value of petitioner's property on January 1, 1992. The DOR assessed the property at $6,502,900 and the petitioner alleged the value to be $4,000,000. The petitioner submitted an appraisal of the property indicating the value to be $4,400,000. On August 31, 1994 the petitioner sold the property in an arm's-length sale for $6,450,000.

The DOR brought a motion for summary judgment alleging the 1994 sales price to be the best evidence of value as of January 1, 1992. The petitioner argued that its appraisal was the best evidence of value.

Despite the date of the sale, it is evidence of value. Petitioner's appraisal report, which relied on evidence of other comparable sales, cannot be used to refute evidence of value resulting from a sale of the subject. The Commission awarded summary judgment to the DOR.

***Walgreen Co. v City of Madison*, Wisconsin Supreme Court, Appeal No. 2006AP1859. July 8, 2008.** The main issue is the appropriate method of assessing retail space being leased at above-market rents. The City argued that such assessments should be based on the contract rent of the lease while Walgreens believed the assessments should be based on market rents. Walgreens alleged that because the City based its assessments on contract rents rather than fair market rents, the assessments violated the uniformity clause of the Wisconsin Constitution.

The court held that the WPAM aligns with both statutory and case law in requiring that an assessment based on the income approach shall develop an assessed value based on fair market rents rather than actual contract rent, *except* the assessment can reflect the reduced value of properties with leases below-market rents, or encumbrances bringing a leased property's value below the market rate. The court declined to comment on the issue of uniformity.

***Walgreen Co. v City of Madison*, Wisconsin Court of Appeals, District IV, Appeal No. 2006AP1859, May 17, 2007.** NOTE: The Court of Appeals called on the DOR to revise the language. The case is currently on appeal at the Supreme Court. A revision decision will be made by the DOR after a decision is handed down by the Supreme Court. The courts upheld the City's assessment. The main issue is the appropriate method of assessment. Walgreen's argued that the assessments should have been based on several factors, including sales of comparable properties, and to the extent the income-producing capacity of the properties is relevant, the City was required to use estimated market rent, not the contract rents. The City argued that there were no comparable properties because of Walgreen's atypical leasing arrangement and that the income approach was the only appropriate assessment method.

Arm's-Length Sale

Section 70.32, Wis. Stats. states, "Real property shall be valued …at the full value which could be obtained therefor at private sale." When the assessor signs the affidavit affixed to the roll, the assessments are assumed to have been made according to statutory requirements and are correct. The "private sale" specified in **sec. 70.32, Wis. Stats**. may be an arm's-length transaction, that is, a sale on the open market between knowledgeable parties, neither of whom holds a dominant bargaining position. Non-arm's-length transactions provide poor evidence of market value and should not be used for assessment purposes. According to **sec. 70.32, Wis. Stats**. "In determining the value, the assessor shall consider recent arm's-length sales of the property to be assessed if according to professionally acceptable appraisal practices those sales conform to recent arm's-length

sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed."

If there is a recent sale, the assessor should use the sale price as a basis for the assessment or be prepared to show why the sale price does not reflect market value. Once the assessor can show that a transaction does not reflect market value, there is no sale of the property, or that there are no reasonably comparable sales, the assessor is free to use any other information available in determining the market value.

Noah's Ark Family Park v Village of Lake Delton, **Wisconsin Court of Appeals, Docket No. 96-1074, April 17, 1997.** Reversed and cause remanded with directions.

The scope of review on certiorari is the same as that of the circuit court. ***State ex rel. Levine v Board of Review of Village of Fox Point, 191 Wis.2d 363, 370, 528 N.W.2d 424, 427 (1995).***

Noah's Ark need not comply with **sec. 70.47(7)(a), Wis. Stats**., because it objects not to its own property valuation, but to other commercial properties' valuations.

The assessor must value property at its purchase price if recently involved in an arms-length sale. ***Levine, 191 Wis.2d at 372, 528 N.W.2d at 373, 538 N.W.2d at 428.***

The use of other means to value the property in the presence of an arm's-length sale violates **sec. 70.32(1), Wis. Stats.,** and constitutes an error of law, which this court may correct on certiorari.

Since the assessor has recent sales of commercial properties in the Lake Delton Village district, he should not look to comparable properties to value Noah's Ark. See ***Rosen, 72 Wis.2d at 662-63, 242 N.W.2d at 685.***

By approving the increased assessment of Noah's Ark Water Park in spite of the evidence that other commercial properties with recent sales at a price above prior assessments did not have their assessments increased to reflect the sale price, the board acted arbitrarily and in violation of the law.

To take the equalized value into account when considering the fair market value of individual properties violates **sec. 70.32(1), Wis. Stats.**

Compliance with **sec. 70.05(5), Wis. Stats**. is not a substitute for compliance with **sec. 70.32(1), Wis. Stats**.

To satisfy the constitutional mandate of uniformity the Appellate Court directs the board to reassess Noah's Ark Water Park for 1995 by disregarding the evidence of the recent sale. Oral arguments scheduled for 12/02/97.

***Noah's Ark Family Park v Village of Lake Delton*, Sauk County Supreme Court Case #96-1074 February 26, 1998.** Remanded to Sauk County circuit court.

The 1995 assessment of Noah's Ark violated the uniformity clause in this case. Singling out one commercial property for special treatment, under a mistaken view of proper assessment practice, cannot withstand a uniformity challenge. On remand. The Board of Review is directed to reassess Noah's Ark Family Park for 1995 by disregarding the 1994 sale.

***Doneff v City of Two Rivers Board of Review*, 184 Wis. 2d 203 (Wisconsin Supreme Court 1994)** The WPAM on page 7-3 (1994 WPAM Revised 12/92) lists six conditions that are necessary for a sale to be considered a "market value" transaction as follows:

1. It must have been exposed to the open market for a period of time typical of the turnover time for the type of property involved.

2. It presumes that both buyer and seller are knowledgeable about the real estate market.

3. It presumes buyer and seller are knowledgeable about the uses, present and potential, of the property.

4. It requires a willing buyer and a willing seller, with neither party compelled to act.

5. Payment for the property is in cash, or typical of normal financing and payment arrangements prevalent in the market for the type of property involved.

6. The sales price must include all of the rights, privileges, and benefits of the real estate. For rental property, this includes both the lessor's and lessee's interests.

In discussing whether conditions two and three made "legal presumptions that shift the burden of proof to the city," the Wisconsin Supreme Court held, "the taxpayer, rather than the assessor, retains the burden of proof on each condition set forth in the Property Assessment Manual that must be met to show that the sale was a market or an arm's-length transaction."

In addition, the Wisconsin Supreme Court overruled the Court of Appeal's earlier decision in ***Martinsen v Board of Review of Iron River, 163 Wis. 2d 807, 472 N.W. 2d 574 (1991)*** which also stated that conditions two and three are "legal presumptions that are deemed satisfied unless rebutted." The Wisconsin Supreme Court added, "This language [the six conditions] does not indicate that an assessor, or a board reviewing an assessment, can assume any of the conditions exist. Rather, each condition must be shown to exist by proof submitted by the taxpayer. The Court of Appeals misread these conditions."

State ex rel. Brighton Square Co. v City of Madison, 178 Wis. 2d 577 (Court of Appeals 1993) The city claims that the sale of Kingswood Hills, the adjacent property to Brighton Square, was not an arm's-length sale and therefore the assessor and the Board of Review were not required to consider that sale when determining the fair market value of Brighton Square. However, the assessor conceded that he had assessed Kingswood Hills at its sale price before and after its sale in 1989. The Court of Appeals reversed the Board of Review's decision of the 1991 Brighton Square real property assessment by agreeing with the Circuit Court decision that the assessment was not made according to **sec. 70.32(1) Wis. Stats**. because the assessor and the Board failed to consider the 1989 sale of the adjacent Kingswood Hills apartment complex.

The City of Madison contends that the assessor valued Kingswood Hills erroneously from 1989 through 1991, thereby impeaching the assessor's affidavit which **sec. 70.49(1), Wis. Stats**. requires be annexed to the completed assessment roll. However, **sec. 70.49(3), Wis. Stats**. provides: "No assessor shall be allowed in any court or place by oath or testimony to contradict or impeach any affidavit or certificate made or signed by the assessor as assessor." The Court of Appeals ruled, "When the assessor or the city disavows the correctness of a valuation of comparable property shown on the assessment roll, the burden is on the assessor or city to explain why the valuation is incorrect."

The only evidence the city presented to the court to refute the validity of the arm's-length sale was the assessor's testimony that the Kingswood Hills sale was a "sale out of Bankruptcy." However, the city did not introduce any evidence to support this testimony or other evidence which would support its argument that the sale of Kingswood Hills was not an arm's-length sale.

***Darcel, Inc. v City of Manitowoc Board of Review,* 137 Wis. 2d 623 (Wisconsin Supreme Court 1987)** The Board of Appeals erred by affirming property tax assessment based on market rental income by the Board of Review when there was a recent arm's-length sale of property from which to determine fair market value. The Wisconsin Supreme Court states, "an arm's-length sale price is the best indicator to determine fair market value for property tax purposes and an approach that considers factors extrinsic to the arm's-length sale is not statutorily correct and therefore in error as a matter of law."

The Board of Review argued that the "presence of the long-term leases [of subject property] artificially lowered the sale price to less than 'full value'" and although the sales transaction was arm's-length, "not all of the 'bundle of rights' that make up the property were transferred to the new owners because some of the value of the rights were retained by the long-term tenants. However, these were the rights of the tenants, not the seller-owner." The Wisconsin Supreme Court determined that "it is immaterial that the lease was a detriment to the property; it was transferred to the new mall owners, and its value was reflected in the sales price of the property."

***State ex rel. Lincoln Fireproof Warehouse Co. v Board of Review, City of Milwaukee,* 60 Wis. 2d 84, 208 NW 2d 380 (1973)** "Since it was clear from the undisputed evidence in the instant case that the parties were willing but not compelled to transact, it follows that the sale was fair and the sale price did adequately reflect the fair market value. The assessor, the Board of Review, and the circuit court on certiorari erred in rejecting the

sale price of the subject property as evidence of its fair market value. There is nothing in the record to support the conclusion that the sale was not an arm's-length transaction conducted by parties willing but not compelled to transact."

***State ex rel. Markarian v City of Cudahy*, 45 Wis. 2d 683, 173 N.W. 2d 627 (1970)** When market value is established by a fair sale of the property, or sales of reasonably comparable property are available, it is an error for an assessor to resort to other factors in order to determine its fair market value although such factors in the absence of such sales would have a bearing on its value. Rules on judicial review of valuation of real estate for tax purposes presuppose the method of evaluation is in accordance with the statutes; hence errors of law should be corrected by the court on certiorari and the failure to make an assessment on the statutory basis is an error of law. Only in the absence of a sale of the property in question or sales of reasonably comparable property, can the tax assessor, in determining fair market value, consider all factors collectively which have bearing on the value of property.

The court decided that the assessor reasonably concluded that the allocations were influenced by considerations which made their use questionable in determining the fair market value of the elements of the sale. This did not require the assessor to completely reject the comparables. It was proper to accept the sales as they represented reasonable comparability but to determine the market value of the exempt and taxable parts of the sale by other methods.

***State ex rel. Hennessey v City of Milwaukee*, 241 Wis. 548, 6 NW 2d 718 (1942)** Prior to the assessment date, property was purchased at a price considerably lower than the assessment value. Evidence clearly shows that the instant sale was as a result of negotiations between a willing seller not obligated to sell and willing buyer not obligated to buy. Evidence also showed that sales of like property brought like prices in the same locality. It was held that when value is established by sale of instant and like property, there is no occasion to resort to reproductive value less depreciation.

***State ex rel. Evansville Mercantile Ass'n. v City of Evansville*, 1 Wis. 2d 40, 82 NW 2d 899 (1957)** The assessed valuation of a certain property exceeded the sale price of such property when the sale was made on May 1, 1955, the date of assessed valuation. All evidence showed that the parties dealt at arm's-length; the owners were willing but not obliged to sell and the buyer willing but not obliged to buy. Therefore, the purchase price or sale price is the fair market value of the property in question, notwithstanding possibility of greater intrinsic value.

***State ex rel. Farmers & Merchants State Bank v Schanke*, 247 Wis. 182, 19 NW 2d 264 (1945)** In order for an actual sale to be controlling on assessment value of real estate for purposes of taxation, it must be shown that the sale was made under such circumstances as would lead to the conclusion that the price was that which ordinarily could be obtained at a private sale. The price paid by the property owner for a bank building, records of other assessments and sales in the immediate vicinity, and uncontradicted testimony as to the fair market value of the building, established that the assessment exceeded its fair market value and justified reversal of the action of the city Board of Review.

***State ex rel. Baker Mfg. Co. v City of Evansville*, 261 Wis. 599, 53 NW 2d 795 (1952)** In discussing **sec. 70.32(1), Wis. Stats.,** the court held that this section and **sec. 70.34, Wis. Stats.** presuppose a value at which a willing buyer and a willing seller would deal, but where the property has a restricted or nonexistent market or is unique, the appraisal is based on many factors other than actual sales and the assessor must determine as accurately as possible the amount which the property would bring in the period for which the assessment is made, if both buyer and a seller were willing and able to deal.

***Goff v Board of Supervisors of Outagamie County*, 43 Wis. 55 (1877)** Where the assessor, in 1872, valued lands in town at what he thought they would bring at forced sale, knowing that this was less than the value which could ordinarily be obtained therefor at private sale, this violation of statutory rule of assessment vitiated the tax, and sale of the land for nonpayment of the tax would be restrained.

***State ex rel. Flambeau Paper Co. v Windus*, 208 Wis. 583, 243 NW 216 (1932)** The court held that even the sale price of some properties is not controlling because of motives and circumstances which may prevent the price from being a true measure of value.

***State ex rel. Collins v Brown*, 225 Wis. 593, 275 NW 455 (1937)** "Evidence of the sale of property for less than the assessed value must be accompanied by evidence showing that the price paid was ordinary market value, otherwise the presumption of the correctness of the assessment is not rebutted."

***State ex rel. Hein v City of Barron*, 3 Wis. 2d 127, 87 NW 2d 785 (1958)** Property recently purchased for $15,000 was assessed at $28,850 and affirmed by the board since the owner failed to prove that the purchase was made under normal and usual circumstances. This was the owner's burden. The court held, "The fact that the property was purchased by the taxpayer at a figure less than that at which it was assessed for property taxes, does not demonstrate the assessment's inaccuracy in the absence of evidence establishing that the sale was made under normal circumstances."

***Dempze Cranberry Co. v Biron Review Board*, 143 Wis. 2d 879 (1988)** This case concerns the fair market value of the taxpayer's cranberry beds, exclusive of the vines exempted under **secs. 70.11(30) and 70.111(4), Wis. Stats.** The assessor used six relatively contemporaneous sales of marshes reasonably comparable to the taxpayers' marshes to determine the fair market value of the beds and vines. However, she did not accept the allocation by the parties of the sales price between the beds (taxable) and the vines (exempt).

The assessor testified that her investigation established values for vines which were considerably less than the values allocated by the parties to the sale. The assessor determined the value of the vines through the income, cost, and sales approaches. She deducted that value from the sales prices to determine the value of the beds in each comparable sale.

The taxpayers contend that because the sales are comparable, arms-length transactions, the assessor and the Board of Review must accept the allocations of the purchase prices

made by the parties to these sales.

The court said that the general comparability rule does not require the fair market value of the assessable part of the property to be set by the allocation by the parties to the sales. Internal comparability may be destroyed by a factor or factors which allocate too much of the purchase price to one part of the sale and too little to another part.

The court decided that the assessor reasonably concluded that the allocations were influenced by considerations which made their use questionable in determining the fair market value of the elements of the sale. This did not require the assessor to completely reject the comparables. It was proper to accept the sales as they represented reasonable comparability but to determine the market value of the exempt and taxable parts of the sale by other methods.

***State ex rel. N/S Associates by JMB Group Trust IV v Greendale Board of Review*, 164 Wis. 2d 31, 473 NW 2d 554 (1991)**. The appeal related to the assessor's valuation of a shopping mall based on the sale of the mall. N/S Associates raised several issues in an attempt to show that the sales price did not represent market value.

N/S Associates contended that the sale was simultaneous with, and contingent on, its purchase of additional property from the same seller. Thus, it was not a stand-alone market sale. The court ruled that the evidence before the Board was mixed and N/S Associates failed to prove how, if at all, the sales price was affected by the combined ownership.

N/S Associates argued that the sales price was affected by its "extensive relationships" with the parties to the sale. The court ruled that there was no evidence in the record to show that the extensive relationships affected the sales price.

N/S Associates argued that the mall was not sufficiently exposed to the market prior to sale. The court ruled that the requirement that the property be exposed in the open market for a time typical of the turnover time for the type of property involved is intended to insure that the property is sold for as high a price as possible. The court ruled that it is "dead-end logic" to rely on this provision to argue that the property would have sold for less if it had been exposed to the market for a longer period of time.

N/S Associates argued that the sales price should have been adjusted to reflect an assumed mortgage. The court ruled that the mortgage was for a small portion of the sales price and no evidence was introduced to show the effect of the mortgage on the sales price.

N/S Associates argued that the investors were purchasing a syndicated deal and the total consideration exceeded the value of the real estate. The court ruled that no evidence was introduced to justify this argument.

N/S Associates argued that the sales price included the mall's intangible value as a growing concern, or "business value," because the replacement cost less depreciation was less than the sales price. According to the court, assessable real property includes not only the land itself but all buildings and improvements thereon and all fixtures, rights, and privileged appertaining thereto. The key is whether the value in question is part of the property and thus transferable with the property or whether it is in effect independent of the property so

that the value either stays with the seller or dissipates upon sale. According to the court, because the mall's income producing capacity was inseparable from the building, improvements, fixtures, rights, and privileges, the assessor made no error in this regard.

Great Lakes Quick Lube, LP,* v *City of Milwaukee, Wisconsin Court of Appeals, District I, Appeal No. 2009AP2775, December 14, 2010.

What Assessors should know: Where several properties were purchased by another company and then simultaneously leased to the taxpayer and where no special financial arrangements were reported on the associated real estate transfer returns, the sales were properly considered "arm's-length" for assessment purposes.

The Court's reasoning: CRIC Great Lakes Acquisitions LLC (CRIC) purchased properties in the Milwaukee area in 2004. CRIC entered into a lease with Great Lakes Quick Lube at the same time. In 2005 CRIC I BETA, determined by the court to be the same as CRIC, purchased additional properties and leased them to Great Lakes Quick Lube, LP. In both instances CRIC completed real estate transfer returns that either made no representation as to the nature of the financing, if any, or reported "no financing involved," "financial institution conventional" or financing by an "other 3rd party."

The City assessed the four properties based on their investigation of the arm's-length sales. Great lakes Quick Lube argued that "creative financing" in the form of a sales-leaseback transaction inflated the sales prices and thus the sales were not arm's-length sales, and the values were improperly assessed. Great Lakes further argued that the over-taxation resulting from the inflated assessment amounted to a violation of the uniformity Clause in Article VII, section 1 of the Wisconsin Constitution.

The Court concluded the sales were arm's-length since the seller was not leasing back the properties they sold. Since the sales were properly considered to be "arm's-length", the Court found that the City properly assessed the properties in 2006 and 2007. Furthermore, because the properties were assessed accurately based on recent arm's-length sales, the Court also determined that Great Lakes did not establish a violation of Article VIII, section 1 of the Wisconsin Constitution.

Absence of Arm's-Length Sales

In the absence of an arm's-length sale price or reasonably comparable sales, the assessor should use all other information available in determining a market value. Other information can include replacement cost less depreciation (through Volume II of the WPAM Series), income generated, book value, amount of insurance carried, appraisals procured by the owner, sales of like properties based on price per cubic or square foot, location, and any restrictions on the use of the building. The value should not vary based on the ownership (corporate v. private) nor should the quality of the management affect the value.

***State ex rel. Brighton Square Co. v City of Madison,* 178 Wis. 2d 577 (Court of Appeals 1993)** In discussing whether Kingswood Hills (an adjacent apartment complex) is "reasonably comparable" to Brighton Square (also an apartment complex), the city argued:

"Kingswood is a bigger complex, has a decidedly different 'mix' of units with Kingswood's greater number of two-bedroom apartments and exclusive offering of three-bedroom townhouses. Kingswood has recreational facilities which the subject [property] lacks." However, the Court noted that "Brighton Square and Kingswood Hills are physically adjacent" and thus essentially have the "same rental location" with the "same exterior design" and "similar interior design."

Although the number and type of apartment units differ, the court determined that the properties were "reasonably comparable" and the approach of the taxpayer to make adjustments because of the differences between the units was appropriate. The Court of Appeals affirmed the circuit court's order remanding the assessment to the Board of Review for reconsideration.

***State ex rel. Kaskin and Sokolski v Board of Review, County of Kenosha,* 91 Wis. 2d 272, 282 NW 2d 620 (1979)** The taxpayers challenged the use of annual percentage increases based on comparative sales as a method of arriving at an assessment. The county makes an assessment based on actual view and on-site viewings of each property in each tax district once every four years. The assessments in the other three years are based on factoring up the on-site assessments by a percentage. This percentage was developed by first classifying the property in a district as either residential, commercial, industrial, or agricultural. All sales within each classification were examined to determine if they were arm's-length. The arm's-length sale prices were then compared to the current assessment of the properties that sold, a percentage by which the sale prices were greater or less than the assessed value was calculated. An average of these percentages was taken to give an overall percentage increase to value of property within each category in each district.

The court held that this "percentage increase method" was not the best information available to the assessor and the assessments made by this method were not valid.

***State ex rel. Pierce v Jodon,* 182 Wis. 645, 197 NW 189 (1924)** Assessment officers must ascertain the market value of property from the best evidence obtainable, and place that value on the assessment roll.

***State ex rel. Enterprise Realty Co. v Swiderski,* 269 Wis. 642, 70 N.W. 2d 34 (1955)** Where there was not evidence of sales of office buildings in the vicinity of the office building being assessed for taxes, the city assessor and Board of Review did not act arbitrarily, in bad faith, or in excess of their jurisdiction in declining to be limited by original purchase price paid for the building by the owner two years before the assessment and the cost of owner's subsequent alteration thereof, but properly considered also the owner's conversion of the building from light manufacturing into office buildings attracting more desirable tenants, present income therefrom, and reproduction cost less depreciation.

Where the clear market value of realty to be assessed for taxes is not established by sales of other realty, the city assessor or Board of Review should consider all facts bearing on such value collectively, but such facts should not be resorted to when market value is established by the fair sale of the property in question or like property.

In determining the market value of realty, the assessor may consider such elements as cost, depreciation, replacement value, income, industrial conditions, location and occupancy,

sales of like property, book value, amount of insurance carried, value asserted in prospectus, and appraisals procured by the owner.

***Superior Nursing Homes, Inc. v Board of Review, City of Wausau*, 37 Wis. 2d 570, 155 NW 2d 670 (1968)** Where the assessor is confronted with real estate that has not been recently sold in an arm's-length transaction, nor are there any recent sales of comparable property which could constitute a reliable basis for determining the market value of the property in question, the assessor must determine the market value from the best information that the assessor can practicably obtain, which may or may not coincide with the construction costs less depreciation.

***State ex rel. Northwestern Mutual Life Insurance Co. v Weiher*, 177 Wis. 445, 188 NW 598 (1922)** In valuing large business buildings for taxation, it was not improper to use a basic price per cubic foot found by experience to roughly represent the value of the average large office building, where this was merely a starting point to which was added or deducted the proper amount depending on a character of the construction of the building, the amount of depreciation, obsolescence, location, and other elements.

A large office building having an intrinsic value in excess of the sum for which it would sell, because it was built for a specific purpose, can only be valued at the selling value; depreciation, cost of reproduction, location, etc., can only be considered in arriving at the market value.

***State ex rel. Flambeau Paper Co. v Windus*, 208 Wis. 583, 243 NW 216 (1932)** While the sale value is the point to which the evidence must be addressed, the Board of Review was not confined solely to the testimony of the witnesses in arriving at its determination. The prospectus, book value, appraisals procured by the plaintiff, and the amount of insurance carried might properly be considered by the Board of Review.

***Buildings Development Co. v City of Milwaukee*, 225 Wis. 357, 274 NW 298 (1937)** The assessment of municipal taxes on land and office buildings thereon did not rest wholly on prospective income, and assessors and Board of Review in determining valuation properly considered income, cost depreciation, replacement value, earnings, industrial conditions, location of property relative to business section of city, insurance carried, and statements of owners in prospectus issued to induce sale of bonds, issued against property.

Use by municipal tax assessors of percentages of increase in valuation of land based on location in respect to street corners and alleys was not improper as to taxpayers who suggested no proper separate valuation of land, but contended that the method used had no bearing on sale value of land, on which office buildings were located.

***State ex rel. Wisconsin Electric Cooperative v Board of Review of City of Madison*, Dane County Circuit Court, Case No. 11930 (1967)** "The restrictions placed upon the use of building, coupled with the provision that in the event of termination of the lease, the lessee, Wisconsin Electric Cooperative is obliged to remove the building from the property at its own expense and restore the land to its original condition, very substantially diminishes the value of the building to any owner, including Wisconsin Electric Cooperative... The method of assessment followed by the assessor is founded upon an

erroneous legal concept. This erroneous legal concept is that the value of the building is substantially the same as that of an average building for which a fair price can be reached in the absence of market value by utilizing the standard of reproduction cost new, less depreciation... By following such standard the assessor unquestionably over-assesses the building because it is given the same value as a like building unencumbered by the lease restriction which must be taken into consideration. Thus, if we accept the statement received before the board as evidence, the realtor has established absolutely that the assessor did not follow the statutory provisions relative to assessing the property in question at fair market value or its equivalent."

State ex rel. International Business Machines Corp. v Board of Review, City of Fond du Lac, 231 Wis. 303, 285 NW 784 (1939) In determining market value of real estate for taxation purposes, it is proper to consider such elements as cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus and appraisals procured by the owner.

Net income from the rental of either real or personal property is a proper element to consider in fixing value for taxation purposes, but it cannot be considered as the sole controlling factor.

***State ex rel. North Shore Development Co. v Axtell*, 216 Wis. 153, 256 NW 622 (1934)** In the absence of a sale of the property or comparable sales, evidence of the value of property based on the income the property was producing and was capable of producing was competent for consideration in determining the assessment value. Cost, depreciation, replacement value, earnings, industrial conditions, location, and occupancy are proper for consideration in determining the assessed value of improvements on land.

***State ex rel. Miller v Thompson*, 151 Wis 184, 138 N.W. 638 (1912)** The fact, shown before a Board of Review, that real property is not on a paying basis as presently managed does not establish its value, nor does the fact that old buildings thereon if torn down would be worth only the wreckage, establish their value as a going concern; nor does the fact that the owner will derive a larger revenue from a lease of the land for ninety-nine years, which has been made to one who will tear down the old and erect new buildings, show that the present buildings are not worth the assessor's valuation. Evidence of such facts is not evidence of the market value of the property or the price which could ordinarily be obtained for it at private sale.

***State ex rel. Gisholt Machine Company v Norsman*, 168 Wis. 442, 169 NW 429 (1918)** Two lots lying side by side, one having improvements and the other without improvements, were to be valued the same by the assessor, if the improvements are the only element of difference in value.

The assessor properly valued the land of a manufacturing company independent of buildings, then valued the buildings independent of the land, and reached a total valuation by adding the two items, instead of first finding the value of land and improvements as a whole, and then apportioning it.

An assessor's method of assessment by reducing the front-foot valuation of lots by blocks,

$5.00 a block, proceeding away from the center or business part of the city, was not so arbitrary as to meet with condemnation, there being nothing to indicate it was unreasonable or unfair.

***Chicago & N.W.R. Co. v State*, 128 Wis. 553, 108 NW 557 (1906)** Property owned by private corporations is to be valued the same as if owned by a private person. In assessing property of ordinary corporations, the same is to be valued with reference to its use, situation, and all that concerns the same, no value being placed on such intangibles, as ordinary corporate rights or other mere circumstances other than the same is included in the actual value of the tangible things in the places and under the conditions in which they are found.

***Bradley Co. v Town of Rock Falls*, 163, N.W. 168, 166 Wis. 9 (1917)** Considering the value of water rights relating to each lot, as determined by the relation it bore to value of all water privileges, was proper in assessing taxes under St. 1915, 1039, 1052.

***Rosen v Milwaukee*, Wisconsin Supreme Court, 72 Wis. 2d 653, 242 NW 2d 681 (1976)** The taxpayers contended that the assessor and the Board of Review did not make the valuations on their three parcels of improved real estate in accordance with the statutes, and that there was no credible evidence to sustain the decision of the Board of Review.

A certified public accountant testified on the behalf of the taxpayers to the total costs, gross rental income, and net income for each parcel as was stated in the owner's records. An investment real estate broker, using this information, expressed an opinion of fair market value for each parcel by multiplying a gross rent multiplier times the net income of each parcel.

The assessments were arrived at after a visual viewing of each parcel and were obtained by adding the estimated replacement cost of each building minus estimated depreciation, to the estimated market value of the land. The assessments based on this method of valuation were substantiated for parcels B and C by an analysis of comparable sales and their income-producing capacity. These comparable sales took place a year after the assessment was made. No specific comparable sales information was provided for parcel A.

It was the taxpayer's position that the assessor should have used the reported actual costs and that the sales used as comparables were not actually comparable, citing both the time and size differences.

As a basis for making its decision, the court reviewed the standards for considering the correctness of a valuation of real property for tax purposes. The function of the court is not to make an assessment, but to determine from evidence presented to the Board of Review, whether the valuation has been made on the statutory basis of fair market value. Without evidence to show that an assessment is incorrect, the assessor's opinion of value is presumed correct. It is the responsibility of the taxpayer to produce credible evidence overcoming the assessor's opinion of market value.

The best information as to market value is established by a recent fair sale of the subject property or sales of reasonably comparable property. Where there has been no recent sale of

the subject property or of reasonably comparable property, market value determination is based on relevant factors, including costs, depreciation, replacement value, income, industrial conditions, location, occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus and appraisals procured by the owner.

In this case it was disputed that there were no recent sales. The appealed assessments were based on the estimated replacement cost of the buildings less depreciation, plus the value of the land. The taxpayer's contention was that the assessment should be based on actual reported cost.

The court responded to this by indicating that there may be occasions where assessments based on estimated costs will be set aside in favor of actual costs. These occasions would be based on the existence of at least the following circumstances: (1) fair market value cannot be established by a recent sale of the subject property or of reasonably comparable property; (2) the assessor and the Board of Review must have considered reconstruction costs less depreciation as the only element in arriving at market value; (3) there must be evidence that the Board excluded from consideration other relevant evidence of value; (4) the construction must have been completed and the cost incurred, reasonably close to the time of valuation; and (5) there must be no question concerning the veracity or bona fide nature of the amounts submitted as evidence of actual costs.

The court in this case sustained the assessments for parcels B and C since the replacement cost less depreciation method of valuation was supported by reference to sales of comparable property which indicated that the gross rent multiplier of assessed property was comparable to that of comparable properties that had sold. The court held that in the absence of a sale of the subject property, the sale of a reasonable comparable property provides the best information of market value. Important considerations in determining comparability include location, including the distance from the assessed property, its business or residential advantages or disadvantages, its improvements, size, and use. It is also important to consider the conditions of the sale including its time in relation to the date of valuation, and its general mode and character insofar as they tend to indicate an arm's-length transaction.

The court concluded that the Board's action concerning parcel A should be reversed because the uncontroverted testimony as to the actual costs indicates that the assessor's unconfirmed valuation based on estimated replacement cost less depreciation was not an adequate basis to sustain the valuation.

***State ex rel. Kesselman v Sturtevant*, 133 Wis. 2d 122 (1986)** Equalization is the DOR's independent evaluation of the total value of real property within the municipality. It is not a measure of fair market value of a particular parcel within the municipality. Rather it is a test of the local assessor's overall valuations. Equalization is concerned with equity between municipalities, while the local assessor's concern is equity between individual properties.

Highest and Best Use

Nestle, Inc., v Wisconsin Department of Revenue, Wisconsin Court of Appeals, District IV, Appeal No. 2008AP322, October 8, 2009.

Nestle claimed the city assessor should have applied an adjustment for functional obsolescence when using the cost approach to value a newly constructed plant that contained specialized FDA-mandated equipment for manufacturing powered infant milk formula. Nestle contended there was no market for a plant manufacturing powdered infant formula and that the typical buyer of the property was likely to be a general food processor or other type of manufacturer to whom the cost of the specialized equipment would have little or no value.

The appellate court sided with the Tax Appeals Commission, upholding the city's assessment. The city assessor's analysis of the highest and best use of the property, as improved, indicated that the property would have greatest appeal and value to buyers wishing to utilize the facility for the production of powdered infant formula. The court ruled that Nestle failed to prove there was no market for a plant capable of producing powdered infant formula. Because there was a market for the type of facility, and because the specialized equipment was mandated by the FDA, no adjustment for functional obsolescence was necessary.

Nestlé USA, Inc.,* v *Wisconsin Department of Revenue, Wisconsin Supreme Court, 2011 WI 4, February 2, 2011

What Assessors should know: A market can exist for a subject property, especially a special-use property, without actual sales data of similar properties being available.

The Court's reasoning: Nestlé was assessed at $10,719,900 using the cost assessment method, because the Tax Appeals Commission agreed with the Department that (1) the Gateway Plant's "highest and best use" was as a powdered infant formula production facility, and (2) no comparable sales of powdered infant formula production facilities that satisfied FDA regulations existed.

Nestlé argued that the actual value was only $3,590,000, because the Gateway Plant's "highest and best use" was as a food processing plant and comparable food processing plant sales should be used. Alternatively, it argued that it would cost Nestlé over $17 million to reproduce an identical plant, but that approximately $13 million of that should be deducted due to functional obsolescence, because many of the plant's FDA-required features had no value in the market for generic food processing plants.

A subject property's highest and best use must be: 1) legal, 2) complementary, 3) nit highly speculative, and 4) marketable for that use. Nestlé argued that there was no marketability, because the Commission found no instance in the United States where a powdered infant formula production facility was sold for continued use as a powdered infant formula production facility. The court disagreed, concluding that a market can exist for a subject property, especially a special-use property, without actual sales data of similar properties being available, especially in a young industry.

The court also rejected Nestlé's argument that the cost approach should include deductions for functional obsolescence. Functional obsolescence or super-adequacy is measured by whether a prudent purchaser or owner would include or pay for the feature in a particular type of structure under current market conditions. Prudent purchasers of powdered infant

formula production facilities would value the plant's specialized features because these features are required by FDA regulations and are therefore necessary to the operation of such a plant.

Going Concern

***State ex rel. Van Dyke and Others v Cary*, 181 Wis. 564, 191 NW 546 (1923)** In the absence of express statutory language otherwise providing, property should ordinarily be valued for taxation at its actual going value, rather than at a fictitious or mere book value.

***State ex rel. N.C. Foster Lumber Co. v Williams*, 123 Wis. 61, 100 N.W. 1048 (1904)** In proceedings before a Board of Review for reduction of an assessment of sawmill property for taxation, the testimony of the owner bore mainly on what the property was worth to disorganize and dispose of its parts. The testimony in support of the assessment bore mainly on what the property was worth as an entirety and as a going concern; that is, what the property would bring at private sale, assuming that a buyer, with the same opportunity for the use of the mill as the owner, was at hand, and had the means to buy it. The court held that under St. 1898, 1052, providing that real property shall be valued at the value which could ordinarily be obtained therefore at private sale, and prescribing what elements the assessor shall consider in determining the value, the evidence of the owner, furnished no basis for valuing the property, while the evidence in support of the assessment was sufficient to warrant the board in adopting the assessor's valuation. [Also see *State ex rel. Miller* v. *Thompson*, 151 Wis. 184, 138 NW 638 (1912) page 19.

Personal Property

Legal Definitions of Personal Property for Assessments Purposes

Section 70.04, Wis. Stats. defines personal property in a broad and comprehensive way in the following words:

"The term 'personal property', as used in Chs. 70 to 79, shall include all goods, wares, merchandise, chattels, and effects of any nature or description, having any real or marketable value, and not included in the term "real property' as defined in sec. 70.03, Wis. Stats."

The legislature enumerated certain specific kinds of property which should be included in personal property, in the following language of subs. (1) and (2):

"(1) Personal property also includes toll bridges; private railroads and bridges; saw logs, timber and lumber, either upon land or afloat; steamboats, ships and other vessels, whether at home or abroad; ferry boats, including the franchise for running the same; ice cut and stored for use, sale, or shipment; and entire property of companies defined in s. 76.02(8), located entirely within one taxation district."

"(2) The term "personal property" as used in Chs. 70 to 79, shall also include irrigation implements used by a farmer, including pumps, power units to drive the pumps, transmission units, sprinkler devices and sectional piping."

Personal Property Legal Reference

Personal property as a class, presents questions in discovery, listing and valuation which are not present in real estate. The proper classification of personal property will be very important in determining whether the property is exempt or taxable. **Section 70.11(17), Wis. Stats.** exempts merchants' stock-in-trade, manufacturers' materials and finished products, and livestock as of January 1, 1981. The court cases and legal decisions discussed in this section are directed toward answering those questions once property has been correctly classified as personal property. Cases and opinions dealing with stocks are still included in this section even though they are exempt as of January 1, 1981 because the assessability of these stocks may still surface in the form of omitted property or pending court cases.

Recommended Classification of Items as Personal Property

Livestock (exempt January 1, 1981)
Merchants' stock (exempt January 1, 1981)
Manufacturers' stock (exempt January 1, 1981)
Machinery, tools, and patterns
Furniture, fixtures, and equipment
Leasehold improvements, removable (lighting, ceiling, floor covering)
Signs

Supplies -materials purchased for use in business but not for resale such as: fuel, office and cleaning supplies.
Non-domesticated animals (deer, bear)

Furniture, fixtures and equipment not classified as realty should be valued at their "true cash value". Numerous court decisions have held "true cash value" to have the same meaning as "market value". Thus, the basis for valuing personal property should be same as real property, this is the arm's-length sale of the subject or sales of comparable properties. However, the assessor rarely has arm's-length sales of the subject personal property or comparable personal property from which to make the valuation. Therefore, in the absence of sales information, an alternative method is the use of the index method for valuation of fixed assets with recommended composite lives of the various group classifications. The index factors and composite lives provide a measure with which all applicable classes of personal property may be assessed on a uniform and equitable basis. A complete discussion of this method is found in WPAM Chapter 16 - Valuation of Fixed Assets.

The personal property of entities where rats and mice are being raised for commercial purposes should be classified as "all other" personal property. The rats and mice are not livestock, merchant's stock-in-trade, or manufacturers' materials and finished products.

***State ex rel. Dane County Title Co. v Board of Review, City of Madison,* 2 Wis. 2d 51, 85 NW 2d 864 (1957)** Title records of a title company constitute personal property in that they are chattels and in that they have a real or market value all within the definition of **sec. 70.04, Wis. Stats**. These records would be classified as "all other personal property."

***Menomonee Falls v Falls Rental World,* 135 Wis. 2d. 393 (1986)** The court ruled that property held for rental was not exempt as "merchants' stock-in-trade".

The taxpayer was in the business of renting personal property to others. Occasionally, some of the rental property was sold either to someone who had rented the property or because the property was no longer usable as rental property.

The court stated that a merchant is defined as one who buys and sells goods; and, "merchants' stock-in-trade" is defined as goods held for resale. Since the personal property was held for rental and not for resale, it was not entitled to Exemption as "merchants' stock-in-trade".

Revenue Department Informational Bulletin (June 21, 1962) RE: Classification of Logs, Timber and Other Forest Products. Personal property in this category includes logs, timber, lumber, shingles, poles, posts, cordwood, pulpwood, bolts, lath, and other forest products.

The aforementioned property is determined to be merchants' or manufacturers' stock only when belonging to a person or persons, or a corporation whose principal activity is related to: (a) the buying and selling or (b) the buying and use for manufacture of such property.

52 Opinion of Attorney General 387 (1963) Do the following items fall within the terms "merchants' stock-in-trade" or "manufacturers' materials and finished products"?

1. Seed potatoes raised and used by growers, a portion of which are held for sale to other growers;

2. Hay and grain raised by a farmer, but held for sale;

3. Ice cut and stored or made and stored and held for sale;

4. Dogs in commercial kennels;

5. Eggs in a commercial hatchery;

6. Boats and motors owned and kept by a resort for the purpose of leasing to patrons, but which are occasionally sold;

7. Golf carts owned by a pro shop and rented to golfers, but occasionally sold;

8. Junk cars and used parts taken therefrom sold to persons in need thereof;

9. The stock of "job tradesmen" (plumbers, carpenters, heating contractors, etc.) who stock a certain amount of goods which they sell to a property owner and usually (but not always) install;

10. The goods of service trades (shoe repair shops, beauty parlors, etc.) part of which is used in repairing items or rendering a service, and part of which is sold separately across the counter as, for example, shoe polish, shoe laces, shampoo, etc.;

The word "merchant" is defined in Webster's New International dictionary in the second edition as: "Anyone making a business of buying and selling commodities; a trafficker; a trader; one who carries on a retail business; a storekeeper or shopkeeper."

And in the third edition as the following:

> "A buyer and seller of commodities for profit; TRADER, the operator of a retail business; STOREKEEPER."

There have been many court decisions interpreting the word. In ***White v Commonwealth*** *78 Va. 484* it was said that a merchant is a dealer in goods, wares, and merchandise who has the same on hand for sale and immediate delivery. ***Magnolia Petroleum Co. v City of Broken Arrow****, 184 Okla. 362, 87 P. 2d 319* defines the words as meaning one who buys to sell and sells goods or merchandise in a store or shop. A merchant is defined in ***City of Joliet v O'Sullivan****, 303 Ill. App. 108 24 N.E. 2d 751* as one engaged in the business of buying commercial commodities and selling them again for the sake of profit or one whose business is the buying and selling of merchandise.

It was indicated in ***Com v Wytheville Knitting Mills Emp. Welfare Ass'n.,*** *195 VA. 663, 79 S.E. (2d) 621*, that a merchant ordinarily does not resell to the same class of persons from whom the merchant buys, and that the merchant is a middleman in the distribution of goods. There are numerous other decisions the composite of which is that a merchant is one who is engaged in the business of buying commercial commodities for the purpose of selling them at a profit, at an established location and maintains on hand a stock or supply thereof for immediate sale and delivery.

The term "stock-in-trade" as ordinarily used among businessmen includes the supply, inventory, or stock of goods, wares, and merchandise held and kept on hand by a merchant for sale. In the case of ***Story v Christin***, *14 Cal. (2d) 592, 95 P. 2d 925*, it was variously interpreted as meaning the goods kept on hand by a merchant or shopkeeper for resale. In my opinion it is in this sense that the term is used in this statute.

The word "manufacturer" as used in this instance is to be given its common and ordinary meaning, which is generally accepted to be one who engages in the business of making from, working up, or changing materials (usually raw materials) into a different form or shape as an article or ware of use or value. ***Sharpe v Hasey***, *134 Wis. 618 (1908).*

As stated in ***State v Magnolia Packing Company***, *213 La., 661*, the cases on the subject are legion. However, in the ***City of New Orleans v Ernst & Co.,*** *(1883) 35 La. Ann. 746*, a manufacturer was defined to be:

> "One who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer, or first consumer, depending for his profit on the labor which he bestowed on the raw material."
>
> A manufacturer is different from a merchant who buys articles and resells them for a profit. The manufacturer sells to realize a profit earned whereas a merchant sells to earn the profit. The manufacturer sells to realize a profit from the work upon raw materials or in producing the finished product but a merchant sells to realize a profit from the activities in the distribution of goods made or produced by others.

Upon the application of the above definitions, the following are my conclusions in respect thereto:

1. A grower raising seed potatoes and holding a portion of the crop for sale to other growers is not a merchant or manufacturer. Although the potatoes are sold for a profit, the primary occupation is the cultivation of the soil to produce a potato crop. The grower thus does not derive the potatoes from a manufacturing operation as it is from a cultivation of soil and the grower is not a merchant (**sec. 70.111(4), Wis. Stats.** exempts growing and harvesting crops in the hands of the grower.)

2. In my opinion a farmer raising hay and grain for sale does not come within the definition of a merchant or a manufacturer. A farmer makes a living primarily by the tilling of the soil. The income derived from the sale of such hay and grain is not as a merchant as the farmer does not buy and sell the same for the purpose of obtaining income. A farmer is not a manufacturer. A farmer does not work raw materials into wares suitable for use. A farmer is a grower. To call a farmer who cultivates land and reaps and markets crops a manufacturer would do violence to the common concept of a farmer. ***Sharpe v Hasey, supra.***

3. A dealer in ice in my opinion is a merchant within the meaning of this statute. The ice is either cut or made and stored for sale and is thus a dealing in goods, wares or merchandise. The ice is a commodity kept on hand for sale and for present delivery. The ice dealer does not till the soil and raise crops as does a farmer, grower or producer of agricultural products. Such ice dealer's primary source of income is from the sale of the ice as a commodity and in doing so, the dealer is acting in the capacity of a merchant. It was held in ***Kansas City v Vindquest****, 36 Mo. Appeal 584* that an ice dealer was a merchant within the meaning of the word as used in a city licensing ordinance.

4. If a commercial kennel buys dogs for the purpose of immediate resale and it regularly engages in that activity, it could be that such dogs so held for resale would be stock in trade of a merchant.

   In order for such dogs to qualify, it would be necessary that it be established that such kennel regularly and rather extensively engages in buying dogs for resale and selling them. Just an occasional instance would not be sufficient to make the commercial kennel a merchant. Such dogs clearly would not qualify as livestock as that term includes hogs and sheep, but not dogs. ***Howard & Herrin v Nashville C. & St. L. Ry. Co.,*** *153 Tenn. 649, 284 S.W. 894. In* ***White Mountain Fur Co. v Town of Whitefield****, 77 N.H. 340, 91 A. 870* it was held that one raising and selling foxes is not a merchant.

5. Eggs in a commercial hatchery would in general not qualify for the Exemption. The eggs are not purchased for resale as such and they would not constitute stock in trade nor the owner of the hatchery a merchant. The eggs are products of the farm but are not livestock and therefore, would not be entitled to the Exemption as such. The eggs, which are to be hatched into baby chicks are not stock in trade of a merchant or a finished product or the material of a manufacturer. The method of operation by which the owner of a hatchery derives income from conducting the same is the hatching of chickens and not the purchase and resale of a product.

6. Boats and motors owned and kept by a resort for the purpose of leasing to patrons and golf carts owned by a pro-shop and rented to golfers, although occasionally sold, are similar in classification. The primary purpose of both

the resort owner and the operator of the pro-shop is the service of customers. Neither of such operations would qualify as a merchant as they do not buy such boats, motors and golf carts for the express purpose of resale at a profit.

7. Junk cars and used parts taken therefrom to be sold to persons in need thereof, in my opinion, qualify for the Exemption on the basis that the operator of such a business is a merchant and the cars and parts are stock in trade within the meaning of the provisions. The primary function of the junk cars and parts enterprise is one of purchase and resale for profit.

8. The stock of "job tradesmen" (plumbers, carpenters, heating contractors, etc.) who maintain a stock of a certain amount of goods which they sell to and install for a property owner, although not always, is a closer question. In my opinion such "job tradesmen" are contractors or sub-contractors to the extent that they maintain any parts or stock on hand to sell to a property owner and to be installed by the tradesmen as such. They are not in that respect merchants or manufacturers. Their main source of income is derived from the services they render in their trade. In order to render this service, such tradesmen must stock a certain amount of goods and wares for which the property owners are charged when installed. Such goods are not purchased for resale as a merchant would do, but are purchased by the tradesmen only to complete the services rendered. However, if what the tradesmen has is a complete unit or appliance which might and could be sold to a customer without being installed by the tradesmen, then it would appear to that extent the tradesmen is a merchant in respect to those items. In order to qualify as a merchant and have sufficient materials of that character to qualify as stock in trade the tradesman would have to be engaged substantially in maintaining on hand such complete units or appliances for resale without regard to whether someone else installs the same. If the tradesmen specifically orders and has on hand goods or wares of this character for the express purpose of selling them to customers and they are designed for such, it would appear that then such property would constitute stock in trade.

9. 1The goods of service tradesmen (shoe repair shops, beauty parlors, etc.) that are used in rendering a service are like similar goods maintained by a tradesmen, not stock in trade. However, items that are sold separately across the counter, as for example, shoe polish, shoe laces, etc., are purchased by the shop operator expressly for the purpose of resale at a profit. To the extent of the last type of merchandise, the shop operator in my opinion would qualify as a merchant and those mentioned items would be stock in trade.

Omitted Property

Like real estate, personal property omitted from assessment in any of the previous two years may be added to the present year's roll under **sec. 70.44, Wis. Stats**. Often property is omitted because it is assumed to be exempt or is completely missed. This is particularly true of personal property, which by nature, is harder to discover than real estate.

Section 70.44, Wis. Stats. also applies if the assessor discovers that the personal property has been substantially under or over reported.

State ex rel. Davis & Starr Lumber Company* v *Pors, 107 Wis. 420, 83 NW 706 (1900) The general provision of **sec. 70.34, Wis. Stats**. requiring property to be assessed from actual view does not apply to an assessment of personal property omitted from a previous assessment under **sec. 70.44, Wis. Stats**., as amended, since the latter section provides that assessment thereunder shall be according to the assessor's best judgment.

State ex rel. H.A. Morton Co.* v *Board of Review, City of Milwaukee, 15 Wis. 2d 330, 112 NW 2d 914 (1962) The entire assessment must be set aside where some merchandise was improperly assessed, but the assessment was not null and void, and taxable property could be reassessed as omitted property.

State ex rel. M. A. Hanna Dock Company* v *Willcuts, City Clerk, 143 Wis. 449 (1910). The fact that the assessor omitted a portion of the taxpayer's personal property from assessment on the mistaken pretext that such portion was exempt, does not preclude the assessment of that property in the following year as omitted property under **sec. 70.44, Wis. Stats**.

Where Assessed

According to **sec. 70.13, Wis. Stats**., "All personal property shall be assessed in the assessment district where the same is located or customarily kept…" Customarily kept refers to location the item may be brought back to from time to time, either for repairs or storage. Customarily kept is not necessarily synonymous with the same location where the property is used. If it is not possible to determine where personalty is customarily kept, it may be assessed by the municipality in which the owner (individual, partnership, or corporate) resides. Section 70.13(6), Wis. Stats. states, "No change of location or sale of any personal property after the first day of January in any year shall affect the assessment made in such year."

Machine tools that are in for repair at a location that is not considered where they are "located and customarily kept" are not assessable at that location. Machine tools owned by nonresident entities and used outside of Wisconsin do not have an assessable situs in Wisconsin.

The dollar amount of labor and parts applied to a machine owned by a Wisconsin resident, and customarily kept in Wisconsin, should be reported to the assessment district where taxable in Wisconsin so the assessor will have knowledge of the condition of the machine as of January 1 for purposes of determining its fair market value.

Parts intended for incorporation into machine tools, but not incorporated on January 1, should be assesses as inventory.

***F. F. Mengel Co. v Village of North Fond du Lac*, 25 Wis. 2d 611, 131 NW 2d 283 (1964)** Reinforcement steel, to be used in the construction of a United States highway, temporarily in a village on May 1, then the assessment date, did not have such a fixed

location in the village as to subject it to the personal property tax. The taxpayer, a Wisconsin corporation, with its principal place of business in the Town of Stockton, Portgage County, had been awarded a contract to construct 15 miles of U.S. Highway 41, part of which was located five miles from the limits of the village of North Fond du Lac. The steel was placed along the railroad right of way in the Village between March 30 and April 11, until its removal for use in the construction between May 5 and June 23. The steel had no fixed location in the village within the meaning of s. 70.13(1), Stats., to permit the village to impose personal property tax.

***Cady v Alexander Construction Co., Inc*. 12 Wis. 2d 236, (1960)** Taxable situs was held to be in said town as of May 1, 1958 for said assessment year. The court held that "situs" of property for tax purposes is determined by whether the taxing state has sufficient contact with the personal property sought to be taxed to justify in fairness the particular tax.

The court went on to state the facts and explain that a foreign corporation's road construction machinery, which was in town from fall of 1957 until the personal property assessment in May 1958, was present in town for a sufficient period of time to be located there within this section authorizing assessment of the personalty where it is located.

Construction machinery which was in the state for somewhat less than a year, but which was not used for the purpose for which it was made, and for the benefit of its owner's business, acquired a taxable situs in the state, which had justification to tax it, and was subject to tax in a town in which it was located for some time, even though it had no fixed location therein.

***Wisconsin Transportation Co. v Village of Williams Bay*, 207 Wis. 265, 240 NW 136 (1932)** It was held that for purposes of this section customarily kept refers to personalty which is moved from place to place but brought back at regular intervals to a given place for a time of nonuse. "Customarily kept" is not synonymous with "customarily used."

***Village of Middleton v Lathers*, 213 Wis. 117, 250 NW 755 (1933)** The court held that it was the evidence which sustained a finding that the highway equipment which was kept in the Village of Middleton during the winters was nevertheless taxable in the different tax district in which the owner resided because it was property without a fixed location.

22 Opinion of Attorney General 1018 (1933) That road construction machinery belonging to a corporation, having no fixed location, should be assessed either where customarily kept or at the place of residence of the corporation, depending upon the facts of the case.

***O'Keefe v City of De Pere*, 9 Wis. 2d 496, 101 NW 2d 649 (1960)** Said that under this section personal property having no fixed location shall be assessed in the district where the owner or person in charge or possession thereof resides. Personal property belonging to a partnership of a construction company but having no fixed location could be assessed by the municipality in which the partnership maintained its principal place of business.

***William J. Kennedy & Son, Inc. v Town of Albany*, 66 Wis. 2d 447, 225 NW 2d 624 (1975)** A bituminous plant which manufactures a product used in road construction is moved from location to location on road construction sites. The court held that the personal property had no fixed location so the assessment should be made where the owner resides, not where it was located on the assessment date.

***Union Refrigerator Transit Co. v Kentucky*, 199 U.S. 194 (1905) and Sancho v. Humacao Shipping Corporation, 108 F. 2d 157 (1939)** It was held that tangible personal property may not be taxed at the owner's domicile when it has acquired a taxable situs in another state.

To Whom Assessed

Section 70.18, Wis. Stats. states that "Personal property shall be assessed to the owner thereof, except when it is in the charge or possession of some person other than the owner it may be assessed to the person so in charge or possession of the same." The owner has been interpreted to be the beneficial owner, who is not necessarily the same as the owner of the legal title. The determination of who is the beneficial owner is based on (1) possession, (2) benefits gained by the possessor of the property, and (3) the control of the use or responsibility in case of loss of the property.

If an improved property is owned by an exempt government entity, but the former owners retain a reserve for use and occupancy for a set number of years, and the interest reverts to the exempt government entity at the end of the reserve period, the improvements on the property would be taxable as personal property to the former owners who are considered to be the beneficial owners.

If former owners retain salvage rights to improvements sold to an exempt government entity, the improvements are taxable as personal property to the former owner.

If a property is subject to a government easement which restricts future use and development, the easement is not assessed separately. They are factors to be considered in valuation of the land assessable to the original owner.

If property is sold prior to the assessment date, but is later returned to the seller after the assessment date due to lack of payment by the purchaser, the purchaser is considered to be the owner of the property as of the assessment date since they were in "charge and possession of the property" on the assessment date.

***Mitchell Aero, Inc. v City of Milwaukee*, 42 Wis. 2d 656, 168 NW 2d 183 (1969)** This is the case where Mitchell Aero, Inc. built two hangers on county property and expected them to be exempt since the title of the hangers was given to the county. Mitchell, however, had use and control of the buildings and basically built the hangars to fit their needs.

"The court held that Mitchell Aero, Inc. was properly assessed the property tax on two hangars constructed by it and in which they vested the title to Milwaukee County."

***State ex rel. Mitchell Aero v Board of Review, City of Milwaukee,* 74 Wis. 2d 268, 246 NW 2d 521 (1976)** Mitchell Aero, Inc. built an addition to an existing structure owned by the County. Mitchell Aero, Inc. argued that this addition should be exempt from property tax because this improvement was made to a county owned building. The court held that Mitchell Aero, Inc. was the beneficial and true owner of the improvements to the structure for personal property tax purposes.

***Superior-Kuetemeyer Co., Inc. et al v City of Milwaukee,* Milwaukee County Circuit Court (1975)** Contractors were to build low income housing on non-contiguous sites on land owned or leased by the Housing Authority of the City of Milwaukee. The City of Milwaukee assessed personal property taxes on the uncompleted housing units to the contractors. The court found the contractors had the:

1. legal title;
2. risk of loss up to settlement; and
3. construction financing, insurance, employees, and equipment.

The Housing Authority, which is exempt from property tax under **sec. 70.11(18), Wis. Stats.** had:

1. established requirements for design, costs, plans and specifications;
2. obtained a guarantee of federal funding for the project;
3. paid for units as soon as they were completed; and
4. arranged for code modifications, sewer and water, and street improvements.

The court held that the personal property taxes levied against contractors were invalid due to the fact that the Housing Authority is the beneficial owner. In doing so, the court felt that the risk of loss and insurance cost was actually an additional charge to the Housing Authority by the contractors.

***State ex rel. Wisconsin University Building Corp. v Bareis,* 257 Wis. 497 (1950)** The court held that the property was exempt from taxation. The reasoning was that although title in the real estate was in the name of the dummy corporation, it was clear the land was held for the benefit of the university and thus the beneficial owner was the State of Wisconsin. Thus the court held "owned" in the statute meant beneficial ownership, not mere technical title. In taking this view, the court stressed the substance of the transaction and not the form for the purpose of tax Exemption in favor of the state.

***American Motors Corp. v City of Kenosha,* 274 Wis. 315, 80 NW 2d 363 (1957)** Personal property in the possession of a Wisconsin company was subject to taxation even though, by contract with the federal government, the property belonged to the U.S., where the U.S. had not paid for it, the company could add to and dispose of it, and all property not finally accepted by the U.S. was to revert to the company.

Valuation

According to **sec. 70.34, Wis. Stats**., the assessor is to value personalty at its true cash value, which is basically, the value at which a willing buyer and willing seller, neither obliged to transact, would agree to in an arm's-length transaction. The valuation of personal property causes problems not present in real property valuation such as few sales and numerous methods of depreciation. As with real estate, if there are no sales or market comparables, the assessor must rely on any information that can be obtained. This information may include insurance on the property, rental income, and cost less depreciation. The legislature, as an aid to the assessor, has authorized the assessor to require certain property owners to furnish information on a personal property form. This information then may or may not be used by the assessor in making the assessment.

***Xerox Corp. v Wisconsin Department of Revenue,* Dane County Circuit Court, Case No. 81-CV-4918** Conceding that Xerox's market for copying machines has generally been a leasing rather than a sales market, the court nevertheless concluded that the DOR could properly use a sales approach to value where between May 1, 1976, and April 30, 1977, Xerox sold only 262 or 5% of the machines leased during that period. Prior to 1977, an income approach to valuation was used to determine the true cash value. However, in the year preceding May 1, 1977 (then the assessment date), the number of machines sold in Wisconsin were 70% of the total sales ever made. This greatly increased figure was sufficient to warrant using the sales approach, which is preferred as a matter of law over the income approach under Wisconsin Law.

***Ryerson's Estate,* 239 Wis. 120, 300 NW 120 (1941)** In all cases, parties who rely upon sales of property to establish fair market value for general and inheritance tax purposes should bear the burden of establishing that the sales were made by a person willing to sell but not obliged to sell to a willing buyer who was not obliged to buy, together with such other circumstances that indicate the price was fairly obtained in an open market.

***State ex rel. Baker Mfg. Co. v City of Evansville* 261 Wis. 599, 53 NW 2d 795 (1952) Section 70.34, Wis. Stats**. presupposes a value at which a willing buyer and a willing seller would deal, but where the property has a restricted or nonexistent market or is unique, the appraisal is based on many factors other than actual sales and the assessor must determine as accurately as possible the amount which the property would bring in the period for which the assessment is made, if both a buyer and a seller were willing and able.

***State ex rel. Berg Equipment Corp. v Board of Review, Town of Spencer* 53 Wis. 2d 233, 191 NW 2d 892 (1971)** Inspection whereby assessors visited corporate taxpayer's barn-cleaning equipment manufacturing plants and viewed not only real estate but contents of the plants constituted "as far as practicable" an "actual view" of the personal property and thus complied with this section requiring that all articles of personal property shall as far as practicable, be valued by the assessor upon actual view at their true cash value, though assessor made no actual count of inventory.

Even if the town assessor agreed to accept, without further proof, figures submitted by the president of corporate manufacturer as to portion of manufacturing stock exempt from

personal property tax as stock being held for direct retail sale, such agreement would have no validity, in view of the mandatory obligation of assessor to value personal at its "true cash value."

Tax assessment must be based on market value and not on depreciated book value.

***Lawrence v City of Janesville*, 46 Wis. 364, 50 NW 1102, rehearing denied 46 Wis. 364, 1 NW 338 (1892)** When a person has given the assessor a statement, not under oath, of the moneys and securities owned or held by that person, the assessor is not bound by the valuation stated therein, but may resort to any means of information to determine the amount which should be assessed, even though the unsworn statement was accepted as satisfactory, and no request was made that it be a sworn statement.

***State ex rel. Garton Toy Co. v Town of Mosel*, 32 Wis. 2d 253, 145 NW 2d 129 (1966)** Assessment of personalty solely on book value figure for raw materials, work in process, and finished goods as reflected in the taxpayer's department of taxation form without consideration of undisputed evidence to effect that certain inventories were distressed merchandise having cash value below book value was invalid as not having been made on the basis of statute providing that all personalty shall as far as practicable be valued by assessor upon actual view at true cash value.

***Central Cheese Co. v. City of Marshfield*, 13 Wis. 2d 524, 109 NW 2d 75 (1961)** Where information necessary to make a computation on the value of cheese on hand in the taxpayer's warehouses was not given on the return nor in response to a written request, and the assessor made the assessments based on inventory figures from the close of the previous fiscal year of each taxpayer, and resulting figures were substantially less than the year-end figures and in line with the quantity of cheese that the assessor observed, assessor complied with this section as having valued the property "as far as practicable upon actual view."

***State ex rel. Beloit Iron Works v City of Beloit*, 257 Wis. 422, 43 NW 2d 473 (1950)** Evidence established that the inventory of the corporation engaged in manufacture and sale of large machinery was as claimed by the corporation, and the local Board of Review exceeded its jurisdiction by affirming the assessment on personalty of the corporation based on a larger inventory, which the assessor believed more reasonable than the inventory claimed by the corporation.

***State ex rel. Dane County Title Co. v Board of Review, City of Madison*, 2 Wis. 2d 51, 85 NW 2d 864 (1957)** Where the cash sale value of title records owned by an abstract title company could not be determined because of the absence of such sales, the assessor was justified in employing cost, depreciation, replacement value and earnings, as the basis of the assessment.

***State ex rel. International Business Machines Corporation v Board of Review, City of Fond du Lac*, 231 Wis. 303, 285 NW 784 (1939)** In assessments involving property which is not bought and sold on the market, inquiry should relate to the price that such property would probably bring if offered for sale.

Where electrical tabulating machines were not sold, but always leased by the manufacturer under contracts requiring the manufacturer without further charge to render valuable and expert services to lessees by highly trained employees during the lives of contracts, the value of the machines for purpose of taxation could be determined by considering the price obtained for other patented electrical machines manufactured and sold by the same manufacturer, the actual cost of which was known or could be ascertained with reasonable certainty, but the value thus obtained was required to be reasonably depreciated in accordance with credible evidence relating to depreciation. Net income from the rental of either real or personal property is a proper element to consider in fixing value for taxation purposes, but it cannot be considered as the sole controlling factor.

***State ex rel. National Dairy Products Corp. Sealtest Central Division v Piasecki,* 2 Wis. 2d 421, 86 NW 2d 402 (1957)** In proceeding to review the assessment of leased milk packaging machines which were assessed on a method of valuation amounting to a capitalization of net rent received for the machines, assessment without consideration of the ratios between rent and selling price of other types of milk packaging machines was improper in the absence of explanation why such ratios were irrelevant. In making an assessment of personal property leased to another, evidence as to insurance carried on the property should be considered if it can be obtained.

27 Opinion of Attorney General 362 (1938) In the assessment of merchandise under this section, according to true cash value, consideration should be given to state and federal excise taxes already paid and which will be included in the final retail price; but where such taxes are paid only by the ultimate purchaser and are not included in the price, such taxes form no part of true cash value of the commodity while in the hands of the manufacturer, wholesaler or retailer.

53 Opinion of Attorney General 110 (1964) The "true cash value" under **sec. 70.34, Wis. Stats.** of gasoline carried in this state for sale should be determined by the actual market price on May 1 (now January 1), undiminished by the amount of any state and federal taxes chargeable thereto, whether or not such taxes have in fact been paid to the taxing governments.

Taxable Versus Exempt Household Furnishings

Mary Faydash,* v *City of Sheboygan, Wisconsin Court of Appeals, District II, Appeal No. 2010AP2073, March 2, 2011.

What Assessors should know: A home that was used by a taxpayer three months out of the year while made continuously available for rent via the Internet was deemed to have a commercial use that was neither de minimis nor inconsequential and therefore the personal property within the home was not exempt under sec. 70.111, Wis. Stats.

The Court's reasoning: In March, 2006 Mary Faydash purchased a single-family home in the City of Sheboygan. She furnished the home with her personal property, and it was used only by Faydash and her family that year.

In 2007 and 2008, Faydash began making the home available for rent over the Internet. She was able to rent the home sporadically, with sixteen overnight stays occurring in 2008. During the years 2007 and 2008, Faydash and her family used the home and the personal property within for approximately 3 months each year.

For 2008, the City assessed the personal property within the home and levied $625 in tax. The City characterized the property as having "a commercial purpose", and therefore argued that the property was not exempt under sec 70.111, Wis. Stats.

Faydash paid the taxes under protest and made a Claim to recover Unlawful tax on Personal Property pursuant to sec 74.35, Wis. Stats. She filed a complaint with circuit court contending the personal property was kept for personal use, that the property was exempt by law from taxation, and that the levy of personal property tax was an unlawful tax. The City filed a motion for summary judgment.

The Circuit Court granted the City's motion for summary judgment. Faydash appealed.

The Court of Appeals upheld the Circuit Court's decision. The Court noted that mere inconsequential or de minimis commercial use would still qualify the personal property within the home exemption. However, the Court found that it was "key" that Faydash's home was continuously advertised over the Internet. This feature, the Court found, meant the property had "a commercial purpose" that went beyond mere de minimis or inconsequential commercial use.

Thus, the Court held that because Faydash did not establish a pattern of de minimis or inconsequential use, she failed to meet her burden of proof that the personal property was exempt.

Real Property v. Personal Property

Importance of Proper Classification

One of the more common questions asked by assessors concerns whether a particular property is assessed as real estate or personal property. With the exception of buildings on leased land and possibly leasehold improvements, which can be assessed as either, this is not a choice of the assessor, but a question of definition as written in the statutes and clarified by interpretation in the courts. Some things that seem to have the characteristics of real property have been defined by statute to be personal property, and vice versa.

The statutes have defined real property as "the land itself and all buildings and improvements thereon together with all fixtures and rights and privileges appertaining thereto." Personal property is in essence anything which is not real property. It is important that the assessor understand these definitions in order to properly classify the property to be assessed. There are a number of reasons why the assessor should properly classify property.

1. **May Determine Assessability.** Proper classification of real and personal property, in some instances, determines whether the property is taxed at all. A good example of this is farm machinery, which when used by any person in farming is exempt from property tax as personal property. In some cases the individual's farming machinery may be attached to the real estate in a more or less permanent manner so as to become regarded by law as part of the real estate and therefore taxable.

2. **Determine On Which Rolls to be Listed. Sections 70.25 and 70.29, Wis. Stats.** require that real estate and personal property be listed on the proper assessment and tax rolls.

3. **May Affect to Whom Assessed. Section 70.17, Wis. Stats**. requires that "Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name..." **Section 70.18, Wis. Stats**. says personal property shall be assessed to the owner thereof, except that when it is in the charge or possession of some person other than the owner it may be assessed to the person so in charge or possession of the same..." For personal property the assessor must find some person to whom to assess the property.

4. **Different Permissible Dates of Payment of Tax.** All personal property taxes must be paid on or before the last day of January, while real estate taxes may be paid in two installments due January 31 and July 31.

   Municipalities, other than a city authorized by its charter to sell land for nonpayment of city taxes, may by ordinance provide for the payment of real estate taxes or special assessments in 3 or more installments as provided in

sec. 74.12, Wis. Stats. The time for payments may not exceed 6 months from January 31. The payments must begin on or before January 31 and at least one-half of the total tax bill shall be due and payable on or before April 30.

5. **Different Procedures for Collection of Delinquent Taxes.** When personal property taxes are delinquent, **sec. 74.55, Wis. Stats**. provides "Delinquent personal property taxes together with any interest and penalty under **sec. 74.47, Wis. Stats**. may be recovered by the taxation district in a civil action, including an action under Ch. 799, if the action is brought within 6 years after the January 1 of the year in which the taxes are required to be paid.

"When real property taxes are delinquent, **sec. 74.57, Wis. Stats**. provides "Annually on August 15, the county treasurer shall issue to the county a tax certificate which includes all parcels of real property included in the tax roll for which real property taxes, special charges, special taxes or special assessments remain unpaid."

"Two years after the issuance of the tax certificate," the county is entitled, as to any property included in the tax certificate which has not been redeemed, to any of the following:

1. Take a tax deed under **sec. 75.14, Wis. Stats**.

2. Commence an action to foreclose the certificate under **sec. 75.19, Wis. Stats**.

3. Commence an action to foreclose the tax lien represented by the certificate under **sec. 75.521, Wis. Stats**.

Please refer to WPAM Chapter 15 for recommended guidelines on classifying individual items as real or personal.

Improvements on Leased Land

Section 70.17, Wis. Stats. states that "Improvements on leased lands may be assessed either as real property or personal property."

***State ex rel. Hansen Storage Co. v Bodden*, 166 Wis. 219 (1917)** Held that a building erected upon leased premises for a temporary purpose, the lessee having the right to remove the same at the end of the term, does not appertain to the land upon which it stands and should be assessed as personal property.

Chapter 244, Laws of 1919 reversed this holding and made buildings on leased lands assessable as real estate.

In **39 Opinion of Attorney General 615 (1950)** regarding an assessment of the building only as real estate, the confusion of the 1919 amendment was pointed out. "If the building only were assessed as real estate and no owner was known nor tax paid, ... the ultimate result was a deed to the buildings." The opinion continued, "This presented many problems

to the tax collectors and particularly in respect to cottages at lakes and other more or less movable buildings which were assessed as real estate. By the time of the tax sale, the buildings would be gone... the remedy of personal liability for the tax was of no value in such instances... The situation became very badly confused. It essentially arose from the splitting up of the lands and buildings into separate items of real estate taxation."

Present Law. This same 1950 Attorney General's Opinion goes on to explain that Chapter 444, Laws 1933 "deleted from the definition of real property (now in sec. 70.03, Wis. Stats.) the language specifically mentioning buildings on leased lands as such language was not necessary to an inclusion to them in an assessment of land and all buildings thereon as a single unit of real property. It also took out of sec. 70.17, Wis. Stats. the language that previously dealt with buildings on leased lands and provided that they should be assessed separately as real estate, and substituted therefore the following: "*Improvements On Leased Lands May Be Assessed Either As Real Property Or Personal Property*"

This opinion explains further that in view of this change, where buildings on leased lands are assessed as real estate, "they are to be included as part and parcel of the land and assessed with it as a unit ... and where assessed as personal property, ... separately from the land. There is no place in the statutes as I view them for a separate assessment of buildings on leased lands alone as real estate. It was to get away from such handling of them that the amendment in 1933 was framed as it was."

***Town of Menominee v Skubitz*, 53 Wis. 2d 430, 192 N.W. 2d 887 (1972)** A person owning improvements on lands of another without a written lease is a tenant at will or sufferance and is deemed to hold improvements on "leased lands" and therefore such tenant was properly assessed for personal property tax on such improvements pursuant to an assessment under **sec. 70.17, Wis. Stats**.

***All City Communication Company, Inc. and Waukesha Tower Associates, v State of Wisconsin Department of Revenue*, 2003 WI App 02-1201, District IV, March 27, 2003** In December of 1985, Waukesha Tower Associates (Waukesha) leased rural agricultural land to build a communications tower. The ten-year lease allowed Waukesha to "occupy and use the land for the operation of a 500 foot broadcast radio tower" and remove any of the improvements at the end of the lease term. Waukesha constructed a 480-foot steel tower on a concrete foundation and secured by 30 guy wires anchored in concrete. Waukesha rented space on the tower to All City Communication Company, Inc. (All City) beginning in 1992.

DOR classified the communication tower as personal property and issued a sales and use tax assessment against Waukesha and All City for the tax years 1992 through 1995 for use of the tower. All retailers must pay sales taxes, under sec. 77.52(1), Wis. Stats., on "the gross receipts from the sale, lease or rental of tangible personal property..."

The court used the following three common law rules or tests to determine if the tower was personal property or real estate:

- actual physical annexation to the real estate
- application or adaption to the use of purpose to which the realty is devoted;

and

- intention on the part of the person making the annexation to make a permanent access to the leasehold.

The court agreed with DOR that the tower was personal property subject to sales and use taxes.

Improvements on Government Owned Land

Section 70.174, Wis. Stats. reads, "Improvements made by any person on land within this state owned by the United States may be assessed either as real or personal property to the person making the same, if ascertainable, and otherwise to the occupant thereof or the person receiving benefits therefrom."

In view of the preceding 1950 Attorney General's Opinion, it would appear that there would be no way in which said property should be assessed as "real" under **sec. 70.174, Wis. Stats**. The cases of whether the personal property owned by a private person and used in the business and located on government owned (U.S.) property was exempt are controlled by **secs. 1.01, 1.02 and 1.03, Wis. Stats**., which are concerned with the degree of sovereignty of the United States Government and concurrent state jurisdiction over any places acquired by said U.S. Government within the State of Wisconsin.

39 Opinion of Attorney General 78 (1950) held that "Machines owned by a private corporation located in the Federal Forest Products Laboratory (at Madison, Wis.) are not exempt from local taxation." Cited with approval is ***Nikis v Commonwealth, 131 S.E. 236***. "That the right of a state to tax the property of others located upon lands owned by the United States, although it cannot tax such lands, will not be held to be abandoned by the state, except for the most compelling reasons, is quite manifest from several decisions of the Supreme Court of the United States…"

Fixtures

In the assessment of real estate and personal property, the assessor is confronted at times with the difficult question of whether to classify items referred to as "fixtures" as personalty or realty. Whether fixtures are real or personal property is often a very complicated question that ends up being resolved in the courts.

For the purposes of this chapter a fixture can be defined as "An article that was once personal property but has been installed in, or attached to, land or buildings in some more or less permanent manner so that such article is regarded in law as part of the real estate."

***Rinzel v. Stumpf*, 116 Wis. 287 (1903). *Baringer v Everson*, 127 Wis. 36 (1906). *Wisconsin Department of Revenue v. A. O. Smith Harvestore Products, Inc.*, 240 N.W. 2nd 357 (1976)** In determining whether articles in a building are fixtures, three things should be considered:

1. Actual physical annexation including removability from the real estate without damage to the article being removed or to the realty from which it is removed.

2. The intention on the part of the person making the annexation to make the article a permanent part of the real estate.

3. Application or adaption to the use or purpose to which the realty is devoted.

The intention of the parties, number 2 above, has been held to be the principal consideration.

When a tenant adds property to the land or to a building, and the intention is to remove the property at the expiration of the lease, if the removal does not materially damage the lessor's property, the tenant's property is considered personal property.

When an owner of the land and buildings adds property, the owner's "intent" is judged by how the added property is adapted to the principle use of the land and buildings.

Actual physical annexation. Annexation attempts to answer several questions. One question is "How connected is the article to the real estate?" The connection may be by gravity or weight of the object itself, physical connection, and/or the objects incorporation to the real estate. Common examples of this include: water pipes, electrical wiring, linoleum, and heavy industrial machinery kept in place by its own weight.

Another question that relates to physical annexation is "Can the article be removed from the real estate without material damage to the article or to the real estate?" This question has at times been considered a separate test of fixtures, however, it more properly should be considered a part of physical annexation. Some examples of this include: machinery bolted to the floor, bookcases attached to a wall, or temporary farm sheds.

In the case of ***State ex rel. Gisholt Machine Co. v Norsman*, 168 Wis. 442, 169 NW 429 (1918)**, it was held that where the Gisholt Company installed certain heavy and light machinery on its own premises and which was connected to the building by power wires and belts and was not attached to floors by screws, but held in position by its own weight, was "real property" notwithstanding evidence that said company carried said machinery on its books as movable equipment and that the local assessor had properly assessed these articles as real estate.

In the case of ***McCorkle v Robbins*, 222 Wis. 12 (1936)**, it was held that where the mortgagor (owner) installed "machines adapted to the purposes of and used in a soft drink manufacturing and bottling plant, which were not fastened to the floor or walls by bolts or screws but were kept in place by their own weight and attached to pipes and wires supplying water and electricity with the intention of continuing to operate the plant in manufacturing soft drinks, and which were assessed and taxed continuously as part of the realty, constituted fixtures passing with the realty to the mortgagee as against the mortgagor."

The McCorkle case also held that "Although the question of whether machines installed in a manufacturing plant constitute fixtures is largely one of intent, such intent may be established where the machines were clearly adapted to (the realty), and were put by the owner of the machinery and the realty, to the use to which he devoted the realty and the installed machines as an entirety."

In the case of ***Wisconsin Department of Revenue v A.O. Smith Harvestore Products, Inc.*, 72 Wis. 2d 60 (1976)** it was held a silo, weighing 30 tons and consisting of 105 steel sheets, 7,000 bolts and sealant, and affixed to a 60-ton concrete base by numerous bolts was annexed to real estate. Where the owner of realty puts an article of property on a foundation especially prepared for the article and actually uses the article for the same purposes as the realty, this is conclusive evidence of intent to make permanent accession to realty.

***Future Bldg. & Loan Assoc. v Mazzochi et al.* 107 N.J. Eq. 422 (1931)** The supplier of refrigerators, ranges, and cabinets to the builder of an apartment building executed a subordination agreement with the mortgagee of the builder to forego their mechanic's lien in favor of the mortgagee. The mortgagee foreclosed on the builder and the supplier wanted to remove the refrigerators and ranges claiming that they were personal property not subject to mortgage. The court held that if such property had not changed from personalty to realty, the supplier was estopped from denying that it had not. Material injury to the property upon removal also means material injury to the value of the structure of which the refrigerators and ranges are a part.

***Standard Oil Co. v LaCrosse Super Auto Services, Inc.*, 217 Wis. 237 (1935)** Tanks, pumps and concrete structures are held to be personal property removable by the tenant at end of the lease term.

***Old Line Life Insurance Co. of America v Hawn* 225 Wis. 627 (1937)** Buildings erected by the tenant on farm property were removable at end of the lease term.

***O'Malley et al v U.S.A.* 220 Fed. Suppl. 30 (1962)** The Federal Court followed Wisconsin Law in permitting farm buildings erected by the tenant to be removed at end of the lease term.

***Auto Acceptance & Loan Corp. v Kelm*, 18 Wis. 2d 178 (1962)** Where there was an agreement that the bar on the premises was part of the leasehold between tenant and landlord, erection of a new bar by the tenant without the landlord's approval became real property not subject to chattel mortgage.

Intention of the parties. The intention test is a hard test to prove in court. Generally, it is thought of as what an average person would consider to be a permanent fixture. Wall to wall carpeting, whether over hardwood, concrete slab or Masonite is considered by an average person as fixture and part of real estate. In some instances carpeting may be considered a fixture because of the physical annexation test.

***Anglo-American Mill Co. v Wis. Hydro-Electric Co. and Chetek Light and Power Co.* 189 Wis. 120 (1926)** A tenant had leased a building, and by agreement with the landlord

was to be permitted to install a new 13,000 pound flour roller mill in place of an old one which said tenant would remove. After two years the tenant gave up the lease, left the machinery in place and later the landlord sold the premises to the Wisconsin Hydro-Electric Co. There was an agreement between tenant and landlord that at the termination of the lease the new mill might be removed and the old machinery reinstalled.

This was not done and the question was, could the tenant's assignee to the rights in the new mill maintain an action against the owner of the real estate for replevin of the said new machine. The court held that "From all physical appearance it was part of the plant, and, in the absence of any notice on the part of a purchaser of the premises, title to the mill passed to the purchaser by virtue of the deed of conveyance."

The court held that as between tenant and landlord "the mill clearly retained its character as personal property… In permitting the mill to remain upon the premises (the tenant) took the chance of losing his right to remove it if the premises were conveyed, and this right he did lose when the conveyance… was executed and delivered."

***Shields v Hansen*, 201 Wis. 349 (1930)** "The property when first leased, was entirely vacant, and it can be restored to its original condition by the removal of the tanks, building and concrete slab … so that the premises will be in identical condition that they were when leased."

"The common law with reference to trade fixtures has been much modified in this country, so that the question of attachment to soil and adoption for the purpose is not considered of so much importance as the intention of the parties at the time of the attachment."

"Accession to the realty must affirmatively appear, and the tenant needs no express stipulation in the lease to give him right to remove fixtures."

***Century Holding Co. v Pathe Exchange Inc.*, 192 N.Y. Suppl. 380 (1922)** A lease provided that alterations and improvements "except movable office furniture put in at the expense of the tenant" should remain as part of the premises after termination of the lease. Sectional and interchangeable movable partitions were installed in premises by tenant and were held to be a part of the "movable office furniture". It had been agreed between landlord and tenant that such removal would not result in injury to the building.

***Wisconsin Department of Revenue v A.O. Smith Harvestore Products, Inc.*, 72 Wis. 2d 60 (1976)** In determining whether the annexor intended to make permanent accession to realty, the test to be applied is not the subjective intent of the actual annexor, but rather the objective intent of a hypothetical, reasonable person under similar circumstances. It was held that the objective intent of a hypothetical farmer in purchasing a silo was to create a permanent fixture which was not affected by facts supporting the defendant's contention that silos were financed under the Uniform Commercial Code as personalty and sometimes were traded in, since subjective agreements between the annexor and another had no bearing on the objective test and evidence of trade-ins supported the conclusion of permanence.

Application or adaptation to the use to which the realty is devoted. Personal property designed for and used in the "normal use" of a parcel of land may be classified as a fixture. Physical, permanent attachment is not always necessary for personal property to become a fixture to the real estate. Storms and screens specifically built for a house, a built-in oven which merely sits in a cabinet specially built to hold it, house keys and church pews are some common fixtures that meet this test.

***Brunswick-Balke-Collender Co. v Franzke-Shiffman Realty Co. et al,* 211 Wis. 659 (1933)** Evidence showed that bowling alleys were placed in a building built expressly for such purpose and not usable without such alleys, but also hinged the decision on the fact that they were built into the building to remain a permanent part of it and were attached to the building by screws and nails and only removable by sawing them into pieces and removing the screws and nails, and that this was sufficient to support a finding that they were so affixed to the realty as to become a part thereof. The court went on to say that the fact that bowling alleys are commonly treated as personal property in dealings does not overcome the above presumption (that they should be considered as realty).

***American Laundry Machine Co. v Larsen, et al,* 217 Wis. 208 (1935)** In reference to personal property which is attached to the realty and adopted to the use in which the realty is devoted, the fact that such property is subject to a chattel mortgage does not guarantee that it cannot be classified as part of the real property.

***Wisconsin Department of Revenue v A.O. Smith Harvestore Products, Inc.,* 72 Wis. 2d (1976)** It was held that inasmuch as the purpose of a silo weighing 30 tons and consisting of 105 steel sheets, 7,000 bolts and sealant was to store and process fodder into silage, the silo was adapted to the same use that the realty was devoted.

Time elements. In addition to the three tests of a fixture, time often plays an important part in determining the ownership of a fixture.

***Phelps v Ayers,* 142 Wis. 442 (1910)** It was held that if a lessee surrenders possession of the premises before removal of a fixture without an express reservation of the right of removal, ALL RIGHTS TO REMOVAL ARE LOST. The law implies in such case that the lease and the use and occupation of the premises thereunder constitute a consideration compensating the lessee for the cost of adding the fixture to the land, and can afford no relief if the lessee sustains a loss by omission to remove it.

***Hansen v Ryan,* 185 Wis. 566 (1925)** Where the plaintiff leased a portable garage to the tenant without the defendant's (landlord) knowledge, failure to remove such portable garage on surrender of the possession of premises by the tenant at expiration of the lease does not forfeit the right of the plaintiff to remove the portable garage. The defendant, (landlord) is not a purchaser for value without notice.

***Anglo-American Mill Co. v Wis. Hydro-Electric Co. and Chetek Light and Power Co.,* 189 Wis. 120 (1926)** The tenant had the right to remove the mill at termination of the lease, which the tenant failed to do. The assignee of the tenant had no right to remove the mill after the landlord had sold to the purchaser for value.

Uniformity of Assessments

The assessor is required to value all real estate "at the full value which could ordinarily be obtained therefor at private sale" (**sec. 70.32, Wis. Stats**.), and personal property "at their true cash value" (**sec. 70.34, Wis. Stats**.). The courts have interpreted these statutes to mean that the valuation must be completed in a uniform manner, but the assessed value placed on the roll may be a fraction of the market or cash value. When the assessed value is less than the market or cash value, the assessor must use the same percent of market value for all classes of real estate as well as all items of personal property. See Section I, Article VIII of Wisconsin Constitution as to uniform treatment of property taxation.

***Marsh v Board of Supervisors of Clark County*, 42 Wis. 502 (1877)** "The exercise of taxing power must be upon a uniform rule; and it is only upon an equal assessment, as the foundation of uniform apportionment, that the taxing power can be put in operation… The constitution clearly implies uniform assessment of values as an essential prerequisite to taxes upon property … and such a tax, to be valid under the constitution, must proceed upon a regular, fair, and equal assessment of the property to be taxed, made by the officers, in the manner and with the securities and solemnities provided by statute."

***State of Wisconsin ex rel. Wayne Schilz and Lela I. Schilz v Town of Darien BOR*, Wisconsin Court of Appeals, District II, Docket No. 96-0722-FT, June 26, 1996. Under sec. 70.32(1), Wis. Stats**., real property must be assessed based upon an assessor's "[a]ctual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value, the assessor shall consider … recent arm's-length sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed."

A fair market value assessment must reflect the amount the property could be sold for in the open market. ***State ex rel. Levine v Board of Review, 191 Wis. 2d at 372, 528 N.W. 2d at 427 (1995).***

Unrefuted evidence shows the sewerage facility's presence reduced the value of the Schilzes' property by ten to twenty percent.

The assessor failed to consider the impact of the facility on the property's fair market value.

The assessor testified he considered two methods in valuing the Schilzes' property: (1) adjustment of all residential property by the same formula using a multiplier and (2) cost of replacement less depreciation. Neither method considered a highly relevant feature of the property: the neighboring sewerage treatment facility.

Although the Schilzes' concerns regarding odor and the knifing of sludge depend on the future operation of the facility, a fair market value assessment could not simply ignore the presence of the facility.

The Schilzes' concerns imitate the same concerns of a prospective purchaser of the property in a private sale.

The assessor failed to consider "all factors that ... affect the value of the property to be assessed." (**sec. 70.32(1), Wis. Stats**). The Board approved an assessment that did not comply with **sec. 70.32(1), Wis. Stats.**

State ex rel. Robert A. Levine, Ileen K. Levine, Russell Yale and Susan Yale v Board of Review of the Village of Fox Point, Wisconsin Supreme Court, 191 Wis.2d 363 (1995), Docket No. 93-0249, March 14, 1995. Must taxpayers whose properties were assessed at fair market value, but who object to their assessments on the grounds that other properties in the district were under assessed, present evidence that at least two percent of other properties in the tax district were under assessed?

The assessor clearly failed to use the best information available when he ignored the purchase price of certain older properties in assessing their value. The Wisconsin Constitution and **sec. 70.32(1), Wis. Stats**. require that property be assessed uniformly using the best information that the assessor can obtain. The assessor must value property involved in a recent arm's-length sale at its purchase price.

By using arbitrary and improper considerations in making the assessment, the assessor violated **sec. 70.32(1), Wis. Stats**., and committed an error of law.

In this case, the assessor admitted that he did not rely on sale prices of certain older properties and that he used an "arbitrary" method for assessing older homes that resulted in their being assessed for an amount that was dramatically less than their subsequent sale values.

The decision in ***Walthers*** is not a "bright line" (strictly construed) two percent rule for determining whether taxpayers have met their evidentiary burden. Such a rigid rule would place an onerous burden on taxpayers who live in populous districts and a large financial burden on those who live in small districts.

In ***Walthers*** the taxpayer argued that the assessed value of his property was too high relative to the assessment of certain other properties in the district. The only evidence presented was testimony that nine other properties in the district were assessed at a lower value. No evidence was presented to show that the assessor used an arbitrary method or that improper considerations influenced the valuation. Nor did the taxpayer show the properties were assessed below market value or were comparable. The ***Walthers*** court sought to prevent taxpayers from selectively picking a few lower assessments and then complaining that their property was over assessed. The two percent figure was used as a method of underscoring the inadequacy of the evidence in that case and is tied to the facts of that decision.

The Levines and the Yales introduced ample evidence that improper considerations influenced the valuation of older properties in the tax district. It is difficult to fashion a remedy in this case in order to satisfy the mandate of uniformity. Ordering the board to reassess the entire district for each of the years in issue would be too costly.

The Court, despite acknowledging that the action is at odds with the statute, ordered the Board to reassess the taxpayers' properties to harmonize with the lesser assessed values of older comparable properties.

***State ex rel. Walthers v Jung*, 175 Wis. 58, 183 N.W. 986 (1921)** "A taxpayer has no complaint when a valuation which could ordinarily be obtained therefor at private sale is placed upon his property, unless there is such a general undervaluation of the other property of the assessment district as will result in an excessive tax as to him."

***State ex rel. Baker Mfg. Co. v City of Evansville*, 261 Wis. 599, 53 N.W. 2d 795 (1952)** **Section 70.32, Wis. Stats**. requires real property to be valued at the "full value" which ordinarily could be obtained at a private sale. **Section 70.34, Wis. Stats**. provides that articles of personal property shall be valued at their "true cash value." The court said, "In each class of property they presuppose a value at which a willing buyer and willing seller would deal."

The city claimed that there is a uniformity of taxation if one fraction of true value is applied to real estate and another fraction applied to personal property as long as there is uniformity within the class of property. The court viewed Section 1, Article VIII of the Wisconsin Constitution, to require uniformity of taxation, according to the value of real and personal property without distinction. To assess real property at a different fraction of the value than personalty is error, discriminatory, and not in compliance with the constitution or with **secs. 70.32 and 70.34, Wis. Stats**.

***Knowlton v Board of Supervisors of Rock County*, 9 Wis. 410 (1859)** "when property is the object of taxation, it should all alike, in proportion to its value, contribute toward paying the expense of such benefits and protection. These are plain and obvious propositions of equity and justice, sustained as we believe by the very letter and spirit of the constitution. Its mandate, it is true, is very brief, but long enough for all practical purposes; long enough to embrace within it clearly and concisely the doctrine which the framers intended to establish, viz: that of equality. 'The rule of taxation shall be uniform,' that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform: it shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity in such a proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised."

***State ex rel. Boostrom v Board of Review, Town of Linn, Walworth County*, 42 Wis. 2d 149, 166 N.W. 2d 184 (1969)** Evidence established that a reassessment was not made upon the statutory basis and there was a pattern of unequal underassessment of agricultural land as contrasted to residential land which resulted in an unequal burden of property taxation.

***Town of Menominee v Skubitz* 53 Wis. 2d 430, 192 NW 2d 887 (1972) Section 70.17, Wis. Stats**. allowing improvements on leased lands to be assessed as either personalty or real property does not violate the constitutional "uniformity rule" on theory that real property is assessed at full value which could ordinarily be obtained therefor at private sale while personal property is assessed at true cash value, in absence of any contention that town had used different fractions in assessing the two classes of property.

***Dean v Gleason,* 16 Wis. 1 (1862)** An agreement among the assessors of a district that they will assess all property at about one-third its value, if faithfully carried out, works no injustice to the taxpayers of the district, and furnishes no reason why equity should interpose to restrain the collection of the tax.

***State ex rel. Hensel: Scotty Smith Construction Co. v Town of Wilson, Sheboygan County,* 55 Wis. 2d 101 (1972)** "Under the rule of uniformity, the appellant should be allowed, as here, to demonstrate that, despite the fact that he has paid a fair price for the property, the assessments of comparable property were significantly lower and that this amounted to a discriminatory assessment of this property …

The court must determine not only that the assessment is based upon fair market value of the real estate, but also that the assessment does not discriminate against a property owner even though his property has been acquired at a recent sale…

The factual record in this case was completely developed before the town Board. The board took evidence relating to the comparable value of other property in the area. Thus, while the trial court affirmed the review board on too narrow a basis, there is still a full evidentiary record on the issue of comparable value to allow this court to review the record and determine if the evidence supports the trial court's determination.

The 4.6 western acres of appellant's land are assessed at a rate in excess of $1,000 per acre, while the eastern 5.6 acres are assessed at the rate of $200 per acre. The entire parcel is agricultural land actually used for farming (both before and after the recent sale), although the western 4.6 acres are zoned for commercial use. The trial court, in reviewing the same evidence as it relates to the 1968 assessment, found that the land involved in this case was disproportionately assessed because of its zoning. It should be noted, however, that other farm land not assessed at this high rate was also commercially zoned …

As we have noted, the precise question in this case is not how the land was evaluated-that was based on the 1969 sale-but how the property was assessed once the evaluation was made. How were other lands of comparable location, zoning and use assessed? Extensive evidence was produced before the review board that shows beyond any question that other land which was used for farming was located in the same area, and that some of this land had the same zoning as appellant's land, yet it was assessed at between $80 and $400 an acre as compared with the assessment of part of appellant's land at the rate of $1,000 an acre …

There is no question but what other comparable lands in the immediate area were not assessed at anything like a comparable figure …

There is no question that the assessment was improperly made and in violation of the rule of uniformity. The fundamental equity of the entire real estate property tax is based on the fairness of the assessment procedures, both as to the evaluation and the subsequent assessment."

***Gottlieb v City of Milwaukee,* 33 Wis. 2d 408, 147 N.W. 2d 633 (1967) Section 66.409(1), Wis. Stats**. authorized any local governing body to adopt an ordinance to allow a partial Exemption of real property for up to 30 years where owned by a redevelopment corporation. This meant that such corporation would pay less than the full property tax which would normally be due regarding such property. This statute was held to be unconstitutional because it violated the uniformity requirements of Article VIII, Section 1 of the Wisconsin Constitution.

"For reasons that the legislature considered sufficient, the property of the redevelopment corporation is given preferential treatment and bears less of its tax burden on the true ad valorem basis than does other property. This law accomplishes its intended, but constitutionally prohibited, purpose—the unequal taxation of property. Property taxes where such a freeze is in force are not uniform in their impact on property owners. Such lack of uniformity is accomplished by a prohibited partial Exemption from taxation. While it may be conceded, as contended by respondent, that, if the law accomplishes its purpose, new building may be stimulated and the tax base broadened to the extent that at some time in the future taxpayers not covered by the freeze might be benefited, nevertheless, the fact remains undisputed and undisputable that, if redevelopment corporations are assessed at a figure less that which would be assigned to other taxpayers holding equally valuable property, other taxpayers will be paying a disproportionately higher share of local property tax. This is not uniformity."

The determination that a partial Exemption for urban redevelopment corporations is unconstitutional has placed a cloud over the constitutionality of sec. 70.105, Wis. Stats. (assessment freezes) and sec. 70.11(24), Wis. Stats. These statutes, however, have not been tested in the courts. NOTE: secs. 66.409(1) and 70.11(24), Wis. Stats. have been repealed; however, the rationale of this decision still applies to sec. 70.105, Wis. Stats.

U. S. Oil Co., Inc.,* v *City of Milwaukee, Wisconsin Court of Appeals, District I, 2011 WI App 4, December 28, 2010.

What Assessors should know: Where comparables are assessed differently, some using an income approach and the rest using a sales approach, the assessment is excessive under the Wisconsin Constitution's Uniformity Clause.

The Court's reasoning: The oil terminal properties were physically adjacent, shared the same physical characteristics and features, served the same function and were used in the same fashion, so they were comparable properties. The City initially assessed all terminal properties relying on a 2002 sale of the subject. When one owner, U.S. Oil Company, appealed, in the course of that appeal the City reassessed its property using the income approach, causing the assessment on U.S. Oil's property to rise from $6 million to $14 million. Although the City could have reassessed the other properties using the income approach, it chose not to do so. The Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the

tax district. Because the assessor used a different methodology for comparable properties, U.S. Oil was unfairly singled out in violation of the uniformity clause.

Exemptions of Property

General

The largest portion of the court cases and legal opinions dealing with property tax concern the assessability of property. The assessor begins with the premise that all property both real and personal, is assessable. The only exceptions to this premise are the specific Exemptions allowed by the legislature. The courts have interpreted Exemptions strictly against the taxpayer, it is up to the individual requesting an Exemption to prove that the property fulfills all the Exemption requirements.

***Wisconsin Central R. Co. v Taylor County*, 52 Wis. 37, 8 NW 833 (1881)** The power to prescribe what property shall be taxed necessarily implies the power to prescribe what property shall be exempt.

***State ex rel. Thomson v Giessel*, 265 Wis. 207, 60 NW 2d 763 (1953)** The legislature, subject only to constitutional restrictions and limitations, may exempt property from taxation and limit exercise of taxing power of municipal corporations.

***State ex rel. Wisconsin Allied Truck Owner's Ass'n. v Public Service Commission of Wisconsin*, 207 Wis. 664, 242 NW 668 (1932)** Legislature can exempt an entire class of property from taxation, and make such class very narrow.

***State ex rel. Dane County Title Co. v Board of Review, City of Madison*, 2 Wis. 2d 51, 85 NW 2d 864 (1957)** All presumptions are against Exemption from taxation and Exemption will not be extended by implication.

Tax Exemptions are matters purely of legislative grace and one claiming such an Exemption must point to an express provision granting such Exemption and thus bring oneself clearly within the terms thereof. The basis for allowing an Exemption can be found in one of the four criteria listed below.

1. **Ownership.** The property must be owned by an individual or group that is exempt from property tax such as the federal government.

2. **Use.** The property must be used by an individual or group that is exempt from property tax such as the personal property used by a nonprofit hospital.

3. **Taxes collected through other sources.** If the property is taxed through sources other than property tax, it is exempt from property tax. Common examples of this include: some occupational taxes, motor vehicles, and mobile homes subject to a parking fee.

4. **Ownership and use.** Sometimes property must be owned and used by the same individual or group to qualify for Exemption, such as property owned and used exclusively by a labor organization.

***First National Leasing Corp. v City of Madison*, 81 Wis. 2d 205, 260 NW 2d 251 (1977)** Equipment leased by a corporation to a hospital was "used exclusively" by the hospital within the meaning of **sec. 70.11(4m)(2), Wis. Stats**., and was, consequently, exempt from property tax assessment. The municipality's position was that the property was not "used exclusively" for hospital purposes because the leasing company does business for profit, takes depreciation on the leased property for income tax purposes, and has put the property up as collateral on a loan. In enacting the Exemption, the legislature set as the only criterion that the property be "used exclusively" by a hospital; no weight was given to ownership or incidents of ownership, such as the right to take depreciation or use the property as loan collateral. Personal property is "used exclusively" for hospital purposes when it is in possession of the hospital and is operated only by authorized hospital personnel and only in connection with the regular activities of a hospital. It is irrelevant that an owner derives a profit or secures a benefit from the ownership. What is relevant is the fact that property is physically used exclusively by a hospital.

***Men's Halls Stores v Dane County*, 269 Wis. 84, 69 NW 2d 213 (1955)** Plaintiff, which was a nonstock corporation whose members were students occupying a men's dormitory erected and owned by the University of Wisconsin and which was engaged in selling merchandise in a store in the dormitory to occupants of dormitories was not exempt from personal property taxation as an educational association which was an integral part of an educational institution, even though students who operated the store received experience and training of some educational value and corporate articles provided that profits would be used for literary and educational purposes beneficial to students occupying dormitories and that upon dissolution of the corporation its assets would go to the Men's Halls library.

The court felt that the main function was the selling of merchandise and only a very few people received any educational benefit. This was compared to publishing the student newspaper, where those publishing the paper as well as those purchasing the paper received the educational benefits.

It is use of property and not purpose of income there from that determines taxability of property which is asserted to be exempt from taxation.

Property of the State

Section 70.11(1), Wis. Stats. exempts all state owned property from property tax except for land sold on land contracts and land devised to the state while allowing the grantor or others the benefit of the land. The exempt status of acquired property depends on the date the property was acquired. The controlling date for determining the taxability of newly acquired land by the state is the January 1 assessment date.

Submerged land under navigable water is owned by the State of Wisconsin and exempt under sec. 70.11(1), Wis. Stats. However, the submerged land under an artificially created lake on privately owned property is not vested with the State of Wisconsin and therefore is assessable to the property owner.

20 Opinion of Attorney General 352, (1931) Under a land contract to the state deferring the right of possession until the following year, the vendor was obligated to pay taxes for the year the vendor remained in possession, but if the vendor failed to pay such taxes the county could collect them from the state under **sec. 74.57, Wis. Stats**. by filing a claim with the land commissioners, and the state would have cause of action against the grantor for breach of warranty against encumbrances.

1912 Opinion of Attorney General 989 Lands held by the state under a contract of purchase by which the state agreed absolutely to pay for such land, was not taxable even though the state contracted with the vendor to pay all taxes assessed on the land.

20 Opinion of Attorney General, 1202 (1931) Where the sale of escheated property was made by the commissioners of public lands, title did not pass until the entire purchase price was paid and deed issued, and such property was not taxable so long as the title thereto remained in the state although the purchaser had made a down payment on the purchase price.

***F. F. Mengel Co. v Village of North Fond du Lac*, 25 Wis. 2d 611, 131 NW 2d 283 (1964)** Steel which was used in the construction of a highway under contract with the state but which had not been accepted by state or paid for so as to be appropriated by the state was not exempt from personal property taxes assessed by the village in which the steel had been unloaded. The grounds for the Exemption request had been that it was impressed with trust for use and benefit of the state.

Municipal Property and Property of Certain Districts, Exception

Section 70.11(2), Wis. Stats. exempts from property tax "Property owned by any county, city, village, town, school district … Ownership is the deciding factor with municipal property Exemption. This section goes on to state that "but any residence located upon property owned by the county for park purposes that is rented out by the county for a nonpark purpose shall not be exempt … this exemption shall not apply to land conveyed after August 17, 1961, to any such governmental unit or for its benefit while the grantor or others for his or her benefit are permitted to occupy the land or part thereof in consideration for the conveyance." This statement refers to the previously discussed concept of beneficial ownership. The courts have decided in both the *Shoup Voting Machine* and *Mitchell Aero* cases that use and control of property, not necessarily title, decide ownership for exemption purposes.

4 Opinion of Attorney General 379 (1915) Property owned by a city is exempt from taxation under **sec. 70.11(2), Wis. Stats**., and the fact that the land is located in a different county from that of the city makes no difference.

***City of Milwaukee v Shoup Voting Machine Corp.*, 54 Wis. 2d 549, 196 NW 2d 694 (1972)** Provision of the city charter allowing the city to lease, purchase, and hold real or personal estate sufficient for the convenience of its inhabitants, allowing it to sell and convey the same, and providing that the same shall be free from taxation was not repealed or superseded by the enactment of chapter providing the basis on which general property, both real and personal, may be taxed.

Voting machines leased by the city were exempt from taxation under provisions of city charter, since the charter provides that personal property leased by the city for the convenience of its inhabitants shall be free from taxation, and since the voting machines were personal property, were leased by the city, and were for the convenience of its inhabitants on election days.

The city was the beneficial owner of the voting machines for purposes of the state ad valorem tax, where, inter alia, the voting machines were leased to the city under a 10-year lease, where, at end of the first four years, the city could terminate with a 60-day written notice, where, after an initial 4-year period, that lease was deemed in effect for additional 2-year periods, where the lessor had no right to terminate the lease, and where the city had the option of electing to purchase the machines with the rental payments to apply on the purchase price.

The person who provided insurance was an important consideration in determining the beneficial ownership of the voting machines leased by the city, but it was only one of several factors to be considered and a disregard of it did not prevent a valid determination of beneficial ownership.

***Mitchell Aero Inc v City of Milwaukee*, 42 Wis. 2d 656, 168 NW 2d 183 (1969)** The word "owned" within the statute exempting from taxation property owned by any county means real or true ownership and not paper title only.

An airport tenant which had constructed hangers at its own expense on land leased from the county had sufficient "ownership" to sustain taxation of hangers by the city, notwithstanding the facts that legal title to the hangers was in the county, that no modification of hangers could be performed by the tenant without written consent of the county, and that use of the hangers was restricted by lease and subject to approval of the airport director. Such control as the county keeps over these hangers is not indicative of true ownership but concerns the operation of the airport.

Educational, Religious and Benevolent Institutions, Women's Clubs, Historical Societies, Fraternities, Libraries

Many of the legal questions about Exemptions deal with the interpretation of **sec. 70.11(4), Wis. Stats**. The following court cases and legal opinions are designed to serve as a guideline for the assessor. The assessor should also review the material in WPAM Chapter 22.

Whether a property qualifies for Exemption depends on the specific facts regarding each property. The assessor must determine Exemptions on a case-by-case basis.

Educational

***Engineers and Scientists of Milwaukee, Inc. v City of Milwaukee*, 38 Wis. 2d 550, 157 NW 2d 572 (1968)** The property was owned by a nonprofit, nonstock corporation. The purpose of the organization was the continuing education and professional advancement of engineers and scientists. The court ruled that such activities are not "traditional" educational activities, and therefore, the organization is not exempt.

***National Foundation v Brookfield*, 65 Wis. 2d 263 (1974)** To qualify as an "educational association", an organization must meet five criteria:

1. It must be an educational association.
2. The property must be owned and used exclusively for the purpose of the association.
3. The property must be less than 10 acres.
4. The property must be necessary for the location and convenience of buildings.
5. The property must not be used for profit.

***International Foundation v City of Brookfield*, 100 Wis. 2d 66, 301 N.W. 2d 175 (1981)** The Supreme Court upheld an Appeals Court ruling that the foundation organized to educate trustees of employee welfare and pension plans is not engaged in "traditional" education. Therefore, it is not entitled to Exemption as an education association.

"Traditional" education includes systematic instruction, formal or informal, directed to an indefinite class of persons; benefits the general public directly; is of a nature that would ordinarily be provided by the government in that it lessens the government burden; and is the primary, rather than incidental, purpose of the organization. "Traditional" education does not include continuing education or education for the professional advancement of its members.

***Janesville Community Day Care Center, Inc. v Spoden*, 126 Wis. 2d 231 (1985)** This case involved a non-profit day care center that sought Exemption as an educational association. It made daily use of structured instructional programs. These programs were administered by a staff of teachers who had post-secondary education in early childhood training. In addition, an educator from the Janesville school system testified to the educational value of this educational program.

The court ruled that the Day Care Center met the five criteria for Exemption as an "educational association" including providing "traditional" educational activities.

***Kickers of Wisconsin, Inc. v City of Milwaukee*, Wisconsin Court of Appeals, District I, Docket No. 94-2140, October 17, 1995.**

Appeal and cross-appeal from the Circuit Court for Milwaukee County: Affirmed. Does Kickers of Wisconsin, Inc. (Kickers), a youth soccer association, qualify as an "educational association" entitled to property tax Exemption under **sec. 70.11(4) Wis. Stats**?

In considering whether Kickers is entitled to an Exemption under **sec. 70.11(4), Wis. Stats**., we are guided by certain principles:

> "Taxation is the rule and Exemption from taxation is the exception. Tax Exemption statues are matters of legislative grace and are to be strictly construed against the granting of an Exemption. A strict construction does not mean the narrowest possible reading, however. Rather, the statute should be construed in a 'strict but reasonable' manner. The party claiming the Exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability."

***Trustees of Indiana Univer. v Town of Rhine*, 170 Wis. 2d 293, 299, 488 N.W. 2d 128, 130 (Ct. App. 1992)** (Citations omitted). Further, "'[a]n Exemption from taxation must be clear and express. All presumptions are against it, and it should not be extended by implication.'" ***Janesville Community Day Care Ctr., Inc. v Spoden*, 126 Wis. 2d 231, 233, 376 N.W. 2d 78, 80 (Ct. App. 1985**) (citation omitted). Finally, "the burden of proving an entitlement to a tax Exemption is on the party seeking the Exemption." ***Friendship I*, 181 Wis. 2d at 219, 511 N.W. 2d at 350**.

To qualify for the property tax Exemption under **sec. 70.11(4)**, **Wis. Stats.** Kickers must satisfy five criteria. We conclude that Kickers does not qualify as an "educational association." A two-step test determines whether Kickers is an "educational association."

Step One: The organization and its property must be substantially and primarily devoted to educational purposes. Although Kicker's activities do indeed carry important educational values in many ways, their programs, as measured by their own summary judgment submissions describing its programs, conclude that Kickers is "substantially and primarily devoted to" recreational purposes.

Step Two: The organization's educational activities must be "traditional," in the sense that their benefits are in the general public interest and are available to an indefinite class. Although Kickers provides carefully structured programs comparable to those that the Wisconsin Department of Public Instruction requires of public school physical education programs, and although that may further support Kicker's undisputed claim to educational value for its programs, that does not qualify Kickers as an educational association any more than a school's physical education department, independent of the school's other programs and academic curriculum, would necessarily qualify as an educational association. The trial court correctly granted summary judgment to the City.

Religious

Where the whole property is devoted to the purposes of the exempt organization, occasional uses for gain will not destroy the exemption. However, if the property is used substantially for gain, the exemption will be lost, even if all of the profits are devoted to the exempt organization's purposes. The lease income derived from a specific building may not exceed the maintenance and construction debt retirement of that specific building to preserve the exemption.

To qualify for exemption as church-owned property used for housing for ordained assistants or teachers, the emphasis would be on ordination and functioning as an assistant or

teacher. In other words, sec. 70.11(4), Wis. Stats. does not contemplate being ordained as teachers, but rather that ordained individuals happen to function as teachers. A teacher's mere membership in a religious corporation would be insufficient to grant an exemption.

13 Opinion of the Attorney General 291 (1924) A parsonage owned and occupied by a minister is not exempt from taxation. The parsonage must be owned by the church to be exempt from property tax.

***State ex. rel. State Association of Y.M.C.A. of Wisconsin v Richardson*, 197 Wis. 390, 222 NW 222 (1928)** The 10 acre Exemption for a religious association applies to each municipality in the State.

***Madison Particular Council of St. Vincent De Paul Society v Dane County*, 246 Wis. 208, 16 NW 2d 811 (1944)** The Society consists of members of the Roman Catholic Church. Its purpose is to provide necessities without cost to poor persons who are unable to pay for them, and its net income is devoted wholly to that end.

The Society receives gifts of clothing, furniture, and discarded articles of all sorts. The articles are distributed to the poor so far as they have need for the articles. The articles not required by the needy are sold to the public. The proceeds of these sales and any contributions are used to buy articles not contributed for which poor persons have need.

The court ruled that such sales to the public were "incidental" and the proceeds of the sales were used to further the Society's religious or benevolent purpose. Therefore, the property is exempt.

***Evangelical Alliance Mission v Williams Bay*, 54 Wis. 2d 187, 194 NW 2d 646 (1972)** Under **sec. 70.11(4), Wis. Stats.,** exempting property owned and used for housing for pastors and their ordained assistants, members of religious orders and communities, and ordained teachers, "housing" means shelter or lodging.

A religious association owned a duplex house and two lots. It was used for rest and recreation of missionaries and employees of the Mission. This qualifies for Exemption as "housing."

***Midtown Church of Christ, Inc. v City of Racine*, 83 Wis. 2d 72, 264 NW 2d 281 (1978)** A parsonage occupied by a pastor's widow is not exempt from property taxes. **Section 70.11(4), Wis. Stats.** exempts church-owned property that is not used for profit and that is occupied by pastors, their ordained assistants, members of religious orders and communities, or ordained teachers.

The church contended that the pastor's widow met this criteria because the church designates all of its members "missionaries" or "members of a religious order and community." Including all members of the church would be inconsistent with the statutory purpose of exempting housing occupied by persons whose employment is integral to the functioning of the church.

***Wauwatosa Ave. United Methodist Church v City of Wauwatosa*, Wisconsin Court**

of Appeals, District 1, Appeal No 2009AP202, October 6, 2009

Circuit Court ruling was upheld. Property housing a church custodian does not qualify as exempt property. Only property used as housing for the four categories of persons listed in the statute is exempt. The categories are pastors, their ordained assistants, members of religious orders and communities, and ordained teachers.

The appeals court also upheld the circuit court ruling that the onus for proving Exemption status is on the property owner and that the city's failure to include the property on the roll in previous years did not change the fact that it should be taxable.

The appeals court also ruled that **Sec 74.35 Wis. Stats**. relates exclusively to the procedure for obtaining a return of tax money paid and is not a procedure for determining whether a property is taxable or exempt.

***Oshkosh v Graf*, Court of Appeals, District. II, Case No. 82-215 (1982)** Taxpayer argued that his chiropractic personal property had been given to a church (he founded) and was exempt religious personal property under **sec. 70.11(4), Wis. Stats**. The court disagreed on the basis that no gift to the church had occurred because he never relinquished his control over the property which he continued using in his practice.

***Dominican Nuns v City of La Crosse*, 142 Wis. 2d 577 (1987)** The order maintained a convent on the property from 1953 to December, 1983, when it moved its headquarters and all its members to new facilities in another part of the country. The order continued to maintain heat and electric service at the property and arranged for its continued maintenance until it was sold on December 31, 1985. The assessor placed the property on the assessment roll for the years of 1984 and 1985.

The order argued that the property was exempt as "exclusively used" for religious purposes because: (1) it stored some maintenance tools and lawn implements there; (2) it retained a groundskeeper to maintain the property; (3) it had the property listed for sale; and (4) it maintained a mortgage on the property.

The court ruled that the property was not being "used" for any of the order's regular activities or benevolent purposes. Heating the property, keeping it in repair, listing it for sale, and maintaining a mortgage did not make the property "exclusively used" for religious purposes. The former convent was vacant, and premises which are "wholly vacant and unoccupied" do not qualify for Exemption.

Benevolent

In some instances retire homes can qualify for exemption as a nonprofit, benevolent organization. The articles of incorporation must provide for proper disposition of assets in the event the corporation is dissolved. For instance, the assets should be turned over to another nonprofit, benevolent organization.

In order to qualify for an exemption the property owned and used exclusively by the qualifying organization cannot be vacant and unused on the assessment date.

When computing acreage for exemptions with acre limits, land for the "convenience of buildings" must be included in the computation. It is not permissible to use just the land under each building.

***Methodist Episcopal Church Baraca Club v City of Madison*, 167 Wis. 207, 167 NW 258 (1918)** A church organized a club to provide for Bible study and to promote religious, social, and moral culture. It maintains a clubhouse as a home for its members and also serves meals. The club rented rooms to nonmembers when not desired by members and operated a public cafe.

Its benevolent activities consisted of securing positions for a few young men and in furnishing an inconsequential number of free meals. The court stated that this was insufficient to qualify as a benevolent association. The dominant purpose of the club was to furnish a home and meeting place for its members. While this purpose was laudable and wholesome it was not considered benevolent.

***Catholic Woman's Club v City of Green Bay*, 180 Wis. 102, 192 NW 479 (1923)** In determining whether an organization qualifies for Exemption under **sec. 70.11(4), Wis. Stats**., it must not only be judged by its declared objectives, but also by what it actually does.

***Sisters of St. Joseph v Plover*, 239 Wis. 278 (1941)** A benevolent institution does not lose its Exemption on the ground that it attempts to operate at a profit. But as the profit made by these institutions, if any, is payable to nobody, but is only turned back into improving facilities or extending the benevolence in which the institutions are primarily engaged, the profit element becomes immaterial.

***Prairie du Chien Sanitarium Co. v Prairie du Chien*, 242 Wis. 262 (1943)** To qualify for Exemption, an association claiming to be a "benevolent association" must use its property so that it is free from any connection with profits accruing to those owning it.

A group of doctors owned a hospital. The doctors receive no salary from the hospital. However, they receive rent free use of offices and other hospital facilities. The articles of incorporation say that the institution is a benevolent association.

The court denied the Exemption. It ruled that the hospital was maintained for the convenience and profit of the managing doctors in the practice of their profession. The articles of incorporation do not control whether the association is exempt. The actual financial setup of the hospital determines if the property meets the criteria for Exemption.

***Hahn v Walworth County*, 14 Wis. 2d 147 (1961)** An individual held title to the property as a trustee for a corporation. The corporation is a nonprofit educational and benevolent association incorporated under the laws of another state. The corporation is considered the beneficial owner of the property. If the association meets the requirements of **sec. 70.11(4), Wis. Stats**., it is entitled to Exemption as an educational and benevolent corporation.

***Milwaukee Protestant Home for the Aged v City of Milwaukee*, 41 Wis. 2d 284, 164 N.W. 2d 289 (1969)** To qualify for exempt status as a benevolent association, three tests must be met: 1.The organization must be a benevolent association. 2. The property must be used exclusively for the purposes of such association. 3. The real and personal property must not be used for pecuniary profit.

The Milwaukee Protestant Home had operated since 1884 "to own and operate a residence and nursing home for aged persons and to do and perform any and all acts as may be necessary to the furtherance of such purposes." Its articles of incorporation provided that no part of its net earnings shall be used for the benefit of or be distributable to its members, directors, officers or any private shareholders or individual.

In 1963, it opened an addition partially funded by a loan from its endowment fund. To repay this loan, initial residents of the addition were required to pay a founder's fee plus a monthly occupancy charge. These proceeds are to be paid into the endowment fund to cover the outstanding loan and the annual operating expenses.

The court found that the operating of a non-profit retirement home for the aged is a benevolent purpose. The property is used exclusively for the purposes of the organization.

The challenge is does the fact that the founder's fee and occupancy charges exceed the present operating costs of the addition mean that the addition is operating "for pecuniary profit"? The court ruled that the founder's fee and the occupancy charges paid by the residents are used solely to carry out the corporate purpose: i.e., operating a home for the aged. In this case, the fact that there is some present margin of income does not make the organization taxable. Where there is no element of gain to anyone and where all of the net income is devoted exclusively to carrying on the benevolent purposes of the institution, there is not an operating for "pecuniary profit."

66 Opinion of the Attorney General 232 (1977) The Opinion commented on the criteria for Exemption as a retirement home established by the Milwaukee Protestant Home case. The Milwaukee Protestant Home case established three criteria: (1) the organization must be a benevolent association; (2) the property must be used exclusively for the purposes of the association; and (3) the real and personal property must not be used for pecuniary profit.

The Opinion went on to state that in order to qualify as "benevolent", the persons benefited need not be objects of charity but the classification must have some limits, i.e., to help retired persons of moderate means live out their remaining years. Further, all phases of the operation of any such retirement home should have the common denominator of serving aged and retired persons. Also, there must be a significant age limitation as to occupant eligibility.

***Bayview Foundation, Inc. v City of Madison*, Dane County Circuit Court, 161-054 (1978)** The Bayview Foundation provides low cost housing to low and moderate income families under the Federal Housing Act. The rent paid by a given tenant is determined under a formula which considers the size of the family, the apartment, and the family's adjusted gross income. Families whose income is below a certain level pay a base rent with supplemental rent paid by HUD. No profit or dividend is paid to any officers or directors of the foundation. The assets of the corporation consist of less than 10 acres of land, buildings and land improvements, equipment for rental to tenants, furnishings, and maintenance equipment. All of the assets transfer to the City at the time the mortgage is paid or if the corporation dissolves.

The term "benevolent association" has a broad meaning. The basic nature and dominant purpose of the organization determine whether it is benevolent. The purpose and operation of Bayview is benevolent under any reasonable construction of that term. Here it is undisputed that no profits are generated. No dividend or profit has ever been paid to anyone in connection with the operation of Bayview. The articles of incorporation preclude the officers and directors from receiving compensation for services, much less dividends or profits.

Therefore, the Bayview Foundation meets the tests of a benevolent association as outlined in *Milwaukee Protestant Home v. Milwaukee* and is exempt.

***St. John's Lutheran Church v City of Bloomer*, 118 Wis. 2d 398 (1984)** The church organized St. John's Lutheran Foundation, Inc. to operate a home for the aged. The City argues that, because the residents do not receive rental discounts or services without charge, no benevolent aid is provided and the home is not entitled to exemption. In addition, the City argued that the facility is not exempt because it does not provide nursing care.

The court ruled that based on Milwaukee Protestant Home, the property is exempt. The fact that neither rental discounts, services without charge, benevolent aid, nor nursing services are provided does not change the benevolent purpose and character of the organization.

The failure to include the word "benevolent" in the articles of incorporation does not affect the exemption. It is the facts as a whole that determines whether the property is exempt.

The court also ruled that provision in the articles of incorporation for distribution of its remaining assets upon dissolution to one or more organizations which are exempt under Section 501(c)(3) of the Internal Revenue Code satisfies the requirement that the assets not be used for pecuniary profit. It is not necessary that these organizations also be exempt from property taxation.

***Deutsches Land, Inc., v City of Glendale*, Wisconsin Supreme Court decision, case number 96-2489, April 16, 1999.** Deutsches Land sought review of the decision from the Court of Appeals that reversed the granting of Exemptions from real property taxes by the circuit court.

Beginning in 1993, Deutsches Land sought an Exemption from Wisconsin property taxes under **sec. 70.11, Wis. Stats**.

Deutsches Land sought a full Exemption for its soccer fields and Old Heidelberg Park and a 25% Exemption for the Bavarian Inn building for the years 1993 through 1995. The City of Glendale denied the applications for Exemption and Deutsches Land filed suit in the Milwaukee County Circuit Court. The court ruled Deutsches Land was entitled to a full Exemption on the soccer fields and Old Heidelberg Park and a 25% Exemption for the Bavarian Inn building.

Glendale appealed to the Court of Appeals and the decision was reversed. The Court of Appeals determined Deutsches Land did not meet the "used exclusively" requirement of **sec. 70.11(4). Wis. Stats.** As a result, Deutsches Land could not receive an Exemption for Old Heidelberg Park and the Bavarian Inn. Based on the same subsection, the court ruled there was no evidence in the record that the soccer fields were necessary for the location and convenience of any building that was exempt from taxation. The Court of Appeals held that Deutsches Land was not entitled to a real property tax Exemption on any of its property.

Deutsches Land appealed to the Wisconsin Supreme Court to rule that it was entitled to an Exemption from real property tax.

Deutsches Land is a non-stock, non-profit corporation that owns property on behalf of five other non-stock, non-profit cultural corporations devoted to advancing German culture including dancing, singing, camaraderie and soccer. The five non-stock, non-profit cultural corporations are the sole shareholders in a for-profit corporation the Bavarian Waldhaus Inn, Inc. that operates the Bavarian Inn a for-profit restaurant, bar, and banquet facility on the property.

Deutsches Land holds title to approximately 14 acres in Glendale for the benefit of the benevolent associations. The land has not been subdivided and is considered a single parcel. Deutsches Land treats the property as four lots, two of the lots have buildings. The other two lots, which are approximately five and one half acres, are used as soccer fields.

Deutsches Land did not offer sufficient evidence to support its requested Exemptions from property taxes for the years 1993 through 1995. Deutsches Land must show its actual exempt use to sustain its burden of proof. A benevolent organization must detail its use of the property for tax assessors to determine what types of activities occur on the property.

Benevolent organizations may seek Exemption from property tax for up to 10 acres provided they satisfy the conditions stated in the statute. Deutsches Land did not meet its burden of proof.

The taxation of property is the rule and Exemption is the exception. The Supreme Court on previous cases has ruled that an organization must show three facts to qualify for a total Exemption under **sec. 70.11(4), Wis. Stats.** The organization must prove the following: 1) they are a benevolent organization; 2) it owns and exclusively uses the property, and 3) it uses the property for exempt purposes.

Deutsches Land is not entitled to an Exemption on the soccer fields. **Section 70.11(4), Wis. Stats**. does not allow Exemptions for "buildings necessary for the location and convenience of lands."

To determine if there is a partial Exemption, organizations must meet the criteria set forth in the preamble to **sec. 70.11, Wis. Stats**. The preamble lists the conditions under which Exemption organizations may lease their property and maintain their exempt status. The conditions are: 1) if the lessor uses all of the leasehold income for maintenance of the leased property, construction debt retirement of the leased property or both and, 2) if the lessee would be exempt for taxation under this chapter if it owned the property. Deutsches Land is not an exempt organization, and is not entitled to a partial Exemption for Waldhaus or the Bavarian Inn. Deutsches Land did not provide documentation to support its partial Exemption claim.

***Deutsches Land, Inc. v City of Glendale,* Wis. Court of Appeals, District I, Docket No. 96-2489, (1997)** Is the real property necessary for the location and convenience of buildings and/or used exclusively by a benevolent institution. The Court determined the following.

1. There is no evidence in this record that Lots 1 and 4, the soccer fields, are "necessary for location and convenience" for any building that is exempt from taxation under **sec. 70.11(4), Wis. Stats**. ("convenience" as used in **sec. 70.11(4)** connotes a "condition factorable to achieving the function or purpose of a building or group of buildings"). Lots 1 and 4 are not exempt from taxation under **sec. 70.11, Wis. Stats**.

2. **Section 70.11(4), Wis. Stats**. requires as a condition to the tax Exemption it grants to "benevolent associations" that the property be "used exclusively by" those benevolent associations and not for profit. This condition is not ambiguous; the term "exclusively" brooks no exceptions. The trial court did not address the exclusivity" issue.

   Both the Bavarian Inn (Lot 2) and Old Heidelberg Park (Lot 3) are used by members of the public, who pay for that privilege. There is no dispute about this. The money collected from members of the public is paid to the for-profit corporation, Bavarian Waldhaus. There is also no dispute about this. Thus, neither Lot 2 nor Lot 3 is "used exclusively by benevolent associations", as is required by **sec. 70.11(4), Wis. Stats.**

3. **Section 70.11(8) Wis. Stats.** does not permit the tax-Exemption apportionment as to the Bavarian Inn made by the trial court. First, by its own terms, s.70.11(8) "does not apply to property that is leased by an exempt organization to another person". Both the Bavarian Inn and Old Heidelberg park are leased to Bavarian Waldhaus, the for-profit corporation. Second, the preamble to **sec. 70.11, Wis. Stats**. specifically requires as a precondition to the Exemption of leased property that the lessee ":be exempt from taxation under this chapter if it owned the property." Bavarian Waldhaus would not

be exempt from taxation if it owned the property. Lots 2 and 3 are not exempt from taxation under **sec. 70.11, Wis. Stats**.

***Columbus Park Housing Corporation v City of Kenosha,* Wisconsin Supreme Court, Case No. 02-0699, November 19, 2003** The Supreme Court reversed the Court of Appeals decision.

Kenosha raised three issues on appeal. However, the Supreme Court only addressed the following:

"(1) whether a benevolent association satisfies the lessee identity condition in the preamble of Wis. Stats., §70.11 when it rents property to low-income individuals participating in Section 8 of the Federal Fair Housing Act;..." The Supreme Court did not address the two remaining issues since Columbus Park did not satisfy the lessee identity condition in the preamble of **sec. 70.11, Wis. Stats**.

Kenosha sought review of the Court of Appeals decision granting a summary judgment affirming Columbus Park's property tax Exemption. Kenosha argued Columbus Park does not meet the lessee identity condition in the preamble to **sec. 70.11, Wis. Stats**. Both parties agree that Columbus Park is a benevolent association under **sec. 70.11(4), Wis. Stats**. The parties also agree the low-income tenants would not qualify for a property tax Exemption if they owned the property.

The Court held Columbus Park did not satisfy the lessee identity condition in the preamble of **sec. 70.11, Wis. Stats**. The property is taxable since the condition was not met. The Court stated when tax Exemptions are reviewed, taxation is the rule and Exemption is the exception as required by **sec. 70.109, Wis. Stats**. The Court applies a "strict but reasonable" interpretation to Exemption statutes.

The Court does not have the authority to determine policy related to property tax Exemptions. Property tax Exemptions "... exist purely by virtue of "legislative grace." NOTE: As a result of the Supreme Court decision, the legislature enacted 2003 Wisconsin Act 195. Act 195 changed the language in the introduction on **sec. 70.11, Wis. Stats**. to read "... and except for residential housing,..." This language allows property leased for residential housing to maintain its property tax Exemption.

***Columbus Park Housing Corporation v City of Kenosha,* Case Number 259 Wis 2d 316, November 20, 2002** The Court of Appeal affirmed the Kenosha County circuit court decision that Columbus Park is entitled to tax Exemptions for the properties in question. The City of Kenosha (Kenosha) has appealed to the Wisconsin Supreme Court.

The following question is before the Supreme Court, "Is a residential property that is owned by a benevolent association, but rented to qualified low-income tenants 'exclusively used' by the benevolent association for purposes of the tax Exemption set forth under Wisconsin Statutes Section 70.11?"

Columbus Park Housing Corporation (Columbus Park) a nonstock, nonprofit organization seeks Exemption from 1998 and 1999 real property taxes for the properties it leases in

Kenosha. Columbus Park owns 16 properties they rehabilitate and lease to low-income residents of Kenosha.

The Supreme Court has ruled that in order to qualify for Exemption under **sec. 70.11(4), Wis. Stats.** an organization must show that it:

- is a benevolent organization
- owns and exclusively used the property
- uses the property for exempt purposes

In addition, sec. 70.109, Wis. Stats., the preamble to sec. 70.11, Wis. Stats. allows exempt property to be leased under two conditions:

- the exempt organization must use the leasehold income for maintenance of the property, construction debt retirement or both
- the lessee would itself be entitled to an Exemption if it owned the property

In 1999, four of Columbus Park's properties showed a positive net income. Kenosha contends Columbus Park didn't meet the requirements of sec. 70.11, Wis. Stats. due to the positive net income. In addition, Columbus Park leases to nonexempt individuals, which does not meet the eligibility requirement for the Exemption.

***University of Wisconsin Medical Foundation, Inc. v City of Madison*, Appeal 02-1473, District IV, September 25, 2003** The Court of Appeals affirmed the Circuit Court's judgment dismissing the University of Wisconsin Medical Foundation, Inc. (Foundation) Exemption claim.

The Foundation claims it is exempt from property taxes as:

- a benevolent association under **sec. 70.11(4), Wis. Stats.,** and as

- a nonprofit organization performing medical research, education of physicians or treatment of deserving destitute individuals under **sec. 70.11(25), Wis. Stats.**

The University of Wisconsin established the Foundation in 1995 to improve the administration of the medical school. The Foundation is a non-stock, nonprofit corporation required to operate exclusively for charitable, education and scientific purposes. It is prohibited from carrying on a trade or business for profit and from distributing any earnings or profit for the benefit of any private individual.

In 1998, the Foundation purchased the Physicians Plus Medical Group for $8,000,000 including seven clinics in Madison and a staff of approximately 225 doctors and 1,100 other employees. This acquisition made the Foundation one of the 10 largest practice groups in the nation. Approximately 98% of the patients paid for their treatment through personal funds, private insurance or government programs. The Foundation provided services at its

Madison clinics at a reduced rate or free for 2% of their patients. Research and educational activities were carried out at some of the clinics, however detailed records on these activities were not kept.

The Foundation requested property tax Exemptions for 1998 and 1999 from the City of Madison (City) for its clinics, administrative buildings, parking facilities and personal property acquired when it purchased Physicians Plus. The City denied the request and levied property taxes of approximately $900,000 per year on the properties and the Foundation paid the taxes. In 2000, the Foundation filed a claim against the City to recover the property taxes based on its claim that the properties should be exempt under **secs. 70.11(4) & (25), Wis. Stats**. The City moved for a summary judgment stating the Foundation did not use the properties "exclusively" for exempt purposes as required.

In making its decision the court stated real and personal property is presumed taxable under **sec. 70.109, Wis. Stats**. The Foundation did not meet their burden to prove the properties were used exclusively under **secs. 70.11(4) or (25), Wis. Stats**. The court granted the City's request for a summary judgment on the Foundation's claim for Exemption under **secs. 70.11(4) or (25), Wis. Stats**.

***Marshfield Clinic v City of Eau Claire and Al Andreo, City Assessor,* Wisconsin Supreme Court, 679 N.W. 2d 545 (Table), 2004 WI 50, April 20, 2004** The Supreme Court denied petition for review on April 20, 2004. Marshfield claims its health care clinics are exempt from property taxes under **sec. 70.11(4), Wis. Stats.**

The Supreme Court denied the petition for review. The decision by the Court of Appeals stands, Marshfield does not meet the requirements for Exemption from property taxes under **secs. 70.11(4) or 70.11(25), Wis. Stats**.

***Marshfield Clinic v City of Eau Claire and Al Andreo, City Assessor,* Wisconsin Court of Appeals, District III, Appeal Number 03-0411, December 9, 2003** The Court of Appeals affirmed the Eau Claire County Circuit Court decision denying Marshfield Clinic's request for a property tax refund. The Clinic has not proved it uses its property exclusively for benevolent purposes under **secs. 70.11(4) and 70.11(25), Wis. Stats.**

The Marshfield Clinic operates three health care clinics in Eau Claire. Marshfield is exempt from federal income taxes as a nonprofit corporation.

Marshfield filed suit against the City and the City assessor requesting a refund of property taxes for 2000 and 2001. Marshfield claims it is exempt from property taxes under **sec. 70.11(4), Wis. Stats**. The Eau Claire Circuit Court denied the request and ruled Marshfield did not meet its burden to prove it is a benevolent association, it owns and exclusively uses its property, and uses its property exclusively for benevolent purpose.

Northwest Wisconsin Community Services Agency, Inc.,* v *City of Montreal, Wisconsin Court of Appeals, District III, 2010 WI App 119, July 20, 2010.

What Assessors should know: Under sec. 74.35, Wis. Stats., courts are authorized only to return taxes already paid by taxpayers and may not grant taxpayers future tax relief.

The Court's reasoning: Northwest and the City disagreed as to whether Northwest qualified for tax exempt status for 2008 under sec. 70.11(4), Wis. Stats. The circuit court ruled that Northwest was exempt in 2008 and for all future years. The Court of Appeals reversed, reasoning that tax exempt status may change in the future. Organizations are subject to continuing review and the legislature may change the criteria to determine the tax exempt status. Furthermore, to hold otherwise would undermine the legislature's ability to establish criteria governing tax exemptions.

Nonprofit Hospitals

Section 70.11(4m)(a), Wis. Stats. exempts from the property tax real property owned and used, and personal property used exclusively for the purpose of any hospital of 10 beds or more devoted primarily to the diagnosis, treatment, or care of the sick, injured, or disabled, which hospital is owned and operated by a corporation, voluntary association, foundation, or trust, no part of the net earnings of which goes to the benefit of any shareholder, member, director, or officer.

This statute denies an Exemption to any hospital which is operated principally for the benefit of or as an adjunct to the private practice of a doctor or group of doctors. In addition, any part of a nonprofit hospital that is used for commercial purposes, such as a doctor's office or a for-profit pharmacy, is taxable.

***St. Clare Hospital of Monroe, Wisconsin, Inc. v City of Monroe,* Wisconsin Court of Appeals, District IV, Docket No. 96-0732, March 6, 1997.** Decision affirmed.
St. Clare overstates the similarities between this case and the *St. Elizabeth* case. Unlike the *St. Elizabeth* case, St. Clare's clinic physicians receive variable compensation, supervise non-physician staff, and the clinic and hospital generate billing statements by two separate software systems.

"Doctor's office" is not a technical phrase that has a peculiar meaning in the law, but is defined according to its common usage as "the building where doctors have their offices." The type of services provided, the schedule of hours, and inpatient facilities were considered by the court to determine that the building is used as a "Doctor's Office."

The fact that the doctors at St. Clare do not own the medical practice, building, or equipment does not in itself remove the clinic from being defined as a "Doctor's Office."

The definitions contained in the "Hospital & Regulation Approval Act" and "Clean Indoor Air Act" are not helpful in determining whether the clinic is "used as a doctor's office for purposes of property tax Exemption." Also, **sec. 70.11(4m)(a), Wis. Stats.** does not provide that the word "hospital" has the meaning provided by sec. 50.33(2), Wis. Stats.

Joint use of some equipment and facilities does not change the fundamental use of the building from a "doctor's office' to something else.

The Court determined that following a "strict but reasonable" construction of **sec. 70.11(4m)(a), Wis. Stats.** leads to the conclusion that the clinic building was "used as a

doctor's office" and thus is not exempt from property taxation. As of October 21, 1997, no petition for review to the Wisconsin Supreme Court has been received.

Group Health Cooperative of Eau Claire, Group Health Cooperative of South Central Wisconsin and Family Health Plan Cooperative v Cate Zeuske and the City of Glendale, Wisconsin Court of Appeals, District I, Docket No. 98-1264, August 10, 1999.

Group Health Cooperative of Eau Claire, Group Health Cooperative of South Central Wisconsin and Family Health Plan Cooperative (collectively GHC) appeal from a summary judgment granted in favor of the Wisconsin DOR, Cate Zeuske and the City of Glendale, Wisconsin, regarding tax liabilities of GHC.

GHC states the trial court erred when it granted summary judgment due to the following:

1. the challenged portions of 1995 Wisconsin Act 27 are unconstitutional; and
2. Glendale should have exempted Family Health Plan from paying property tax in 1994 since Family Health Plan was preparing the property for a benevolent purpose.

GHC challenged three specific provisions of Act 27. They are specifically, **secs. 70.11(4), and (4m), Wis. Stats.,** which now provides that general property tax Exemptions are not available to "an organization that is organized under **sec. 185.981, Wis. Stats**., or chapters 611, 613, or 614 that offers a health maintenance organization … or a limited service health organization." In addition, **secs. 71.26(1)(a) and 71.45(1), Wis. Stats.** remove corporate income tax Exemptions for income of "cooperative sickness care associations organized under section 185.981, or of a service insurance corporation organized under Chapter 613, that is derived from a health maintenance organization."

GHC is composed of nonprofit, benevolent, cooperative sickness care associations that provide health care services to the community. They filed an action in July, 1996, challenging the validity of the 1995 Wisconsin Act 27.

The challenged portions of Act 27 are not unconstitutional, and the Glendale property was not being used at the time of the assessment for an exempt purpose, the judgment is affirmed.

***First National Leasing Corp. v City of Madison*, 81 Wis. 2d 205, 260 NW 2d 251 (1977)** Equipment leased by a corporation to a hospital that is used exclusively by the hospital is exempt from property tax assessment. It is irrelevant that the lessor derives a profit or secures a benefit from the ownership.

22 Opinion of Attorney General 749 (1933) A nonstock hospital, the articles of which provide for no dividends or pecuniary profits to members and which excludes no one because of poverty, is a "benevolent association" and exempt from taxation.

***Bethel Convalescent Home, Inc. v Town of Richfield*, 15 Wis. 2d 1, 111 NW 2d 913 (1961)** A nonstock corporation which operated a hospital for the aged, was not entitled to tax Exemption on its real estate which was purchased entirely with borrowed money that

was to be repaid from five percent of the gross income even though the bylaws provided that the members should not convey the property, except to one engaged in a nonprofit undertaking with similar objectives, when such provision would not prohibit a sale of the property with the net proceeds available to the members.

***Riverview Hospital v City of Tomahawk*, 243 Wis. 581, 11 NW 2d 188 (1943)** A hospital which a physician established for personal convenience and for a nominal consideration was conveyed to a nonprofit corporation, which the physician organized in such a way as to retain control of the hospital and use it for greater profit in the practice of the profession, was not operated by a "benevolent association" so as to be exempt from taxation under statute, even though the hospital received all patients regardless of ability to pay and operated at a loss which was made up by the physician.

Provisions of articles of incorporation are not controlling in determining whether a corporation is a benevolent association entitled to tax Exemption, but the court will consider the close connection between donor and donee and reserved power of control by donor over the institution and its capability of enabling the donor to harvest the returns flowing from the combination of the institution and private practice.

Whether a hospital is operated by a "charitable organization" entitled to statutory tax Exemption is to be determined from the relationship between the hospital and its actual owner, the test being its origin and the objects of its organization, its complete dedication to charitable purposes, and absolute divorce from gain to those controlling ownership.

***St. Joseph's Hospital Ass'n. v Ashland County*, 96 Wis. 636, 72 NW 43 (1897)** An association incorporated by members of a Roman Catholic religious order, without capital stock, for the purpose of conducting a hospital where the sick and maimed of all classes of persons, without distinction on account of race, religion, or position in life, are received and treated, with or without charge, according to the ability of the patient, and which permits no dividends or pecuniary profits to be paid to the members of the order, but loans, without interest, the money received in excess of expenses to other organizations of the same character, is a "benevolent association."

***Columbia Hospital Ass'n. v City of Milwaukee*, 35 Wis. 2d 660, 151 NW 2d 750 (1967) Section. 70.11(4m)(a), Wis. Stats**. exempting nonprofit hospitals from general property taxes and applying to property which is used exclusively for purposes of any hospital of ten beds or more devoted primarily to diagnosis, treatment or care of the sick, injured or disabled does not limit the meaning of the word "hospital" to institutions performing the primary purpose of a hospital or to institutions like a typical small hospital offering limited facilities, but refers to property used for any and all hospital purposes, not just for primary purpose of care, diagnosis, or treatment.

This case exempted residential property owned by the hospital and rented to residents and interns as property "exclusively used for hospital purposes". **Section 70.11(4m), Stats**., was subsequently amended to limit the Exemption for residential property to dormitories of 12 or more units which house student nurses enrolled in a state accredited school of nursing affiliated with the hospital.

***Prairie du Chien Sanitarium Co. v City of Prairie du Chien*, 242 Wis. 262, 7 NW 2d 832 (1943)** The fact that a hospital takes all, or at least a fair number of charity patients applying and the fact that a hospital receives and is dependent on donations indicates that it is a "benevolent association" which is entitled to Exemption from taxation under statute.

But if all books of the hospital show substantial profit, that is a circumstance tending to negate the idea that the hospital is a "benevolent association" within the statute exempting such associations from taxation.

Where a hospital was maintained primarily for greater convenience and profit of managing physicians in the practice of their profession, the hospital was not a "benevolent association" so as to be exempt from taxation under statute, although physicians received no salaries but only offices in the hospital rent free and one meal a day for supervising the hospital, and the hospital cared for county and municipal patients, comprising about 30 percent of the total patients for a contract price that was less than cost.

***Associated Hospital Service, Inc. v City of Milwaukee*, 13 Wis. 2d 447, 109 NW 2d 271 (1961)** Blue Cross is exempt under **secs. 182.032(2) (a) and (5), Wis. Stats**. It is considered a nonprofit corporation of hospital service. The test of a nonprofit corporation is whether any dividends or pecuniary profits are contemplated to be paid to its members. Blue Cross contemplates no such payments.

***St. Elizabeth Hospital v Appleton*, 141 Wis. 2d 787 (1987)** St. Elizabeth Hospital provided walk-in medical services in its emergency room facility under the licensed trade name "First Care." Based on the severity or urgency of the injury, patients are directed to the emergency, outpatient, or "First Care" area of the facility. The "First Care" waiting area is separate and distinct from the emergency room waiting area.

The assessor assessed the real and personal property of the "First Care" portion of the emergency room. The assessor determined the "First Care" unit to be separate and distinct from the hospital's emergency room and to be "an adjunct to the private practice of a group of doctors".

The court held that if the general use of the property is for a hospital purpose and the particular use is reasonably necessary, then the facility is held to be exclusively used for hospital purposes although there may be incidental benefit to others. The court concluded that the "First Care" service is a direct function of the hospital's broad purpose of diagnosing and treating the sick or injured. Additionally, it is not necessary that the "First Care" unit be integrated into the emergency room to be exempt. It is the reasonable necessity of the facility, not its proximity to the hospital, that determines if it is exempt.

Therefore, the court concluded that providing an immediate care service is a valuable and necessary function of St. Elizabeth Hospital and its "First Care" unit is entitled to exemption.

FH Healthcare Development, Inc., and United/Dynacare, LLC., v City of Wauwatosa, 276 Wis 2d 243 (2004) The court ruled the City properly assessed and taxed the laboratory space and equipment.

Milwaukee Regional Medical Center, Inc. v City of Wauwatosa, Wisconsin Supreme Court, Appeal No. 2005AP1160, (2007) The decision of the Court of Appeals was affirmed. MRMC's property was not exempt from property tax under **secs. 70.11(2) or (4), Wis. Stats**. for the years at issue. The case was remanded back to the circuit court to determine whether beneficial ownership may change after 30 years is up on the lease and MRMC pays market value rent.

Covenant Healthcare System, Inc.* v *City of Wauwatosa, Wisconsin Supreme Court, 2011 WI 80, July 19, 2011

What Assessors should know: A nonprofit clinic owned and operated by a tax-exempt hospital may be exempt under sec. 70.11(4m)(a), Wis. Stats., if the clinic is used exclusively for the purposes of the hospital.

The Court's reasoning: Covenant Healthcare System, Inc. operated an outpatient clinic which provided a broad range of outpatient medical services, including a 24-hour urgent care center. The clinic was located five miles away from St. Joseph's hospital, a tax-exempt entity owned and managed by Covenant.

Covenant filed Property Tax Exemption requests for 2003 to 2006 for the first, third and fifth floors of the building. The City of Wauwatosa denied the exemptions.

The Supreme Court determined that the Clinic effectively served as a department of the larger Hospital. The court found that the Clinic was designed, constructed and operated to alleviate the burden on the downtown Hospital by providing additional space for outpatient services and that, given this high degree of integration, the Clinic was used exclusively for the purposes of the hospital as required by sec. 70.11(4m)(a). The Clinic's services were integrated with and complementary to the hospital's services; both were staffed by the same four rotating physician groups and patient records were accessible at either location.

Furthermore, the court found that the exemption should not be disqualified on grounds that the Clinic was a "doctor's office." The Clinic was constructed to significantly higher standards than a typical medical office, and it was accredited by the Joint Commission on the Accreditation of Hospitals, an organization which does not accredit private doctor's offices. Additionally, the Clinic possessed many qualities normally attributed to a hospital, including a gift shop, public cafeteria, space for visitors, accommodation for overnight stays and an Urgent Care Center which functioned similarly to a hospital emergency room. Furthermore, while patients would normally receive one bill for all services rendered at a doctor's office, Clinic patients received a facility bill from the Clinic and a professional services bill from the attending physician.

Finally, the court found that the Clinic was not used for commercial purposes, nor was there improper inurement to a member. Charitable organizations are not required to operate at a loss and the mere existence of profits by itself is not enough to establish an improper commercial purpose. Furthermore, because the term "member" under sec. 70.11(4m)(a) does not include not-for-profit entities, any potential transfer of funds from the Clinic to the Hospital would not constitute improper inurement to a member.

Covenant Healthcare System, Inc. v City of Wauwatosa, Court of Appeals, District I, Appeal No. 2009AP1469 & 2009AP1470, August 10, 2010

The court reversed the trial court's conclusion that Covenant Healthcare's clinic was a tax-exempt property under **sec. 70.11(4m)(a), Wis. Stats**., and remanded for entry of judgment in favor of the City.

The clinic is a freestanding outpatient medical facility with a twenty-four-hour Urgent Care service, occupying less than ten percent of the clinic's space. Doctors saw patients during scheduled business hours by appointment mostly, had cubicles to complete paperwork.

The court held the facility was a doctor's office after considering the nature of services provided and the manner in which those services were provided to the patients.

A petition for review by the Wisconsin Supreme Court is pending.

Property of U.S. Government

All U.S. Government real and personal property is exempt from general property tax, regardless of where it is located as long as beneficial ownership does not accrue to someone other than the federal government. When personal property not owned by the federal government is located on federal real property, it is generally assessable unless it is on a federal enclave where the State of Wisconsin has given up all jurisdictional rights.

NOTE: The U.S. Government has consented to the taxation of certain property under the United States Code. Please see WPAM Chapter 22 for further information on taxation of certain U.S. Government property.

Foreign diplomat's official residence is exempt from taxation. However, summer homes or cottages or second homes are taxable. Summer homes may be exempt if proven to be used for governmental or public purposes.

A real estate transfer return is required to be filed for all sales made by a Menominee Indian grantor, even though no transfer fee is due on sales where the grantor resides on the reservation. A real estate transfer fee is due on sales by a Menominee Indian grantor who does not reside on the reservation.

Native American owned real property on an Indian reservation is not subject to state and local taxation unless an Act of Congress provides for it. Non-Native American owned real property on an Indian reservation is taxable, unless an Act of Congress expressly prohibits such taxation.

Personal property owned by an enrolled member of the tribe or the tribe, which is kept on the reservation, is not taxable. Personal property owned by non-Native Americans and kept on the reservation are taxable unless it can be shown that taxation has been preempted by Federal law.

As a general rule, ownership is the deciding factor for determining taxability of property on the reservation. Property off the reservation which is owned by Native Americans is considered taxable unless preempted by Federal law.

39 Opinion of Attorney General 78 (1950) Machines owned by a private corporation located in the federal forest products laboratory are not exempt from local taxation.

27 Opinion of Attorney General 508 (1938) Personal property owned by the federal government on real estate used for coast guard purposes, located within a township, is exempt from taxation, and local authorities are not authorized to assess it.

***United States of America v State of Wisconsin and City of Superior*, 70-C-259 U.S. Federal District Court, Western District of Wisconsin, (August 30, 1971)** The City of Superior adopted an ordinance to the authority of **sec. 66.058, Wis. Stats**., which required owners of mobile homes to pay a parking permit fee for their mobile homes. Decision by Judge Doyle: a memo of the DOR states that the monthly mobile home parking permit fee qualifies as a deduction for income tax purposes since it is in lieu of personal property taxes. Since personal property taxes are not properly assessed to members of the U.S. Armed Forces who are present in this state and absent from their home state by the provisions of the Soldier's and Sailor's Relief Act of 1950, the ordinance is accordingly not properly imposed here.

Taxed in Part

When exempt property is used in part for unrelated trade or business, that portion is assessable. Please see the material in Chapter 22 on Taxed-In-Part.

Memorials

Section 70.11(9), Wis. Stats. allows for an exemption of personal property owned and real estate owned, occupied, and used as a memorial hall by any organization of United States war veterans. Commonly these halls contain restaurant and bar facilities which are open to both members and non-members alike. Where part of the building is used for an unrelated trade or business, such as a bar or restaurant, that part may be assessed.

Alonzo Cudworth Post No. 23 American Legion v City of Milwaukee, 42 Wis. 2d 1, 165 NW 2d 397 (1969) Under the section exempting memorial halls occupied by organizations of United States war veterans from property taxation but providing for taxation in part of any portion of hall not used for exempt purposes and used for pecuniary profits, use of any part of the building by nonmembers for which compensation is received or its use by members for purposes outside of the object of the organization operate to defeat tax Exemption.

Action of the commissioner of assessments and Board of assessors in holding that American Legion Post memorial hall, which contained a bar and restaurant on ground floor that was used by members and up to a limit of nine guests per member, was taxable in part was not arbitrary, capricious or unreasonable.

Cemeteries

13 Opinion of Attorney General 43 (1924) A tract of land used as cemetery was exempt under **sec. 70.11(13), Wis. Stats**., even though hay cut upon it was sold and a small building was temporarily leased, the proceeds of which were donated to cemetery purposes. Cemetery purposes, would include the manufacture of burial vaults sold exclusively to customers of the cemetery only for use on the cemetery grounds.

30 Opinion of Attorney General 358 (1941) Exemption from taxation under **subs. (8), (now subs. (13)) of sec. 70.11, Wis. Stats**. is applicable to cemetery corporations organized under **sec. 180.01, Wis. Stats**. et seq., the business corporation statutes as well as those organized under **sec. 157.01, Wis. Stats**. et seq., pertaining to cemeteries. Burial grounds are exempt from taxation whether the lots therein be owned by a corporation or whether the corporation has sold them to individuals for burial purposes.

***Highland Memorial Park, Inc. v City of New Berlin* 67 Wis. 2d 363, 227 NW 2d 72 (1975)** Two types of cemetery property are exempt by **sec. 70.11(13), Wis. Stats.** (1) Land which is used exclusively as public burial grounds, and (2) land which adjoins such burial grounds, owned and occupied exclusively for cemetery purposes. The second category obviously includes land reserved for burial purposes.

Archaeological Sites

***Timothy Wrase and Barbara Wrase v City of Neenah*, Winnebago Court of Appeals, Case No. 97-3457 (1998)** The issue before the court involves the construction of **sec. 70.11(13m), Wis. Stats**. Statutory construction is a question of law. Section 13m states Archaeological sites and contiguous lands identified under **sec 44.02(23), Wis. Stats**., if the property is subject to a permanent easement, covenant or similar restriction running with the land and if that easement, covenant or restriction is held by the state historical society or by an entity approved by the state historical society and protects the archaeological features of the property.

The court held the proposed method of assessment of valuing the entire parcel then subtracting the covenanted portion would amount to "double-dipping" the Exemption statue. Not only would you be exempting the covenanted lands but you would also be reducing the tax burden on the remaining lands not subject to the covenant.

The court cites the WPAM page 22-7. (1998 WPAM Revised 12/96) The WPAM states, "Properties where part is exempt due to an archaeological site may not necessarily experience a reduction in total property value. As with other property factors and market conditions, the market must be carefully analyzed to determine the effect on value.

The court also determined that the language in sec. 44.30, Wis. Stats. was met in that the property owner who covenants his or her land still enjoys the fact that particular land is exempt from taxation.

Property Held in Trust

***Little Sissabagama Shore Owners Assoc., Inc. v Town of Edgewater and Sawyer County*, Wisconsin Court of Appeals, District III, Docket No. 95-1800, January 14, 1997**

This appeal requires an interpretation of the interaction between **secs. 70.11(20) and 893.80, Wis. Stats**.

The construction of a statute presents a question of law reviewed de novo (reviewed anew; reviewed a second time). ***State ex rel. Frederick v McCaughtry***, *173 Wis.2d 222, 225, 496 N.W.2d 177, 179 (Ct. App. 1992).*

The county board acted with authority under subsec.(d) of **sec. 70.11(20), Wis. Stats**. when it denied the requested tax exempt status.

The court case ***DNR v City of Waukesha***, *184 Wis.2d 178, 515 N.W.2d 888 (1994)*, does not declare a requirement for a notice of claim.

The *Waukesha* case extended **sec. 893.80, Wis. Stats**. to all actions including those in equity and not just to those actions seeking money damages. However, such an action does not require submitting a notice of claim when appealing a county board's determination under **sec.70.11(20), Wis. Stats**., similar to the right of an inmate not to file a habeas corpus action.

This case complies with **sec. 893.80, Wis. Stats**., and applies in each case arising under **sec.70.11(20), Wis. Stats**.

An exempt organization need not provide a notice of claim under **sec. 893.80, Wis. Stats**., if (the County had actual notice of the incident giving rise to the action, and (2) the exempt organization satisfied the requirements of **sec. 893.80(1)(b), Wis. Stats**., ***Waukesha***, *184 Wis.2d at 197, 515 N.W.2d at 895*; **sec. 893.80(1)(a), Wis. Stats**.

When the county board acts under **sec. 70.11(20), Wis. Stats**., automatic compliance with the elements of **sec. 893.80(1)(b), Wis. Stats**. occurs for the following reasons:

1. The County knows the location of the property in question and its owner.
2. The County knows about the relief sought in every case; the taxpayer requests tax exempt status for a certain parcel of property.
3. The entire county board knows of the claim since the county board acts on claims filed under **sec. 70.11(20)(d), Wis. Stats**.
4. The county board's vote of denial makes the taxpayer aware.

To fulfill the requirements of **sec. 70.11(20), Wis. Stats**., an exempt organization automatically complies with the elements of **sec. 893.80(1)(b), Wis. Stats**., and the presence of actual notice.

The County that acts under **sec. 70.11(20), Wis. Stats**. has actual notice because it specifically addresses the tax exempt status issue of this taxpayer's property.

Jewelry, Household Furnishings, and Apparel

40 Opinion of Attorney General 430 (1951) A law library used by a lawyer in the law practice was not exempted from property taxes by **sec. 70.111(1), Wis. Stats**.

Mary Faydash,* v *City of Sheboygan, Wisconsin Court of Appeals, District II, Appeal No. 2010AP2073, March 2, 2011.

What Assessors should know: A home that was used by a taxpayer three months out of the year while made continuously available for rent via the Internet was deemed to have a commercial use that was neither de minimis nor inconsequential and therefore the personal property within the home was not exempt under sec. 70.111, Wis. Stats.

The Court's reasoning: In March, 2006 Mary Faydash purchased a single-family home in the City of Sheboygan. She furnished the home with her personal property, and it was used only by Faydash and her family that year.

In 2007 and 2008, Faydash began making the home available for rent over the Internet. She was able to rent the home sporadically, with sixteen overnight stays occurring in 2008. During the years 2007 and 2008, Faydash and her family used the home and the personal property within for approximately 3 months each year.

For 2008, the City assessed the personal property within the home and levied $625 in tax. The City characterized the property as having "a commercial purpose", and therefore argued that the property was not exempt under sec 70.111, Wis. Stats.

Faydash paid the taxes under protest and made a Claim to recover Unlawful tax on Personal Property pursuant to sec 74.35, Wis. Stats. She filed a complaint with circuit court contending the personal property was kept for personal use, that the property was exempt by law from taxation, and that the levy of personal property tax was an unlawful tax. The City filed a motion for summary judgment.

The Circuit Court granted the City's motion for summary judgment. Faydash appealed.

The Court of Appeals upheld the Circuit Court's decision. The Court noted that mere inconsequential or de minimis commercial use would still qualify the personal property within the home exemption. However, the Court found that it was "key" that Faydash's home was continuously advertised over the Internet. This feature, the Court found, meant the property had "a commercial purpose" that went beyond mere de minimis or inconsequential commercial use.

Thus, the Court held that because Faydash did not establish a pattern of de minimis or inconsequential use, she failed to meet her burden of proof that the personal property was exempt.

Boats

Watercraft that are owned by businesses that are rented to individuals for pleasure watercraft use are not exempt from taxation. Watercraft, and their outboard motors, that are owned and used for personal recreational pleasure are exempt.

***Town of Liberty Grove v Charles Voight and Voight Marine Service,* Court of Appeals, District III, Case No. 98-1292, (1998)** The court concluded that the ferry activity of the Yankee Clipper constitutes interstate movement. In the years 1995 and 1996 the Yankee Clipper was regularly employed in interstate traffic according to the meaning of **sec. 70.111(3), Wis. Stats**., and therefore is exempt from payment of personal property tax.

***Town of LaPointe v Madeline Island Ferry Line, Inc.*, 179 Wis. 2d 726 (Court of Appeals 1993)** The Court of Appeals reversed the trial court's ruling. The trial court concluded Madeline Island Ferry (the Ferry) was not exempt under **sec. 70.111(3), Wis**. **Stats**. from personal property taxes on its three ferry boats because none of the boats moved between states and none of the boats were employed in interstate commerce as the statute required for Exemption. **Section 70.111(3), Wis. Stats**. exempts all "watercraft employed regularly in interstate traffic."

The Court of Appeals resorted to judicial construction of the legislative intent of **sec. 70.111(3), Wis. Stats.** because of the ambiguous meaning of "interstate traffic" which the Court determined is synonymous with the term "interstate commerce." This conclusion is supported by the WPAM on page 15-12 (1992 WPAM, Revised 12/89) which uses the terms interchangeably.

In addition, the Court of Appeals compared the principles learned from the rulings of ***United States v Yellow Cab Co***., *332 U.S. 218, 228 (1947)* with ***Charter Limousine, Inc. v Dade County Board of City Commissioners***, *678 F.2d 586 (5th Cir. 1982)* and determined that the Ferry is employed in interstate commerce because an interstate vehicular traveler cannot complete a journey to or from the island without taking the Ferry. Furthermore, the Ferry carries a significant number of parcels and other freight that are moving in interstate commerce to and from Madeline Island; therefore, the Court concluded that it is regularly employed in interstate commerce within the meaning of **sec. 70.111(3), Wis. Stats**., and is exempt from paying personal property tax subject to **sec. 70.15, Wis. Stats**.

Crops

Recent statutory revisions exempt virtually all crops. **Section 70.111(4), Wis. Stats**. exempts "Growing and harvested crops, and the seed, fertilizer and supplies used in their production or handling, in the hands of the grower, including nursery stock and trees growing for sale as such, medicinal plants, perennial plants that produce an annual crop and plants growing in greenhouses or under hotbeds, sash or lath. This Exemption also applies to trees growing for sale as Christmas trees."

In addition, any crops, seed, supplies, trees, etc. held by a merchant for sale would be exempt as Merchants' Inventory under **sec. 70.111(17), Wis. Stats**. Trees grown for

forestry purposes would still be assessable, however, some forests and forest land may be subject to special taxation under Forest Crop, Woodland Tax, or Managed Forest Land.

Tools, Machinery

In the 1989 Legislative Session, the Legislature created separate Exemptions for tools and garden machines and farm machinery and equipment. **Section 70.111(9), Wis. Stats**. exempts "the tools of a mechanic if those tools are kept and used in the mechanic's trade; and garden machines and implements and farm, orchard and garden tools if those machines, implements and tools are owned and used by any person in the business of farming or in the operation of any orchard or garden." **Section 70.111(10)(b), Wis. Stats**. exempts "tractors and machines; including accessories, attachments, fuel and repair parts for them; whether owned or leased, that are used exclusively and directly in farming; including dairy farming, agriculture, horticulture, floriculture and custom farming services; but not including personal property that is attached to, fastened to, connected to or built into real property or that becomes an addition to, component of or capital improvement to real property and not including buildings or improvements to real property, regardless of any contribution that personal property makes to the production process in them and regardless of the extent to which that personal property functions as a machine." Machinery not used exclusively and directly in farming is considered to be taxable, unless classified as manufacturing.

Section 70.111(10)(a)2, Wis. Stats. defines a machine as "an assemblage of parts that transmits force, motion and energy from one part to another in a predetermined manner."

Section 70.111(10)(a)1, Wis. Stats. defines a building as "any structure that is intended to be a permanent accession to real property; that is designed or used for sheltering people, animals or plants, for storing property or for working, office, parking, sales or display space, regardless of any contribution that the structure makes to the production process in it; that in physical appearance is annexed to that real property; that is covered by a roof or encloses space; that is not readily moved or disassembled; and that is commonly known to be a building because of its appearance and because of the materials of which it is constructed." The assessor should be aware of these definitions when deciding whether property is an exempt farm machine or a taxable building. NOTE: Although the following cases were decided under the prior single Exemption for tools and machinery, they still provide guidelines to the assessor for determining this Exemption.

***Pulsfus Poultry Farms, Inc. v Town of Leeds* 149 Wis. 2d 797 (1989)** As part of its egg-producing activities, Pulsfus maintains a "layer house" containing approximately 10,800 cages, each cage containing eight hens. It is constructed of steel beam framing and metal siding on a concrete foundation. The layer house creates a controlled environment for the hens, automatically controlling the temperature, light, and humidity. The hens are fed, watered, medicated, and relieved of their eggs and wastes by automated machinery and equipment. The farmer-operator uses a system of suspended walkways to enter the structure, observe the hens, and repair equipment. The operator spends only a few hours a day in such activities.

Pulsfus contended that the "use or function" of the layer house is farm machinery and equipment. Therefore, it should be exempt under **sec. 70.111(9), Wis. Stats**. The Town contended that the layer house is a building, or real property. Therefore, it should not be exempted under **sec. 70.111(9) Wis. Stats**.

The Supreme Court ruled that **sec. 70.111(9), Wis. Stats**. only exempts personal property. **Section 70.03, Wis. Stats**. defines real property as "not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto..." **Section 70.04, Wis. Stats.** defines personal property as "goods, wares, merchandise, chattels and effects ... and not included in the term 'real property' as defined in s. 70.03." The court held that the layer house is a building. The layer house is constructed of steel beams, metal siding, and a roof. It stands on a permanent concrete foundation. Its primary, and arguably only, function is to provide for the habitation of chickens.

The Town also contends that the items of equipment inside the facility are fixtures and therefore not exempt. The court applied a three part test to determine whether or not these items are fixtures. The three tests are:

1. Actual physical annexation to the real estate;
2. Application or adaptation to the use or purpose to which the realty is devoted;
3. Intention on the part of the person making the annexation to make the item a permanent part of the realty.

The court ruled that the items inside the facility met all three of the tests and are fixtures. The layer house structure and integrated equipment is real property. It is therefore not exempt under **sec. 70.111(9), Wis. Stats**. Only personal property is exempt under this statute.

28 Opinion of Attorney General 302 (1939) A chicken hatchery is exempt only if the primary use is in the operation of a farm; the hatchery is not exempt if the commercial use is the primary use. The primary use test versus the incidental use test may be applied to farm machinery owned by a farmer and used in the operation of the farm and also in a logging operation.

Under the Exemption granted by **sec. 70.111(17), Wis. Stats**., the used farm machinery, goods on consignment, and replacement parts are now exempt as merchants' stock. **Section 70.111(20), Wis. Stats**. exempts "All equipment used to cut trees, to transport trees in logging areas or to clear land of trees for the commercial use of forest products." In addition to **sec. 70.111(9), Wis. Stats**., which in general terms exempts farm machinery used by any person in farming, there are other Exemptions or legal opinions regarding specific farm machinery and equipment.

1. Irrigation Equipment. In order for irrigation equipment to be exempt from taxation it must pass two tests:

    - it must be defined as personal property under **sec. 70.04(2), Wis. Stats**., including pumps, power units to drive the pumps, transmission units, sprinkler devices and sectional piping; and

- it must be used by a farmer in the operation of a farm.

If these two tests are met, the irrigation equipment is exempt. The only related item that would be taxable would be the well, which is considered part of the real estate.

2. Milkhouse Equipment. Milkhouse equipment used by a farmer including mechanical can coolers, bulk tanks, and hot water heaters is exempt from property tax under **sec. 70.111(14), Wis. Stats**. This Exemption applies whether the property is classified as real estate or personal property.

3. Manure Storage Facilities. Any manure storage facility used by a farmer is exempt from the property tax regardless of whether it is classified as real estate or personal property, **sec. 70.11(15), Wis. Stats**.

4. Bees and All Bee Equipment. **Section 70.111(2), Wis. Stats**. exempts all bees and bee equipment from the property tax. Bees and bee equipment are no longer subject to an occupational tax.

5. Grain Storage Containers. In ***Wisconsin Department of Revenue v. A.O. Smith Harvestore Products, Inc. 72 Wis. 2d 60 240 N.W. 2d 357 (1976)*** it was held that grain storage containers assembled on farm property are considered fixtures and, therefore, assessable as real estate.

***Village of Lannon v Wood-Land Contractors, Inc.*, 259 Wis. 2d 879, Wisconsin Supreme Court, 2003 WI 7, December 4, 2003** The Wisconsin Supreme Court reversed the decision of the Court of Appeals and the cause was remanded to the Circuit Court.

Wood-Land argues the Court of Appeals erred in applying the "primary purpose" of the business test instead of the use of equipment test. Wood-Land uses the equipment in question to clear land of trees. Wood-Land claims their equipment should be exempt from taxation under **sec. 70.111(20), Wis. Stats.** as logging equipment.

In 2000, the Village of Lannon taxed Wood-Land's tree cutting equipment. Wood-Land refused to pay the taxes and the Village sued. The Village interprets "to clear land of trees for commercial use" to mean logging as an operation not as an incidental part of a business.

The Circuit Court ruled the statute was designed to exempt the equipment of companies systematically engaged in the logging business, not those who incidentally cut logs and sell the products.

The trail court ruled that Wood-Land was not in the "primary" business of logging and the Exemption was appropriately denied. They also stated that when there is a doubt about an Exemption, the statutes are interpreted in favor of taxation rather than Exemption.

The Supreme Court held the Court of Appeals erred in adopting the "primary purpose" of the business test.

The Supreme Court agreed with Wood-Land that section 70.111(20) is defined by the use of

the equipment.

***Village of Lannon v Wood-Land Contractors, Inc.*, 2003 WI App 7, Appeal No. 02-0236, December 26, 2002** The Wisconsin Supreme Court has accepted this case. At issue, is the "primary purpose test" the proper standard for determining if the defendant's equipment, which is used to clear timber, is exempt from personal property taxes under **sec. 70.111(20), Wis. Stats.?**

Wood-Land claims the equipment they use to clear land of trees should be exempt from taxation under **sec. 70.111(20), Wis. Stats**. as logging equipment. Wood-Land clears land for developers and removes all timber from the site. Some timber is processed on-site into wood chips and the rest is removed to its facilities and processed into logs or firewood.

In 2000, the Village of Lannon taxed Wood-Land's tree cutting equipment. Wood-Land refused to pay the taxes and the Village sued. The Village interprets "to clear land of trees for commercial use" to mean logging as an operation not as an incidental part of a business.

The circuit court ruled the statute was designed to exempt the equipment of companies systematically engaged in the logging business, not those who incidentally cut logs and sell the products.

The trail court ruled that Wood-Land was not in the "primary" business of logging and the Exemption was appropriately denied. They also stated that when there is a doubt about an Exemption, the statutes are interpreted in favor of taxation rather than Exemption.

Property Exempted from Taxation Due to Special Tax

Certain types of property are exempted from general property tax because the tax is collected through other means. Common examples of this collection include licensing fees on automobiles and the gross receipts taxes on most utility property.

Section 70.112(4), Wis. Stats.
Special Property and Gross Receipts Taxes or License Fees

All special property assessed under Chapter 76 and such property of any telephone company, car line company, and electric cooperative association as is used and useful in the operation of the business of such company or association is exempt from general property taxes. In cases where a general structure (this does not include land) is used in part for the operation of a public utility and in part for non-operating purposes of a utility, the general structure is assessed by the local assessor at the percentage of its full market value that fairly measures and represents the extent of its use for non-operating purposes.

While part of a general structure may be assessed locally and part by the DOR, this is not the case with land. In cases where a property is used in part for the operation of a public utility and in part for non-operating purposes, the land is either completely exempt from local taxation, or entirely subject to local taxation, depending upon the predominant use. Refer to WPAM Chapter 15 for additional information on the valuation of utilities.

Rented gas conversion units installed in private homes by the public utility are taxable to either the property owner or the utility company depending on the contract. If it is a rental contract, then the burner is taxable to the public utility as non-operating personal property. If it is a conditional sales contract, the burner is taxable to the property owner.

***TDS Real Estate Investment Corp. & Central State Telephone Co. v City of Madison*, 151 Wis. 2d 530 (Court of Appeals, August 2, 1989)** In an action for declaratory relief, the Wisconsin Court of Appeals, District IV, ruled that the real estate of a telephone company that is used in part for operating purposes and in part for nonoperating purposes is not subject to proportional assessment. Such real estate is exempt from local assessment and taxation only if its "dominant" or "principal" use is for operating purposes.

Under **sec. 76.38(8), Wis. Stats.,** telephone companies pay a telephone license fee in lieu of all other taxes on all property used and useful in the company's business. A provision in **Sec. 70.112(4), Wis. Stats.,** which requires the proportional assessment of telephone company property used and useful in part for operating purposes and in part for non-operating purposes, applies only to general structures and not to real estate. Therefore, if a general structure for which an Exemption is sought is used and useful in part for the company's business and in part for non-operating purposes, that general structure shall be assessed for taxation at the percentage of its full market value that represents the extent of its use for non-operating purposes. The court rejected the company's claim that proportional assessment also applies to real estate.

In this case, the city assessor determined that the company's real estate was subject to assessment and taxation in its entirety and that 90% of the value of the improvements was subject to local taxation. (See WPAM Chapter 10, Telephone Company Assessment).

Section 70.112(5), Wis. Stats., Motor Vehicles, Bicycles, Snowmobiles

Motor vehicles are exempt from taxation per sec. 70.112(5), Wis. Stats.; however, street sweepers are not exempt under this statute. Although they are motorized vehicles, they are not designed to transport persons or property on public highways, they are designed to do a different job.

38 Opinion of Attorney General 126 (1949) A well-drilling outfit mounted on a truck is not exempt from personal property tax as a motor vehicle.

Opinion of Attorney General 290 (1931) An automobile equipped with a sawing outfit or feed grinding outfit was exempt from taxation, but the outfit was not part of the automobile and was to be separately taxed.

29 Opinion of Attorney General 17 (1940) "You state in certain instances the use of cement mixers mounted upon trucks eliminates the necessity of a concrete mixer at the manufacturing plant and also at the place of the construction job at which the concrete is used. The right proportion of cement, sand, gravel and water are put into the mixer on the truck at the central manufacturing plant of the company operating the same and during the

transportation of this material to the construction job upon which they are working at the time, the mixer is operated so that the mixture is completed upon arrival. We perceive no substantial distinction between a cement mixer so mounted and used and a feed mill or sawing outfit mounted securely on a truck, which would bring the former within the Exemption provision. In either case the apparatus is installed for use on the truck. In each instance the apparatus installed is principally for a manufacturing use as distinct from a transportation use. The latter is the controlling factor. The primary purpose of the concrete mixer mounted on the truck is not to serve the ends of transportation, but to effect a manufacturing process. That the cement mixer is used while the truck is operating over the highway, while a feed mill or sawing outfit is used only when the truck is stationary is not sufficient to give the cement mixer a transportation use so as to be part of the vehicle which is exempt."

"It seems quite clear that the distinct and sole use of such freezing units in refrigerator trucks is in aid of transportation. Their function is the preservation of the commodity carried while in transit. By virtue of this function, such freezing units are an integral part of the truck…"

Section 70.112(7), Wis. Stats., Mobile Homes

In general, all mobile homes subject to a monthly parking permit fee under **sec 66.0435, Wis. Stats**., and all recreational mobile homes as defined in **sec. 70.111 (19), Wis. Stats**., are exempt from general property taxes. However, the mere licensing of mobile home parks, without the license fee for the park of the monthly parking permit fee for the mobile home, would not permit the exemption of all mobile home. The exemption is granted because the property is otherwise "taxed." The taxable status of a mobile home can be determined by using the chart found in WPAM Chapter 15 of Volume I.

Ahrens v Town of Fulton, **242 Wis.2d 543, 629 N.W.2d 783 (Table), 2002 WI 43, March 26, 2002** The decision of the Court of Appeals was affirmed. The Town properly assessed and taxed the representative owners' mobile homes as improvements to real property. The non-representative owners were remanded to the Circuit Court to determine if these owners were properly classified as improvements to real property based on this opinion.

In deciding this case, the statutory language classifying mobile homes under **secs 66.058(1)(d), 70.043 and 70.111(19)(b) Wis. Stats.,** was reviewed. The Court stated the language in the sections is inconsistent and nearly irreconcilable and the legislature "should pay immediate attention to the statutes at issue in this case." They found it difficult to harmonize the language in **secs. 70.043 and 70.111(19)(b), Wis. Stats.** since different criteria are used to classify the units. **Section 70.043 Wis. Stats**. uses location, utility hook-up and foundation for classification. **Section 70.111(19)(b) Wis. Stats**. classifies mobile homes based on size and intended use.

The Supreme Court ruled **sec. 70.043(1) Wis. Stats.** states a mobile home is an improvement to real property when it is resting for more than a temporary time, in whole or in part, on some other means of support than its wheels before it can be taxed as real

property. The legislature intended that anything more than a transient location would be permanent and, accordingly, is an improvement to real property.

All of the representative owners mobile homes were "set upon a foundation" within the meaning of the statute. The Court found the Town properly assessed and taxed the mobile homes as improvements to real property and dismissed the representative owners' case.

***Ahrens et. al. v Town of Fulton*, Court of Appeals District IV, Case Number 99-2466, (2000)** The Court of Appeals reversed the appealed judgment in part, and remanded for further proceedings consistent with their opinion with respect to the "non-representative" owners. "Basic unit" mobile homes not supported entirely by their wheels were properly taxes by the Town as improvements to real estate.

Owners of "non-representative" "mobile home can establish on remand both that 1) his or her basic unit rests wholly on its wheels, qualifying as personal property for purposes of taxation; and 2) the total area of the basic unit, together with that of any structures attached to it in any way, does not exceed 400 square feet (and that it is used "primarily as temporary living quarters for recreational, camping, travel or seasonal purposes," *see* **sec. 70.111(19)(b), Wis. Stats**.; the mobile home is exempt from tax and the Town levied and collected an unlawful tax from that owner."

The Court of Appeals clarified two mobile home classification definitions based on the legislative intent of **secs. 70.043 and 66.058(1)(d), Wis. Stats**. **Note: Section 66.058 was renumbered in 1999 and the new number for this section of the Wis. Statute is 66.0435.**

The Court of Appeals found that **sec. 70.043(1), Wis. Stats**. is ambiguous because its meaning cannot be readily determined from its plain language. The statute's definition of set upon a foundation i.e., "off its wheels and… set upon some other support," is capable of being understood by reasonably well-informed persons in two or more different ways. When the language of the statute is ambiguous, the court turns to extrinsic aids such as the legislative history, scope, context and purpose of the statute to determine legislative intent.

1. The court defined **sec. 70.043, Wis. Stats.** "off it wheels" test to mean that a unit that is not completely supported by it wheels, when it also rests in part on some "other" means of support, meets one of the three tests to be considered real estate.

2. In addition, they clarified the definition of a mobile home under sec. 66.058 (1)(d), Wis. Stats. The Court of Appeals reviewed the legislative intent of what is considered an addition, annexation, or appurtenance, to a mobile home. They also addressed the issue of what and how it needs to be attached to be included in the square footage to determine taxable status under **sec. 70.111(19) (b), Wis. Stats**.

The Court of Appeals concluded that when a mobile home, situated on land owned by its owner, is connected to utilities and is not completely supported by its wheels, but also rests in part on some "other" means of support, it is "off its wheels" and set upon some other

support," and is therefore "set upon a foundation" within the meaning of **sec. 70.043(1), Wis. Stats.** We find this interpretation to be consistent with the legislature's intent and purpose, as evidenced by the history of the statute, and it provides a reasonable and workable standard for assessors and taxpayers alike.

The Court of Appeals reviewed the dictionary definitions of the terms in **sec. 66.058, Wis. Stats**. and concluded the following:

> "It seems clear from the foregoing that any rooms, porches, decks and the like that are attached in any way to the basic unit are included within the definition of the mobile home. Thus, the area of any attached structures must be counted when determining the square footage of a mobile home."

The court also stated, "we reject the towns interpretation that would place freestanding sheds, barns and garages within the statutory definition of a mobile home. The statutory language plainly envisions only structures that are attached or affixed to the basic unit."

Since the Court of Appeals found that freestanding structures should not be included in the 400 square foot determination, it remanded the case in part back to the circuit court. The Court of Appeals stated, "On remand, any non-represented owner shall be given the opportunity to establish facts qualifying his or her mobile home for assessment as personal property under section 70.043(2), and for Exemption under section 70.043(19)(b), as we have interpreted these provisions."

Native American Property

Native American owned real property on an Indian reservation is not subject to state and local taxation unless an Act of Congress provides for it. Non-Native American owned real property on an Indian reservation is taxable, unless an Act of Congress expressly prohibits such taxation.

Personal property owned by an enrolled member of the tribe or the tribe, which is kept on the reservation, is not taxable. Personal property owned by non-Native Americans and kept on the reservation are taxable unless it can be shown that taxation has been preempted by Federal law.

As a general rule, ownership is the deciding factor for determining taxability of property on the reservation. Property off the reservation which is owned by Native Americans is considered taxable unless preempted by Federal law.

66 Opinion of Attorney General 290 (1977) There have been a number of questions raised on the taxability of property within Menominee County and what effect the United States Supreme Court decision in *Bryan v. Itasca County* has on these questions.

In Bryan, the court held invalid the state personal property tax as applied to a mobile home of an enrolled Chippewa Indian where such mobile home was located on land held in trust for tribal members. This opinion has a limited effect on the taxation of Menominee Indians and Menominee property because taxation jurisdiction in this case is based on the

Menominee termination and restoration legislation.

1. **Menominee Termination Act (June 17, 1954)** This act discontinued the reservation status of Menominee tribal land and authorized the state to tax this property when the act became effective April 30, 1961.

2. **Menominee Restoration Act (December 22, 1973)** This act repealed the termination act and reinstated all rights and privileges of the tribe. The state is still authorized to tax real property until the property is placed in trust status.

On April 22, 1975, real property and other assets owned by Menominee Enterprises, Inc., were placed in trust and were therefor exempt. Some real property owned by tribal members was also placed into trust status on this date and at various dates thereafter which also removed such property from taxable status.

***Keweenaw Bay Indian Community v Naftaly, et al.*, United States Court of Appeals, Sixth Circuit, Appeal No. 05-1952, (2006)** The issues are: 1) Whether individual parcels of land allotted to the Tribe or its members in fee simple under the 1854 Treaty are subject to property taxation under the Treaty's terms, and 2) If not, whether Congress clearly expressed its intent after 1854 to permit state taxation of reservation lands. The court ruled the State's property tax assessments were disallowed based on the following: 1) All applicable treaties and federal statutes must be read against the backdrop of Indian sovereignty; 2) Even though a treaty does not contain an express provision exempting state taxation, it is to be interpreted in the Indians' favor; 3) Because Article 11 of the treaty is unclear as to the exact meaning and scope of removal, the Court must interpret its meaning in the Tribe's favor; 4) Article 11 of the treaty prevented any form of involuntary state alienation, including the sale of the parcels in fulfillment of a tax judgment. Therefore, it also prevents state taxation of the parcels to begin with; 5) An interpretation disallowing state taxation supports the purpose of the treaty to provide a permanent home for the Chippewa bands; and, 6) Since 1854, Congress has not clearly expressed its intent to abrogate these treaty rights or permit state taxation of these reservation lands.

***Town of Menominee v Sarah Skubitz*, Wisconsin Supreme Court, No. 218, 192 N.W.2d 887, 53 Wis. 2d 430.(Jan. 04, 1972)** Skubitz, a member of the Menominee Indian Tribe, living on lands transferred from the United States to the Menominee Enterprises, Inc., a Wisconsin corporation charged with the management of lands for the benefit of the Menominee Tribe, is subject to personal property taxes on improvements owned by the taxpayer and located on lands owned by Menominee Enterprises, Inc. The taxpayer had the option to lease or purchase the real estate after Menominee Enterprises, Inc. received title to the real estate but refused to accept either. The term "leased lands" contained in **Sec. 70.17, Wis. Stats**. is broadly construed so as to encompass a multitude of situations in which the occupier of lands not owned by him places improvements on those lands. Since improvements on leased lands may be assessed as either real or personal property and the Town of Menominee chose to assess the improvements as personal property taxable to the taxpayer, the assessment was upheld.

***Cass County, MN, et all v Leech Lake Band of Chippewa Indians* US Supreme Court, docket 97-174, (June 8, 1998)** Is state and local taxation allowed on land once part of the reservation, subsequently sold off to private ownership interests, then reacquired, but not put into trust status. The Court Held the that all parcels were taxable. The Court said that because of the allowance for public sale of reservation land to non-Indians, under the Nelson act, it was the clear intention of Congress was to allow for taxation of those lands. Since the land was removed from Federal protection, the land was made freely alienable, as allowed for under the Yakima decision, unless specifically stated to the contrary. The tribal repurchase of such lands was not specifically authorized by Congress, and no Congressional legislation revoked state taxing authority. Furthermore, Sec. 465 of the Indian Reorganization Act allows the Secretary of the Interior the authority to place such lands in trust, and then stipulate it is not subject to state or local taxation. The assumption by the court is since that was not done in this case, the Tribe had no right to expect tax exempt status.

Denial of Computer Exemption Claim

***Xerox Corp v Wisconsin Department of Revenue*, Wisconsin Court of Appeals, District IV, Appeal No. 2007AP2884, July 30, 2009.**

The appeals court affirmed the decision of the circuit court and the Tax Appeal Commission that multi-function devices (MFDs) such as copier/printer/scanner/fax machines are not exempt as computers, servers, peripheral equipment, and printers. The court relied on the Commission's construction of **Sec 70.11 (39) Wis. Stats**., and its adoption of a legal rule, that in order to be exempt, an MFD must *be* an exempt item and not merely *contain* an exempt item.

***Xerox Corp. v Wisconsin Department of Revenue,* Wisconsin Circuit Court, Docket No. 2007CV1767, September 21, 2007** The issue was whether Xerox's multifunction devices (MFDs) were exempt from property tax as “computers” or fell under the exception as “fax machines” or “copiers,” under **sec. 70.11(39), Wis. Stats**. The court affirmed the Wisconsin Tax Appeals Commission's decision that Xerox's MFD's are not exempt.

Denial of Exemption – Exclusive Appeal Procedure

***TOPS Club, Inc., v City of Milwaukee*, 2003 WI App 62, District I ,Appeal No. 02-1904, February 4, 2003 The Court of Appeals affirmed the circuit court's decision. TOPS appeals the circuit court order dismissing its complaint against the City of Milwaukee.**

TOPS submitted a tax Exemption request to Milwaukee for the tax year 2001, as an educational, charitable and benevolent organization under **sec. 70.11(4), Wis. Stats.** Members of TOPS receive education, motivation and group support to attain and maintain physician-prescribed weight goals.

Milwaukee sent TOPS a letter denying the request and informed them the exclusive procedure for disputing the determination was to follow the procedures in **sec. 74.35, Wis. Stats**.

TOPS did not follow the procedures of **sec. 74.35; Wis. Stats**., instead they paid the taxes "under protest" under **sec. 74.33, Wis. Stats**. TOPS stated they didn't need to comply with the procedures in **sec. 74.35, Wis. Stats**. since the property tax was void due to their Exemption from property taxes.

Under 1997 Wisconsin Act 27, section 311m was enacted with the specific legislative intent to overrule the holding in ***Friendship Village*** that denial of tax Exemption could be challenged via a declaratory-judgment action.

"Absent a constitutional infirmity, courts must apply statutes as they are written, unless to do so would lead to an absurd result that did not reflect the legislature's intent." *State v. Young* affirmed 191 Wis. 2d 393, 528 N.W. 2d 417 (1995). The section is not ambiguous; it trumps the common-law cases it has overruled. See ***Ervin v City of Kenosha***, 159 Wis. 2d, 464, 475, 464 N.W. 654 (1991) (statute supplants common-law doctrine when that is what legislature intended).

Treatment Plant and Pollution Abatement Equipment: Lagoon Lands

60 Opinion of Attorney General 154 (1971) The property tax Exemption for pollution control facilities provided in **sec. 70.11(21) (a) Wis. Stats**. applies to pollution control facilities incorporated into new plants to be constructed, in addition to those installed to abate or eliminate existing pollution sources.

Waste Treatment Facility

City of Green Bay v Wisconsin Department of Revenue*, Wisconsin Tax Appeals Commission, Docket No. 06-M-146, December 21, 2007.** **Note**: This case was decided under the 2005-06 statutes, so its value as precedent is limited. **Sec. 70.11(21)(a), Wis. Stats.** was amended in 2007. City of Green Bay (City) appealed a determination by the State Board of Assessors (BOA) that reduced the DOR's property tax assessment of manufacturer Green Bay Packaging, Inc. (GBP) to zero, finding that GBP qualified for a total exemption under **sec. 70.11(21)(a), Wis. Stats**. (2005-06), as interpreted in ***The Newark Group, Inc. v Wisconsin Department of Revenue.

The court ruled: 1) The phrase "abating or eliminating pollution," used in **sec. 70.11(21)(a), Wis. Stats**., includes preventing pollution; 2) The statute did not require that the property be used *primarily* for the exempt purpose – only that the exempt purpose be one of the purposes for which the property is used; 3) The Commission refused to overturn *Newark Group* and instead affirmed its central holding, but limited the scope of the case in the following way: Where there is a combined recycling and manufacturing facility, a partial Exemption is consistent with **sec. 70.11(21)(a), Wis. Stats.** (2005-06), where part of the facility may qualify as a waste treatment facility and part of the facility may not; 4) In this case, the tax-exempt parts of the mill included: bale storage and unloading areas, recycled fiber cleaning, screening, and preparation areas, the land and buildings that house the paper machine where water from the manufacturing process is recycled in a closed-loop process water system, the water storage facilities, and the boiler and baghouse used to meet

environmental air standards. The taxable parts of the mill included: the main office, the maintenance shop, the sheet metal shop, and maintenance offices, the shipping building, and the parking areas.

Denial of Exemption for Rented Personal Property

***United Rentals, Inc. v City of Madison*, Wisconsin Court of Appeals, District IV, Appeal No. 2005AP1440, April 26, 2007**. The issue is whether the rental property owned by United Rentals qualifies as "personal property held for rental for periods of one month or less…" and thus qualifies for a tax exemption under **sec. 70.111(22), Wis. Stats**. The court held the following:

1. Personal property is presumed taxable. Exemptions are only allowed to the extent the plain language of a statute permits; 2) **sec. 70.111(22), Wis. Stats.** is clear and unambiguous. The legislature expressly intended that the Exemption apply only to property held for rental for one month or less, and, therefore, property available for rental for more than one month is taxable; 3) Because United Rentals' personal rental property may be rented for more than one month, the property does not qualify for an Exemption under Wis. **sec. 70.111(22), Wis. Stats.**

Board of Review

The Board of Review system was established to give taxpayers a formalized method of appealing an assessment. Before an assessment can be appealed outside the taxation district it must first be heard at the local Board of Review. It is the responsibility of the Board to correct any apparent errors in the roll and raise or lower incorrect valuations. It is important to note that the Board does not act as an appraiser or assessor to value property, but serves as a quasi-judicial body that decides on the validity of assessments from facts presented orally, under oath, before it.

General

***Brown v Oneida County*, 103 Wis. 149, 79 NW 216 (1899)** The court held that, "the Board is a creature of the statute, and has only such powers given to it by the statute."

***State ex rel. International Business Machines Corporation v Board of Review, City of Fond du Lac*, 231 Wis. 303, 285 NW 784 (1939)** A Board of Review is not an assessing body but rather a quasi-judicial body whose duty it is to hear evidence tending to show errors in the assessment roll and to decide upon the evidence adduced whether the assessor's valuation is correct.

***Shove v City of Manitowoc*, 57 Wis. 5, 14 NW 829 (1883)** An arbitrary increase, without examination of sworn witnesses, is void.

***State v Gaylord*, 73 Wis. 306, 41 NW 518 (1889)** The power of the Board to review and alter extends not merely to the correction of errors in the roll, but also to lowering or raising the valuation of any property, including securities on the assessment roll; and the sworn statement as to the amount of such securities, made by the taxpayer to the assessor, is not conclusive on the Board.

***Krembs v City of Merrill*, 183 Wis. 241, 197 NW 818 (1924)** The Board of Review cannot rule on the taxability of property, except in a prima facie way by putting taxable property on the tax roll when it has been omitted.

***State ex rel. Mautz Paint and Varnish Company, Inc. v Board of Review, City of Madison* Case No. 137-294, Dane County Circuit Court (1975)** At the Board of Review hearing, the assessor and taxpayer's appraiser presented contradictory testimony on the value of the property in question. Based on this testimony the Board came to the conclusion that the improvements on the property as valued by the assessor did not represent the fair market value and therefore reduced the value on the assessment as a whole by $32,500 or a full market value of $50,000. The taxpayer appealed the Board of Review's decision to circuit court.

The court ruled that once the Board of Review rejected the assessor's valuation as incorrect, they had the duty to reach a reasonable figure for the fair market value. The court did not believe the value established by the Board was, in view of the evidence as a whole,

adequately supported. Once the assessor's figure had been discarded, the Board was confined to work with what it had. The appraiser's figure should have become the base figure to which adjustments were made as indicated by the evidence.

***State ex rel. Kimberly-Clark Co. v Williams*, 160 Wis. 648, 152 NW 450 (1915)** The court said, "The Board of Review is not an assessing body and it is not to do over the work of the assessor or substitute its judgment for his." Court set aside an assessment made by the Board of Review after the Board had made a personal viewing of the property.

Clear Channel Outdoor, Inc. and Lamar Central Outdoor, LLC v City of Milwaukee and City of Milwaukee Board of Assessors, Wisconsin Court of Appeals, District I, 2011 WI App 117, July 26, 2011 **(Petition for review pending as of October 12, 2011)**

What Assessors should know: A dispute over a city's legal authority to tax billboards as property must be initially brought to the Board of Review before it can be properly heard in court.

The Court's reasoning: Clear Channel Outdoor and Lamar Central Outdoor appealed the circuit court's dismissal of their complaints seeking declaratory judgment to overturn the assessment of their billboards.

The court concluded that its review was limited to whether or not Clear Channel and Lamar first exhausted all of their administrative remedies in accordance with sec. 70.47(16)(a), Wis. Stats. That section prohibits any person from filing a lawsuit questioning the "amount or valuation" of real or personal property without first taking their claim to the Board of Review.

Clear Channel and Lamar argued that they were not objecting to the "amount" or "valuation" of the assessment, but instead were challenging the City's constitutional authority to levy tax, so that sec. 70.47(16)(a) did not apply.

The court disagreed, finding that any determination on the validity of the tax is necessarily and directly tied to determining "amount of valuation." Whether real or personal property, a crucial component of a billboard's value is the associated permit granted by the City. Clear Channel and Lamar's challenge was essentially a dispute over the permit aspect of the billboards' value and thus concerned "amount of valuation" as contemplated by sec. 70.47(16)(a). For that reason, the issue must first be addressed by the Board of Review.

Procedures

Once the assessor has placed a value on all taxable property listed on the assessment roll and signed the affidavit attached to the roll, the assessments are presumed correct. At this time, the assessor is not allowed to impeach the information found in the assessment roll nor is the Board of Review permitted to change an assessment without sworn oral testimony. The Board of Review meets once the assessment roll has been completed and delivered to the municipal clerk.

***Richard Hermann, et al. v Town of Delavan Board of Review,* Wisconsin Court of Appeals, District II, Docket No. 96-0171, December 27, 1996.**

Sections 70.47(13), 70.85 and 74.37, Wis. Stats. provide the exclusive method for residents to challenge a municipality's bases for the assessment of individual parcels. Each of the above statutory sections require that the property owner first appeal the assessment to the Board of Review (***Bourque v Wausau Hosp. Ctr***., *145 Wis.2d 589, 594* (1988)).

The ***Marsh*** case does not provide a bypass of the board of review process.

In ***Marsh***, the court did not consider the issue of whether property assessments were fair or uniform. The property owners in ***Marsh*** were not contesting the uniformity of tax assessments, but rather the legality of the property tax itself.

Neither the ***Levine*** nor the ***Friendship Village*** cases answer the precise question raised in this case.

The court in the ***Levine*** case did not consider the question of whether a plaintiff can avoid statutory prerequisites to review by asserting a claim of a constitutional violation. The court's holding in ***Friendship Village*** is not controlling as to the question of whether a challenge to the *uniformity* of a tax assessment procedure can be maintained without compliance with the statutory guidelines.

The taxpayers' contention that the circuit court erroneously concluded that it could not provide relief is without foundation.

Sections 70.47(13), 70.85 and 74.37, Wis. Stats. provide a comprehensive means to challenge property tax assessments. The circuit court is not without authority to provide a remedy for a *procedurally correct action*.

***Richard Hermann, et al. v Town of Delavan Board of Review*, Wisconsin Supreme Court decision, 208 Wis. 2d 216, 560 N.W. 2d 280. 1998** Supreme Court agreed with the Court of Appeals and affirmed its decision.

The detailed and comprehensive objection and appeals procedure provided in chapters 70 and 74 were intended to be the exclusive means by which taxpayers may challenge the valuation of real property assessed for taxation.

This court has adopted the general principle that, where a method of review is prescribed by statute the prescribed method is exclusive. These procedures and remedies, being expressly provided by statute, are therefore considered exclusive and must be employed before other judicial remedies are pursued.

65 Opinion of Attorney General 162 (1976) The Board of Review cannot meet in a closed session under **sec. 19.85(1)(2), Wis. Stats**. to deliberate, discuss, or otherwise act with respect to the hearing before it. Board of Reviews do not conduct hearings as covered by **sec. 19.85(1)(2), Wis. Stats**.

***State ex rel Nekoosa Papers, Inc. v Saratoga Board of Review*, Court of Appeals, Dist. IV, Case No. 82-572 (1983)** The court held that while **sec. 70.47(8)(e), Wis. Stats.** requires that all hearings before the board be recorded, **sec. 70.47(9) Wis. Stats**., which governs the board's determination is silent regarding the record the board must make when it deliberates. Thus, no record need be made of the board's deliberation.

***State of Wisconsin ex rel. Richard A. Bender et. al. vs. the Town Board of Kronenwetter, et. al*. Marathon County #79CV1555.** In this case the court found that "complete and accurate records of the (Board of Review) meetings were not kept... **Sec. 70.47(8)(e), Wis. Stats.** states in part, that " All proceedings shall be taken in full by a stenographer or by a recording device." Yet there is no transcript or recording of a number of evidentiary and decision hearings... The erratic records have made it difficult and sometimes impossible to tell whether there was a quorum at each evidentiary and decision hearing as required by **sec. 70.47(1), Wis. Stats**., and whether any board member voted on an assessment after failing to attend the evidentiary hearing on that valuation in violation of **sec. 70.47(9)(b), Wis. Stats**.

"Another problem is that all the board members who voted on a decision may not have attended the evidentiary hearing on that assessment or have read a transcript or listened to a recording of the evidentiary hearing at least five days before voting as s. 70.47(9)(b) requires."

"Still another problem is that a majority of the Board members may not have agreed on each of the assessment decisions... the record suggests that not all voting members were at the evidentiary hearings and therefore, should not have been counted in the majority vote... Allowing a board member to vote or participate in deciding an assessment when he did not attend the evidentiary hearing and deciding cases without the agreement of at least two board members are fundamental errors."

"Because the court has found numerous errors in the proceedings of the board that affect each petitioner, it finds those proceedings void and remands each of the assessments that petitioners had hearings on before the Board for a rehearing."

Sturgeon Bay Housing Limited Partnership v City of Sturgeon Bay Board of Review, Wisconsin Circuit Court, Door County, Docket No. 94-CV-173, March 30, 1995. Appeal from the Board of Review: Affirmed. Was it proper for a City's attorney to act as both counsel and as an advocate in favor of the assessor?

From review of the record, the Board acted according to law because they listened to the evidence giving both sides an opportunity to present all the information they wished to show.

Because the Board members asked questions of their own and made their decisions without direction from anyone, the City's attorney did not create "an aura of unfairness" when he acted as both counsel and as an advocate in favor of the assessor. The valuation remained at the figure set by the Board.

Organization

Section 70.46, Wis. Stats. specifies the organization of the Board of Review. The Village Clerk cannot be excluded from a Board of Review composed of public officials.

***State of Wisconsin ex rel. Richard A. Bender et. al. vs. the Town Board of Kronenwetter, et. al.* Marathon County #79CV1555.** The court stated: "It is clear from s. 70.46(1) that the assessor cannot act as a Board of Review member in deciding appeals. Common sense dictates that an assessor should not be judging the merits of his own assessments when a taxpayer appeals to the Board of Review. The assessor has a right to be present at a decision hearing, as any other citizen does at an open meeting, but the assessor cannot participate in any way or vote on the cases. The action by the Board in allowing the assessor to repeatedly give information, participate and even vote at decision hearings was a major error that materially prejudiced petitioners' rights to a fair appeal. Sec. 70.46(1) and due process considerations forbid this participation by an assessor."

Notice

Section 70.365, Wis. Stats. specifically states that the notices shall be sent "at least ten days before the meeting of the Board." This is ten calendar days, weekends and legal holidays are not excluded from the calculation of the ten days.

***State ex rel. Vilas v Wharton*, 117 Wis. 558, 94 NW 359 (1903)** The Board need not, before receiving testimony, give notice to the persons likely to be affected thereby.

***State ex rel. John R. Davis Lumber Co. v Sackett*, 117 Wis. 580, 94 NW 314 (1903)** The court held, "The Board of Review must give the property owner notice of intention to increase his assessment before it can legally increase it." **Section 70.47(10), Wis. Stats**. states that the Board of Review can add omitted property but must notify the property owner. The Board cannot raise an assessment except upon reasonable evidence submitted to it; to do so constitutes jurisdictional error.

***Town of Amnicon v Kimmes*, 249 Wis. 321, 24 NW 2d 592 (1946**) The failure of the defendant, in action by the town to recover unpaid personal property taxes, to appear before Board of Review and present objections was not excused because of a statement by the assessor to the defendant's employee that the assessor would notify the defendant when the Board of Review met and the assessor's failure to do so, since it was no part of the official duty of the assessor to notify persons against whom assessments were made of the time of the meeting of the Board.

***Milwaukee County v Dorsen*, 208 Wis. 637, 242 NW 515 (1932)** A taxpayer is not entitled to specific notice of the time and place of the meeting of the Board of Review. The statute fixing the time and place of meeting, together with the giving of such general notice as statute may require, is sufficient to constitute due process.

***Bogue v Laughlin*, 149 Wis. 271, 136 NW 606 (1912)** Property owners cannot complain that they did not receive the statutory six days notice of the assessment of property as omitted property, where they appeared generally before the Board of Review, pursuant to the notice.

***State ex rel. Baker Mfg. Co. v City of Evansville*, 261 Wis. 599, 53 NW 2d 795 (1952)** Where the original meeting of the city Board of Review to consider the taxpayer's objection to the assessment of its personal property was adjourned to no particular time, a later meeting to consider the assessment not referring to the adjourned meeting and held almost two months after the first meeting, was a new meeting and not an adjourned meeting, and the statutory 48-hour notice was required to be given to the taxpayer.

***Fitzgerald v Town of Gibraltar Board of Review*, Court of Appeals, District III, Case No. 80-2163** A postcard sent more than 10 days prior to the meeting of the Board of Review advising taxpayers that their property had been reassessed did not contain the date of the meeting of the board as required by **sec. 70.365, Wis. Stats**. A subsequent letter informing them of the meeting was issued less than ten days prior to the meeting. The trial court erroneously concluded that taxpayers had waived the notice defect by appearing by representative at the board hearing refusing a 48-hour continuance under **sec. 70.47(7)(b), Wis. Stats**. The appearance by representative was not a waiver where objection was made to the lack of timely notice.

A continuance is not a proper remedy for a jurisdictional defect, particularly where the adjournment would not have caused the meeting to be commenced at least 10 days subsequent to the valid notice as described in **sec. 70.365, Wis. Stats**.

Objections

***Bitters v Newbold*, 51 Wis. 2d 493, 187 NW 2d 339 (1971)** A taxpayer wishing to appeal an assessment appeared at the Board of Review with an improvised objection form. At the meetings, the taxpayer refused to fill out the proper objection form or be sworn in and left the meeting without testifying. When the tax bills were later issued based on the original assessment, only the portion of the bill based on the taxpayer's estimate of value was paid. The taxpayer then filed a claim under sec. 74.73, Wis. Stats. For recovery of illegal taxes. The court held that the Board of Review may deny a taxpayer a hearing if the objection is not stated on an approved form; the Board does not have to accept the information supplied by the taxpayer in a different style. A certiorari review is limited to the action of the Board. In this case the taxpayer did not meet the requirements of appearing at the Board of Review.

42 Opinion of Attorney General 126 (1953) In proceedings to this section (**sec. 70.47, Wis. Stats**.), objections to valuations must be in writing unless expressly waived by action of the Board, the clerk must take notes of testimony given unless it is reported by a stenographer or recording device, and no assessment may be raised or lowered except after a hearing as provided for in subpars. (8) and (10), Stats., herein.

***Bratton v Town of Johnson*, 76 Wis. 430, 45 NW 412 (1890)** The court determined that the requirement under former par. 1061, Stats., that no person would be heard, in any action or proceeding, to question the equality of any assessment unless the person has first made an objection before the Board of Review and made an offer to sustain the same by competent proof. This was determined as valid because the Board of Review procedure afforded a reasonable and sufficient time and opportunity for making such an objection.

***State ex rel. Reiss v Board of Review of Town of Erin*, 29 Wis. 2d 246, 138 NW 2d 278 (1965)** In this case the taxpayer had filled out answers to all the questions on the form, including date of purchase and purchase price, improvement (nature and value), amount of fire insurance carried on the buildings, and that there had been no recent commercial appraisal of the buildings. However, in answer to the question "What is the present fair market value of this property?" the objecting taxpayer wrote "I do not know." The court says, "Even if it were considered that the Board had accepted the answers to other questions, the answer remained insufficient. Surely the single most important fact relevant to an assessment is the fair market value of the property, and a taxpayer who desires to proceed with an objection in good faith must be prepared to take a position as to what the fair market value is."

The majority of the court held that the taxpayer had not properly filled out the objection form and therefore had no right to a hearing at the Board of Review.

***State of Wisconsin ex rel. Richard A. Bender et. al., v the Town Board of Kronenwetter, et. al.* Marathon County #79CV1555.** In this case, the court found that "the failure of some petitioners to file standard objection forms does not lead to the conclusion that they have no standing in an appeal on a writ of certiorari. Although Board members made statements on the record that they would not consider assessments for which no forms had been filed, they went ahead and did just that … Because the Board heard testimony on these petitioners' assessments, and then went on to discuss and decide or change most of those valuations, this court finds that the Board waived the filing requirement. The Board's actions led these six petitioners to reasonably believe that their assessments had been reviewed like the other taxpayers and that they had a right to appeal the decisions to this court despite the failure to file forms."

***Patrick P. Fee and Mark P. Fogarty v Board of Review for Town of Florence*, 2003 WI App 17, District III, Appeal 02-1758, December 23, 2002** The Court of Appeals reversed and cause remanded with directions.

Patrick Fee and Mark Fogarty (Fee & Fogarty) appeal an order quashing a certiorari appeal of their 2000 property tax assessment. They believe the circuit court improperly relied on ***State ex rel. Reiss v. Board of Review***, 29 Wis. 2d 138 N.W. 2d 278 (1965) in making its decision. In ***Reiss,*** the Supreme Court ruled that a board of review may deny a taxpayer a hearing for failing to complete the objection form in writing as required by **sec. 70.47(7)(a), Wis. Stats**. Fee & Fogarty argue the assessor should have classified the land as agricultural and the Board of Review erred in affirming the assessment. They also raised the issue that the assessor did not take into consideration the effect of a conservation contract in determining the assessment.

Fee & Fogarty own a parcel in the Town of Florence containing 93 acres of hayfield and 142 acres subject to a federal conservation easement. In November of 2000, they were notified the property was assessed at $228,000. Fogarty appeared before the Florence Board of Review (BOR). He submitted an objection form but did not state the fair market value of the property. Fee & Fogarty argue there isn't a fair market value on the property since it should be valued according to its use as an agricultural property.

The assessor argued Fogarty was not entitled to a hearing since the objection form was incomplete. The BOR allowed Fogarty a hearing over the assessor's objection and affirmed the assessment. The Supreme Court did not address this argument because the BOR waived the writing requirement by allowing the hearing. The Supreme Court was unable to conclude the entire parcel should be classified as agricultural land based on the evidence presented.

The assessor did not value the hayfield as use value since a neighbor cut the hay rather than Fee & Fogarty. During the hearing, the assessor testified he was not aware of the easement but stated it was irrelevant to the value.

The Supreme Court ruled the assessor should have classified the land not subject to the conservation contract as agricultural under Wisconsin Administrative Code 18.05 in effect at the time of the assessment. The Court remanded to the circuit court to remand to the BOR to assess the hayfield at its use value and determine the conservation contract's effect on the property's value.

Sworn Oral Testimony

***State of Wisconsin ex rel. Richard A. Bender et. al. v the Town Board of Kronenwetter et. al.* Marathon County #79CV1555**. The court found that "another error that the Board made was failing to swear the assessor in when he spoke at the evidentiary hearings. **Sec. 70.47(8), Wis. Stats**. requires that all persons be sworn before giving evidence on the valuation of property to the Board of Review. These transcripts show that each objecting taxpayer, taxpayer's attorney and witnesses (if any) were all duly sworn, but never once was the assessor sworn before he gave testimony. The assessor spoke at many hearings without being under oath. The Board should have had the assessor take an oath before speaking about any assessments or offering information… The fact that the assessor testified at several evidentiary hearings without being under oath like all the other witnesses requires a finding that these hearings were void."

***State ex rel. Heller v Fuldner*, 109 Wis. 56, 85 NW 118 (1901)** Where no evidence under oath is given or offered before the Board of Review upon an application to reduce an assessment, the Board has no power to reduce the valuation.

***Steele v Dunham*, 26 Wis. 393 (1870)** A town Board of equalization or review, in determining the value of land within the town, is acting upon a subject within the jurisdiction; and if it increases the assessor's valuation without examining any person upon oath in relation thereto, it acts erroneously and contrary to law.

***State ex rel. De Forest v Hobe*, 124 Wis. 8, 102 NW 350 (1905)** Oral testimony only can be accepted by the Board of Review. In this case the court stated, "Deposition of property owner taken in another state cannot be considered by the Board. Personal appearance by owner cannot be waived."

***State ex rel. Giroux v Lien*, 112 Wis. 282, 87 NW 1113 (1901)** The court held, "The statutes contemplate oral evidence as the only thing upon which the Board can act in raising or lowering a valuation and cannot act on 'ex-parte' affidavits."

***State ex rel. Vilas v Wharton*, 117 Wis. 558, 94 NW 359 (1903)** Letters and affidavits of the purchasers of property are not admissible as evidence before a Board of Review upon the question of whether the title passed to them prior to the assessment date.

***Ryerson's Estate*, 239 Wis. 120, 300 NW 782 (1941)** The taxpayer not being required to furnish the assessor with a sworn statement describing and valuing property, the assessment roll is not admissible for any other purpose than that prescribed by statute, but statements made to assessor or the Board of Review with respect to description and value of property, whether written or oral, may be received in evidence against taxpayer as an "admission against interest"; it being within the power of the assessor and Board to require a taxpayer to submit to an examination.

***Town of Wauwatosa v Gunyon*, 25 Wis. 271 (1870)** The court stated that a note should be made in the records—"refused to swear," when parties refuse to swear or present evidence under oath. The Board may then proceed to hear the appeal.

***State ex rel. Foster v Williams*, 123 Wis. 73, 100 NW 1052 (1904)** When a taxpayer gives evidence against the amount which the assessor has fixed, it is but right that the taxpayer furnish all the enlightenment possible without evasion or concealment. If the taxpayer refuses this in any degree, the statute denies benefit from the statement the taxpayer chooses to make.

Assessor Presumed Correct

***Krom v Antigo*, 220 Wis. 542 (1936)** The court said, "There can be no recovery of tax paid unless it can be shown that it is inequitable. A difference of opinion amounting to 12 1/2% of the value fixed by the assessor does not within the rule of cases cited warrant the court in saying that plaintiff is called upon to pay more than his just share of the tax."

***Walthers v Jung*, 175 Wis. 58, 183 NW 986 (1921)** Assessed valuation cannot be impeached by testimony which states that as compared with less than two percent of the value of other tracts of land in the town, the assessed valuation is too high. Such testimony also sustains the conclusion that the lands upon which the comparisons are made is assessed too low, as well as the conclusion that the taxpayer's land is assessed too high.

***State ex rel. Vilas v Wharton*, 117 Wis. 558, 94 NW 359 (1903)** Where the agent of one to whom lumber was assessed for taxation testified before the Board of Review that all said lumber had been sold prior to May 1, and produced in evidence, the contracts of sale, if the contracts were effectual to pass the title, such evidence of non-ownership overcame the presumption in favor of the assessment.

***Spear v Door Co.*, 65 Wis. 298, 27 NW 298 (1886)** A party who has conveyed real estate, with covenants of warranty, or mortgaged real estate, and covenanted to pay all taxes subsequently levied thereon, can after making such conveyance or mortgage, maintain an

action to set aside an illegal tax levied upon such real estate while the party was the owner thereof.

***Salscheider v City of Fort Howard*, 45 Wis. 519 (1878)** Testimony from an assessor, that "had all the property in the city been thrown on the market on the day of assessment", it would not have brought in more cash than the sums at which it was assessed, has no tendency to prove that the assessment of the same is at its full value.

***Bass v Fond du Lac County*, 60 Wis. 516 (1884)** The court ruled, "The Board of Review and the clerk should see to it that the assessor's affidavit is signed and attached to the roll, for its absence is prima facie evidence of the inequality or injustice of the assessment and shifts the burden of proving it equitable and just to the municipality."

***State ex rel Giroux v Lien*, 108 Wis. 316, 84 NW 422 (1900)** In proceedings before the Board of Review, the assessor's valuation is prima facie correct.

***State ex rel. Kimberly-Clark Co. v Williams*, 160 Wis. 648, 152 NW 450 (1915)** The assessor's valuation of property is prima facie correct and is binding on the Board of Review in the absence of evidence showing it to be incorrect.

***State ex rel. Enterprise Realty Co. v Swiderski*, 269 Wis. 642, 70 NW 2d 34 (1955)** The assessor's valuation is presumptively correct and the owner's evidence that such valuation exceeded construction costs was not sufficient to upset the assessor's valuation. Construction costs do not prove the sale price.

Witnesses

***State ex rel. Baker Mfg. Co. v City of Evansville*, 261 Wis. 599, 53 NW 2d 795 (1952)** While subs. (8), par. (d), Stats., provides the Board of Review may compel attendance of witnesses and, if requested by tax assessor, must compel attendance of such witnesses, it was not bound to compel such witnesses at the request of a taxpayer, and, where the Board of Review issued subpoenas for persons requested by taxpayer and delivered such subpoenas to taxpayer for such use as it might wish to make of them, the Board went as far as it was required.

Note: **Section 70.47(8), Wis. Stats**. has been revised to allow the Board of Review to hear under oath, by telephone, all ill or disabled persons who present to the Board a letter from a physician, surgeon, or osteopath that confirms their illness or disability.

***State ex. rel. Park Falls Lumber Co. v Stauber*, 190 Wis. 310, 207 NW 409 (1926)** Witnesses, who neither had any personal knowledge concerning sales of lumber companies' plants, nor had been engaged or worked about a sawmill, and had no experience in construction or operation of same, were incompetent to testify as to private sale value of lumber mill equipment under St. 1925, **sec. 70.32(1), Wis. Stats.** for purposes of assessment.

***State ex rel. Flambeau Paper Co. v Windus*, 208 Wis. 583, 243 NW 216 (1932)** The fact that assessment valuation witnesses did not participate in the sales respecting which they testified did not disqualify them on the theory that their knowledge was based on hearsay.

Witnesses sworn by the city are qualified and competent to testify respecting the value of their company's plant for taxation.

***State ex rel. N.C. Foster Lumber Co. v Williams*, 123 Wis. 61, 100 NW 1048 (1904)** It was the taxpayers contention that the Supervisor of Assessments had acted as the assessor, made the assessment, and furnished evidence at the Board of Review to sustain the assessment. The court held that the Supervisor of Assessments did not have the jurisdiction to take the place of the assessor and make the assessment. A Supervisor of Assessments is a competent witness to give testimony before a Board of Review, and the fact that in giving this testimony the Supervisor of Assessment was supporting the assessment, goes to the weight of the testimony, but not its competency.

***State ex rel. M.A. Hanna Dock Co. v Willcuts*, 143 Wis. 449 (1910)** The court held, "The assessor is a competent witness before the Board of Review."

State ex rel. Gregersen v Board of Review, Town of Lincoln*, 5 Wis. 2d 28, 92 NW 2d 236 (1958)** The court admits that extraordinary cases might arise wherein "it may be very important to the taxpayer to examine the assessor as an adverse witness at the very outset…" of the proceedings. The court proceeds to quote favorably the language in the case of ***Baker Mfg. Co. v Evansville, *261 Wis. 599, 53 NW 2d 795 (1952).*

"few questions to the assessor may quickly establish facts which could otherwise be proved only by the time-consuming and expensive method of proving the values of a large sampling of properties to show that discrimination has been practiced against one class. Other examples might be suggested. Where the case is one of that sort, the taxpayer's right to determine the order in which he will present his case, and to call the assessor at the outset for cross-examination, is a matter of such substance that only extraordinary circumstances could warrant its denial. On the other hand, in an ordinary case where the sole contention is that the assessor has overestimated the value of taxpayer's own property, circumstances may justify the Board in requiring the taxpayer to present his own testimony on value or that of his expert witnesses before examining the assessor."

The court then concludes that if the taxpayer "thought he would be prejudiced by waiting until after his own testimony to examine the assessor, he owed it to the Board to assert such prejudice and explain how it might result. Having failed to do so, he cannot later be heard to say in court that the Board exceeded its jurisdiction in directing him to put in other testimony first." The court also remarked that in the certiorari proceeding the taxpayer should have, but did not, show how the Board's action was prejudicial to a material degree.

Evidence

***State ex rel. Hellere v Lawler*, 103 Wis. 460, 79 NW 777 (1899)** The clear intent and meaning of St. 1898, **sec. 1061, Wis. Stats**. was to place it beyond the power of the Board of Review to change the valuation of real estate without evidence, and to make it the duty of such Board to change such valuation in accordance with the evidence.

***State ex rel. M.A. Hanna Dock Co. v Willcuts*, 143 Wis. 449, 128 NW 97 (1910)** While a city Board of Review has no jurisdiction to set aside an assessment where there was no evidence to impeach it, it has jurisdiction to sustain the assessment if there is any evidence which reasonably justifies it doing so.

***State ex rel. Althen v Klein*, 157 Wis. 308, 147 NW 373 (1914)** The Board of Review cannot change the assessor's valuation without evidence; but if, in any reasonable view of it, the evidence furnished a substantial basis for the action of the Board in making a change, and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts.

***State ex rel. Edward Hines Lumber Co. v Fisher*, 129 Wis. 57, 108 NW 206 (1906)** "Board may consider evidence of an earlier hearing to support its findings and is not held to regular court rules on evidence."

***State ex rel. Pierce v Jodon*, 182 Wis. 645, 197 NW 189 (1924)** The court held, "All that can be asked of assessment officers is that they act on the evidence and facts before them, honestly and without discrimination against such property. When this is done and the case is before us on appeal, we will examine the record to ascertain if there is any competent, credible evidence to sustain the valuations placed upon the property by the assessing officers, and if there be such, it is not our province to weigh the testimony to determine where the preponderance lies."

***Milwaukee Iron Co. v Schubel*, 29 Wis. 444 (1872)** The Board of Review has no authority to value property arbitrarily or capriciously, but must be governed by the sworn evidence before it, where that is clear and uncontradicted; although, if the evidence is conflicting, the decision of the Board may be final.

***State ex rel. First & Lumbermen's National Bank of Chippewa Falls v Board of Review*, Chippewa Falls, 237 Wis. 306, 296 NW 614 (1941)** The rule on real estate assessment is that value for tax purposes shall be arrived at by the assessor from an actual view or from the best information that can be practically obtained as to the full value which would ordinarily be obtained for property at a private sale, and when the assessor has complied with such rule and the Board of Review has been guided by competent evidence in passing upon fairness of assessment, a court can not disturb the findings.

***State ex rel. Home Insurance Co. v Burt*, 23 Wis. 2d 231, 127 NW 2d 270 (1964)** Under this section requiring real property to be assessed at the full value which could ordinarily be obtained at private sale, the assessor's valuation must be taken as presumptively correct in proceedings attacking an assessment, but presumption gives way to undisputed competent evidence establishing a lower value or substantially higher value.

***State ex rel. Goldsmith Building Co. v Bolan*, 259 Wis. 460, 49 NW 2d 409 (1951)** Where a relator in a certiorari proceeding conceded that the Board of Review of real estate tax assessment could have placed a value of $212,000 or $175,000 upon relator's property, and in view of the fact that there was no evidence before the Board to sustain a finding of a lesser value, relator was not prejudiced by an assessment of $150,000.

***State ex rel. North Shore Development Co. v Axtell*, 216 Wis. 153, 256 NW 622 (1934)** Assessed value of land improvements would not be disturbed, notwithstanding that the taxing authorities introduced no witnesses to contradict the landowner's testimony where from such testimony it could be reasonably concluded that the improvements were assessed at fair value.

If there is credible evidence before the Board of Review that may in any reasonable view support the assessor's valuation, such valuation must be upheld by Board.

***State ex rel. Collins v Brown*, 225 Wis. 593, 275 NW 455 (1937)** "It has been consistently held that in this state the assessor's valuation is prima facie correct and will not be set aside in the absence of evidence showing it to be incorrect." The fact that the property was sold immediately after the assessment at a lower price than the assessment does not prove the assessment wrong unless it is shown that the price paid is that which could be obtained at a private sale. The burden of proof is upon the person attacking the assessment.

***State ex rel. Evansville Mercantile Ass'n. v City of Evansville*, 1 Wis. 2d 40, 82 NW 2d 899 (1957)** The court will not substitute its opinion of property valuation for that of the Board of Review if there is a conflict in testimony respecting the value of the property, the assessor's valuation will be upheld if there is credible evidence before the Board to support it.

Where there was a contemporaneous sale of property which had been subsequently assessed at value greater than the sale price, the taxpayer still had the burden of showing that the sale was made under normal conditions so as to lead to the conclusion that the price paid was that which ordinarily could be obtained for the property.

***Ryerson's Estate*, 239 Wis. 120, 300 NW 782 (1941)** In all cases, parties who rely upon sales of property to establish the fair market value for general and inheritance tax purposes should bear the burden of establishing that the sales were made by a person willing to sell but not obliged to sell to a willing buyer who was not obliged to buy, together with such other circumstances as indicate that the price was fairly obtained in an open market.

***State ex rel. N.C. Foster Lumber Co. v Williams*, 123 Wis. 61, 100 NW 1048 (1904)** In proceedings before a Board of Review to reduce the assessor's assessment, the Board is not bound to accept as true the evidence upon one side or that of the other, but may, in the exercise of its judgment, disregard the evidence on both sides, and fix a valuation between the two extremes.

In proceedings before a Board of Review for the reduction of an assessment of sawmill property for taxation, the testimony of the owner bore mainly on what the property was worth to disorganize and dispose of its parts. The testimony in support of the assessment bore mainly on what the property was worth as an entirety and as a going concern; that is, what the property would bring at private sale, assuming that a buyer, with the same opportunity for the use of the mill as the owner, was at hand, and had the means to buy it. The court held that under **sec. 70.32, Wis. Stats.,** providing that real property shall be valued at the value which could ordinarily be obtained therefor at private sale, and prescribing what elements the assessor shall consider in determining the value, the evidence of the owner furnished no basis for valuing the property, while the evidence in support of the assessment was sufficient to warrant the Board in adopting the assessor's valuation.

***State ex rel. Kimberly-Clark Co. v Williams,* 160 Wis. 648, 152 NW 450 (1915)** Disregard, by the Board of Review, of competent testimony, unimpeached by other evidence, which shows the assessor's valuation to be incorrect, is a jurisdictional error.

***State ex rel. Kenosha Office Bldg. Co. v Herrmann,* 245 Wis. 253, 14 NW 2d 157, rehearing denied, 245 Wis. 253, 14 NW 2d 910 (1944)** Evidence supported the findings that the action of the city Board of Review in confirming the assessment of the taxpayer's realty was arbitrary in that its conclusion to confirm the assessment was predetermined and that it failed to give fair consideration to the taxpayer's testimony to establish that the assessment had not been fixed upon the statutory basis, and hence, justified the trial court in vacating the assessment.

***Rahr Malting Co. v City of Manitowoc,* 225 Wis. 401, 274 NW 291 (1937)** If there is any competent credible evidence to sustain the valuation placed upon the property by assessing officers, the assessment must be sustained by the court, since the court cannot weigh the testimony to determine where the preponderance lies. The valuation given to realty on the taxpayer's income tax report which included income from realty and deductions for insurance and repairs, when considered with evidence of the sale price of the realty, appraised price, and going value, was sufficient, competent, and credible evidence to sustain the assessment of tax officials.

***Worthington Pump & Machinery Corporation v City of Cudahy,* 205 Wis. 227, 237 NW 140 (1931)** The court stated, "Taxpayer's income tax return and annual report to stockholders is competent evidence as an admission by taxpayer of the value of his property."

***State ex rel. Flambeau Paper Co. v Windus,* 208 Wis. 583, 243 NW 583 (1932)** The court said that, "It was proper to consider cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value in a prospectus and appraisals produced by owner."

***Superior Nursing Homes, Inc. v. City of Wausau, Board of Review,* 37 Wis. 2d 570, 155 NW 2d 670 (1968)** It is the obligation of the assessor and Board of Review to determine fair market value of property from best competent evidence available, which may or may not coincide with the construction costs less depreciation.

***Central Cheese Co. v City of Marshfield*, 13 Wis. 2d 524, 109 NW 2d 75 (1961)** If the company overstated its inventory of cheese for taxation purposes on its Form 10, it would be entitled to prove that fact, but the Board of Review could properly disregard a personal unsupported statement of an officer of the taxpayer to that effect.

The Board of Review in reviewing the assessments of personalty of taxpayers had the power to compel the attendance of witnesses and the production of all records containing material facts.

***Hixon v Oneida County*, 82 Wis. 515, 52 NW 445 (1892)** The fact that two businessmen, in their testimony as to the value of lands which have been assessed for taxation, differ considerably from the judgment of the assessor and the Board of Review, is not sufficient to impeach the assessment or to show intentional undervaluation.

***State ex rel. Lake Nebagamon Ice Co. v McPhee*, 149 Wis. 76, 135 NW 470 (1912)** A mere opinion of the owner with reference to the value of personal property, unsupported by facts or circumstances and coupled with evasive answers as to the quantity and market value, does not so nullify the valuation of an assessor that the Board of Review is without jurisdiction to confirm the latter.

***Bauermeister and others v Town of Alden*, 16 Wis. 2d 111 (1962)** Owners of 22 properties alleged that their lakeshore properties were assessed in 1959 at a much higher ratio (average 96.9%) than six farms they picked out as comparisons which were assessed at an average ratio of 53.8%. The court gave much weight to the fact that these farms were not random samples; and that testimony of tabulated sales of farms sold in 1957, 1958, and 1959 showed that "the particular farms sold were assessed at a higher percentage of the respective sales price than the particular lakeshore properties sold in the same year…

These facts tend to show that there was no discrimination in favor of farms, at least in the assessment of the particular properties sold."

The court continued, "We take judicial notice of the fact that the Department (of Revenue) determined that in 1959, in the Town of Alden, the assessed value of all real estate was 99.2% of full value, and the assessed value of all real estate and personal property combined was 95.6% of full or true value… It is of some significance that the Department, following its own statistical methods, arrived at a result which does not support the plaintiff's contentions." Relief to plaintiffs was denied.

***Dolphin v Board of Review, Village of Butler* 70 Wis. 2d 403 (1975)** A taxpayer went to the Board of Review with three separate appraisals of the property in question. No other testimony was presented and the Board stated that they would notify the taxpayer by mail of their decision. After the hearing, the Board went into executive session with the assessor present, but not the taxpayer. At this session, the assessor proceeded to attack the taxpayer's appraisals. Based on this information the assessment was reduced, but not to what the taxpayer's appraisals had indicated.

The court held that the executive session was more than a mere deliberation session. It was closer to a continuation of the quasi-judicial hearing but without the potentially bothersome presence of the objecting taxpayer. This session was ruled improper and amounted to a jurisdictional error on the part of the Board of Review.

State ex rel. 3077 Investors Limited Partnership, A Wisconsin Limited Partnership v Board of Review of the City of Wauwatosa, Wisconsin Circuit Court, Milwaukee County, Docket No. 95-CV-000-595, July 14, 1995. In this case, at issue is the credibility of a Board of Review decision in the presence of misstated and insufficient evidence presented by the petitioner.

The Partnership is expected to present the Court with true facts and not with misstatements of the key evidentiary facts before the Board. The Partnership submitted to the Board an unaudited financial report when they initially claimed it was an audited report and they failed to address this discrepancy to the Board in their reply.

The appraisal document the Partnership submitted to the Board fails to explain how they arrived at the valuation figure. None of the exhibits it refers to were presented to the Board, and there are no calculations as to income and/or expenses to support the appraisal. Moreover, although the Board had provided the petitioner with notice of what types of evidence must be presented to the Board, and element number 6 required a copy of an appraisal and that the "Appraiser must be present," the appraiser was not present at the hearing. Thus, there was no competent evidence to support the appraisal, or at the least, the Board was free to give the appraisal the weight it saw fit.

The Partnership provided insufficient information to rebut the presumption of correctness. The Partnership's reliance on ***Levine v. Fox Point*** is misplaced because that case involved the underassessment of other properties in the tax district, but the Partnership's issue rests with the over assessment of their property only.

It's permissible to use the income valuation method and verify the figures using sales and the sales comparison method (***Waste Management v. Kenosha County Board of Review***, *184 Wis. 2d 541, 558-560 (1994)*). The valuation remained at the figure set by the Board.

ABKA Partnership v Board of Review, Village of Fontana-On-Geneva-Lake, **Wisconsin Supreme Court, Case Number 98-0851, (1999)** The majority decision determined the management income is "inextricably intertwined" with the resort property and the assessor employed proper data and methodology. The determination of the Board of Review was made according to law and is supported by a reasonable view of the evidence.

The majority cautioned that the determination is not to be ".construed as a broad license to ignore the site of income and thus assess income derived from any off-site property that may have a tenuous relationship to the main property being assessed. It is true that the off-site location of income lends itself to the initial conclusion that the income should not be encompassed in the assessment."

The portion of the order upholding the assessor's "rounding" of the final assessed value was remanded with direction to reduce the rounded assessment to the actual assessed value.

***ABKA Limited Partnership v Board of Review of the Village of Fontana-On-Geneva-Lake*, Court of Appeals, District II, No. 98-0851, (1999)** The Board's determination that the management income is "inextricably intertwined" with the property is in accordance with the law and is supported by a reasonable view of the evidence. The assessor's reliance on a stabilized operating statement was not improper.

The portion of the order upholding the assessor's "rounding" of the final assessed value was remanded with direction to reduce the rounded assessment to the actual assessed value.

***ABKA Partnership v Board of Review, Village on Fontana on Geneva Lake*, Walworth County Circuit Court, Case No. 97CV501 (1998)** It is the Court's opinion that the decision of the Board of Review was based on substantial evidence and was made according to the law. The assessor gave detailed testimony regarding the rental income being properly included in the assessment. The plaintiff never offered any evidence to rebut the assessor. The assessor discussed Wisconsin law that supported his decision and the plaintiff offered no points of law in rebuttal. The assessor presented evidence to support is argument that the income from the rental units are inextricably intertwined with the property and should be assessed with the resort property. In addition, the evidence submitted indicates that the income from the rental units was property included because it is not related to the plaintiff's labor or skills. The management fees will be generated no matter who owns the property simply because the hotel and the off-site units are so intertwined. Next the plaintiff's expert criticized the information considered by the assessor in establishing his opinion of value. The assessor explained every one of the plaintiff's objections to the Board of Review. The plaintiff's cited cases which they believe require the use of the actual income instead of market or estimated income in applying the income approach. These cases were distinguished by the defendant and the court is not satisfied that any methodology or figures used was contrary to the law. Plaintiff's relied on hypotheticals that went beyond the record created at the Board of Review.

***Northeast Corporate Centre v Board of Review of the City of Glendale*, Court of Appeals, District I, Case Number 98-2864, (2000)** The Board did not require it to produce income evidence *in order to perform a valuation*, but rather, the Board did so *in order to determine whether the properties were comparable* and, therefore, could support Northeast's objections. This purpose is entirely consistent with the Board's authority. Northeast does not deny that it failed to make any good faith effort to produce income information about its own property, or to obtain any of the requested information about other properties. Nor does Northeast dispute the Board's argument that it has authority to dismiss a challenge to an assessment if, in fact, a party has failed to comply with a proper request for information.

Northeast failed to carry its burden to establish that the Board acted contrary to law. The Board acted properly when it dismissed Northeast's challenge.

Northeast Corporate Centre v Board of Review of the City of Glendale, Milwaukee County Circuit Court Branch 18, Case No. 97-CV-008293 (1997) The court held, "The best information of fair market value is the sale of the property, but there has been no such sale. Next best information is sales of reasonably comparable property and reasonable

comparability depends on the degree of similarity between the properties. The income data the Board requested about the alleged comparable properties falls within the elements outlined in the WPAM which would be used when evaluating comparable properties. The requested information would have assisted the Board in determining whether the alleged comparable sales were in fact comparable. The question is whether there was an effort to comply with the subpoena. The court stated that it was significant there was no effort, nor was there any evidence on the record of any effort to comply to provide any information whatsoever.

***Rite-Hite Corporation and Michael H. White v Board of Review of the Village of Brown Deer*, Wisconsin Court of Appeals, District I, docket 96-3178 (1997)** Appeal from a judgment of the circuit court for Milwaukee County. The court held the following: 1) "Under the scope of our review, whether the "comparable" properties identified by Rite-Hite's expert were sufficiently comparable to the Rite-Hite property to be used in arriving at a fair-market value for the Rite-Hite property was the Board's call. Further, the Board credited the assessor's cost-approach methodology over that used by the expert hired by Rite-Hite and White. This, too, was the Board's call. Rite-Hite and White have not demonstrated that the Board's determination was unreasonable or that it represented its will and not its judgment. 2) The assessor testified that he did not believe that the disparity of assessment ratios among the various statutory classes of property violated the uniformity clause. The Board, too, rejected the argument made by Rite-Hite and White that the uniformity clause required uniformity of taxation among all classes of taxable property. This was in error. Accordingly, we remand this matter to the Board for either: a reassessment of the Rite-Hite property in compliance with Article VIII, S. 1 of the Wisconsin Constitution, or a uniformity analysis that demonstrates that the assessment of the Rite-Hite property was done in conformity with that provision. 3) Rite-Hite and White's contention that the assessor cannot ask questions of the witnesses presented by the objecting taxpayer is without merit. 4) Giving the Board access to legal advice on technical and procedural matters advances rather than retards the goal of setting a fair assessment.

John J. Bunker v City of Green Bay Property Assessment Board of Review, Their Agents, Employees, or Those Acting by Their Direction, or on Their Behalf, Court of Appeals, District III, Appeal number 04-10191-FT, June 29, 2004 The Board appropriately relied on the comparable sales method in determining the value of Bunker's property. The Board reasonably refused to rehear Bunker's case. Bunker cites no authority supporting his right to present evidence after the Board of Review's decision instead of during the initial hearing.

Appeals

Once the Board of Review has adjourned, the appeal of an assessment must follow the procedures outlined in WPAM Chapter 18-Board of Review & Assessment Appeals. Whenever the valuation of property is being questioned, the taxpayer must have first appeared before the Board of Review and presented sworn oral testimony.

***Central Cheese Co. v City of Marshfield*, 13 Wis. 2d 524, 109 NW 2d 75 (1961)** Where the Board of Review had adjourned sine die, it could give no further consideration to the assessment.

***State ex rel. Bues v Phelps*, 174 Wis. 203 (1921)** The court held, "A taxpayer must first appear before the Board of Review, object to the valuation of his property and make full disclosure of this property before bringing action to question his assessment."

***Milwaukee County v Dorsen*, 208 Wis. 637, 242 NW 515 (1932)** A taxpayer who does not appear before the Board of Review and object to the validity of the tax sought to be imposed cannot thereafter question the tax imposed on either the property or the income.

***Pelican Amusement Co. v Town of Pelican*, 13 Wis. 2d 585, 109 NW 2d 82 (1961)** The taxpayer, who claimed that the real and personal property taxes were illegal and excessive was required to file written objections with the clerk of the Board of Review and to appear before the town Board of Review and make full disclosure of all of the taxpayer's property before bringing an action for the recovery of the alleged illegal excessive taxes paid.

In cases of illegal taxes not involving the amount or valuation of property or excessive assessment, it is not necessary to comply with the statutes requiring the taxpayer to file a written objection and appear before the town Board of Review.

***Highlander Co. v City of Dodgeville*, 249 Wis. 502, 25 NW 2d 76 (1946)** An assessment on property on any basis other than the full value obtainable at private sale, as required by statute, is illegal and if the assessment is so substantially out of line with other assessments as to impose an inequitable tax burden, the taxpayer may proceed under sec. 74.73, Wis. Stats. relating to the recovery of taxes unlawfully assessed.

***State ex rel. J.S. Stearns Lumber Co. v Fisher*, 124 Wis. 271, 102 NW 566 (1905)** "In order for the appellate court to remove the findings of the Board, the evidence must be overwhelmingly against the Board's findings."

***State ex rel. Garton Toy Co. v Town of Mosel*, 32 Wis. 2d 253, 145 NW 2d 129 (1966)** If the assessor or the Board of Review has excluded from consideration evidence entitled to consideration or the assessor has based the valuation on improper considerations, has gone upon false assumption or theory in determining the amount of the assessment, has given unwarranted effect to facts considered, or has drawn from the unwarranted conclusions, the assessment must be set aside on certiorari.

On appeal, the Supreme Court would not determine the values in reassessment to follow remand upon the vacation of the assessment; reassessment would be the function of the assessor, corrected if necessary by the Board of Review.

***State ex rel. John R. Davis Lumber Co. v Sackett*, 117 Wis. 580, 94 NW 314 (1903)** Where a Board of Review commits a jurisdictional error in increasing the valuation of property, injustice to the owner is presumed, in the absence of any showing to the contrary in the record of the proceedings of the Board, and upon a proceeding by certiorari to challenge the assessment, if there is no affirmative showing that substantial justice has been done, it is error to quash the writ upon the ground that the petitioner has not shown injustice.

***Marina Fontana et al v Village of Fontana-on-Geneva Lake*, 69 Wis. 2d 736, 233 NW 2d 349 (1975)** Taxpayers bought action against the village under sec. 74.73, Wis. Stats. (Recovery of Illegal Taxes) claiming an excessive increase in the valuation of the real estate owned by them. They also claimed that they were not given notice of the increased assessment even though it was in excess of $100 as required by **sec. 70.365, Wis. Stats**. The village countered these claims by pointing out that according to the case of *Pelican Amusement Co. v. Pelican, 13 Wis. 2d 585,* any objection to the assessment must begin at the Board of Review. The taxpayers had not appeared at the Board. The village also contended that the taxpayers failed to properly plead which alternative provision of sec. 74.74, Wis. Stats. they relied on for the reassessment of the property taxes. The court found that the Pelican case was decided in 1961 and that **sec. 70.365, Wis. Stats**. was enacted two years later. This later enactment of **sec. 70.365, Wis. Stats**. modified the holding in the Pelican case. The failure to give the required notice of assessment waived the taxpayer's obligation to appear at the Board of Review. The court dismissed the village's second contention that the taxpayers did not properly plead which alternative provision of sec. 74.74, Wis. Stats. because the responsibility of determining which alternative to proceed under lies with the trial court.

***State ex rel. Geipel v City of Milwaukee* 68 Wis. 2d 726, 229 NW 2d 585 (1975)** The scope of review by certiorari is strictly limited in Wisconsin… the reviewing court may consider only…

1. Whether the Board kept within its jurisdiction;
2. Whether it (the Board of Review) acted according to law;
3. Whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and
4. Whether the evidence was such that it might reasonably make the order a determination in question.

Duesterbeck et. al. v Town of Koshkonong Board of Review, Court of Appeals, District IV, Case Number 98-3048, (1999) The Town violated the rule of uniform taxation when the assessor applied a different method when valuing the Blackhawk Bluff properties, than it applied to other lakefront residential properties, and to other residential properties in the Town in 1993.

The Appeals Court concluded that the 1994 valuations were also the result of the discriminatory appraisal practices used by the assessor in 1993, and, therefore, that the Town's 1994 valuations violated the rule against uniform taxation as well.

The court found the Duesterbeck Owners were entitled to relief for <u>both</u> years; that the circuit court had properly exercised its authority in ordering a refund; and that the Duesterbeck owners are entitled to costs. The court voided the refund for the Saenger Trust Owners, since they did not appeal their 1993 assessment to the Board of Review.

***Karen M. Joyce v Town of Tainter*, Court of Appeals, District III, Case Numbers 99-0324 and 99-1421, (1999)** The orders were affirmed by the Appellate Court based on the following: 1) the assessor acted as a de facto public officer, even if the assessor was not appointed correctly; and 2) a reasonable view of the evidence before the board indicates that the assessor did consider comparable sales.

***U. S. Bank National Association, et. al. v City of Milwaukee*, Court of Appeals, District I, Appeal Number 03-0724, September 30, 2004** What impact does *Nankin* have on sec. 74.37, Wis. Stats. for property owners in Milwaukee County?

Fourteen City of Milwaukee properties appeal an order dismissing their claims for property tax refunds, under sec. 74.37, Wis. Stats., against the City. Prior to the *Nankin* decision, Milwaukee County property owners were not allowed to challenge property taxes under Section 74.37. *Nankin* declared this restriction to be unconstitutional.

The Court decision is based on the following issues:

A. Section 74.37(2)(b)5, Wis. Stats. Issue: The City of Milwaukee's BOR is not done by Jan 31, so taxpayers cannot meet the deadline.

   First, a citizen's resort to the courts may not be frustrated because inaction by the governmental body whose action the citizen seeks to contest makes impossible the citizen's compliance with rules requiring the citizen to act within a certain time.

   Second, "[t]he cardinal principle of statutory construction is to save and not to destroy. Thus, where part of a statute is struck, portions of other statutes that conflict with the surviving statute should not be allowed to nullify full operation of the surviving statute-especially when those now-inconsistent provisions were compatible with the statute before the excised part was removed.

B. **Sections 74.37(4)(a) & 70.47, Wis. Stats.** Issue: Milwaukee taxpayers cannot comply with **sec. 70.47(13), Wis. Stats**.

   Section 74.37(4)(a), Wis. Stats. says that taxpayers need not comply with **sec. 70.47(13), Wis. Stats**. before they may use sec.74.37, Wis. Stats. It is immaterial that City of Milwaukee taxpayers cannot comply with **sec. 70.47(13), Wis. Stats**.; they never had to comply with it.

C. **Section 74.37(4)(b), Wis. Stats.** Issue: Milwaukee taxpayers cannot comply with the payment statutes referenced.

   Again, under the rules of statutory construction we have already discussed, the intent of the legislature that protesting taxpayers must first pay their taxes before they may use **sec. 74.37, Wis. Stats.** can be easily obeyed by, as the trial court recognized, substituting the provision applicable to City of Milwaukee taxpayers; the pre-payment concept is the significant part of the legislative scheme, not the specific provision implementing that scheme.

D. **Section 74.37(4)(c), Wis. Stats**. Issue: The omission of any reference to (16) in **sec. 74.37(4)(c), Wis. Stats**. read literally, means that City of Milwaukee taxpayers could bring BOTH a Writ of Certiorari and a claim under **sec.74.37, Wis. Stats.**

First, as we have already discussed, **sec. 70.47(13), Wis. Stats**. does not apply to City of Milwaukee taxpayers. There is thus no conflict. Second, as to the trial court's concern that City of Milwaukee taxpayers will attempt to use *both* **secs.74.37 and 70.47(16), Wis. Stats**. to challenge a tax assessment, we question whether given the clear advantages of the procedures authorized by **sec. 74.37, Wis. Stats**., *Nankin,* 2001 WI 92 at ~~19-33, 245 Wis.2d at 101-108, 630N. W.2d at 148-151, any City of Milwaukee taxpayer would be tempted to also use the writ-of-certiorari procedure set out in **sec.70.47(16), Wis. Stats**.

E. **Section 70.47(16), Wis. Stats.** Issue: The only appeal is via certiorari, by statute.

Section 74.37, Wis. Stats. trumps any provision that was once, but no longer is, consistent with its provisions, and this includes that part of **sec**. **70.47(16), Wis. Stats**. that says that those contesting City of Milwaukee property-tax assessments may only seek judicial review of those assessments *via* certiorari.

Armin Nankin, Trustee of the Gertrude H. Weiss Revocable Trust v Village of Shorewood, Wisconsin Supreme Court decision, Case Number 99-1058, (2001) We conclude that Nankin has met his burden of proving that **sec. 74.37(6), Wis. Stat**. is unconstitutional as a violation of equal protection. The classification established in this statutory section treats members of the class significantly different than members outside the class. We cannot determine any rational basis for this disparate treatment. Accordingly, we find this statutory section unconstitutional. We reverse the decision of the court of appeals and grant summary judgment in favor of Nankin. Because the legislature has not indicated its intent otherwise, we conclude that **sec 74.37(6), Wis. Stats**. is severable from the remainder of the statute.

Sager v Board of Review of Taycheedah, Wisconsin Court of Appeals, District II, Appeal No. 2009AP972, December 30, 2009

The circuit court's decision was reversed and the case was remanded with directions to affirm the Board's decision, which upheld the Town's assessment.

The Sager's appealed their board of review determination, which upheld the assessment, to circuit court. The circuit court did independent research and remanded the case back to the board of review with directions to value the property between $5,176.50 and $12,390.30.

The court of appeals held that the circuit court had exceeded its authority by going outside of the record to determine the appropriate assessment and by remanding the matter back to the board of review to reassess the property at set amount.

Ownership for Purposes of Appeal

Both the owner as of January 1 and the owner as of the Notice of Changed Assessment date qualify as objectors under sec. 70.47(7)(a), Wis. Stats. Furthermore, if the property is conveyed prior to the last date on which the notice to intent to object must be filed, the new owner qualifies as an objector.

General

Tax Incremental Financing

***Sigma Tau Gamma Fraternity House v City of Menomonie,* 93 Wis. 2d 392 (1980)** The City of Menomonie approved the formation of a Tax Incremental District. Under the Tax Incremental Law, cities are authorized to create tax incremental districts to assist in financing needed public improvements in areas, 25% of which are blighted, in need of rehabilitation or conservation work (sec. 66.435, Wis. Stats.), or suitable for industrial sites (sec. 66.52, Wis. Stats.) Included in this city of Menomonie district was the Sigma Tau Gamma Fraternity House. Even though the fraternity house was in satisfactory condition, the city started condemnation proceedings to take the property for elimination of blighted slum areas and encourage improvements under the tax incremental financing

The owners of the fraternity house challenged:

1. the right of the city to condemn property under the Tax Incremental Law; and
2. the constitutionality of the Tax Incremental Law because of:
   a. lack of uniformity and
   b. lack of public purpose.

Addressing the first challenge, the court held that tax incremental financing is authorization for financing not condemnation. Any proceedings to take property must be done according to appropriate condemnation laws. Since all legislative enactments are presumed constitutional, the court held the Tax Increment Law as constitutional.

State ex rel. Olson v City of Baraboo Joint Review Board, 252 Wis.2d 628, 643 NW2d 796, 2002 WI. APP .64, (2002) The Court found that the meeting notice contained the required elements as required by law. They also found that anyone interested in the TIF district was reasonably apprised that they should attend the Joint Review Board meeting. The notice made clear that the board would be considering whether to approve the TIF district.

On the expenditure issue, the Circuit Court stated "It was the common councils responsibility to authorize expenditures, and that the Joint Review Board had no authority to approve or deny individual portions or items of the project plan." The Court of Appeals agreed with the Circuit Court with regard to the Joint Review Boards duties.

The Court also found that the Joint Review Board is not barred from approving a TIF District if some land within the district would have been developed without being in a TIF. The Court of Appeals noted that the review board must look at the district "as a whole" and determine whether development would occur without the use of tax incremental financing.

In conclusion the Court of Appeals found that the Joint Review Board acted according to the law and that its decision was reasonable.

Objection to County Assessment

***Village of Silver Lake and Town of Randall v Wisconsin Department of Revenue,* Kenosha County Circuit Court (1978)** A request for the Wisconsin DOR to re-determine a county assessment was filed by two municipalities within the county. The court found the request was not provided for in the statutes, which limits such review or redetermination to those complaints brought on by the county, not by the municipalities within the county.

***Thompson v Kenosha County*, 64 Wis. 2d 673, 221 NW 2d 845 (1974)** The court held that abolishing the office of town assessor in favor of a county assessor system (**sec. 70.99, Wis. Stats**.) does not violate the uniformity clause.

Municipal Services on Tax Roll (Special Assessments)

Opinion of Attorney General (January 12, 1968) "you asked whether towns, villages and cities may add to their tax rolls the amounts due from property taxpayers for goods and services such as gravel, snowplowing and blacktopping, which have been furnished by the taxing district to the taxpayer.

Certainly in the absence of any statute authorizing such a practice, a taxing district would have no basis for adding such items to the regular tax roll and treating these amounts due as liens upon the property. In some instances the amounts due for goods and services furnished by a municipality may be added to the tax roll, but this is pursuant to express statutory authority. See, for example, section 94.22 regarding the cutting of noxious weeds by a municipality, and section 66.069(1) (b), regarding amounts due for water."

Treasurer's Signature on Tax Receipt

Failure to properly sign the tax receipt does not affect the rights of the taxpayer. A rubber stamp signature is acceptable.

Forest Crop Land

58 Opinion of Attorney General 8 (1969) "In order to be eligible for entry under the forest crop law, the lands must be continuous or contiguous, and 40 or more acres individually, would not be eligible even if they total more than 40 acres, for 'contiguity' is the essence of the definition of the word 'tract' as it appears in s. 77.02(1), Wis. Stats. Such detached lands would, however, be eligible for entry under the Woodland Tax Law (Sec. 77.16, Wis. Stats.)."

Section 77.16, Wis. Stats. now restricts entry under the woodland tax law to lands of 10 acres or more.

NOTE: Due to statutory changes, lands may no longer be entered in the Forest Crop Land or Woodland Tax Law programs. Lands must be entered in the Managed Forest Land program. See WPAM Chapter 6 of Volume I for further information on this program.

State Assessment of Manufacturing Property

***S.C. Johnson & Sons, Inc. v Wisconsin Department of Revenue,* Court of Appeals, District IV, Docket No. 95-3215, (1996)** The resolution of this case depends on an interpretation of **sec. 70.995, Wis. Stats**. If the plain meaning of the statute is clear, then the rules of statutory construction or other extrinsic aids are not examined by the Court. *UFE Inc. v. LIRC, No. 94-2794,* [*slip op. at 4 (Wis. May 22, 1996)*].

The first two sentences of **sec. 70.995(1)(a), Wis. Stats**. creates three categories of manufacturing property: (1) lands, buildings, structures and other real property used in manufacturing, assembling, processing, fabricating, making or milling tangible personal property for profit; (2) warehouses, storage facilities and office structures when the predominant use is in support of property belonging to the first group; and (3) all personal property owned or used by any person in this state engaged in any of the activities mentioned and used in the activity.

Section 70.995(1)(a), Wis. Stats. does not provide that structures used predominantly in support of manufacturing property are manufacturing property. It plainly limits the support structures that qualify as manufacturing property to warehouses, storage facilities or office structures.

The plain language of **sec. 70.995(1)(a), Wis. Stats**. cannot be ignored. Armstrong Park is not incorporated into a structure that is used for manufacturing and it is not a warehouse, storage facility, or office structure.

Although the introductory language of **sec. 70.995, subsection (2)** confuses the distinction between the activities or industries included in the definition of manufacturing and the type of property included in the definition of manufacturing property, a reasonable interpretation of subsection (2) is that it defines the activities or industries that are considered manufacturing. It does not add a fourth category of manufacturing property.

This conclusion is based on two reasons: First, subsection (1)(d) refers to the classification in subsection (2) as "activities"; Second, the Petitioner's fourth category includes the second category, making an extra requirement that the support structure be a warehouse, storage facility or office structure. Courts should avoid interpreting extra constructions into statutes. *State v. Wachsmith, 73 Wis.2d 318, 324, 243 N.W.2d 3410, 3414 (1976).*

The Wisconsin Supreme Court denied S.C. Johnson's petition for review on September 17, 1996. The Court of Appeals decision stands.

***State ex rel. Fort Howard Paper Co. v State of Wisconsin, Lake District Board of Review,* 82 Wis. 2d 491, 263 NW 2d 178 (1978)** The court found the assessment of manufacturing property as provided in **sec. 70.995, Wis. Stats**. does not violate either the uniform taxation or the equal protection clauses of the Wisconsin Constitution. The taxpayer failed to prove that the revaluation of manufacturing property over a four-year period would violate **sec. 70.32, Wis. Stats**. requiring full value assessments.

***Zip Sort, Inc., d/b/a Federal Mailing Systems v Wisconsin Department of Revenue,* Court of Appeals, District IV, Case No. 00-2824, (2001)** Zip Sort first argues that de novo review is necessary because the question the TAC faced was one of first impression, as well as one where it had no special expertise. Zip Sort asserts that it uses technology not contemplated by the SIC manual, which was published in 1987, and that the TAC therefore could not rely on the SIC manual. We disagree. Even assuming the TAC has not previously decided whether the application of bar codes to mail is manufacturing under **sec. 70.995, Wis. Stats**., it is still entitled to some degree of deference. Assuredly, this is not the first time that the TAC has been called upon to make **sec. 70.995, Wis. Stats.** determinations for business activities that, due to technological advances, were not specifically contemplated by the fourteen-year old SIC manual. The WPAM is promulgated by DOR and is the primary document for defining assessment standards and practices in Wisconsin. *See Campbell,* 210 Wis. 2d at 258. The WPAM explicitly recognizes that not all business activities will be covered by the SIC manual, and it sets forth the three questions precisely for the purpose of interpreting "the criteria and general definitions included in **sec. 70.995(1)(a) and (b), Wis. Stats**." The TAC's decision to apply the three questions in the WPAM in interpreting **sec. 70.995, Wis. Stats.** was therefore reasonable. The questions themselves refer to language in the statute, and Zip Sort's assertion that the general definition of "manufacturing property" in the statute must be analyzed independently of the questions is no more reasonable that the interpretation of the TAC.

We conclude that the TAC is experienced in interpreting **sec. 70.995, Wis. Stats**., and that any inconsistency in its past decisions was with regard to an issue not dispositive of this case. We disagree with Zip Sort's assertion that the correct standard of review is de novo.

The TAC's interpretation of **sec. 70.995(1)(a), Wis. Stats.** is reasonable, and the alternative proposed by Zip Sort is not more reasonable. Therefore, we need not determine whether the proper standard of review is due weight deference or great weight deference.

***APV North America, Inc. v Wisconsin Department of Revenue*, Wisconsin Tax Appeal Commission, Docket Number 01-M-220, December 13, 2002.** The Tax Appeals Commission granted the Department of Revenue's (DOR) motion and dismissed the petition for review. The Commission lacks matter jurisdiction over the petition because North America, Inc. (APV) was not aggrieved by the action of the State Board of Assessors. They requested and received a reduced assessment.

APV owns a manufacturing property in Lake Mills. The DOR assessment on the property was $6,889,700. APV filed an objection with the State Board of Assessors stating the property should be valued at $6,000,000 based on the asking price of the property. At the time, APV was negotiating the sale of the property.

The Board of Assessors issued its Notice of Determination for $6,000,000 on October 16, 2001.

APV and the buyer agreed to a price of $4,400,000 after receiving the Notice of Determination but before filing the petition for review. APV filed a petition for review with the Commission to further reduce the assessment to $4,400,000. On January 4, 2002, the property sold for $4,400,000.

Recovery of Taxes Paid

***S.C. Johnson & Sons, Inc. v Town of Caledonia*, Court of Appeals, District II, Docket No. 95-2700, October 23, 1996.** Affirmed and cause remanded. Traditionally, statutes have permitted an action for the recovery of illegal taxes paid. In *Pelican Amusement Co. v. Town of Pelican, 13 Wis. 2d 585, 109 N.W.2d 82 (1961),* the Supreme Court addressed sec.74.73(1), Wis. Stats., 1957, the predecessor statute to the present **sec.74.37, Wis. Stats**. That statute permitted an action for the recovery of illegal taxes paid (*Pelican, 13 Wis.2d at 591, 109 N.W.2d at 85*). The court said: "Prior to 1955, sec. 74.73(4), Wis. Stats. required an allegedly excessive assessment to be re-viewed by an appeal from the determination of the board of review by a writ of certiorari to the circuit court." Note: By Ch. 440, Laws of 1955, the provision that required an appeal from the determination of the board of review was eliminated.

The language in **sec.74.37(4)(a), Wis. Stats**., when compared with the certiorari statute, **sec.70.47(13), Wis. Stats**. supports the interpretation that **sec.74.37(4)(a), Wis. Stats**. embodies the ***Pelican*** rule that envisions the alternative methods of judicial review.

In 1987, the legislature enacted **sec.74.37, Wis. Stats**. in its current form. Consistent with the *Pelican* holding, subsec. (3)(d) of this statute authorizes an action in circuit court to collect the amount of the claim not allowed.

Section 74.37, Wis. Stats. carries language that signals the legislative intent to create a separate and distinct method of judicial review.

Since the legislature eliminated the certiorari method of judicial review by the language in **sec. 70.47(13), Wis. Stats**., it contemplated another in **sec. 74.37(3)(d), Wis. Stats**. by providing for a separate action in the circuit court. For example, before an action under sec. **sec. 74.37, Wis. Stats**. may be commenced, the taxpayer must first pay the disputed tax and comply with the claim procedures set out in the statute—**Section 74.37(4)(b), Wis. Stats. Section 70.47, Wis. Stats**. carries no such requirement.

The legislature provided a clear signal that they contemplated alternative methods of judicial review at the option of the taxpayer when constructing **sec. 74.37(4)(c), Wis. Stats**. **Section 74.37(4)(c), Wis. Stats**. provides that no action may be brought under this statute if the taxpayer has contested the assessment for the same year under sec. 70.47(13), Wis. Stats., the certiorari statute. **Section 74.37(3)(d), Wis. Stats**. allows for a trial de novo as a means of judicial review when the taxpayer claims an excessive tax.

The Town failed to meet the exceptions of the "no standing rule" and thus could not make a valid argument that Johnson's interpretation of the statute produced a constitutional violation of the uniformity clause.

Because the Town raised a statutory construction argument, the trial court is correct to examine this argument as a constitutionality issue. In similar situations where a municipality sought to defend a taxpayer's suit by raising claims of unconstitutionality, the Wisconsin Supreme Court has analyzed the question under the "no standing" rule and its

exceptions. See, for example, ***Fulton Found . v Department of Taxation***, *13 Wis.2d 1, 11, 108 N.W.2d 312, 317 (1961)* and ***Associated Hosp. Serv., Inc. v City of Milwaukee***, *13 Wis.2d 447, 469, 109 N.W.2d 271, 282 (1961).*

The rule does not apply: (1) when the governmental agency has a duty to raise the issue, or the agency will be personally affected if it fails to do so, and the statute is held invalid; and (2) if the issue is of "great public concern." The Town did not meet any of these conditions.

Subdivided Property

Whitecaps Homes, Inc. v Kenosha County Board of Review, **Wisconsin Court of Appeals, District II, Docket No. 96-1913, (1997)** The court must consider: "'(1) [w]hether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.'" ***Metropolitan Holding Co. v Board of Review***, *173 Wis.2d 626, 630, 495 N.W.2d 314, 316 (1993)* (citations omitted).

Because the Whitecaps development has relatively small lot sizes, the front foot method is more appropriate to use than the square foot method according to the WPAM, Part I at page 8-2 (1997 WPAM Revised 12/91).

For the Board to choose an across-the-board reduction in such an instance is not arbitrary when the lots and the lots containing partially completed homes in a development are so similarly situated and it is apparent that the assessor's initial valuation considered those lots and partially completed homes which presented unique characteristics.

The Board's decision to reduce the overall land assessments by some percentage was a proper exercise of its discretion.

The value assigned to each lot by a developer who sells only home packages may not necessarily be considered comparable to an arm's-length sale.

The evidence before the Board provided a "substantial basis" for the Board's decision to reject the assessor's methodology and utilize a flat assessment value for these lots. See ***N.C. Foster Lumber Co.,*** *123 Wis. at 65, 100 N.W. at 1049.*

Use-Value of Farmland

Mallo v Wisconsin Department of Revenue, **253 Wis2d 391, 645 N.W2d 853, 2002 WI 70, (2002)** The summary judgment from the Dane County Circuit Court in favor of DOR was affirmed and the action dismissed. **Section 70.32(2r), Wis. Stats**. grants the DOR authority to promulgate Wisconsin Administrative Code Section Tax 18.08, implementing full use value assessment of agricultural land beginning January 1, 2000. After reviewing the plain language of the **sec. 70.32, Wis. Stats**., the court concluded it is unambiguous and gives DOR the authority to promulgate Wis. Admin Cost Tax 18.08. In addition, the legislature was aware of the pending challenge to the proposed rule's impact and neither legislative committee objected to the rule.

***Ray Mallo and Wanda Mallo v Wisconsin Department of Revenue,* Court of Appeals, District 4, Case #00-3252, (2001)** The Court held that resolution of this appeal is undeniably a matter of substantial statewide importance because the immediate full implementation of the agricultural-use-value provides a substantial benefit to some property owners and presumably increases the tax burden of other property owners throughout the state. The three members of the Appellant Court believe the Wisconsin Supreme Court is the appropriate forum to resolve this controversy.

***Norquist v Zeuske,* 253 Wis 2d 445, 645 N.W.2d 869, 2002 WI 69 (2002)** The Wisconsin Supreme Court was petitioned to review the unpublished decision of the Court of Appeals in *Norquist v. Zeuske*, case number 98-2795 that dismissed the complaint. The Court of Appeals affirmed the Dane County Circuit Court decision dismissing the complaint. The plaintiffs challenged the constitutionality of **sec. 70.32 (2r), Wis. Stats**. providing use-value assessment of agricultural land as of January 1, 2000, in Dane County Circuit Court. The case was dismissed after the judge concluded the plaintiffs failed to carry their burden of proving the statute was unconstitutional. The Wisconsin Supreme Court held the decision in *Mallo* makes this case moot and the petition for review is dismissed.

***John O. Norquist, et al. v Cate Zeuske, Secretary of the DOR,* Wisconsin Supreme Court, Docket No. 96-1812, (1997)** Original action for declaratory judgment: Dismissed without prejudice.

Because the value of Jorgensen's agricultural land could decrease and will inevitably change by a degree different from other agricultural land, he has demonstrated the injury necessary for standing to challenge the constitutionality of **sec. 70.32(2r), Wis. Stats**. (Mr. Jorgensen is one of the appellants in this case).

To prove whether **secs. 70.32(2r)(a) and (b), Wis. Stats**. violate the Uniformity Clause of the Wisconsin Constitution, an owner of agricultural land will have to (1) satisfy the initial burden by proving that his agricultural land is over assessed and that other agricultural land is under assessed as a result of the statute, and (2) demonstrate beyond a reasonable doubt that **sec. 70.32(2r), Wis. Stat.** does not create uniform taxation of agricultural land to the extent practicable.

Jorgensen has not offered any evidence that his property is over assessed or that other agricultural land is under assessed, but it is apparent that some agricultural land will change in value and cause Jorgensen's property to not be treated uniformly. However, this information is not sufficiently developed and thus a decision in this case would be premature.

A determination of the constitutionality of **sec. 70.32(2r), Wis. Stats.** must await a more developed record. A property owner may be able to prove the statute unconstitutional in the future.

Because this action is premature, the question of whether **secs. 70.32(2r)(a) and (b), Wis. Stats.** are severable from **sec. 70.32(2r)(c), Wis. Stats**. has not been reached.

The Court held that Jorgensen, who owns agricultural land, has standing to challenge the constitutionality of **sec. 70.32(2r), Wis. Stats**., but given the state of the record, a decision by this court would be premature. Motion for reconsideration denied as of 06/26/97.

Compensation for Partial Taking of Land

National Auto Truckstops, Inc. v State of Wisconsin, Department of Transportation, 2003 WI 95, July 8, 2003 **The Supreme Court reviewed the decision from the Court of Appeals. The Supreme Court affirmed in part, reversed in part, and cause remanded.**

National Auto Truckstops, Inc. (National) petitioned the Supreme Court to review the decision of the court of appeals related to exclusion of certain evidence when determining an appropriate amount of compensation for the partial taking by the Department of Transportation (DOT). DOT condemned 0.27 acres of National's frontage along Highway 12 for a reconstruction and widening project. The jury awarded National $275,000. The circuit court denied the motions from National and DOT for a new trial. National appealed the decision and the court of appeals affirmed the judgment and order of the circuit court.

National owns a truck stop outside of Hudson near the intersection of U.S. Highway 12 and Interstate 94. Before the Highway 12 reconstruction project the truck stop had two direct access points, one for trucks and the other for cars. The truck stop consists of a travel center, diesel and gasoline sales, a restaurant, convenience store, diesel truck services and other services. Twin City East manages and operates the truck stop through a lease with National.

The Supreme Court reviewed two issues in this case:

1. Did the circuit court erroneously exclude evidence of the alleged damages due to a change in access to National Auto's property; and
2. Did the circuit court erroneously exclude evidence based on the income approach when valuing the taken property?

DOT acquired National's property under sec. 84.09, Wis. Stats. DOT claims it changed access to the truck stop as an exercise of its police power and the action is not compensable. The Supreme Court disagreed with DOT. In previous cases, the Supreme Court has stated "the Wisconsin statutes specifically provide that compensation shall be paid when there is a partial taking of premises, such as access rights under the power of eminent domain."

The Supreme Court held that the circuit court erroneously excluded evidence related to National's alleged damages due to the change in access. This issue was remanded to the circuit court for a jury to determine if the change in access was reasonable. No compensation will be awarded if the jury finds the change in access was reasonable. If the jury finds the change was not reasonable, National will be entitled to just compensation.

The circuit court did not err when it excluded income approach information to value the condemned portion of National's parcel. The Supreme Court ruled in *Leathem*, 94 Wis. 2d at 413 that income evidence is normally inadmissible to establish property values since the

business income depends on too many variables, such as an owner's skill and talent, and is therefore not reliable as a guide to fair market value. There are three exceptions to this rule: 1) when the character or the property is such that profits are produced without the labor and skill of the owner; 2) when profits reflect the property's chief source of value; and 3) when the property is so unique that comparable sales are unavailable. "…Wisconsin law holds that income evidence is never admissible where there is evidence of comparable sales." The court of appeals noted that evidence of comparable sales was available in this case.

National believes income evidence should be allowed since there is a lease and the rental income is non-speculative. The Supreme Court disagreed stating they are bound by prior case law deeming that "income evidence is never admissible where there is evidence of comparable sales." In *Leathem* the Supreme Court stated "…because there was evidence of market value based on comparable sales, for that reason alone the trial court was justified in holding valuation based on income to be inadmissible."

Billboards

Adams Outdoor Advertising, Ltd* v *City of Madison, Wisconsin Court of Appeals, District IV, Appeal No. 2009AP1373, July 8, 2010

The court of appeals affirmed the circuit court's decision, which concluded that the City's assessments were improper.

In 2002 and 2003 the City included a portion of the billboard permits' value in the assessment of billboards. In 2006, the Wisconsin Supreme Court held in *Adams I* that cities could not include the value of billboard permits in their assessments of billboards. In that decision, the Court noted that billboard permits are taxable real property as defined under sec. 70.03, Wis. Stats., and that its decision did not shift 100 percent of the real property tax burden relating to the permits from the billboard owners to the owners of the land upon which the billboards were placed.

As a result, the City suggested that a portion of the permit value should be taxed as stand-alone real property, untethered to either the billboards or the land underneath them. However, the court of appeals noted that the City used a different approach than the one it was arguing. The City had placed an assessed value on the billboard structures treating the permits as though they added value to these structures. *Adams I* expressly precluded this action.

Adams Outdoor Advertising, v City of Madison, Supreme Court of Wisconsin on certification from the Court of Appeals, Case No. 2005AP508, July 13, 2006. **The Supreme Court reversed the City's assessment. The case has been sent back to the Circuit Court pending reassessment of Adams' billboards by the City or until the parties reach a settlement.**

Adams appealed under **sec. 74.37, Wis. Stats**. after appearing at the Board of Review. The Court consolidated the 2002 and 2003 actions. The City's Assessor testified the billboards were appraised using the income approach since there were no recent arm's-length sales of billboards and no reasonably comparable sales information.

The City was entitled to use the 3rd tier methods of assessment to assess the billboards in the absence a recent arm's-length sale. The income approach used cannot be the sole controlling factor in determining value as the prevailing practice for assessing billboards throughout Wisconsin and the United States uses the cost approach. The City erred by including the value of billboard permits in the assessment since the permits are not tangible personal property.

"We conclude that because billboard permits are real property, as defined in Wis. Stats. § 70.03, the income attributable to them is properly included in the real property tax assessment, not the personal property tax assessment. Any value attributable to the billboard permits is not inextricably intertwined with the structure of the billboards. The primary value of the permits is unrelated to the structures; rather, the primary value of the permits appertains to the location of the underlying real estate."

The City's use of the income approach violating the Uniformity Clause was not questioned due to the (2) stated errors immediately above.

Clear Channel Outdoor, Inc. and Lamar Central Outdoor, LLC v City of Milwaukee and City of Milwaukee Board of Assessors, Wisconsin Court of Appeals, District I, 2011 WI App 117, July 26, 2011 **(Petition for review pending as of October 12, 2011)**

What Assessors should know: A dispute over a city's legal authority to tax billboards as property must be initially brought to the Board of Review before it can be properly heard in court.

The Court's reasoning: Clear Channel Outdoor and Lamar Central Outdoor appealed the circuit court's dismissal of their complaints seeking declaratory judgment to overturn the assessment of their billboards.

The court concluded that its review was limited to whether or not Clear Channel and Lamar first exhausted all of their administrative remedies in accordance with sec. 70.47(16)(a), Wis. Stats. That section prohibits any person from filing a lawsuit questioning the "amount or valuation" of real or personal property without first taking their claim to the Board of Review.

Clear Channel and Lamar argued that they were not objecting to the "amount" or "valuation" of the assessment, but instead were challenging the City's constitutional authority to levy tax, so that sec. 70.47(16)(a) did not apply.

The court disagreed, finding that any determination on the validity of the tax is necessarily and directly tied to determining "amount of valuation." Whether real or personal property, a crucial component of a billboard's value is the associated permit granted by the City. Clear Channel and Lamar's challenge was essentially a dispute over the permit aspect of

the billboards' value and thus concerned "amount of valuation" as contemplated by sec. 70.47(16)(a). For that reason, the issue must first be addressed by the Board of Review.

Constitutionality of Appeals Options

Metropolitan Associates,* v *City of Milwaukee, Wisconsin Supreme Court, 2011 WI 20, March 25, 2011

What Assessor should know: All of 2007 Wisconsin Act 86's modifications to secs. 70.47, 73.03, and 74.37, Wis. Stats. are unconstitutional. Instead, property owners may challenge Board of Review assessment determinations with either certiorari or de novo review. This ruling reversed a prior Court of Appeals decision.

Also, property owners are not afforded the right to a jury trial in disputes over property assessments.

The Court's reasoning: *Metropolitan* is the legislature's second attempt to limit property owners' ability to seek judicial review of property assessments. The first attempt was challenged by *Nankins v. Village of Shorewood,* 2001 WI 92. The *Nankin* court struck down a statute that denied property owners in counties over 500,000 people or more the ability to challenge property assessments with de novo review in circuit courts. The statute in *Metropolitan* allowed municipalities to "opt out" by providing an enhanced certiorari review in place of the traditional de novo review.

The court in *Metropolitan* reasoned that Act 86 lacked a rational basis because it created a distinct class of taxpayers in the "opt out" municipalities, this new class was treated differently because they were unable to contest their case in a court trial and there was no rationale for treating these citizens differently than others. Therefore Act 86's denial of de novo review to a distinct class of citizens violated both the Wisconsin and the United States Constitutions.

Metropolitan Associates v City of Milwaukee, Wisconsin Court of Appeals, District I, Appeal No. 2009AP524, September 9, 2009

Act 86 provides an alternative appeals process in lieu of sec. 74.37(3)(d), Wis. Stats., which grants property owners the right to appeal a BOR decision to circuit court for certiorari review. The alternate appeal process was implemented in Milwaukee as the standard procedure for appeal. Act 86 also gave other municipalities the option of utilizing the alternate appeal process by passing an ordinance to that effect.

Metropolitan asserted that Act 86 violated the equal protection clauses of both the US and state constitutions by depriving property owners in Milwaukee, and those in opt-in municipalities, of an independent action in circuit court for appealing assessments. The circuit court agreed.

The appeals court reversed the circuit court's decision stating that the alternate appeals process granted under **secs. 70.47(13) and 70.47(16)(a), Wis. Stats**. provides property owners with the functional equivalent of a full trial. The court ruled that the treatment of

taxpayers operating under the new options were not 'substantially different' than the treatment of taxpayers in jurisdictions where an action for certiorari under Sec. 74.37(3)(d) Wis. Stats. is preserved.

Pending. Metropolitan appealed to the Supreme Court who is expected to render an opinion in 2010 on the following issues: Does 2007 Wisconsin Act 86 violate the equal protection clause, and specifically, is the appeal court's decision in this case in conflict with the Supreme Court's decision in Nankin v Village of Shorewood.

Fair Market Value

State of Wisconsin ex rel. Stupar River LLC v Town of Linwood, Portage County Board of Review. Wisconsin Supreme Court, 2011 WI 82, July 22, 2011

What Assessor's should know: The law does not require that the assessed value of a property equal its fair market value. It only requires that the assessed value be based on the property's fair market value.

The Court's reasoning: In 2001, Stupar River LLC purchased a property in the Town of Linwood for $830,000. In 2002, the town assessed the property at $1,831,500. Stupar mounted an unsuccessful legal challenge to the 2002 assessment. The same $1,831,500 figure was used for the years 2003 and 2004.

In 2005, the assessed value increased to $1,893,400. Once again Stupar challenged the assessed value. While litigation over the 2005 value was pending, the 2006 assessment resulted in a lower value of $1,435,900. The circuit court remanded the case to the Board of Review with instructions to either re-assess the property for the years 2003 - 2005 in a manner consistent with the 2006 appraisal or to provide a rational explanation as to why the 2006 value was lower.

The Board of Review opted for the latter, explaining that the lower 2006 value was not due to any change in the fair market value of the property but was instead made in response to a Department of Revenue report calling for a lower total assessed value of the commercial class of properties in order to "bring it back in line with the other classes of properties."

Stupar argued that the assessed value of a property must, pursuant to sec 70.32(1), Wis. Stats., equal that property's fair market value, and that the lower 2006 value demonstrated that the 2003, 2004 and 2005 values were above fair market value of the subject property.

The court disagreed. The *Property Assessment Manual* requires only that a property's assessed value be *based on* fair market value and need not be *equal to* its fair market value in order to comply with sec. 70.32(1), as assessments at a percentage of fair market value are acceptable when applied uniformly. Thus, the court concluded that the 2005 assessment was made in accordance with sec. 70.32(1) and the assessed value was presumed accurate in the absence of any evidence to the contrary.

David G. Hildebrand and Susan G. Hildebrand v Town of Menasha, Wisconsin Court of Appeals, District II, 2011 WI App 83, May 11, 2011.

What Assessors should know: a municipality may not legally assess commercial property for the cost of installing a portion of an asphalt recreational trail, where the purpose is to complete a trail system in that county and the property is already served by a trail.

The Court's reasoning: Section 66.0703(1)(a), Wis. Stats. allows certain municipalities to levy special assessments upon property in a limited and determinable area for special benefits conferred upon the property by any municipal improvement. Special assessments can only be levied for local improvements.

The primary purpose of the improvements was not local benefit, but general benefit. The purpose was to complete a recreational trail system throughout Winnebago County that would eventually connect with other municipalities. The lower court also noted that the Hildebrand property was on a trail system before the new trail was installed.

The court also rejected the Town's argument that a recreational trail was the same as a sidewalk under sec. 66.0907, Wis. Stats.