



CITY OF WAUWATOSA
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BOARD OF REVIEW
Tuesday, January 11, 2011 – 1:00 p.m.

PRESENT: Mr. Benz, Mr. Duffey, Mr. Rice

ALSO PRESENT: Ms. Aldana, Asst. City Atty./Human Res. Dir.; Mr. Miner, City Assessor; Mr. Lenski, Dep. City Assessor

Mr. Benz in the Chair

Personal Property Account #162325
2500 N. Mayfair Road

(Meeting continued from December 17, 2010.)

Mr. Millis referred to Section 70.17 (1) of the Wisconsin Statutes saying that this section gives an assessor the option to assess improvements on leased land as either real or personal property for the 2008-2010 tax years. He noted that the assessor has opted to assess Macy's leasehold improvements as personal property for the years in question.

The following exhibits were entered into the record:

- Exhibit 21 Transcript from December 15, 2011, pages 1-6, and 9-12
- Exhibit 22 Transcript from December 17, 2011, pages 1-12, and 41-48
- Exhibit 23 Amendment to Lease dated May 22, 1989
- Exhibit 24 Assignment and Assumption Agreement (Real Estate) July 31, 2004
- Exhibit 25 Amended 2008-10 Personal Property Tax Returns, Seibel Law Offices, January 11, 2011
- Exhibit 26 Macy's Inc. v City of Wauwatosa, Reinhart Boerner Van Deuren, January 11, 2011
- Exhibit 27 Summary Appraisal Report, American Valuation Group, Inc., January 1, 2009

Mr. Millis noted Exhibit 21, page 9, line 18 which reads, "In the City of Wauwatosa, the Assessor's Office has adopted a policy whereby all tenant improvements, leasehold improvements made by the tenant, are assessed as personal property under the Statement of Personal Property, and the Assessor's Office does do an investigation of each reported leasehold improvement to make sure that there is no double counting."

Mr. Miner commented that discovery is part of their job. The methods include building permits and statement of personal property. There is a back and forth to determine what the person is reporting.

Mr. Millis felt that when the Assessor has to make a determination s/he may determine that it is personal or real property. He asked if Mr. Miner agreed that 'vanilla shell' improvements must be included in the assessment. Mr. Miner responded that it would depend on what was being leased. It could be leased as 'vanilla shell'.

Mr. Millis thought that 'vanilla shell' is the description of the lessee's rental. Mr. Miner explained that this became necessary in 2009; however, in 2008 they had no answer for leasehold improvements.

Mr. Millis thought that leasehold improvements came about in 2009. He noted that the 86th amendment deals with assignment and subletting. Leasehold improvements are not mentioned. Mr. Miner noted that the same amendment also says the tenant shall not assign transfer or sublet the property.

A discussion continued regarding Exhibit 22, page 46, line 10 regarding the Darcel decision which stated that the contract rent has to be used if there is a long-term lease. As the assessor, Mr. Miner noted that he should use the contract rent if it's a long-term lease and it is going to encumber the property. Mr. Miner explained that the income approach would include a portion of value that is attributable just to that lease which includes that footprint of the store and the shell of the building.

The discussion continued regarding the status of the Macy's property as 'vanilla shell' or something more. The number of fixed assets listed on their forms and any way in which the conversion factor pertaining to useful life of the improvements would apply.

Mr. Miner thought it was unusual that they didn't consult the contractor. They had no information from Macy's. He referred to tab 18 in the assessor's binder where Marshall & Swift provided estimates of useful life for different types of material used in remodeling. Mr. Miner didn't find out about a number of the improvements until August, 2010. Macy's did four or five million dollars more in improvements, but that wasn't indicated in their paperwork.

Ms. Seibel noted that the improvement values from 2008-2009 are different. Mr. Miner explained that it goes back to 2006. The value for the improvement for McCormick and Schmick was asked to be separate from Macy's. The improvement value has decreased as the land value has increased.

The board recessed at 2:55 p.m. and reconvened at 3:14 p.m.

Mr. Miner commented that they had an appraiser do an analysis of the property. The appraiser did not include the rent or leasehold improvements. He added that they use contract rent – other criteria were Wisconsin law. He noted that if the landlord puts in the improvements in the rent would go up.

Ms. Seibel asked if there was a large category of property that would go untaxed if leasehold improvements were not included in the assessment criteria. She cited Sections 70.17 and 70.18 of the Wisconsin State Statutes which state that an assessor is allowed to choose to tax and assess leasehold improvements as either real or personal property. In the City of Wauwatosa the Assessor's Office has adopted a policy whereby all tenant improvements, leasehold improvements made by the tenant are assessed as personal property under the Statement of Personal property. The Assessor's Office does an investigation of each reported leasehold improvement to make sure that there is no double counting. Leasehold improvements cannot be assessed as both personal property and real property. She asked who was in possession of the leasehold improvements.

Mr. Miner responded that they belonged to Macy's. He added that at the end of the cycle for assessing personal property they look at equipment. It is a time consuming process.

Ms. Seibel asked for Mr. Miner's opinion of the value of the leasehold improvements for Macy's.

Mr. Miner reported that the value for the leasehold improvements were as follows: 1) 2008 - \$8,825,933; 2) 2009 - \$8,686,568; and 3) \$11,704,800. He added that Macy's has not questioned the value.

Mr. Millis noted that General Growth Properties gets nothing for the improvements, but the increased sales raise the rent to General Growth Properties. In other words, improvements might bring in more sales.

Mr. Miner observed that sales have gone down since Macy's has taken over the store. Mr. Millis countered that if improvements hadn't been made maybe sales would have been even less. He asked if General Growth Properties came into possession of the store because the lease is gone wouldn't the leasehold improvements be important to them. Mr. Miner declined to answer saying that the scenario is conjecture. He added that if Macy's were to default on their lease the leasehold improvements could be a factor.

Mr. Millis thought there should be a time difference to determine whether leasehold improvements have an influence. He asked if there were more factors to consider than rent and the cost of leasehold improvements. He thought that the rent under the Darcel case covers improvements. They have a below market lease using the income approach.

Ms. Seibel noted that Section 70.17 of the Wisconsin State Statutes should be broadly construed to encompass a multitude of improvements that the occupier of the land might choose to do. She added that \$10,000,000 in improvements was put in by Marshal Fields and \$5,000,000 was put in by Macy's. If those amounts were charged through the rent it would create the biggest loophole around. The goal is to access all taxable property. According to the State Supreme Court, it should be construed broadly in order to cover all situations. General Growth Properties has determined the rent. Macy's has not said that they are leaving the location. He noted that leasehold improvements on a multi-tenant property have been assessed with the land apart from the leasehold improvements in the City of Milwaukee. They have no evidence of what Macy's believes the value is.

Mr. Millis pointed out the Macy's appraiser, Mr. Kenney, was not present to testify regarding his appraisal.

Ms. Seibel stressed that Mr. Miner offered his income based evaluation as proof that there is no double taxation. The appraisal was just added information.

The board recessed at 3:40 p.m. while members read Exhibits 23 through 27 and reconvened at 4:10 p.m.

Mr. Millis gave his closing statement. He didn't think that Section 70.17 (1) of the Wisconsin State Statutes applies in this case. He noted that Ms. Seibel said that if the board finds for Macy's they will open the flood gates. When the discussion centers on millions of dollars it is time to start litigating. The value would be determined by the amount of rent that's paid. The Keane case said that 'vanilla shell' was presented to Marshal Field and Macy's finished with improvements. Once improvements are completed they become the property of the landlord.

Mr. Millis felt that Mr. Miner had not been consistent with his arguments. He noted that in 1999 in a Supreme Court Case under Wisconsin law it was determined that all real property must be assessed. Leasehold improvements are real property. All is governed by the lease. He and his clients are of the opinion that the lease provides real property and should be assessed to the owner. All the fixtures

and wall hangings are owned by Macy's. Macy's filed a motion to stop the subpoena and it was never enforced. They don't think the valuation of the property is correct. The amended appraisal was not used.

Ms. Seibel gave her closing statement starting with a question, asking if this property was taxable. Wisconsin State Statute Section 70.03 says that all property must be taxed and under Sections 70.17 and 70.18 gives direct statutory authority. They believe that Macy's is the owner, but Macy's disputes this, so the assessment goes to the occupant. Macy's is the owner of the leasehold improvements. In 1989 the lease required an investment of \$10,000,000. Macy's was given the authority to sell the improvements. The assessor has the authority to tax. There is no ground lease in this issue.

Ms. Seibel noted that the Department of Revenue is talking about leased land under 70.03 - real property, real estate, and land (not only the land itself) plus building and improvements thereon and all fixtures and rights and privileges.

Ms. Seibel added that Macy's is asking for the board to accept a value of zero on \$10,000,000. She pointed out that, in the case of McCormick and Schmick, they built the building and pay \$365,000 for the ground lease; therefore, the entire building is assessed. The burden of proof as reflected in Section 70.34 of the Wisconsin State Statute notes that when assessing personal property, the assessor should use his/her best judgment when assessing a property omitted tax assessment. The burden of proof for Macy's is to show that the assessor was wrong.

Ms. Seibel added that it is ludicrous to assume that Macy's doesn't expect to get something for the investment in the improvements. The Department of Revenue recognizes that when they make significant improvements they are worth something. Ms. Seibel ended by saying that Mr. Miner did not double tax Macy's.

Mr. Miner reiterated the values for the leasehold improvements: 1) 2008 - \$8,825,933; 2) 2009 - \$8,686,568; and 3) \$11,704,800. He added that Macy's has not questioned the value.

Mr. Millis asked if improvements on leased lands or any buildings means the business can be assessed in two installments; what is really going on is an end run around the Darcel case. He was against using market rents to determine the value of the property. In the case of Walgreens they have had above market rents. That is an encumbrance on the property. Everything in the Macy's store belongs to General Growth Properties except for the fixtures. He stressed that the assessor needs to look at what this would get in the open market. Who owns the property? Economics is the only thing that can be dealt with here. It is unknown how the purchase was made with Marshal Field's. They did not put in information about valuation because it was not the point. They feel they have done enough to show that everything is not fixtures.

Ms. Seibel noted that the City Assessor agrees that Darnel is the law in Wisconsin. When a property is encumbered by a long-term lease the only thing for sale is the lease. This is not an end run around Darcel.

Mr. Duffey thought that Macy's proof was not sufficient.

Ms. Seibel commented that Macy's contention is that their assessment is part of their lease, but they didn't provide any proof. The 'vanilla shell' of the building is included and consistent with the

manual. When a building is located on leased land the entire building is assessed. Macy's has to show that the assessor has included the leasehold improvements in the rent.

Mr. Millis responded that they did give proof that the improvements are not fixtures.

Ms. Seibel stressed that the state statute gives the assessor a lot of latitude in Sections 70.17 and 70.18. The reason the meaning is so broad is so that the assessor is not caught in a situation where a small detail makes the property exempt.

Ms. Aldana asked by what authority the board has to make the decision Ms. Seibel is asking for.

Ms. Seibel responded that it is a valuation question. Mr. Millis concurred.

Mr. Rice referred to the Board of Review handbook noting that they are legally bound to accept that the assessor's judgment is correct unless it can be proven otherwise. It is his belief that the assessor is correct. He felt comfortable that there has been no double-counting and he was comfortable with the city's numbers.

Mr. Duffey felt he was unable to make the correct designation, but he must default to the guidelines in the manual in support of the City Assessor.

Mr. Benz noted that this is a complicated lease. The ownership of the improvements does not go to the lessee until the lease is over.

Moved by Mr. Duffey, seconded by Mr. Rice that the assessment be sustained – 3

The board adjourned for the 2010 year at 5:16 p.m.

Susan Van Hoven, Deputy City Clerk

svh