

STATE OF WISCONSIN
TAX APPEALS COMMISSION

NESTLÉ USA, INC.,

DOCKET NOS. 04-M-101
05-M-21

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DIANE E. NORMAN, COMMISSIONER:

The above-entitled matters were heard by the Commission on November 8 and 9, 2005, in Madison, Wisconsin. The parties submitted post-hearing briefs. On briefs for petitioner Nestlé USA (“petitioner”) are Attorney Don M. Millis (initial brief) and Attorney Robert L. Gordon (reply brief) of Michael Best & Friedrich LLP, Milwaukee, Wisconsin, and on brief for respondent Wisconsin Department of Revenue (“respondent”) is Attorney Sheree Robertson.

Having considered the entire record before it, the Commission finds, decides, concludes, and orders as follows:

FINDINGS OF FACT

Jurisdictional Facts

1. On June 23, 2003, respondent issued to petitioner a Notice of Real Property Assessment (“2003 assessment”) for petitioner’s manufacturing plant at 5023

Venture Avenue, Eau Claire, Wisconsin (“Gateway¹ Plant”), stating that the assessed value of the subject property was \$1,335,100 (\$35,000 per acre) in land and \$9,579,900 (\$121 per square foot) in improvements, for a total assessed value of \$10,915,000.

2. On June 7, 2004, respondent issued to petitioner a Notice of Real Property Assessment (“2004 assessment”) for the Gateway Plant stating that the assessed value of the subject property was an amount identical to the 2003 assessment.

3. Petitioner timely objected to the 2003 assessment by filing a “Form of Objection to Real Estate Assessment” with the State Board of Assessors on August 26, 2003. Petitioner’s opinion of value for the Gateway Plant in the objection was \$600,000 in land and \$4,000,000 in improvements, for a total value of \$4,600,000.

4. Petitioner timely objected to the 2004 assessment by filing a “Form of Objection to Real Estate Assessment” with the State Board of Assessors on July 8, 2004. Petitioner’s opinion of value for the Gateway Plant in the objection was \$1,140,000 in land and \$2,410,000 in improvements, for a total value of \$3,550,000.

5. On March 16, 2004, the State Board of Assessors issued a Notice of Determination denying petitioner’s appeal of the 2003 assessment of the Gateway Plant and affirming the original assessed value of the subject property at \$10,915,000.

6. On January 24, 2005, the State Board of Assessors issued a Notice of Determination denying petitioner’s appeal of the 2004 assessment of the Gateway Plant and affirming the original assessed value of the subject property at \$10,915,000.

¹ The Gateway Plant is located within Eau Claire’s Gateway Industrial Park.

7. On April 20, 2004, petitioner timely filed with the Commission a petition for review from the State Board of Assessors' determination of the subject property's real estate assessment for January 1, 2003.

8. On February 4, 2005, petitioner timely filed with the Commission a petition for review of the State Board of Assessors' determination of the subject property's real estate assessment for January 1, 2004.

Gateway Plant - Generally

9. The parties have stipulated that the Gateway Plant is a special purpose plant at which petitioner manufactures whole protein powdered infant formula.

10. Prior to the construction of the Gateway Plant, petitioner produced both hydrolyzed and whole protein powdered infant formula at its main Nestlé Avenue plant in Eau Claire, Wisconsin.

11. Petitioner built the Gateway Plant in order to have a facility dedicated to the production of whole protein powdered infant formula.

12. The Gateway Plant is a satellite facility to petitioner's main plant on Nestlé Avenue in Eau Claire, Wisconsin. Most of the office space for the professionals working at the Gateway Plant is located at the Nestlé Avenue plant. Much of the testing done for the Gateway Plant is performed at the Nestlé Avenue plant. The Nestlé Avenue plant also produces a small quantity of medical products.

13. The production of powdered infant formula is heavily regulated by the federal Food and Drug Administration ("FDA") pursuant to authority granted by

the Federal Food, Drug and Cosmetic Act. The Gateway Plant was designed to efficiently produce whole protein powdered infant formula in this strict regulatory environment.

Physical Description of the Gateway Plant

14. The parcel on which the Gateway Plant is located was purchased by petitioner in December of 1999 for \$935,000 (\$24,510 per acre).

15. The improvements at the Gateway Plant were constructed in 2001, have been well-maintained, and were in good condition as of the assessment dates.

16. Petitioner initially reported on its 2001 FORM M-R (Wisconsin manufacturing real estate self-reporting return) that the construction costs of the Gateway Plant improvements were \$13,168,780. On petitioner's 2002 FORM M-R, those construction costs were changed to \$16,459,253.

17. The Gateway Plant sits on a 38.147-acre site. The improvements on the subject property consist of a two-story primary building area and a tower area. The gross building area of 85,107 square feet² consists of the following:

A. Primary Building Area of 65,628 square feet:

1. 38,883 square feet of 1st floor manufacturing & warehouse area;
2. 14,120 square feet of 2nd floor manufacturing & warehouse area;
3. 7,951 square feet of 1st floor utility area;
4. 800 square feet of 2nd floor utility area;

² Respondent's assessments show the gross building area of the Gateway Plant at 90,130 feet. Respondent's appraiser testified that this figure was obtained from petitioner and that he would not dispute the figure of 85,107 square feet.

5. 3,874 square feet of 1st floor utility area.

B. Tower area of 19,479 square feet:

1. 3,600 square feet of 1st floor tower area;

2. 3,120 square feet of 3rd floor tower area;

3. 12,759 square feet of tower area on floors 4 through 8.

18. The Priority One Area of the Gateway Plant includes the spray dryer tower, the tote room, and the packaging room. These are ultra-sensitive areas where petitioner must guard against contamination of the whole protein powdered infant formula.

19. The spray dryer tower at the Gateway Plant is approximately 122 feet high and has eight stories. The spray dryer itself is 110 feet high and is considered very large relative to other spray dryers. The spray dryer is considered manufacturing equipment and not part of the real property, but the tower in which the spray dryer is located is part of the real property that is being assessed.

20. Spray dryers are typically used to create a homogenous blend in powdered form of substances that would normally separate (e.g., oils, proteins, and sugars) and have applications for products other than powdered infant formula. These products include nonfat dry milk, sour cream, cheese, nondairy creamer, and butter products.

Special Features at the Gateway Plant

21. The Gateway Plant has many special features that were specifically designed for the production of powdered infant formula in compliance with federal

regulations. These features include:

a. The tower area houses a large spray dryer designed specifically for manufacturing powdered infant formula.

b. The process areas of the plant were constructed to a “no hollow body” or “zero tolerance” standard. All concrete surfaces in the Priority One Area were treated to eliminate any hollow bodies and air bubbles in the concrete where moisture with microbial growth may reside.

c. Approximately 2,500 to 3,000 square feet in the utility building is dedicated to housing the reverse osmosis treatment equipment which removes chemicals from the city water piped into the Gateway Plant as required by federal regulations.

d. A waste water treatment facility that brings the pH of the waste within an acceptable range before discharging.

e. The height of the spray dryer necessitates a fire pump house for fire protection.

22. These special features are not typical in other food processing applications and added significant cost to construct the improvements at the Gateway Plant. These features may be used in plants that manufacture pharmaceutical products.

Respondent's Appraisal

23. Respondent's appraiser for the Gateway Plant was Curt Stepanek (“respondent's appraiser”), a Property Assessment Specialist-Advanced for respondent. Respondent's appraiser has been certified by the State of Wisconsin as an Assessor II for 7 years. Prior to that, he was certified by the State of Wisconsin as an Assessor I for 15 years. Respondent's appraiser is an expert witness and was qualified to appraise the Gateway Plant for respondent.

24. Of the three valuation methodologies (cost approach, comparable

sales approach, and income approach), respondent's appraiser considered the comparable sales approach, but ultimately chose to value the Gateway Plant by utilizing only the cost approach.

25. Respondent's appraiser determined the highest and best use of the Gateway Plant as improved is the continued use as a food processing plant for the production of powdered infant formula.

26. Respondent's appraiser testified that a likely purchaser of the Gateway Plant would be another powdered infant formula manufacturer. Even though there are other powdered infant formula manufacturers in the United States, neither party could find any instance in the United States where a powdered infant formula manufacturing plant was sold for continued use as a powdered infant formula manufacturing plant. Respondent's appraiser testified that since there were no other sales of infant formula manufacturing plants or any reasonably comparable manufacturing plants, the comparable sales approach could not be used for the appraisal of the Gateway Plant.

27. Respondent's appraiser testified that he could not employ the comparable sales approach by comparing recent sales of "food processing plants" in general because of the special features that were built into the Gateway Plant to meet FDA regulations for manufacturing powdered infant formula. He said that it would not be financially feasible to consider the Gateway Plant as a general food processing plant because the Gateway Plant could never be used for any other food production without enormous capital investment. Therefore, respondent's appraiser could not find

any general food manufacturing plants that were reasonably comparable to the Gateway Plant.

28. There are other manufacturers of powdered infant formula in the United States that could be potential purchasers of the Gateway Plant.

29. When a colleague of respondent's appraiser performed an appraisal of petitioner's Nestlé Avenue powdered infant formula plant for respondent's 2003 assessment, that appraiser did employ the sales comparison approach as well as the cost approach. No evidence was presented to show why the sales comparison approach was employed for appraising the Nestlé Avenue plant or that the sales comparison approach was correctly employed to appraise the Nestlé Avenue plant.

30. Respondent's appraisal for the Nestlé Avenue plant states that its highest and best use is as an infant formula production plant. The appraisal further states that the highly specialized features of the property, the large investment in the property to bring it into compliance with the strict regulatory standards, and the small number of infant formula manufacturers "make finding sales that are truly comparable to the subject [property] virtually impossible." (Exhibit 30 at p. 5.)

31. Respondent's appraiser valued the land for the Gateway Plant property at \$1,335,100 or \$35,000 per acre. This was based upon the sales price of land in the Gateway West Industrial Park set by the Eau Claire Area Economic Development Corporation as the non-negotiable sales price of land in the Industrial Park.³

³ Respondent's appraiser testified that he was aware that some purchasers of land (including petitioner) in the Gateway West Industrial Park bought land in the industrial park for less than \$35,000 per acre.

32. Respondent's appraiser valued the improvements at the Gateway Plant by using the 2001 cost of building the improvements and made a 3% deduction for physical depreciation and a 25% deduction for exempt manufacturing components of the plant⁴ as follows:

\$13,168,780	cost of building improvements as originally reported
X .97	physical depreciation
X .75	exempt components
<hr/>	
\$9,579,900	
1,335,100	land value added
\$10,915,000	total assessment

33. Respondent's appraiser did not reduce the assessments for any functional obsolescence since the plant was new and built and operated specifically for its purpose of manufacturing powdered infant formula.

34. Respondent's appraiser also did not reduce the assessments for any economic obsolescence.

Petitioner's Appraisal

35. Petitioner presented the expert testimony and written report of S. Steven Vitale, an MAI certified appraiser ("petitioner's appraiser"). Petitioner's appraiser is an expert witness and was qualified to appraise the Gateway Plant.

⁴ These items included the power wiring and special foundation for the tower and spray dryer that were included in the construction costs on petitioner's FORM M-R. Although they may be exempt as manufacturing equipment, they are too intertwined with construction of the real property construction to have been taken out of the amount on the FORM M-R. Petitioner's accountant also testified that the value of construction costs on petitioner's FORM M-R included both real and personal property. Mr. Stepanek testified that he believed the 25% deduction was extremely generous.

36. Petitioner's appraiser concluded that the fair market value of the subject property as of January 1, 2003 and January 1, 2004 was \$3,590,000. In reaching that conclusion, petitioner's appraiser employed the sales comparison and the cost approach to value the subject property. As with respondent's appraiser, petitioner's appraiser did not employ the income approach.

Cost Approach

37. By using the cost approach, petitioner's appraiser concluded that the value of the subject property was \$3,430,000. He defined the cost approach as the cost of reproducing or replacing the improvements, less depreciation from physical deterioration, functional obsolescence, and economic/external obsolescence, and adding in the value of the land.

a. Petitioner's appraiser first valued the land on which the Gateway Plant sits by employing an analysis of comparable land sales. He found that while the Gateway West Industrial Park land sale price was set at \$35,000 per acre by the Eau Claire Economic Development Corporation as the non-negotiable sale price, land in the industrial park actually sold for different amounts to different buyers. The sale price per acre to petitioner had been \$24,510 in 1999. From an analysis of 7 other land sales in the Gateway West Industrial Park, petitioner's appraiser valued the Gateway Plant land at \$30,000 per acre, for a land value of \$1,140,000.

b. He determined the value of the improvements under this approach by determining the cost to construct in 2001, plus inflation, plus an arbitrary addition of 10% for soft costs of construction⁵ (for a total value of \$17,196,879 for improvement cost new), and subtracting 4.44 percent for physical deterioration⁶ and

⁵ Soft costs of construction include developer's overhead, legal costs, administrative costs, real estate taxes, insurance, construction period interest, and permanent financing fees.

⁶ This figure was depreciation of the improvements based upon economic life for 45 years.

another deduction for functional obsolescence (a reduction of \$13,895,020 or over 80% for the building). He also reduced the value by 10% for economic obsolescence. Finally, he added back in the value of the land at \$1,140,000 for the rounded-up value of \$3,430,000.

38. Petitioner's appraiser defined functional obsolescence as the special features of the building that are unique to its use as a powdered infant formula plant. He testified that these special features would not be marketable on the open market for sale as a general food processing plant. He identified these improvements as the special concrete construction, special interior wall and floor finishes, water treatment building, fire pump house building, liquid propane vaporizer and design/layout for a reduction in value of \$13,895,020.

39. Petitioner's appraiser reduced his valuations by 10% for economic obsolescence. Economic obsolescence is the impairment of desirability or useful life from factors external to the property such as economic forces in the market. Petitioner's appraiser estimated economic obsolescence at 10% based on a cursory review of depreciated improvement costs for manufacturing facilities and recent sales of manufacturing facilities in the immediate and surrounding area.

Comparable Sales Approach

40. Petitioner's appraiser also employed the comparable sales approach to value the Gateway Plant. Using this approach, petitioner's appraiser concluded that the value of the subject property was \$3,590,000.

41. In determining the Gateway Plant's highest and best use, petitioner's appraiser testified that it is functional for continued use as a powdered

infant formula manufacturer. However, petitioner's appraiser also testified that because of the limited number of powdered infant formula manufacturers⁷, if the Gateway Plant were to sell, it is unlikely that it would be for continued use as a powdered infant formula production facility.⁸

42. Petitioner's appraiser testified that since the Gateway Plant would probably not be sold as a powdered infant formula manufacturing plant, the highest and best use needed to be expanded to include other functional uses. He testified that the Gateway Plant would be functional for other food or light manufacturing processes but did not show any sales of powdered infant formula plants that had been sold for other uses.

43. Petitioner's appraisal contains 7 comparable sales of food processing plants in Wisconsin. None of these sales were of plants that were capable of producing powdered infant formula. None of the sales included a large tower containing a spray dryer. None of the sales were plants that were constructed with special features and finishes to comply with FDA regulations for the production of powdered infant formula or other pharmaceutical products.

a. Improved Sale No. 1 is the November 2000 sale of a 60,055-square foot cheese processing plant in Fond du Lac for \$40.59 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, age/condition, construction quality, finished space, and ceiling height. Following the adjustments, this sale

⁷ Petitioner's appraiser testified that while there were other powdered infant formula manufacturers in the United States, petitioner was the only powdered infant formula manufacturer in Wisconsin.

⁸ Petitioner's appraiser would not testify that there was "no market" for an infant formula manufacturing plant.

indicated a price of \$55.24 per square foot.⁹

b. Improved Sale No. 2 is the July 2000 sale of a 107,995-square foot fluid milk processing plant in Richland Center for \$46.30 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, location, size, age/condition, construction quality, finished space, ceiling height, and land-to-building ratio. Following the adjustments, this sale indicated a price of \$84.71 per square foot.¹⁰

c. Improved Sale No. 3 is the April 2000 sale of a 33,172-square foot dairy product (dry blend) processing plant in La Crosse for \$35.42 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, age/condition, construction quality, ceiling height, and land-to-building ratio. He adjusted this sale downward for size, finished space, and other (above-market rent). Following the adjustments, this sale indicated a price of \$46.07 per square foot.

d. Improved Sale No. 4 is the February 2000 sale of a 73,785-square foot leased cheese manufacturing plant in Bristol for \$46.08 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, size, age/condition, construction quality, on-ground floor area, ceiling height, and land-to-building ratio. He adjusted this sale downward for location, and finished space. Following the adjustments, this sale indicated a price of \$67.08 per square foot.¹¹

e. Improved Sale No. 5 is the May 2004 sale of a 67,225-square foot dessert pack (pudding and jell-o) manufacturing plant in Bristol for \$56.60 per square foot. Petitioner's appraiser adjusted this sale upward for size, age/condition, construction quality, non-ground floor area, ceiling height, and land-to-building ratio. He adjusted this sale downward for market conditions, location, and finished space. Following the adjustments, this sale indicated a price of \$74.78 per square foot.¹²

⁹ This comparable sale was Sale #4 in respondent's appraisal of the Nestlé Avenue plant.

¹⁰ This comparable sale was Sale #1 in respondent's appraisal of the Nestlé Avenue plant.

¹¹ This comparable sale was Sale #2 in respondent's appraisal of the Nestlé Avenue plant.

¹² This comparable sale was Sale #2 in respondent's appraisal of the Nestlé Avenue plant.

f. Improved Sale No. 6 is the October 2003 sale of a 20,000-square foot potato processing plant in Plover for \$30.75 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, age/condition, construction quality, and ceiling height. He adjusted this sale downward for size. Following the adjustments, this sale indicated a price of \$35.85 per square foot.

g. Improved Sale No. 7 is the June 2003 sale of a 53,876- square foot rye chip manufacturing plant in Pewaukee for \$47.66 per square foot. Petitioner's appraiser adjusted this sale upward for market conditions, age/condition, construction quality, ceiling height, and land-to-building ratio. He adjusted this sale downward for location, finished space, and other (above-market rent). Following the adjustments, this sale indicated a price of \$54.97 per square foot.

44. After comparing the 7 comparable sales, petitioner's appraiser valued the Gateway Plant at approximately \$42.18 per square foot to total building area, or \$70.80 per square foot of primary ground floor area for the following values:

Primary Ground Floor Area	\$3,040,000
Primary Second Floor Area	450,000
Tower Area	<u>100,000</u>
Total	\$3,590,000

45. After comparing the two values of \$3,430,000 (by the cost approach), and \$3,590,000 (by the sales comparison approach), petitioner's appraiser valued the subject property at \$3,550,000.

46. In his testimony, petitioner's appraiser agreed with the following excerpt from an article in *The Appraisal Journal*:

Recent literature reports that the existence of specialized assets is quite common and that their valuation problems deserve more attention. It is generally recognized that conventional valuation techniques of sales comparison and income approaches are usually not applicable in these instances because of comparable data

limitations. When data does exist, physical disparities are often dramatic and would require adjustments of such magnitude that the value indications would be meaningless. Consequently, the cost approach is usually considered the only valid approach to value.

David Paul Rothermich, *Special-Design Properties: Identifying the "Market" in Market Value*, *The Appraisal Journal*, October, 1998, at 410. (Transcript, Vol. II at pp. 65-66.)

APPLICABLE WISCONSIN STATUTES

70.32 Real estate, how valued.

(1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03 (2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefore at private sale. 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; 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.

70.995 State assessment of manufacturing property.

* * *

(13) In the sections of this chapter relating to assessment of property, when the property involved is a manufacturing property subject to assessment under this section, the terms "local assessor" or "assessor" shall be deemed to refer also to the department of revenue except as provided in sub. (10).

73.03 Powers and duties defined. It shall be the duty of the department of revenue, and it shall have power and authority:

* * *

(2a) To prepare, have published and distribute to each property tax assessor and to others who so request assessment manuals. The

manual shall discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level. The manual shall be amended by the department from time to time to reflect advances in the science of assessment, court decisions concerning assessment practices, costs, and statistical and other information considered valuable to local assessors by the department. . . .

* * *

CONCLUSIONS OF LAW

1. The presumption of correctness associated with respondent's assessment of the improvements to the Gateway Plant has not been rebutted and there is credible evidence to support the assessment.
2. The presumption of correctness associated with respondent's assessment of the Gateway Plant land at \$1,335,100 was rebutted. Petitioner showed by competent, uncontroverted evidence that the value of the land on the subject property as of the assessment date was \$1,140,000.
3. Petitioner failed to show the existence of recent sales of properties reasonably comparable to the Gateway Plant to show that the comparable sales approach would constitute the best information in rendering the assessment.
4. The special features or super adequacies of the Gateway Plant that were built for their current uses and are still functional are not functionally obsolete and cannot be deducted from the replacement

value of the property for a cost approach appraisal analysis.

5. Petitioner has failed to demonstrate by credible evidence that respondent's use of the cost approach in valuing the subject property was incorrect.

OPINION

Presumption of Correctness of Respondent's Assessments

Respondent's assessment is presumed to be correct, and it is the taxpayer's burden to demonstrate that the assessment is incorrect. *See Hormel Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-741 at 32,962 (WTAC 2004). If there is credible evidence that may in any reasonable view support the assessor's valuation, that valuation must be upheld. *Universal Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-316 at 31,111 (WTAC 1997). However, it is error to disregard uncontradicted competent evidence which shows the assessor's valuation is incorrect. *Id.* at 31,111-112.

Comparable Sales Approach

Wis. Stat. § 70.32(1) governs the valuation of real property for the purposes of taxation and requires an assessor to value real property at the "full value" which could ordinarily be obtained at a private sale. *Steenberg v. Town of Oakfield*, 167 Wis. 2d 566, 572 (1992). The Wisconsin Supreme Court has construed, for purposes of real property assessment, the statutory phrase "full market value" to mean fair market value, which is the amount the property will sell for upon arm's length negotiation in the open market, between an owner willing but not obligated to sell, and a buyer

willing but not obligated to buy. *Waste Management of Wisconsin v. Kenosha County Board of Review*, 184 Wis. 2d 541, 556 (1994); *Metropolitan Holding Company v. Board of Review of the City of Milwaukee*, 173 Wis. 2d 626, 631 (1993).

Case law interpreting this statute has consistently held that the statute sets forth a tri-level hierarchy. The statute essentially codified what is commonly referred to as the “Markarian Hierarchy,” established in *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683 (1970). See also *Waste Management*, 184 Wis. 2d at 556-557. That is, the assessor must use a recent sale of the property first to assess value. *Markarian*, 45 Wis. 2d at 686. If there was not a recent sale, the assessor then must use recent comparable sales, and the assessor proceeds to the third level or other appraisal approaches only if the first two are not available. See *id.* at 686; *State ex rel. Campbell v. Township of Delavan*, 210 Wis. 2d 239, 256-59 (Ct. App. 1997).

It is erroneous to assess property using the third level “when the market value is established by a fair sale of the property in question or like property.” *Markarian*, 45 Wis. 2d at 686. Here, the record reflects that the first level was not available because there was no recent sale of the property. The issue, therefore, is whether recent reasonably comparable sales were available for valuing the Gateway Plant.

The Markarian Hierarchy does not mandate that the comparable sales approach is the only appraisal approach that can be used to value property. It simply requires that respondent must first consider the comparable sales approach by determining if there are any recent sales of property that are reasonably comparable

before other methods of appraisal may be employed. *Campbell*, 210 Wis. 2d at 256-59.

When employing the comparable sales method, the first step in the analysis is to determine the highest and best use of the property in question. In determining highest and best use for a property, the use must be legally permissible, in balance with other properties around it, and financially feasible. Property Assessment Manual for Wisconsin Assessors, Vol. I, pp. 7-9 to 7-10 (2005).

Both parties agreed that this is a special purpose property that manufactures powdered infant formula. The Gateway Plant was originally designed as a powdered infant formula plant and has been used for this purpose continuously since it was constructed in 2001. It is fairly new and in good condition, is currently occupied and its owner-occupant has expressed no desire to abandon the property.

Even though there are other manufacturers of powdered infant formula in the United States, there were no recent sales of this type of plant found by either party. Because of this lack of recent sales data, petitioner argues that the highest and best use of the property must be broadened to include general food processing plants. However, Wis. Stat. § 70.32(1) requires that the sales included in a comparable property sales analysis be sales of “reasonably comparable property.” (emphasis added.) Comparable properties should be properties that represent the subject property in age, condition, use, type of construction, location, number of stories, physical features and economic characteristics. Property Assessment Manual for Wisconsin Assessors, Vol. I, p. 7-18 (2005). Petitioner has not shown that the food manufacturing plants included in its comparable sales analysis are reasonably comparable to the Gateway Plant.

Petitioner also attempts to bolster its case for expanding the applicable definition of highest and best use by arguing that there is no market for the Gateway Plant. Petitioner has cited no authority for the proposition that a lack of recent sales of a highly specialized property means that there is no market for such property. Even petitioner's expert appraiser refused to adopt the suggestion made by petitioner's counsel that there was no market for powdered infant formula plants.

We conclude that the nonexistence of recent sales of specialized manufacturing plants does not mean that there is no market for such plants. Thus, as we construe Wis. Stat. § 70.32(1), if a competitor or potential buyer was searching for a powdered infant formula manufacturing facility, that buyer could consider purchasing the Gateway Plant. Therefore, for purposes of determining the property's highest and best use, it is proper to assume that there is a market for the Gateway Plant based upon the value of its current use. *See Clark Equipment Co. v. Township of Leoni*, 113 Mich. App. 778, 318 N.W.2d 586 (1982).

Petitioner also argues that there is no market for the Gateway Plant since petitioner would never sell the plant to a competitor. The subjective desire of petitioner to not sell their property to certain parties is not relevant to a determination of whether there is a market for the Gateway Plant.

To construe Wis. Stat. § 70.32(1) as requiring respondent to prove an active market for a property's current use would lead to absurd undervaluations. It does not make any sense to conclude that a new, modern, manufacturing facility is worth considerably less than represented by its replacement cost premised on its

continued use simply because these types of plants are rarely bought and sold. According to the Property Assessment Manual for Wisconsin Assessors ("Assessment Manual"), "[i]f current use is the highest and best use of the property, use value will equal market value." Assessment Manual, Vol I, p. 7-4 (2005).

Petitioner's appraiser compared the Gateway Plant to 7 food manufacturing plants that were not special purpose properties, did not have a tower containing a spray dryer, and did not have the special features and construction that are required to meet the federal regulations for production of powdered infant formula or other pharmaceutical products. This great disparity between the Gateway Plant's continued use and capabilities and its prospective use as a general food processing plant is so large as to render the general food processing plants considered by petitioner's appraiser as not reasonably comparable. Petitioner's own appraiser testified that he agreed with the general concept that when a prospective use would require adjustments of such magnitude that the value indications would be meaningless, the cost approach is usually considered the only valid approach to value.¹³

Moreover, as stated earlier, a determination of the highest and best use of a property must be financially feasible. Property Assessment Manual for Wisconsin Assessors, Vol. I, pp. 7-9 to 7-10 (2005). By changing the highest and best use to general food manufacturing, both parties have agreed that the value of the property would have to be drastically reduced. Petitioner does not even argue that such a change

¹³ David Paul Rothermich, *Special-Design Properties: Identifying the "Market" in Market Value*, *The Appraisal Journal*, October, 1998, at 410.

would be financially feasible.¹⁴ Thus, it was not error for respondent to conclude that the highest and best use of the Gateway Plant must remain as a powdered infant formula plant.

As precedent that we have considered sales of converted plants in a comparable sales analysis, petitioner cites *Borden, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-723 (WTAC 1980). But, in *Borden*, there was evidence presented of nationwide sales of food processing plants that were sold for general manufacturing uses that were satisfactorily comparable to the subject property. Here, there was no evidence of any recent sales of powdered infant formula plants that had been converted to general food processing plants.

In support of its argument that respondent erred in not utilizing the comparable sales approach, petitioner notes that the comparable sales approach was utilized by a different appraiser for respondent when assessing petitioner's other powdered infant formula plant. Respondent employed the comparable sales approach when valuing the Nestlé Avenue plant, even though this plant was also identified as a special purpose property that was a food processing plant for manufacturing powdered infant formula. There is no evidence in these cases to show the differences in the plants or that the appraisal performed by respondent's appraiser for the Nestlé Avenue plant

¹⁴ The Commission has refused to consider comparable sales with a different use from the subject property when no examination had been made to determine whether the subject property could be operated profitably following this change of use. *Hormel Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-741 at 32,965 (WTAC 2004).

was appropriate.¹⁵ While the propriety of the sales comparison approach utilized in the Nestlé Avenue appraisal is not before the Commission, we note the qualification contained in the Nestlé Avenue appraisal that “finding sales that are truly comparable to the subject [property is] virtually impossible.” Therefore, we conclude that the Nestlé Avenue appraisal is not helpful in determining the appropriate appraisal method here.

Overall, petitioner argues that the scarcity of data regarding sales of infant formula manufacturing plants requires that we expand the definition of highest and best use of such facilities, apparently without reference to whether the facilities included in the analysis are reasonably comparable. Instead, we agree with respondent that, under Wis. Stat. § 70.32(1), where there is insufficient data concerning sales of reasonably comparable property, the next step in a proper analysis of fair value is to look at data derived from other methods of appraisal, including the cost approach.

Cost Approach

When a property has not been recently sold and there are no recent sales of reasonably comparable property, it is appropriate to use the cost approach. In other words, the cost approach is the “best information” because there are no comparable sales. *Rosen v. Milwaukee*, 72 Wis. 2d 653, 662 (1976); *Markarian*, 45 Wis. 2d at 686.

Wis. Stats. § 70.32(1) states that the Property Assessment Manual for Wisconsin Assessors (“Assessment Manual”) shall govern the manner of assessment.

¹⁵ The Commission notes, however, that when arguing against the admissibility of the Nestlé Avenue appraisal, the Department’s attorney claimed that the Nestlé Avenue Plant was older, much larger, extensively renovated and produced some other items.

See also Waste Management, 184 Wis. 2d 541; *Metropolitan Holding*, 173 Wis. 2d 626. The Assessment Manual permits reliance on the “cost approach” alone when no sales of reasonably comparable property are available:

When appraising, the appraiser should consider all available data and the three approaches to value. Then the appraiser should identify the most appropriate approach considering the type of property. For example, appraisers typically use the sales comparison approach in markets where adequate sales exist. They typically use the cost approach in cases of new or special purpose structures or where limited sales . . . data exist.

Assessment Manual, Vol. I, p. 7-18 (2005).

Both petitioner’s appraiser and respondent’s appraiser employed the cost approach to value the Gateway Plant. This approach was the only approach used by respondent’s appraiser and a secondary approach used by petitioner’s appraiser.

The Assessment Manual defines the cost approach as follows:

The cost approach is based on the principle of substitution. That is, that a well-informed buyer will pay no more for a property than the cost of constructing an equally desirable substitute property with like utility.

The basic steps in the cost approach are the following:

1. Estimating the land value.
2. Estimating reproduction or replacement cost new of the structure.
3. Estimating accrued depreciation.
4. Subtract the accrued depreciation from the estimate of a cost new to arrive at a present value for the improvements.
5. Add the present value of the improvements to the estimated land value for a total property value.

Assessment Manual, Vol. I at p. 7-22 (2005).

Although petitioner's appraiser also employed the cost approach to value the Gateway Plant, petitioner argues that respondent's application of this approach was erroneous because valuation was based upon its value in use and not its value in exchange as required by Wis. Stat. § 70.32(1). Moreover, petitioner argues that the Commission has rejected the cost approach method of appraisal based on value in use in the case of *Hormel Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-741 at 32,962 (WTAC 2004).

The Commission rejects petitioner's characterization of *Hormel*. In *Hormel*, the Commission held that one of the comparable sales used to value the subject property could not be considered because it was part of a larger transaction and respondent determined the sale price by conducting a replacement-cost appraisal, which was not an actual sales price. *Hormel* did not eradicate the cost approach, as argued by petitioner. Rather, it only rejected that approach when there is evidence of a recent sale of the property. *Hormel*, at pp. 32,964-32,965. *Hormel* affirmed that the Commission follows the Markarian Hierarchy in determining the correct method of appraising real property in Wisconsin to arrive at the "full market value." *Hormel*, at p. 32,965. As stated above, under the Markarian Hierarchy, the cost approach is an appropriate method of appraisal for the Gateway Plant.

Cost Approach Land Valuation

Respondent's appraiser valued the Gateway Plant's land based upon information from the seller in the industrial park that the land value has a non-negotiable price of \$35,000 per acre. While the seller stated that this was a non-

negotiable price, petitioner showed that the selling price per acre had varied for different buyers in the industrial park depending on a number of factors.

The actual selling price of the land in the Gateway West Industrial Park was sometimes less than the \$35,000 per acre selling price. Petitioner's appraiser used comparable sales to determine the value per acre, while respondent's appraiser did not.

If the presumption of the correctness of respondent's appraisal is rebutted, the burden is still upon the petitioner to show that its appraisal reflects the correct value of the subject property. *Universal Foods, Wis. Tax Rptr. (CCH) ¶ 400-316 at 31,112*. By failing to employ the comparable sales approach for the value of the land when reasonably comparable sales were available, respondent's appraisal of the land loses the presumption of correctness.

Respondent's appraiser agreed that the land in the Gateway West Industrial Park sold for values less than \$35,000 per acre as shown by petitioner's appraisal. Therefore, the value of \$30,000 per acre for the land for the Gateway Plant as stated in petitioner's appraisal that was determined from comparable sales is competent, non-controverted evidence of its fair market value.

Replacement Cost of Gateway Plant

Both respondent's and petitioner's appraisers estimated the reproduction costs to determine the cost of replacing the Gateway Plant. The parties differed in the deduction for functional obsolescence. Functional obsolescence is the loss in value due to a lack of or excessive utility. Assessment Manual, Volume 1 at 7-23 (2005).

The fundamental difference in the conclusions reached by the appraisers

in this matter is whether to deduct for functional obsolescence for the special features or super adequacies of the Gateway Plant that were built to comply with federal regulations for manufacturing powdered infant formula. Because the Gateway Plant was being used for its original intended purpose, which respondent deemed to be the highest and best use of the property, respondent's appraiser made no deduction for functional obsolescence. In contrast, petitioner's appraiser made drastic reductions in the cost value of the plant by identifying all special features that were built specifically for its use as a powdered infant formula plant. He determined the replacement value of the building to be \$17,196,879 and reduced that value by \$13,895,020 for the features in the plant that are functional specifically for its use as a powdered infant formula plant, because he found that none of these features would be marketable.

The Assessment Manual defines functional obsolescence as "loss in value, due to a lack of or excessive utility. Functional obsolescence occurs over time because of changing needs, technology, design, promotion/marketing, and cost/construction." Assessment Manual at p. 7-23.

There is nothing in this definition that identifies an item as functionally obsolete that must be deducted from property value because it may not add value to the plant if marketed as a general food processing plant, particularly when applying the cost method of appraisal. Nor does petitioner provide any authority for its assertion.

The Commission has found that deductions for functional obsolescence were appropriate for features that were currently usable in a subject plant. *See Borden*, Wis. Tax Rptr. (CCH) ¶ 201-723 at 11,078. However, as stated earlier, there was

evidence presented in *Borden* of sales of plants that were sold for a different use that were satisfactorily comparable to the subject property. Therefore, the Commission allowed deductions for features that were usable in the current plant, but would not be marketable in a plant with a different use. *Id.* at 11,078. In the present matter, there was no such evidence of reasonably comparable plants with a different use and, therefore, the features of the Gateway Plant that are currently functional are not functionally obsolete.

Petitioner's large discount for functional obsolescence is based on its position that the highest and best use of the facility is for general food manufacturing and any features not marketable for general food manufacturing are functionally obsolete. In effect, petitioner is bootstrapping its comparable sales approach of appraisal to its cost approach of appraisal. The highest and best use of the Gateway Plant is its current use as a powdered infant formula manufacturing plant. Therefore, there should be no functional obsolescence discounts or deductions for features that are currently functional for that use in the Gateway Plant.

We find that the special features of the Gateway Plant that were built for the uses that are still functional are not functionally obsolete and cannot be deducted from the replacement value of the property. Thus, petitioner has failed to rebut the presumption of correctness of respondent's assessment of the improvements at the Gateway Plant.

Therefore,

IT IS ORDERED

That the determination of the State Board of Assessors of petitioner's manufacturing property in this matter is sustained for the value of the improvements at \$9,579,900 and is reduced for the value of the land to \$1,140,000 for a total assessed value of \$10,719,900.

Dated at Madison, Wisconsin, this 29th day of November, 2006.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"