# WISCONSIN LEGISLATIVE COUNCIL
# STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON PROPERTY TAX ASSESSMENT PRACTICES

FROM: Anna Henning, Senior Staff Attorney, and Scott Grosz, Principal Attorney

RE: Options for Committee Discussion

DATE: October 2, 2018 (Revised October 4, 2018)

This memorandum presents potential options and questions for discussion at the committee's October 9, 2018 meeting. Where appropriate, the memorandum notes the name of the committee member who suggested a particular option or topic. Other options draw upon presenters' comments and general committee discussion. The October 4, 2018 revisions to the memorandum reflect the availability of bill drafts relating to two options, discussed below, as well as topics of discussion submitted by Public Member Don Millis.

## COUNTY ASSESSMENT (LRB-0336/P1)

### Background and Option

In previous meetings, the committee discussed the possibility of shifting the assessment of commercial (and, possibly, manufacturing) property to the county level. Previous legislative proposals to shift all property assessment to the county level have not been enacted. The December, 1994 Department of Revenue report, *Study of Assessment Practices* (previously distributed to the committee), recommended shifting assessment to the county level. The 1994 report noted that municipalities and public survey respondents were not in favor of that shift but nonetheless recommended the shift because of the advantages to be gained in technical proficiency and uniformity.

Multiple committee members have expressed interest in exploring county level assessment for purposes of facilitating technical specialization in complex commercial property assessments. Committee members have noted the possibility of municipal opposition and the higher costs that may result from shifting some assessment to the county level.

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**Questions**

Based on previous legislation and the interest expressed by committee members, LRB-0336/P1 has been prepared in order to aid the committee's discussion of this option. While the bill draft makes certain assumptions, the committee may wish to discuss the following questions if it chooses to explore the option of shifting some assessment to the county level:

- Should the assessment of **all** commercial property be shifted to the county level, or only a subset (e.g., based on building square footage)?
- Should the assessment of manufacturing property, and other categories of property currently administered by the state,[1] also be shifted to the county level?
- How should funding or other cost sharing be structured?
- Should there be any exceptions for large cities?
- Should regional consortia be authorized?
- How, if at all, should legislation address existing contracts between municipalities and assessors and other questions relating to transitioning to a county-based system?
- Should the board of review process for county-assessed property be transferred to the county level?

## PRESUMPTION REGARDING OTHER FILINGS (LRB-0394/P1)

**Background and Option**

The committee received testimony regarding and discussed the unique assessment challenges that arise with respect to build-to-suit properties, triple-net leases, sale-leaseback transactions, and other special financial arrangements. In multiple cases, taxpayers have argued that the purchase price of a property that is subject to a long-term lease with a nationally recognized tenant exceeds market value. Others argue that a purchase price by an outside investor is the best evidence of market value. It can be difficult for assessors and courts to identify which items in a sale-leaseback transaction might be "above market" under *Walgreen Co. v. City of Madison*, 2008 WI 80.

A potential option to address that challenge is to require assessors to rely on estimates of property value filed by a taxpayer for specified other government or investment purposes, when available. In addition, for purposes of challenges to assessments, a bill draft could establish a presumption that such specified filings represent the market value of the real estate, unless proven otherwise. Examples of such other filings might include imputed value for purposes of

[1] Currently, DOR conducts assessment for the following categories of property: manufacturing, telecommunications, power companies, air carriers, railroads, pipelines, and municipal electric. All other property tax assessment is conducted by municipal assessors.

income tax, real estate transfer tax returns, securities filings, and real estate asset disclosures reported to shareholders.

A potential challenge with this approach is that property valuation may have differing purposes and outcomes, depending on the legal context. Committee members have mentioned the effects of certain federal tax requirements on real estate financing, and the relevance of those effects with respect to the manner in which real estate leases and sales are structured. For example, a real estate deal may be structured so as to ensure a maximum amount of capital gains taxes may be deferred under Section 1031 of the Internal Revenue Code. Similarly, if a real estate purchaser is a real estate investment trust (REIT), there may be an incentive to characterize a great number of elements in a sale as a real estate investment to comply with federal law requiring a REIT to invest a minimum amount in real estate.

Another challenge is that such information may be confidential or proprietary. Any legislation may need to include confidentiality requirements, and might also need to include incentives to encourage disclosure.

**Questions**

LRB-0394/P1 has been prepared in order to aid the committee's discussion of this option. While the bill draft makes certain assumptions, the committee may wish to consider the following questions if it chooses to pursue the above option:

- Which filings would be appropriate to include?
- What disclosure incentives, or non-disclosure penalties, would best ensure that adequate information is shared with assessors? In limited circumstances, current law authorizes state assessment of certain high-value commercial property; for those assessments, the failure to submit "any information" that the Department of Revenue (DOR) "considers necessary" results in a denial of any right of redetermination by the tax appeals commission. [s. 70.855 (2) (a), Stats.] Should a similar penalty apply to the failure to disclose any relevant filings specified in this legislation, or is there another incentive or penalty that would be more effective?

## PROCESS FOR CHALLENGING ASSESSMENTS

Committee members have discussed the process for challenging assessments. Representative Allen suggests that the committee consider adding a 30-day arbitration process. Arbitrators would be selected from a statewide pool of assessors, and statutory authorization for the process would sunset after 10 years.

If the committee chooses to consider this option, it may wish to discuss the following questions:

- Would arbitration be mandatory in some circumstances?

- When would arbitration occur? Under current law, each stage of the process for challenging an assessment is time limited. Should the time periods for current steps in the process be shortened?
- What effect would arbitration have on later stages of review?
- Should some portion of funds be placed in escrow while arbitration is pending? If so, what amount?

## COMPARABLE SALES BILL (2017 ASSEMBLY BILL 386 AND 2017 SENATE BILL 292, AS AMENDED)

### Background and Option

The "comparable sales bill" prohibits a "dark property" from being used as a comparable property.[2] For that purpose, the bill defines "dark property" to mean property that is vacant or unoccupied beyond the normal period for property in the same real estate market segment.

The bill likewise prohibits assessors from using certain deed-restricted properties as comparable properties. The bill also requires an assessor to use generally accepted appraisal methods and consider certain factors when assessing property based on recent, comparable sales. Specifically, it requires an assessor to consider: (1) sales or rentals of properties exhibiting the same or a similar highest and best use; and (2) sales or rentals of properties, located locally, regionally, or nationally, that are similar to the subject property with respect to specified characteristics.

In addition, the bill specifies that, if the current use of the property is the highest and best use, then the value of the property in its current use equals full market value. As amended by the Senate Committee on Revenue, Financial Institutions, and Rural Issues, the bill defines "highest and best use" to mean "specific use of the property as of the current assessment date or a higher use to which the property can be expected to be put before the next assessment date, if the use is legally permissible, physically possible, not highly speculative, and financially feasible and provides the highest net return."

The committee may wish to recommend similar legislation.

### Questions

If it chooses to pursue this option, the committee may wish to consider whether any of the following modifications, or any other modifications, are appropriate:

- Incorporate changes to the bill from one or more of the amendments previously offered to the bill.

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[2] The bill likewise prohibits assessors from using certain deed-restricted properties as comparable properties.

- Incorporate changes to the bill as described in LRBa2310/P5, an amendment to 2017 Assembly Bill 40, relating to comparable sales. A copy of this unintroduced amendment is available on the committee's website. [Millis]

- Modify the definition of "dark property" to define "dark property" as "property that has been vacant for more than 18 months, unless the property is located in a market in which it can be proven that the average marketing time for a similar property is longer than 18 months." [Hoffman]

- Modify language allowing properties located outside of the immediate area of the subject property to be used as points of comparison. [Hoffman]

- Provide that a value derived from the cost-based assessment serve as a ceiling for assessments based on comparable sales. [Hoffman]

- Create a mechanism to escrow tax payments while an assessment is being challenged. [Hoffman]

## LEASE BILL (2017 ASSEMBLY BILL 387 AND 2017 SENATE BILL 291)

### Background and Option

Under current law, if a Wisconsin assessor concludes that recent sales data is insufficient to allow assessment based on a sale of the subject property or sales of comparable properties, then the assessor turns to other methods. One recognized method is the "income approach," in which an assessor estimates a property's value based on its income-generating potential. For leased property, a lease is one measure of income-generating potential.[3]

In 2008, the Wisconsin Supreme Court held that leased property must be assessed in terms of market rent, rather than actual rent.[4] [*Walgreen Co. v. City of Madison*, 2008 WI 80.] That opinion is sometimes characterized as having made Wisconsin a "market rent" state rather than a "contract rent" state. The lease bill could be characterized as reversing the decision in *Walgreen*.

In key part, the bill requires an assessor, when assessing leased real property, to consider the actual rent pertaining to a property and affecting its value, including sale-leaseback provisions. However, that requirement only applies if all such lease provisions and rent are the result of an arm's length transaction involving unrelated persons.

The bill also specifies that real property must be valued by an assessor at its highest and best use. As amended by the Senate Committee on Revenue, Financial Institutions, and Rural

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[3] A lease may also be a relevant consideration in step two of the *Markarian* approach. The Wisconsin Property Assessment Manual (WPAM) states: "when using the sales comparison approach with leased properties, it is important to know the income and expenses of each property. A property that appears to be comparable may in fact not be if the income and/or expenses are not at market levels due to differences in the bundle of rights being transferred." [WPAM at 13-13.]

[4] An exception applies if the actual rent is lower than market rent.

Issues, the bill defines "highest and best use" similarly to the definition in the comparable sales bill.

The committee could recommend a bill similar to the lease bill.

**Questions**

If the committee chooses to move forward with a proposal similar to the lease bill, it may wish to consider the following options:

- Incorporate changes to the bill from one or more previously offered amendments.
- Provide that a value derived from the cost-based assessment serve as a ceiling for assessments based on an income approach. [Hoffman]
- Create a mechanism to escrow tax payments while an assessment is being challenged. [Hoffman]
- Create a mechanism by which "highest and best use" is altered after a unique tenant vacates property. [Hoffman]

## REVISIONS TO THE PROPERTY TAX APPEALS PROCESS

**Background and Options**

Under current law, an assessor must complete assessments by the first Monday in April and deliver the assessment roll by the first Monday in May. In populous cities, which may have boards of assessors to process objections to property tax assessments, assessments must be finally completed before the first Monday in April.

After assessments are completed, the relevant municipal clerk notifies property owners, generally by newspaper publication, of when the assessment roll will be open for public inspection.

The period when the assessment roll is open for public inspection is generally known as "open book." Property owners may discuss their assessments with assessors during the open book period. A property owner may contest an assessment by filing an objection with the local board of review. A board of review may raise or lower an assessment in light of relevant evidence. DOR may also review an assessment in certain circumstances. A taxpayer may then appeal a final tax assessment decision in circuit court. [ss. 70.47 and 70.85, Stats.]

Among the requirements that qualify a taxpayer to appeal a tax assessment to DOR under s. 70.85, Stats., a complaint must generally be filed with DOR within 20 days of the board of review's determination, and the value of the property may not exceed $1 million. [s. 70.85 (1) and (2), Stats.]

Mr. Millis suggests that the committee consider removing the $1 million limit on a property's value and extending the filing deadline for the appeal to DOR to 90 days after the board of review's determination, to match the deadline for appeal to circuit court under s. 70.47 (13), Stats.

As an alternative to the options for appeal of a final tax assessment decision under ss. 70.47 and 70.85, Stats., a taxpayer may bring a claim for excessive assessment in circuit court. [s. 74.37, Stats.] Currently, the amount of the claim filed may include interest at the same rate as the most recent auction of six-month treasury bills.

Mr. Millis suggests that the committee consider revising the rate of interest that may be included in a claim for excessive assessment to the same rate of interest paid on verdicts under s. 814.04 (4), Stats., which is 1 percent, plus the prime rate of interest as reported by the Federal Reserve Board in federal reserve statistical release H. 15.[5]

**Questions**

If it chooses to pursue one or more of these options, the committee may wish to consider the following questions:

- Should the value limit for DOR appeal under s. 70.85, Stats., be adjusted upward or removed entirely?
- Is 90 days the appropriate deadline for both circuit court and DOR appeals?

## ASSESSOR TRAINING, EDUCATION, AND CERTIFICATION

**Background and Options**

Current law provides for the election of local property tax assessors and the local hiring of assessment personnel to support the elected assessor. Tax assessors and assessment personnel for towns, villages, cities, and counties must be certified by DOR before they may assume office or perform its functions. [s. 70.05, Stats.]

Mr. Millis suggests several revisions to the training, education, and certification of local assessors, including transfer of assessor oversight from DOR to the Department of Safety and Professional Services (DSPS); creation of mandatory coursework for assessor certification; creation of a class of assessor certification specifically authorized to assess commercial property; and creation of outcome-based disciplinary standards for assessors.

**Questions**

If it chooses to pursue one or more of these options, the committee may wish to consider the following questions:

- How would these options interact with other recommendations of the committee? For example, would revision to assessor training be necessary if county-based assessment were recommended?

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[5] The H.15 release is updated daily. It can be accessed at https://www.federalreserve.gov/releases/h15/.

- What guidance should legislation offer on the scope of discipline for assessors based on over- or under-assessment?
- What coursework should be required for assessor certification? Should this determination be left to DOR or DSPS discretion or specified in legislation?
- If created, should coursework requirements be limited to a new class of commercial assessor certification?
- How will additional oversight be funded?

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