STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019AP1618

State of Wisconsin ex rel. Nudo Holdings, LLC,
Petitioner-Appellant-Petitioner,

v.

Board of Review for the City of Kenosha,
Respondent-Respondent.

On Review of a Published Decision of the Wisconsin Court of Appeals, District II, Affirming an Order of the Kenosha County Circuit Court, the Honorable Anthony G. Milisauskas, presiding, Case No. 18-CV-896

JOINT *AMICUS CURIAE* BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION, WISCONSIN BUILDERS ASSOCIATION, AND NAIOP-WI

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On September 11, 2017, the Petitioner purchased the subject property, which consists of 8.9 acres of undeveloped land within the City of Kenosha. App. 104. The property is zoned for agricultural use, with 120 walnut trees and numerous Christmas trees growing on the property. App. 107, 110.

Within the first 3 months of purchasing the property, the Petitioner performed various agricultural activities on the land including harvesting walnuts from the trees, cutting trails through the brush to access the Christmas trees and walnut groves, tilling portions of the land, and made the necessary preparations to plant pine trees for a wind break to protect the walnut trees. Resp. Br. at 19; App. 109. In addition, the Petitioner applied for and received various permits and approvals necessary to operate his farming business, such as permits for timber and Christmas tree harvesting, and a livestock license. *See* App. 109.

Despite these efforts, the City of Kenosha maintains that not enough agricultural activity occurred on the property between mid-September and January 1 to classify the property as "agricultural" for property tax purposes. Resp. Br. at 19-20. Specifically, the City asserts that the

property was not eligible for an agricultural classification because "'the majority' of the parcel" was not "'chiefly put to agricultural use'" during this three-month time period. *See* Resp. Br. at 19 (citing *State ex rel Peter Ogden Fam. Tr. of 2008 v. Bd. of Review for Town of Delafield*, 2019 WI 23, ¶39, 385 Wis.2d 676, 923 N.W.2d 837).

Alternatively, the City classified the property as "residential" because the Petitioner indicated his intent to develop the property in the future as residential, which was consistent with the City's land-use plan. *See* Resp. Br. at 20. According to the City, if a City's land-use plan designates the future use of a property as residential, a property owner's expression of potential future use of a property as residential is "enough to classify the land as 'residential'" for property tax purposes. *Id.*

This case presents this Court with an opportunity to clarify (a) how much agricultural activity on a property is required in determining whether a property is classified as "agricultural" under Wisconsin's property tax assessment law, and (b) whether a property can be classified as "residential" for property tax purposes based primarily on the potential future use of the property.

LAW AND ARGUMENT

In a certiorari review, this Court reviews the decision of the Board of Review (Board) and determines whether the Board's decision "(1) stayed within its jurisdiction; (2) acted under a correct theory of law; (3) was arbitrary, oppressive, or unreasonable, representing its will and not its judgment; and (4) supported by the evidence such that the board might reasonably make the order or determination in question." Wis. Stat. § 70.47(13); *Ogden,* 385 Wis.2d at ¶23.

The Board's decision must be based upon a correct interpretation of the law. If the Board's decision is based on an incorrect interpretation, a reviewing court shall reverse the Board's decision. *State ex rel Kesselman v. Bd. of Review for Village of Sturtevant*, 133 Wis.2d 122, 127-28, 394 N.W.2d 745 (1986)(citation omitted). A property tax assessment that fails to meet the statutory requirements is an error of law that can be corrected on certiorari review. *State ex rel Boostrom v. Bd. of Review*, 42 Wis. 2d 149, 156, 166 N.w.2d 184 (1969).

I. AGRICULTURAL USE IS THE KEY FACTOR IN DETERMINING THE ELIGIBILITY FOR USE VALUE.

The assessment of real property, including agricultural land, is governed by the Wisconsin Statutes. *See* Wis. Stat. § 70.32. Pursuant to the

Wisconsin Statutes, assessors are required to classify properties "on the basis of use" into one of eight categories (including the category "other"). Wis. Stat. § 70.32(2)(a). The "agricultural" classification consists of "land, exclusive of buildings and improvements and the land necessary for their location and convenience that is devoted primarily to agricultural use." Wis. Stat. § 70.32(2)(c)1g. "Agricultural use" is "defined by the department of revenue by rule and includes the growing of short rotation woody crops, including poplars and willows, using agronomic practices." *Id.* at 70.32(2)(c)1i. The Wisconsin Department of Revenue (DOR) rules define "agricultural use" as any activity that falls into one of four categories, including crop production, as defined in subsector 111 Crop Production, set forth in the North American Industry Classification System (NAICS), and the growing of Christmas trees. Wis. Admin. Code § Tax 18.05(1).

The NAICS broadly defines "crop production" as an establishment "primarily engaged in growing crops, plants, vines, or trees and their seeds." *See* NAICS subsector 111 Crop Production. Moreover, each industry group identified under the crop production subsector is defined to include "establishments primarily engaged in growing . . ." which includes

the growing of "tree nut crops." *See e.g.,* NAICS subsector 111150 Corn Farming ("establishments primarily engaged in growing corn"); *see* NAICS subsector 1113 Fruit and Tree Nut Farming ("establishments primarily engaged in growing fruit and/or tree nut crops"). Under this bright-line test, if the establishments are primarily engaged in growing any of the eligible crops on the property, the activity is considered "crop production" under the NAICS. *See* NAICS subsector 111 Crop Production.

If land is devoted primarily to an agricultural use, the assessor must classify the property as agricultural land. Wis. Admin. Code § Tax 18.06(1). More specifically, when put to an agricultural use "for the production season of the prior year, and not in a use that is incompatible with agricultural use on January 1 of the assessment year, the land qualifies for use value." Wis. Admin. Code § Tax 18.05(4). Again, agricultural use, which includes crop production and the growing of Christmas trees and the growing of tree nut crops, is dispositive as to whether the land qualifies for use value.

In this case, the Petitioner demonstrated that 120 walnut trees and numerous Christmas trees were growing on the property. App. 107, 110. In addition, during his 3 months of ownership in 2017, the Petitioner

performed various agricultural activities on the land including cutting trails through the brush to gain access to the Christmas trees and walnut groves, harvesting walnuts from the trees, tilling portions of the land, and made the necessary preparations to plant pine trees for a wind break to protect the walnut trees. Resp. Br. at 19; App. 109. In addition, the Petitioner applied for and received various permits and approvals necessary to operate his farming business, such as permits for timber and Christmas tree harvesting, and a livestock license. *See* App. 109. Moreover, nothing in the record demonstrated that the Petitioner used the property for anything other than agriculture use.

As this Court has declared, when "the evidentiary record shows [the land] is 'devoted primarily to agricultural use,' [the land is] entitled to be classified as 'agricultural land' [as a matter of law]." *Ogden*, 385 Wis. 2d at ¶44. If a board of review fails to properly classify property as "agricultural" based upon its current use, the board has erred and a reviewing court must reverse the board's decision. *See Fee v. Bd. of Review for the Town of Florence*, 2003 WI App 17, ¶¶18-19, 259 Wis.2d 868, 657 N.W.2d 112.

II. USE VALUE ELIGIBILITY DOES NOT REQUIRE THE ENTIRE PARCEL TO BE DEVOTED TO PRIMARILY TO AGRICULTURAL USE.

The DOR, which oversees the property tax assessment system in Wisconsin, recognizes that portions of a parcel may qualify for use value if the entire parcel has not primarily devoted to an agricultural use. *See* Wis. Stat. § 73.03. As part of its guidelines on how to implement the property tax classification system related to agricultural land, the DOR states that when part of small parcel that would otherwise be classified as "residential" is used primarily for agricultural purposes, that part of the parcel should be classified as agricultural.

> Even though the minimum residential parcel size may be 5 acres, if all or part of the land is primarily devoted to a qualifying agricultural use under administrative tax rule (tax 18, Wis. Admin. Code), the qualifying acreage is classified as agricultural. . . . Acreage use, not zoning, is the determining factor.

"Use-Value Assessment Common Questions," Wisconsin Department of Revenue, https://www.revenue.wi.gov/Pages/FAQS/slf-useassmt.aspx (emphasis added). In response to a question on how to properly classify a five-acre parcel, partially wooded, with two acres devoted to crop production and the crop harvested last fall, DOR indicates that the "[p]arcel is classified as part Agricultural (the two acres) and part Residential." *See*

"Use-Value Assessment Common Questions, Question 9, Parcel A," https://www.revenue.wi.gov/Pages/FAQS/slf-useassmt.aspx.

In this case, while the assessor and members of the Board acknowledged that walnuts had been harvested and Christmas trees were growing on the property, the assessor and Board failed to consider whether part of the property was eligible for use value. According to the transcript from the Board meeting on June 27, 2019, the Board believed they were not allowed to classify only a portion of the parcel as agriculture:

> I'm on record as stating that the walnut portion of the Nudo property is a quasi-agricultural use. I stand by that.
>
> During Mr. Nudo's hearing on August 1, the question was raised as to how much of the 8.9 acres is devoted to walnut harvesting. According to the Board of Review manual, 'property owners can only appeal the total value of a parcel.' So while the portion of the walnut harvesting is an interesting discussion, the Board of Review attorney, . . . , has advised us that Mr. Nudo may only appeal the total value of the parcel, which, unfortunately, rules out a compromise based on a percentage of the acreage that might be defined as a legitimate agricultural use.

App. 104, lines 4-17.

The Board's failure to consider whether part of the parcel could be classified as "agriculture" and eligible for use value was based on an incorrect interpretation of the law.

III. THE ASSESSOR ERRED BY CLASSIFYING LAND AS "RESIDENTIAL" BASED UPON POTENTIAL FUTURE USE.

As indicated above, the classification of real property for property tax purposes requires assessors to consider only how a property is currently being used. *See* Wis. Stat. § 70.32(2)(a). Specifically, assessors are required to classify properties "on the basis of use" into one of eight categories, including residential. *Id.*

In *Thoma v. Village of Slinger*, 2018 WI 45, 381 Wis.2d 311, 912 N.W.2d 56, this Court recently affirmed that the actual use of the land is the controlling factor in determining all classifications of property for tax assessment purposes. In upholding the tax assessor's change in use classification from agricultural to residential due to the lack of evidence demonstrating the land was used for agricultural purposes, the Court stated,

> We emphasize what is clear under applicable law [. . .]: classification of real property for tax assessments is based on how the property is being used [. . .]. Actual use controls whether property qualifies for agricultural or any other classification for tax assessment purposes.

Id. at ¶17 (emphasis added). The consideration of factors not pertaining to the actual use of the land is irrelevant in determining any classification of property for tax assessment purposes, including residential. *Id*.

In this case, nothing in the record demonstrates the property was being used for residential purposes. In fact, residential development was not a permitted use under the property's A-2 zoning classification. *See* City of Kenosha Zoning Ordinance, III-127 (Effective as of May 21, 2021). According to the City's zoning ordinance, the purpose of the A-2 zoning classification is to "maintain and generally preserve for a period of time, those agricultural lands where urban expansion is proposed to take place." *Id.* Thus, according to the ordinance, only "agricultural lands" are to have the A-2 zoning classification. *Id*. Moreover, under the zoning ordinance, all permitted uses, permitted accessory uses, conditional uses, lot dimensions, and building requirements under the A-2 zoning classification are identical to the City's "A-1 General Agricultural District" zoning classification. *Id*. Under the City's A-1 zoning classification, thirty-one permitted uses are identified, many of which are inherently agricultural uses and the same uses in which the Petitioner has engaged in such as "forest management," "orchards," "poultry raising," and "raising of tree fruits, nuts and berries." *Id.* at III-125. Under the ordinance, residential development is not allowed as a permitted use, permitted accessory use, or conditional use, except for (a) one single-family residence on lots less than 35 acres

that were created prior to the adoption of the ordinance, and (b) housing for farm laborers or farm workers which is a conditional use. *Id.*

Nevertheless, the City contends that the potential future residential development of the property is sufficient to classify the property as "residential" for property tax purposes. Resp. Br. at 20-21.

> Mr. Krystowiak explained that Mr. Nudo's development plan matched the City's – that the land's inclusion in the City's 'St. Peter's Neighborhood Plan' meant the City contemplated it would be developed into the single family lots Mr. Nudo was planning. . . . that was enough to classify the land as 'residential.'

Id. (citations omitted.)

As established by Wis. Stat. § 70.32(1) and this Court in *Thoma*, the classification of real property for property tax purposes requires assessors to consider the actual use of the property. *See Thoma*, 381 Wis.2d at ¶17 ("Actual use controls whether property qualifies for agricultural or any other classification for tax assessment purposes.")

IV. THE WPAM GUIDELINES FOR RESIDENTIAL CLASSIFICATION ARE IN DIRECT CONFLICT WITH STATE STATUTES AND THE UNIFORMITY CLAUSE.

In support of its claim that the potential future use of the property can be relied upon exclusively in determining the residential classification of land, the City cites to guidelines published in the Wisconsin Property Assessment

Manual ("WPAM) as persuasive legal authority. *See* Resp. Br. at 13-14, 20. These same WPAM guidelines were cited by the court of appeals in this case, when affirming that the potential future use of property can be relied upon exclusively in determining the residential classification of land. *See State ex rel. Nudo Holdings, LLC v. Bd. of Review for the City of Kenosha*, 2020 WI App 9, ¶20, 395 Wis.2d 261, 925 N.W.2d 816. Specifically, the court stated:

> [T]he WPAM guidelines for residential classification concern future use: whether 'the actions of the owner(s) [are] consistent with an *intent* for residential use,' whether 'residential zoning [is] *likely* to be allowed,' whether 'the parcel's topography or physical features *allow for* residential use' and 'any other factors . . . which would indicate residential use is *reasonably likely or imminent*.'

Id. (citing WPAM 12-1)(emphasis in original). The court interpreted these guidelines to allow for a residential classification based upon potential future use and concluded that reliance on these guidelines by the assessor and Board was proper. *Id.*

If the court's interpretation of the WPAM guidelines is accurate and the guidelines recommend that assessors classify land as "residential" based upon its potential future use, then WPAM is in direct conflict with Wis. Stat. § 70.32(2), which requires all classifications to be based upon actual

use. *See Thoma,* 381 Wis. 2d at ¶17. If the WPAM conflicts with a statute, the statute controls. *See Metropolitan Holding Co. v. Bd. of Review of City of Milwaukee*, 173 Wis.2d 626, 633, 495 N.W.2d 34 (1993). Moreover, "compliance with the [WPAM] is not a defense when the method of assessment suggested by the [WPAM] results in a violation of sec. 70.32(1)." *Id.* at 632-33.

When comparing the WPAM guidelines for the "residential" classification with WPAM guidelines for other classifications, the guidelines for other classifications focus on actual use, rather than potential future use. For example:

- For the "commercial" classification, the WPAM indicates "commercial property consists of properties for which the predominant use is the selling of merchandise or a service." WPAM at 13-1 (emphasis added).

- For the "undeveloped land" classification, the WPAM indicates "[t]his class also includes land that, because of soil or site conditions, is not producing or capable of producing commercial forest products." WPAM 15-1.

- For the "productive forest lands" classification, the WPAM indicates that classification is to be "determined primarily by the use of the land." WPAM at 15-3 (emphasis added).

In clear contrast to the guidelines for the "residential" classification, none of these guidelines recommend considering the potential future use of the

property in determining the classification. *See also*, WPAM at 7-12 thru 7-20 (identifying the actual use of the property as the determining factor for each of the classifications including "residential"). The WPAM recommends the consideration of potential future use only for the "residential" classification. *See* WPAM at 12-1.

By recommending that assessors consider potential future use only for the residential classification, the WPAM is encouraging inconsistent treatment within the property tax classification system. While the legislature has authorized the DOR to create the WPAM to assist in the administration of our property tax system, the uniformity clause found in Article VII, Section 1, of the Wisconsin Constitution requires consistent treatment of property within all classifications. Wis. Stat. § 70.03; s*ee Gottlieb v. City of Milwaukee*, 33 Wis.2d 408, 427, 147 N.W.2d 633 (1967). As noted by the court of appeals, this Court has "expressly rejected the argument that the uniformity clause permits different classifications of taxable property as long as there is uniformity within each classification." *Noah's Ark Family Park v. Bd. of Review of the Village of Lake Delton*, 210 Wis.2d 301, 317, 565 N.W.2d 230 (Ct. App. 1997)(citing *Gottlieb*, 33 Wis.2d at 427).

Thus, if the court of appeal's interpretation is correct and the WPAM guidelines for residential classification do allow for a determination based upon future use, then such guidelines would allow for inconsistent administration of our property tax system, which would be a violation of the uniformity clause.

CONCLUSION

For the reasons stated above, we respectfully request this Court to invalidate the Board's decision and clarify that current use of the property, in whole or in part, is the only factor considered in classifying real property for purposes of property tax assessments.

Dated this 19th day of July, 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2991 words.

_____
Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 19th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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