COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1076 **Cir. Ct. No. 2013CV380**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FRANK J. MULTERER, KATHLEEN MULTERER, RYAN F. WALDSCHMIDT, SARA A. WALDSCHMIDT AND D & D SCHMIDT FARMS, LLC,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN DEPARTMENT OF REVENUE AND RICHARD CHANDLER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Frank and Kathleen Multerer, Ryan and Sara Waldschmidt, and D & D Schmidt Farms (collectively, the appellants) appeal summary judgment in favor of the Department of Revenue. The appellants are owners of parcels of land that are subject to permanent wetland conservation easements under federal law. That land does not meet the definition of "agricultural use" in WIS. ADMIN. CODE § Tax 18.05(1)(d) (through September 2017) and is, therefore, not classified "agricultural" for property tax assessment purposes. The appellants contend that § Tax 18.05(1)(d) is unconstitutional as applied to them and that it was not promulgated in compliance with the Wisconsin Environmental Policy Act. For the reasons discussed below, we affirm summary judgment in favor of DOR.

BACKGROUND

¶2 The facts in this case are not disputed. Each of the appellants is an owner of a parcel of land that are subject to permanent easement under the Wetland Reserve Program (WRP).[1] The appellants' lands that are subject to the permanent easements under WRP were previously farmed, however, the easements prohibit the appellants from any future "haying, mowing or seed harvesting [the land] for any reason … planting or harvesting any crop; and [] grazing or allowing livestock on the easement area."

[1] The Wetland Reserve Program (WRP) was subsequently repealed by the Agricultural Act of 2014, which established the Agricultural Conservation Easement Program. The validity of existing easements under the WRP was not affected. https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/ (last visited Sept. 24, 2017).

¶3 Land that is classified as "agricultural" under WIS. STAT. § 70.32(2)(a) (2015-16)[2] is, pursuant to § 70.32(2r), "assessed according to the income that could be generated from its rental for agricultural use." WISCONSIN ADMIN. CODE § Tax 18.05(1) defines "[a]gricultural use" for purposes of § 70.32. That definition excludes the appellants' land that is subject to permanent wetland conservation easements. *See* § Tax 18.05(1)(d). As a result, that land is not classified as agricultural and is not assessed according to the income that could be generated from the land's rental for agricultural use.

¶4 The appellants brought suit against DOR challenging the validity of WIS. ADMIN. CODE § Tax 18.05(1)(d).[3] The appellants alleged that DOR's exclusion of their properties from the definition of "agricultural use" in § Tax 18.05(1)(d) violates their state and federal equal protection rights and the Uniformity Clause of Wisconsin's Constitution. The appellants also alleged that § Tax 18.05(1)(d) was promulgated without environmental review required by the Wisconsin Environmental Policy Act (WEPA). The circuit court granted summary judgment in favor of DOR, and dismissed the action. The appellants appeal.

DISCUSSION

¶5 The appellants contend that the circuit court erred in granting summary judgment in favor of DOR. Before we address the appellants'

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] The Multerers, Waldschmidts, and D & D Schmidt Farms initially brought separate suits against DOR challenging WIS. ADMIN. CODE § Tax 18.05(1)(d). Their separate actions were consolidated in the circuit court.

arguments, we first provide a brief explanation of the statutory framework underlying this appeal.

¶6 At the crux of this appeal are the property tax assessments for the appellants' separate parcels of land that are subject to the permanent easements under WRP. The manner in which real property is valued in Wisconsin for tax assessment purposes is governed by WIS. STAT. § 70.32. *See* ***ABKA Ltd P'ship v. Board of Review of Village of Fontana-On-Geneva Lake***, 231 Wis. 2d 328, 339, 603 N.W.2d 214 (1999). Under § 70.32(1), an assessor first determines a property's "full value," which is the same as "fair market value," the "value which could ordinarily be obtained [for the property] at private sale." *See* ***Sausen v. Town of Black Creek Bd. of Review***, 2014 WI 9, ¶15, 352 Wis. 2d 576, 843 N.W.2d 39; ***U.S. Oil Co., Inc. v. City of Milwaukee***, 2011 WI App 4, ¶24, 331 Wis. 2d 407, 794 N.W.2d 904. After the full value of the property is determined, the assessor classifies the property under one of the following eight statutory classifications: residential, commercial, manufacturing, agricultural, undeveloped, agricultural forest, productive forest land, or other. *See* § 70.32(2)(a).

¶7 While some classifications of property are assessed at the property's full value, certain classifications of property, including agricultural, are assessed differently than at the property's full value. *See* WIS. STAT. § 70.32(2r); ***Sausen***, 352 Wis. 2d 576, ¶15; *see also* § 70.32(3) (manufacturing property) and § 70.32(4) (agricultural forest land and undeveloped land). Land is classified as agricultural if it is "devoted primarily to agricultural use." ***Fee v. Board of Review for Town of Florence***, 2003 WI App 17, ¶12, 259 Wis. 2d 868, 657 N.W.2d 112. WIS. ADMIN. CODE § Tax 18.05(1) defines "[a]gricultural use" in relevant part as "any of the following":

> (a) Activities included in subsector 111 Crop Production, set forth in the North American Industry Classification System (NAICS), United States, 1997, published by the executive office of the president, U.S. office of management and budget.
>
> (b) Activities included in subsector 112 Animal Production, set forth in the North American Industry Classification System (NAICS), United States, 1997, published by the executive office of the president, U.S. office of management and budget.
>
> (c) Growing Christmas trees or ginseng.
>
> (d) Land without improvements subject to a federal or state easement or enrolled in a federal or state program if all of the following apply:
>
> 1. The land was in agricultural use under par. (a), (b), or (c) when it was entered into the qualifying easement or program, and
>
> 2. Qualifying easements and programs shall adhere to standards and practices provided under the January 31, 2014 No. 697 version of s. ATCP 50.04, 50.06, 50.71, 50.72, 50.83, 50.88, 50.91, 50.96, or 50.98. The Wisconsin Property Assessment Manual, authorized under s. 73.03 (2a), Stats., shall list the qualifying easements and programs according to the ATCP provisions, and
>
> 3.a. The terms of the temporary easement or program do not restrict the return of the land to agricultural use under par. (a), (b), or (c) after the easement or program is satisfactorily completed, or
>
> b. The terms of an easement, contract, compatible use agreement, or conservation plan for that specific parcel authorized an agricultural use, as defined in par. (a), (b), or (c), for that parcel in the prior year.

¶8 The lands at issue in this case are subject to permanent easements under the Wetland Reserve Program that permanently prohibit agricultural use as defined in WIS. ADMIN. CODE § Tax 18.05(1)(a), (b), or (c). Accordingly, they do not meet the definition of "agricultural use," s*ee* § Tax 18.05(1)(d)2. and 3., and

therefore that land is not classified as agricultural for tax assessment purposes. *See* WIS. STAT. § 70.32(4).

¶9 The appellants contend that the exclusion of their land from the definition of agricultural use in WIS. ADMIN. CODE § Tax 18.05(1)(d) is unconstitutional because it violates the equal protection clause of the Wisconsin and United States Constitutions and the Uniformity Clause of the Wisconsin Constitution. They also argue that § Tax 18.05(1)(d) is invalid because it was not promulgated in compliance with WEPA.[4]

¶10 We review a circuit court's decision to grant or deny summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Whether a statute or administrative rule is unconstitutional is a question of law that we review de novo. ***Phillips v. Wisconsin Personnel Comm'n***, 167 Wis. 2d 205, 224, 482 N.W.2d 121 (Ct. App. 1992). Administrative rules, like statutes, are presumed constitutional, and the challenger must prove that the rule is unconstitutional beyond a reasonable doubt. ***Id.***

A. Equal Protection

¶11 The appellants argue that the exclusion of their land at issue here from the definition of "agricultural use" in WIS. ADMIN. CODE § Tax 18.05(1)(d)

[4] The appellants devote a substantial part of their brief-in-chief to discussing the alleged influence of outside interests on DOR in promulgating WIS. ADMIN. CODE § Tax 18.05(1)(d). The appellants do not develop an argument that any influence on DOR was unlawful or is otherwise pertinent to any legal argument they develop on appeal. Accordingly, we do not further address that issue.

violates the equal protection clauses of the Wisconsin and United States Constitutions as applied to them.

¶12 "The Equal Protection Clause ensures that people will not be discriminated against with regard to 'statutory classifications and other governmental activity.'" ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶37, 235 Wis. 2d 610, 612 N.W.2d 59 (quoted source omitted). When reviewing an equal protection claim, we must first determine which of the following three levels of judicial scrutiny applies: strict, intermediate, or rational basis. *See* ***State v. Alger***, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d 346; and ***State v. Barman***, 183 Wis. 2d 180, 191 n.4, 515 N.W.2d 493 (Ct. App. 1994). The parties in this case agree that the definition of "agricultural use" in WIS. ADMIN. CODE § Tax 18.05(1)(d) does not involve a suspect classification or a fundamental right. Therefore, we will assume without deciding that the proper standard is rational basis scrutiny.

¶13 "Rational basis review is deferential to the legislature." ***Alger***, 360 Wis. 2d 193, ¶50. When we apply the rational basis test to a law that is subject to an equal protection challenge, we will uphold the law "if 'any reasonably conceivable state of facts … could provide a rational basis for the classification.'" ***Id.*** (quoted source omitted). If there is, we must assume the legislature passed the act on that basis. ***Ferdon v. Wisconsin Patients Compensation Fund***, 2005 WI 125, ¶75, 284 Wis. 2d 573, 701 N.W.2d 440. The burden of proof rests upon the party raising the equal protection challenge. *See* ***Clear Channel Outdoor, Inc. v. City of Milwaukee***, 2017 WI App 15, ¶26, 374 Wis. 2d 348, 893 N.W.2d 24.

¶14 WISCONSIN ADMIN. CODE § Tax 18.05(1)(d) defines "agricultural use" as including land that is subject to a "federal or state easement or enrolled in

a federal or state program," provided the "easement or program" does not permanently prohibit future crop or animal production, or the growing of Christmas trees or ginseng on the land. None of the "agricultural use" definitions describe land that is subject to a permanent easement that prohibits the land from being used for crop and animal production at the present time or any time in the future.

¶15 The appellants argue that they are similarly situated to, but treated differently than, owners of land that has temporary restrictions on agricultural use. That is, the appellants argue that, as to the tax years at issue here, their land—subject to a permanent easement prohibiting altogether the land's present and future use for crop or animal production—and land owned by others—subject to an easement that temporarily restricts the use of the land for agricultural purposes—are identical in their *current* physical characteristics in that none of the land may, at the time of classification, be used for crop or animal production. The appellants argue that there is not a rational basis for treating these two types of land differently for property tax purposes. We are not persuaded.

¶16 Land that is subject to a permanent easement permanently restricting the land's agricultural use may not ever again be used for crop or animal production. However, land that is subject only to a temporary easement restricting the land's use for crop or animal production may be returned to agricultural use in the future after the easement or program is completed. As we now explain, it is reasonable for the legislature to give preferential tax treatment to land that can be put to agricultural use in the future.

¶17 The preservation and encouragement of land use for the production of food is a stated goal within this State. The assessment of each parcel of

"agricultural land" is at its agricultural use value, rather than full value which might be affected by the value of the land if used in the future for a non-agricultural purpose. WIS. STAT. § 70.32(2r). The goal in creating this category of assessment is "to preserve farmland and to reduce the conversion of farmland to other uses." WIS. STAT. § 73.03(49)(c).

¶18 By assessing land that is not currently being used for agricultural use but that can be returned to agricultural use at a later date at the "use value," rather than the full value, DOR provides an incentive to landowners to keep open the possibility that their land can be returned to crop or animal production in the future. Taxing land that cannot be later returned to crop or agricultural production at use value provides no incentive to landowners to preserve their land for farmland use and this difference in goals provides a rational basis for excluding such land from the definition of "agricultural use" in WIS. ADMIN. CODE § Tax 18.05(1)(d).

¶19 Both categories effectively receive preferential tax treatment. Land in a permanent easement is not as valuable as land without such restrictions and, thus, is taxed less than unrestricted land. Agricultural land receives the preferential treatment described above. To the extent agricultural land under temporary restrictions is taxed at a lower level than similar land in a permanent conservation easement, that difference reasonably reflects the legislature's preference for preserving farmland in the long run.

¶20 Accordingly, we agree with the circuit court that the appellants have not established that their equal protection rights were violated and that summary judgment in favor of DOR was appropriate on that claim.

B. Uniformity Clause

¶21 The appellants next argue that the exclusion of their WRE enrolled land from the definition of "agricultural use" in WIS. ADMIN. CODE § Tax 18.05(1)(d) violates article VIII, section 1 of the Wisconsin Constitution, otherwise known as the Uniformity Clause. This court reviews de novo a circuit court's conclusion whether a taxation rule violates the Uniformity Clause. ***U.S. Oil Co., Inc.***, 331 Wis. 2d 407, ¶12.

¶22 The Uniformity Clause provides in relevant part:

> The rule of taxation shall be uniform, but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods…. *Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property*. (Emphasis added).[5]

¶23 The Uniformity Clause requires that the method and mode of taxing real property be applied uniformly to all property within a tax district. *See* ***U.S. Oil, Co.***, 331 Wis. 2d 407, ¶¶2, 23-24; ***Norquist v. Zeuske***, 211 Wis. 2d 241, 248, 564 N.W.2d 748 (1997). The last sentence of the Uniformity Clause, which is emphasized in the quote above, "makes clear that agricultural land need not be uniformly taxed as compared to other types of property, but it must be taxed uniformly as compared to other agricultural land." ***Id.***

[5] "Undeveloped land," is defined as "bog, marsh, lowland brush, uncultivated land zoned as shoreland under [WIS. STAT. §] 59.692 and shown as a wetland on a final map under [WIS. STAT. §] 23.32 or other nonproductive lands not otherwise classified under this subsection." WIS. STAT. § 70.32(2)(c)4. "Undeveloped land" is assessed at fifty percent of the full value of the property. *See* WIS. STAT. § 70.32(4). Whether the subject lands are "undeveloped" is not at issue in this appeal.

¶24 The appellants argue that WIS. ADMIN. CODE § Tax 18.05(1)(d) violates the Uniformity Clause because it does not include their WRE enrolled land in the definition of "agricultural use," which has resulted in their WRE enrolled land being classified for tax assessment purposes as undeveloped, whereas property enrolled in non-permanent conservation easements are classified as agricultural and taxed as such. The appellants argue that lands enrolled in long-term, but temporary, conservation easements and those lands such as theirs enrolled in permanent easements "are currently identical in every meaningful way" and it is therefore not "reasonable" to treat their WRE enrolled property different from property subject to non-permanent conservation easements.

¶25 The appellants do not argue that their property is not taxed uniformly with other property not classified as agricultural. Rather, their argument centers on the failure of their property to be classified as agricultural. In claiming that there is no meaningful difference between their property and agricultural property, the appellants are really just restating their arguments made in support of their equal protection challenge. We have addressed and rejected those arguments above. We explained that they are different in a meaningful way, in that lands subject to a temporary easement have the potential to be returned to agricultural production at some time in the future and lands subject to a permanent easement that permanently prohibit use of the land for agricultural purposes cannot. For the same reason, we reject their argument in this context.

C. Compliance with the Wisconsin Environmental Policy Act (WEPA)

¶26 The appellants contend that WIS. ADMIN. CODE § Tax 18.05(1)(d) is invalid because DOR failed to prepare an environmental impact statement under WEPA when it revised § Tax 18.05(1)(d) in 2014.

¶27 "The purpose of WEPA is to insure that agencies consider environmental impacts during decision making." ***State ex rel. Boehm v. DOR***, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993). WEPA requires that agencies consider and evaluate, in the framework provided by WIS. STAT. § 1.11, the environmental consequences of alternatives available to them. ***Id.***

¶28 WISCONSIN STAT. § 1.11(2)(c) requires that all state agencies prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment …." Our supreme court has agreed that in some cases "it will be obvious to [the] agency and [the] court alike on the basis of facts that no EIS need be prepared," ***Wisconsin's Environmental Decade, Inc. v. PSC***, 79 Wis. 2d 409, 424, 256 N.W.2d 149, and an agency is not obligated to make an explicit determination that an action will or will not require an EIS. *See* ***Larsen v. Munz Corp.***, 167 Wis. 2d 583, 600, 482 N.W.2d 332 (1992).

¶29 The appellants argue that the burden lies with DOR to prove that an EIS was not required because there were no significant environmental effects resulting from the revision of WIS. ADMIN. CODE § Tax 18.05(1)(d) in 2014, and that they have no burden to prove that there are significant effects from the revision. However, as the supreme court explained in ***Wisconsin's Environmental Decade***, an agency is required to show justification for its negative-EIS decision only "where issues of arguably significant environmental import are raised." ***Wisconsin's Environmental Decade, Inc.***, 79 Wis. 2d at 424. A party challenging an agency's decision not to file an EIS must allege facts constituting a bona fide challenge. ***Id.*** Allegations of environmental effect "which are patently trivial or frivolous" are not sufficient to trigger judicial review. ***Id.***

¶30 In this case, the appellants allege that the exclusion from agricultural status of land enrolled in permanent wetland conservation easements that permanently prohibit the land's use for animal or crop production has reduced the amount of wetlands that provide flood abatements, soil conservation, filtration of agricultural run-off, groundwater recharge, and water quality improvement, flood plan mitigation, and wildlife habitat. They also assert that "[t]axpayers' ability to hunt and recreate will be diminished and they will face other concerns caused by the decline in these beneficial wetlands." The evidence cited to this court in support of the appellants' assertions, which includes the appellants' complaint and a 2002 letter from the secretary of DOR to the secretary of the Department of Administration setting forth concerns with proposed amendments to WIS. ADMIN. CODE § Tax 18.05(1)(d), does not rise to the level of "facts constituting a bona fide challenge," but instead are only unsupported and unexplained allegations. For example, the appellants do not provide any information on the amount of land that is potentially affected by WIS. ADMIN. CODE § Tax 18.05(1)(d), or any evidence other than speculation that lands will not be set aside for the purposes discussed. Without such facts, it is impossible to say whether there is a genuine challenge, that is to say, that allegations of a significant environmental impact are not patently trivial or frivolous. We conclude that the appellants have thus failed to meet their threshold obligation in raising a WEPA challenge and that the circuit court did not err in granting summary judgment in favor of DOR on this issue.[6]

[6] Because our decision on this issue is dispositive, we do not address other arguments raised by DOR as to why summary judgment on the appellants' WEPA challenge was appropriate. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

CONCLUSION

¶31 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.