

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2159

Cir. Ct. No. 2009CV1943

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF LITTLE CHUTE,

PETITIONER-APPELLANT,

V.

OUTAGAMIE COUNTY DRAINAGE BOARD,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Village of Little Chute appeals from a judgment upholding upon certiorari review a reassessment by the Outagamie County Drainage Board for maintenance costs related to the Vandebroek

drainage district. The Village argues the reassessment rates were arbitrary, inequitable and disproportionate to benefits accruing from the project. We affirm.

¶2 The drainage district comprises approximately 1575 acres of land, consisting of 40.8% agricultural land use and 59.2% residential/commercial development land use. The district is served by an above-ground open drainage way that needs periodic maintenance and dredging due to the accumulation of sediments carried by water that runs through the drainage way.

¶3 During the Drainage Board's annual spring meeting in April 2007, it proposed a revised district boundary to correct the assessment of lands that did not drain to the district. In fall 2008, the Drainage Board assessed the district based on the revised boundary. The Drainage Board assessed cropland on a flat rate-per-acre basis. For developed parcels, the assessments were based on a per-acre-basis with an increase for impervious areas, depending on the amount of impervious area and the amount of stormwater management.¹ As a result, the Village's assessment was increased. The Drainage Board determined this method equitably accounted for the additional volume of water being sent through the district by the development of impervious surfaces in the Village. The Village contested the increased assessment and requested a reassessment of the entire district.

¶4 A reassessment was subsequently proposed by the Drainage Board and the Village filed a written objection. The Drainage Board held a hearing and the Village's objection was denied. The Village subsequently petitioned the circuit court for certiorari review. The circuit court issued a written decision

¹ Impervious surfaces include areas such as buildings or driveways that result in stormwater runoff rather than infiltration.

upholding the reassessment. The court declared the reassessment fair, equitable and in proportion to the benefits accruing. The Village now appeals.

¶5 On review of a circuit court’s decision in a certiorari proceeding, our standard of review is the same as that of the circuit court and we decide the merits of the matter independently of the circuit court’s decision. *See State ex rel. Town of Norway Sanitary Dist. No. 1 v. Racine Cnty. Drainage Bd. of Comm’rs*, 220 Wis. 2d 595, 605, 583 N.W.2d 437 (Ct. App. 1998). We review the Drainage Board’s action to determine if it acted unreasonably or made a decision unsupported by substantial evidence. *See id.* at 606. An assessment is reasonable “if it is fair and equitable and in proportion to the benefits accruing.” *Id.* (citation omitted). We intercede only when the municipal body has been “clearly unreasonable.” *See Peterson v. City of New Berlin*, 154 Wis. 2d 365, 370, 453 N.W.2d 177 (Ct. App. 1990).

¶6 Authority to levy assessments for the costs of maintenance and repair, or any other lawful expenditures of a drainage district, is found in WIS. STAT. § 88.23.² The factors to consider for assessing benefits to agricultural land in a drainage district are set forth in WIS. ADMIN. CODE § ATCP 48.08(1) (Oct. 2004). When assessing benefits to nonagricultural lands in a drainage district, WIS. ADMIN. CODE § ATCP 48.10(1) (Oct. 2004), provides:

[A] county drainage board may consider all the factors specified for agricultural lands under s. ATCP 48.08(1). The county drainage board may also consider the extent and frequency of additional discharges from the nonagricultural lands to district drains, and the drainage district’s cost to accommodate those additional discharges. Additional discharges may include additional discharges of

² References to the Wisconsin Statutes are to the 2009-10 version unless noted.

stormwater, wastewater, or precipitation runoff from impermeable surfaces.

¶7 To account for runoff from impervious surfaces, the Drainage Board in this case established an “equivalent runoff unit” (“ERU”). An ERU is the average amount of impervious surface in the district from which runoff is attributed, in this case 8000 square feet. This methodology resulted in a 59% allocation to the Village for present and future charges for maintenance costs.

¶8 The Village disputes the Drainage Board’s utilization of the impervious surface methodology as a basis for its reassessment. The Village concedes that impervious surfaces may be considered as a factor in assessing nonagricultural lands. However, the Village claims, “While the ERU methodology is expedient ... it fails to adequately apportion costs pursuant to WIS. STAT. § 88.23(1).” The Village insists that an alternative methodology based upon a computer model known as the “Soil and Water Assessment Tool” (“SWAT”) is the most reliable method to apportion costs based on accrued benefits. The Village contends the SWAT model takes into account relevant factors such as land area, sediment load and runoff volume. According to the Village, the impervious surface methodology results in a very poor correlation to sediment load, the primary cause of ditch maintenance costs.

¶9 The Village fails to appreciate our standard of review. Our task is not to determine whether an alternative methodology is more reliable. Rather, the question is whether the Drainage Board’s methodology was reasonable and supported by the record.

¶10 Here, the Drainage Board established a detailed framework for the reassessment of developed parcels within the drainage district based upon a

methodology prepared by Jeremy Freund, a professional engineer with the county, and conservationist Greg Baneck.³ The reassessment was reviewed by Richard Gumz, the president of the Wisconsin Association of Drainage Districts. The reassessment was also reviewed by Seth McClure, a drainage engineer for the Wisconsin Department of Agriculture, Trade and Consumer Protection Bureau of Land and Water Resources.

¶11 Both Gumz and McClure submitted letters supporting the Drainage Board's reassessment. Gumz stated as follows:

Having examined both the Board's re-assessment and the documents submitted to the court by the Village of Little Chute, we feel that the Board's method of assessment is both equitable and follows the stipulations of Chp. 88 Wis. Stats. and ATCP 48 Wis. Admin. Code.

As a professional organization of drainage boards, we also feel that the use of sophisticated scientific modeling techniques (such as SWAT) to assess benefits to landowners within drainage districts has its limitations. Specifically, models that must be reevaluated annually would put an undue cost burden on districts which operate on a minimal budget. While [the Wisconsin Association of Drainage Districts] does not wish to comment on the specific methods of assessment of various drainage boards, it is standard practice, and well within the prescribed assessment practices as outlined by ATCP 48.10, to assess non-agricultural land based on impervious area.

¶12 McClure submitted an additional letter supporting the reassessment. McClure stated:

[I]t is DATCP's assertion that the Outagamie County Drainage Board's re-assessment of the Vandebroek Drainage District is accurate, equitable and in compliance with Chp. 88 Wis. Stats[.] and ATCP 48, Wis. Admin[.]

³ Freund and Baneck testified at the hearing before the Drainage Board regarding the impervious surface methodology utilized in the reassessment report.

Code. It reflects current engineering practice and understanding of stormwater runoff and hydraulic design.

¶13 Nevertheless, the Village insists that maintenance costs are required by increased sediment load. The Village argues that “ERUs are based solely on impervious surface and do not take into account the fact that the majority of the water from the Village has been treated for sediment reduction by the Village Storm Water Utility before it enters the Drainage District.”

¶14 However, McClure indicated that the issue of sediment deposition “misses the point entirely,” and “is minor compared to the issues of runoff and ditch capacity.” Moreover, McClure noted that the ERU methodology took into account the fact that some developed parcels employed stormwater management practices, or did not contribute stormwater in small rain events. Those parcels were given credit for their stormwater management practices. McClure specifically noted:

[T]he reassessment takes pains to assess portions of the Village of Little Chute (“Village”) that lie within the drainage district equitably with particular consideration and leniency given to the Village’s stormwater attenuation practices.⁴

¶15 McClure also opined that an “untenable precedent” may be set if the Drainage Board were forced to use SWAT modeling to assess its drainage district:

⁴ The Drainage Board argues that “[t]he Village also ignores the fact that there are also more than 228 District ERU’s not served by the storm water utility treatment facility.” The Drainage Board also contends “the Village’s storm water treatment facility exceeds the peak flow rate adopted by the Board and approved by the Department of Agriculture, Trade and Consumer Protection by 331%.” The Village fails to adequately reply to these arguments and we therefore deem them conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979).

While SWAT is a very well-respected tool for modeling sediment transport, its inputs are highly variable and would require yearly, if not seasonal, updating and inspections to maintain an accurate count of farming practices within the district. Also, SWAT requires a highly trained user, such as a civil engineer. Assessments would then become prohibitively expensive as drainage boards would be required to frequently hire consultants to ensure the accuracy of the models.⁵

¶16 We conclude that a sufficient basis supports the reassessments in this case. The Drainage Board’s methodology was endorsed by the Department of Agriculture, Trade and Consumer Protection, as well as the president of the Wisconsin Association of Drainage Districts. Both indicated the methodology was accepted practice, equitable and in compliance with statute and administrative rule. The methodology was rational and did not arbitrarily or capriciously apportion costs. *See Village of Egg Harbor v. Mariner Group*, 156 Wis. 2d 568, 573, 457 N.W.2d 519 (Ct. App. 1990). Applying the applicable standard of review, as we must, the reassessment was reasonable and supported by evidence in the record.

By the Court.—Judgment affirmed.

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

⁵ McClure also stated, “Perhaps most telling is the fact that the Village’s stormwater utility itself uses the impervious area to assess it’s [sic] citizens.” McClure inquired, if impervious area is not an equitable methodology by which to assess the Village for its use of the drainage district’s facilities, “why then are they using it?”

