COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3134 **Cir. Ct. No. 03CV001069; 02CV001968**

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

JOSEPH E. SABOL,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Joseph E. Sabol appeals from the judgment of the circuit court that affirmed the decision of the Wisconsin Department of Revenue denying his request to classify a portion of his property as agriculture. He argues on appeal that the DOR erred when it allowed his property to be classified as

commercial. Because we conclude that Sabol did not establish that the land was primarily for agricultural use, or that the DOR erred, we affirm.

¶2 This case involves the assessment of a portion of Sabol's property that he claims should be classified agricultural. The property consists of .36 acres for Sabol's residence and appurtenant surroundings, and 1.51 acres on which Sabol grows vegetables and fruit, and in which there is also a grassy area. In this area, Sabol grows some produce, some of which he has sold and traded. He argues that this area should be assessed as agricultural. The Town of Mount Pleasant's Board of Review assessed this portion of the property as commercial. Sabol appealed his 2002 assessment to the DOR. The DOR agreed with the assessor that none of the property should be classified as agricultural.[1] Sabol then challenged the matter in the circuit court by writ of certiorari. The circuit court concluded that the property had been properly assessed. Sabol appeals.

¶3 The scope of this court's review by certiorari is limited to determining the following: (1) whether the agency kept within its jurisdiction; (2) whether the agency acted according to law; (3) whether the agency's action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the agency might reasonably make the order or interpretation in question. *See* ***Fee v. Board of Review for Town of Florence***, 2003 WI App 17, ¶11, 259 Wis. 2d 868, 657 N.W.2d 112 (Ct. App. 2002). This four-part test requires that the court defer to the agency's decision "unless it is unreasonable and without rational basis." ***Klinger v. Oneida County***, 146 Wis. 2d 158, 163, 430 N.W.2d 596 (Ct. App.

[1] Sabol previously challenged similar assessments unsuccessfully.

1988), *aff'd*, 149 Wis. 2d 838, 440 N.W.2d 348 (1989). The taxpayer bears the burden of proof when challenging an assessment. *See* ***Woller v. Department of Taxation***, 35 Wis. 2d 227, 233, 151 N.W.2d 170 (1967). In certiorari proceedings, the court does not substitute its view of the evidence for that of the agency. ***Steenberg v. Town of Oakfield***, 167 Wis. 2d 566, 572, 482 N.W.2d 326 (1992).

¶4 Sabol argues that the assessor's classification of the property as commercial was unreasonable. He argues that the land should have been classified as agricultural and valued according to its use and not its fair market value, that the DOR erred when it found his evidence of agricultural use to be not credible, and that the DOR did not point to any law or fact that established that his land was not agricultural.

¶5 "Land must be classified as agricultural if it is devoted primarily to agricultural use. WIS. STAT. § 70.32(2)(c)1." ***Fee***, 259 Wis. 2d 868, ¶12.

> (1) "Agricultural use" means 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. "Agricultural use" does not include growing short rotation woody trees with a growing and harvesting cycle of 10 years or less for pulp or tree stock under NAICS industry 111421. (b) Activities included in subsector 112 Animal Production, set forth in the North American Industry Classification System, United States, 1997, published by the executive office of the president, U.S. office of management and budget.

WIS. ADMIN. CODE § Tax 18.05(1) (April 2004).

¶6 We agree with the circuit court that Sabol did not present any credible evidence that the primary use of the land was agricultural. It is not

enough for the taxpayer to show that some produce is grown on the land and that some of this produce was sold, bartered, traded, or consumed. Selling some or all of the produce from a garden does not establish that the property on which the garden is located has an agricultural use as defined by WIS. ADMIN. CODE § Tax 18.05(1). We agree that the DOR properly determined that there was no basis for overturning the assessor's valuation of the property. In other words, "agricultural use" does not include personal gardens and hobby farms. Based on the record before us, we cannot conclude that the agency acted unreasonably or without a rational basis when it concluded that the property should not be assessed as agricultural.

¶7 Sabol also argues that because the property is zoned as agricultural, the assessor erred when valuing it as commercial land. The State responds that zoning and actual use assist the assessor in determining the property's fair market value, but do not determine the property's assessed value. The State argues that the assessor properly considered the potential for commercial use in the area. The evidence showed that the assessor considered the commercial activity in the same area and that zoning changes were not a significant issue for other property holders in that area. The State further argues that Sabol did not offer any contrary evidence of the value of the property other than his claim that it should be classified as agricultural. Based on this record we are not convinced that the assessor erred when classifying the property as commercial. Consequently, for the reasons stated we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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