COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1105 **Cir. Ct. No. 2010CV5254**

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

STEPHANIE MILLER, JAMES STELLHORN AND HARLAN LLC,

PETITIONERS-APPELLANTS,

V.

CITY OF MONONA AND CITY OF MONONA BOARD OF REVIEW,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Higginbotham, Blanchard and Kloppenburg, JJ.

¶1 BLANCHARD, J. Stephanie Miller, James Stellhorn, and Harlan, LLC, appeal an order of the circuit court denying certiorari relief and affirming

2010 and 2011 property tax assessments on two adjacent parcels of unimproved property that they own.[1] The property owners argue that the City of Monona's Board of Review erred in affirming the City assessor's classification of the property for each year as residential use, rejecting the property owners' argument for an agricultural use classification. The agricultural classification results in lower assessments. We conclude that the Board's decisions as to each year are not unreasonable and have a rational basis, because they are based on credible evidence that the property was not used primarily to cultivate crops in 2009 and 2010. Accordingly we affirm.

BACKGROUND

¶2 We skip over prior proceedings not directly relevant to this appeal, and begin our summary with the meeting of the City of Monona Board of Review held on August 18, 2011. At this meeting, the Board took evidence and addressed the property owners' objections to classification of the property as residential use for assessment years 2010 and 2011.

¶3 To establish context for what follows, we briefly address the time frames that apply to the assessment classifications at issue. The general rule is that an assessment for purposes of levying a real property tax is made "as of the close of January 1 of each year," so that the particular dates at issue here are

[1] More precisely, during relevant times, Harlan, through Miller and Stellhorn, owned an unimproved parcel of land with the street address 4111 Monona Drive, City of Monona. Miller and Stellhorn, as individuals, owned an adjoining parcel, also unimproved, at 4113 Monona Drive.

We generally refer to Harlan, Miller, and Stellhorn collectively as "the property owners" or "the owners," and refer to the two parcels as "the property," viewing the parcels as one piece of property for purposes of this appeal.

January 1, 2010, and January 1, 2011. *See* WIS. STAT. § 70.10.[2] However, as one would expect in the agricultural context, the focus for assessments shifts to activity that occurred during the production season of the year preceding January 1 of the assessment year.[3] Thus, the question before the Board was whether the property at issue was in agricultural use for crop production seasons during 2009 and 2010.

¶4 Miller was the only property owner to testify before the Board. No person who claimed to have cultivated crops on the property testified.

¶5 Miller testified that the property owners paid a total of approximately $810,000 for the property. Together the two parcels cover approximately one-half acre fronting on Lake Monona.

¶6 Miller testified that, after removing the only improvements on the property, the owners encountered problems in "trying to build some condominiums" on the property. Miller testified that the owners then decided to derive rent from the vacant land by leasing it out to tenants to grow crops.

¶7 For this purpose, the owners entered into three leases with tenants between August 2009 and the time of the Board's hearing. These leases were

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] The administrative code defines "[l]and devoted primarily to agricultural use" as "land *in 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." WIS. ADMIN. CODE §§ Tax 18.05(4) (July 2000) (emphasis added). Neither party presents a developed argument on the topic of whether there was evidence regarding use incompatible with agricultural use specifically occurring on January 1 of either 2010 or 2011, and therefore the final clause of this code provision is not relevant to the analysis.

intended to allow a series of tenants to grow crops on the property, generating rent for the property owners totaling $100 per year per lease. More specifically, Miller testified that:

- Miller and Stellhorn entered into a lease for the period August 1, 2009, to July 31, 2010, with the first tenant, who had a part-time job doing something unrelated. The lease allowed the first tenant, in exchange for the payment of $200 (later reduced to $100), to grow garlic and "winter wheat" on the property. Miller testified that the first tenant "had some difficulties, and I don't know how productive his crops were."

- Miller and Harlan entered into a lease with a second tenant that overlapped with the first lease, this time for the period December 1, 2009, to December 30, 2010.[4] The second lease allowed the second tenant, a student, to grow "[m]ostly pumpkins and Indian corn" on the property in exchange for $100. Miller testified that the second tenant did eventually grow crops on the property, although in 2009 the second tenant did no planting, but merely turned over soil with a rototiller in preparation for planting that occurred in 2010.

- Miller and Stellhorn entered into a lease with a third tenant, for a term that had not yet expired at the time of the hearing, namely, January 1, 2011, to December 31, 2011. The third tenant was a farmer from Oregon, Wisconsin, who was allowed, in exchange for $100, to grow a variety of crops.

Miller testified that, consistent with the intent behind the three leases, the three tenants used the property predominantly for the growing of crops.

¶8 At the same time, however, Miller testified that she did not know and did not attempt to estimate the volume of the yields of any crop harvested by any tenant. She also testified that she did not know and did not attempt to estimate

[4] Regarding the overlap in the time periods covered by the leases with the first and second tenants, Miller testified that, after the first tenant had difficulties and "wanted out," the second tenant was brought in as a substitute.

how much profit any of the tenants made from crops grown on the property, or what any tenant did with any crops grown on the property.

¶9 The City assessor, Jim Danielson, testified, in part, that there was no evidence that the tenants harvested crops "for actual farm purpose[s]." As to the nature and volume of any harvests, Danielson testified, "we have no idea what was even on [the property], what was even taken [from the property], and how much was even on [the property]."

¶10 More specifically, Danielson testified that he visited the property on July 7, 2011, and at that time observed "very limited" plant growth, and that even this limited growth resembled "brush," as opposed to crops, causing him to draw the conclusion that "a majority" of the property was not being used for agricultural purposes. Danielson further testified that an employee of his company reported in 2009, after the employee visited the property, that there were signs of only "sporadic crops" being grown at that time. Along these same lines, the Board had before it an affidavit submitted by Danielson averring that, as of 2010, the property was "observed to have a small garden … with various vegetables …. The garden was the size of approximately one-quarter of the area" of the property. Danielson reaffirmed in testimony at the hearing that this is what his employee had reported as of 2010.[5]

[5] As to Danielson's "small garden" averment and testimony, there is some ambiguity in the record as to whether Danielson was making this particular comment in reference to observations made in 2009 and 2010 or only in reference to observations made in 2010. Regardless, as we discuss in more detail below, the Board could have reasonably relied on Danielson's affidavit and testimony as evidence regarding the lack of extensive cultivation during both years. As indicated above, Danielson separately testified that, as to 2009, there were only "sporadic crops" being grown at that time.

¶11 In voting 4-0 to sustain both assessments based on the residential classification, members of the Board made observations that included the following. Although he did not vote, Chair Robert Larsen commented that "the quality of the evidence" that the owners had offered at the hearing "in support of the actual farming activities" claimed was "meager indeed …. For all we know these were the personal gardens of the gardeners, which clearly would not qualify as agricultural purposes." Board member James Hoelzel referred to the owners' evidence as "nebulous."

¶12 After the owners filed petitions for judicial review of the assessments under WIS. STAT. § 70.47(13), the circuit court issued a decision and order affirming the Board's decisions as to each assessment year, denying certiorari relief, and quashing the attached writ.

DISCUSSION

¶13 On appeal, the owners argue that the assessor's classification decisions are not entitled to the presumption of correctness, the Board did not hear any credible evidence supporting its determinations, and the Board's decisions were arbitrary and capricious. After first setting forth the standards of review and the statutory and regulatory language at issue, we explain why we conclude that each of these three arguments is without merit.

Standards of Review

¶14 In a certiorari action under WIS. STAT. § 70.47(13), such as this, we review the Board's decision independently, but benefit from the analysis of the circuit court. ***State ex. rel. Stupar River LLC v. Town of Linwood Portage Cty. Bd. of Review***, 2011 WI 82, ¶16, 336 Wis. 2d 562, 800 N.W.2d 468. "[W]e look

for 'any error in the proceedings of the board which renders the assessment or the proceedings void.'" ***Id.*** (quoting § 70.47(13)). However, this review is "'strictly limited'" to the determination of "whether the Board's actions were: (1) within its jurisdiction; (2) according to law; (3) arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) supported by evidence such that the Board might reasonably make the order or determination in question." ***Id.*** (citations omitted).

¶15 Turning to the standard to be applied by the Board to a challenge to an assessment, this court has summarized the law as follows:

> A challenger to a property tax assumption has an uphill battle; the assessor's valuation is presumed to be correct. The challenger can only overcome the presumption by showing that the assessment is not supported by substantial evidence or the assessor's methods do not comport with statutory and administrative code requirements. If the challenger overcomes the presumption of correctness, the question we must answer is "whether credible evidence was presented to the board that may in any reasonable view support the board's determination."

Anic v. Board of Review, 2008 WI App 71, ¶10, 311 Wis. 2d 701, 751 N.W.2d 870 (citations omitted); *see also* WIS. STAT. § 70.47(8)(i) ("The board shall presume that the assessor's valuation is correct. That presumption may be rebutted by a sufficient showing by the objector that the valuation is incorrect.").

Agricultural Use Classification Defined

¶16 Pursuant to WIS. STAT. § 70.32(2)(a), assessors "shall" classify properties "on the basis of use" into one of seven categories (or the additional category, "other"). These uses include a "residential" classification and an "agricultural" classification.

¶17 The following are pertinent definitions contained within WIS. STAT. § 70.32(2)(c):

> 1g. "Agricultural land" means land, exclusive of buildings and improvements and the land necessary for their location and convenience, that is devoted primarily to agricultural use.
>
> 1i. "Agricultural use" means agricultural use as defined by the department of revenue by rule and includes the growing of short rotation woody crops, including poplars and willows, using agronomic practices.
>
> 1k. "Agronomic practices" means agricultural practices generally associated with field crop production, including soil management, cultivation, and row cropping.
>
> ….
>
> 3. "Residential" includes any parcel or part of a parcel of untilled land that is not suitable for the production of row crops, on which a dwelling or other form of human abode is located and which is not otherwise classified under this subsection.

¶18 Turning to relevant administrative regulations of the Wisconsin Department of Revenue, these provide in part:

> An assessor shall classify as agricultural land devoted primarily to agricultural use. Land devoted primarily to agricultural use shall typically bear physical evidence of agricultural use, such as furrows, crops, fencing or livestock, appropriate to the production season. If physical evidence of agricultural use is not sufficient to determine agricultural use, the assessor may request of the owner or agent of the owner such information as is necessary to determine if the land is devoted primarily to agricultural use.

WIS. ADMIN. CODE § Tax 18.06(1) (Sept. 1997).

> **(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 ….
>
> ….
>
> **(4)** "Land devoted primarily to agricultural use" means land in 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.

WIS. ADMIN. CODE § Tax 18.05.

I. Assessor's Classification Decisions Entitled To Presumption Of Correctness

¶19 The owners argue that they overcame the presumption of correctness that attaches to an assessor's classification by demonstrating to the Board that (1) the classification decisions were not supported by substantial evidence and (2) the assessor's methods in making the classification decisions were improper. *See* ***Anic***, 311 Wis. 2d 701, ¶10 (presumption may be overcome if assessor's decision "is not supported by substantial evidence or the assessor's methods do not comport with statutory and administrative code requirements"). We address each argument in turn.

A. Substantial Evidence

¶20 As indicated above, the owners first argue that the assessor's classification decisions were not supported by substantial evidence. We reject this argument because, as we explain below, Danielson's own testimony and the leases provided substantial evidence to support the assessor's classification decisions. *See* ***id.*** And, even if the owners had overcome the presumption of correctness, Danielson's testimony and the leases would be credible evidence supporting the Board's decision. *See* ***id.***

¶21 As cited above, the regulations state in part that property "devoted primarily to agricultural use shall typically bear physical evidence of agricultural use, such as furrows, crops, fencing or livestock, appropriate to the production season." WIS. ADMIN. CODE § Tax 18.06(1). Danielson provided testimony suggesting that the physical evidence was to the contrary. As summarized above, Danielson testified that a limited amount of what looked like brush was growing on the property in July 2011 and that in 2009 there were signs of only "sporadic crops" and a garden covering only about one quarter of the property.[6]

¶22 In addition, the lease with the second tenant included "special condition" language, added by the parties to a form lease, that referred to "planting or maintaining said gardens," and also referred, in a nonstandard provision added in handwriting, to "the garden areas." Use of the term "gardens" suggests an intent that the second tenant would create mere plots of plantings in what are sometimes referred to as residential gardens or hobby gardens. *See* WISCONSIN PROPERTY ASSESSMENT MANUAL at 11-11 (assessors "should be aware of questionable classification claims," such as "gardens [that] are cultivated in urban areas" and "gardens [that] are cultivated in rural areas for personal consumption."). While the other two leases do not contain this language, the Board could rationally have considered this language significant, particularly in light of Miller's admissions elevating the significance of the second lease, namely, that the first tenant apparently produced few crops and that the third tenant's lease term did not begin until January 1, 2011.

[6] While, as we have explained, the focus here is on agricultural use in 2009 and 2010, not in July 2011, it is a reasonable inference from Danielson's testimony and the other evidence that the extent of cultivation on the property in 2010 was not materially greater than in 2009 or 2011.

¶23 The owners point to contrary evidence supporting their view that the property was primarily agricultural during the 2009 and 2010 production seasons. However, the owners significantly overstate the quantity and nature of that evidence, and they all but ignore the above evidence that supports the Board's decisions. There was conflicting testimony; it was the task of the Board to determine the probity and credibility of witnesses and the significance of the various items of evidence. We may not substitute any view we may have regarding the quality of the evidence regarding cultivation of the property for the Board's view. The owners effectively ask this court to re-weigh the evidence, but, as the circuit court recognized, that is not the court's role in reviewing the Board's decision. *See* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶26, 247 Wis. 2d 118, 633 N.W.2d 674 ("In our review we do not weigh the evidence, but rather assess whether there is substantial evidence in the record to support the … Board's determination."). To the extent that Miller's and Danielson's testimony conflicted, it is plain that the Board chose to credit Danielson.

¶24 Moreover, some aspects of Miller's testimony provide further evidence supporting the assessor's classifications and the Board's decisions. As summarized above, Miller's testimony included admissions that: the first tenant had little success in cultivation efforts; the second tenant did no cultivation until 2010; and the third tenant's lease term did not begin until January 1, 2011. Miller could give no approximation of how much of any particular crop was ever actually harvested, either at any particular time or in the aggregate during relevant periods over the course of the three lease terms. It was not merely a question of not knowing precisely how many rows of which crop were planted or growing at a given time; Miller provided no numerical estimates of any kind.

¶25 Except to baldly assert that crops were grown on much or all of the property, Miller did not even attempt to address the use of any particular "agronomic practices" on the property, as that term is defined in WIS. STAT. § 70.32(2)(c)1k: "agricultural practices generally associated with field crop production, including soil management, cultivation, and row cropping." Similarly, Miller provided little specific testimony about whether there was "physical evidence of agricultural use, such as furrows, crops, fencing or livestock, appropriate to the production season." WIS. ADMIN. CODE § Tax 18.06(1).

¶26 The owners suggest, based on the terms of WIS. STAT. § 70.32(1), that the assessor improperly relied on the account of his employee about the appearance of agricultural uses of the property. *See* § 70.32(1) ("Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual … *from actual view or from the best information that the assessor can practicably obtain* ….") (emphasis added). However, the owners fail to develop a legal argument that, considering all circumstances, the assessor did not use the best information the assessor could practicably obtain. Therefore we do not address this topic further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

B. Assessor Methodology

¶27 The owners also argue that the presumption of correctness is overcome because "the Assessor failed to follow the procedures prescribed by Wisconsin law in reaching his classification decisions." More specifically, the owners argue that the assessor relied on improper considerations and failed to conduct, as required by the WISCONSIN PROPERTY ASSESSMENT MANUAL, a

detailed comparative analysis between agricultural industry standards and the agricultural activity that occurred on the property.

¶28 As to the first argument, that the assessor relied on improper considerations, the owners point to references the assessor made to the previous classification of the property as residential use; to the fact that parcels in the area of the property are classified as residential; and to the concept that the tenants were not "actual farmers." However, assuming without deciding that any or all of these factors would have been impermissible to consider, we need not determine whether, or to what degree, the assessor relied on any of these concepts. This is because the assessor plainly averred and testified, independently from any of these factors, that there was evidence that the property was not devoted primarily to crop production during 2009 and 2010, and, as summarized above, it was on this ground that the Board accepted the assessor's agricultural classification.[7]

¶29 Turning to the second argument, it does not help the owners to point to a passage in the WISCONSIN PROPERTY ASSESSMENT MANUAL about the analysis that assessors should undertake when "questionable classification claims arise," because the assessor reasonably asserted, based on record evidence accepted by the Board, that he believed cultivation on the property was so sparse

[7] To clarify, it is true that, at points in his testimony, the assessor suggested that he concluded that the property must be classified as residential because "actual farmers" were not cultivating crops on the property. At other times, however, he focused on the lack of evidence regarding the growing of crops in sufficient volume to constitute an agricultural use, and this is the evidence explicitly relied upon by the Board. At one point, for example, the assessor testified, "I don't think a lot of [the property] was being used as agricultural use from what we knew about the property." Thus, it is apparent that the assessor was asserting that there was a lack of sufficient cultivation, not simply that the cultivation was not by actual farmers. The Board was free to, and did in fact, focus its determination on the assessor's assertion that there was a lack of sufficient cultivation.

that it did not rise to the level of a "questionable classification claim." The owners fail to cite any legal authority supporting the contention that an assessor who has a reasonable basis for concluding that property use is not "questionable" must nevertheless, as the owners now argue, "engage in a detailed, comparative analysis" involving agricultural industry standards.

¶30 Given the discussion above, it is not necessary to address at great length the separate argument of the owners that the Board here disregarded competent, unimpeached, and uncontradicted evidence presented by the owners. This argument is premised on the inaccurate assertion that "[n]either the Assessor nor the City proffered any evidence contradicting" Miller's testimony. As discussed above, while neither the owners nor the assessor offered extensive evidence, the Board could rationally have concluded that what little testimony of substance Miller offered was undermined by the assessor's testimony.

¶31 As far as we can discern, the owners are not seriously arguing that a relatively small amount of gardening or crop cultivation on an otherwise empty lot is sufficient to require an assessor to conclude that use of the property is primarily agricultural and to assess the property accordingly. However, if that is part of their argument, they have presented no authority to persuasively support it. The owners cite ***Fee v. Board of Review***, 2003 WI App 17, 259 Wis. 2d 868, 657 N.W.2d 112, but there is no resemblance between the facts in ***Fee*** and the relevant facts here. In ***Fee*** there was apparently no question that the portion of taxpayers' land at issue was in fact worked as a hayfield. *See* ***id.***, ¶¶3, 14. Clear evidence of such agricultural use is missing here.

II. Arbitrary and Capricious

¶32 The owners argue that the Board's decision was arbitrary and capricious. However, their grounds for this argument are not entirely clear, beyond repeating the position we reject that the Board's decision was not supported by credible evidence. They apparently intend to add to the analysis an argument that the Board based its decision not on relevant evidence but instead on animus arising from the Board's perception that, during the relevant assessment period, the owners held the property for eventual development, having become frustrated with City officials regarding initial development plans, and attempted in the meantime to rely on an agricultural use classification for the purpose of holding down carrying costs of the property.

¶33 Whatever the owners intend to argue in this regard, they fail to point to any evidence of animus resulting in a faulty decision, and therefore fail to carry their burden. *See* ***State ex rel. Hanson v. DHSS***, 64 Wis. 2d 367, 375-76, 219 N.W.2d 267 (1974) (petitioner has burden of proof by a preponderance of the evidence to establish that board's action was arbitrary and capricious).

¶34 It is true that the board chair said that he was "disturb[ed]" and "troubl[ed]" by the recent history of the property's use, but the chair did not say that in his view this disqualified the property from agricultural use classification. The owners fail to show that this isolated comment by the chair improperly affected the Board's vote. When explaining their reasons for agreeing with the assessor that the owners' property should be classified as residential instead of agricultural, Board members appeared to place primary emphasis on the lack of evidence of significant cultivation, as summarized above.

¶35 The owners' remaining arguments on this topic represent only further summaries of their side of the story. We have explained why we reject the owners' argument that this is the only side that the Board could rationally credit. *See* ***Cohn***, 247 Wis. 2d 118, ¶26 ("A determination that has a rational basis is neither arbitrary nor capricious.").[8]

CONCLUSION

¶36 For all of these reasons, we conclude that the Board had a reasonable basis to accept the assessor's classifications for each assessment year. The property owners have not overcome the presumption of correctness of the assessor's classifications, there was substantial evidence to support the Board's decision, and the Board's decisions were not arbitrary or capricious. The circuit court did not err in affirming the Board.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[8] The owners make passing references to their due process and equal protection rights, but do not develop any arguments along these lines. These passing references to constitutional rights add nothing to the owners' arguments.