

FILED

APR 12 2021

CLERK OF SUPREME COURT
OF WISCONSIN

Case No. 2018-AP-1239

**In the
State of Wisconsin
Supreme Court**

APPLEGATE-BADER FARM, LLC,

*Plaintiff-Respondent/
Cross-Appellant-Petitioner,*

v.

WISCONSIN DEPARTMENT OF REVENUE and
RICHARD CHANDLER, in his capacity as
Secretary of the Department of Revenue,

*Defendants-Appellants/
Cross-Respondents.*

**PLAINTIFF-RESPONDENT'S RESPONSE TO
DEFENDANTS-APPELLANTS' MOTION AND
MEMORANDUM FOR CLARIFICATION OR
RECONSIDERATION**

Defendants-Appellants Wisconsin Department of Revenue, et. al's ("DOR") motion for clarification or reconsideration requests legal guidance regarding this Court's stay of Wis. Admin. Code Tax § 18.05(1)(d). The question raised is undoubtedly important, but it is generally not the role of this Court to provide legal advice. DOR

has expertise in tax law and capable counsel that can advise it as to its obligations. To the extent the Court elects to reconsider its prior order, it should simply invalidate the rule pursuant Wis. Stat. § 227.40(1).

I. DOR Is Empowered to Correctly Advise Local Assessors.

Citing Wis. Stat. § 70.10, DOR states that it “believes that it remains proper to apply Tax § 18.05(1)(d) to parcels for the 2021 tax year’s assessments, which will govern bills issued in December 2021.” Mot. p.5. Despite this stated belief, DOR argues that absent express clarification from this Court, its assessors may be confused.

That argument is puzzling because as DOR concedes, it has the power to issue guidance to its assessors as to the status of the law. *See* Wis. Stat. §§ 73.03(1); 73.06(1). There is no reason for assessors to be confused because DOR has the authority to promptly direct them as to the law applicable to the 2021 assessment year. Therefore, clarification by this Court is unnecessary.

II. The Court Should Not Issue an Advisory Opinion.

What DOR really seeks is an advisory opinion from the Court allowing it to continue applying Tax § 18.05(1)(d) notwithstanding this Court’s mandate. However, the Wisconsin Supreme Court’s role does not include issuing “advisory opinions”.

State v. Grandberry, 2018 WI 29, 380 Wis. 2d 541, 564, 910 N.W.2d 214, 224. Instead, the Court's job is "to adjudicate the dispute in front of [it]." *State v. Steffes*, 2013 WI 53, ¶27, 347 Wis. 2d 683, 832 N.W.2d. Providing advisory opinions is beyond the scope of appellate review. *See Wisconsin Bell, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2003 WI App 193, n.2, 267 Wis. 2d 193, 197, 670 N.W.2d 97, 99. (declining "invitation to provide the Commission with a detailed road map to guide a journey the Commission may or may not take.")

As the motion observes, DOR's request "has no effect on Applegate." Mot. p.5. Accordingly, there remains no justiciable controversy between the parties with respect to DOR's request for clarification. Like the court of appeals in *Wisconsin Bell*, this Court should decline the agency's invitation to provide its blessing upon its remedial plans.

III. DOR's Interpretation of Wis. Stat. § 70.10 Is One of First Impression.

The question of whether Wis. Stat. § 70.10 acts to fix property tax classifications as DOR suggests was never a question presented in this case, nor does it appear that any Wisconsin courts have been confronted with the question. A review of the tax statutes and the Wisconsin Property Tax Assessment Manual suggests that the January 1 date is a starting point and that classifications and assessments may change throughout the

assessment process. Section 70.10 is concerned with the *use* of real property. *See, e.g., W. Capitol, Inc. v. Vill. of Sister Bay*, 2014 WI App 52, ¶ 30, 354 Wis. 2d 130, 147, 848 N.W.2d 875, 883–84; Wis. Admin Tax § 18.05(4).

Although § 70.10 references January 1 as the date of assessment, midyear changes are contemplated by the statutes and regularly occur. As DOR's own motion states "[t]here are other possible steps along with way, culminating in property tax bill distribution by the third Monday in December of that year." Mot. p.3; *see also State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev.*, 2020 WI App 77, ¶¶ 14-21, 395 Wis. 2d 239, 952 N.W.2d 806 (describing the various steps in the process).

Beginning in April, the municipal clerks are obligated to examine and correct erroneous assessments. Wis. Stat. § 70.52; WPAM 4-18. Throughout April, boards of review entertain taxpayer objections through open book sessions that may result in changes to classifications and assessments. Wis. Stat. § 70.47; WPAM 4-17. Municipal Assessment Reports are not due until June, and even then, may be extended by DOR. Wis. Stat. 73.03(5); WPAM 4-22. In fact, the statutes allow for corrections to be made up to December. WPAM 4-27, citing Wis. Stat. 70.73(1).

It follows that January 1 is merely a starting point for classification and assessment. The Court issued its mandate on March 16, 2021 leaving plenty of time for DOR to issue guidance

to its assessors and boards of review that the rule has been stayed and that certain classifications should be changed.

IV. Implications for the 2022 Tax Year

DOR next requests clarification about what it should do for the 2022 tax year. It suggests that it may be unable to fully comply with WEPA prior to January 1, 2022 and implies that this may have unintended consequences. It invites the Court to clarify to the extent “this Court intended a different result”. Mot. p.6.

It is not clear to Applegate exactly what relief DOR seeks with respect to 2022. However, suggesting that this Court should clarify DOR’s obligations for 2022 because DOR is uncertain whether it can complete its WEPA obligations or that there may be consequences are not legal grounds upon which the Court may excuse or otherwise permit an action to proceed without WEPA compliance. *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 409, 438, 256 N.W.2d 149, 164 (1977) (“compliance with WEPA to the fullest possible extent is not excused merely by considerations of administrative difficulty, expense or delay.”)

V. Reconsideration

Should the Court reconsider its order based on DOR’s confusion over the stay, it should invalidate the rule pursuant to Wis. Stat. § 227.40(1). Invalidating the rule is the preferred remedy under § 227.40(1) and would alleviate any confusion on the part of DOR. It would also remove any obligation this Court has to

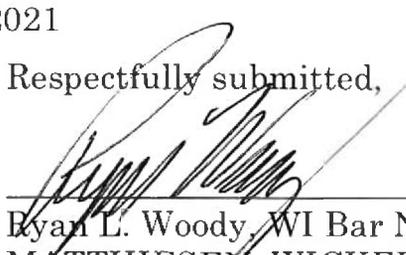
provide guidance to DOR about how to handle tax years 2021 or 2022. The agency will be able to regulate on a clean slate. It may decide to re-promulgate Tax § 18.05(1)(d). It may not. As this Court explained in *WED 1977*, “[t]he critical matter at this juncture is not what the Commission should have done in 1973, but what it is doing now to comply with the WEPA”. 79 Wis. 2d 409, 442.

CONCLUSION

Applegate respectfully requests that the Court neither clarify nor reconsider its decision. Alternatively, to the extent the Court elects to clarify its mandate, it should invalidate the rule, thereby providing clarity to the agency.

Dated: April 12, 2021

Respectfully submitted,



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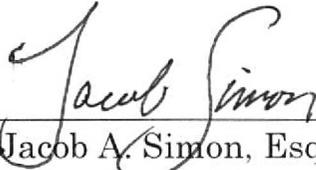
)
Defendants-Appellants /)
Cross-Respondents.)

**CERTIFICATE OF SERVICE BY HAND DELIVERY
AND UNITED STATES MAIL**

The undersigned, being first duly sworn, deposes and states that he filed with the Supreme Court of the State of Wisconsin, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, nine (9) copies of Plaintiff-Respondent's Response to Defendants-Appellants' Motion and Memorandum for Clarification or Reconsideration via hand delivery, on April 12, 2021. One (1) copy of the Response was served upon the below-listed counsel of record via United States Mail, postage prepaid, on April 12, 2021:

Anthony Russomanno
Wisconsin Department of Justice
17 W Main Street, P.O. Box 7857
Madison, WI 53707-7857

Dated this 12th day of April, 2021.



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