COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2795

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

JOHN O. NORQUIST, KEVIN M. CRAWFORD, MICHAEL R. MILLER, JOSEPH LAUX, DAN THOMPSON, EDWARD HUCK, GERALD JORGENSEN, HUNTER BOHNE, JANET BOHNE, AND JILL BRAN,

PLAINTIFFS-APPELLANTS,

V.

CATE ZEUSKE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT-RESPONDENT,

WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE, FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, WISCONSIN DIVISION, NATIONAL FARMERS ORGANIZATION, WISCONSIN AGRIBUSINESS COUNCIL, WISCONSIN AGRI-SERVICE ASSOCIATION, INC., WISCONSIN CATTLEMEN'S ASSOCIATION, COOPERATIVE, WISCONSIN CORN GROWERS ASSOCIATION, INC., WISCONSIN FEDERATION OF COOPERATIVES, WISCONSIN PORK PRODUCERS ASSOCIATION, COOPERATIVE, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION, INC., WISCONSIN SOYBEAN

ASSOCIATION, INC., WISCONSIN STATE CRANBERRY GROWERS ASSOCIATION, HOWARD D. POULSON AND JEANNETTE POULSON,

INTERVENING DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: DANIEL L. LaROCQUE, Reserve Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

Introduction and Decision

¶1 EICH, J. The plaintiffs in this action, the Mayor of Milwaukee, various other city officials and several owners of agricultural property, appeal from a judgment dismissing their constitutional challenge to § 70.32(2r), STATS. The statute, enacted in 1995, attempts to ameliorate what the legislature believed to be a disproportionate property tax burden borne by agricultural land resulting from its being assessed at its "fair market value," which includes its speculative or development value.

¶2 The vehicle chosen by the legislature to correct this imbalance—"phasing in" a switch from fair-market to use-based assessment of agricultural land by freezing all agricultural assessments at their January 1, 1995, assessed values for a stated length of time[1]—is said by plaintiffs to violate the uniformity clause of the constitution.[2]

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[1] The supreme court described the statutory scheme in more detail in ***Norquist v. Zeuske***, 211 Wis.2d 241, 246, 564 N.W.2d 748, 750 (1997):

(continued)

¶3 Initially, plaintiffs brought their claims to the supreme court in an original action, naming Department of Revenue Secretary Cate Zeuske as the respondent.[3] After briefing and argument, however, the court concluded that the record was not sufficiently developed by the stipulated facts and dismissed the action as premature. ***Norquist v. Zeuske***, 211 Wis.2d 241, 252, 564 N.W.2d 748, 753 (1997). Starting over in circuit court, plaintiffs advanced the same uniformity-clause arguments, and this appeal follows the circuit court's rejection of their claims.

¶4 In broadest terms, the issue before us is whether plaintiffs have carried their burden of proving the statute's unconstitutionality. In ***Norquist***,

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> [T]he statute provides for three phases in transforming agricultural land assessments for property taxes from a market value system to a use value system. The first phase, created by [§ 70.32] subsection (a), freezes assessments of agricultural land at the January 1, 1995, assessment level. This freeze, which began in 1996, will last for at least two years. Subsection (b) provides for a mixed assessment system that will last from the end of the initial freeze until 2009. During this period, agricultural land will be assessed based partly on the frozen market value assessments and partly on [the] land's agricultural use value. In each year during this phase, the market value assessment is reduced by ten percent and the use value portion of the assessment is increased by ten percent. In 2009, the mixed assessment period ends and agricultural land will be assessed based entirely on its agricultural use value.

[2] Article VIII, § 1, of the Wisconsin Constitution, provides in pertinent part:

> The rule of taxation shall be uniform, but … [t]axation of agricultural land … need not be uniform with the taxation of each other nor with the taxation of other real property….

The concluding phrase (following the word "but"), which was added by a 1974 constitutional amendment, formed the basis for the enactment of § 70.32(2r), STATS.

[3] Cate Zeuske is the respondent in this case as well, joined by a variety of statewide organizations representing a cross-section of Wisconsin agricultural interests who have intervened in the proceedings to argue in favor of the statute's constitutionality.

however, the supreme court specifically addressed the burden faced by the plaintiffs in this case. Noting first that while, under the constitution, agricultural land need not be uniformly taxed as compared to other types of property, "it must be taxed uniformly as compared to other agricultural land," the court went on to state that, in order to prevail in their challenge, these plaintiffs must:

> (1) satisfy the initial burden by proving that [their] agricultural land is over assessed and that other agricultural land is under assessed as a result of the statute, and (2) demonstrate beyond a reasonable doubt that [the statute] does not create uniform taxation of agricultural land to the extent practicable.

Id. at 248, 253, 564 N.W.2d at 751, 753.

¶5 The circuit court concluded that, while the plaintiffs had met the first requirement, they failed the second. We disagree. We are satisfied that plaintiffs' proof fails the first ***Norquist*** test in that they have not established by a preponderance of the evidence[4] that their land was overassessed, and other

[4] Statutes, of course, may not be ruled unconstitutional unless the challenger establishes unconstitutionality beyond a reasonable doubt. ***State v. Carpenter***, 197 Wis.2d 252, 263, 541 N.W.2d 105, 109 (1995). And that is particularly true with respect to tax statutes, where "the presumption of constitutionality is the strongest." ***Treiber v. Knoll***, 135 Wis.2d 58, 66, 398 N.W.2d 756, 759 (1987) (quoting from ***Department of Revenue v. Moebius Printing Co.***, 89 Wis.2d 610, 625, 279 N.W.2d 213, 219 (1979)).

As indicated in ***Norquist***, however, before a challenger can even "begin to carry [the] heavy burden of proving unconstitutionality," he or she faces the initial requirement of establishing overassessment of his or her property and underassessment of similarly situated property. ***Id.***, 211 Wis.2d at 251, 564 N.W.2d at 752, quoting from ***State ex rel. Fort Howard Paper Co. v. State Lake Dist. Bd. of Review***, 82 Wis.2d 491, 507-08, 263 N.W.2d 178, 186 (1978). Then, in stating the two-part test, the ***Norquist*** court mentioned the "beyond a reasonable doubt" standard of proof only with regard to the second requirement, thus strongly suggesting, without specifically stating, that the threshold "overassessment/underassessment" requirement need only be established by a preponderance of the evidence. The circuit court so ruled in deciding the issues in this case, and the parties do not challenge that ruling on appeal. As we indicate above, we are satisfied that plaintiffs have not established the initial requirement by a preponderance of the evidence.

agricultural land underassessed, as a result of § 70.32(2r), STATS. And we affirm the circuit court's judgment on that basis.[5]

¶6 The agricultural property-owner plaintiffs, Hunter and Janet Bohne and Jill Bran, each own forty-acre "farmettes" in the Town of Lodi, which is located on the northern fringe of the greater Madison area. Properties in the town comprise a mix of agricultural, recreational and urban uses.

¶7 Plaintiffs' evidence on the first ***Norquist*** test—whether their property was overassessed, and other properties underassessed, as a result of § 70.32(2r), STATS.—came from their expert witness, Mary Reavey, the Kenosha City Assessor.[6] Reavey analyzed sales of agricultural land in Lodi between January 1994 and September 1997—including the sales to Bran and the Bohnes, both of which were made before January 1, 1996, the effective date of the freeze. She identified four larger parcels of agricultural land in the town, which she said were comparable to the plaintiffs', and which were recently sold for more than their assessed values. Even though these sales occurred *after* the freeze went into effect, Reavey concluded from them that, as a result of the freeze, smaller farms such as Bran's and the Bohnes's were no longer being assessed uniformly in comparison to the larger "comparables." This resulted, she said, in an overassessment of the smaller parcels, and an underassessment of the larger, which would not only continue during the "freeze," but would affect the "phase-

[5] We may, of course, sustain a circuit court judgment on alternative grounds. *See* ***State v. Truax***, 151 Wis.2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989). We do so in this case; and, as a result of our conclusion that the first ***Norquist*** requirement is dispositive, we limit ourselves to the parties' arguments on that issue.

[6] The testimony of plaintiffs' other principal expert witness, Milwaukee City Assessor Julie Penman, was limited to matters relating to the second ***Norquist*** issue. Plaintiffs' arguments on the first issue contain no mention of Penman's testimony, and we do not consider it here.

in" period as well, since the "frozen" assessments are one component of the formula set forth in the statute to determine assessed value during that period.

¶8 As indicated, ***Norquist***'s threshold requirement is two-fold: plaintiffs must show both (a) that their property was overassessed, and other agricultural property underassessed, and (b) that that over- and underassessment occurred as a result of the statute.

¶9 As to the first element, the trial court, believing that all plaintiffs needed to show in that regard was a "relative" overassessment—simply that their land was assessed higher, on a per-acre basis, than Reavey's four "comparables"—concluded that they had met that burden. The court's decision was based on its reading of a case argued by plaintiffs, ***State ex rel. Levine v. Fox Point Review Bd.***, 191 Wis.2d 363, 528 N.W.2d 424 (1995)—in particular, the supreme court's statement in that case that taxpayers mounting a uniformity-clause challenge to a statute "may demonstrate that although their properties were assessed at fair market value, other comparable properties were assessed significantly below fair market value, thus amounting to a discriminatory assessment of their property." ***Id.*** at 371-72, 528 N.W.2d at 427. From this, plaintiffs argue (and the trial court agreed) that they need show only that their land "was overassessed compared to the … land of their neighbors," in order to pass the first ***Norquist*** test.

¶10 We disagree. ***Levine*** is inapposite. In that case, two families objected to the assessment of their property, claiming that it was assigned a higher value than that of comparable properties as a result of arbitrary and improper factors considered by the assessor. The only constitutional issue was whether the applicable assessment statutes had been *applied* to them by the assessor in

violation of the uniformity clause.[7] It was not, as this case is, a claim that the statute is unconstitutional on its face. As the supreme court has recognized, facial challenges and as-applied challenges are very different animals.

> If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances.

State v. Konrath, 218 Wis.2d 290, 321 n.13, 577 N.W.2d 601, 607 (1998) (quoted source omitted).

¶11 Of even greater significance in this regard, we think, is the fact that ***Norquist***—which is not only a more recent decision, but states the "law of the case" with respect to this appeal—set forth precisely what these plaintiffs were required to establish in this case in order to proceed with their constitutional challenge: "that [their] agricultural land is over assessed *and that other agricultural land is underassessed* as a result of the statute." ***Id.***, 211 Wis.2d at 253, 564 N.W.2d at 753 (emphasis added). The emphasized language clearly requires more than a mere showing that the valuation of the challenger's land is high *relative* to other comparable properties in the same taxing district—*e.g.*, that similar agricultural property in the town was assessed lower than their property. We agree with Zeuske that the ***Norquist*** court "plain[ly] … understood there to be two concepts—one of overassessment and one of underassessment—and not simply the single concept of relative over (and under-) assessment."

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[7] In ***State ex rel. Levine v. Fox Point Review Bd.***, 191 Wis.2d 363, 528 N.W.2d 424 (1995), the supreme court, ruling in plaintiffs' favor, remanded the case to the local Board of Review, directing it to reassess their properties so as to bring their assessments into conformity with those of the identified comparable properties.

¶12 Beyond that, even if we were to assume that plaintiffs' evidence established a lack of uniformity in the assessments of their property and the four larger parcels, they have failed to show, as ***Norquist*** also requires, that those discrepancies arose *as a result* of the statute. What plaintiffs proved—and all they proved—was that whatever inconsistencies may have existed prior to the effective date of the law (January 1, 1996) were carried forward into the "phase-in period" by the statutory freeze. A showing that pre-existing discrepancies or inequities may have been prolonged by the statute, however, is something altogether different from showing that those inequities were caused by its passage.

¶13 The testimony of Mary Reavey, plaintiffs' oar-carrying witness on the subject, was that, in 1995, the year prior to the effective date of the statute, the Bohne and Bran properties were assessed higher, with respect to their estimated fair market value, than were the four comparable properties. And the only argument plaintiffs put forth attempting to relate those pre-existing discrepancies to the enactment of § 70.32(2r), STATS., is that the statutory freeze precluded the town's assessor from changing the assessments on the other, larger, properties to bring them in line with the assessed values of smaller parcels in the town. In Reavey's words, the assessor's "hands [were] tied due to the freeze." That is insufficient, in our opinion, to meet the "as a result of" language of ***Norquist***.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.