COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP116 **Cir. Ct. No. 2010CV249**

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

CNL INCOME GW WI-DEL, LP,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF LAKE DELTON BOARD OF REVIEW,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Reversed and cause remanded for further proceedings.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. This appeal involves a property tax assessment by the Village of Lake Delton on a resort owned by CNL Income. CNL objected to the assessment and received a hearing before the Village's Board of Review.

After the hearing, the Board lowered the assessment, but not as much as CNL had proposed. CNL then sought judicial review, and the circuit court affirmed the Board's decision by applying "enhanced certiorari" review. CNL appealed to this court. During briefing, our supreme court issued ***Metropolitan Associates v. City of Milwaukee***, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, holding that the assessment review scheme employed in this case is unconstitutional. Although the circuit court followed controlling case law at the time of its decision, we remand for further proceedings consistent with the subsequent ***Metropolitan Associates*** decision and this opinion.

Background

¶2 CNL objected to the 2009 property tax assessment for its Great Wolf Resort, located in the Village of Lake Delton. To address such objections, the Village had enacted an ordinance adopting a statutory scheme created by 2007 Wis. Act 86. Having adopted Act 86's scheme, the Village's Board of Review was required to provide certain procedures for objecting taxpayers who were seeking review of their assessments before the Board. *See* WIS. STAT. § 70.47(7)(c).[1] Notable here, Act 86 also limited the type of judicial review available to taxpayers such as CNL. *See* WIS. STAT. §§ 74.37(4)(d) and 70.47(13).

¶3 The Board conducted a hearing on CNL's objection to its assessment, during which the Board took testimony and other evidence. The Board decided that the proper assessment was $48.5 million, which was lower than the assessor's original $55 million assessment but more than CNL's proposed

[1] All references to the Wisconsin Statutes are to the 2007-08 version, unless otherwise noted.

$34 million assessment. According to Act 86's "enhanced certiorari" review scheme, CNL then sought review in the circuit court. Applying the "enhanced certiorari" standard of review, the circuit court rejected CNL's challenge based on a threshold question, concluding that CNL had failed to overcome the presumption that the Board's decision was correct. Accordingly, the circuit court affirmed the Board without taking additional evidence or independently determining the correct assessment. CNL appealed.

Discussion

¶4 On the same day that CNL filed its brief-in-chief in this appeal, our supreme court issued ***Metropolitan Associates***, 332 Wis. 2d 85. ***Metropolitan Associates*** holds that the assessment review process created by 2007 Wis. Act 86 and followed in this case is unconstitutional. *See* ***Metropolitan Assocs.***, ¶81. ***Metropolitan Associates***, however, does not specify whether its holding applies to cases pending on direct appeal, such as the present case.[2] In their responsive and reply briefs, the parties here dispute whether the holding in ***Metropolitan Associates*** should apply to this case and, if it applies, how to proceed.

¶5 We begin by summarizing ***Metropolitan Associates*** and the parties' arguments in light of that case. We then conclude that the holding in ***Metropolitan Associates*** applies retroactively to this case. Finally, we conclude

[2] Given the posture of ***Metropolitan Associates v. City of Milwaukee***, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, the supreme court did not need to and did not address retroactive application. *See* ***id.***, ¶16 (addressing "a class action lawsuit against Milwaukee seeking declaratory relief and a ruling that Act 86's opt out provision violated the equal protection provisions").

that the appropriate course of action is to remand to the circuit court for a de novo review of the Board's decision.

A. ***Metropolitan Associates***

¶6 In ***Metropolitan Associates***, the supreme court began by explaining that, absent the statutory changes at issue, a property owner who is unhappy with a property tax assessment decision has two judicial review options. *See* ***id.***, ¶¶9-12. One option is regular, or "common law," certiorari review, which is "limited" in that the circuit court is bound by the record before the board and the legal inquiries on review are narrow. *See* ***id.***, ¶¶2, 9. The second option is de novo judicial review, which is "more substantial" in that the circuit court may receive additional evidence, the court gives no deference to the board's decision, and the court may calculate the proper assessment without remanding to the board.[3] *See* ***id.***, ¶10.

¶7 In 2007 Wis. Act 86, the legislature gave taxing authorities the option of adopting a replacement judicial review procedure. *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶¶13-14. Act 86 allowed municipalities to opt out of the existing review procedures and, instead, provide a new "enhanced certiorari" review option. *See* ***id.***, ¶¶3, 14.

¶8 Because some taxing authorities adopted the new review procedure under Act 86, taxpayers in different taxing districts were treated differently. ***Metropolitan Associates*** addressed whether this amounted to "significantly different" treatment and, if so, whether that violated equal protection principles.

[3] Other differences are that certiorari review actions, in contrast to de novo review actions, receive scheduling preference and the taxpayer "does not have to pay the tax before filing." *See* ***id.***, ¶¶9-10.

See ***id.***, ¶¶24-47, 60-74. The court answered both questions in the affirmative and held that Act 86's modifications were unconstitutional and invalid in full.[4] *See* ***id.***, ¶81. Thus, ***Metropolitan Associates*** restored to all taxpayers the review options that were in place prior to the enactment of Act 86. *See* ***id.***, ¶80.

¶9 We need not repeat all of ***Metropolitan Associates***' reasoning here. It is sufficient to explain that the court essentially concluded that Act 86 taxpayers (which includes CNL here) were at an unfair disadvantage because they could not seek de novo judicial review. *See* ***id.***, ¶¶44, 47, 68. This reasoning focused on the fact that judicial review under enhanced certiorari review "is narrower in scope than the de novo review available to all other taxpayers." ***Id.***, ¶31. For example, the court noted that, unlike de novo review, enhanced certiorari review has a threshold presumption that the board's assessment decision is correct, which must be overcome before the circuit court may consider additional evidence. *See* ***id.***, ¶¶31, 44, 46. The court contrasted this to de novo review where, although there is a presumption of correctness afforded to the assessor's valuation, the board's decision is not afforded a presumption of correctness. *See* ***id.***, ¶32. Rather, under de novo review, "a circuit court make[s] its determination without regard to the Board of Review's record or decision" and "[t]he taxpayer on de novo review need not first overcome any presumptions to introduce evidence." ***Id.***, ¶¶32, 46.

¶10 Given the holding in ***Metropolitan Associates*** that the Act 86 review employed in the present case is unconstitutional, the issue arises whether that holding should apply here to invalidate the circuit court's review and, if so, how

[4] The supreme court explained that one Act 86 provision survives, but that provision does not relate to enhanced certiorari review. *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶79 n.23 (not invalidating an interest rate provision).

this case should proceed. Before addressing the factors applicable to retroactive application, we first examine and respond to the parties' positions.

B. The Parties' Positions

¶11 Consistent with the presumption of retroactive application discussed below, the Board assumes that the holding in ***Metropolitan Associates*** applies retroactively to this case. The Board's argument focuses on what that retroactive application should entail. The Board argues that ***Metropolitan Associates*** has the effect of limiting CNL to regular certiorari review and that CNL is not entitled to de novo review, even though the point of ***Metropolitan Associates*** was to provide a de novo review option to all taxpayers. The Board's argument is flawed.

¶12 Specifically, the Board takes the position that, because CNL pursued enhanced certiorari review, a statutory provision prevents CNL from seeking de novo review. The Board relies on a subsection in the de novo review statute. After the enactment of Act 86, but before release of ***Metropolitan Associates***, that subsection stated: "No claim or action for an excessive assessment may be brought or maintained under this section if the assessment of the property for the same year is contested under s. 70.47(7)(c), (13), or (16)(c) …. No assessment may be contested under s. 70.47(7)(c), (13), or (16)(c) … if a claim is brought and maintained under this section based on the same assessment." WIS. STAT. § 74.37(4)(c). The cross-references in § 74.37(4)(c) were to the provisions for certiorari review and enhanced certiorari review in WIS. STAT. § 70.47. Thus, § 74.37(4)(c) provided that a taxpayer may not pursue both a type of certiorari review and de novo review. The problem with the Board's argument is that ***Metropolitan Associates*** invalidated *all of* Act 86's modifications to these provisions, including the modifications to § 74.37(4)(c) that cross-reference

enhanced certiorari review.[5] *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶81. Accordingly, applying ***Metropolitan Associates***, the pertinent statutory language now simply states that a taxpayer may not seek both de novo and regular certiorari review. CNL sought neither.

¶13 Further, as ***Metropolitan Associates*** explained, taxpayers such as CNL did not have the option to seek de novo review because of an unconstitutional restriction. *See* WIS. STAT. § 74.37(4)(d) (not allowing Act 86 taxpayers to seek de novo review). The Board fails to explain why it would make sense to apply a provision requiring a taxpayer to choose between options that were not available to the taxpayer and, in effect, treat the taxpayer as if he or she had actually made a choice. Applied here, the Board argues that we should treat CNL as if it had chosen regular certiorari review, even though CNL made no such choice.

¶14 The Board also asserts that CNL has forfeited any argument against applying regular certiorari review. The Board points to the fact that CNL did not challenge the constitutionality of Act 86 before the circuit court. We discern no logic in this position. First, the controlling law at the time was our decision in ***Metropolitan Associates v. City of Milwaukee***, 2009 WI App 157, 321 Wis. 2d 632, 774 N.W.2d 821, in which we upheld Act 86 as constitutional. *See* ***id.***, ¶11. Thus, CNL could not have successfully argued for a different standard of review.

[5] Thus, in ***Metropolitan Associates***, the court invalidated WIS. STAT. § 74.37(4)(c)'s cross-references to WIS. STAT. § 70.47(7)(c) and (16)(c), which explained that a municipality may, by enacting an ordinance, adopt the Act 86 scheme and, in turn, must provide certain additional procedures. The court also invalidated the portion of § 70.47(13) that provided for enhanced certiorari judicial review. *See* 2007 Wis. Act 86 (creating or amending these subsections).

Second, there is no question at this point that Act 86 is unconstitutional. Thus, the issue we must resolve is whether the supreme court's decision in ***Metropolitan Associates*** should apply retroactively and, if so, how to proceed in this case. The Board's forfeiture argument does not come to grips with this fact. Accordingly, we discern no forfeiture issue as to CNL.

¶15 Thus, we are left with the Board's assumption that ***Metropolitan Associates*** applies retroactively here. But, as we have just discussed, the Board provides no colorable argument supporting its assertion that applying ***Metropolitan Associates*** means that CNL may pursue only certiorari review. That is, apart from what we have discussed, the Board presents no argument that there is a barrier to applying the de novo option, which the ***Metropolitan Associates*** court declared must be an option for all taxpayers.[6]

¶16 Based on the particular circumstances of this case, CNL takes the position that ***Metropolitan Associates*** should not apply retroactively, even though ***Metropolitan Associates*** purports to benefit taxpayers like CNL. CNL largely bases this assertion on the view that retroactive application would be inequitable. CNL's argument, however, assumes that we would adopt the Board's assertion that CNL may not have de novo review, but must instead be limited to certiorari review. Given our rejection of the Board's argument, the argument CNL makes

[6] We note that, in a typical case, a taxpayer electing de novo review would be required to timely pay the tax to pursue that review. *See* WIS. STAT. § 74.37(4)(b); ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶10. In contrast, under enhanced certiorari review, which was CNL's only option when it commenced this action, CNL was not required to prepay the tax. *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶31. We are presented with no argument that this should matter in the unique circumstances of this case or that it might somehow affect the legal determinations on review. More specifically, the party that might be interested in this requirement is the Board, but the Board does not raise the argument that the requirement matters here.

against retroactive application of ***Metropolitan Associates*** falls away, and we discern no reason why CNL would persist in arguing against retroactive application.

¶17 Having addressed the parties' positions, we now explain that, based on well-established factors, retroactive application is warranted in this case.

C. Retroactive Application

¶18 In civil cases, our supreme court has explained that retroactive application is presumed. ***Wenke v. Gehl Co.***, 2004 WI 103, ¶69, 274 Wis. 2d 220, 682 N.W.2d 405; *see also* ***id.***, ¶68 (explaining that retroactive application of a rule announced in that case would mean that the appellant in ***Wenke***, and parties in similar "pending cases," would be bound by the holding). However, in certain "rare situations," a judicial holding is not applied retroactively because to do so would be inequitable. *See* ***id.***, ¶69. In ***Wenke***, the supreme court explained that three factors bear on whether the retroactive application presumption applies:

> (1) whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retroactive application would further or retard the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results.

Id., ¶71. We conclude that the presumption of retroactive application applies in this case. That is because at least two of the three factors favor retroactive application, and the third does not significantly weigh either way.

¶19 The first factor focuses on the parties' reliance on existing law. *See* ***id.***; *see also* ***State ex rel. Brown v. Bradley***, 2003 WI 14, ¶17, 259 Wis. 2d 630,

658 N.W.2d 427 (discussing the three factors generally, and explaining that the factors "require us to consider if reliance on a contrary rule of law was so justified and so detrimental as to require deviation from the traditional retroactive application"). However, the parties do not explain, and we do not glean, why the first factor is significant here.[7]

¶20 The second factor plainly favors retroactive application because applying ***Metropolitan Associates*** here furthers the view of the majority in that case that all taxpayers should have the option of de novo review. *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶¶44-46, 47, 68, 80.

¶21 The third factor also favors retroactive application because the parties point to no inequity, and we discern none, if retroactive application affords CNL de novo review.

¶22 In sum, the presumption in favor of retroactive application is not overcome here. Indeed, at least two factors weigh in favor of retroactive application. Thus, we conclude that ***Metropolitan Associates***' holding invalidating Act 86 applies and returns CNL to the position of having two options for judicial review of its assessment—de novo review and certiorari review. *See* ***id.***, ¶80.

[7] We note that, pursuant to Act 86, the review before the Board included additional procedures that were not previously required. *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶26 (the additional board procedures under Act 86 included "a more detailed notice of a changed assessment, the right to additional time to prepare for their Board of Review hearing date, and comparatively broader discovery rights"). The parties do not argue that the fact that these additional procedures were in place when the Board conducted its hearing in this case matters to the question of whether ***Metropolitan Associates*** should be applied retroactively, and it is not evident to us that they would matter.

¶23 Given our above conclusion that ***Metropolitan Associates*** should be applied retroactively here, the parties provide no clear arguments on how they believe this case should proceed. The Board, for its part, provides no argument on point because, as we have already explained, the Board does not come to terms with the fact that ***Metropolitan Associates*** has invalidated all of Act 86's assessment review provisions. Rather, as explained above, the Board's only argument is flawed because it is based on invalidated portions of WIS. STAT. § 74.37(4)(c). Accordingly, we deem the Board to have effectively conceded that there is no barrier to the circuit court conducting de novo review.

¶24 CNL, for its part, requests remand, but does so under the erroneous assumption that we will adopt the Board's argument that retroactive application of ***Metropolitan Associates*** precludes de novo review. CNL does not address remand in light of our conclusion that applying ***Metropolitan Associates*** retroactively does not preclude de novo review in the circumstances of this case.

¶25 Based on the limited arguments before us, we conclude that the course of action most in keeping with ***Metropolitan Associates*** is to remand so that the circuit court may conduct de novo review.[8] This result is as favorable to CNL as the remedy it requests, namely, that "the Board's determination must be overturned and this matter remanded to the circuit court to determine the assessment in accordance with the evidence in the record consistent with the [enhanced certiorari statute] procedures." Generally speaking, de novo review is consistent with CNL's request because, under de novo review, the circuit court

[8] Neither party suggests a reason why applying ***Metropolitan Associates***' holding in the circumstances of this case would require sending the case back to the Village's Board of Review for new proceedings.

determines the correct assessment without deference to the Board.[9] *See* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶10.

¶26 In sum, we are presented with no colorable argument on point from the Board, and the argument presented by CNL is effectively an argument that de novo judicial review should apply in the circumstances of this case. Thus, based on the arguments before us, we remand so that the circuit court may conduct a de novo review of the Board's decision.[10]

Conclusion

¶27 For the reasons discussed, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

[9] We acknowledge that, on de novo review, the court affords the assessor's valuation a presumption of correctness, *see* ***Metropolitan Assocs.***, 332 Wis. 2d 85, ¶32, but the parties have not given us a reason to think that this has practical significance here. Further, we note that the Board has already rejected the assessor's valuation in the proceedings before the Board and, presumably, the Board would take the same position on remand.

[10] In addition to the arguments we have addressed, CNL complains about specific aspects of the proceedings before the Board. However, in light of our conclusion that remand for de novo review is warranted, and given that, on remand, additional evidence may be considered by the circuit court, these parts of CNL's arguments appear to fall away, and we need not address them.