

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2009AP524

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OF WISCONSIN**

**METROPOLITAN ASSOCIATES,
A WISCONSIN LIMITED PARTNERSHIP,**

ON BEHALF OF ITSELF AND ALL OTHER
PERSONS AND ENTITIES WHO FILED
AN OBJECTION TO THE 2008 ASSESSMENT
OF ANY PARCEL OF REAL OR PERSONAL
PROPERTY IN THE CITY OF MILWAUKEE,

Plaintiff-Respondent-Petitioner,

-vs-

**CITY OF MILWAUKEE,
A WISCONSIN MUNICIPAL CORPORATION,**

Defendant-Appellant.

***AMICUS CURIAE* BRIEF AND APPENDIX OF
STATE BAR OF WISCONSIN TAXATION SECTION
BOARD OF DIRECTORS**

**Review of a Decision of the Court of Appeals, Dist. I,
Reversing the Judgment of the Circuit Court for
Milwaukee County, Honorable Jean W. DiMotto,
Presiding, Case No. 2008CV9866**

Maureen A. McGinnity
(WBN 1009581)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 297-5510

Douglas A. Pessefall
(WBN 1034109)
WHYTE HIRSCHBOECK
DUDEK, S.C.
555 East Wells Street
Milwaukee, WI 53202-3819
Telephone: (414) 978-5534

John T. Barry (WBN 1029886)
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 277-5000

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INTRODUCTION

The State Bar Taxation Section Board of Directors (“Tax Section Board” or “Board”)¹ is comprised of 17 practitioners with a combined total of over 300 years’ experience representing clients throughout the state in tax controversies, including representing taxpayers and tax authorities in property tax disputes.² Board members regularly advise clients concerning Board of Review (“BOR”) procedures and the pros and cons of the various avenues for seeking relief from BOR determinations. The Board therefore is well-positioned to address the central issue in this appeal, *i.e.* whether there are “significant differences” in the treatment of the two classes of taxpayers created by Sections 8 and 9 of 2007 Wis. Act 86 (“Act 86”).

ARGUMENT

I. TAXPAYERS DID NOT REQUEST ACT 86.

Prior to the Act 86 amendments to Wis. Stat. §§ 70.47 and 74.37, all Wisconsin taxpayers (except manufacturers and other state-assessed taxpayers) had three distinct options for challenging BOR determinations:

¹ This Brief is filed only by the Tax Section Board and not the State Bar Board of Governors or other State Bar entity.

² Robert Gordon, counsel for the petitioner, is a member of the Tax Section Board. Mr. Gordon abstained from the Board’s otherwise unanimous vote to file this *amicus* brief and has had no involvement in the preparation of this brief.

(1) direct *certiorari* judicial review pursuant to Wis. Stat. § 70.47(13), (2) a revaluation by the Department of Revenue under § 70.85 (provided certain conditions are met) followed by *certiorari* judicial review, or (3) a *de novo* refund action in circuit court following the tax district's determination of a claim for excessive assessment under § 74.37.

Each of these options has advantages and disadvantages. A taxpayer's choice depends on a variety of factors, including whether the BOR's determination was primarily factual or legal, the complexity of the issues, the completeness and quality of the BOR record, the amount of taxes at issue, and cost and timing considerations.

The availability of these different appeal options provides important protections to taxpayers, as discussed below. Common sense dictates that taxpayers would not advocate for the elimination of their options.

The City of Milwaukee ("City") suggests the legislature's decision to allow municipalities selectively to deprive taxpayers of the *de novo* trial option resulted from "the joint plea of a large Wisconsin business lobby and Wisconsin's largest city for a faster, more efficient, more cost-effective method of hearing appeals." (City Br., at 18.) The City presumably refers to the fact a single business group – Wisconsin Manufacturers and

Commerce (“WMC”) – was invited by the assessing community to comment upon the original version of Act 86. WMC consists primarily of manufacturers who are assessed by the Department of Revenue pursuant to Wis. Stat. § 70.995 rather than by local assessors, and who therefore have no interest in the procedures for appealing BOR determinations.

No taxpayer group “pleaded for” the elimination of the option of appealing BOR determinations through *de novo* refund actions. Nor did the City and other proponents of Act 86 reach out to the Tax Section Board or other taxpayer advocacy groups in formulating and drafting the legislation that became Act 86 to assure taxpayers’ interests were taken into consideration. Upon learning about the proposed legislation after it already passed the Assembly and was being considered by the Senate – and before the Tax Section Board even had the opportunity to vote on taking a position on the legislation – a couple of private tax practitioners took the initiative to meet with the bill’s sponsors to point out its constitutional flaws and urge that the bill not be enacted. Failing in that effort, the practitioners offered suggestions to ameliorate certain specific deficiencies with BOR procedures, only some of which ultimately were accepted. This process was a far cry from a “political compromise” (City Br., at 18 n.7) and should

not be construed as taxpayers getting what they bargained for, as the City seems to suggest.

II. BOR HEARINGS ARE SIGNIFICANTLY DIFFERENT FROM *DE NOVO* TRIALS IN CIRCUIT COURT.

In considering whether the two classes of taxpayers created by Act 86 are treated significantly differently, it is important to understand the process for presenting objections to BORs.

January 1 of each year is the valuation date for all locally assessed property. The actual assessment process continues well into the year of the assessment, however. Assessors spend months doing their behind-the-scenes work and typically mail assessment notices to taxpayers in the spring or summer. Those notices often are the first indication to taxpayers that the assessor has made a change to their assessments.

If taxpayers want to challenge their assessments, they need to give notice of their intent to object at least 48 hours prior to the BOR's first meeting, and file objections within the first two hours of the BOR's first meeting. It is not unusual for the BOR's first meeting to be scheduled within a couple of weeks after the issuance of the assessment notice. In the interim, the taxpayer may have the opportunity to meet informally with the assessor to ask questions about the assessment during an "open book"

period, and the assessor has the authority to change the assessment during that period if persuaded it is erroneous. However, there is no guarantee the taxpayer will be able to talk to the assessor prior to the BOR hearing. Especially in years when a municipality conducts a city-wide revaluation, open book meeting slots tend to fill up quickly, and the assessor may not be able to accommodate all taxpayers who request meetings.

Because of this compressed timeline, the taxpayer's appearance at the BOR hearing may well be the first opportunity to find out why its assessment was increased. Even if the taxpayer had the opportunity to meet with the assessor during the open book period, there typically is very little time between that meeting and the BOR hearing. BOR hearings may be scheduled on only 48 hours' notice to the taxpayer. That means the BOR hearing may be scheduled before the taxpayer even has the opportunity to investigate the factual basis for its assessment change, much less prepare to refute the assessment.

At the BOR hearing, the deck is stacked against the taxpayer because the assessment is presumed to be correct. It is the taxpayer's burden to come forward with affirmative evidence to rebut that presumption. Absent a recent sale of the subject property, the assessment is

required to be based on arm's-length sale prices of reasonably comparable properties or, if there are no comparable sales, other professionally accepted appraisal practices. This necessitates identification of the existence of other sales, comparison of the characteristics of other properties to the characteristics of the subject property, and investigation into the terms of sale of the other properties to verify they qualify as arm's-length sales.

In the absence of a pool of comparable sales, it is necessary to develop other valuation evidence such as the cost of construction and/or income producing capacity. Depending on the size and complexity of the property at issue, developing and presenting such evidence often is beyond the taxpayer's expertise and requires expert assistance. Competent appraisers, especially for commercial properties, tend to be in high demand and frequently cannot realistically complete valuations in the short window of time before the BOR hearing.

In addition to valuation issues, other issues may call assessments into question. For example, Wis. Stat. § 70.32 requires assessors to classify land into various statutory categories based on use, with agricultural, agricultural forest, and undeveloped land to be assessed at less than fair

market value. There may be disputes regarding the proper classification. Additionally, taxpayers who assert their assessments violate the Uniformity Clause of article VIII, § 1 of the Wisconsin Constitution are required to appear at a BOR hearing before seeking judicial relief. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 572 N.W.2d 855 (1998).

There are no minimum qualifications for BOR members. In particular, there is no requirement that any board member be a legal professional or otherwise trained with respect to evidentiary rules (nor do the rules of evidence apply in BOR hearings). The levels of experience of BOR members who hear and weigh the evidence and decide taxpayer objections vary widely. BORs in some municipalities may include attorneys or real estate brokers, whereas the BORs in many municipalities are comprised of individuals who have no relevant experience or expertise. Except in the City of Milwaukee, BOR members may be public officials. In some communities the membership of the BOR is the same as the

membership of the town or village board, raising concerns about bias given the latter's fiscal responsibilities and interests.³

Just as there are no minimum qualifications for BOR members, there also are no minimum training requirements for individual BOR members. Wis. Stat. § 70.46(4) merely requires that at least one member of the BOR have attended a single Department of Revenue training session within the prior two years. As a result, it is not unusual for BORs to be comprised almost exclusively of individuals who have no special expertise and no training whatsoever to equip them to understand and weigh the evidence and make competent valuation determinations.

Notwithstanding these limitations, BOR procedures are a valuable and effective tool for resolving most taxpayers' assessment questions and disputes. Residential taxpayers typically have an understanding of which of their neighbors' properties are similar to their own and can provide information at open book meetings or BOR hearings from personal knowledge. Lay BOR members' common experiences as home owners,

³ At the March 27, 2008 hearing of the Milwaukee Judiciary & Legislation Committee at which the committee voted to adopt an extension ordinance and thereby deprive Milwaukee citizens of the right to file *de novo* refund actions, one committee member opined that judges are no more objective than political officials. It is troubling to think such important decisions may be based upon a fundamental lack of understanding of judges' duty and training to be fair and impartial.

and their general knowledge of their communities, often enable them to compare residential properties and review assessments for consistency. BOR hearings also provide a forum for taxpayers to vent their concerns about property taxes in general. The vast majority of BOR objections therefore are resolved at the BOR stage without further appeal; municipalities are not being inundated with appeals from BOR determinations.⁴

The BOR procedures summarized above are not limited to reviewing the assessments of properties about which BOR members have common knowledge, however. The same BOR procedures apply whether the taxpayer is complaining that his modest home is assessed \$2,000 higher than his neighbor's, or that the assessor used an invalid methodology and over-assessed a high rise office building by \$20 million. The same BOR procedures apply whether the subject property is a residence in a crowded urban residential neighborhood with twenty other similar houses on the

⁴ See the Addendum hereto for a report of § 74.37 claims for excessive assessment filed in 2006, upon which the City relied in lobbying in favor of Act 86. Although the City has over 150,000 property owners, only 116 claims for excessive assessment were even filed with the City. Taxpayers filed *de novo* refund actions in circuit court in only a fraction of those cases, and a small fraction of those few actions actually went to trial.

same street, or a mixed-use 30-acre rural parcel that includes wetlands and agricultural land, or an income producing commercial building.

In some complex cases where BOR determinations are appealed, the BOR record is adequate to permit a court fairly to decide the issues raised, and *certiorari* judicial review is sufficient. In other cases, the compressed and relatively informal BOR procedures simply do not afford taxpayers the opportunity fully to develop and present their case at the BOR stage to assure judicial review is based upon a full and fair record.

A review of this Court's recent decisions in § 74.37 actions illustrates this point. For example:

- In *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687, this Court reversed the assessments of several Walgreen stores, holding that Walgreen's above-market leases are contracts rather than real property rights and are not assessable.
- In *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803, this Court held that billboard permits are rights that appertain to real property and may not be assessed as tangible personal property. The Court further held that the "inextricably intertwined" doctrine does not apply to personal property.

In both cases, the Court considered trial court records that included extensive expert testimony. Imagine the difference in the quality of the record on which this Court would have been asked to make these important rulings – with statewide and long-lasting significance – if instead of a full

trial in circuit court following formal discovery, the taxpayers had been limited to whatever evidence they could muster in the short time between learning of their tax assessments and appearing before the BOR.

The “enhanced” BOR procedures under Act 86 that the City argues now make BOR hearings “functionally equivalent to a Court trial” (City Br., at 9) fall far short of doing so. In complex cases, adding 60 days to the compressed timeline described above still does not give taxpayers a fair opportunity fully to investigate the bases for their assessments, identify and study comparable sales, obtain expert reports if necessary, and otherwise prepare for the hearing. Requiring the parties to exchange hearing exhibits 10 days before the BOR hearing is not the equivalent of being able to conduct formal discovery – including obtaining information that the assessor elects not to volunteer – methodically and with adequate time pursuant to established discovery rules. Allowing taxpayers to conduct depositions and subpoena witnesses for BOR hearings, while theoretically advantageous, does not change the fact they often will not have adequate time to determine who their witnesses should be. Moreover, trying to schedule the deposition of the assessor in that short time frame undoubtedly will prove difficult if not impossible given the fact that is a very busy time

for assessors, many of whom are contract assessors with responsibility for multiple jurisdictions, and the BOR is not regularly in session to compel their attendance.

In short, what the City refers to as the “enhancement” sections of Act 86 do not overcome this Court’s conclusions in *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141 regarding the constitutionally significant differences between BOR hearings and circuit court trials.

III. *CERTIORARI* JUDICIAL REVIEW OF BOR DETERMINATIONS IS SIGNIFICANTLY DIFFERENT FROM INDEPENDENT DECISION-MAKING IN A *DE NOVO* TRIAL.

In arguing that *certiorari* review under Act 86 is functionally equivalent to a *de novo* trial, the City points out that Act 86 permits courts on *certiorari* review to consider such additional evidence as the court “otherwise determines should be considered in order to determine the correct assessment.” The mere possibility that a court may consider additional evidence is no substitute for the rights accorded civil litigants, however. For example, the City previews its intent to object to the introduction of live testimony on *certiorari* review (City Br., at 15), whereas it would have no basis to object to live testimony at a *de novo* trial.

At a minimum, there is considerable risk that, in construing and applying the scope of *certiorari* review under § 70.47(13) in the context of the elimination of the statutory right to a *de novo* trial, trial courts will be inclined to limit the additional evidence they are willing to consider so the record will be far less complete than with a *de novo* trial.

In addition, as petitioner has pointed out, there is no right to a jury trial under the § 70.47(13) *certiorari* review procedures, whereas a jury trial is available in *de novo* refund actions.

These are constitutionally significant differences in the treatment of taxpayers who have the right to file *de novo* refund actions, and those who do not.

IV. THERE IS NO RATIONAL BASIS FOR DEPRIVING TAXPAYERS IN CERTAIN TAX DISTRICTS OF THE RIGHT TO FILE *DE NOVO* REFUND ACTIONS.

The City cites “promotion of settlement” as a rational basis for the different Act 86 classifications. To the extent the Act 86 amendments prompt more settlements at the BOR stage in cases otherwise destined for *de novo* refund actions, that is not necessarily a desirable outcome that somehow justifies disparate treatment. Tax practitioners must advise taxpayers in extension ordinance municipalities that they cannot be assured

their assessments will be decided by the court on a full and fair record, and that there may be increased costs associated with arguments over whether the court should consider evidence beyond the BOR record. There is a very real likelihood that taxpayers who ultimately would have prevailed in a *de novo* refund action will unduly compromise their rights rather than incur the additional risks associated with *certiorari* review. Giving some municipalities unfair settlement leverage over taxpayers does not pass constitutional muster.

The City also argues that the speed with which *certiorari* review proceeds as compared with *de novo* court trials provides a rational basis for the different classifications created by Act 86. That argument ignores the fact taxpayers in municipalities that do not enact extension ordinances retain the right to choose between the two appeal routes. There is no rational basis for giving taxpayers in some communities more appeal options than taxpayers in other communities.

CONCLUSION

This Court already decided in *Nankin* that BOR hearings are significantly different than trials in circuit court, and that *certiorari* review

is significantly different than a *de novo* trial. Nothing in Act 86 alters those conclusions.

For all of the foregoing reasons, the Tax Section Board respectfully requests that the Court reverse the decision of the Court of Appeals and reinstate the circuit court's judgment holding Sections 8 and 9 of Act 86 to be unconstitutional.

Dated this 16th day of March, 2010.

Maureen A. McGinnity (WBN 1009581)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 297-5510

John T. Barry (WBN 1029886)
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 277-5000

Douglas A. Pessefall (WBN 1034109)
WHYTE HIRSCHBOECK DUDEK, S.C.
555 East Wells Street
Milwaukee, WI 53202-3819
Telephone: (414) 978-5534

By s/Maureen A. McGinnity
One of the Attorneys for the State Bar
Taxation Section Board of Directors

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19 (b) and (c), Stats. for a brief produced with a proportional serif font. The length of this brief is 2,992 words.

I hereby certify that the text of the e-brief is identical to the text of the paper brief.

Dated 3/16/10 .

s/Maureen A. McGinnity
Maureen A. McGinnity

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