STATE OF WISCONSIN CIRCUIT COURT GREEN COUNTY

APPLEGATE-BADER FARM, LLC,

Plaintiff

vs.

Case No. 16CV48

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

Defendants

Memorandum Decision on Motion for Summary Judgment

STATEMENT OF CASE

The Plaintiff asserts that the Department of Revenue (DOR) has exceeded its rulemaking authority while modifying and adopting the present form of an administrative rule, Tax 18.05(1). The rule was modified and adopted in 2014. This rule defines land that qualifies for agricultural use value assessment in conjunction with Wis. Stat. 70.32(2r), enacted in 1995. That statute provides for use value assessment for agricultural land and consequently lowers real estate taxes for land that qualifies. However, the statute did not define agricultural use and it was left to the DOR to define agricultural use through Tax 18.05(1).

The Plaintiff claims the rulemaking violations resulted in an arbitrary property tax classification which excludes lands enrolled in the federal Agricultural Conservation Easement Program (ACEP). This program was established by Congress through the Agriculture Act of 2014. It replaced the Wetland Reserve Program, but did not modify any of the existing WRP contracts. Enrolled lands were simply renamed Wetland Reserve Easements (WRE).

The USDA and federal law deemed all lands enrolled in Wetland Reserve Easements to be an agricultural use of the land. Federal statistics include Wetland Reserve Easements as cropland, which is part of the base acreage of the farm for all purposes. (Amended Complaint, paragraph 15, citing 7CFR Sec. 1410.4)

The DOR first defined agricultural use in 1997 in order to help implement the use-value statute enacted by the state legislature two years earlier. The definition did not include land enrolled in the federal Wetland Reserve Program.

The Amended Complaint cites other extensive history involving the rule between 1995 and 2013, when the present version of the rule had its origins. The Plaintiff points out that the Legislative Reference Bureau stated that the original intent of ag use value assessment was to slow urban sprawl and allow farmers to keep lands in agricultural production without burdensome taxation. The application of Tax 18.05(1) has been an ongoing and significant issue for the State of Wisconsin and its citizens.

The content of the rule was revisited by the DOR in 2013. In December of 2013, the DOR submitted a draft rule to the Wisconsin Legislative Council Rules Clearinghouse. It repealed the prior rule and for the first time would include all lands subject to permanent federal and state agricultural easements. WRE land would have been included under the proposed rule's language.

A public hearing for the proposed rule was held in January of 2014. The rule was submitted to the governor for signature in April of 2014. From the date of the public hearing to the date the final draft that was sent to the governor for approval, the rule's definition of agricultural use was altered to exclude permanent easements unless they had a compatible use permit.

The draft rule included land enrolled in the WRE in its definition of agricultural use. The final version of the rule that was signed by the governor and put into effect did **not** (emphasis added) include that land in its definition of agricultural use, unless it had a compatible use permit. The relevant portion of the draft rule, Tax 18.05 (1)(e), which would have included the WRE land, read as follows:

(e) Commencing with the January 1, 2015 assessment, land without improvements subject to a permanent federal or state easement or enrolled in a permanent federal or state program if that land was in agricultural use under par. (a), (b), or (c) when it was entered into the easement or program.

The final rule, adopted without further public hearing, a revised scope statement, or a new economic impact statement, eliminates that language:

(1) "Agricultural use" means any of the following: …
(d) Land without improvements subject to a federal or state easement or enrolled in a federal or state program if all of the following apply:

1. The land was in agricultural use under par. (a), (b), or (c) when it was entered into the qualifying easement or program, and
2. Qualifying easements and programs shall adhere to standards and practices provided under the January 31, 2014 No. 697 version of s. ATCP 50.04, 50.06, 50.71, 50.72, 50.83, 50.88, 50.91, 50.96, or 50.98. The Wisconsin Property Assessment Manual, authorized under s. 73.03 (2a), Stats., shall list the qualifying easements and programs according to the ATCP provisions, and
3. a. The terms of the temporary easement or program do not restrict the return of the land to agricultural use under par. (a), (b), or (c) after the easement or program is satisfactorily completed, or
b. The terms of an easement, contract, compatible use agreement, or conservation plan for that specific parcel authorized an agricultural use, as defined in par. (a),(b),or(c), for that parcel in the prior year.

The Plaintiff's complaint set forth nine separate claims against the DOR, including various violations of constitutional provisions. This decision resolves only motions for summary judgment on claims one and nine, claims based on procedural or rules violations. There are no genuine issues of material fact that prevent the court
from deciding the motions for summary judgment on claims one and nine.

Claim I-The Rule was adopted without compliance with the Statutory Rule-making Procedure

The Plaintiff sets forth in the complaint that Tax 18.05 was adopted without compliance with the statutory rulemaking procedure, specifically the requirements for a revised statement of scope, a revised economic impact statement, and a subsequent public hearing. An administrative rule must be declared invalid if it violates constitutional provisions, exceeds the statutory authority of the rule-making agency,

or if it was adopted by the agency without compliance with the statutory rule-making procedure. *Liberty Homes, Inc. v. DILHR, 136 Wis.2d 368, 377, 401 N.W.2d 805, 809 (1987),* Wis. Stat. §227.40(4)(a).

Economic impact statement

Wis. Stat. §227.137 requires a rulemaking agency to prepare an economic analysis of its proposed rule that includes information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. It mandates the agency or person preparing the analysis to solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule. Wis. Stat. §227.137 (3). The DOR itself said originally that "The intent of this rule is to clarify this situation so that the land under these programs **will qualify (**emphasis added) for agricultural use value assessment in the same circumstances as other program land. (DOR Rule Rec. 792).

Wis. Stat. 227.137 (4) Requires the agency to prepare a revised economic impact analysis if a proposed rule is modified after the economic impact analysis is submitted under this subsection so that the economic impact of the proposed rule is significantly changed. When the economic impact analysis was first prepared, WRE were included in the proposed rule's definition of agricultural use. When the draft rule was changed, Wetland Reserve Easements were excluded. The analysis specifically discussed the extent that a farmer's property taxes could be reduced as a result of the rule. Whether or not the easements were included under the rule's definition of agricultural use would significantly change the economic impact of the rule on landowners who had land already enrolled in federal programs, and for those who were eligible to enroll land in the program.

The Plaintiff notes in its brief, "As the Department's own Economic Impact Analysis stated, the average assessed value for ag land in 2012 was $177 per acre, which is $459 per acre less than the $636 average assessed for undeveloped land. (DOR Rule Rec 224). The DOR estimated 87,000 acres may be affected by the rule, which could include land enrolled in state programs as well as the WRE land. Using the DOR's words, "to the extent that a farmer's land can shift from undeveloped to agricultural as a result of the rule, his or her property taxes may decrease.."

The change affected individual land owners who may not farm themselves, individual landowners who operate their own family farms (small businesses), corporate farms and local governmental units which would deal with a shifting tax base. In its final form, the rule essentially eliminated the 44,000 acres estimated to be enrolled in the WRE program from ag use value assessment. The final rule created a significant change in the impact of the rule. That change triggered the need for a new economic impact statement under Wis. Stat. 227. 137(4).

The DOR argues that the change merely *shifts* the tax burden for the taxes that ultimately will be collected. In other words it doesn't change for the tax collector, the State of Wisconsin. But for the farmers and land owners who pay the taxes, there will be a significant, negative impact. The DOR itself said that the intent of the rule was to clarify this situation so that the land under these programs would qualify for agricultural use value assessment.

The final rule was not a mere "shift" for the taxpayers, it was a complete and arbitrary change in the law which dumped the tax burden on the farmers and landowners it was supposed to protect. The DOR had some latitude in modifying the rule and may be able to justify the substance of the rule it finally adopted. But where the change from the proposed rule is so significant, it cannot justify bypassing the rulemaking procedure that insures that our government follows an open and transparent rulemaking process.

A new Economic Impact Statement was required.

Statement of Scope

Wis. Stat. 227.135 requires an agency to prepare a Statement of Scope for a proposed rule that includes a description of the objective of the rule, a description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives, the statutory authority for the rule, estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule, a description of all of the entities that may be affected by the rule, and a summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Section (4) of the statute provides that if any time after a statement of the scope of a proposed rule is approved under sub (2), the agency changes the scope of the proposed rule in any **meaningful or measurable way,** (emphasis added) the agency shall prepare and obtain approval of a revised statement of scope of the proposed rule in the same manner as the original statement was prepared and approved.

The Defendant filed one statement of scope. Its listed objective was for the proposed rule "to provide further clarity regarding what land in federal and state pollution control and soil erosion programs should be classified as agricultural property that qualifies for use-value assessment". (DOR Rule Record 002) The statement is vague. It does not list any specific programs for which it intends to clarify whether a use value assessment applies. In fact the DOR ultimately decided it was not going to define which programs would qualify, but rather that qualification would be determined by use, not by program. (DOR Rule Record 693) That fact alone changes the scope statement in a measurable and meaningful way as to how land would qualify for use value assessment. But in addition, the objective of the rule changed, the DOR reversing itself and appearing to adopt a new policy of excluding federal programs rather than including them.

The DOR argues that the scope statement said that the proposed rule would modify Tax 18.05(1). The new rule did modify the old rule. The DOR feels that's close enough to the original intent so the DOR says that they didn't need a new scope statement. The DOR argues that it doesn't matter that the proposed rule varied greatly from the final rule, but rather that the final rule was within the bounds of the original scope statement. But Wis.Stat. 227. 135(4) clearly says a measurable and meaningful change in the **proposed** (emphasis added) rule requires a new scope statement. The department's interpretation would nullify the meaningful and measurable language entirely.

Clearly the statute demands that a new Statement of Scope be prepared under the circumstances of this case. The DOR cannot hide behind an intentionally vague original Statement of Scope. It must obtain approval of a revised statement in the same manner as the original, which would include the need to conduct another public hearing.

Public Hearing

Wis. Stat. §227.16 requires an agency to hold a public hearing prior to all rulemaking. On January 14, 2014, the DOR held a public hearing on the proposed draft rule. The Plaintiff states there was widespread support for the proposed rule. But the Plaintiff alleges there was a "bait and switch" after the public hearing, alleging that agricultural lobbyists, including the Wisconsin Farm Bureau, initiated private meetings with the department in an effort to replace the draft rule with their own.

The Plaintiff alleges that the final version of the draft rule was taken verbatim from the Farm Bureau's lobbyists and removed all permanent easements except those lands which have a compatible use agreement that authorizes an agricultural use under Tax 18.05(1)(a), (b) or (c). It contained exactly the language that had been used by the Farm Bureau lobbyists in their August 2013 meeting with the DOR. However, the defendant denied that the revised rule was essentially drafted by the Farm Bureau's lobbyist as alleged by the plaintiff. There is no specific legal claim that the rule change was somehow invalid because of undue private influence after the public hearing and this court is not ruling on any such implied issue.

However, the court can rule on the public hearing issue based on the clear and undisputed change in the language of the rule and the applicable law. Regardless of the pressure that was or was not exerted by the Farm Bureau, the rule changed significantly after the public hearing.

The Plaintiff cites a Wisconsin Court of Appeals case from 2015 that held that public comment may cause the agency to prepare successive drafts which require additional notice and public hearings. *Coyne v. Walker*, 2015 WI App 21 ¶18. The Defendant argues that the Coyne language is dicta and does not mandate that an agency must have another public hearing if a rule is modified after the initial public hearing.

The Defendant points out that rulemaking is a statutory process and there is no statute that says an agency must conduct a public hearing if there is a change in the rule after a public hearing. However, case law also indicates there may be a point where "…the question of the need for an additional hearing might well arise where the rules as adopted bore little resemblance to the rules as proposed." *Brown County v. Department of Health &Social Services*, 103 Wis. 2d 37(1981), quoting *HM Distributors of Milwaukee v. Dept. of Agriculture*, 55 Wis. 2d 261(1972). Case law suggests that a new public hearing should be required where major changes are made in a proposed rule. To suggest otherwise would mean an agency or department has unlimited power to make changes and to even mislead the public with its stated intentions.

Wis.Stat. 227.19 (3)(b) says a report shall include, "A summary of public comments to the proposed rule and the agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at a public hearing." The Department did provide a report summarizing public comments and reasons for modification, (DOR Rule Record 681-694) in fact noting that there were many comments stating the benefits wetlands provide to agricultural lands. (p. 692).

The DOR then goes on to say that it no longer wishes to define ag use by program, but by ag use, with criteria that show sufficient nexus with ag production to justify defining it as ag use. (p. 693). The revised rule then sets criteria, not
based on present use, and not based on whether an easement presently
benefits ag production land, but whether the land may be returned to ag production in the future, or whether an agreement allows compatible uses like haying and grazing during the term of the agreement.

The Plaintiff notes in its Response Brief that because the revised rule effectively removed permanent easements from its scope, it would affect the state Department of Agriculture (DATCP) Soil and Water Resource Management (SWRM) easements. DATCP then inserted a blanket compatible use authorization in its easements to work around the problem. (Plaintiff's Response Brief at pages 2and 3, citing to P-App. 218-221, Second Woody Aff. P. 3), The DOR subsequently took the position that owners with compatible use authorization don't have to actually perform haying or grazing, simply having the authorization qualified the land for use-value assessment.

The DOR knew at the outset of this process that the WRE land was already in permanent easements that didn't allow compatible uses but that preserving wetlands benefitted agricultural production land. After stating an expressed intent to include this WRE land, it appears the final rule accomplishes the exact opposite with language apparently intended to exclude the WRE land and special work around rules the allow land under state programs to qualify. The final rule appears to bear little resemblance to the rule as proposed.

The draft of Tax 18.05(1) was changed in a significant way after the public hearing. The DOR may be able to justify the content and substance of the new rule, but it cannot justify violating the rulemaking process and eliminating public comment on a rule that was significantly changed from the proposed rule after a public hearing.

A new public hearing was required where the final rule bore little resemblance to the original rule and the DOR did not seek additional public comment. Another public hearing would be required in any event because of the significant changes which created a need for a new Statement of Scope.

Claim IX – The Defendant was Required to Prepare an Environmental Impact Statement for Rule 18.05

The Plaintiff contends that the DOR failed to comply with the Wisconsin Environmental Protection Act's requirement for the preparation of an environmental impact statement. Wis. Stat. §1.11(2)(c) requires that all state agencies prepare an environmental impact statement (EIS) for "every

recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment...." Wis. Stat. §1.11(2)(c). The Wisconsin Supreme Court ruled in *Wisconsin's Environmental Decade, Inc. v. PSC*, that "it will be obvious to [the] agency and [the] court alike on the basis of facts that no EIS need be prepared," *Wisconsin's Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 409, 424, 256 N.W.2d 149, and an agency is not obligated to make an explicit determination that an action will or will not require an EIS.

The Court of Appeals decided this same issue in an unpublished opinion involving a similar lawsuit brought against Tax 18.05 by a landowner in Dodge County, *Multerer v. Wisconsin Department of Revenue*, 2017 WI App 71. While an unpublished, nonbinding opinion, the court's analysis is helpful. Citing *Wisconsin's Environmental Decade*, the court reasoned that an agency is required to show justification for its negative-EIS decision only "where issues of arguably significant environmental import are raised", and allegations of environmental effect 'which are patently trivial or frivolous' are not sufficient to trigger judicial review. *Wisconsin's Environmental Decade, Inc.*, 79 Wis. 2d at 424. The Court of Appeals held that the circuit court in that case did not err in granting summary judgment on the issue, as the appellants do not provide any information on the amount of land that is potentially affected by Tax 18.05(1)(d), or any evidence other than speculation that lands will not be set aside for the purposes discussed. Without such facts, it would be impossible to say whether there is a genuine challenge, and that allegations of a significant environmental impact are not patently trivial or frivolous. *Multerer v. Wisconsin Department of Revenue*, 2017 WI App 71at ¶ 30.

The Plaintiff notes in its brief in response to the Defendant's motion that a five county study completed by the Wisconsin Wetlands Association, showed that wetlands were not uniformly assessed as agricultural land. In some counties less than 50% of the wetland was assessed agricultural, while in Manitowoc over 88% was. Some farmers apparently had been grazing wetlands to qualify for ag use, even though that is not allowed under the WRE rules. That certainly shows the need for more clarity and uniform application of the rules. But those facts do not show the potential environmental impact of a change.

How many acres are enrolled now? How many acres will be withdrawn? There is no evidence presented that landowners can and will remove land already enrolled the federal programs because of a change in the tax rule. Anticipating a reduction in new enrollments is only speculation. There are simply not facts supporting this claim and it fails for that reason.

Claim under Wis. Stat. 227.114

The Plaintiff also raised an argument under Wis. Stat. 227.114 Rule making; considerations for small businesses, in its brief in support of a motion for summary judgment. However, this claim was not pled in the Amended Complaint, nor does it appear to allow the court to grant the proposed relief, declaring the rule invalid.

Order

After reviewing the record and the briefs of the parties, the court finds that Tax 18.05 was promulgated without compliance with statutory rulemaking procedures. After the Department chose to make a significant change, it was required to prepare and obtain approval of a revised Statement of Scope and it did not. It was required to prepare a revised Economic Impact analysis and it did not. It should have held a second public hearing and it did not.

1. Pursuant to Wis.Stat. 227.40(4)(a), administrative rule Tax 18.05 (1)(d) is declared invalid because the Department of Revenue failed to follow proper rulemaking procedures.

2. The court will stay the order for 60 days to allow for a notice of appeal to be filed. If an appeal is filed, a motion may be filed to stay the order pending appeal.

3. Either party may file a motion to delay the effective date of the order if no appeal is filed.

4. No costs or attorney fees are awarded, each party shall pay their own costs and fees.

5. This court will provide notice to the Legislative Reference Bureau pursuant to Wis. Stat. 227. 40(6).

Dated this _____ day of June , 2018.

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Thomas J. Vale, Green County
Circuit Court Judge, Branch 2