

# Municipal Law Newsletter

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### ***Divided Court Agrees With Kenosha: Property Not Actually Used for Ag Purposes May Be Assessed as Residential***

A divided Court of Appeals ruled that Kenosha could assess undeveloped property as residential, when the owner was unable to show any actual agricultural use of the land. *State ex rel Nudo Holdings LLC v. Board of Review for Kenosha*, 2020 WI APP 78 (November 25, 2020), *petition for review filed*.

In Wisconsin, property is normally assessed at its fair market value, that is, what a willing buyer would pay for the property from a willing seller. However, the state has an exception for agricultural property. Ag property is assessed based on its value as used for agriculture, the so-called “use value.” Ag use value is advantageous to the owner, as it is usually much less than fair market value. The policy behind the ag use law is to help farmers afford to stay on their land.

This difference in assessment of property often leads to disputes, and Nudo Holdings LLC disputed the City of Kenosha assessor’s determination that its land should be assessed at fair market value as residential property. In upholding the Kenosha Assessor, and the affirmance of the Assessor by the Board of Review, the court noted (¶ 29):

...the agricultural classification does not attach merely because plants falling within the DOR definition of “agricultural use” happen to be growing on the property. See WIS. ADMIN. CODE § TAX 18.05(1). Agricultural *activity* is necessary. ... Properties should not qualify for agricultural classification through happenstance.

In this case, the property was undeveloped, had no sewer or water, was zoned Agricultural, had walnut trees and fir trees on it, and the owner had a permit to raise chickens. But, in contrast to those facts, the land was in a zone slated for future residential development in Kenosha’s Comprehensive Plan, the owner admitted he intended to develop it into residential lots, there was no sign that any harvesting of walnuts or fir trees ever occurred, and the owner did not actually raise chickens or any other livestock on the land.

Relying upon various directives in the Administrative Code and the Wisconsin Property Assessment Manual, the Court of Appeals essentially agreed with this

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## ***Governor's Climate Change Task Force Sees Prominent Role for Local Government***

The Governor's Task Force on Climate Change report released this past December (Report) outlines an array of policy recommendations to address the growing impact of climate change. The 32 member bipartisan task force was convened under the leadership of Lieutenant Governor Mandela Barnes in October 2019. The Report details policy options and implementation strategies in nine sectors, including energy, transportation and resiliency.

Among the more consequential recommendations in the 46 so-called "Tier 1" policy options described in the Report are: the goal of reducing net carbon levels to 100% below 2005 levels by 2050; creating an Office of Environmental Justice; analyzing how to implement a state-wide carbon pricing regime; expanding Focus on Energy funding; and creating a Wisconsin Economic Development Corporation Green Grant and Loan program.

The Report also identifies nine "Tier 2" policy options, such as modernizing utility rate design and allowing third party renewable financing, which were too controversial to achieve stakeholder consensus.

In addition to proposing policy recommendations, the Report outlines implementation strategies. These are primarily to be pursued via executive or agency action, the 2021-2023 State Budget and legislation. But the report also identifies numerous areas in which local governments can lead the way.

In the energy sector, for example, the Report supports low-cost debt financing of customer clean energy programs through the expansion of property assessed clean energy (PACE) financing programs, which are currently implemented through county ordinance. The Report also recommends that the state update commercial and residential building codes to promote and enhance energy efficiency measures, including EV charging station readiness. In contrast to current law, local governments, however, would be allowed to set stricter standards.

The Report also recommends an increase in funding to the Office of Energy Innovation, which is housed with the Public Service Commission of Wisconsin (PSCW), to assist local communities develop critical green energy infrastructure to improve resilience. This would include energy storage facilities and microgrids, which are

self-sufficient distributed energy systems that serve discrete local areas such as hospitals, business parks and college campuses.

According to the Report, "communities need support and incentives to invest in renewable energy projects so that they can be part of the state's green energy future." One area highlighted by the Report where local communities can play a lead role -- in partnership with their incumbent utilities -- is community solar.

Community solar projects provide greater access to green energy in local communities by removing ownership and geographic barriers. They generally require special utility tariffs in order to insulate non-participating customers from cross subsidies and reduce upfront buy-in costs for customers. One such tariff was recently approved by the PSCW for Superior Water, Light & Power. The tariff will enable the utility to develop a 470 kw solar garden in Superior, which will serve over 100 residential customers. Successful community solar tariffs have also been developed to support solar installations in Middleton, Eau Claire, La Crosse, River Falls and several other Wisconsin localities.

Notably, the Report cites Wis. Stat. sec. 196.192, which requires investor owned utilities to develop market based rates and other developmental tariffs, as being a tool to facilitate community solar project development.

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### **Divided Court Agrees With Kenosha**

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succinct description of the Kenosha Assessor: "I don't see any effort, any action, any plan in terms of agricultural. *This is a piece of land that has some things growing on it.*" (Emphasis added.)

The dissent argued that the majority put too much emphasis on the potential future use of the land and that ag zoning is retrospective. The dissent would have zoned the property as agricultural.

A petition for review has been filed with the Wisconsin Supreme Court.

*- Michael P. May*

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## ***Municipal Prosecution Cost Saving Tips***

Most municipalities struggle finding a balance between saving costs and diligently prosecuting municipal violations. The following tips may prove useful in accomplishing these objectives:

1) ***Relationship between judge and prosecutor.*** Many municipal judges have standard amendments to violations. It is important that the prosecutor be aware of and implement similar amendments. Knowing what the judge will likely approve as an amendment ensures a smoother and cost-efficient case resolution. For example, in the case of an underage drinking violation, a judge may routinely require an alcohol and drug assessment and a hold-open to earn a dismissal. While a defendant may plead not guilty, it is rarely the case when that defendant will not accept this offer when it is presented by the prosecutor. Being on the same page as the judge also ensures consistency in case resolutions, resulting in fewer citizen complaints.

2) ***Relationship between police chief and prosecutor.*** Similarly, the prosecutor should have a general sense of what amendments or strategies the lead law enforcement officer is comfortable with. Trust between the chief and prosecutor is critical to keeping costs down. The prosecutor should feel comfortable resolving most cases without input from the chief, but also recognize those situations when the chief's input is needed.

3) ***Use the clerk.*** Clerks are immensely knowledgeable about municipal procedures. The more the prosecutor can lean on the clerk to handle the day-to-day nuances of municipal prosecution, the more money the municipality will save in the long run. For example, the prosecutor can direct all questions regarding community service, license revocations and occupational licenses to the clerk who is far better equipped to deal with those issues.

4) ***Periodic police trainings.*** While police trainings by the prosecutor may cost more money up front, the benefits of such trainings can save money in the long-term. For example, one issue that officers frequently have trouble with during trials is testifying about the purpose of field sobriety tests and interpretation of the results. In the academy, they are taught how to demonstrate the test and what clues to look for. However, few officers are

well-versed in explaining what those clues mean regarding impairment. Some simple training on this can go a long way by ensuring better trial outcomes.

5) ***Consistency.*** As stated above, it is important that the prosecutor be consistent. For example, in OWI cases, I always tell the defendant that I am going to treat her the same whether or not she has an attorney. I make it clear that the municipality only amends to reckless driving in extraordinary circumstances and that my offer will remain the same whether she has an attorney or not. This puts defendants at ease and results in fewer cases going to trial.

6) ***Empathy.*** We live in a litigious society. When a prosecutor first meets with a defendant, her tone and method of communication can potentially control the direction of the case. Not listening to a defendant, being too tough or being a know-it-all will result in more cases going to trial. Many times, defendants dispute citations simply so they can tell their story to the prosecutor. If they do not feel that they are heard, they may be more inclined to take a case to trial.

- Kathryn A. Harrell

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### **Governor's Climate Change Task Force Sees Prominent Role for Local Government**

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The Report also suggests that local governments be enlisted "to help regulate" such projects. The Report, however, does not expound on these ideas further.

In the transportation sector, the Report recommends an increase in public transit system funding in the state budget and recommends that municipalities and regions be encouraged to effectively coordinate and fund local transportation systems. It also identifies vehicle electrification as a "key solution" for decarbonizing transportation and proposes a number of policies to promote EV infrastructure throughout the state.

It's unclear as yet how significant an impact the Report will have on the legislative front, or the Budget process. However, municipalities with energy or carbon reduction-related goals should be attuned to the potential development of opportunities in these areas.

An online version of the Report can be found at: <https://climatechange.wi.gov/Pages/Home.aspx>

- Richard Heinemann



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