

NOTICE OF REFERENDUM
City of Kenosha
November 6, 2018

NOTICE IS HEREBY GIVEN, that at an election to be held in the City of Kenosha, on November 6, 2018, the following resolution of the Common Council, will be submitted to a vote of the people:

RESOLUTION NO. 76-18

SPONSOR: ALDERPERSON DANIEL PROZANSKI, JR.
CO-SPONSOR: ALDERPERSON ROCCO J. LAMACCHIA, SR.
ALDERPERSON HOLLY KANGAS
ALDERPERSON JAN MICHALSKI
ALDERPERSON DOMINIC RUFFALO
ALDERPERSON KEITH ROSENBERG
ALDERPERSON JACK ROSE
ALDERPERSON CURT WILSON
ALDERPERSON ERIC HAUGAARD
ALDERPERSON DAVE PAFF
ALDERPERSON STEPHANIE L. KEMP

TO SUPPORT PLACING AN ADVISORY REFERENDUM QUESTION ON THE NOVEMBER 6, 2018, ELECTION BALLOT, TO DETERMINE IF THE WISCONSIN LEGISLATURE SHOULD CONSIDER AND PASS LEGISLATION REQUIRING ALL BUSINESSES TO PAY THEIR FAIR SHARE OF PROPERTY TAXES BY CLOSING PERCEIVED LOOPHOLES IN THE ASSESSMENT PROCESS

WHEREAS, Wisconsin governments – including all cities, villages, towns, counties, public school systems, and the vocational schools, and including the state government – are funded by property taxes, which are levied uniformly on all non-exempt property in the state; and

WHEREAS, homeowners already currently pay sixty-eight percent (68%) of the statewide property tax levy; and

WHEREAS, under current Wisconsin law, to assure uniformity and fairness, property is assessed by certified assessors who pursuant to law must use a three-step process in order to properly assess a property to determine its full value at its highest and best use, which steps include in order of priority:

- (1) basing the assessment on any recent arm's-length sale of the subject property;
- (2) if the subject property has not been recently sold, next considering sales of reasonably comparable properties;
- (3) if no such comparable sales are present, employing a "cost" or "income" assessment approach, considering all factors that have a bearing on the value of the property; and

WHEREAS, to avoid being properly taxed, several national-chain businesses are successfully arguing before courts either of two theories to lower property assessments, and hence the taxes associated with those assessments: the first is a “dark store” theory, whereby a thriving store is valued for property tax purposes using vacant and abandoned stores from different market segments as comparable properties (“Dark Store Theory”), and the second is the net-leased land argument accepted by the courts in the Wisconsin Supreme Court decision in Walgreen Co. v. City of Madison, reported at 2008 WI 80, ¶¶65, 311 Wis. 2d 158, 752 N.W.2d 687 (“Walgreen’s Decision”), whereby actual property value is not determined by actual arm’s-length leases, which leases are required to be purposely ignored; and

WHEREAS, lawsuits using either the Dark Store Theory or the Walgreen’s Decision are forcing local governments, such as the City of Kenosha, to lower the market value of thriving national chain stores, shifting the tax burden to local businesses, apartment owners and homeowners; and

WHEREAS, some national chain stores in Wisconsin, using the Dark Store Theory, have argued that the assessed value of their property, for property tax purposes, should be only half of its actual value on the open market; and

WHEREAS, proposed legislation such as 2017 Assembly Bill 386 and Senate Bill 292, which had been clarifications of the existing, long-standing statutory directives found in Wisconsin Statutes that when using the comparable sale method of valuation, assessors should consider as comparable only those sales within the same market segment exhibiting a similar highest and best use rather than similarly sized but vacant properties in abandoned locations, and which proposed legislation had been drafted, had been introduced, had been subjected to public hearings by the Wisconsin legislature, and had sufficient bipartisan support in both houses of the Wisconsin legislature to pass with wide margins in that a majority of the members of both the Wisconsin State Assembly and Wisconsin State Senate were co-sponsors of the proposed legislation, but which were not allowed to the legislative floor for vote; and

WHEREAS, without new legislation similar to 2017 Assembly Bill 386 and Senate Bill 292, residential assessments could go up 9.5 percent, which for the average home in the City of Kenosha valued at \$133,000, would result in an increase in property taxes that could be more than \$300 per year; and

WHEREAS, the Indiana state legislature has on two occasions in the last two years overwhelmingly passed legislation prohibiting assessors from valuing new big box stores the same as nearby abandoned stores from a different market segment; and

WHEREAS, the Michigan legislature overwhelmingly passed legislation similar the Indiana legislation referenced, in May of 2016; and

WHEREAS, the Walgreen’s Decision addressed the assessment of retail drug stores that rent retail space through net leases, by which the tenant is obligated to pay the real estate taxes, and by which the tenant pays a premium to the landlord for either an investment by the landlord or as consideration for custom building the property; and

WHEREAS, in the Walgreen's Decision, the Wisconsin Supreme Court determined that the income approach was the best fit for valuation of commercial rental property, but that when applying the income approach, the assessor was required to use an arguable market rent, rather than use the actual contract rent; and,

WHEREAS, proposed legislation such as 2017 Assembly Bill 387 and 2017 Senate Bill 291 were introduced to reverse the Walgreen's Decision, and which proposed legislation had been drafted, had been introduced, had been subjected to public hearings by the Wisconsin legislature, and had sufficient bipartisan support in both houses of the Wisconsin legislature to pass with wide margins in that a majority of the members of both the Wisconsin State Assembly and Wisconsin State Senate were cosponsors of the proposed legislation, but which were not allowed to the legislative floor for vote; and

WHEREAS, the disproportionate burden of property taxes on homeowners will worsen unless state legislators take action to clarify language in the property tax law to prohibit misapplication of the law in a manner that allows some national chain stores use to gain substantial reductions in property taxes; and

WHEREAS, this issue appears to be one of great import and great controversy such that it is desirable for the state legislature to understand the wishes of the citizens of the City of Kenosha in a formal and unequivocal way.

NOW, THEREFORE, BE IT RESOLVED by the Common Council of the City of Kenosha, Wisconsin, that an Advisory Referendum be held coincident with the general election on November 6, 2018, asking the citizens of Kenosha to answer the following question:

"Should the state legislature protect residential property taxpayers by preventing commercial and manufacturing property owners from using tax loopholes that shift an ever-increasing tax burden to homeowners who already pay 68% of the statewide property tax levy by enacting legislation that: 1) prohibits using closed, vacant (dark) properties as comparable properties for determining the assessed value of open, occupied, and fully operational properties; and 2) overturns the 2008 Wisconsin Supreme Court decision in Walgreens v. City of Madison, which is being interpreted by the courts as requiring municipalities to assess many leased commercial properties at a substantial discount, often 50% below the actual sale prices of such properties?"

Adopted this 7th day of May, 2018

ATTEST:  City Clerk/Treasurer
DEBRA L. SALAS

APPROVED:  Mayor
JOHN M. ANTARAMIAN

Date: 05/09/18

Drafted By:
EDWARD R. ANTARAMIAN
City Attorney

The question will appear on the ballot as follows:

"Should the state legislature protect residential property taxpayers by preventing commercial and manufacturing property owners from using tax loopholes that shift an ever-increasing tax burden to homeowners who already pay 68% of the statewide property tax levy by enacting legislation that: 1) prohibits using closed, vacant (dark) properties as comparable properties for determining the assessed value of open, occupied, and fully operational properties; and 2) overturns the 2008 Wisconsin Supreme Court decision in *Walgreens v. City of Madison*, which is being interpreted by the courts as requiring municipalities to assess many leased commercial properties at a substantial discount, often 50% below the actual sale prices of such properties?"

EXPLANATION

Wisconsin governments – including all cities, villages, towns, counties, public and vocational school systems, and the state government – are funded by property taxes, which are levied uniformly on all non-exempt property in the state. Homeowners currently pay sixty-eight percent (68%) of the statewide property tax levy. Under current Wisconsin law, to assure uniformity and fairness, property is assessed by assessors certified by the State. Assessors are required by law to use a three-step process in order to properly assess a commercial property to determine its full value at its highest and best use. The steps include in order of priority:

- (1) basing the assessment on any recent arm's-length sale of the subject property;
- (2) if the subject property has not been recently sold, next considering sales of reasonably comparable properties;
- (3) if no such comparable sales are present, employing a "cost" or "income" assessment approach, considering all factors that have a bearing on the value of the property.

To avoid being taxed based on the values determined by the state-certified assessors, several national chain businesses are successfully arguing before courts either of two theories to lower property assessments, and hence the taxes associated with those assessments: the "dark store" theory, and the leased fee argument. Under the "dark store" theory, a thriving store is valued for property tax purposes using vacant and abandoned stores from different market segments and even different communities and states, as comparable properties. The second argument used is the leased fee argument accepted by the courts from the Wisconsin Supreme Court decision in *Walgreen Co. v. City of Madison*, reported at 2008 WI 80, ¶65, 311 Wis. 2d 158, 752 N.W.2d 687 (sometimes called the "Walgreen's Decision"). Rather than use the actual arm's-length leases between the parties to determine the landlord's income from the lease, the landlord is allowed to argue lower rents that some other tenant might theoretically pay.

These two arguments have been categorized by some as tax loopholes since they effectively decrease what commercial and manufacturing property owners pay in property taxes, thereby shifting the additional tax burden to homeowners to make up the difference to pay for government services.

Legislation was proposed to address the Dark Store Theory in 2017 Assembly Bill 386 and Senate Bill 292. The proposed legislation re-established long-standing statutory directives that assessors should consider as comparable sales only those sales within the same market segment exhibiting a similar highest and best use rather than similarly sized but vacant properties in abandoned locations. The proposed legislation had sufficient bipartisan support in both houses of the Wisconsin legislature to pass with wide margins as a majority of the members of both the Wisconsin State Assembly and Wisconsin State Senate were co-sponsors of the proposed legislation. The legislation was not allowed to the legislative floor for a vote.

Legislation was also proposed to reverse the Walgreen's Decision in 2017 Assembly Bill 387 and 2017 Senate Bill 291. The proposed legislation also had sufficient bipartisan support in both houses of the Wisconsin legislature to pass with wide margins as a majority of the members of both the Wisconsin State Assembly and Wisconsin State Senate were co-sponsors of the proposed legislation. The legislation was not allowed to the legislative floor for a vote.

The effect of a “yes” vote will advise the City of Kenosha Common Council to recommend to the state legislature that the state legislature pass legislation: (1) prohibiting commercial and manufacturing property owners from using closed, vacant (dark) properties as comparable properties for determining the assessed value of open, occupied, and fully operational properties, and (2) when considering a lease in employing an “income” assessment approach, that the actual contract rent be used.

The effect of a “no” vote will advise the City of Kenosha Common Council not to make any recommendation on the subjects to the state legislature.

Done in the City of Kenosha on September 28, 2018.

Debra L. Salas
City Clerk

Published: November 5, 2018