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Developing Public Land for Private Sale Serves Public Purpose

A local government may develop publicly-owned land into a privately-owned subdivision without violating the public purpose doctrine. The Wisconsin Supreme Court so held in *Town of Beloit v. County of Rock*, 2003 WI 8, decided March 4, 2003.

The case stems from the Town of Beloit's decision to subdivide and develop a "greenfield" parcel it owned on the Rock River north of the City of Beloit. The Town intended to sell the platted lots as homesites to private buyers in order to create the Heron Bay Subdivision. The Town claimed it did not need the land for governmental purposes and that it could not find a private developer to develop it. Some City officials doubted that the 20 acre waterfront parcel had no attraction to private developers and speculated that the real issue was that the Town could not find a private developer who could be trusted not to annex the land to the City.

In any event, the Town invested in surveying and engineering and plans for extension of utility services to the site.

The Town was not able, however, to reach agreement with the County over subdivision review standards. Among other things, the County wanted a buffer strip to protect the Rock River and its shoreline. The Town resisted,

preferring to extend the private lots to the shoreline and subject them to restrictive covenants limiting shoreline development.

The Town sued to challenge the conditions of County plat approval. Citizens and a local environmental group intervened in support of the County conditions, and also questioned whether a Town can become a subdivider. The Circuit Court held that the Town government had no authority to act as a developer of lots for sale. The Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals' decision.

The Supreme Court began with an analysis of the public purpose doctrine. That doctrine is an implied constitutional mandate that public funds may be expended only for public purposes. In determining what constitutes a public purpose, courts have considered whether a project is one of "public necessity, convenience or welfare," and whether it would be difficult for private individuals to provide the benefit for themselves. *Id.* at ¶ 29. The Court also observed that municipalities are generally given wide discretion to determine whether a particular project serves the "public necessity, convenience or welfare." *Id.* at ¶ 30.

The intervenors argued that "the development of a residential

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for-profit river-front subdivision” fails this public purpose test. The Court disagreed. It found that, in developing the Heron Bay Subdivision, the Town had acted for the purposes of job creation, expanding the local tax base, promoting orderly growth, and environmental conservation. The Court also noted that several proposals by private parties to develop the site had never been implemented, either because the parties’ plans fell through, or, in some cases, because the Town deemed the proposals inadequate. Accordingly, the Court concluded that it would be difficult for private parties to achieve the combination of goals the Town enunciated. Thus, the two parts of the public purpose test were satisfied.

The Court then took up an argument that the Intervenor had raised. The Intervenor asserted that a ruling in favor of the Town would undermine protections afforded to private property owners in takings cases. This argument was based on the fact that the eminent domain provisions of the Fifth Amendment allow the government to take private property only where (1) a public use has been determined, and (2) just compensation has been paid. Thus, the Intervenor argued that a broad reading of “public purpose” in *Town of Beloit* would give local governments free reign to condemn private property for purposes of creating jobs and increasing the tax base. [For a discussion of recent cases concerning the legality of municipal condemnation of property for transfer to other private owners, see *Municipal Law Newsletter*, Vol. 7, Issue 5, May 2002, p. 4.]

The Court observed that *Town of Beloit* did not involve the taking of private property. Rather, the land that is intended to become the Heron Bay Subdivision is and has been publicly owned. Nevertheless, the Court went on to consider whether the phrase “public purpose” in the public purpose doctrine means the same thing as “public use” in takings jurisprudence. It cited several cases from other jurisdictions that suggest the phrases are not equivalent. However, it declined to decide the issue “because this is not in fact a takings case.” *Id.* at ¶ 44.

In dissent, Chief Justice Abrahamson, joined by Justice Bradley, blasted this discussion of the takings clause as “pure, adulterated dicta.” *Id.* at ¶ 74. It is part of what the dissent sees as a trend on the Supreme Court to “reach out and decide issues that are neither squarely presented nor adequately briefed and argued by the parties.” *Id.* at ¶ 72. There is conflicting case law as to whether comments made in an opinion that are not addressed to the question before the court are binding in subsequent cases. Thus, the dissent sees the majority’s discussion of the taking clause as not just gratuitous opining, but rather as a back-door attempt to tie the hands of future courts.

— Dick Lehmann & Matt Weber

FCC Revamps Its ILEC Network Unbundling Rules

In a split decision, the Federal Communications Commission (“FCC”) voted last month to modify its rules regarding the obligations of incumbent local exchange carriers (“ILECs”), such as Verizon, BellSouth, SBC and Qwest, to make elements of their networks available to competitors on an unbundled basis (known as “unbundled network elements” or “UNEs”).

While the detailed rules which should follow from the Commission’s decision have yet to be issued, the following issues are described in the FCC’s press release on the Commission’s decision:

Broadband Issues. To provide incentives for ILECs to invest in broadband network facilities, the Commission is providing “substantial unbundling relief” for loops using fiber facilities by ruling that ILECs need not provide fiber-to-the-home (“FTTH”) loops on an unbundled basis to competitors. ILECs have not invested heavily in FTTH loops, and, therefore, this ruling is not likely to have much of an impact on the broadband market.

Phase out of UNE-P. The commission finds that switching (a key unbundled network element platform or “UNE-P”) will no longer be available on an unbundled basis for large business customers served by high-capacity loops such as DS-1. Likewise, ILECs may no longer be required to make available to competitors on an unbundled basis that portion of a loop used to offer competitive DSL services. Over a three-year period the relatively low rates competitors pay for such access may be phased out. Whether or not the phase out will occur will be decided on a state-by-state basis by the local public service commission. The state commissions are to apply the FCC’s “impairment standard” (i.e., impairment of competition due to lack of access) to determine whether the unbundled access is to continue in the state. If a state commission determines that competition will not be impaired, then the three year phase-out period will apply.

Role of State Commissions. Under the new rules, the states will have a substantial

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Citizen Challengers to Negotiated Annexation Lack Standing

For the second time in the last year, the Wisconsin Court of Appeals has rejected a citizen challenge to the annexation of property to a city based on the challengers' failure to establish standing.

In *Kenosha 2020 v. Department of Administration*, Appeal No. 02-0651, decided January 29, 2003, the Town of Bristol and the City of Kenosha submitted a cooperative plan to the Department of Administration ("DOA") providing for the transfer of certain property to the City. DOA approved the plan and Gary Thompson and Kenosha 2020, LLC appealed. Thompson owned property in the area to be annexed and Kenosha 2020 is a public policy organization that had reviewed and commented on the cooperative plan.

Both the Town and the City filed a motion to dismiss the appeal. They argued that Thompson and Kenosha 2020 lacked standing because they were not "aggrieved" by DOA's decision. The trial court granted the motion and the Court of Appeals affirmed.

The Court of Appeals noted that a person is "aggrieved" within the meaning of § 227.52

and 227.53(1), if they have sustained, or are in immediate danger of sustaining, some direct injury due to the agency's decision. Thompson argued that he was aggrieved because annexation would subject his property to requirements under the City's ordinances that would not otherwise apply under the Town's ordinances. However, the court observed that Thompson had done little more than cite the ordinances that would apply to him, and had done nothing to show any injury from their application. Moreover, "Thompson has no right to be free of city ordinances or other ordinances regulating land development." *Id.* Accordingly, the court found that Thompson suffered no injury.

Thompson also argued that annexation would lead to development in the agricultural area of his property, and "almost inevitably" to conflicts with neighbors. However, the court found these allegations too vague to confer standing, absent some specification of what kinds of conflicts with neighbors he expected to ensure. Thus, the court concluded that Thompson lacked standing.

The court quickly rejected Kenosha 2020's claim of standing as well. It noted that Kenosha 2020 did not own any land in the Town, nor did it have any members who resided in the town. Nor were there any allegations the Kenosha 2020 would suffer any injury from DOA's decision. Consequently, Kenosha 2020 was not an "aggrieved" party.

The court's ruling in *Kenosha 2020* is consistent with its ruling in June 2002 in *Village of Slinger v. City of Hartford*, 2002 WI App. 187. In that case, the court rejected claims by property owners adjoining an annexed area that they had standing to challenge the annexation due to the harm to their property values and to their quality of life that they expected to suffer as a result of the development of the annexed area. The court observed that any harm they might suffer was not due to annexation per se, but rather to development of the annexed parcel. Because annexation did not cause them harm, they lacked standing to challenge it. [For a full discussion of *Village of Slinger*, see the *Municipal Law Newsletter*, Vol. 7, No. 8, August 2002, p. 4.]

Taken together, *Kenosha 2020* and *Village of Slinger* substantially remove negotiated annexations from citizen challenge. Certainly, anyone aggrieved by an annexation decision may challenge it, but it appears few have suffered the requisite harm in order to support a claim.

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role in applying the FCC's impairment standard according to specific guidelines directed at specific network elements. Under the standard, a competitor may lease UNEs when its ability to compete would be "impaired" if the UNE were not available. This ruling is seen as a major victory for competitors who sell lines of service based on UNE-P (i.e., the competitor obtains all relevant network elements, including the loop, local switching, and inter-switch transport). If the FCC had not left the decision up to the states and had made a presumptive finding of no impairment, selling such services by competitions would not be a viable business.

In addition, the FCC reaffirmed its position that "dark fiber" should be an available UNE. The Commission also initiated a rulemaking to consider whether the Commission should modify its "pick-and-choose" rule that allows requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements.

— Anita T. Gallucci

— Dick Lehmann & Matt Weber

Wisconsin's "New Property" Approach to Substantive Due Process Limits Judicial Review

In *Hearst-Argyle Stations, Inc. v. Board of Zoning Appeals*, Appeal No. 02-0596, decided February 4, 2003, the Wisconsin Court of Appeals reviewed a decision by the City of Milwaukee Board of Zoning Appeals ("BOZA") to deny a special use exception permit to Hearst-Argyle Stations ("Hearst"). Hearst had sought to extend an existing transmission tower by 115 feet to accommodate a digital television antenna. The court reviewed BOZA's decision under the deferential standards applicable to certiorari actions. That is, it considered whether any reasonable view of the evidence would sustain BOZA's decision. The Court affirmed.

Several recent cases from other jurisdictions remind us that BOZA's decision in *Hearst-Argyle Stations, Inc.* might have been subject to a substantive due process challenge but for two important aspects of Wisconsin land use law: Wisconsin courts take a "new property" approach to substantive due process claims, and the decision to issue a conditional use permit in Wisconsin is discretionary.

The Due Process Clauses of the United States and Wisconsin Constitutions protect both procedural and substantive due process rights. The right to procedural due process is the right to a decision-making process that is fair and proper. The right to substantive due process is the right to a decision that is not arbitrary. Thus, substantive due process claims require courts to review the merits of the decision itself.

As Daniel Mandelker explains in *Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 Wash. Univ. J. of Law & Policy 61 (2000), whether a court will review the merits of a decision to deny a land use permit depends

in part on whether the court takes a "new property" or "old property" approach to substantive due process claims. In the "new property" approach, courts hold that a landowner cannot challenge the denial of a permit on substantive due process grounds unless the landowner had an entitlement to the approval. Mandelker deems the entitlement to a permit a "new

property" interest because it is a creation of the modern regulatory state. "Old property," by contrast, is the property interest in the ownership of land, which has long been recognized.

If ownership in land were sufficient to support a substantive due process claim, then courts would frequently review the merits of land use decisions. Indeed, a minority of courts take this "old property" approach. For example, the United States Court of Appeals for the Third Circuit recognizes that "ownership is a property interest worthy of substantive due process protection." Until recently, the Third Circuit would allow a

landowner to challenge even the discretionary denial of a land use permit where it was alleged "that the decision limiting the intended land use was arbitrarily or irrationally reached." *Id.* at 80, quoting *DeBlasio v. Zoning Board of Adjustment for the Township of West Omro*, 53 F.3d 592 (3d Cir. 1995).

Most courts, however, apply the "new property" approach. Accordingly, if the decision to issue a requested land use permit is discretionary, a substantive due process challenge will not be heard.

The "new property" approach necessarily focuses attention on the circumstances under which a land use permit must be issued, as illustrated by *George Washington University v. District of Columbia*, United States Court of Appeals for the District of Columbia, Appeal No. 02-7055, decided February

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4, 2003. In that case, George Washington University sought a special exception permit in order to expand its facilities in a residential neighborhood. The District of Columbia denied the permit. The University appealed, claiming the District had violated the University's substantive due process rights.

To determine whether the University could raise such a challenge, the Court of Appeals considered the special exception criteria that the District applied. It observed that under the applicable ordinance, the District was required to issue a special exception permit if the proposed use was consistent with the local comprehensive plan and was not likely to become objectionable to users of neighboring property. Although these criteria require fairly subjective determinations, the Court of Appeals nevertheless found that the University had a "new property" right to a permit.

The determinative issue for the court was that "substantial limits" had been placed on the government's licensing discretion. Thus, if the special exception requirements were met, then the District was required to issue the permit. This framework was sufficient to give rise to a "new property" interest.

In Wisconsin, the decision to grant or deny a conditional use or special exception permit is generally deemed discretionary. Although a conditional use is deemed a permitted use when the standards prescribed in an ordinance are met, the Wisconsin Supreme Court has rejected the argument that a municipality must find a way to issue a permit by devising sufficient conditions. Rather, the applicant bears the burden of fashioning conditions that will satisfy the ordinance. See, e.g., *Kraemer & Sons v. Sauk County Adj. Bd.*, 183 Wis. 2d 1, 16-17, 515 N.W.2d 256 (1994). Thus, the court in *Hearst-Argyle Stations, Inc.* observed that the law places in the applicant's hands "the laboring oar to prove that it met the conditions for its proposed use under the ordinance." *Hearst* at ¶ 17.

Dicta in last year's *Sills v. Wakworth County Land Management Committee*, 2002 WI App. 111, 254 Wis. 2d 538, 648 N.W.2d 878, undermines this

view somewhat. In that case, neighbors opposed the establishment of a museum in their neighborhood in part because they believed such use of the property was not compatible with surrounding land uses. The court of appeals rejected the argument because compatibility was not one of the criteria the municipality was to consider in deciding whether to issue a conditional use permit for the museum under the applicable ordinance. The court then went on to note that "the neighbors' position is contrary to the fundamental tenet that inclusion of a conditional use in an ordinance is equivalent to a legislative finding

that the prescribed use is one that is in harmony with the other uses permitted in the district." *Id.* at ¶ 17.

Thus, contrary to *Kraemer*; the *Sills* court sees conditional uses as presumptively consistent with the neighborhood. This view could shift the burden of proof to municipalities to show that the imposition of conditions is necessary to protect the public welfare. In doing so, it could also lead courts to find that landowners are entitled to conditional use and special exception permits unless municipalities demonstrate otherwise.

Even if courts follow this path, however, the consequences for municipal decision-making may not be so dramatic. The Third Circuit Court of Appeals, which has long held that "old property" interests alone are sufficient to support a substantive due process claim, has recently moved to a more lenient standard of review for municipal actions. See *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 2003 U.S. App. LEXIS 515 (2003), decided January 14, 2003. Thus, rather than striking down governmental action if it evinced an "improper motive," the Third Circuit now holds that it will intervene in official action only if that action "shocks the conscience." Accordingly, the court seeks to limit the application of the substantive due process clause to "the most egregious official conduct." Wisconsin has similarly adopted the "shocks the conscience" test. See, e.g., *State v. Laxton*, 2002 WI 82, at ¶ 10, n. 8, 254 Wis.2d 185, 647 N.W.2d 784.

— Dick Lehmann & Matt Weber

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Effect of Outagamie County Decision Still Uncertain

Nearly two years after a sharply divided Wisconsin Supreme Court issued its decision concerning zoning variances in *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis.2d 613, 628 N.W.2d 376, the impact of the case is still uncertain. No appellate court decisions interpreting the ruling have been published. However, two unpublished decisions, including the recently issued *State v. Jackson County Board of Adjustment*, Appeal No. 02-1683 (December 5, 2002), offer insight into what may become a split among the courts of appeals as to the proper interpretation of Outagamie County.

A Brief Review of Outagamie County

The seven-member Supreme Court in *Outagamie County* split 3-2-2 over the status and meaning of *State v. Kenosha County Board of Adjustment*, 218 Wis.2d 396, 577 N.W.2d 813 (1998). All of the Justices acknowledged that *Kenosha County* eliminated the historic distinction between area and use variances. Inasmuch as Wis. Stat. § 59.694(7)(c) authorizes counties to grant variances only upon a showing that the regulations at issue impose an “unnecessary hardship,” the *Kenosha County* Court declared that a single standard applies to all variances. However, what that standard is remains unclear.

The lead opinion in *Outagamie County*, by Justices Sykes, Bablitch and Prosser, interprets *Kenosha County* as establishing a “no reasonable use of property” standard for the issuance of all variances. The practical effect of such a standard is to make variances nearly impossible to obtain. Consequently, the three Justices held that *Kenosha County* was wrongly decided and should be overruled.

They would interpret “unnecessary hardship” in the context of a use variance to mean that “no reasonable use of the property is feasible without a variance.” *Id.* at ¶ 68. By contrast, “unnecessary hardship” in the context of an area variance would mean that “strict compliance with an area restriction would unreasonably prevent the property owner from using the property for a permitted purpose or is otherwise unnecessarily burdensome.” *Id.* The Justices observed that “both standards are considered in light of the purpose of the zoning

restriction in question and with the goal of doing substantial justice as between the individual property owner and the community.” *Id.* at ¶ 69. Accordingly, the lead opinion would restore the use/area variance distinction. Applying this distinction, the Justices indicated that they would uphold the variance at issue in *Outagamie County*.

Justices Crooks and Wilcox concurred in the decision to uphold the variance, but found it unnecessary to overrule *Kenosha County*. Based on prior case law, they understood the “unnecessary hardship” standard to be somewhat amorphous, so that the hardship imposed by a zoning regulation could be considered “unnecessary” (or unreasonable) only upon consideration of the purpose underlying the regulation. *Id.* at ¶ 72. Thus, they did not read *Kenosha County* as requiring all variances to meet the “no reasonable use of property” standard. Rather, they limited *Kenosha County* to holding only that in light of the purposes of the shoreland regulations at issue in that case, a “no reasonable use of property” standard was appropriate. In other contexts, where a variance would have a minimal impact on the character of a neighborhood, a variance might be more easily granted. In this way, county boards of adjustment had some flexibility: “The boards can determine, by looking to the purpose underlying the ordinance at issue, what reasonably constitutes an unnecessary hardship.” *Id.* at ¶ 74.

In dissent, Chief Justice Abrahamson and Justice Bradley gave *Kenosha County* precisely the reading that the Justices who joined the lead opinion sought to overrule. That is, “to grant a variance, a County Board of Adjustment must conclude that the property owner has no reasonable use of the property.” *Id.* at ¶ 147. They also observed that, insofar as four of the seven Justices in *Outagamie County* refused to disturb the holding of *Kenosha County*, its elimination of a distinction between use and area variances remained in full force. *Id.*

Jackson County

The unpublished decision in *Jackson County*, *supra*, seems to indicate that the Court of Appeals for District IV, based in Madison, shares the dissent’s understanding of the impact of *Outagamie County*. At issue was a variance that the Jackson County Board of Adjustment granted a property owner to expand a residence within the County’s shoreline

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setback zone. The Board granted the variance based on its conclusion that the owner would otherwise be denied the “full beneficial and legal use of the property.” The State challenged the Board’s action on the ground that the Board had applied the wrong standard. It argued that the Board could only grant a variance where a property owner would have no reasonable use of the property without the variance. Although the trial court found for the Board, the Court of Appeals reversed.

The Court of Appeals observed that the more lenient standard that the Board applied derived from the area variance standard set forth in the lead opinion in *Outagamie County*. While the three Justices who joined the lead opinion intended their use and area variance standards to replace the standard announced in *Kenosha County*, “four justices in *Outagamie County*, a majority, declined to overrule *Kenosha County*.” *Id.* at ¶ 6. Consequently, the court concluded that “the test for unnecessary hardship set forth in *Kenosha County* remains the law in Wisconsin.” *Id.* The court stated the test as follows: “Such hardship exists in cases involving minimum setbacks from navigable waters only where a property owner demonstrates that without the variance the owner has no reasonable use of the property.” *Id.* at ¶ 5.

Molitor

The Court of Appeals for District III, based in Wausau, seems to have a different understanding of *Outagamie County*. Its views are found in a footnote to the unpublished *Molitor v. Rusk County Board*, Appeal No. 00-2554, which was decided August 21, 2001, just two months after *Outagamie County*. Footnote 5 states in full:

Members of our supreme court disagree on whether its recent decision in *State v. Outagamie County Board of Adj.*, 2001 WI 78, ___ Wis.2d ___, 628 N.W.2d 376, modified the standard in *Kenosha County*. Justices Sykes, Prosser, Crooks and Wilcox agreed that an owner must only show unnecessary hardship in light of the purpose of the applicable zoning regulations. Justices Sykes and Prosser perceived that *Kenosha County* should be overruled to arrive at this standard. Justices Crooks and Wilcox, however, viewed *Kenosha County* as already applying this

same “purpose” standard. See *Outagamie County*, 2001 WI 78 at ¶¶ 68, 69, 73, 81 and 83. It is unnecessary to resolve this conflict for the purpose of this decision.

Thus, the *Molitor* court sees a majority of the court in *Outagamie County* as rejecting a uniform “no reasonable use of property” standard for variances in favor of a more flexible standard in which the necessity or reasonableness of a hardship is judged in light of the purpose of the zoning regulations at issue. Although the court counts four Justices in that majority, it overlooks Justice Bablitch’s support of the lead opinion, which would raise the majority to five.

Analysis

Although *Jackson County* and *Molitor* hint at a split between the courts of appeals, neither is a clear statement of the courts’ positions. The *Jackson County* court shares the view of the dissenting Justices in *Outagamie County* that that case did not disturb the holding of *Kenosha County*. However, whereas the dissenting Justices read *Kenosha County* as mandating a “no reasonable use” standard for all variances that require a statutory showing of “unnecessary hardship,” the *Jackson County* court’s position on that point is not clear. It cites *Kenosha County* only for the proposition that a “no reasonable use” standard applies “in cases involving minimum setbacks from navigable waters.” Whether the court believes that same standard applies in all cases where “unnecessary hardship” must be shown remains to be seen.

The views of the *Molitor* court are similarly uncertain. While the *Molitor* court sees a majority of the Supreme Court in *Outagamie County* supporting a flexible “hardship in light of the purposes of the ordinance” standard, it also declines to apply that standard because doing so is unnecessary to the outcome of the case. Thus, we do not know how the court might rule in practice. The fact that three Justices feel that *Kenosha County* must be overruled to arrive at the *Molitor* standard, while two do not, may dissuade the court from ultimately adopting this approach.

Accordingly, we must await additional appellate decisions to determine the impact of *Outagamie County*.

— Matt Weber

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, (608) 257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Municipal Drinking Water Division.

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