

MUNICIPAL LAW NEWSLETTER

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Court Rejects Assessed Value of Section 515 Subsidized Housing Project

The Wisconsin Court of Appeals recently reversed a county court decision that had upheld a 2003 property tax assessment of a subsidized housing project. *Northland Whitehall Apartments Limited Partnership v. City of Whitehall Board of Review*, 2004 AP002941 (Feb. 23, 2006). The project was an apartment complex financed through the USDA Section 515 program for rural rental housing projects. The assessor had valued the project at \$590,300 relying on the comparable sales and cost valuation methods. Northland claimed the value was \$188,000 based on a written appraisal by a certified appraiser who used the income method.

Northland's appraiser had rejected the cost method and comparable sales method because of the age of the project, the lack of recent arm's length sales of comparable projects. Moreover, the income method was supported by the discussion of assessment of Section 515 projects in the Wisconsin Property Assessment Manual (WPAM). "The income approach is the most useful and often the only method for valuing subsidized housing because of the conditions of the [regulatory] agreement and the limited availability." WPAM p. 9-39 (12/04). The court noted that Northland's appraiser had provided testimony as to why the appraised value constituted a fair determination of the project's market value and why the assessor's valuation did not. In contrast, the assessor did not challenge the appraisal but merely rejected it because it produced a value that was inconsistent with the assessed value.

The court rejected the assessor's valuation based on the comparable sales method because there was no evidence that the sales relied upon by the assessor consisted of "recent arm's

length sales of reasonably comparable property." Wis. Stat. § 70.32(1); WPAM p. 9-39 (12/04). The assessor had relied upon data regarding rural subsidized housing projects that had been sold in Wisconsin during the 8-year period prior to the assessment. The court first determined that the assessor's valuation was flawed because several of the sales relied upon were not at arm's length, as they were not open market sales but rather sales to nonprofit organizations pursuant to federal subsidization program restrictions. Second, the court determined that there was no evidence that the other projects were "reasonably comparable" because the record only indicated the locations of the other projects and the number of units; there was no evidence as to whether the other projects were comparable in age, condition, use type of construction, number of stories, physical features and economic characteristics, as required under WPAM p. 7-18 (12/04). Third, there was no evidence as to whether the other projects were in high- or low-demand areas or had vacancy rates that were higher, lower or comparable to the Northland project's 30% vacancy rate. WPAM p. 7-9 (12/04). Finally, the assessor made no adjustments to the sales prices of the other projects in order to account for any differences among Northland's project and the others.

In this case, Northland overcame the assessed valuation's presumption of correctness under Wis. Stat. § 70.49(2). The court determined that the board of review could not reasonably uphold the assessed value based on the evidence before the board. Lacking the authority to independently determine the project's assessment, the court sent the case back to the board of review for further proceedings. — *William R. Peck*

Guidance Offered on Benefit Owed to Businesses Relocated Due to Condemnation

A recent, unpublished court of appeals decision offers some guidance to municipalities requiring the relocation of businesses for public projects through the use of eminent domain. *City of Milwaukee Post 2874 VFW v. Redevelopment Authority*, 2004 AP 3266 (Ct. App. February 14, 2006). The appeal addresses issues arising under the duty to “make available comparable replacement property.”

Post 2874 held a very favorable lease in a downtown Milwaukee hotel. It leased 5,250 out of a total of 113,000 square feet in the hotel. The lease term was 99 years. Post 2874 paid \$1 per year in rent and the landlord paid the real estate taxes, heat, air conditioning, and maintenance. In addition, the landlord agreed to redecorate every 7 years.

The Redevelopment Authority started condemnation proceedings in the late 1990s to acquire the entire hotel property. The process generated at least three separate pieces of litigation involving the VFW. The first addressed the just compensation to be paid for the property. The Authority offered \$440,000 for the entire property in January 2001. After an apportionment hearing, a court awarded \$300,000 to Post 2874 and the remaining \$140,000 to the landlord, giving consideration to the value of the leasehold interest. Post 2874 apparently filed an appeal of the value, arguing that its leasehold interest should be valued separately from the landlord's interest. The circuit court rejected this argument relying on the well-established “unit rule,” which provides that property taken by condemnation is valued as a whole, not as the sum of the individual interests. The court then assigned the case to the county condemnation commission.

The RDA instituted the second piece of litigation seeking a writ of assistance to gain possession of the property from Post 2874. The writ was granted in March 2002. Post 2874 appealed both the valuation ruling and the issuance of the writ. In an unpublished opinion, the court of appeals upheld the application of the unit rule to valuation. It did not address the issuance of the writ, because Post 2874 agreed the issue was moot after the building was razed.

After the building was razed, Post 2874 filed a claim for relocation benefits for \$902,500—the cost of constructing a new building and paying future taxes, maintenance, and utilities, minus the \$300,000 it had been awarded as just compensation. The Authority denied the claim and the Department of Commerce denied the Post's administrative appeal. The Post then commenced an action claiming that: (a) the Authority had failed to provide a comparable replacement property,” and (b) that the statutory limit of \$50,000 to owner-occupied business relocation benefit was unconstitutional. (It is unclear why the Post cited the owner-occupied limit, rather than the \$30,000 limit on tenant-occupied businesses.) The circuit court granted summary judgment for the Authority, holding that the comparable replacement property claim was barred by issue preclusion, because it had been decided in the writ proceeding, and that the statutory limit was constitutional. The Post's appeal from that

The court of appeals affirmed the circuit court on both grounds. “Making available” a comparable replacement

Court of Appeals Affirms County Board of Adjustment Substantial Evidence Standards

The Dunn County Board of Adjustment granted a special exception approval to convert a property with a current use of clay mine and contractor's storage yard to a landfill specializing in construction waste. Neighbors in the suburbanizing area sued. The circuit court ruled that the record did not contain substantial evidence that the landfill would not be “substantially adverse to property values in the neighborhood” or that the facility would provide “important service to the community.” These were among the applicable standards.

The court of appeals reversed, finding evidence in staff reports that the new use would be more attractive than the old use, and that the new use would last a shorter period of time. The court noted that the site is already developed, so no agricultural lands, forest lands or wetlands would be intruded upon.

The neighbors attacked the principal source of evidence, a staff report, saying that it simply stated conclusions and did not contain facts supporting those conclusions. The appeals court dismissed this criticism, stating that the judicial rules of evidence, rules that require conclusions to be based on foundational facts, do not apply to a zoning board. The court added that determinations as to credibility of witnesses and weight of evidence were issues for the Board and not the court.

The court then found that test of community benefit was met by the fact that no other landfill was available to deal with construction waste generated in the community.

The case is not recommended for publication.

— Richard A. Lehmann

property is a predicate to the issuance of a writ of assistance in condemnation cases. Therefore, Post 2874 could have raised that defense in the writ proceeding and, apparently, did not. It could also have argued the issue in the appeal from the writ proceeding, but did not. The lesson is that issues must be raised promptly and at the right juncture in condemnation proceedings. Condemnation procedures, set out in sections 32.05 and 32.06, unlike general court procedures, require issues of just compensation to be tried in separate proceedings from other issues. Failure to raise issues in appropriate proceedings constitutes a waiver of those issues.

The court of appeals also confirmed that the \$50,000 statutory cap on business replacement payments is constitutional. Post 2874 argued that the provision violated article 1, section 13 of the Wisconsin Constitution and relied on *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970). In *Luber*, the supreme court held that the owner of a theater was entitled to recover lost rent as part of just compensation when it was deprived of a theater license in advance of a formal taking of the property through eminent domain. However, in *Hasselblad v. City of Green Bay*, 145 Wis. 2d 439, 427 N.W.2d 140 (Ct. App. 1988), the court of appeals had already upheld the constitutionality of the statutory cap on relocation benefits and distinguished it from the rental losses at issue in *Luber*.

— Mark J. Steichen

Court of Appeals Enforces City Lead Abatement Order Against New Property Owner

The Court of Appeals recently upheld a circuit court decision which enforced an abatement order against a resident who purchased property contaminated with lead. *City of Oshkosh v. John Daggett* (Appeal No. 2005AP1664). After losing in circuit court, the defendant, John Daggett filed an appeal of the trial court ruling that concluded that he was in violation of Section 15-25 of the Oshkosh municipal code. The Court of Appeals rejected his argument, stating that the purpose of the ordinance is to reduce exposure to lead hazards, and that any subsequent owners should also be responsible for getting rid of the hazard, otherwise the purpose of the ordinance would be hindered.

In 2002, a child residing on Bowen Street in Oshkosh, Wisconsin was diagnosed with an elevated blood lead level. Following this diagnosis, Sandra Knutson, a city health inspector and certified lead risk assessor, inspected the property. Ms. Knutson discovered abounding lead hazards and issued an abatement order.

Two years later, John Daggett bought the house. The purchase offer included a lead disclosure. Upon learning that there was a new property owner, Ms. Knutson mailed Daggett a letter and enclosed the abatement order, a list of lead hazard reduction companies and a copy of the Oshkosh municipal ordinance regarding lead hazard reduction. The letter stated that Daggett had thirty days to submit a work plan to address the lead paint. Daggett failed to respond and Knutson issued him a citation, the case then went to trial.

During trial, Daggett testified that he had spent approximately \$20,000 to improve the property. He also acknowledged that he was aware that lead abatement is supposed to be done by a licensed specialist. The trial court concluded that Mr. Daggett violated Section 15-25 of the municipal code. Daggett appealed this decision.

In his appeal, Daggett stated that he did not receive the required notice of the lead hazard. However, during trial, Daggett never argued when the issue was raised that the offer to purchase the property included a lead disclosure. After reviewing the record, the Court of Appeals sided with the trial court and determined that Daggett was given proper notice of the lead danger before he was issued a citation.

Daggett also protested that the citation was issued to him, when it should have been issued to the prior owner of the property. But the Court of Appeals disagreed since if subsequent purchasers were not also subject to the abatement requirements, the Ordinance would not be able to achieve its purpose.

— Richard A. Heinemann

Court Rebuffs Efforts by the Attorney General to Characterize a Private Entity as Covered by the State Public Records Law

Normally this newsletter covers appellate decisions. However, a recent circuit county decision in Dodge County warrants mention because of the direct participation of the Attorney General and the implications for dozens of similar situations in local communities.

The case involves a private, non-profit corporation known as the Beaver Dam Area Development Corporation (“Corporation”). The Corporation’s Board consists of the Mayor and the Chair of the City’s Community Development Committee as voting, ex officio members and ten additional citizen members. The board is self-perpetuating, in that the board appoints people to the ten citizen seats. The Corporation is staffed by a director who is not a city employee and who has an office in private quarters, although it was officed in city facilities for the first seven years of its operations. The city funds approximately 84% of the expenses of the Corporation.

There is a “Cooperation Agreement” between the city and the Corporation. Per this Agreement and apparently in practice, the Corporation does not purport to be a branch of the city or to bind the city to any contracts or obligations.

The Wisconsin Attorney General sued the Corporation and its then board members in 2004, alleging that the Corporation was so closely intertwined with the City as to bring it under the Wisconsin Public Records law. In a decision dated January 30, 2006, Judge Richard O. Wright of Marquette County concluded that the Corporation is not a government, or a public authority or a quasi-government corporation as these terms are defined in section 19.82 of the Wisconsin Statutes.

The case stands in contrast to a decision of the Iowa Supreme Court holding that a corporate entity playing a fund raising and support role for Iowa State University was covered under the Iowa Public Records law, which has wording similar to the Wisconsin law. *Gannon v. Bd. of Regents*, 692 N.W.2d 31. That case, which has sent shock waves through the world of fund raising entities at major Universities was not cited in the Dodge County Circuit Court decision.

— Richard A. Lehmann

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