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County Stuck With Closed Landfill Taken By Tax Deed

The Wisconsin Supreme Court has declared that a county may not rescind its tax deed after discovering that a landfill located on the property was unprofitable and could expose the county to long-term liability. *Jackson County v. DNR, et al.*, 2006 WI 96 (July 11, 2006).

The decision obviously illustrates that counties must exercise caution in issuing and accepting tax deeds for property that may have no value and may carry with it significant liabilities, especially for environmental contamination. The decision leaves open the possibility that a county might be able to avoid ownership of an undesirable property where a county clerk has issued a tax deed, if the county acts promptly and declines to accept the deed. Counties could protect themselves by requiring an inspection of properties before tax deeds are issued or, perhaps, by adopting ordinances setting out a procedure for accepting or rejecting tax deeds after they are issued.

In *Jackson*, the landfill operator stopped paying real estate taxes in 1998. In 2000, the landfill reached its authorized capacity and began to close down. In June 2002, the county clerk issued a tax deed for the property, acting under the authority of a 1905 county board resolution granting continuing authority to issue tax deeds for delinquent taxes. The county

accepted the deed, recorded it and recorded clarifying affidavits. After learning that ownership of the landfill could lead to long-term liabilities for the county, the county board voted to rescind the tax deed in September and October 2003. The former landfill operator objected to the resolution, refused to accept a reconveyance, and continued to argue that the county owned the landfill and was responsible for maintenance costs and any future liability.

The county then brought an action seeking a declaration that its rescission was valid, or, in the alternative, that the county was not liable for the long-term maintenance because section 292.11(9)(e)1m.a. exempts it from such liability. The DNR was made a party because it regulates the closure and maintenance of landfills. The circuit court granted summary judgment for the DNR and landfill operator on the grounds that the county could not rescind its tax deed. The court of appeals certified that issue to the supreme court. The supreme

Court of Appeals Denies Tax Exemption for Leased Property

In a recent decision, the Wisconsin Court of Appeals ruled that a child care facility used by Milwaukee Regional Medical Center, Inc. ("MRMC") that was located on land owned by Milwaukee County and subject to a long-term lease was not exempt from property taxes.

Milwaukee Regional Medical Center, Inc. v. City of Wauwatosa, Appeal No. 2005AP1160 (June 20, 2006).

The appeal involved Wauwatosa's property tax assessment of MRMC's child care facility, including both the land and the building, for the years 2001-2003. The decision reversed a decision by the Milwaukee County circuit court, which found the property qualified for exemption from property taxes under Wis. Stat. § 70.11(2).

Section 70.11(2) generally exempts property owned by counties and other local governmental entities, including property leased by such local governmental entities, regardless of the lessee and the use of the leasehold income. Based on prior Wisconsin Supreme Court case law, ownership of leased property for property tax purposes is not determined solely by ownership of legal title. Such determination requires weighing the indicia of ownership of the parties based on the facts and circumstances. *City of Franklin, v. Crystal Ridge, Inc.* 180 Wis.2d 561 (1994) (Section 70.11(2) exemption upheld); *Mitchell Aero, Inc. v.*

Milwaukee, 42 Wis.2d 656 (1969) (Section 70.11(2) exemption denied); *Gebhardt v. City of West Allis*, 89 Wis.2d 103 (1979) (upheld Section 70.11(1) exemption for State-owned property).

By way of background, without reciting all of the relevant facts that were considered in the case, MRMC is a Section 501(c)(3) tax-exempt consortium of health care providers. In 1990, MRMC leased a 1.75 acre parcel of land located in Wauwatosa from Milwaukee County for a 50-year term. The purpose of the lease was to permit MRMC to construct a two-story child care facility on the land with a minimum construction cost of \$400,000. The lease provided for payment of annual rent of one dollar for 30 years. After the 30th year, the lease provided for annual rent based on 10% of the land's fair market value (disregarding the value of the improvements made by MRMC), unless the parties agreed otherwise. MRMC owned title to the

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County Stuck With Closed Landfill Taken By Tax Deed

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court affirmed the circuit decision by a 6-1 margin and remanded for further proceedings regarding the county's liability for the landfill.

The county relied on its home rule powers in section 59.03(1), Stats., to argue that it had the power to rescind the tax deed. The court rejected that argument, noting that counties' home rule powers are narrower than the broad grants of authority given to cities and villages. Being solely subunits of the state, counties are limited to the authority granted by the state. Accordingly, the exercise of their powers must complement rather than conflict with state law.

The rescission of tax deeds under these circumstances would conflict with state law in two ways. First, the legislature has spelled out in section

75.22, Stats., the grounds on which tax deeds may be undone and those grounds do not include the discovery that the property is undesirable. Second, a tax deed vests fee ownership of the land with the county. Wisconsin common law provides that a deed is not effective unless accepted by the grantee; one cannot force another to accept a conveyance. The county had demonstrated its acceptance of the deed by recording it and then recording clarifying affidavits.

Justice Abrahamson concurred with the result. She dissented, on grounds of judicial economy and speedy resolution, to the majority's decision to remand the remaining issues to the court of appeals, because the parties had briefed them. Justice Prosser dissented with the result and stated that he would have used the court's equitable powers to cancel the tax deed to "undo this scam." He also urged the legislature to take action to close what he described as a "blueprint . . . for future tax cheats."

—Mark J. Steichen

facility during the term of the lease and, at the end of the term, title to the facility would vest in Milwaukee County at the County's option.

In determining that the County was not the "owner" of the property on account of the ownership rights transferred to MRMC under the lease, the Court of Appeals gave great weight to the factors of current benefits and control over the property. Under the rule "derived" by the Court of Appeals from the *Crystal Ridge*, *Mitchell Aero*, and *Gebhardt* cases, a tax-exempt entity is treated as the beneficial owner of property if it: (1) receives "not-inconsequential benefits" from the property, and (2) has substantial control of the property in order to preserve or enhance such benefits.

The Court noted that the County did not receive any current financial benefit from the land and it lost the use of the potential income from the land during the first 30 years of the lease, which required only one dollar annual rent. The right to charge rent based on the land's fair market value during the last 20 years of the lease, and the right to obtain title to the facility upon expiration or termination of the lease were viewed by the Court as not providing the County with significant current benefits to establish ownership for the years at issue. In addition, the Court noted that the lease granted MRMC the right to mortgage the facility, which was a significant financial benefit. Moreover, the County lacked control over the day-to-day management of the child care facility under the lease. Instead, the County's control was limited to matters such as safety, health, and aesthetic requirements.

Since the issue of whether Section 70.11(2) applies is subject to a *de novo* standard of review, each appellate court that considers the question will independently balance the indicia of ownership in light of the facts and circumstances, without giving deference to decisions by a lower court. In this case, two of the three appellate court judges determined that the property was not exempt based on a finding that MRMC was the "owner" of the property, while the third appellate court judge and the circuit court judge reached the opposite conclusion. Similarly, in the *Crystal Ridge* case, the trial court and Wisconsin Supreme Court both upheld the exemption while the Court of Appeals determined that the property was not exempt. In light of the nature of the balancing test used for purposes of determining "ownership" and exemption, and given that each case will have unique facts and circumstances and different judges may take differing views of such facts and circumstances, courts may disagree about which facts are relevant or critical

and may reach different conclusions. If the amount in controversy is significant, a tenant facing such an assessment has an incentive to take its chances by challenging the assessment in litigation.

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This case illustrates the uncertainty of the property tax exemption under Section 70.11(2) as applied to leased property that is not subject to a conventional commercial lease with current rent at market rates. On its face, Section 70.11(2) seems clear enough: if property is owned by a local governmental entity, then it is exempt from property tax, even if the property is leased, regardless of the identity of the tenant or the use of the rental income. Based on current Wisconsin case law, however, legal title is not sufficient to establish "ownership" and the exemption may be denied if a governmental entity transfers too many indicia of ownership to the tenant. In addition, if the retention of current benefits and control is the primary focus in the analysis—as suggested by the Court of Appeals—the exemption can be denied if the governmental entity does not receive sufficient current benefits or gives up too much control over the property under a lease. There are no bright lines that distinguish when a governmental entity has transferred too many indicia of ownership, retained sufficient current benefits, or given up too much control. The primary guidance is the facts and circumstances under lease transactions reviewed in prior cases such as *Crystal Ridge*, *Gebhardt* and *Mitchell Aero*. The uncertain legal standards for establishing "ownership" for purposes of Section 70.11(2) thus create a challenge for a governmental entity that desires to lease property to a private party under an arrangement other than a conventional commercial lease. The uncertainty also provides an opportunity for local assessors who wish to take an aggressive position in assessing such property.

— William R. Peck

County Entitled To Interest On Deposit of Condemnation Award Pending Outcome of Litigation

The court of appeals has ruled that clerks of court are entitled to invest deposits of condemnation awards pending the outcome of litigation with the interest being paid into the county general fund. Judges may not order that the funds be invested in private accounts with the interest being awarded to the persons with interests in the condemned property.

HSBC Realty Credit Corp. v. City of Glendale, 2005 AP 1042 (7/5/06).

The decision involves the construction of and interplay between two statutes -- section 59.40(3), Stats., relating to the clerk's authority to invest moneys deposited with the clerk of courts, and section 32.05(7), Stats., relating to the deposit of condemnation awards with the clerk of courts. Since the decision depends on statutory construction, the legislature could change the result by amending the statutes.

Section 32.05, Stats., sets out one of two basic procedures for condemning property. The statute is generally applicable to condemnation for transportation, sewers, and water purposes. It is known as the "quick-take" condemnation statute, since it allows the condemnor to deposit an amount with the clerk of court equal to at least the amount of the jurisdictional offer. Once the payment is made, the condemnor obtains title to the property. The property owner may then challenge whether the award is less than the fair market value of the property. If multiple persons have interests in the condemned property and dispute the apportionment of the award among themselves, they may ask the court to apportion it. Once the disputes over the total value of the property and its apportionment are resolved, the money is distributed accordingly.

Section 59.40(3)(b), Stats., authorizes clerks of court to invest funds deposited with their office and requires that the income earned be paid into the county's general fund. Paragraph (3)(c) states that "a judge may direct that par. (b) does not apply to certain funds paid into the office," but the judge's authority extends only to cases pending before his or her court.

In *HSBC*, the Glendale Community Development Authority deposited approximately \$14.5 million into the Milwaukee County Clerk of Court's office as part of the redevelopment of the Bayshore Mall. The clerk deposited the sum in the county's general fund, which

earned 2% annually. Bayshore Town Center, LLC, one of the parties with an interest in the award moved the circuit court handling the condemnation proceeding to order the clerk to transfer the funds to a private money market fund with the interest being retained for the benefit of the persons with interests in the condemned property. The clerk intervened in the action to object. The circuit court granted the motion and ordered the transfer.

On appeal, Bayshore argued that the circuit court order was permissible under the court's equitable and inherent powers. The court of appeals rejected this argument. The exercise of a court's equitable power is only appropriate to remedy violations of legal rights, but the holders of interest in condemned property have no right to earn interest on an award deposited with the court. Moreover, a court's inherent powers are only those necessary to function properly, and ordering the transfer of funds in condemnation cases is not necessary to the court's functioning.

The court of appeals then addressed the argument that section 59.40(3)(c), Stats., gave the court express authority to order the transfer. The court found the language of that paragraph to be ambiguous and looked to the legislative history. It found that the provision had arisen out of concern over the scope of the clerk's authority to invest funds and allows a circuit court to veto the clerk's investment decisions, but not to order the transfer of funds. It found that nothing in section 32.05 gave property owners the right to receive interest on awards deposited with the court. In contrast, the alternate condemnation procedure in section 32.06, Stats., permits property owners to withdraw awards deposited with the court on condition that they post a bond for one-half the amount in case the award is found to exceed the value of the property and some part must be refunded.

— Mark J. Steichen

Conditional Use Permit For Wind Farm Upheld

The court of appeals upheld the issuance of a conditional use permit for a wind turbine “farm” in *Roberts v. Manitowoc County Board of Adjustment*. The decision is a straight-forward analysis of typical arguments raised in certiorari review of zoning decisions, but does provide interesting guidance on Wisconsin’s renewable energy law.

Roberts v. Manitowoc County Board of Adjustment, 2005 AP 2111 (July 5, 2006)
(recommended for publication).

Wisconsin adopted section 66.0401, Stats., to promote renewable energy sources, including wind power. The statute bars local governments from placing any restrictions on wind or solar power systems unless they satisfy at least one of three criteria:

- 1) the restriction serves to preserve or protect public health or safety,
- 2) it does not significantly increase the cost of the system or significantly decrease the system’s efficiency, or
- 3) it allows for an alternate system of comparable cost and efficiency.

Manitowoc County adopted a Wind Energy System Ordinance. The ordinance states that the county will grant a conditional use permit for a wind energy system if the requirements of the ordinance are met and the permit will not unreasonably interfere with orderly land use and development plans. Part of the ordinance governs set backs from property lines, residences, and businesses. However, that portion of the ordinance allows a “variance” if the adjacent parcel is part of the same wind farm system.

A corporation applied for a conditional use permit to build a 49-turbine wind system on multiple parcels. At the hearing, a number of local residents spoke against the proposal. The county planning commission staff report noted that the proposal met the minimum standards in the ordinance, but that some of the sites would need variances. All of the variances involved set backs from lot lines and

residences for parcels that were part of the whole system. One board member questioned whether the board had the authority to grant variances at that meeting since the notice of the meeting had not included the topic of variances. He also opined that the variances would have to be addressed on an individual parcel basis. The county zoning code administrator responded that the staff considered the term “variance” in the ordinance to be a part of the conditional use permit (CUP) process, and not the process envisioned by section 59.694(7), Stats. The board voted 2-1 to grant the CUP with variances.

Several individuals and “COWS,” the acronym for a group called Citizens Opposing Windturbine Systems, brought a certiorari action. They argued that the board proceeded on an incorrect legal theory by not applying the “unnecessary hardship” standard applicable to variances under section 59.694(7), Stats. Showing deference to the board’s interpretation of the ordinance, the court concluded that the use of the term “variance” was unfortunate, but did not have the technical meaning that the challengers sought to impose. The county ordinance and state law seek to encourage wind energy, not to restrict it. The ordinance expressly authorized the board to grant lesser setbacks under specific circumstances. Therefore, considered in context, the board’s interpretation was reasonable.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

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