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SPEAKERS FORUM

February 16, 2006
Property Taking Through Eminent Domain: What You Need to Know in Wisconsin
NBI, Madison, WI
Mark J. Steichen

Pigeon People Lose Appeal: 7th Circuit Upholds Chicago Bird Ban

A Chicago ordinance that prohibits the keeping of pigeons in residential areas recently survived a challenge by the Greater Chicago Combine and Center, Inc. (“GCCC”), whose members are homing-pigeon keepers and enthusiasts. The GCCC argued that the ban violated members’ substantive due process and equal protection rights. The Seventh Circuit disagreed. See *Greater Chicago Combine and Center, Inc. v. City of Chicago*, Appeal No. 05-1271, decided December 22, 2005.

The Chicago City Council passed the “Restrictions on Pigeons” ordinance in September 2003 in response to citizen complaints about feathers, droppings, odor and cooing generated by pigeons housed in coops in people’s homes, backyards and garages. The ordinance prohibited the keeping of pigeons in residential districts of the city, except for “educational, medical, scientific, and zoological purposes.”

Members of the GCCC interpreted the ordinance to allow them to continue to harbor homing pigeons. They claimed that they raised, trained and bred homing pigeons for educational purposes. Consequently, they asserted, they met one of the four exceptions to the ban.

The City Council responded by amending the ordinance to eliminate these exceptions. Instead, it excluded two zoos in the city from the terms of the ban. Otherwise, the

ban applied to all residential districts in the city.

Pigeon people apparently have a strong lobby. Within a month after the City Council adopted a complete ban, constituents in two of the city’s fifty wards persuaded their aldermen to introduce an amendment exempting those wards from the ban. The amendment passed. Thus, the amended ban prohibited the keeping of pigeons in all residential districts in the city, except in the city’s 32nd and 47th ward, and at the two zoos.

The GCCC filed suit. It claimed that the ban violated members’ substantive due process and equal protection rights. These claims turned in part on the fact that the ban did not apply equally across the city, so that people were treated differently depending on the ward in which they lived. GCCC’s complaint asserted that this classification was arbitrary and unreasonable, in violation of the Equal Protection Clause of the U.S. Constitution.

GCCC probably was right. However, the court never ruled on this issue as Chicago quickly amended the ordinance to eliminate the two ward exemption. The case, thus, was heard on the basis of a complete ban on keeping pigeons in all residential areas, with the two zoos continuing to be excluded.

GCCC nevertheless continued to challenge the ban. It claimed that the ban violated members’ substantive due

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process rights under the “substantial relationship” test. The Seventh Circuit did not explain just what GCCC meant by the “substantial relationship” test, as the court found that a different standard applied. Presumably, GCCC was arguing that the pigeon ordinance must be substantially related to protecting the public health, safety and welfare to survive review. GCCC largely based this test on Illinois law. However, the Seventh Circuit concluded that federal law dictates the standard of review in federal constitutional cases.

Thus, the Seventh Circuit applied “rational basis” review to GCCC’s substantive due process claim. This is a low level standard of review that is satisfied if the city offers “at least hypothetically rational justifications for banning pigeons in residential areas.” Chicago easily met this standard. The Court observed that “it is at least conceivable that the feathers, droppings, odor, and noise generated by kept pigeons in tight, urban lots would be an untenable nuisance to residential neighbors.” The Court also deemed “plausible” the City’s assertion that banning pigeons ameliorated “the public health risks posed by rodents and disease.” Based on these “conceivable” and “plausible” justifications for the ban, the court concluded that GCCC’s substantive due process rights were not violated.

GCCC’s equal protection claim met a similar fate. Because the ordinance did not involve an inherently suspect classification—such as race—the standard of judicial review is very low. “[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” With the two-ward exemption repealed, Chicago’s pigeon ordinance easily met this test.

GCCC argued that banning pigeons, but not other pets, made no sense. After all, dogs and other pet animals make noise, leave droppings, and engage in other conduct that can make them a nuisance to urban neighbors. Thus, the ban should apply to all such pets or none.

However, the Seventh Circuit disposed of this argument by noting that “a city’s decision to address a problem gradually is rational. . . . [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”

GCCC also asserted that it was irrational to impose a ban solely in residential, and not commercial, districts. However, the Seventh Circuit observed that Chicago could reasonably believe that “the need to protect the public against the nuisance and adverse health concerns generated by pigeons is attenuated in predominately commercial areas (even though some people may live in such areas) but warrants greater or immediate attention in residential areas where people predominately live.”

Continued next column

7th Circuit Upholds Local Ban on Fertilizers Containing Phosphorous

The Seventh Circuit Court of Appeals recently upheld ordinances adopted by the City of Madison and Dane County that ban the use and sale of fertilizers containing phosphorous. *Croplife Am., Inc. v. City of Madison*, 2005 U.S. App. LEXIS 28733 (7th Cir. Wis., Dec. 23, 2005).

Makers of “weed and feed” products, including Croplife America, Inc., challenged Madison and Dane County ordinances that banned such products using a herbicide and a fertilizer containing more than small amounts of phosphorous. The plaintiffs argued that the local ordinances were preempted by § 94.701(3)(a), Wis. Stats., which forbids a city or county to “prohibit the use of or otherwise regulate pesticides.” Stating that their products are pesticides, the plaintiffs argued that Madison and Dane County could not regulate their weed and feed products. In affirming a summary judgment determination by Judge Crabb, Judge Posner concluded that since a weed and feed product is both a pesticide and a fertilizer, the product can be regulated by both local and state governments.

Despite the plaintiffs’ complaint that in order to sell their products in Dane County, they would have to replace the phosphorous and reconstruct their weed and feed product, Judge Posner found that no evidence was presented to show that changing their product would be impossible or expensive. The Court agreed with Madison and Dane County that it makes practical sense to allow local regulation of phosphorus because the effects differ from county to county depending on the local environment. The Court further concluded that its interpretation of the Wisconsin statute at issue was “the natural interpretation” and had the “further virtue of closing a regulatory loophole.” The Madison and Dane County ban on the sale and use of fertilizers containing phosphorous thus may continue.

— Anita T. Gallucci

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Because GCCC could not show that it was “wholly impossible” to relate Chicago’s ordinance to legitimate governmental objectives, its equal protection claim necessarily failed.

While the decision in this case does not break new ground, it is conveniently timed. Many municipalities are considering, or have adopted, ordinances governing the keeping of birds, such a pigeons or chickens, within the municipality, as a pre-emptive strike against the much-discussed Asian bird flu. The Seventh Circuit’s decision in this case might help ward off challenges to such ordinances, saving municipalities the time and money of defending them.

— Matt Weber

Legislature Limits Municipal Power to Remove Nonconforming Signs and Billboards

The sign and billboard industries scored a victory in December last year at the considerable expense of local land use planning. The industries successfully lobbied for the passage of Assembly Bill 155 to eliminate municipalities' power to adopt "amortization ordinances." Governor Doyle signed the bill into law as 2005 Wisconsin Act 81 on December 21. It took effect January 6, 2006.

Amortization ordinances aim to balance landowners' interest in recouping their investment in structures and fixtures with municipalities' interest in securing ultimate compliance with changed zoning standards. To that end, such ordinances give landowners a lengthy period of time—typically 5 to 15 years—to remove structures and fixtures that no longer conform to zoning requirements. In Wisconsin, the authority to adopt such ordinances has never been clear. Nevertheless, many communities have adopted them, with positive results.

These ordinances apply to nonconforming structures and fixtures, but not to nonconforming uses or buildings. Under section 62.23(h), Wis. Stats. (and comparable statutes for county and village authority), a city zoning ordinance may not prohibit the continued lawful use of any building for any trade or industry for which the building or premises was used when the ordinance took effect. However, the right to continue such use is extinguished if the use is discontinued for a period of 12 months. This was arguably the extent of municipal power to limit such uses. Thus, even before the passage of Act 81, state law shielded nonconforming uses from amortization ordinances.

Similarly, section 62.23(h) and comparable county and village statutes limit lifetime repairs of nonconforming buildings to 50% of their assessed value. Again, this grant of authority arguably prevented municipalities from adopting amortization statutes to terminate the use of nonconforming buildings in a fixed number of years, even before the passage of Act 81.

"Structures" and "fixtures," however, are distinguishable from buildings. They are comparatively minor appurtenances—such as billboards—that are affixed to buildings or the land. Nothing in the law seemed to shield them from amortization, which is what opened the opportunity for municipalities to act. It is also what prompted the sign and billboard industries to lobby for Act 81.

Act 81 amends the relevant statutes to extend the prohibition on eliminating lawful uses of buildings to include the lawful uses of structures and fixtures. It also adds structures and uses to the "50% of assessed value" limitation.

Finally, it adds an express prohibition against amortization ordinances, which it defines as "an ordinance that allows the continuance of the lawful use of a nonconforming building, premises, structure, or fixture that may be lawfully used as described under par. (a), but only for a specified period of time, after which the lawful use of such building, premises, structure, or fixture must be discontinued without the payment of just compensation."

By eliminating municipalities' power to adopt amortization ordinances, the Legislature has significantly hampered their ability to improve the appearance and appeal of business districts and other important gateway corridors. Act 81 also significantly complicates the administration of zoning ordinances. Many communities have had difficulty tracking the assessed value of nonconforming buildings over time. This task is likely to be more difficult for "structures" and "fixtures," whose presence on property and whose assessed value may not always be noted on tax records.

— Matt Weber

Zoning Board Of Appeals Statute Amended To Eliminate 4 Vote Requirement

A little-noticed enactment of the 2005 Wisconsin State Legislature has removed the longstanding requirement that a city or village zoning board of appeals could grant a variance or an administrative appeal or any other request brought before the board only if 4 board members vote to grant the request.

Effective August 30, 2005, all board of appeals decisions are accomplished by majority vote, if enough members are in attendance to constitute a quorum.

This makes the vote requirement for city and village boards of appeals, and town boards of appeals where the town is conducting zoning under "village powers," consistent with the majority rule applicable to county boards of adjustment.

The 2005 amendment of the city and village statute is numbered 2005 Wisconsin Act 34.

— Richard A. Lehmann

Supreme Court Rejects Speculative Evidence of Value in Condemnation Case

In December, the Supreme Court upheld a court of appeals decision in *Pinczowski v. Milwaukee County*, 2005 WI 161, aff'g, 276 Wis. 2d 520, 687 N.W.2d 791. The case presents three issues related to valuation of property in condemnation cases: (a) whether a condemnor's negotiated purchase of property could be submitted as evidence of comparable sales, (b) whether an unconsummated offer to purchase the landowner's property could be offered as evidence of private interest in the sale, and (3) whether the condemnor's initial offer of a replacement housing payment was binding even after the government offered a much higher purchase price for the existing home later in the process.

The *Pinczowski* case deals with Milwaukee County's plans to expand General Mitchell International Airport. The planning started in 1987, with a master plan being adopted in 1992. By the mid-1990s, the county informed Hertz and another car rental firm that they would need to relocate their facilities. In July 1997, Hertz sent Pinczowski a non-binding letter of intent to purchase her property subject to various conditions, including environmental inspections and "all government approvals." The county bought two properties adjacent to Pinczowski's in 1997 and 1998. In 1999, the county initiated negotiations to buy Pinczowski's property, offering her \$93,027 and explaining that she was eligible for a statutory replacement housing payment of \$24,178 if she accepted the offer and purchased a house worth at least \$78,000. She rejected that offer and the county ultimately paid her an award of damages in the amount of \$350,000. The case went to trial and a jury placed the value of her property at \$300,000, which was reduced by \$15,000 for environmental concerns for a net value of \$285,000. Thereafter, the condemnor declined to pay her any replacement housing payment based on the difference between the final award and the undisputed comparable replacement housing value of \$78,000. Pinczowski appealed to the Department of Commerce, which affirmed the county's decision.

At trial, Pinczowski argued that she should be allowed to introduce evidence of the price the county paid for two adjacent parcels. In condemnation, the general rule is that purchases of property by the condemning authority are not admissible as evidence of comparable sales. The reason is that it is not a voluntary arms-length transaction. If the parties do not reach an agreement, the condemnor has the power to take the property and litigate the issue of

just compensation. Since one or both sides may fear the risks of litigation, a negotiated price often means one party has paid more or taken less than they would otherwise be willing to do. Fair market value, by definition, involves a willing buyer and a willing seller, neither being under compulsion to buy or sell. In addition, the general rule avoids extensive satellite litigation over just how voluntary a negotiated price was. Pinczowski took a narrow view of the timing issue and argued that the sales of the adjacent properties were voluntary because they took place before the county initiated formal condemnation proceedings. The Supreme Court agreed with both lower courts that this distinction was semantic and unconvincing, since the county board had already declared its intent to acquire the properties by eminent domain.

Pinczowski also tried to introduce the sales evidence through expert testimony. Rule of evidence 907.03 allows experts to base their opinions on evidence that may not otherwise be admissible in evidence if it is of a type usually relied upon by experts in the field. The court rejected this rather clever approach as well on grounds that sales made under the threat of condemnation are inherently unreliable as indicators of fair market value.

Next, Pinczowski argued that the letter of intent ought to be admissible as evidence that private parties were interested in acquiring her property for a particular use. By the time of the petition for review, she had dropped her argument that the letter should be admitted for purposes of the offer price. Evidence of demand influences the fair market value. However, the court found that the letter was so preliminary, so filled with contingencies and uncertainties, that it was speculative. It was also cumulative, since Pinczowski had presented other evidence and argument to the jury about demand for her property. Ultimately, the court affirmed the circuit court's discretionary decision to exclude the letter.

Finally, after some discussion of the proper standard of review, the court upheld the Commerce Department's decision denying Pinczowski's claim for a replacement housing payment. Pinczowski argued that the county should be held to its initial offer of the roughly \$24,000 payment. The purpose of the offer is to compensate displaced homeowners for the difference between the value of their property and the cost of purchasing comparable replacement

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Proper Tax Assessment Method for Billboards Certified to Supreme Court

The court of appeals has certified an issue that may be of interest to municipalities throughout the state. In *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2005 AP 508 (Dec. 14, 2005), the court asked the supreme court to determine whether, in the absence of “comparable sales” evidence, billboards should be assessed using the “income” approach or the “cost less depreciation” approach. Which method is used can have an appreciable difference in the assessed value of the signs.

The case arises out of Madison’s personal property tax assessment of signs owned by Adams Outdoor Advertising. In the 1980s, Madison began limiting the number of allowable billboards, which resulted in a loss of some of Adams’ sign sites. Adams brought an inverse condemnation action, in which its appraiser valued the signs at \$5 million using the “income” approach. Before this appraisal, Madison had valued the signs using the “cost less depreciation” method, which had resulted in assessments in the range of \$1.3–2 million for the years 1991-93. Subsequently, Madison adopted Adams’ appraiser’s method and the assessment for 1994 rose to \$3 million. Adams paid the 2002 and 2003 property taxes under protest. Hearings were conducted before Madison’s board of review, which affirmed the assessments. Adams

then appealed to the circuit court, which also affirmed the assessments. Many of the underlying facts were stipulated and the trial centered on a battle of appraisal experts.

Section 74.34, Stats., which governs personal property taxes, requires that personal property be assessed at its “real cash value.” Section 70.32(1), Stats., addressing real property, requires that property be assessed “at full value which could ordinarily be obtained therefor at private sale.” The court of appeals notes that there was general agreement that these standards mean the same thing and can be expressed as “fair market value.” There is a well-established hierarchy of valuation methods used to determine the value of property. First, the assessment must be based on a recent arm’s length sale of the subject property if there was one. If not, one looks to evidence of recent sales of comparable properties. If no such sales exist, the assessment may be based on a variety of other facts, including costs, depreciation and income. There are two separate, well-established valuation methods known as the “income” and the “cost less depreciation” methods, which can arrive at quite different values.

One of the key subissues in the case is whether to include the value of the billboard permit in the assessment. There is no controlling Wisconsin precedent on this issue. Madison argued, and the circuit agreed, that the value of a billboard is “inextricably intertwined” with the value of a permit, since a sign cannot be erected and displayed without a permit. On the other hand, Adams argued that the value of its leasehold interest must be valued as real property and that the permit is an “intangible” lacking “physical presence” for purposes of property tax assessment. Adams cited what the court of appeals characterized as “formidable authority” for its position, including three opinions from the Wisconsin Department of Revenue and testimony from the author of a chapter entitled “Condemnation of Billboard Interests,” in the well-respected treatise, *Nichols on Eminent Domain*. In addition, Adams contended that the cities of Madison and Sun Prairie are the only jurisdictions assessing its property using the income method.

Although the case arises out of District IV of the court of appeals, the case was transferred, presumably for caseload reasons, to District II, which issued the certification order. As of January 19, 2006, the supreme court has not decided whether to accept the certification.

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housing. The court noted that the county’s initial offer was conditioned on the value of her house being only \$93,000 and found that the statutes and administrative regulations contemplate the final payment being adjusted for final values determined for the condemned property and the replacement housing.

Aside from the issues directly raised by the petitioner, the case is a good example of the benefits to offering reasonable compensation even when an appraiser may assign a very low value to the condemned property. The case does not explain the reasons for the difference between the county’s initial offer of \$93,000 and the eventual award of \$350,000. It is likely that Pinczowski had alternate appraisals made that were persuasive to the county. If the county had not raised its offer substantially, it would have paid not only the \$285,000 price ultimately found by the jury, but also all of Pinczowski’s litigation expenses, including attorney’s and appraiser’s fees.

— Mark J. Steichen

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MUNICIPAL LAW NEWSLETTER

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