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Open Meetings and Public Records Laws Applied to an Economic Development Corporation

In *State of Wisconsin v. Beaver Dam Area Development Corp.*, 2008 WI 90, decided July 11, 2008, the Wisconsin Supreme Court decided that open meetings and public records laws may apply to private economic development corporations. The case involved the Beaver Dam Area Economic Development Corporation.

The City of Beaver Dam formerly ran an economic development program as a City function. In 1997, local citizens incorporated the Beaver Dam Area Development Corporation (BDADC). In 2004-2005, BDADC, acting as the City's agent, negotiated with Wal-Mart regarding a huge distribution center to be built in Beaver Dam. The Wal-Mart negotiations dealt in part with City services and financial incentives, and the final agreements for the deals ultimately had to be approved by the City.

The Wal-Mart project was controversial and as an adjunct to the controversy, the Wisconsin Attorney General filed a lawsuit against BDADC and its Board members, asserting that BDADC had not complied with the Wisconsin's open meetings and public records laws. The suit asserting that those laws applied to BDADC as a "quasi-governmental corporation." The circuit court rejected the Attorney General's complaint. The case was certified to the Wisconsin Supreme Court on appeal.

The Supreme Court held that the open meetings and public records laws did apply to BDADC. The Court began by noting that the open meetings law applies to meetings of a "governmental body," and the definition of such a body expressly includes "governmental corporations" and "quasi-governmental corporations." Wis. Stats. § 19.82(1). The Supreme Court did not classify the BDADC as a governmental corporation, but rather as a "quasi-governmental corporation." The term "quasi-governmental corporation" is not defined in the state statutes, but the Court examined a dictionary and various treatises and concluded that a "quasi-governmental corporation" is a private corporation that "resembles a governmental corporation in function, effect or status."

The Supreme Court decided that the proper way to determine whether a particular entity is a quasi-governmental corporation is to look at the totality of the circumstances, with the following indications of priority among the circumstances. The first and most important circumstance is whether all or most of the corporation's funding comes from the government. BDADC had only one source of income, that being payments from the City derived from the City room tax. The next circumstance connecting BDADC to

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the City was the fact that the assets of BDADC are to be turned over to the City upon the demise of the BDADC. The third circumstance is the fact that the economic development functions in Beaver Dam were formerly performed by the City. In fact, the City staff person who did that work was the CEO of the BDADC. Finally, the role BDADC played in the negotiations was similar to the role the City would have played had the BDADC not been in place. The close semblance between how the economic development function was previously performed by the City and how it is now performed via the BDADC fits the definition of a quasi-governmental corporation, being one that resembles a government with respect to the relevant functions being performed.

The Supreme Court also noted other connections between the City and the BDADC: the presence of two City officials as BDADC board members; the City right of access to the BDADC's financial records; and the fact that the BDADC uses the City's website as part of how it presents itself to the public.

Based upon the totality of all of these circumstances, the Wisconsin Supreme Court was convinced that the BDADC fit the definition of a quasi-governmental corporation, thus placing the BDADC under the open meetings law, and under the public records law. While the BDADC is covered by the open meetings and public records law, the Court noted that under certain circumstances these laws allow closed meetings and the withholding of certain confidential records. The Court suggested that because of these allowable exceptions, the decision should not undermine economic development programs and proceedings.

The Court summarized its decision as follows: "In sum, we determine that an entity is a quasi-governmental corporation within the meaning of (the Open Meetings and the Public Records laws) if, based on the totality of the circumstances, it resembles a governmental corporation in function, effect, or status. Such a determination requires a case-by-case analysis." The use of the word "entity" in the above quotation raises the question of whether an entity that was not organized as a corporation under state law — such as a limited liability company, partnership, or unincorporated association — could be defined as a "quasi-governmental corporation" if such entity resembled a governmental corporation in function, effect or status, based on the totality of the circumstances.

A 26-page dissenting opinion was filed by Justice Prosser and joined in by Justice Roggensack. Justice Ziegler

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Towns Shut Out from Challenging Unanimous Direct Annexations

In 2004, in a political compromise, the legislature enacted section 66.0217(11)(c), Stats., barring towns from suing to contest the validity of unanimous direct annexations. The scope and effect of the new provision was tested in cases resulting in unpublished decisions. See, e.g., *Ostrander, et al. v. Village of Genoa City*, 2006 AP 314 (reported in Boardman Municipal Newsletter, March 2007). A recent published decision appears to foreclose any way around the broad language of the prohibition. *Town of Merrimac v. Village of Merrimac*, 2007 AP 2491 (May 22, 2008)(recommended for publication).

In *Merrimac*, the town's complaint alleged that the annexed property was not contiguous to the village and was separated by at least twenty-four feet from the Village borders. In addition, the annexation ordinance failed to provide for payment to the town of the property tax set-off required by section 66.0217(14)(a).

In seeking to avoid the constraints of subsection (11)(c), the town raised several creative, albeit weak, arguments that had not been addressed and rejected in the *Ostrander* case. The town argued there is a distinction between void and voidable ordinances and that the phrase "contest the validity" does not apply to void ordinances, which have no validity. The court rejected this argument. The town also claimed that, in the absence of statutory certiorari, the town had the right to bring a common law certiorari action. The court found that this argument was not fully developed and, consequently, failed to address it in full. Nevertheless, it appears that the court would

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did not participate in the case. The dissent identified a number of arrangements between the City and the BDADC that showed BDADC had much more autonomy from the City than was recognized by the majority opinion. The dissent then listed the burdens that the open meetings and public records law requirements will place on private economic development corporations. The dissent opined that such "regulatory minefields" will complicate local economic development efforts. The dissent concludes with a sharp attack on the majority for not drawing clear lines, calling the "totality of the circumstances" standard adopted by the majority as requiring the public "to traverse dense fog. . . ."

— Richard A. Lehmann

Open Records Law Does Not Require Access to Municipality's Database

In *WIREData, Inc. v. Village of Sussex, et. al.*, 2007 WI 22, the court of appeals held that municipalities violated the open records law when they did not give an open records requester access to the municipalities' computer databases. On June 25, 2008, the Wisconsin Supreme Court rejected this conclusion in *WIREData, Inc. v. Village of Sussex, et. al.*, 2008 WI 69.

The case involved an open records request filed by WIREData which sought to market and sell real estate information on property assessments in Sussex, Thiensville and Port Washington. WIREData submitted an open records request to these communities requesting their property assessment records in electronic/digital format. Each of the communities had a contract assessor who used computer software to gather the information for the assessments. The communities forwarded the open records requests to their contract assessors who in turn dealt with WIREData regarding the request. Although the information was offered to WIREData in PDF format, WIREData was not satisfied with that format. It subsequently provided the assessors with instructions on how it wanted the information to be provided to it

electronically. The assessors contended that the cost of providing the information in this enhanced form required computer programming which WIREData would have to pay for. Ultimately after some related litigation, the municipalities provided WIREData with PDFs of the property assessment information. WIREData claimed that the municipalities' response violated the open records law because the information was not provided in the form requested.

The court of appeals agreed with WIREData. It concluded that the provision of PDFs was not sufficient under the open records law and that WIREData was entitled to have the opportunity to access the databases for examination and copying. The Wisconsin Supreme Court, however, rejected the court of appeals' conclusion on this point, and held that the municipalities' response was sufficient under the open records law. In reaching its conclusion, the Court noted concerns about allowing requesters such direct access to the electronic databases of an authority, and stated that "[w]e are satisfied that it is sufficient for the purposes of the open records law for an authority, as here, to provide *a copy* of the relevant data in an appropriate format." What is an appropriate format was not addressed as the Court noted (twice) that it was not deciding whether the provision of paper copies would have satisfied the request for electronic information here.

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reject this argument based on the plain language of the prohibition against challenges.

As in *Ostrander*, the town raised the argument that there would be no way to enforce substantive and procedural requirements for annexations if towns were prohibited from bringing suit under any circumstances. While it does not appear to have been at issue in the case, the town noted that section 66.0217(14)(b)1, Stats., prohibits the annexation of land where the annexing municipality and annexed land are in completely separate counties unless the town board adopts a resolution approving the annexation. If a town could not object to an annexation that proceeded in violation of this provision, it would cease to have the force of law. Just as in *Ostrander*, the court was not troubled with this prospect and held that the provision was not rendered meaningless, because it still applied to annexations other than unanimous direct annexations.

Finally, the court rejected the town's argument challenging the ordinance was necessary to ensure compliance with the statutory requirement that the village pay the town for lost property taxes for five years. Without specifying the precise nature of the action, the court noted that there are other means by which a town could compel payment of the property taxes.

— Mark J. Steichen

The Supreme Court also addressed a number of other open records issues. The Court concluded an independent contractor is not a proper recipient of an open records request and does not have the authority to officially deny an open records request. The municipality is responsible for responding to open records requests and it may not shift this responsibility or liability to an independent contractor.

The Court also indicated that municipalities are entitled to a reasonable amount of time to respond to complex open records requests. The Court noted that "what constitutes a reasonable time for a response by an authority 'depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.' Accordingly, whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request." Regarding costs charged for responding to open records requests, the Court indicated that an authority may charge the requester the costs necessary to recoup the authority's actual cost of responding to the request, including the costs of any necessary computer programming.

— Lawrie Kobza

Assessing Walgreens v. City of Madison

On July 8, 2008, the Wisconsin Supreme Court ruled that property tax assessments must be based on fair market value when the property is leased at a rate significantly higher than fair market value. *Walgreen Co. v. City of Madison*, 2008 WI 80, 2008 Wisc. LEXIS 331 (2008). The implication for local municipalities is less property tax revenue where a retail tenant pays more than fair market value. The implication for other tax payers is higher property taxes.

Walgreen Co. (or “Walgreens”) leases properties, rather than owning them. Developers find sites at prime locations in heavily trafficked areas, buy out existing businesses located at the desired sites, purchase the property, and build or develop it to Walgreens’ specifications. In exchange for these services, Walgreens pays rent to the developer at an above-market rate. The lease also requires Walgreens to pay all property taxes.

One way to appraise real estate for purposes of property taxes is to measure the rental income that the property generates. This is sometimes called the “income” approach. The two other generally accepted means of appraising real estate are the “cost” approach, which values the building based on what it would cost to build or rebuild it, and the “sales comparison” approach, which compares the property to similar properties that have recently been sold. The City of Madison assessed Walgreens’ properties on the “income” basis, using their actual lease rates. Walgreens argued that the use of above-market lease rates was unfair and resulted in an over-assessment of the real estate.

The Supreme Court agreed with Walgreens. The Court based its decision in part on case law precedent that proscribes assessing real property in excess of market value. *See Flood v. Bd. of Review*, 153 Wis. 2d 428, 431, 451 N.W.2d 422 (1990). Citing the national Appraisal Institute, the Court noted that its holding is consistent with the nationally recognized principle that a lease never increases the market value of real property rights to the fee simple estate. The Court’s decision was also based on the Wisconsin statutes

that require adherence to the Wisconsin Property Assessment Manual (“Manual”), which admonishes appraisers to estimate the market value of properties, and when using the income approach, to use the market rent, rather than the contract rent, of the property.

The lower courts identified a potential conflict in the language of Section 70.32 of the Wisconsin statutes, which requires that property be assessed “in the manner specified in the [Manual],” and also “on the full value that could be obtained at a private sale.” If the owner of the Walgreens sold the property, the contract rent—rather than the market rent—would dictate the price of the sale. However, the Manual called for the imposition of market rents. The lower courts resolved the conflict in favor of the contract rent. In doing so, the lower courts also relied on several case law precedents which held that where the contract value of the lease is less than market value, the appraiser is directed to use the lower contract value. Therefore, they reasoned, it is consistent to use the contract value when it is higher than the market value.

In responding to the rationale of the lower courts, the Court declined to extend the case precedents to situations in which contract rents are higher than market rents, relying instead on the holding in *Flood*, which clearly forbids assessments in excess of market value. As a matter of policy, the Court noted that the approach urged by the City might result in *property* assessments becoming *business value* assessments, with assessors improperly equating financial arrangements with property value.

This decision will make the job of the assessor somewhat more difficult. The contract rate, on its face, is readily ascertainable. Determining the market value rental rate will always be more complicated. Nevertheless, an increasing number of retail establishments are structuring their real estate transactions in this manner, so the issue is of paramount importance to municipal appraisers.

— John P. Starkweather

Supreme Court Holds Zoning District with No Permitted Uses Unconstitutional

In *Town of Rhine v. Bizzel*, 2008 WI 76, the Wisconsin Supreme Court found a zoning district with no permitted uses to be unconstitutional. The Town of Rhine in Sheboygan County, exercising “village powers,” adopted a zoning ordinance. One of the Districts, B-2 Commercial Manufacturing or Processing, listed no permitted uses, but instead listed six categories of uses that were potentially allowable as conditional uses. A private recreational club purchased 77 acres of land that were zoned B-2 and began use of the lands for riding all terrain vehicles (ATVs) and for hunting. The club applied for a conditional use permit for those uses and the application was denied. The town sued asking the court to order an end to the ATV riding. Instead, the circuit court held that the zoning district was unconstitutional because it allowed no permitted uses. The town appealed and the case was certified to the Wisconsin Supreme Court.

The Supreme Court characterized the constitutional challenge to the zoning district to be a substantive due process challenge -- the test being whether the zoning district is clearly arbitrary and unreasonable in that it has no substantial relation to the public health, safety, morals or general welfare. The Court noted that normally zoning districts have permitted uses, uses allowed as of right, while also having conditional uses, uses allowed by application of discretionary standards and criteria. The Court found no Wisconsin appellate court cases dealing with conditional use only districts.

After analysis, the Court concluded that the town had no reasons grounded in public health, safety or morals for the draconian terms of its B-2 District, and as such, the zoning district was unconstitutional. In reaching its conclusion, the Court examined the analogous case of *State ex rel. Nagawicka Island Corp. v. City of Delafield*, 117 Wis. 2d 23, 343 N.W. 2d 816 (Ct. App. 1983). In that case, the court invalidated a zoning district with a minimum lot size standard of 3 acres when

applied to an island that was 2 acres in size because the zoning district essentially left the island with no development possibilities. While *Nagawicka Island* was a takings case, the Court felt that the rationale in that case would also apply to a no permitted use district where there was no special reason for that type of district.

The Court also found a case from New York which upheld a no permitted use district as applied to lands within a floodplain, where the risks of development justified careful, individualized scrutiny of all development applications. The Court, however, found

no similar justification for such individualized scrutiny in the Town of Rhine situation. Finally, the Court also examined several zoning texts and articles, all of which cast doubt upon districts that have no permitted uses. The Court also noted that other districts in the town’s zoning code allowed permitted uses.

The town argued that other court cases characterize conditional uses as being uses allowed as a matter of right once the conditional use standards are shown to be satisfied. The Supreme Court, however, rejected the idea that conditional uses ever have an entitlement to approval. In addition, the Court looked at the town’s standards for granting of conditional uses and found that the standards in the town’s ordinance were too vague to convey a sense of certainty of approval to an applicant.

Chief Justice Abrahamson wrote a concurring opinion, agreeing that the Rhine zoning district was unconstitutional, but worrying that the main opinion left the impression that all districts with no permitted uses were unconstitutional. The Chief Justice emphasized her view that all zoning ordinances come into court with a presumption of constitutionality and legality and she does not want the Court to dissuade communities that can find valid reasons for highly restrictive districts from creating and applying such districts.

— Richard A. Lebmann

MUNICIPAL LAW NEWSLETTER

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