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Ability To Take Possession of Condemned Property Is Thrown Into Confusion and Potential Cost Rises Dramatically

On January 26, 2006, the Wisconsin Court of Appeals issued a decision in *City of Janesville v. CC Midwest, Inc.*, 2004 AP 267 that may dramatically increase costs of and/or delay municipal condemnation efforts. The decision directly contradicts a previously published decision of the court of appeals, which will make it difficult to determine what the law is in this area.

The case concerns a condemnor's ability to obtain possession of property after it has been condemned. Currently, section 32.05(8), Stats., imposes certain conditions and obligations on the condemnor before an occupant of the property can be ousted from possession. Subsection (c) requires that the condemnor "make available a comparable replacement property." In short, the term "comparable replacement property," as defined in the statutes and administrative code, means a property that is substantially equivalent in size, functionality, and location to the property being vacated and that is available on the market for lease or purchase. Understandably, there will be many occasions when there will be no existing business property available on the market that will be completely comparable to the business property that has been condemned.

Three years ago, the Court of Appeals addressed the extent of a condemnor's duties when no comparable replacement property exists. *Dotty Dumpling's Dowry v. Community Development Authority*,

2002 WI App 200, 257 Wis.2d 377, 651 N.W.2d 1. In *Dotty*, the business owner argued that it could not be required to vacate its restaurant property unless it was paid the \$1 million cost of remodeling another site to make it comparable to the existing site, in addition to the \$583,000 fair market value of the existing property. The court rejected this argument stating:

"¶21. We are satisfied that by identifying potential replacement properties, obtaining renovation cost estimates for a property in which Dotty expressed some interest, tendering the maximum business replacement payment, and offering to reimburse Dotty for its other statutorily authorized relocation expenses, the Authority "made available" to Dotty a comparable replacement property 'to the extent required by the relocation assistance law.' *Bassinger*, 163 Wis.2d at 1040."

The business replacement payment mentioned by the court has a statutory maximum of \$50,000 for owner-occupied businesses, and \$30,000 for tenant-occupied businesses. The court rejected the owner's argument as leading to an "absurd" result, since it would have effectively nullified the statutory caps on business relocation payments.

The *CC Midwest* case presented essentially the same factual situation. *CC Midwest, Inc.* operated a trucking facility on a roughly 10-acre site, which it leased. There was a building with 10 cross docks on each of two sides located

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directly across from one another for loading semi-trailers. CC Midwest would collect less than full truck load shipments from customers, combine them with other partial loads, and reload them into full truck loads for shipment, thereby achieving greater transportation efficiency. Janesville needed the site for a road realignment project. The condemnation process began in late 2001 when the DOT approved Janesville's relocation plan. The plan identified a number of other properties that could be modified to suit CC Midwest's needs. Not surprisingly, there were no existing properties available on the market that were identical to the existing facility. The city continued to identify additional potential relocation sites, but CC Midwest rejected every site out of hand when it did not duplicate the exact characteristics of its existing property. Janesville acquired title to the property on February 7, 2003. In October 2003, it brought an action for a writ of assistance to require CC Midwest to vacate the property. The circuit court granted the writ on the city's motion for summary judgment, because the city had met the requirements set out in *Dotty*.

CC Midwest appealed, raising the same arguments about the interpretation of section 32.05(8)(c), Stats., that had been rejected in *Dotty*. The court of appeals certified the case to the supreme court. When the supreme court declined, the court of appeals went ahead and essentially reversed *Dotty*. While paying lip service to the *Dotty* decision, the court in *CC Midwest* ignored the clear holding in *Dotty*. While the *Dotty* court had expressly rejected the argument that section 32.05(8)(c) should be read in isolation, the *CC Midwest* court did exactly that. The *CC Midwest* decision attempts to distinguish the *Dotty* case because the owner in *Dotty* argued that the condemnor must pay the cost of providing a comparable replacement property, while the *CC Midwest* court was merely holding that the condemnor could not obtain possession until it had done so. However, the *CC Midwest* court ignores the fact that the *Dotty* court expressly rejected the same argument—that the condemnor could not obtain possession of its property until it provided a comparable replacement property.

Until the conflict in the two decisions is resolved, the law in this area is unclear. The *Dotty* case and *City of Racine v. Bassinger*, 163 Wis. 1029, 473 N.W.2d 526 (Ct. App. 1991), expressly hold that section 32.05(8), Stats., creates no substantive rights and that it is limited to the relocation benefits granted in sections 32.19, et seq., Stats. The *Dotty* case squarely holds that a condemnor has complied with section 32.05(8)(c), Stats., when it has identified "potential" replacement properties, rendered assistance when asked in obtaining cost estimates for renovations, and tendered the maximum business relocation payment. The *CC Midwest* decision simply cannot be reconciled with this holding. A strong argument exists that, since the court of appeals does not have the authority to overrule its own decisions, the *Dotty* decision remains the binding precedent.

Janesville will be petitioning the supreme court for review of the *CC Midwest* decision. Janesville is represented by the Boardman law firm.

— Mark J. Steichen

County Powerless to Require Nonconforming Use to Obtain Conditional Use Permit

The Wisconsin County zoning statute recognizes that a land use that is lawfully established when a zoning ordinance takes effect may continue, even though it would be prohibited under the new ordinance. Such land uses are termed lawful nonconforming uses. Thus, while local ordinances can limit alterations, additions and repairs to 50% of the assessed value of the nonconforming use, they cannot prohibit its continuation outright.

What happens, however, if the zoning of the property is subsequently changed, so that the formerly prohibited use becomes a permitted conditional use within the zoning district? Can the County prohibit the continuation of the lawful nonconforming use unless the owner seeks and receives a conditional use permit? No, it cannot, according to the Wisconsin Court of Appeals in an unpublished decision in *The Kraemer Company, LLC v. Pierce County Board of Adjustment*, Appeal No. 2004 AP 3383, decided February 7, 2006.

A quarry use in Pierce County was established in 1957. In 1972, the County passed zoning and zoned the site into a district that did not allow mining. The site was recognized as having nonconforming status.

In 1998, the County rezoned the parcel into a district that allowed mining, but as a conditional use.

The County encouraged the owner to apply for a conditional use permit. The owner refused, choosing to rest on its nonconforming status. The dispute went to the County Board of Adjustment, the Circuit Court and then to the Court of Appeals.

The Appeals Court sided with the property owner, saying that the rights of owners of nonconforming properties are vested property rights that cannot be regulated by either state statutes or ordinances. The rights are so powerful that the regulating municipality cannot even require that a permit be obtained.

The County surmised that its conditional use process would have granted the permit, but would have attached some conditions. The court held that once a property achieves nonconforming status, it is exempt from conditions beyond those found in the state law (those involving expansion, modification, discontinuance or substantive change in the use.)

The court implied that if the county were to make the quarry a permitted use, it could not place conditions on the granting of that status.

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Appeal From Condemnation Award Not Thwarted By Technical Defects In Notice

Under section 32.05(9), Stats., property owners have two years to appeal the amount of compensation paid for property taken by eminent domain. A recent case tested just how technical the requirements are for filing such an appeal. *Community Development Authority of the City of Burlington v. Racine County*, 2005 AP 1370 (Ct. App. Feb. 1, 2006) (recommended for publication).

The CDA made a statutory “award of damages” and effectively acquired a parcel of property in Burlington on June 26, 2002. The property was owned by Bel-Mur Enterprises, Inc. and the award listed the Bank of Elmwood as having an interest in the property. On June 24, 2004, the Bank filed a notice of appeal with the Racine circuit court pursuant to section 32.05(9)(a) asking the court to assign the appeal to the Racine County Condemnation Commission. The notice listed Bel-Mur in the caption and stated in the body that Bel-Mur had an interest in the property. However, the notice contained a “mailing matrix” under the caption, which indicated that the notice was directed to the Racine County clerk of court, Racine County treasurer and the CDA, but it did not list Bel-Mur. The Bank filed an amended notice the next day naming two additional entities, but still did not list Bel-Mur in the mailing matrix. On June 25, 2004, the circuit court issued an order assigning the appeal to the condemnation commission. Sometime within 60 days after filing of the appeal notice, proof of service of the notice by certified mail (as allowed by statute) was filed with the court. The notice was served on Bel-Mur as well as the other entities listed.

The decision does not describe what happened during the year after the assignment order was issued. However, on June 10, 2005, the CDA filed a separate action with the Racine circuit court seeking a writ of prohibition to enjoin the condemnation commission from hearing the appeal. The CDA then moved for summary judgment arguing that: (a) the appeal notice was defective because it did not list Bel-Mur in the mailing matrix, and (b) the order assigning the appeal was invalid, because it was

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The rationale for the decision is not well stated. It may be in part because the state law fails to define what happens when a use becomes legally allowable after first not being either a permitted or a conditional use. Or it may be the court felt that a property owner who put up with the risks and disadvantages of owning a nonconforming use should at least not be put through the risks of a hearing and a vote to continue the use.

— Richard A. Lehmann

issued before proof of service of the appeal notice was filed with the court.

The circuit court in the writ proceeding and the court of appeals made short shrift of the defective notice argument. Section 32.05(9)(a) requires that the appeal notice contain the names of “all parties in interest” and that notice be given to all such parties. However, the CDA’s argument focused entirely on the mailing matrix and disregarded the listing of Bel-Mur both in the caption and the body of the notice, as well as the fact that Bel-Mur was served.

Next, both the circuit court and the court of appeals agreed that the initial assignment order was invalid, because it was issued before proof of service of the appeal notice was filed. The statute requires that the circuit court make the assignment “upon proof of the service.” The CDA argued that, as a result, the Bank had to refile the appeal—which would have time-barred unless the court found that the deadline had been tolled as a result of the initial filing. However, the courts rejected this argument as well, holding that the circuit court could issue a second assignment order, since proof of service had been filed in the interim.

Finally, the circuit court held that the proof of service had been filed timely, because section 801.02(1), stats., extends the time for filing the proof of service if the appeal notice is filed in a timely manner. This rule was established in *City of LaCrosse v. Shiftar Bros., Inc.*, 162 Wis. 2d 556, 469 N.W.2d 915 (Ct. App. 1991). The CDA did not expressly dispute that *Shiftar* governed the result, but argued that “[t]his legal conclusion should be reviewed.” The court of appeals interpreted that as an invitation to overrule *Shiftar*, but declined as it does not have the power to overrule its own decisions.

— Mark J. Steichen

Boardman Law Firm Welcomes New Municipal Special Services Paralegal

Sobha Ketterer has joined the Boardman Law Firm and will provide paralegal support for the firm’s Municipal Special Services practice group, replacing Joan Wentworth. Sobha earned a Post Baccalaureate Certificate in Paralegal Studies from Tulane University College and is also a graduate of the University of Wisconsin-Madison, where she majored in sociology.

Sobha has three years of paralegal experience. Please join us in welcoming Sobha Ketterer to the firm.

MUNICIPAL LAW NEWSLETTER

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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