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Court Limits Fishing Expeditions Into Allegations of Bias in Zoning Decisions

A recent case from the second district court of appeals - *Sills v. Walworth County Land Management Committee*, Appeal No. 01-0901 (Ct. App. April 3, 2002) (recommended for publication) - offers important guidance on three issues in zoning law. First, it holds that historic preservation may be considered as part of the general welfare in making zoning decisions. Second, it decides that the existence of private restrictive covenants cannot preclude the issuance of a conditional use permit. Third, it offers guidance on the circumstances under which discovery may be allowed and under which the record may be expanded in a certiorari action to flesh out claims of bias in local zoning proceedings.

Black Point estate is a historic, Queen Anne Style residence built on Lake Geneva in 1888. The estate houses a valuable collection of period furnishings and art and is listed on the National Register of Historic Places and the Wisconsin State Register. The current owner and great-grandson of the original owner entered into an agreement to allow the State of Wisconsin to acquire the property and Black Point Historic Preserve, Inc. ("Preserve") to operate it as a museum.

As part of the plan, the owner, the State and Preserve sought a conditional use permit. A group of neighbors opposed the application, in part, on

grounds that a restrictive covenant limited the use Black Point to "first class residence property." Following two days of hearings and with a recording consisting of almost 2,000 pages, the Walworth County Land Management Committee granted the permit. The neighbors then sought certiorari review. They contended that the committee erred as a matter of law in failing to consider the restrictive covenants and challenged the sufficiency of the evidence supporting the application. They also charged that the committee had engaged in *ex parte* communications and was not impartial. The circuit court upheld the decision and the neighbors appealed.

Expansion of Discovery to Show Bias

On appeal, the neighbors challenged the circuit court's refusal to permit a deposition of a lobbyist hired by the owner of Black Point regarding *ex parte* contacts he may have had with committee members. In support of their position, the neighbors submitted a promotional brochure from the lobbyist containing a rather mild quotation from the owner of Black Point praising the lobbyist's efforts at the state and local levels. The brochure made no express reference to *ex parte* contacts.

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The neighbors relied on *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) and *Thorp v. Town of Lebanon*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59, to argue that the record can be expanded in a certiorari action to prove bias. The court rejected the neighbors' overbroad interpretation of these cases, but agreed with the general proposition that the policy of promoting confidence in impartial tribunals may justify expansion of the record on certiorari where evidence outside the record demonstrates procedural unfairness. However, the court said that they must make a *prima facie* showing of wrongdoing. In this case, the brochure offered by the neighbors did not establish that there had been any *ex parte* contacts. Consequently, the court decided that the use of discovery to uncover evidence of bias would be a "fishing expedition" and was "precluded by the presumption of honesty and integrity that we accord to the Committee's decision." *Id.* at ¶ 43.

The court went on to note that, even if *ex parte* contacts had taken place, the neighbors had cited no legal authority for the proposition that such contacts would be illegal under the circumstances. "Given the localized and political nature of zoning decisions, and the status of Committee members as representatives of the community, it may be natural that such contacts occur. We hold that an allegation of *ex parte* contacts without more is not sufficient to show the impermissibly high risk of bias that concerned the court in *Marris*." *Id.* at ¶ 44. In *Marris*, the chairman of the local zoning board had made remarks during the proceedings indicating that he had prejudged the issue and that he was determined to vote against the applicant for reasons of personal animosity.

The court in *Sills* is stating that allegations of the mere existence of *ex parte* contacts alone, without a further showing that such contacts demonstrate bias by the zoning officials, will not justify discovery to investigate such allegations, let alone a request to supplement the record on certiorari. This ruling will have an important effect in keeping the burden of litigation over zoning issues to a minimum. Certiorari cases are usually straightforward. The record of the underlying proceeding is filed with the court and the case is decided on briefs, without the need for discovery. Boilerplate allegations of bias are commonplace in certiorari challenges to zoning decisions. Moreover, communications between local zoning officials and people who happen to have an interest in the

outcome of zoning decisions are inevitable. If discovery were allowed in all such cases, persons challenging zoning decisions could regularly require zoning officials to sit for depositions inquiring into all communications they have had outside the record and the bases for their decisions. Based on *Sills*, the use of discovery in certiorari proceedings remains the exception rather than the rule.

Sufficiency of Evidence Regarding Historic Preservation

With respect to the sufficiency of the evidence, the neighbors argued that the committee erred in considering the historic benefit of Black Point, because historic preservation was not expressly included as a purpose of the zoning ordinance. The court of appeals noted that the Walworth County ordinance included aesthetics and the general welfare of the county as goals of its regulation of zoning. The court found that the term "general welfare" is very broad and cited case law holding that there can be "no doubt" that municipalities may expend public funds on recreation, educating the public, and encouraging respect for our history. *Id.* (citing *State Historical Society v. Carroll*, 261 Wis. 6, 20, 51 N.W.2d 723 (1952)). The court also cited Wis. Stat. § 44.30 as establishing historic preservation as a public policy of the state.

Private Restrictive Covenants

Turning to an issue of broader interest to zoning authorities, the court addressed the neighbors' argument that the private restrictive covenant barred the committee from granting a conditional use permit. The neighbors argued that granting the permit for any use other than as "first class residence" would effectively repeal or abrogate the private covenant. They contended that this would contravene the express intent of the ordinance not to impair or interfere with existing easements, covenants, deed restrictions, and agreements. The committee concluded that it was not allowed as a matter of law to consider the private covenant as part of its review.

Noting that the impact of private covenants on the administration of county zoning ordinances was an issue of first impression in Wisconsin, the court looked to treatises and case law from outside the state. The court found support in these sources for the proposition that the operation of private covenants has no relevance to zoning administration. The court concluded that the ordinance confirmed that the granting of a conditional use permit would not affect the validity of the private covenant. Citing

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Court Upholds PSC CIAC Order

Rejecting a petition for judicial review filed on behalf of municipal water utilities and water associations, the Dane County Circuit Court has affirmed an April 2, 2001 order of Public Service Commission (PSC) that modifies the accounting treatment of Contributions in Aid of Construction ("CIAC").

CIAC is capital contributed directly by a customer to finance a utility project that would otherwise be financed by utility borrowing or retained earnings. The PSC's CIAC order was issued in order to address what the PSC perceived to be a problem in the current accounting system. The PSC's position is that current accounting treatment requires customers to pay for contributed plant twice—once when the customers make their initial contribution to plant, and again when depreciation expense for contributed plant is included in rate base.

Municipal water utilities have objected to the PSC's proposed accounting methodology because it eliminates CIAC-related depreciation cash flow from allowable revenues, meaning that municipal water utilities with significant CIAC balances will have less money to fund operations and maintenance costs, which in turn could impair a municipal utility's credit rating.

In its decision, the court first granted the water utilities' motion to supplement the record by including affidavits of various utility representatives who attended

an August 23, 2001 meeting with Commissioner Mettner, as well as a transcript of the January 6, 2001 Open Meeting at which the Commissioners discussed the accounting methodology which the Commission ultimately adopted. The court reasoned that inclusion of these documents better enabled it to gauge the reasonableness of the Commission's decision.

The court then determined that the PSC order was not arbitrary and capricious. The court stated that the Commission's adoption of a new accounting methodology was not equivalent to a request for a rate increase, and thus did not trigger application of the PSC rules prohibiting approval of rates that would impair a utility's credit.

The court also rejected the petitioners' argument that the rate increase in fact would impair utility credit. According to the court, the record indicated only the possibility of credit rating downgrades in connection with issuing bonds as a means of replacing lost revenues, but not in connection with raising rates, which is an alternative means of revenue replacement available to utilities. The court was also unsympathetic to the petitioners' argument that the PSC order will require municipal utilities to comply with two widely differing different sets of accounting standards.

The court concluded that the commission's decision was reasoned and that the loss of utility revenue had been considered as part of its deliberations. The PSC order, according to the court, must be viewed as the result of a "sifting and winnowing" process in which some interests had to be compromised in favor of others.

Whether the circuit court decision will be appealed has not yet been determined.

— Richard A. Heinemann

Court Limits Fishing Expeditions . . .

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Kramer v. Nelson, 189 Wis. 560, 208 N.W. 252 (1926), as analogous, the court noted that rezoning land had no effect on a existing restrictions. This result was also mandated by the U.S. and Wisconsin constitutions, which prohibit the impairment of contracts.

Because the granting of a conditional use permit could not impair the private covenant, the neighbors were free to pursue private remedies for any breach of the covenant. However, the court agreed with the committee that using the county's zoning authority to enforce the private covenant by denying a conditional use permit would constitute an impermissible delegation of police power to private entities. The court concluded that the committee could consider the existence of private covenants as part of its review, but that it had no obligation to do so and certainly no obligation to deny a permit on grounds of such a covenant.

— Mark J. Steichen

SPEAKER'S FORUM

May 9, 2002

**Understanding Municipal Telecommunications
Regulatory Issues**

Wisconsin Economic Development Assn. - Eau Claire, WI
Anita T. Gallucci

May 16, 2002

**Public Rights-of-Way: Authority,
Responsibility and Use**

Wisconsin State Bar Annual Convention - Madison, WI
Anita T. Gallucci

May 22-23, 2002

Eminent Domain

NBI - Milwaukee & Madison, WI
Richard A. Lehmann and Mark J. Steichen

June 12, 2002

Cable Television Franchise Renewals

2002 Municipal Attorneys Institute - Sturgeon Bay, WI
Anita T. Gallucci

Recent Court Decisions on the Legality of Municipal Condemnation of Property for Transfer to Other Private Owners

The question of the constitutional limits on condemning private property for transfer to subsequent private owners is again stirring in the courts.

The current spate of cases includes:

- ***Southwestern Illinois Development Authority (SWIDA) v. National City Environmental***, decided April 4, 2002 (viewable at <http://state.il.us/court/Opinions/Supreme Court/2002/April/Opinions/html/87809.htm>).

A divided Illinois Supreme Court struck down the condemnation by an economic development authority of non-blighted land to transfer to an adjoining NASCAR racetrack that needed more parking and did not want to spend money building structured parking on lands it already owned (having bought that land with part of the proceeds of an earlier \$22 million loan from the same economic development agency.) The majority on the Court saw no blight and found that the expansion of surface parking was not the only way parking could have been expanded. The majority decision goes on to note that the parking will be privately controlled. The only way the public can use it is to pay the racetrack. This also fails under the majority's view of the "public use" test.

The project was not part of a formal development or redevelopment project. The Development Authority apparently advertises that it will condemn lands needed for expansion for any business that pays a \$5,000 application fee and a percentage of the condemnation award.

Two dissenting justices argue that the majority opinion rolls back the advance of condemnation law over several decades and hamstring the powers with a right of public access test.

- ***Kelo v. City of New London, 2002 WL 500238 (Connecticut Superior Court)*** March 13, 2002.

The City of New London, an economically downtrodden community, created a development plan for a 90-acre brownfield area and allied with a state entity, the New London Development Corporation. Much of an established

neighborhood was slated for condemnation and clearance. Some of the condemnees connected with a Washington D.C. group called the Institute for Justice (*see* http://ij.org/media/private_property/connecticut/con_property/background.html), which conducted vigorous litigation, the result of which is contained in a 90-page trial court decision. (The court begins the narration of facts by saying, "The court will give a brief factual rendition of the events surrounding this litigation ... (I)t is necessarily incomplete, life, after all, is short, unlike this decision and the excellent briefs filed by the parties.")

The decision is an excellent "collector case" in that it describes the state of the law with respect to "public use" issues. The court ultimately decides that a portion of the condemned properties was not necessary to be purchased and the improvements removed in order for the redevelopment project to proceed. A major local employer was slated to take over much of property, and some of the discussion turns out how much control that company had over the public decisionmaking.

- ***Tal Technologies, Inc. v. City of Oklahoma City, certiorari petition denied by the United States Supreme Court on April 15, 2002.***

The City initiated a redevelopment plan to tear down existing improvements in substitute sports and entertainment-related uses and parking. One of the property owners in the target area was part of a group of investors who applied for the contract to carry out the redevelopment plan. When their bid was rejected, the property owner turned on the project and challenged the constitutionality of the condemnation. The property owner lost in the state courts and sought an appeal with the United States Supreme Court. The property owner brought the *New London* decision to the attention of the Court, to no avail, shortly before the court denied certiorari.

In addition to the cases noted here, there are several cases pending in different parts of the country involving condemnation of apparently good, nonblighted properties because a preferred business user wants the properties to build or expand their facilities and cannot reach agreement with the owners on acceptable terms for a private purchase. These will be reported as they are decided by the courts.

— Richard A. Lehmann

Wisconsin Court of Appeals "Signals Disfavor" and Asks the Supreme Court to Reverse a Prior Appeals Court Land Use Ruling

The Court of Appeals is not empowered to overrule its prior decisions, but it can tell the Supreme Court that it wants the prior decisions overruled and ask the Supreme Court to accept the case for review. The Court of Appeals has done so in an April 11, 2002 case: *Wood v. City of Madison* (Court of Appeals, District IV, Appeal No. 01-1206).

Approximately ten years ago, the City of Madison denied a land subdivision in its extraterritorial area because the intended use of the proposed lots was inconsistent with the City's master plan for the extraterritorial area. The Court of Appeals said denial of a subdivision for land use reasons had to be done as part of zoning. Madison had no extraterritorial zoning and the County zoning allowed the intended development. *Gordie Boucher Lincoln-Mercury of Madison, Inc. v. City of Madison Plan Commission*, 178 Wis. 2d 74 (Ct. App. 1993). The Court was troubled about the fact that a master plan could be adopted by the Plan Commission only and did not require a public hearing or have other procedural protections that zoning laws afforded. (This was before the adoption in 1999 of the comprehensive plan statute that provides for a hearing and adoption by the Council.)

More recently, the City denied a different extraterritorial plat on grounds of land use, but this time the land use standards were spelled out in the subdivision ordinance itself. The case—*Wood v. City of Madison*—found its way to the Court of Appeals. Only one member of the Appeals Court panel today was also on the panel in 1993.

The City pointed to a difference between the new case and the 1993 *Gordie Boucher* case, namely, that the basis for the denial was part of the subdivision ordinance that had a hearing and was adopted by the Council.

The Court of Appeals dismissed this distinction as not being important. In the final analysis, the *Boucher* decision rested on the idea of a different distinction: zoning decides land use and land subdivision ordinances decide what the court called "quality questions," such as design details and infrastructure.

However, in its 2002 *Wood* decision, the Court of Appeals says it no longer believes that this distinction is legally correct. Noting the statutory statement of purposes for land subdivision regulation includes the purpose of "encouraging the most appropriate use of land" (§ 236.45(1), Wis. Stats.), the Court of Appeals announces its new view that land use can be regulated by land subdivision ordinances, and presumably by other ordinances that have a scope of interest that includes land use, even if such ordinances contradict the applicable zoning.

— Richard A. Lehmann

WEPCO Loses Stray Voltage Appeal

The Wisconsin Court of Appeals rejected Wisconsin Electric Power Company's ("WEPCO") appeal in a stray voltage case. *Hoffman v. Wisconsin Electric Power Company*, Appeal No. 00-2703 (Wis. Ct. App. April 4, 2002). The appellate court upheld a jury verdict for money damages against WEPCO and the lower court's order for abatement to remedy a stray voltage problem at a farm owned by the Hoffmann family. In the lower court proceeding, the jury found that WEPCO was negligent in the provision of electricity to the Hoffmann farm, causing harm to farm livestock. Based on its finding of negligence, the jury awarded the Hoffmanns money damages and the court ordered WEPCO to abate the problem by installing an overhead, ungrounded system.

The Court of Appeals rejected WEPCO's argument that there was insufficient evidence to sustain the jury's negligence verdict because WEPCO had relied on certain findings of the Public Service Commission of Wisconsin ("PSC") in generic stray voltage proceedings that the manner in which WEPCO distributed electricity to the farm could only harm livestock if it passed through the animal. According to WEPCO, the jury did not find that it was unreasonable for WEPCO to rely on the PSC's findings. The Court of Appeals concluded that the jury was free to decide that the farm owners' evidence proved WEPCO negligent despite WEPCO's reliance on PSC conclusions that animal contact measurements were the exclusive measure of livestock harm.

With respect to the lower court's abatement order, WEPCO argued that the lower court failed to properly exercise its discretion in ordering WEPCO to install an overhead, ungrounded system. According to WEPCO, the lower court did not make adequate express findings of fact to justify its choice of remedy and failed to consider relevant safety and reliability factors. The Court of Appeals rejected these arguments, concluding that express findings of fact as to the appropriate remedy were not necessary and that WEPCO had not shown the abatement method ordered by the lower court was unsafe or unreliable.

— Anita T. Gallucci

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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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Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Christopher J. Dodge	283-1777	cdodge@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com
Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com
Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	rlehmann@boardmanlawfirm.com
Michael P. May	283-1737	mmay@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

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Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

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