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Gordie Boucher Case Overturned in Extraterritorial Subdivision Regulation Decision

In a decision released on April 11, 2003, the Wisconsin Supreme Court held that a city can deny approval to an extraterritorial land subdivision based on land use standards. *Wood v. City of Madison*, 2003 WI 24, Case No. 01-1206.

The decision overturns the separate but related 1993 Court of Appeals decision in *Gordie Boucher Lincoln-Mercury v. Madison Plan Commission*, 178 Wis. 2d 74, 503 N.W.2d 265 (Ct. App. 1993). In that case, the City of Madison denied approval to a certified survey map in its extraterritorial area based upon noncompliance of the proposed land use with the municipal land use plan. The Court of Appeals found that the City had acted beyond the scope of its authority, holding that extraterritorial land subdivision regulation decisions could not override the county zoning applicable to the property.

A decade later, *Wood v. City of Madison* came before the Wisconsin Supreme Court. The case involved the same City exercising land subdivision review in the same town (Burke), and once more denying subdivision approval for land use reasons. This time, the land use bases for the decision were found in criteria that had been included in the City Subdivision Ordinance, but this turned out not to be a significant difference. The new case presented the Supreme

Court with a recommendation from the Court of Appeals that the ruling of *Gordie Boucher* be overturned. The Court of Appeals had made the *Gordie Boucher* decision in 1993, but as an intermediate appellate court, it was unable to overturn the decision.

The reason for overturning the *Gordie Boucher* decision was that the statement of purpose for local land subdivision ordinance in section 236.45 of the Wisconsin Statutes says that such ordinances shall be adopted and enforced for several purposes, one of which is to encourage "the most appropriate use of land throughout the municipality...." While this does place land subdivision regulation in overlapping position with land use regulation through zoning, this overlap is the product of legislation. The Supreme Court sees no reason for the courts to interfere.

The majority decision, written by Justice Bradley and joined by Chief Justice Abramson and Justices Crooks and Bablitch, devotes 24 pages to establishing this point and determining that Madison's land use criteria were sufficiently specific and were reasonably applied to the subdivision plat.

A concurring opinion written by Justice Prosser and joined by Justices Sykes and Wilcox, devotes 32 pages to explaining that the

Charter Towns Bill Threatens Municipal Utilities

A "charter towns" bill is once again pending before the Wisconsin Assembly, introduced by Rep. Carol Owens (R-Oshkosh) as Assembly Bill 136. The latest version of this perennial proposal includes new provisions that will directly and adversely impact municipal water systems. AB-136 allows towns to block municipal efforts to extend or loop a municipal water system through town territory. It also allows charter towns to bar a municipality from acquiring property in a charter town for a municipal water system. Both provisions could significantly hamper municipal water utilities' efforts to deliver safe, affordable water to Wisconsin residents.

A copy of the bill is available at <http://www.legis.state.wi.us/2003/data/AB-136.pdf>.

Extending Municipal Water Systems into Town Territory

Current law recognizes that a municipality sometimes may find it "necessary or economically prudent" in order to serve customers within the municipality to install its facilities "through, upon or under a public street, highway, road, public thoroughfare or alley located within the boundaries of [an] adjacent municipality." See § 196.58(7)(a),

Wis. Stats. In such cases, the municipality may file a petition with the clerk of the adjacent municipality requesting approval for the installation of its facilities. The adjacent municipality then has 15 days in which to act on the petition. If the adjacent municipality does not act within that time, the petition is deemed approved and the petitioning municipality may proceed with the installation.

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Gordie Boucher Case Overturned in Extraterritorial Subdivision Regulation Decision

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Gordie Boucher decision does not need to be, and should not be overturned, although the concurring Justices agree that the plat in question was properly denied by the City.

The concurring opinion traces the history of Wisconsin's land subdivision laws back to 1839. It notes that cities have had extraterritorial plat approval powers since 1909. It pays homage to the late Professor Jacob Beuscher, who was instrumental in shaping the present version of land subdivision statutes in the mid 1950s. Another contributor to the present statutes was attorney Robert D. Sundby representing the League of Wisconsin Municipalities in that era. Mr. Sundby went on to become a member of the Wisconsin Court of Appeals and was the author of the *Gordie Boucher* decision.

The concurring opinion concludes that the Legislature has given cities an array of powers that can be combined. In the *Wood* case, the proposed commercial land use conflicted with the applicable agricultural zoning, the City's land use plan, and the City's land use policies in its subdivision ordinance, and was not serviceable with adequate transportation and sewer facilities. The City was using its powers aggressively, but was not overreaching when applying them to a development proposal that was "so vulnerable to criticism."

But, the concurring justices see *Gordie Boucher* as having dealt with a subdivision that had no defects

of platting or municipal services. The proposed use was consistent with the zoning. Under these circumstances, the City was beyond its bounds in stretching extraterritorial plat review to overrule applicable zoning. The extraterritorial subdivision denial was arbitrary, as applied to the facts.

The concurring justices argue that concern for property rights demands that control of extraterritorial land use through the unilateral powers of extraterritorial subdivision review be bounded by a test of reasonableness. They see the majority as having given municipalities too much of a blank check to control use through plat review.

Neither the majority nor the concurrence seriously address the issue of "regulation without representation," a situation inherent in extraterritorial regulation. This issue had been raised in constitutional terms by the Wisconsin Realtors Association in an amicus brief, which argued that the Town's involvement was necessary to protect the due process rights of citizens and property owners in the Town. The justices directed substantial attention to this issue during oral argument in this case last October. However, while the main parties acknowledged the issue, they did not deal with it in their briefs. The Supreme Court may have determined that the issue was not sufficiently developed to allow a meaningful ruling.

— Dick Lehmann

If the adjacent municipality rejects the petition, the petitioning municipality may apply to the Public Service Commission (PSC) to override the adjacent municipality's decision. The Commission must hold a hearing on the application and determine whether the installation is necessary or economically prudent. If it is, the Commission can issue an order authorizing the petitioning municipality to proceed with the installation. Historically, the PSC has been inclined to grant these overrides.

AB-136 would take away the PSC's authority to override the decision of any town (not just "charter towns"). See AB-136, Section 23, pp. 14-15. Accordingly, if a town rejects a municipality's petition to install its facilities in town territory, that decision would be final. The municipality could not appeal to the PSC for relief.

Acquiring Land in a Town for a Municipal Water System

Municipalities are authorized by statute to acquire property within or outside of their municipal boundaries for any public purpose, including a municipal water system. See, e.g., §§ 61.34(3), and 62.22(1), Wis. Stats. AB-136 would allow "charter towns" to bar municipalities from acquiring property within the charter towns' territory.

A "charter town" is a town that meets certain criteria established in AB-136. Among these criteria are the requirements that the town board adopt a

resolution declaring the town to be a charter town, and that the residents approve that declaration in a referendum.

Under AB-136, a city or village could acquire property in a charter town only if the town board approves. See AB-136, Section 8, at p. 8 [creating §§ 60.225(5)(d) & (e)]. This restriction applies upon adoption of a town board resolution declaring the town to be a charter town — even before a referendum vote has been held. If the voters reject the referendum, then the restriction is lifted. However, if the voters approve the referendum, then the restriction stays in effect so long as the town remains a charter town. Consequently, the town board could bar a municipality from acquiring property in the charter town if, for example, the municipality sought to use the property to establish a new well.

Conclusion

AB-136 includes many other provisions relating to charter towns, many of which are objectionable to cities and villages. However, the provisions highlighted above are the most likely to have an adverse effect on the operations of municipal water systems. Several municipal water systems, as well as the PSC and the Department of Natural Resources, testified at a public hearing on AB-136 before the Assembly Rural Affairs Committee on April 10, 2003, to express their concerns with the bill.

— Matt Weber

The Bumpy Road of Regional Transmission Organizations

Recent developments have demonstrated the difficulties in development of large regional transmission organizations (RTO).

The creation of RTOs is a lynchpin of the deregulation plans of the Federal Energy Regulatory Commission (FERC). In the Midwest, one of the largest RTOs is the Midwest Independent System Operator (MISO). However, it was recently announced that the intended merger of MISO with the Southwestern Power Pool (SPP), which would have made one RTO stretching from Canada nearly to Mexico, was off. The failure of the MISO-SPP merger will greatly restrict the size of the RTO in the middle of the country.

In addition, the attempt by PJM Utilities to expand their size has run into a roadblock from the state of Virginia. Virginia passed a law barring any Virginia-based utility from joining an RTO until approved by the Virginia Public Utilities Commission.

One such utility is American Electric Power (AEP). AEP was intending to team up with Commonwealth Edison to create, in the Midwest, an RTO affiliated with the PJM RTO in the eastern United States. The Virginia law will either delay, or block, the ability of AEP to join the PJM RTO. Without AEP being in the RTO, Commonwealth Edison would have no interconnection with other PJM companies.

— Michael P. May

SPEAKER'S FORUM

May 3, 2003

Potential Bankruptcy in the Cable Industry and Related Franchise Renewal Issues

WAPC Spring Conference

Oshkosh, WI

Anita T. Gallucci

No Liability for “Discrimination by Referendum”

Where a city approves a development project but is required by law to hold a referendum on its decision prior to issuing building permits, the city does not violate the developer's equal protection and due process rights by following its legal duties, even where the petition for a referendum is racially motivated. Consequently, a unanimous United States Supreme Court in *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 538 U.S. ____ (2003), decided March 25, 2003, found in favor of the city.

The case arose from a proposal by a nonprofit developer to build an affordable housing complex in the nearly all-white city of Cuyahoga Falls, outside Akron, Ohio. The proposal brought out vocal opponents who cited concerns about crime, drugs and the “class” of prospective tenants. Nevertheless, the city council adopted an ordinance approving the site plan for the project, finding that it met all zoning requirements.

Project opponents then filed a petition seeking a citywide referendum on the ordinance. State law held that the city could not issue building permits for the project while the referendum was pending. Accordingly, the developer's application for the permits was denied. City residents voted down the project in 1996.

The developer filed suit in both state and federal court. Its state court action alleged that the city ordinance approving the project was not the proper subject of popular referendum. The developer ultimately prevailed in that action, but only after its motion for reconsideration to the Ohio Supreme Court persuaded the court to change positions. The court determined that site plan approval is an administrative determination and therefore not subject to referendum in Ohio.

The developer nevertheless suffered damages due to the construction delay caused by the referendum process and pursued those damages in federal court. The developer's federal court action alleged that the city had violated the developer's due process and equal protection rights and its rights under the federal Fair Housing Act, 42 U.S.C. §§3601, et seq., in at least two ways. First, the city had submitted a racially motivated referendum to the voters. Second, the city had refused to issue building permits for a project the City Council had approved. The federal trial court dismissed the developer's claims, but the United States Court of Appeals for the Sixth Circuit reversed.

The court of appeals found that three elements supported the developer's claims of intentional discrimination. First, the city's decision to deny building permits to the developer during the pendency of the referendum petition had a disparate impact on African Americans. Second, there was evidence of “highly unusual circumstances,” in that no site plan had ever been submitted to a popular referendum in the city. Third, comments by some members of the public and by the mayor could be interpreted as evidence of racial bias. The court concluded that these elements were sufficient to allow the developer's claims to proceed to trial.

The Supreme Court reversed. It began its analysis with the developer's equal protection claims. The Court observed that “proof of racially discriminatory intent or purpose is required” to establish an equal protection violation. *Id.* at 5. The developer failed to meet this standard. The evidence the developer cited might show that the referendum was racially motivated. However, the referendum itself was not at issue in the case, because it had never gone into effect. Rather, the developer was claiming injury from the referendum petitioning process.

The Court found that the developer had failed to provide evidence of a racially discriminatory intent or purpose underlying this process. In submitting the referendum to the voters, and in refusing to issue the building permits, the city followed its legal duties. There was no showing that its motivation for doing so was racial animus. The Court noted that the developer might have established an equal protection claim if it had shown that the city would have selectively refused to follow these procedures under other circumstances. However, the developer made no such showing.

Indeed, the Court noted that the city's actions enabled a public debate on the referendum to take place. Thus, the city acted in harmony with important constitutional principles, including the right of citizens to petition their government regardless of the content of their ideas, and the rule that the government may not prohibit the expression of an idea simply because society finds the idea offensive. The court viewed the City's conduct as representing a “devotion to democracy, not to bias, discrimination or prejudice.” *Id.* at 7.

The Court's assessment that the city acted because it was compelled to act, led the Court to similarly reject the developer's substantive due

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Appeal of Permit Denial Bars Subsequent Decision to Issue Permit

Where an applicant has appealed a zoning administrator's decision to deny a building permit, the zoning administrator is powerless to subsequently issue the permit until the pending appeal has been resolved. Thus, in *Mills v. Vilas County Board of Adjustment*, 2003 WI App. 66, Appeal No. 02-2546, decided February 25, 2003, the Court of Appeals refused to give effect to a building permit that would have allowed the construction of a residence on a privately-owned island in a lake within the Lac du Flambeau reservation.

The dispute in *Mills* arose after the Vilas County zoning administrator originally rejected an applicant's request for a building permit based on five concerns the zoning administrator had with the proposed development. The applicant appealed to the board of adjustment, which affirmed the denial. He then filed for a writ of certiorari with the circuit court.

While the certiorari action was pending, the applicant submitted additional information to address the zoning administrator's concerns. The zoning administrator issued the permit. The Lac du Flambeau Tribe appealed to the BOA, which concluded that the zoning administrator lacked authority to issue the permit while the applicant's certiorari action was pending. The trial court agreed, and the Court of Appeals affirmed.

The Court of Appeals' decision was based largely on the county zoning ordinance, which provided that "an appeal shall stay all proceedings in furtherance of the action appealed from." This requirement is also found in § 59.694(5), and comparably in the

city/village zoning enabling statute at § 62.23(7)(e)5. The applicant pointed to a different section of the ordinance that allowed the zoning administrator to request supplemental information from an applicant. However, the court found that this section applied only before the zoning administrator issued his decision, not after.

The court also noted the "jurisdictional chaos" that would ensue if the zoning administrator could issue the permit despite the pending appeal. Such a ruling would "encourage conflicting and competing decisions of courts and various administrative agencies." Thus, when an appeal is properly before a court, "the court has exclusive jurisdiction over the dispute, and the administrative agencies cannot reevaluate their decision until the court relinquishes that jurisdiction."

The applicant has not filed a petition for review with the Wisconsin Supreme Court.

— Matt Weber

WPS Files for Rate Increases

Wisconsin Public Service Corporation (WPS) of Green Bay recently filed for rate increases, both for its wholesale and retail customers.

The wholesale rate filing represents a restructuring of the WPS wholesale services. It also represents a change in direction for WPS, which previously had indicated little desire to expand its wholesale service.

WPS is proposing to increase wholesale rates by from 11-33%. Municipal utilities located in Manitowoc, Marshfield, and Stratford, Wisconsin, Stephenson, Michigan, and rural electric cooperatives of Alger Delta and Washington Island, have intervened at the Federal Energy Regulatory Commission (FERC), seeking to reduce the proposed increase. The WPS proposal also includes formula rates, by which rates would be adjusted annually. FERC Docket No. 03-606-000.

At the same, WPS also filed to increase its rates to retail customers by 14%. The Public Service Commission of Wisconsin will address that proposed rate increase.

— Michael P. May

No Liability for "Discrimination by Referendum"

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process claims. The Court observed that arbitrary governmental actions may give rise to a substantive due process claim, but cautioned that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 9. Insofar as the city's conduct was compelled by law, the Court found that it was "in no sense . . . egregious or arbitrary." *Id.*

Finally, the Court vacated the Sixth Circuit's opinion insofar as it addressed the developer's disparate impact claim under the Fair Housing Act because the developer abandoned that claim on appeal.

— Dick Lehmann & Matt Weber

FCC Confirms Wireless Carriers Have Access Rights to Utility Poles

In a recent decision, the Federal Communications Commission (“FCC”) confirmed that the federal Pole Attachment Act, 47 U.S.C. § 224, mandates that pole owners under the FCC’s jurisdiction must grant access to their poles for attachments by wireless carriers. *In the Matter of Omnipoint Corporation v. PECO Energy Co.*, Memorandum Opinion and Order, File No. PA 97-002 (March 25, 2003)¹ (“*Omnipoint Decision*”). While declining to set rates for such attachments, the FCC confirmed that pole owners must charge just and reasonable rates for attachments by wireless carriers.

The federal Pole Attachment Act does not apply to municipally owned utilities. Thus, neither the *Omnipoint Decision* nor the Act generally governs attachments to poles owned by municipal electric utilities. However, in any dispute between a municipal electric utility and a wireless carrier regarding attachment to the utility’s poles, a court or agency would likely look to the Pole Attachment Act and the FCC’s decisions interpreting that Act as a benchmark for determining what is fair and reasonable with regard to access to municipally owned poles.

The *Omnipoint Decision* was the first such decision the FCC has issued since the United States Supreme Court issued its decision in *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002) (“*Gulf Power*”). In that case, the Supreme Court affirmed that the FCC has jurisdiction under the federal Pole Attachment Act to regulate wireless carriers’ attachments to utility poles and other utility facilities. The Court determined that since a wireless carrier was a “provider of telecommunications service” under federal law, its attachments were “pole attachments” within the meaning of the Pole Attachment Act. The Act mandates that pole owners grant access to their poles for attachments by “providers of telecommunications service.”

In the *Omnipoint Decision*, a wireless carrier, Omnipoint Corporation (“Omnipoint”), filed a pole attachment complaint with the FCC seeking access to utility poles and other facilities owned by PECO Energy Company (“PECO”). Omnipoint sought to attach base stations, antennas and other equipment to PECO’s facilities. PECO proposed to charge Omnipoint \$2,100 per site. Omnipoint filed its

complaint after PECO refused to provide Omnipoint with information it could use to determine whether the attachments rates PECO proposed were just and reasonable.

While declining to set rates for such attachments, the FCC confirmed that pole owners must charge just and reasonable rates for attachments by wireless carriers.

The FCC first addressed the issue whether it had jurisdiction over the dispute. On this point, the FCC stated that the Supreme Court’s decision in *Gulf Power* left no doubt that the FCC had jurisdiction over wireless attachments pursuant to the Pole Attachment Act. Rejecting all of PECO defenses, the FCC ordered PECO to comply with the Pole Attachment Act and the Commission’s pole attachment rules. Specifically, the FCC ordered PECO

to “provide Omnipoint with the historical cost dated related to the specific facilities to which Omnipoint seeks attachment” after “Omnipoint identifies to PECO the sites it wishes to use and the type of equipment to be installed.” PECO was also ordered to “negotiate a just and reasonable attachment rate based upon the cost data supplied by PECO.”

In so ruling that FCC confirmed that wireless carriers have a right to access utility poles and facilities at just and reasonable rates, terms and conditions and that pole owners must engage in reasonable negotiations with respect to rates and terms and conditions of such access. Moreover, while the FCC recognized that the Pole Attachment Act does not apply to a utility’s transmission facilities, the Commission ruled that the Act required PECO to provide access to its transmission facilities to the extent that such facilities were part of the utility’s local distribution system. See *Southern Company v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002) (“[L]ocal distribution facilities, festooned as they may be with transmission wires, are plainly within the FCC’s jurisdiction under the terms of the Act.”).

While PECO was ordered to negotiate just and reasonable rates with Omnipoint, the FCC did not adopt or endorse a formula to determine such rates. This decision, then, will likely lead to future complaints concerning attachment rates for wireless facilities. Such rates will likely depend on such factors as size, placement and location of the wireless attachments.

— Anita T. Gallucci

¹ The FCC’s decision is available on line at the FCC’s web site: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-857A1.doc.

More Judicial Spins on Variance Law

Does the decision to grant a variance turn on a one- or two-part test? Is it harder to get a shoreland zoning variance than other kinds of variances?

The Court of Appeals split over these questions in *State ex rel. McGinnity v. Washington County Board of Adjustment*, Appeal No. 02-1618, decided March 26, 2003, demonstrating again the difficulty the judiciary has had in settling on a variance standard.

In September, 2001, the Washington County Board of Adjustment denied a zoning variance for a strictly vertical expansion of a home that was located just 26 feet from a lake — and entirely within the 50-foot shoreland setback established by County ordinance. The County had recently amended its Shoreland Zoning Ordinance to prohibit any expansion of a structure that was as dimensionally nonconforming as this home.

The property owners appealed the denial, losing in both the Circuit Court and the Court of Appeals.

The Court of Appeals divided. Judges Anderson and Snyder, comprising the majority of the 3-judge appellate panel, held that the variance was properly denied under application of the test of *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), which allows a variance to be granted only where no reasonable use can be made of the property in the absence of the variance. The structure was clearly usable as a residence without the addition.

The property owners attempted to convince the court that the “no reasonable use” test is applied only if the court first concludes that the proposed variance conflicts with the purpose of the zoning standard. In making this argument, the property owners were saying that *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376, limited the “no reasonable use” test to situations where the grant of a variance would conflict with the purpose of the zoning standard. The majority opinion takes the position that the fractured opinions issued by the justices of the Supreme Court in the *Outagamie County* decision mean that that decision has no precedential value with respect to the hardship test for a zoning variance. Thus, the

property owners were prevented from attempting to convince the Court of Appeals that the variance would have been benign in that it did not increase the footprint and had no objection from neighbors.

A strong concurring opinion by Judge Brown focuses on Justice Crooks' opinion in the *Outagamie County* case, which Judge Brown says reflects a two-stage test established by prior case law. The test requires the court to first determine whether the proposed variance directly conflicts with the purpose of the ordinance. If so, then the property owner must meet the “very strict definition of unnecessary hardship—that no reasonable use can be made of the property in the absence of a variance.” *McGinnity* at ¶ 33. On the other hand, if the proposed variance does not conflict with the purpose of the ordinance, that alone justifies a variance.

Judge Brown uses this example: a zoning ordinance that regulates density in a neighborhood would not have its purpose undermined by a one-foot variance to a front yard setback standard.

Applied to the Washington County case, the opinion concludes that the new amendments to the shoreland ordinance had a strong purpose of preventing further encroachments upon the shoreland. A variance that would allow expansion of an already nonconforming structure strikes at the heart of that purpose. Such a variance must meet a standard of no reasonable use.

Judge Brown argues that shorelands are special and have been recognized as such by the appellate courts. This recognition is also a matter of public perception: “[M]ost riparian owners understand that with rights to riparian ownership comes responsibility to help conserve the shoreland. I believe that the court in [recent shoreland variance cases] merely built on the cornerstone ... that the right to own riparian property brings with it a duty of restraint unless there can be ‘no reasonable use’ without granting a variance.” *Id.* at ¶ 59.

Thus, Judge Brown comes close to carving shoreland zoning out for separate treatment.

This opinion has been recommended for publication. As of this writing, a petition for review has not been filed with the Wisconsin Supreme Court.

— Dick Lehmann

MUNICIPAL LAW NEWSLETTER

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