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Court Rejects Property Tax Exemption Claim By Hospital Affiliates

The Wisconsin Court of Appeals, District I, recently ruled in favor of the City of Wauwatosa in a property tax exemption case, upholding the City's denial of a refund claim for taxes paid for 1999 through 2002 for real property leased by a hospital joint venture company, and for the company's lab equipment. *FH Healthcare Development, Inc. and United/Dynacare, LLC v. City of Wauwatosa*, Appeal No. 03-2999 (Aug. 17, 2004).

Both FH Healthcare Development, Inc. ("FHHD") and United/Dynacare, LLC ("United/Dynacare") were affiliates of Froedtert Health System, Inc., a nonprofit health care system that included the nonprofit Froedtert Memorial Lutheran Hospital, Inc. FHHD was a nonprofit formed to assist the Hospital with the financing, construction and maintenance of buildings used by the Hospital and its affiliates. United/Dynacare was a limited liability company formed in 1997 as a 50/50 joint venture owned by a nonprofit Hospital affiliate and by Dynacare, Inc., a public, for-profit corporation. United/Dynacare performed lab services at cost for the Hospital and for the Medical College of Wisconsin, a nonprofit corporation ("MCW"), and it also performed lab services at market rates for outside clients, including physicians, clinics and hospitals.

FHHD constructed a building ("Building") on a portion of land owned by Milwaukee County that

FHHD subleased from the Hospital. The Building was still under construction in January, 2000 and FHHD began leasing space to United/Dynacare commencing in July, 2000. FHHD also leased space in the Building to the Hospital and MCW.

The facts in the case were undisputed. Each party filed a motion with the trial court for a summary judgment in its favor based upon the stipulated facts but the trial court denied both motions. The Court of Appeals reversed the trial court's denial of the City's summary judgment motion, ruling that the lab space and equipment used by United/Dynacare was not exempt.

The court first ruled that the lab space and equipment did not qualify for the nonprofit hospital exemption under Wis. Stat. § 70.11(4m)(a), which applies to real property owned and used and personal property used exclusively for hospital purposes, but does not apply to property used for commercial purposes. The court ruled that United/Dynacare's lab work at market rates performed for outside clients constituted a "commercial purpose" and therefore the exemption under Section 70.11(4m) did not apply.

The court also ruled that the United/Dynacare lab space and equipment did not qualify for a partial exemption under Wis. Stat. § 70.1105(1), which provides that if property that otherwise qualifies as

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Quarry Operators Lose Appeal on Registering Property Across County Line

The diminishing asset rule does not apply to extend the registration of a nonmetallic mineral mining operation to property that is contiguous to the mining operation but located in a different county. Thus, the Court of Appeals in *Town of Cedarburg v. Dawson*, Appeal No. 03-2347 (August 11, 2004), rejected mining operators' claims that their valid registration under NR 135, Wis. Admin. Code, in Washington County protected their rights to extract minerals from contiguous property located across the road in Ozaukee County.

NR 135 Registration

Generally, NR 135, Wis. Admin. Code, helps landowners whose property is zoned for mineral mining preserve that zoning. By filing a statement with the Register of Deeds in the county where the property is located, a landowner "freezes" the zoning for the duration of the registration period. Also, registration bars the County from taking any other official action that would permit the subject property to be used in a way that would permanently interfere with

a mining operation.

By contrast, NR 135 generally does not confer any rights on landowners whose property is not zoned for nonmetallic mining at the time the landowner notifies the County of its intent to register. This is because registration preserves the existing zoning, rather than forcing the County to change the zoning on the property.

Diminishing Asset Rule

The diminishing asset rule was born of the recognition that "you can't dig on all the . . . acres [of a property] at one time," *Sturgis v. Winnebago Adjustment Bd.* (Ct. App. 1987). The rule holds as follows:

When a single owner has contiguous parcels on which an excavation operation is in existence, all land which constitutes an integral part of the operation is deemed "in use," notwithstanding the fact that a particular portion may not yet be under actual excavation.

In applying this rule, "the relevant inquiry is [the owner's] intent and ownership of the property coupled with the unique use of extraction." *Id.*

Court Rejects Property Tax Exemption Claim By Hospital Affiliates (Continued from front page)

exempt under Section 70.11 is used by the owner partly in an unrelated trade or business that is taxable to the owner for US income tax purposes, then only the portion of the fair market value of the property that is attributable to the unrelated trade or business is assessable for property tax purposes. The partial tax exemption under Section 70.1105(1) does not apply, however, to property that is leased by an exempt organization to a lessee. The court ruled that the lab space and equipment did not qualify for a partial exemption under Section 70.1105 because United/Dynacare was not an exempt entity and because FHHD had conceded that the lab space did not fall within the literal scope of Section 70.1105.

Finally, the court rejected FHHD's claim that the Building was not taxable in 2000 while it was under construction. FHHD argued that, as of the assessment date, the Building was in the process of being prepared for the furtherance of the Hospital's exempt purposes, and even if a portion of the space was to be used for commercial purposes, there was no commercial use until July 2000, after the assessment date. The court ruled that the partially constructed Building did not qualify for exemption because none of it was used in furtherance of exempt purposes at the time of assessment, and because FHHD had failed to prove that the Building was being prepared for an exempt purpose.

— Bill Peck

Town of Cedarburg

The landowners in *Town of Cedarburg* tried to combine the diminishing asset rule with the NR 135 registration process to circumvent the zoning on 47 acres of those land. Those acres were located in the Town of Cedarburg in Ozaukee county, and zoned to allow nonmetallic mining only if the mining was in operation prior to October 5, 1994. The 47 acres have never been used for nonmetallic mining.

However, the landowners also owned an active 155-acre quarry site contiguous to the 47 acre parcel and across the county line in Washington county. The land was zoned properly for nonmetallic mining. The landowners sought to register both sites, and the Town of Cedarburg objected.

The landowners argued that their Ozaukee county parcel was entitled to be registered because it was contiguous to their existing quarry. The court of appeals rejected this argument because the plain language of NR 135 allows registration of contiguous parcels only if the owner can demonstrate that nonmetallic mining is permitted on each of the parcels under local zoning. Thus, while the Washington county parcel could be registered, the Ozaukee County parcel could not.

In the alternative, the landowners argued that they were not subject to registration under the diminishing asset rule. However, the court found the diminishing asset rule inapplicable because the land at issue was located "in different zoning jurisdictions subject to different zoning classifications." The court concluded:

The rules allow a streamlining of the registration procedure for contiguous parcels, but do not relax the substantive registration requirements. This result mirrors the rules' recognition of the need to protect the interests in nonmetallic mineral deposits, while simultaneously respecting local planning and zoning authority.

The *Town of Cedarburg* decision will be published in the official reports.

— Matthew D. Weber

Interesting Plan Consistency Cases

As the statutory deadline draws near for those Wisconsin local governments that have comprehensive plans to achieve consistency between those plans and the zoning and related regulations of the community, the court cases around the country dealing with plan consistency become more relevant.

In the Twin Cities area of Minnesota, state law requires local government comprehensive plans to be consistent with a regional comprehensive plan and regional system plans for such infrastructure as sewer and transportation. The regional plans are made by the Metropolitan Council, and that Council can order modifications in local plans to achieve consistency with the regional plans.

The Council has ordered such modifications in 2% of the local plans it has reviewed, the most highly publicized instance being an order in 2003 that an eastern suburban city called Lake Elmo modify its land use plan.

The City said it would fully build out by 2020 at suburban densities without public sewer service.

The regional plan called for the City to confine most new development through the plan target year of 2020 in about 12% of the town territory. The development was to be concentrated along the City's southern boundary, which was Interstate Highway 94, a designated transit and expressway corridor. The regional plan also called for the City to serve that development with public sewer service.

The City contested the order. The controversy first went to an administrative appeal, then to the Court of Appeals and finally to the State Supreme Court, which upheld the Metropolitan Council's order in an August 5, 2004 decision.

The Court noted that the state legislature had clearly empowered the Council to order conformity of local land use plans, and the population and jobs projections that are part of those plans, with regional plans for land use and for regional infrastructure that the Council itself manages.

Lake Elmo's preference for a particular character and lifestyle would cause parts of the regional infrastructure to be under-used and would shift population growth to other communities causing additional infrastructure investments to be needed.

The case is *The City of Lake Elmo v. Metropolitan Council*, Case No. A03-458, 2004 Minn. LEXIS 482 (August 5, 2004).

The State of Washington requires consistency between local plans and local zoning. The City of Pendleton had a plan. Part of that plan called for certain community parks and defined a minimum size for such parks at 30 acres.

The City proposed to develop a 15 acre community park and granted itself zoning approval to do so. Neighbors challenged. The challenge went first to a state Land Use Board of Appeals (LUBA), then to the State Court of Appeals, back to the LUBA and back to the State Court of Appeals. Another challenge went to the Federal Courts.

All of the state court decisions turned on whether the language in the City comprehensive plan setting what

appear to be standards for location, size and facilities within community parks is mandatory or "aspirational." The Court of Appeals found the language to be merely aspirational, based upon the fact that the Plan did not expressly say the standards were to be standards, and the fact that interpreting the standards as binding standards would mean that if the City could not find a 30 acre park site, it would be stuck with no park at all.

Perhaps an influence on the Court's decision was the fact that the City had attempted, unsuccessfully, to make the lawsuit moot by amending the zoning code to exempt City parks from City zoning approval.

This case illustrates the importance of drafting comprehensive plans under the 1999 Wisconsin comprehensive planning law (Wis. Stat. § 66.1001) with care. The plans must clearly define which parts of the plan are to be mandatory and which are illustrative, or what the Washington Court of Appeals called "aspirational."

The case is *Monogios v. City of Pendleton*, 94 P.3d 118 (Ore. Ct. App., July 14, 2004).

—Richard A. Lehmann

Final Health Mandates "Opt-out" Regulation Issued with No Changes

Non-federal governments offering self-funded health plans, including some cafeteria plans, have the option of "opting out" of some requirements under several Federal law health mandates. On July 26, 2002, an interim final regulation was issued addressing how such plans can be exempted from some of these requirements. On July 23, 2004, the final regulation was issued. The final regulation is identical to the interim rule. The final regulation should require no changes by plan sponsors, but may provide a reminder of the ongoing requirements associated with the opt-out.

Under the opt-out, these plans are given relief from some of the mandated health requirements affecting, for example,

mental health benefits, minimum maternity hospital stays, mastectomy benefits, special enrollment periods, and pre-existing condition exclusions. To be effective, the opt-out requires annual compliance steps, including:

Reminder to Plan Sponsors: Opting-out Means Annual Compliance Steps

- Providing a written notice to plan enrollees; and
- Filing an annual notice with the Centers for Medicare and Medicaid Services.

The regulation provides details on what must be included in both notices.

The opt-out does not relieve sponsors of all Federal health law requirements. Examples include certification and disclosure of creditable coverage requirements and privacy and security rules.

—Cynthia A. Van Bogaert

MUNICIPAL LAW NEWSLETTER

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