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Flexible Approach to Valuing Partial Takings

When the government condemns part of multiple contiguous parcels of property from a single owner, the Wisconsin Supreme Court has ruled that the parcels may be considered individually or together as a unit to determine the highest valuation for compensation purposes. *Spiegelberg v. DOT*, 2006 WI 75 (June 27, 2006). The same result is likely to apply where taking affects all of the contiguous parcels.

Bernice Spiegelberg owned five contiguous tax parcels comprising about 150 acres of land. With the exception of her residence, she leased all five parcels together for use as a farm. Apparently, the tax parcels were separate lots and could be sold individually. They each had public road access or could be accessed through the other lots. The zoning for the parcels also permitted large lot residential development. The DOT condemned 11 acres from three of the parcels.

At issue was the interpretation of Section 32.09(6), Stats., which governs compensation for partial takings. That statute states that compensation shall be paid as the greater of either: (a) the value of the property taken, or (b) the difference between the value of the whole property immediately before the taking and the value of the remainder after the taking.

The DOT appraised the value of the parcels together as a farm and arrived at a fair market value for the taking of \$18,900. Spiegelberg appraised the value of the individual parcels for large lot residential development and arrived at a value of \$84,200.

The DOT argued that the phrase “value of the whole property” in section 32.09(6), Stats., meant that the parcels could only be valued together as a farm and barred Spiegelberg’s valuation method. The court rejected this argument, finding the statutory language ambiguous.

The DOT then argued that the “unit rule” in condemnation required

the property to be valued as a single economic entity. The Court also rejected this argument, noting that the unit rule provides that a parcel is to be valued as a fee simple interest, not as the sum of the value of all the individual interests in the parcel (e.g., leasehold, remainder, easement). Moreover, the court also noted, section 32.09(2), which sets out rules for determining just compensation, requires that the “most advantageous use” of the property be considered. This is equivalent to the concept of “highest and best use” for valuing property for condemnation purposes. The most advantageous use of the property was for residential development according to the Spiegelberg appraisal.

The court concluded that the term “whole property” does not require that contiguous, commonly owned parcels always be treated as a single unit for valuation purposes, but requires that no portion of the property be left out of an assessment. The individual characteristics of the property must be considered in arriving at its most advantageous use. However, in accordance with established law, the most advantageous use must be a use that actually affects the present market value. Speculative uses or uses that are not allowed by zoning, that are unsuited to the physical layout of the land, or that are unlikely due to the surrounding area or economic conditions are not likely to affect the market value.

The court was unanimous in its determination of the law to be followed. Justice Bradley dissented on the court’s application of the law. She would have remanded the case back for further factual development. The case was in an unusual procedural posture. After a trial court’s preliminary ruling that Spiegelberg’s appraisal method was appropriate, the parties entered into a stipulation of facts. Essentially, the parties seemed to agree that Spiegelberg’s appraisal

Effect of Severability Clauses Weakened in Unpublished Court of Appeals Decision

In *Bettendorf v. St. Croix County*, 2005 WI APP 1286 (August 2006), the Court of Appeals weakened the effect of a severability clause in a zoning ordinance. The case is unpublished.

The facts are these. St. Croix County rezoned a parcel into a commercial district in 1985, with a condition that the rezoning would expire if the property were ever sold. Some years later, the owner sued claiming that the “expiration on change of ownership” clause (called the “ownership clause” by the Court) was invalid. The County counter-claimed, admitting that the ownership clause was invalid, but claiming that the entire ordinance was void because the invalid ownership clause was not severable from the remainder.

The circuit court disagreed with the county on inseparability and allowed the rezoning to stand. The County appealed.

On appeal, the property owner pointed to a “severability clause” in the county’s zoning code. That clause said if any part of the county zoning were held unconstitutional or invalid, the remainder of the zoning code shall survive.

The court of appeals held, however, that the intent of a legislative body in a particular rezoning trumps an enacted severability clause. The court held that here, the ownership clause was the motivation behind the rezoning ordinance and, thus, the ownership clause could not be excised. The invalidity of the ownership clause necessarily invalidated the entire ordinance.

The court next took up the property owner’s argument that, even if the commercial rezoning ordinance was invalidated, he had a vested right to use his land for commercial purposes because he had been granted a special exception permit for a commercial use. The court disagreed, holding that the invalidation of the underlying commercial zoning also invalidated the special exception permit.

— *Richard A. Lehmann*

Flexible Approach to Valuing Partial Takings

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value would apply if the trial court’s ruling were upheld and that DOT’s value would apply if it were reversed. Justice Bradley pointed out, however, that there appeared to be disputes of fact that might be relevant to the application of the rule announced by the court. For example, the parties’ appraisers appeared to disagree on whether residential development was likely to occur on this property given the state of economic development in the area. In addition, although the properties were divided into separate tax parcels, Spiegelberg admitted at oral argument that the parcels had not been legally divided through a platted subdivision or CSM. The record does not appear to indicate whether there were any restrictions on dividing the land into residential parcels. The majority assumes that the land could be divided into separate residential parcels.

The unanimous decision on the law is not surprising and is consistent with prior case law. However, Justice Bradley raises cogent arguments about the adequacy of the record in the case. Property owners may look for creative ways in which to value their property, even if those uses are not the same as the current use of the property at the time of the taking. Nevertheless, the government can challenge whether those proposed uses are legally permissible, physically practical, or economically likely to affect what a willing buyer would pay for the property.

— *Mark J. Steichen*

FERC Update

Open Access Transmission

The Federal Energy Regulatory Commission (FERC) has proposed incremental changes to its open access transmission rules. In a proposed rule making issued this past Spring, FERC affirmed core elements of its decade-long policy of unbundling transmission and generation services, but emphasized the need to address certain “deficiencies” with regard to a more accurate, region-specific method of calculating available capacity and a more open, inclusive transmission planning process. Public power has been generally supportive of the proposed revisions, and, in comments submitted by the American Public Power Association (APPA), has emphasized the need for regional planning flexibility, involvement of smaller, load-serving and transmission dependent utilities, and express facilitation of joint municipal transmission ownership.

Reliability Standards

Last year’s federal Energy Policy Act of 2005 (EPAct) required FERC to oversee a mandatory electric reliability regime. In July, FERC provisionally approved an application by the North American Electric Reliability Council (NERC) to be the Electric Reliability Organization (ERO) responsible for coordinating that regime by entering into a series of delegation agreements with regional reliability organizations. With two months remaining before the deadline for completion of this process, considerable uncertainty remains as to the specific roles to be played by the various regions within the new system. It is currently contemplated that all users of the system, including load serving and transmission dependent entities, will be required to join the ERO; what hasn’t been worked out is whether different standards will be applied in the different regions, what the enforcement mechanisms will be, and ultimately which entities must comply.

Long-Term Transmission Rights

Another provision in the EPAct and one heartily endorsed by public power concerned establishment of rules to ensure provision of long-term firm transmission rights in organized electric markets such as the Midwest Independent System Operator (MISO). Effective August 31, 2006, FERC issued guidelines for development of such rules. Long-term firm transmission rights are a key issue for wholesale power customers who need the reliability of long term power sales commitments but who cannot afford the risk of exposure to unhedged congestion costs in the newly organized transmission markets. The proposed guidelines do require transmission organizations such as MISO to make long-term rights available to load-serving entities with long-term power supply arrangements. However, the guidelines appear to open such rights to *all* transmission customers, thereby potentially undercutting the policy behind the EPAct requirement by restricting the availability of long-term rights, particularly in light of the Commission’s decision to also place limits on the amount of capacity available for such rights. The public power community will continue to watch this issue closely.

— *Richard A. Heinemann*

Supreme Court Invalidates Sewer Special Assessment Allocated on a Per Taxable Parcel Basis

The Supreme Court in *Steinbach v. Green Lake Sanitary District*, 2004 WI App 192, 276 Wis. 2d 639, 688 N.W.2d 740 (June 2006) addressed the issue of what constitutes a proper special assessment for a sewer extension. At issue in the case was a sewer extension constructed by the Green Lake Sanitary District.

The District determined to specially assess all the properties to be served by the planned sewer improvements. The special assessments were to include two components: an availability assessment, to cover the costs of making the sewer available to each lot in the plan, and a connection assessment to cover the costs of the infrastructure necessary for transportation of sewage to the treatment plant. The availability charge was levied against each lot or parcel of record receiving sewer service to recover the capital cost of the installation, including the installation of one four-inch pipe stub connecting the sewer main to the property edge of each lot. The connection charge was individually levied against every habitable unit on a lot and every structure connected to the sewer system on any lot that did not include a habitable building.

Under this assessment methodology, an 18-unit condominium located within the District was charged 18 availability charges

because under the law each condominium unit was a separate parcel of record. This was the case even though the single lot on which all of the condominiums were located was provided with only one four-inch sewer stub. The condominium owners challenged the imposition of the 18 availability charges.

The Supreme Court concluded that the number of availability charges allocated to the condominium lacked a reasonable basis and was invalid. The Supreme Court indicated that there was no nexus between the 18 availability charges assessed against the condominium owners and the District's recovery of the capital cost to provide only one sewer stub to the condominium project. The Court also noted that other lots that have multiple habitable units on them, and were provided the same sewer service through one four-inch stub, were assessed only one availability charge, as compared to the 18 charges imposed on the condominium project. Finally, the Court stated that there was no showing that the condominium owners received a greater benefit than was provided to other lots that were affected by the sewer extension. The Court, therefore, concluded the availability charge was not levied uniformly and imposed an inequitable cost burden on the condominium property owners as compared with the benefit accruing to them and to all benefitted properties.

The Court stressed that the reasonableness of a particular assessment method depends on the application of its factual consequences to the properties assessed. No assessment method is *per se* reasonable, and neither procedural fairness nor prolonged use of any particular method can assure reasonableness. Rather any assessment methodology may be unreasonable if it has an entirely disproportionate effect on a group of property owners which could have been avoided by the municipality's use of another assessment method.

— *Lawrie Kobza*

FCC Adopts Order on Broadband Over Power Lines

On August 3, 2006, the FCC unanimously adopted an order designed to promote a wider rollout of broadband over power lines, or BPL. The technology, which is still under development, would allow electric companies to become a third alternative to the cable and telephone companies providing high-speed internet access. BPL uses the radio frequency signals sent over medium and low voltage AC power lines to connect customers over the internet. BPL is capable of delivering internet connection speed comparable to most DSL (digital subscriber line) offerings.

BPL has its opponents. They include the aeronautical industry and amateur radio operators, who complain that BPL causes harmful interference with radio signals used in their systems.

The FCC's August 3, 2006 order focuses on alleviating concerns over signal interference. Among other things, the order places limits on emissions by BPL equipment, requires certification of BPL equipment, and requires BPL providers to enter information about their offerings in a public database at least 30 days before deploying their goods.

A number of utilities across the country are looking into BPL technology. A few have begun BPL trials, with the ultimate goal of renting access to their network to independent internet service providers. Large investors also have started to funnel money into BPL technology.

As technical issues with BPL are resolved, the biggest challenge for BPL will be making significant inroads into an industry dominated by cable and phone companies. Cable and phone companies have a considerable lead in terms of subscribers. They also are able to offer a package of telephony, television, and high-speed data services, which will be a difficult strategy for utilities to match.

Regardless, the FCC's recent order provides a significant push for BPL technology, thereby opening the door for utilities to enter the internet service industry.

— *Mark Neuser*

Little-known Exception To Public Records Law Protects Bank Account Information

Some public agencies covered by the State public records law allow applicants or customers to pay by credit card or by check. If these records are classified as public records, there could be a risk of a demand for production and subsequent misuse by the requester.

2005 Wisconsin Act 58, which took effect January 1st of this year, dealt fairly comprehensively with methods of payment and collection of money by state agencies and local governments. One of its provisions read as follows:

Sec. 19.36(13) FINANCIAL IDENTIFYING INFORMATION. An authority shall not provide access to personally identifiable data that contains an individual's account or customer number with a financial institution, ...including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

An "authority" in this sentence is an agency whose records fall under the public records law.

This provision applies to payment information derived from payment of taxes, fines and forfeitures, as well as to payment for admission tickets to various governmentally owned sports and entertainment venues.

Agencies may wish to consider incorporating the provision in their public records policy documents.

— *Richard A. Lehmman*

MUNICIPAL LAW NEWSLETTER

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