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Wisconsin Supreme Court Takes Traditional Pro-Government Position on Two Key Property Rights Questions

The developer of a private marina on Lake Superior sued the State of Wisconsin, Department of Natural Resources (DNR), alleging a regulatory taking without just compensation. In order to protect a weed bed, the DNR denied the developer a dredging permit required to construct 71 boat slips, the final phase of a large marina development. The case was dismissed on summary judgment, and the Wisconsin Court of Appeals and the Supreme Court affirmed. *R.W. Docks and Slips v. State*, 2001 WI 73 (Sup. Ct. June 28, 2001), 238 Wis. 2d 182, 617 N.W. 2d 519 (Ct. App. 2000, Case No. 99- 2904).

Under Wisconsin law, there is no categorical taking unless the regulatory action in question deprives a property owner of all economically beneficial use of the property. The Court reaffirmed that the property should be considered as a whole in order to determine the extent of deprivation. In this case, the regulatory action affected only the developer's riparian right of reasonable access to the lake, which is subordinate to the public trust doctrine.

The U.S. Supreme Court has recognized two categories of regulatory action as compensable without factual inquiry: "physical invasion," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or deprivation of "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). However, this case is neither. Therefore,

the Court resorted to the traditional ad hoc, factual inquiry of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

The threshold question "... is the nature and extent of the private property interest at stake. This case involves private riparian rights, which are limited by the public trust doctrine. The State argues that the bed and waters of Lake Superior, which are at issue in this case, belong to the public, not Docks, and so no taking of private property occurred." 2001 WI 73 ¶18.

However, "Wisconsin has...recognized the existence of certain common law rights that are incidents of riparian ownership of the property adjacent to a body of water." *State v. Bleck*, 114 Wis. 2d 454, 388 N.W.2d 492 (1983). Even so, the rights of riparian owners are qualified, subordinate and subject to the public trust doctrine.

The DNR's denial of the dredging permit affected only the developer's ability to construct the final 71 (of the 200 planned) boat slips on the bed. Because the DNR's action only affected riparian rights, subject to the public trust doctrine, and affected only a small portion of the marina development as a whole, the Court found no severe economic impact or interference with distinct investment-backed expectations as to constitute a regulatory taking under traditional, case specific takings analysis.

— Richard A. Lehmann

Wisconsin Court Upholds Raze Order for Construction Violating Zoning Codes

Lake Bluff Housing (LBH) appealed from a judgment entered in favor of the City of South Milwaukee (City), ordering LBH to raze and remove two recently built apartment buildings located on the Lake Michigan shoreline. LBH claimed that the trial court erred when it found that there were no compelling equitable reasons to allow the LBH buildings to remain. The Wisconsin Court of Appeals held that this is not a “rare case” where “compelling equitable reasons” exist to invalidate the issuance of an abatement order. *Lake Bluff Housing v. City of South Milwaukee*, 2001 WL 641795, 2001 Wisc. App. Lexis 598 (June 12, 2001, Recommended for publication in the official reports).

This case has a complicated, six-year history. LBH purchased property on Lake Michigan zoned C-2, which allowed multi-family buildings. However, before any building permits were issued, the City rezoned the property to R-A, allowing only single-family buildings. LBH sued, claiming that it had vested rights in the C-2 zoning because it had applied for multi-family permits before the property was down-zoned. LBH won in the trial court and the Court of Appeals, so they gambled on a favorable outcome and applied for permits to build multi-family buildings. After building and occupancy permits were issued with written warnings that they may be revoked if the earlier court decisions were overturned, the Wisconsin Supreme Court reversed the appellate decision and held that because LBH “never submitted an application for a building permit conforming to the zoning and building code requirements, in effect at the time of the application,” it did not obtain any vested rights.

Next, LBH filed a declaratory judgment to enjoin the City from revoking the permits and issuing orders to raze the buildings. The City counterclaimed, asserting the opposite. The trial court agreed with LBH, and the appellate court disagreed, holding that “a building permit grants no right to an unlawful use.” The appellate court remanded with instructions for the trial court to apply the *Forest County v. Goode* analysis of whether “there are compelling equitable reasons” which would make this “one of those rare cases” where the requested order of abatement should not be issued. *Goode* provided that “the circuit court, sitting in equity, should weigh heavily the factors considered by boards of adjustment in determining unnecessary hardship, as well as traditional equitable considerations.” *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998). On remand, the trial court engaged in equitable analysis, and concluded that this was not one of those rare cases. Accordingly, the trial court issued a judgment ordering LBH to raze and remove the two apartment buildings.

LBH cited three reasons why the abatement order should not have been issued: (1) the City had unclean hands; (2) abatement would cause unnecessary hardship; and (3) equity favored allowing the buildings to remain. The appellate court found all three reasons untenable, and held that the trial court properly engaged in the equitable analysis under *Goode*.

Unclean Hands

LBH contended that the trial court erroneously exercised its discretion when it did not conclude that the City acted with unclean hands. The trial court found that there “were signs along

the way that warned LBH of the magnitude of the risk it was taking, including the City’s appeal, cautionary language in the permits, the Supreme Court’s decision to grant the City’s petition for review, etc. The trial court found, as a result, that the harm was caused by LBH’s business decision to proceed with construction before the final legality was determined. Ultimately, the trial court’s findings were not clearly erroneous, and its decision was reasonable.

General Equities

LBH argued that its multi-million dollar investment in the property should outweigh other factors. While LBH’s financial investment is a factor to consider under *Goode*, the trial court found this factor alone was insufficient to justify equitable relief. The court reasoned that a party ought not be able to buy a variance by making financial expenditures.

LBH claimed that the trial court failed to consider the interests of the tenants living in the buildings. To the contrary, the court properly considered the issue and determined that the tenants moved in knowing about the “rezoning litigation.” LBH refers to WHEDA’s (Wisconsin Housing and Economic Development Authority) involvement in support of its claim that there is an interest in providing affordable housing. However, the trial court found that WHEDA’s approval is conditioned on compliance with local codes. LBH claims that they could not wait for the litigation to be resolved because of WHEDA’s award of tax credits, that they had to build immediately or lose the tax credits. However, LBH failed to meet the deadline, and still secured tax credits for the project, so its an incorrect contention.

Other equitable determinations made by the court included: abatement would not cause unnecessary hardships. LBH’s violations were not minor; the City’s gain outweighs LBH’s loss; an abatement order would result in non-economic gain to the City (vigilant protection of shoreland, more green space, etc.); and the only remedy available was an abatement order. The trial court’s findings are not clearly erroneous and its ruling is reasonable.

In conclusion, the Wisconsin Court of Appeals found that the trial court properly engaged in equitable analysis under *Goode*. It emphasized that it is only in a rare case when “compelling equitable reasons” exist that the requested abatement order should not be issued. Ultimately, it was LBH’s business decision that caused the unfortunate financial loss. Broadly, municipalities have a right to enforce their zoning laws. The City has a legal right and duty to secure compliance with its zoning classification.

— Richard A. Lehmann

SPEAKERS FORUM

September 11, 2001

Strengthening the “Smart Growth” Program WAPA 2001
Green Lake, WI — Richard A. Lehmann

October 4, 2001

Planning Legislation in Wisconsin, Upper Midwest Regional
American Planning Association Conference
Rock Island, IL — Richard A. Lehmann

October 9, 2001

401(k) Plans Employee Benefits Institute of America
Columbus, OH — Cynthia A. Van Bogaert

October 20, 2001

Legal Rights and Responsibilities

APPA Workshop on Governing in A Competitive Marketplace
Savannah, GA — Michael P. May

November 6, 2001

401(k) Plans Employee Benefits Institute of America
Minneapolis, MN — Cynthia A. Van Bogaert

Municipal Regulation of Political Signage Upheld

In an unpublished decision, the Wisconsin Court of Appeals (District IV) upheld Beloit's regulation of signage. *City of Beloit v. Veneman*, 2001 WL 722129 (Appeal No. 00-3487, June 28, 2001).

Veneman appealed judgments of conviction for placing signs in a public way in violation of Beloit Ordinance §30.16. The City of Beloit issued her citations after she put approximately 500 blank yellow ribbons (measuring eight feet long) on utility poles (or other poles) throughout the city. Her avowed purpose was to generate political awareness and support for troops then engaged in a foreign military action. After a municipal court found her guilty of violating the ordinance, she requested a jury trial in the circuit court. The circuit court granted the City's motion for summary judgment, concluding there were no disputed issues of fact, the ribbons were an "animated sign" as defined in Beloit Ordinance §30.03(1), and she had not presented evidence of selective enforcement or viewpoint discrimination.

On appeal Veneman asserted that the yellow ribbons were not signs within the meaning of the ordinance and that summary judgment was not appropriate because the facts on the record presented were sufficient to entitle her a trial on the issues of selective enforcement and viewpoint discrimination.

As to the first issue, the Court found that Veneman failed to identify any factual disputes that exist with respect to whether the yellow ribbons are "signs" under this definition of the ordinance. The application of an ordinance to a set of undisputed facts is a question of law. Under *de novo* review, the Court rejected all of Veneman's arguments and found: (1) no indication in the ordinance that an object is not a sign unless it has a "sign face," (2) the plain language of the definition of "sign" does not require that the viewers have any particular understanding of the subject matter of the sign, and (3) the Court found the definition of "sign" ambiguous, and found support for a broad definition, sufficiently broad to include Veneman's yellow ribbons.

Veneman also contends the City's interrogatory response that "no one other than this defendant has been cited between 1992 and the present for illegally posted signs" is sufficient to create a triable issue of fact. The Court held that it is not. "Evidence that a municipality has enforced an ordinance in one instance and not others would not itself establish a violation of the equal protection clause." *Village of Menomonee Falls v. Michelson*, 104 Wis.2d 137, 311 N.W.2d 658 (Ct. App. 1981). Veneman presented no evidence creating a reasonable inference that others have violated the ordinance by similar conduct and have not been prosecuted. For the same reason, the Court rejected Veneman's argument that the circuit court erred in concluding she was not entitled to a trial on her defense that she was the subject of viewpoint discrimination.

— Richard A. Lehmann

Washington Court Finds E-mail Exchanges May Violate Open Meeting Law

The state of Washington has joined other states in finding that e-mail exchanges may constitute a "meeting" subject to the state's open meetings law. *Battle Ground School District v. Wood* (Wash. App. Case No. 25332-1-II, July 27, 2001).

Wood was an employee of the Battle Ground School District. After being criticized by the newly-elected chair of the school board, Wood's contract was not renewed. Wood brought an action for defamation and violation of the Washington Open Public Meetings Act (OPMA).

The Court had to determine whether a series of e-mails between members of the school board constituted a "meeting" under the OPMA. The e-mails were sent by the newly-elected chair of the school board to all of the school board members, a number of whom then responded. At one point, one of the members asked to be removed from any further e-mail discussions, being concerned that the messages constituted a "meeting."

The Washington court noted that some state laws specifically refer to convening by "electronic means," but Washington's law does not contain any explicit reference. Nonetheless, the Court found that the exchange of these e-mails could constitute a meeting, and reversed a summary judgment in favor of the school board. The Court said:

[The] e-mail discussions involved a quorum of the five-member Board. . . . Further, these discussions related to Board business . . . and the active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business.

The Wisconsin open meeting law does not explicitly refer to meeting by electronic means, but the Attorney General has opined that telephonic conference calls constitute meetings subject to the Wisconsin open meeting law. 69 O.A.G. 143 (1980).

— Michael P. May

Public Service Commission Approves Wausau-Duluth Transmission Line

In a special meeting held August 17, 2001, the Public Service Commission of Wisconsin (PSCW) approved the proposed Wausau-Duluth transmission line. The vote was 3-0 on approval of the line.

The new 345 kV line runs from Arrowhead near Duluth, Minnesota to Weston near Wausau. Currently, Wisconsin has only one high voltage transmission line linking it to states to the west. The line had been opposed by a group of landowners in the area. Those landowners have indicated that they will likely appeal the final decision by the Public Service Commission to the Wisconsin courts. Business groups, municipal electric utilities and electric cooperatives supported the need for a new line to the west.

In approving the line, the Commission indicated that the need for a transmission upgrade and additional access to the west had been demonstrated in the record, and that this need could not be met solely by conservation or additional generation construction within the state.

— Michael P. May

MUNICIPAL LAW NEWSLETTER

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