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Condemnation: Supreme Court Fractures on Requirements For Taking Possession of Acquired Property

The aftershocks of the *Kelo* earthquake in the field of condemnation law continue to be felt well beyond the confines of that case. In a decision sure to engender substantial further litigation and potentially legislative activity, the Wisconsin Supreme Court fractured in interpreting a condemnor's obligations under Wisconsin law before taking possession of property it has acquired. See *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93.

The property was rented by CC Midwest, Inc., which was one of a number of subsidiaries owned by a holding company in Michigan and making up a network of trucking facilities. CC Midwest was in the LTL or “less than truckload” business. It would collect small freight shipments from local customers, sort them by destination, and then reload them into full semi-truck loads for more efficient shipment. CC Midwest's operation took up only about 3.2 acres of the property it rented. In addition to a paved area, its facility consisted of a single metal building with 20 loading docks located across from one another.

The case began with Janesville's condemnation of an approximately nine acre parcel for purposes of a road realignment project. In a

separate proceeding, the owner of the property—another wholly-owned subsidiary of the Michigan holding company—sued Janesville challenging the amount of compensation paid for the property. A jury found that Janesville had paid more than the fair market price for the property and the city obtained a judgment for a return of a portion of the award it had paid.

After acquiring the property, Janesville sought to take possession, but the tenant, CC Midwest, refused to vacate on grounds that the city had not fulfilled its obligation to “make available a comparable replacement property” under section 32.05(8)(c), Stats. Under state law, even after acquiring title to property by condemnation, the government is required to provide certain benefits before an occupant can be required to vacate the property. This includes a minimum of 90 days notice of the date the government intends to occupy the property, 30 days free rent, restrictions on rental charges thereafter, and making available a “comparable replacement property.”

In *City of Racine v. Bassinger*, 163 Wis.2d 1029 (Ct. App. 1991), the court of appeals held that the “comparable replacement property” clause in section 32.05(8) did not create new substantive rights for the

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occupant, but rather was meant to incorporate the relocation assistance benefits set out under section 32.19, Stats. Building on the *Bassinger* rationale, the court of appeals came up with a three-part test for meeting the “comparable replacement property” requirement where no identical business was available on the market at the time that the condemnor sought to take possession of property it had acquired. See *Dotty Dumpling’s Dowry v. Community Development*, 2002 WI App 200, 257 Wis.2d 377. In *Dotty*, the CDA had acquired a restaurant property for roughly \$500,000. The restaurant expressed some interest in a replacement location identified by the CDA, but it was estimated to cost an additional \$1 million to renovate the location to make it suitable to reopen the restaurant. *Dotty* refused to move unless the CDA made the renovations at its expense or paid it the additional sum. The court specifically rejected *Dotty*’s argument as unreasonable because it would render superfluous the statutory caps on replacement business payments. The court of appeals held that the CDA had satisfied its obligation to make available a comparable replacement property when it: (a) identified potential replacement properties, (b) obtained cost estimates for renovations for properties in which the condemnee expressed interest, and (c) tendered the maximum replacement business payment.

The *CC Midwest* case presented a situation very similar to *Dotty*. No trucking facility identical to *CC Midwest*’s was available at the time *Janesville* required possession of its property. *Janesville* identified a number of potential replacements, ranging from other trucking facilities in *Janesville* to vacant parcels with the correct zoning, size, and other attributes suitable for construction of a facility. *CC Midwest* rejected each site out of hand, so *Janesville* did not obtain cost estimates for any of them. *Janesville* then tendered the maximum business replacement payment and sought a writ of assistance to obtain possession of the property. The circuit court, applying *Dotty*, granted summary judgment to *Janesville*.

The court of appeals reversed, adopting the very arguments it had rejected in *Dotty*. The court gave a literal interpretation to the “comparable replacement property” clause in section 32.05(8), without consideration of the impact it had in rendering the legislative cap on business replacement payments

meaningless. While claiming to distinguish *Dotty* on the facts, in effect, the court of appeals reversed the *Dotty* decision.

The supreme court, in turn, reversed the court of appeals and reinstated summary judgment for *Janesville*. However, the rationale falls somewhere between the court of appeals decisions in *Dotty* and *CC Midwest*. There is a lead opinion, authored by Justice Roggensack, two concurring decisions, and two dissenting opinions, making it somewhat complicated to determine the holding.

The lead opinion applies section 32.05(8), Stats., without regard to the statutory caps on replacement business payments. However, Justice Roggensack emphasizes that the definition of “comparable replacement business” set out in section 32.19(2)(c) does not require that a replacement property be identical to the existing business. The statute provides that it need only be “adequate for the needs,” “reasonably similar” in characteristics, “functionally equivalent,” and within “reasonable proximity” of the business being replaced. On that basis, she concludes that at least one of the properties identified by *Janesville* was a comparable replacement property. Justice Crooks joined the lead opinion, and Justices Bradley and Abrahamson concurred in this rationale. Justice Bradley wrote separately to object to the discussion of constitutional issues of just compensation in the lead opinion. She noted that *CC Midwest* had waived its constitutional arguments by not raising them before the supreme court.

Justice Wilcox issued a concurring opinion emphasizing that the mere identification of many locations, without regard to their suitability as replacement locations, or the identification of vacant land, did not satisfy the requirement to “make available” comparable replacement properties. Nevertheless, he agreed that one of the properties identified by *Janesville* was comparable. Justice Butler wrote a dissenting opinion concurring with Justice Wilcox’s opinion, except that, when applying the same standards as Justice Wilcox, he reached the opposite result and found that none of the properties identified by *Janesville* were comparable.

Justice Prosser wrote a lengthy dissent arguing that constitutional principles have evolved to the point where consequential damages, such as those incurred in relocating a business, must be paid as a part of “just compensation.” This proposition would overturn long established law under the Fifth Amendment and the

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Open Meetings Law Revisited

In last month's newsletter, we reported on an important Wisconsin Supreme Court decision interpreting the Wisconsin Open Meetings Law, *Buswell v. Tomah Area School District*. This month we look at a recent decision from the Court of Appeals which also explores when a municipal governing body can legally go into closed session. *Herro v. Village of McFarland, et. al.*, 2006 AP 1929 (June 2007).

The case involved on-going discussions between the Village of McFarland and the Town of Dunn regarding boundary issues. Both bodies eventually decided to form a joint committee to discuss those issues. That committee

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Wisconsin Constitution. He then calls for a "strict" reading of the "comparable replacement property" clause and castigates the majority as "simply not prepared to apply clear statutory language" and for "injecting ambiguous 'parameters' into the statutory scheme." This criticism is odd given that the "parameters" discussed in the lead opinion are the express statutory words. It appears to be Justice Prosser who is willing to disregard them. Justice Prosser also suggests several reasons why his "strict" reading of the statute would not prevent the condemnor from ever obtaining possession of its property, but his reasons appear divorced from reality.

Going forward, condemnors who anticipate difficult circumstances for relocating a business will need to be even more careful in preparing for and documenting its efforts and its contacts with the business, and to plan for additional time to obtain possession of the property. It will be important, not only to ask the business about what it considers to be essential requirements for a replacement property, but to assess whether its claims are borne out by the actual characteristics of the existing property and its use. It will also be important to document the business' cooperation or lack thereof in developing a replacement location and to prepare to prove that a location is an adequate replacement regardless of the business' lack of cooperation. Janesville succeeded in this case because of its professional approach to identifying and assessing relocation sites when the business chose to sit back, reject all proposed sites, and try to delay its relocation to create leverage to negotiate an unwarranted premium.

The City of Janesville was represented by the Boardman Law Firm.

— Mark J. Steichen

was comprised of members appointed by each governmental body. The joint committee met a number of times and eventually came up with a proposal to be submitted to the Village and Township for approval of a boundary agreement between the two municipalities. Both the Village and the Township held public hearings on the proposed agreement and the proposed agreement was amended in several respects. Both bodies approved the boundary agreement in properly noticed public meetings.

A developer with an interest which was impacted by the boundary agreement sought to have the agreement voided because of alleged violations of the Open Meetings Law by the joint committee. Specifically, the developer alleged that certain meetings held by the joint committee in closed session were illegal.

During discussions about a potential boundary agreement, the Township representatives requested that portions of the meeting be held in closed session because those discussions dealt with an area of land which the Township was seeking to purchase. The Township was concerned that, if the land owners became aware that the affected parcel of land was going to be transferred to the Village, the landowners would have discussions with the Village instead of the Township. This parcel of land was ultimately transferred to the Village as part of the Village's agreement not to annex part of the developer's land in the Township.

The committee meetings were closed during these discussions under the Open Meetings exemption that permits closed sessions for the "purpose of deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." The municipalities argued that the discussions concerning the Township's desire to purchase the parcel of land clearly fell within this exception.

The developer countered that the reason for going into closed session under this exemption must apply to each governmental body involved in the joint committee. He argued that, since the purchase of the land was only relevant to the Township, the competitive bargaining or negotiation rationale for the closed session was not relevant to the entire committee. The court of appeals rejected this argument. First, it held that, if members of the joint committee vote to go into closed session, the rationale for requesting the vote becomes the reason for the entire committee. Second, the court noted that members of the committee have an obligation to act in the interests of all the municipalities involved in the joint committee, not just

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their appointing municipality. Finally, the court found that the Township could never protect its bargaining interest if it was not allowed to go into closed session; it would be forced to abandon or impair its discussions with the land owners or decline to participate in the joint committee.

The developer also argued that the approval of the Village and Township boards was void since it was based upon a recommendation developed in violation of the Open Meetings law. This argument was based upon case law which suggests that when a governmental body debates an issues in an improper closed session and then returns to open session to approve the matter discussed in that session, the governmental decision is voidable.

The court noted that, in the first place, the joint committee closed sessions did not violate the statute. It further commented, however, that, even if there was an issue of the legality of the the closed sessions, the facts of those prior cases were different than the ones here. In this case, the matter debated in closed session did not result in an immediate vote after returning from closed session. Rather, the approved recommendation was sent to the two governmental bodies, which then held public hearings, modified the agreement and then voted in open session.

The court emphasized that violations of the Open Meetings Law do not automatically void the governmental action taken at the meeting. Rather, a court must balance a number of factors. In this case, even if there were questions about the legality of the closed committee sessions, the fact that the recommended agreement which came from those meetings was not required to be approved by the Village and Township and was subject to significant public notice and debate, was sufficient to overcome the State's policy interest in assuring that governmental meetings as a general rule be held in a public forum.

The decision offers a well thought-out approach to boundary issues which frequently arise between adjacent municipalities and how the concerns of one of the municipalities can be protected by a closed meeting even though the other municipality may not share that interest. The decision also shows that courts will consider practical issues faced by municipalities in dealing with open meetings when the courts are satisfied that the approval process ultimately includes ample notice and opportunity for public input and scrutiny.

— Steve Zach

DNR Urges New Berlin To Begin Negotiations To Purchase Lake Michigan Water

On July 13, 2007, the Wisconsin Department of Natural Resources officially encouraged the City of New Berlin to begin discussions with potential water suppliers for Lake Michigan water. A portion of New Berlin (located east of the Great Lakes divide) is currently served with Lake Michigan water while the rest of the City (located west of the divide) is served by groundwater. The City's groundwater contains elevated levels of radium and the City has been seeking an alternative water supply source to replace its groundwater. Its efforts, however, have been caught in the middle of heated rhetoric regarding water diversions and the proposed Great Lakes Compact.

Under current law, there are questions about whether the western part of New Berlin can use Lake Michigan water without the approval of the other Great Lakes Governors. Under the proposed Great Lakes Compact, however, New Berlin's use of Lake Michigan water could be approved by Wisconsin alone if the requirements of the Compact are met. In its July 13 letter, the DNR stated that it believed that those standards would be met. We "firmly believe that this application meets the standards of the Great Lakes Compact—even though those standards are not yet law. In fact, the application and process went well beyond what is envisioned for communities like New Berlin under the Compact. You are to be commended for your excellent effort." The DNR also importantly indicated that "If a Lake Michigan source can be secured your application [which provided all water would be returned to the Lake Michigan basin] clearly demonstrates that there will be NO adverse impact whatsoever on the water quantity in Lake Michigan and the water quality of Lake Michigan water will be improved."

However, while the DNR encouraged New Berlin to negotiate to purchase Lake Michigan water, it was careful to provide that any purchase would be subject to the DNR's final review and approval. In a final word of caution - and perhaps urging to others—the DNR indicated that its final review of an agreement to purchase Lake Michigan water will be heavily influenced by the status of the state legislation in Wisconsin to ratify the Great Lakes Compact. "If the Compact is law in Wisconsin by the time New Berlin reaches an agreement with a water provider, the path to the completion of the final review will be much easier to walk."

— Lawrie Kobza

City Cannot Indirectly Require Sewer Hook-up Under Extraterritorial Plat Review Authority By Minimum Lot Size

The court of appeals has further defined the scope of extraterritorial plat review in a recent published decision. *Town of Delton v. Liston*, 2007 WI App 111, ____ Wis. 2d ____, ____ N.W.2d ____.

Chapter 236, Stats., governs the subdivision of land. Sections 236.02(5) and 236.45(3), Stats. authorize cities to regulate the subdivision of land within three miles of their borders, which is known as extraterritorial plat review. Chapter 236 provides the same authority to villages, but only for land within 1½ miles of their borders. However, with respect to the installation of public improvements, section 236.13(2)(a), Stats., empowers only the town or municipality within which the subdivision is located to require the installation of public improvements. In *Rice v. City of Oshkosh*, 148 Wis. 2d 78, 81, 435 N.W.2d 252 (1989), the supreme court read the various sections together in concluding that municipalities may not use their extraterritorial plat review to require the installation of public improvements as a condition of approval of land subdivision in another political subdivision.

The City of Baraboo adopted an ordinance setting a minimum lot size of 20 acres per dwelling unit for residential purposes unless the parcel is served by a public sanitary sewer system. The Ritzenthalers owned a 40-acre parcel of land in the neighboring Town of Delton. They wished to create a new subdivision, Poplar Meadows, comprising 21 residential units on lots one to two acres in size. The proposed subdivision would not be served by sanitary sewer service. When they learned of the city's extraterritorial jurisdiction, the Ritzenthalers first applied to the city for a variance. The city council approved the variance, but the mayor vetoed it. The Ritzenthalers then submitted their preliminary plat to the city plan commission for approval. The plan commission rejected the plat on the grounds that it violated the city's ordinance on minimum lot size for unsewered subdivisions. The Ritzenthalers, the Town of Delton, and Poplar Meadows, LLC, then brought a lawsuit seeking a declaratory judgment that the city ordinance was invalid as applied extraterritorially.

The dispute on appeal centered on whether the city's ordinance was best characterized as a regulation of lot size within the city's extraterritorial plat review authority, or as a requirement for installation of public improvements as a condition to approval of lots smaller than twenty acres. The circuit court concluded that the ordinance conflicted with section 236.13(2)(a), Stats., by effectively prohibiting lots smaller than twenty acres unless the developer obtained sanitary sewer service. The court of appeals agreed and found that the city's position established no meaningful distinction from the circumstances in *Rice*.

— Mark J. Steichen

State Supreme Court Upholds "Political Corporation" Status of Statutory Authorities and Districts

The July issue of this newsletter reported on a then pending Wisconsin Supreme Court case where the issue was whether an Authority (the University of Wisconsin Hospital and Clinics Authority), created by a state statute that characterized the Authority as a "public body corporate and politic," is a "political corporation" for purposes of applying the tort claims procedures and recovery limitations of Wis. Stat. §893.80. The July newsletter article pointed out that several other Authorities and Districts at the state and sub-state levels of government had a stake in the outcome of the case since they are also characterized by their enabling legislation as "bodies corporate and politic."

The Supreme Court decided the case on July 6, 2007 in favor of the Authority, holding the Authority to be a "political corporation" fully covered by Wis. Stat. §893.80.

The July newsletter article also pointed out that the plaintiff-appellant argued to the Supreme Court that the \$50,000 limit on tort claim recovery under Wis. Stat. §893.80 was unconstitutional as applied to medical malpractice claims. The Supreme Court made no mention of this issue in its decision. The newsletter article pointed out that this issue had not been litigated in the Circuit Court or the Court of Appeals stages of the case.

The case is *Rouse v. Theda Clark Medical Center and the University of Wisconsin Hospital and Clinics Authority*, 2007 WI 87.

— Richard A. Lehmman

MUNICIPAL LAW NEWSLETTER

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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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