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SPEAKERS FORUM

January 18, 2005
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2006 Wisconsin MEUW & REC Joint Superintendents Conference
Rhonda R. Hazen

“Life Lease” Retirement Community Not Exempt from Property Taxes

The Dane County Circuit Court recently upheld the City of Madison’s determination that a nonprofit corporation is not entitled to a property tax exemption for a “life lease” retirement community that almost exclusively serves middle- and upper-income residents. *See Attic Angel Prairie Point, Inc. v. City of Madison*, Dane County Circuit Court Case No. 03CV1617, Order issued November 9, 2005. The corporation argued that its property qualified for exemption under the benevolent “retirement homes for the aged” provision of Wis. Stat. § 70.11(4). However, the court failed to see benevolence in the corporation’s endeavor.

Background

At issue was the “Prairie Point” complex developed by Attic Angel Prairie Point, Inc. (“AAPP”) commencing in 2000. The complex consists of single family and duplex homes designed with the needs of individuals age 55 and over in mind. Thus, the homes have features such as single story stepless entries, extra-wide doorways, easy-to-use fixtures and non-slip surfaces. However, there is no minimum age requirement for Prairie Point residents, and AAPP is not licensed to provide nursing support to them. Nevertheless, nearly all Prairie Point residents are over age 65.

AAPP offers its homes through a “life lease” payment structure, in which residents pay a mortgage-sized entrance fee when they sign up to live there, plus an ongoing monthly service fee. AAPP pledges to return 90% of the entrance fee when a resident leaves the facility. Entrance fees that Prairie Point residents have paid have ranged between \$230,000 and \$450,000.

One of the benefits of living at Prairie Point is its association with Attic Angel Place, Inc. Attic Angel Place, Inc. is a separate nonprofit corporation that operates a licensed skilled nursing facility and an assisted living facility. A Prairie Point resident who needs or wants to move to such a facility has priority, but not a guarantee, for space at Attic Angel Place.

In 2002 and 2003, AAPP sought property tax exemption for the 4.4 acres of Prairie Point that had been developed, based on ownership and use of the property “by a benevolent association for the benevolent purpose of providing retirement homes for the aged.” Madison denied the exemptions. AAPP paid the taxes on the property and then sued the city to get its money back. It also alleged that Madison violated the Uniformity Clause of the Wisconsin Constitution and the Equal Protection clause of the U.S. Constitution by denying an exemption to AAPP while granting it to other, similar properties.

Property Tax Exemption

To qualify for the “benevolent organization” property tax exemption in Wis. Stat. § 70.11(4), AAPP was required to show (1) that it was a benevolent organization, (2) that it owned and exclusively used the property, and (3) that it used the property exclusively for benevolent purposes.

The dispute between Madison and AAPP centered on whether AAPP used its property for benevolent purposes. AAPP asserted that it did, because it used its property to provide “retirement homes for the aged,” as specified in Wis. Stat. § 70.11(4). However, Madison argued that such use, by itself, is not benevolence. Rather, benevolence must be shown in how such homes are

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operated. The Circuit Court agreed.

AAPP argued that even if it must separately demonstrate benevolent use of its property, it met this standard. It contended that its use of the property was benevolent because it was part of the Attic Angel "continuum of care for the elderly." However, the Circuit Court rejected this argument because AAPP did not provide nursing care to Prairie Point residents, and Prairie Point residents were not guaranteed admission to other Attic Angel facilities. Indeed, there was no guarantee that Prairie Point residents were even elderly, as there was no minimum age requirement.

The Court also concluded that Prairie Point was not otherwise used for benevolent purposes. It focused particularly on the "steep financial commitment" required to reside at Prairie Point. In view of the prices charged and the absence of direct nursing care, the court concluded:

AAPP's actual use of the Prairie Point development is to provide housing for moderate and upper-income people. This is a useful endeavor, but it is not benevolence. Ultimately, when one examines how AAPP uses the Prairie Point property, the difference between Prairie Point and a commercially-owned residential development becomes vanishingly small.

Because AAPP could not identify any public benefit its operations conferred, or any governmental burden its operations relieved, the court concluded that AAPP had failed to show that the Legislature had intended to reward it with a property tax exemption.

Constitutional Claims

The court declined to decide AAPP's constitutional claims. AAPP asserted that Madison violated the Uniformity Clause of the Wisconsin Constitution by denying an exemption to AAPP while granting it to other, similar retirement homes. It made much the same claim under the Equal Protection Clause of the U.S. Constitution.

In response, Madison acknowledged that the Prairie Point project received heightened scrutiny because it raised new issues for the assessor. However, Madison denied that it acted arbitrarily or singled out AAPP for taxation. It asserted that it plans to review all other currently exempt properties to determine whether they should retain their exemption.

The court could not resolve these issues on summary judgment. It found genuine factual disputes as to the similarity of the other retirement homes that AAPP cited to the Prairie Point development, the City assessor's method of analyzing Prairie Point, and the City's plans to evaluate other tax exempt properties.

Conclusion

As a circuit court ruling, the decision in this case has no precedential value. Nevertheless, it suggests other municipalities may enjoy similar success in denying exemption requests to what are, at base, market-rate housing developments unconvincingly cloaked in the mantle of "retirement homes for the aged." In tight municipal budget times, the court's ruling is a welcome development.

— Matt Weber

Tenants Lack Standing to Challenge Municipal Water and Sewer Rates

In *Zehner v. Village of Marshall*, Appeal No. 2004AP2789, decided December 8, 2005, the Wisconsin Court of Appeals concluded that tenants of a mobile home park lacked standing to challenge the water and sewer rates that the Village charged American Mobile Home, the owner of the park.

According to the tenants' complaint, the Village charged American Mobile Home for water and sewer service provided to the park based on the amount of wastewater discharged to the Village sewer system (outflow). The Village charged all other system users on the basis of the amount of water consumed (inflow). The Village implemented this charge system because it determined that, due to defective sewer pipes in the mobile home park, the park was responsible for significant groundwater infiltration into the sewer system. American paid approximately \$100,000 more per year in sewer and water charges than it would have paid had the Village based its charges on inflow.

Tenants of the mobile home park filed a declaratory judgment action against the Village, seeking a declaration that the Village's rates were unjust, unreasonable, and unfairly discriminatory, in violation of Wis. Stat. § 66.0821(5). To have standing to maintain such an action, the tenants were required to show that they had a "legally protectible interest in the controversy." The tenants argued they met this standard because their rent was higher due to the Village's charge system. They alleged that the Village's charge system cost the tenants of each mobile home approximately \$360 per year.

The Court of Appeals found this interest insufficient to confer standing on the tenants. A "legally protectible interest," the court noted, is one that is "within the zone of interests that a statute or constitutional provision, under which the claim is brought, seeks to protect." The court concluded that the tenants' interest failed to meet this standard.

The problem lay in the fact that, even if the tenants prevailed, there was no guarantee that American Mobile Home would reduce their rent. Accordingly, the court concluded that whether the suit would benefit the tenants was speculative. "A justiciable controversy requires the existence of present and fixed rights. A declaratory judgment will not determine hypothetical or future rights."

The court went on to note that granting tenants standing to challenge sewer and water rates under these circumstances would open the door to other challenges, such as tenants in an apartment building having standing to challenge the building's property tax assessment, on the theory that the amount the landlord paid in taxes affected the tenants' rent. The court observed, "We think it apparent that a more direct connection is required to confer standing."

The decision in this case might have been different had each of the mobile homes been individually metered and charges levied on that basis. Under such circumstances, the tenants could have shown a direct impact on their interests from the Village's charge system. Accordingly, municipalities should not conclude from this case that tenants never have standing to challenge municipal water and sewer rates.

The Court of Appeals' decision will be published in the official reports.

— Matt Weber

No Bad Faith in Village Policy of Returning Shoplifted Items to Store

A woman stole hair ties from a grocery store. Store security officers saw her do it. When they confronted her, she confessed to doing it, both orally and in writing. When she emptied the contents of her purse for the officers, hair ties were among its contents.

The woman subsequently confessed the theft to a Village of Plover police officer. Consistent with Village policy, the officer took a photograph of the hair ties and then returned them to the store. The store, in turn, threw them away because the thief had opened the package and used two of the ties.

The Village charged the woman under its shoplifting ordinance, seeking a civil forfeiture. Not surprisingly, the jury found her guilty. Nevertheless, the circuit court vacated the verdict and dismissed the action.

It did so as a sanction against the Village for destroying evidence—the hair ties. The court found that the hair ties were “potentially exculpatory” evidence. Under the standard applicable to criminal prosecutions, a due process violation occurs if the prosecution acts in bad faith when it destroys such evidence. The court concluded that the Village policy of routinely not preserving shoplifting evidence is, by itself, bad faith.

The Village appealed. It argued that the court had applied the wrong standard. Inasmuch as the shoplifting charge involved only a civil sanction, the Village asserted that the civil action standard for the destruction of potentially exculpatory evidence should apply. That standard requires a finding of egregious conduct in the destruction of such evidence in order to support a claim of a due process violation.

The Court of Appeals reversed. It declined to decide whether the civil or criminal action standard for destruction of evidence applies to civil forfeiture actions. It found that even if the criminal, “bad faith” standard applied, it had not been met. “Bad faith” requires a showing that the actors involved knew of the potentially exculpatory nature of the evidence and, in destroying it, acted with official animus or made a conscious effort to suppress the evidence. The court explained:

Here, the policy of returning stolen items to the owner in shoplifting cases apparently derives from Wis. Stat. § 943.50(3m), which provides that authenticated photographs of shoplifted merchandise may be used as evidence in lieu of producing the merchandise. A neutral Village policy of general application, deriving from this statute, does not establish official animus, or a conscious effort to suppress exculpatory evidence.

The case was *Village of Plover v. Binagi*, Appeal No. 2005AP135, decided December 8, 2005. The Court of Appeals’ decision will not be published.

— Matt Weber

Lower Burden of Proof Now Applies in State Court Excessive Force Claims

The use of excessive force by police and corrections officers may violate an individual’s constitutional rights under the 4th and 14th or 8th and 14th Amendments (whether the 4th or the 8th Amendment applies depends on whether the force is pre- or post-conviction). The individual has a remedy for violations of constitutional rights through the federal Civil Rights Act, 42 U.S.C. § 1983. Section 1983 claims can be brought in state or federal court.

In a recent case, the Wisconsin Supreme Court held that the appropriate burden of proof in excessive force cases is the usual “preponderance of the evidence” civil standard, rather than the middle “clear and convincing evidence” standard. *Shaw v. Leatherberry*, 2005 WI 163 (Dec. 6, 2005).

Shaw was a victim of a hit-and-run accident on the Capitol Square in Madison. She was arrested after pursuing the other driver at high speeds and eventually ramming the other car in a parking lot. While being booked into the county jail that night, her answers to intake questions led the booking deputy to conclude that she might be a suicide risk. She was escorted to a segregation cell and ordered to remove her clothing to prevent her from using it to choke herself. Accounts differ, but Shaw denies that she was given the opportunity to do so voluntarily in the presence of only a female officer. She claims that she was thrown across a cement block bunk and that the booking deputy put his knee in the back of her neck and jerked her handcuffed hands up forcefully.

Shaw brought an action in state court against the three deputies involved in the incident. The case was tried to a jury. The court used standard civil jury instruction 2155 applicable to excessive force cases, but also used the middle burden of proof found in standard civil jury instruction 205. Initially, the jury reported that it was deadlocked on the question relating to one deputy’s liability. However, after further deliberation, the jury returned a verdict of 11-1 in favor of two deputies (including the one on which it had initially deadlocked) and 10-2 in favor of the third deputy.

In deciding which standard of proof applies, the supreme court noted that there is no controlling federal precedent establishing the burden to be used in excessive force cases. Nevertheless, the federal courts routinely apply the lower standard in section 1983 cases. The court acknowledged U.S. Supreme Court precedents applying the middle burden of proof “where particularly important individual interests are at stake,” but also recognized that the lowest burden is used in civil cases where the stakes are very high.

Ultimately, the supreme court concluded that the lower standard of proof would have been applied had the case been brought in federal court. Next, the court found that the burden of proof is a substantive factor, making federal law determinative under the Supremacy Clause of the Constitution. The court also held that the burden of proof is outcome determinative and that federal law preempts state law, since applying different standards in federal and state court would “disrupt the federal interest in uniformity.”

The author of this article filed an amicus curiae brief on behalf of the Civil Trial Counsel of Wisconsin.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

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