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Impact Fee Collected for “Aquatic Center” Can Pay for “Spray Ground”

Since 1995, municipalities have been subject to statutory procedures and limits in enacting impact fees. The court of appeals has recently provided important new guidance to municipalities for applying the impact fee statute, section 66.0617, Stats. *Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*, App. No. 2004AP1433 (Ct. App. April 13, 2005).

In 1992, the Village of Germantown conducted a preliminary assessment of potential impact fees to pay for capital expenditures for recreational facilities needed to accommodate a rapidly growing population. Around the same time, Germantown’s Swimming Pool Ad Hoc Advisory Committee started exploring issues relating to construction of an aquatic facility. The committee focused on the idea of a public outdoor swimming pool. In 1995, the Village completed a park and recreation needs assessment (“NA”). The NA estimated that an “Aquatic Center/Youth Center” would have a useful life of 25 years and that the Village’s population would increase 41.35 percent during that time. It also estimated that the cost of a such a facility would be \$1.8 million. Based on those estimates, the NA concluded that the total park and recreation impact fee came to \$613 per new

residential unit, of which \$189 was attributable to the Aquatic Center/Youth Center. The Village subsequently adopted an ordinance imposing the recommended park and recreation impact fee.

In 1998, the Village asked the voters to decide whether it should build a swimming pool/aquatic center whose cost had now grown to \$2.7 million. The referendum was defeated. A year later, a referendum on the same issue failed. In 2002, having collected over \$100,000 in impact fees for the Aquatic Center/Youth Center, the Village began exploring other options for the facility. It then proposed a “spray ground,” a playground with giant sprinklers, but no standing water. The facility would have a water and chlorination system similar to that used in a traditional pool, but would apparently cost only about \$150,000. The Village adopted the proposal and extended by two years the seven-year time limit on using the impact fees that was included in the original ordinance.

The builder’s association brought suit challenging the Village’s authority to apply the impact fees to the spray ground and asking that the funds already collected be returned to the current owners of affected lots. The Village objected to the association’s standing and the decision addresses the standing

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issue at length. The court found that the association had standing because some of its members were affected by the operation of the Village's ordinance.

In addressing the merits, the court looked to the language of the Village ordinance and the impact fee statute. The court found the ordinance ambiguous, because it did not expressly state the nature of the recreational facilities to be constructed using the impact fees. Looking beyond the four corners of the ordinance, the court then found that the Village Board had intended to incorporate the NA. Scrutinizing the NA, the court noted that it called for a particular type of recreational facility, i.e., an "Aquatic Center/Youth Center," but did not limit such a center to an outdoor swimming pool. The court rejected the association's reliance on the Ad Hoc Committee's work as establishing that the impact fees were intended to go only toward a swimming pool, because the express language of the NA was broader than the scope of the committee's work on a swimming pool proposal. The court then went on to find that the ordinance, as interpreted, did not violate the impact fee statute, because the statute requires only that the municipality specify the "type" of facility to be constructed and provide an "estimate" of the cost. The court observed that such flexibility was a sensible and important means of dealing with practical problems that arise in planning for public facilities.

The court of appeals also rejected the association's argument that the Village was required to prepare a new NA in order to apply the impact fees to a spray ground rather than a traditional swimming pool. The court found that the spray ground was not a change in the type of facility being built. Moreover, the court held that the rejection of the referendum did not mean that there was no need for additional recreational facilities, including an aquatic center. The court reasoned that the public might have simply rejected the greatly increased cost of a swimming pool versus other facilities.

Finally, the court did limit the Village to applying impact fees toward only 41.35 percent of the cost of the spray ground -- the amount attributable to the impact of new residential development over the expected life of the facility. Any funds collected in excess of that amount would have to be refunded to the current owners of affected lots. The court also rejected the Village's attempt to extend the impact fee retention period by two years in case the Village proposed additional aquatic facilities. The court based its decision on the fact that the NA contemplated only a single Aquatic Center/Youth Center, not multiple centers.

The *Germantown* case emphasizes the importance of careful drafting of impact fee ordinances and needs assessment reports to ensure that a municipality has the needed flexibility to make changes in facilities as warranted by events.

— Mark J. Steichen

Court Upholds Municipal Authority to Set Minimum Wage

On April 21, 2005, Dane County Circuit Court Judge Maryann Sumi ruled that Wisconsin municipalities have the power to independently establish their own minimum wages. The closely-watched case arose when, on March 30, 2004, the City of Madison passed an ordinance establishing a minimum wage for all employees working within the City's limits. Pursuant to the ordinance, effective January 1, 2005, employers in Madison must pay \$5.70 per hour (\$2.33 for tipped employees), with graduated annual increases to \$7.75 per hour on January 1, 2008. The Main Street Coalition for Economic Growth, Inc., (the "Coalition") challenged the validity of the City's ordinance on grounds that the City lacks power to establish its own minimum wage.

Home Rule Authority. The City argued that it has authority to enact a minimum wage ordinance based on statutorily-granted home rule authority under Wis. Stat. §62.11(5), which states:

POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order for the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation,, and other necessary or convenient means. **The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.** (Emphasis added).

Section 62.11(5), which was enacted in 1921, reversed the long-standing "Dillon's Rule" principle that municipalities have only those powers that are expressly granted, fairly implied or indispensable to municipal function. Statutory home rule allows municipalities to exercise wide discretion in enacting ordinances necessary to the peace and order of the city.

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Moreover, municipalities may pass ordinances that touch on matters of both local and statewide concern. The Coalition argued that the City's ordinance exceeded the City's authority because the State of Wisconsin, through its own comprehensive regulatory wage program, has preempted local authority to enact local minimum wages. In other words, the State had withdrawn local authority to pass a minimum wage ordinance.

Four-part Test. In order to determine whether the legislature had withdrawn local authority in regard to minimum wages, Judge Sumi applied the four-part test established in previous Wisconsin cases. The test asks:

- 1) whether the legislature has expressly withdrawn the power of municipalities to act;
- 2) whether the ordinance logically conflicts with the state legislation;
- 3) whether the ordinance defeats the purpose of the state legislation; and
- 4) whether the ordinance goes against the spirit of the state legislation.

If any of these questions are answered affirmatively, the local ordinance is void.

Express Legislative Withdrawal. Relying on *U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 544 N.W.2d 589 (Ct. App. 1996), the Coalition argued that the Legislature had withdrawn local authority on the issue of minimum wages through its statutory wage regulation scheme. In *U.S. Oil*, the Wisconsin Court of Appeals ruled that the legislature had expressly withdrawn municipal power to adopt regulation of underage tobacco sales. The statutes in effect at that time restricted the sale of tobacco to minors and prohibited the purchase of possession of cigarettes by minors. Each of these statutes stated that a municipal government may adopt an ordinance regulating underage tobacco sales, but only if the ordinance "strictly conforms to this section." The Court in *U.S. Oil* ruled that the statutes' "strict conformity" language must be read as withdrawing local power to act. Judge Sumi concluded that because there is no similar "strict conformity" language in the statutes dealing with wage regulation, there is no express withdrawal of municipal power to act in that area.

Logical Conflict with State Law. Judge Sumi next analyzed whether the challenged ordinance logically conflicted with state law. Previous courts have phrased the logical conflict test as whether municipal action and the state statute are "diametrically opposed." Pointing to the language of Wis. Stat. §104.02 which states that "[e]very wage paid ... shall be not less than a living-

wage," Judge Sumi concluded that there was no logical conflict between the state and local laws because an employer can simultaneously comply with both laws. This is not a case like *Wisconsin Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978), where state law required treatment of lake weeds while a local ordinance banned chemical treatment of lakes. Thus, Judge Sumi concluded that because Madison's ordinance in effect complements the State's minimum wage law, the ordinance passed this prong of the test.

Violation of Purpose and Spirit of State Law. The Coalition also argued that the City's ordinance was invalid on grounds that it violated the purpose and spirit of the state law, the third and fourth prongs of the test. The Coalition argued that the pervasive and comprehensive nature of the state statutory scheme of wage regulation indicates that state law is intended to block local regulation except where specifically recognized. In other words, Wisconsin's statutory wage regulation indicates that statewide uniform regulation of wages is of paramount concern, and thus, the legislature has removed local authority to act.

Judge Sumi rejected the argument, concluding that nothing in the Wisconsin wage statutes indicates that statewide uniformity is the paramount goal of the statutes. Other statutes that have been deemed to withdraw local power expressly state that the subject matter of the legislation, such as the sale of cigarettes, is a matter of "state-wide concern for the purpose of providing a uniform regulation of" the particular issue. By contrast, Judge Sumi stated that the language and history of the minimum wage statutes demonstrate that the purpose and spirit of statutes is to protect employees from substandard wages. As the Madison ordinance is more beneficial to workers than current state law, the ordinance cannot be deemed to go against the purpose of the state wage laws.

Finally, Judge Sumi rejected the Coalition's argument that the ordinance impermissibly extends beyond Madison's borders because employers outside Madison must abide by the ordinance for hours worked in Madison's city limits. Judge Sumi ruled that the ordinance properly regulates wages inside the City's limits and rejected the Coalitions's claim that the ordinance was "extraterritorial" in nature.

The Court's decision struck a victory for municipal home rule authority. We will keep you apprised of the status of this and other minimum wage initiatives.

— Jennifer S. Mirus

Another Ruling on Board of Adjustment Appeals of Conditional Use Decisions

The Wisconsin Court of Appeals has again visited the powers of a zoning board of adjustment to hear appeals of conditional use decisions made initially by the plan commission or the governing body. In *Magnolia Township and Western Rock County Citizens Against Factory Farming, et al., v. Town of Magnolia*, Appeal No. 2004AP1591, decided May 12, 2005, the court held that a town board of adjustment has no such power unless the town's zoning ordinance specifically confers it.

The case involved a dairy farm in the Town of Magnolia in Rock County, which needed a conditional use permit to build a 1,500 animal unit confinement facility. The Town Board denied the permit, following the recommendation of the Town plan commission.

The property owner appealed to the Town Board of Adjustment. The property owner suggested a compromise which resulted in the matter being sent back to the Town Board, which accepted a revision to 1,200 animal units and sent the file back to the Board of Adjustment, which gave the final blessing.

Opposing neighbors filed a court case that challenged whether the Board of Adjustment had jurisdiction even to hear the matter.

Two issues were then litigated. The first was whether the Board of Adjustment was deciding the case as a matter of initial jurisdiction, rather than on an appeal basis. The court noted that the statutes would allow the Town Board to say in its zoning ordinance that conditional uses are to be decided in the first instance by the Board of Adjustment. Wis. Stats. § 60.65(3).

However, the ordinance did not make this delegation. The Town Board then argued that it had made an ad hoc delegation by passing the matter back to the Board of Adjustment after the compromise surfaced.

The Court of Appeals rejected this argument, saying that a delegation of initial conditional use powers must be in the Ordinance and must be a blanket delegation. No such delegation was in the Ordinance.

Next, the issue became whether the Board of Adjustment had authority to hear the matter on appeal, from the initial denial decision of the Town Board and later from the Town Board's approval of the compromise plan.

Here the Court faced the long standing wording of the Statutes (here Wis. Stat. § 59.694(7) applied

to the Town by § 60.65(5)) that says that appeals are from any "decision or determination made by an administrative official in the enforcement of [the zoning ordinance]."

The court ruled that "administrative official" does not include the Town Board. The court said this decision is consistent with the 1990 case of *Town of Hudson v. Hudson Town Board of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990), where the court looked at the statutes and held that a local government cannot grant the board of adjustment powers beyond those in the statutes.

However, this approach differs from the case law established in *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887(1993), where the Supreme Court held that a conditional use decision by the county zoning committee was appealable to the board of adjustment. Nothing in the statutes suggest why an appeal to the board of adjustment should be available when the initial decision was by the plan commission, or equivalent (as in *League of Women Voters*), but not when the initial decision was by the local governing body (as in *Magnolia Township*).

Notably, the nature of the appeal hearing is at issue in *Osterhues v. Board of Adjustment*, 273 Wis. 2d 718, 680 N.W.2d 823 (Ct. App. 2004), which is currently on appeal to the Wisconsin Supreme Court. *Osterhues* is another case of a board of adjustment appeal of a conditional use decision by the zoning committee.

The Court of Appeals in *Magnolia Township* ultimately reversed the approval of the compromise plan by the Board of Adjustment. The decision has been recommended for publication.

— Richard A. Lehmann

SPEAKERS' FORUM

June 9, 2005

Community Broadband - Wisconsin Update
MEUW 76th Annual Conference, La Crosse, WI
Anita T. Gallucci

June 16, 2005

Stormwater Utilities: Overview and Update
League of WI Municipalities' Clerks, Treasurers & Finance
Officers Institute, La Crosse, WI
Lawrie J. Kobza

June 24, 2005

Municipal Authority to Charge Fees
League of WI Municipalities' Municipal Attorneys Institute
Elkhart Lake, WI
Lawrie J. Kobza

Anti-Trust Claim Against Voluntary Limits on "Drink Specials" Dismissed But on Appeal

On April 7, 2005, a Dane County Circuit Court dismissed an anti-trust action in a decision that could have implications for other municipalities seeking to control excessive drinking. *Nic J Eichenseer v. Madison-Dane Co Tavern League Inc et al*, Dane County Case No. 2004CV000923. The plaintiffs filed a notice of appeal on April 20, 2005.

In September 2002, a number of campus-area bars in Madison announced a voluntary ban on weekend drink specials. The announcement came after lengthy efforts by the City of Madison and U.W. - Madison to curb excessive drinking by students. Leading members of the city common council and Alcohol Review Commission had threatened to impose seven-day-a-week restrictions on drink specials if voluntary action was not taken. The U.W. also exerted pressure on bars in the campus-area to eliminate drink specials.

In March 2004, a class action lawsuit was filed in the name of one U.W.-Madison student against the Madison - Dane County Tavern League and twenty-four campus-area bars alleging a conspiracy to limit competition in violation of state and federal anti-trust laws. The lawsuit sought tens of millions of dollars in damages, including treble damages under the anti-trust laws. The plaintiff was represented by a Minneapolis, Minnesota law firm.

On April 7, 2005, the court granted summary judgment dismissing the complaint. The court found that municipalities' authority to regulate the sale of alcohol in furtherance of public health and safety and to place conditions on bars' licenses constitutes an implied repeal of the state anti-trust laws with respect to alcohol regulation. Given the threats by city officials to impose comprehensive restrictions on drink specials in the absence of voluntary action, the court characterized the voluntary ban as a political compromise that did not restrict competition.

The court of appeals will look at the case *de novo*, i.e., without deference to the trial court. We should know in about 18 months if such voluntary bans are legal.

— Mark J. Steichen

Annexation Issues Newly Addressed by Court of Appeals

A Wisconsin Court of Appeals decision that has been recommended for publication contains several rulings on heretofore undecided annexation questions, at least in published appellate cases.

The first issue concerns when a municipality in a county with a population of 50,000 or more must obtain and review an advisory opinion of the Wisconsin Department of Administration before adopting an annexation ordinance. The DOA opinion represents the Department's assessment of whether the proposed annexation is in the public interest. The court held that the DOA opinion is a prerequisite to majority consent annexations under Wis. Stats § 66.0217(3)(a), and annexations by referendum under § 66.0217(3)(b), but not to direct annexation by unanimous consent under § 66.0217(2). The reason is that the state review is triggered by the publication of a notice of intent to circulate an annexation petition. This notice is not used in unanimous consent annexations.

The second issue decided is whether one or more petitioning property owners can be left out of the annexation by having the annexation ordinance not include their property or properties. The court says yes. State law (Wis. Stats. § 66.0217(2)) does not allow petitioning parties to withdraw their signatures on the petition. However, the annexing municipality can exclude them from the annexation ordinance, either because they ask to be excluded or for any other reason.

The third issue of note decided in this Court of Appeals case is whether a municipality that exercises its extraterritorial subdivision review powers to deny platting of urban or suburban sized lots so long as the lands remained outside the municipality violates the rule of reason principle that annexations cannot be coerced by the annexing municipality. Here the Court of Appeals again says no, citing *Wood v. City of Madison*, 2003 WI 24, 260 Wis. 2d 71, 659 N.W.2d 31. The municipality does not abuse its discretion if it uses its extraterritorial plat review powers, even if the outcome is to create an incentive to annex.

The case is *Town of Baraboo v. Village of West Baraboo*, Appeal No. 2004 AP 980, decided April 28, 2005.

— Richard A. Lehmann

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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