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Legislature Bars Use of Condemnation For Purely Economic Development

The U.S. Supreme Court’s decision last June in *Kelo v. City of New London* created a firestorm of protest over property owners’ rights and the scope of the government’s power to use eminent domain for economic development. In *Kelo*, the City of New London had condemned a number of acres of residential and commercial property, assembled it into a larger parcel, and transferred it to private developers in an attempt to revitalize the city, which had been in a long-term economic decline. However, the city had not found that the properties being acquired were blighted.

In response to the public outcry, state legislators across the country introduced legislation to limit the power of eminent domain. In Wisconsin, roughly a half dozen proposals were introduced. On March 30, 2006, the legislature enacted one of the bills, 2005 Wis. Act 233. The Act creates section 32.02(6) of the statutes. The new provision prohibits the use of condemnation where the government intends to transfer or lease the condemned property to a private party, except where the property is blighted. The term “blighted” is defined to include a variety of conditions that make the property “detrimental to the public health, safety, or welfare.”

The definition is consistent with the use of the term “blight” in the housing (§66.1201), urban redevelopment (§66.1301), and blighted area (§66.1331) statutes. The Act also requires that—before commencing a condemnation of blighted property for transfer or lease to a third party—the condemnor must make written findings and provide them to the owner of the property. The findings must include the scope of the redevelopment project, a legal description of the redevelopment area that includes the owner’s property, the purpose of the condemnation, a finding that the owner’s property is blighted, and the reasons for the finding.

The Act appears to require that each property to be acquired for subsequent transfer or lease to a private entity must itself be blighted. This represents a change from the redevelopment statutes, which permit municipalities to define a blighted area as a whole. The definition of blight is sufficiently broad that the findings applicable to the area as a whole usually ought to be applicable to the properties within it, e.g. the crime rate, overcrowding and faulty lot layout. However, one can envision instances in which large numbers of buildings in an area are dilapidated and in need

New Law Increases Public Bidding Threshold

The threshold for public bidding requirements for cities, villages, towns, and town sanitary district commissions has been increased from \$15,000 to \$25,000, effective April 10, 2006.

Prior to April 10, 2006, before a contract for public construction with a value that exceeded \$5,000 but not \$15,000 could be let by a municipality (second, third, or fourth class city, or a village or town), the municipality's governing body had to give a class 1 notice of the proposed construction. Before a contract for public construction with a value that exceeded \$15,000 could be let by a municipality or town sanitary district commission, certain other requirements, such as a lowest responsible bidder requirement, had to be met. 2005 Act 202 increased the \$15,000 threshold applicable to public construction projects to \$25,000. This increased threshold is effective for all actions taken on or after April 10, 2006.

— *Lawrie J. Kobza*

Legislature Bars Use of Condemnation For Purely Economic Development

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of demolition, but where a few buildings remain in adequate condition. The interplay between these statutes may need to be interpreted by the courts. In preparing redevelopment plans, municipalities ought to prepare to defend the decision to acquire each parcel in the redevelopment area on an individual basis.

The Act sets out a specific rule for single family dwellings, which cannot be defined as "blighted" unless they meet at least one of two conditions. First, the property is not occupied by the owner, his or her spouse, or an individual related to the owner by blood, marriage, or adoption within the 4th degree of kinship as defined in section 990.001(16). Second, the crime rate "in, on, or adjacent to the property is at least 3 times the crime rate in the remainder of the municipality in which the property is located." The Act does not define the period of time within which the crime rate must be compared.

The Act became effective on April 13, 2006. It applies to projects in which the jurisdictional offer was made on or after that date.

— *Mark J. Steichen*

A Classic "Rock and a Hard Place" Dilemma Confronts the Wisconsin Supreme Court

In a case decided on January 10, 2006, the Wisconsin Supreme Court affirmed the power of courts to order remedies when welfare agencies holding sexually violent persons in civil confinement find it impossible to locate housing units within the community in which such persons can live under supervised release.

Typically, such placements are controversial in local communities and local regulatory hurdles are put in place. Welfare agencies and correctional agencies have limited powers to override local regulations.

In the case decided in January, a person in prison contended he was entitled to community release with supervision but had been held in confinement for approximately four years because suitable living arrangements were not found for him. He asked to be released and to be awarded damages.

In its decision, the Supreme Court first holds that the individual was not, in fact, eligible for release, with or without supervision, making the other issues moot.

Nonetheless, the Court goes on to observe that the proper remedy for an eligible person would have been for the circuit court to order the State Department of Health and Family Services to create appropriate housing facilities. The opinion does not explain whether such a judicial remedy would extend to ordering that facilities be exempted from local zoning.

A 2005 report of the Sexually Violent Persons Transitional Facility Siting Advisory Committee (advisory to the Secretaries of Health and Family Services and Corrections), dealing with Milwaukee County, suggested that a court might be empowered to direct the relevant state agency to build facilities.

In re Commitment of Schulpilus, 2006 WI 1, 707 N.W. 2d 495, aff'g 2004 WI App 39, 270 Wis. 2d 427, 658 N.W. 2d 369.

— *Richard A. Lehmann*

Court of Appeals Holds PSC Can Order Municipal Utility to Convey Its Utility Property to Another Utility

In a 2-1 decision, the Wisconsin Court of Appeals opined that the Public Service Commission has the authority to order a municipal water utility to transfer utility assets to another utility. *See City of Oak Creek v. Public Service Commission*, Appeal No. 2005AP741, decided March 21, 2006.

The case involves the provision of water service in a portion of the City of Franklin. Back in 1973 and 1979, Oak Creek agreed to provide retail water service to a portion of Franklin, provided Franklin built and conveyed the necessary water utility infrastructure to Oak Creek. Then, in 1994, Oak Creek agreed to provide the rest of Franklin with wholesale water service. The PSC approved all the water service agreements, and, in 1994, ordered that Oak Creek transfer its retail water service customers located in Franklin to Franklin within ten years.

Franklin contended that Oak Creek also had to transfer to it the water utility infrastructure needed to serve the customers located in Franklin. Oak Creek contended that it was not required to transfer the infrastructure to Franklin and that, if Franklin wanted the infrastructure, it would have to buy it. Franklin asked the PSC to consider the issue, and the PSC, in a 2-1 vote, sided with Franklin and ordered Oak Creek to transfer the utility infrastructure to Franklin for no compensation.

The Court of Appeals upheld the PSC's decision. While the Court of Appeals acknowledged that "there exists no four-cornered precedent for the PSC's final decision" to order Oak Creek to transfer its infrastructure assets to Franklin, the Court nevertheless allowed such action to effectuate PSC policy.

The PSC has a policy that utility infrastructure ought to be owned by the utility providing retail service. Under a strict application of this policy, however, if a customer's retail service provider changes, then ownership of the utility infrastructure needed to serve the customer must be transferred from the old retail service provider to the new one. The Court of Appeals' decision allows the

PSC to order that transfer, even though it impairs contracts and property rights of the transferor. In reaching this decision, the court focused on the PSC's superintending power over water utilities and principles of justice and fairness, rather than the PSC's statutory authority.

The Court of Appeals' decision is recommended for publication. It represents a significant departure from existing law and a great expansion of PSC authority. Under this decision, the PSC's power would not be limited to the specific statutes governing the PSC, as current law provides, but rather would be bounded only by the PSC's determination of "justice and fairness" in a particular case. This decision impacts all public utilities. If the Court of Appeals' decision stands, the PSC could order any public utility—electric, gas, or water, whether publicly owned or privately owned—to transfer its assets involuntarily to another utility in the interest of fairness.

—*Lawrie J. Kobza*

SPEAKERS' FORUM

May 5, 2006

Current PEG Issues

Wisconsin Association of PEG Access Channels (WAPC)

Spring Conference

Fitchburg, WI

Anita T. Gallucci

June 15, 2006

Compensation Issues in Eminent Domain Cases

Municipal Attorneys Institute

Sheboygan, WI

Mark J. Steichen

June 16, 2006

**Telecommunications Act Reform: Cable Franchising
Rights and Municipal Broadband Authority**

Municipal Attorneys Institute

Sheboygan, WI

Anita T. Gallucci

Failure To Seek Certiorari Review From Zoning Board Decision Precludes Collateral Attack

The court of appeals has reinforced the authority of zoning boards of appeal and clarified the interplay of zoning statutes in a recent decision recommended for publication. *Barber v. Weber*, 2005 AP 1196 (March 29, 2006, Dist. II). The Webers co-owned a family trucking repair and towing business and applied for permission to establish that business in Pewaukee. The Pewaukee Plan Commission decided that the business was a permitted use in the city's B-5 Highway Business District in which the property was located. The Barbers and others—who were apparently adjoining property owners or neighbors of the Webers—appealed the commission determination to the zoning board of appeals pursuant to section 66.23(7)(3)4, Stats. The board held a hearing and later issued a decision affirming the commission and “tacitly concluded that the proposed use did not require a conditional use permit.” The Webers waited for 30 days—the time allowed for a certiorari action to review decisions of a board of appeals under section 62.23(7)(e)10, Stats. When no action was filed, they applied for a building permit and began razing part of the existing building and constructing a new addition.

Seven months after the board of appeals decision and three months after the building permit issued, the Barbers filed a complaint under subsections 62.23(7)(f)2 and 62.23(8), Stats., asking the circuit court to declare that the Webers' proposed use of the property was unlawful and to enjoin their further use of the property. These sections permit “adjacent or neighboring property owners” who are “specially damaged” by zoning violations to bring enforcement actions against the offending property owner “in addition to other remedies.” The circuit court granted the Barbers' motion for summary judgment, concluding that, although the business was a permitted use under Pewaukee's zoning ordinance, it nevertheless required a conditional use permit and the use must be abated.

The Webers appealed, arguing that the Barbers' failure to seek review of the board of appeals decision precluded them from bringing a separate action to challenge the legality of their use. The Webers relied on a variety of theories, including

“deference” to the administrative order, exhaustion of remedies, laches, and estoppel. They raised the issue of *res judicata* before the circuit court and briefly raised the argument of claim preclusion on appeal. (The old names *res judicata* and collateral estoppel have been renamed claim preclusion and issue preclusion respectively. See *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550, 525 N.W.2d 723 (1995)). Despite the imprecision of the Webers' arguments, the court of appeals found that claim preclusion was the key theory and reversed the circuit court decision.

Claim preclusion has three elements:

- a. an identity of the parties or their “privies” between the prior and present proceedings,
- b. that the prior litigation resulted in a final judgment on the merits by a court with jurisdiction, and
- c. an identity of the causes of action in the two proceedings.

Since the Barbers were parties to the board of appeals proceeding, and since the issue of whether the truck repair business was a permitted use was the same in both proceedings, the court had no difficulty finding that the first and third elements of the test were met. With respect to the second element, the court noted that Wisconsin recognizes unreviewed agency decisions as final judgments for purposes of claim preclusion under certain circumstances. In order for claim preclusion to apply, the administrative agency must be acting in a judicial capacity and the parties must have an adequate opportunity to litigate.

The court found that the zoning board was acting in a judicial capacity when it heard an appeal from the plan commission decision. It also determined that the Barbers had adequate opportunity to litigate because they were represented by counsel at the board hearing, they were permitted to submit briefs, and they presented oral argument. It is not clear whether the board took evidence at the hearing or whether it relied on the record from the plan commission.

—Mark J. Steichen

In Wake of PSC Report, ATC Announces Plans to Build Paddock-Rockdale Line

In February 2005, the Public Service Commission (PSC) opened a docket to investigate an Access Study Initiative report that had been issued by the American Transmission Company (ATC). ATC's report proposed the construction of five extra high voltage transmission (EHV) projects and one lower voltage alternative. The PSC opened the investigative docket and requested comments on what would constitute a suitable amount of transfer capability in Wisconsin.

In September 2005, numerous stakeholders, including Municipal Electric Utilities of Wisconsin (MEUW), WPPI and most of the State's investor owned utilities, filed comments urging the PSC to affirm the conclusions in ATC's report regarding the benefits of independent EHV projects in Wisconsin. MEUW asked the Commission to regard ATC's report as a basis for encouraging ATC to move ahead on one or more of the proposed EHV projects. WPPI expressed concern about Wisconsin's transmission deficiencies, citing the economic benefit of greater transfer capability in and out of Wisconsin, the need for a valuable hedge against major grid disruptions, and enhanced access to renewable energy resources, such as wind power. WPPI's comments suggested that ATC's report justified at least two EHV projects.

On March 23, 2006, the PSC staff issued its final report, concluding that it did not have enough information to make a specific recommendation on construction of a new EHV line. The report emphasized that preference be given to EHV access projects that provide the greatest net ratepayer economic benefit and noted that the Commission has a responsibility to protect ratepayers by remaining vigilant against the risk of over-investment. However, the report did indicate that Wisconsin ratepayers could benefit from smaller scale projects.

Following this ruling, ATC decided to go ahead with the shortest and least expensive of the projects it had proposed in the original access initiative filing. Known as the Paddock-Rockdale line, the project is anticipated to cost \$80 million. The 35 mile, 345 -kV line would run between Wisconsin and

Illinois and should significantly lower congestion on Wisconsin utilities. The line is also expected to improve access to the wider Midwest Independent Transmission System Operator market. ATC says more access to this market should lower the cost of electricity in Wisconsin. The project should be completed and in service by April of 2010.

— Richard A. Heinemann

Retroactive Application of Amendment to Impact Fee Statute

2005 Wisconsin Act 203 took effect on April 11, 2006.

The Act mandates that impact fees imposed by local governments be used within 7 years of their payment or refunded to the then owner of the property against which the fee was imposed, unless the municipality extends the spending period for another 3 years due to extenuating circumstances or hardship conditions.

On its face, the new 7/10 year deadline appears to apply to fees that were collected before the new law took effect. That is, an impact fee under an impact fee ordinance that was collected, say in April of 2000, will need to be spent on the intended project or facility by April of 2007 or April of 2010 by extension.

Obviously, municipalities need to review the dates on which unspent fees were collected and keep track of the new statutory deadlines.

— Richard A. Lehmann

MUNICIPAL LAW NEWSLETTER

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