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Municipal Liability for Failure to Provide Comparable Replacement Property Is Limited

The court of appeals has issued the first guidance since the supreme court's decision in *CC Midwest*, 2007 WI 93 ("*CC Midwest II*"), on relocation assistance and potential liability for failing to provide comparable replacement property to a person or business displaced through condemnation. *C. Coakley Relocation Systems, Inc. v. City of Milwaukee*, 2006 AP 2292 (Aug. 14, 2007), petition for review filed (recommended for publication).

CC Midwest II addressed the scope of a condemnor's duty under section 32.05(8), Stats., to "make available comparable replacement property" to an owner or tenant who is displaced from his property by condemnation. The tenant in that case had threatened to sue for damages in the event that the supreme court determined that Janesville had not met its duty. In *Coakley*, the court of appeals held that an owner or tenant has no claim for damages due to a breach of the duty to provide comparable replacement property, that the municipality is liable only for statutory relocation benefits, and that the tenant's claims in *Coakley* were barred by the two-year statute of limitations in section 32.20, Stats.

Roadster LLC owned a parking lot, which it leased to *Coakley*. The City of Milwaukee acquired the property by eminent domain on January 30, 2002. The city obtained a writ of assistance on October 10, 2002, and *Coakley* vacated the premises on October 14, 2002. The city declined to provide *Coakley* with a comparable replacement property on the grounds that *Coakley* did not qualify as a "displaced person" under section 32.19(2)(e), Stats. In a first round of litigation, the court of appeals held that

Coakley was a displaced person and was entitled to a comparable replacement property. *City of Milwaukee v. Roadster LLC*, 2003 WI App 131, 265 Wis. 2d 518, 666 N.W.2d 524. Following this decision, the parties negotiated with the city offering the full tenant business relocation payment of \$30,000 under section 32.19(4m)(b). *Coakley* refused the offer and served a notice of claim on the city under section 893.80(1), Stats., on December 13, 2004. *Coakley* then brought an action for damages on September 29, 2005. The trial court dismissed an initial and amended complaint on the grounds that section 32.05(8), Stats. does not create new substantive rights for condemnees, that a condemnees' right to relocation assistance is limited to the items specified in sections 32.19, 32.195, and 32.25, Stats., that *Coakley's* claims were all related to section 32.19, Stats., and therefore that all claims were time-barred under the two-year statute of limitations.

The court of appeals affirmed the dismissal of the action. The decision notes that *CC Midwest II* reaffirmed that section 32.05(8) creates no independent right to compensation; therefore, *Coakley's* claim for damages for violation of that section did not state a claim. To the extent that *Coakley* had claims, they arose under either the just compensation provisions of section 32.05(9), or under the relocation assistance statutes 32.19 and 32.195. Either way, the claims were time barred. *Coakley* did not allege a violation of the city's obligations under section 32.25, Stats., which would not be subject to the two-year limitation of section 32.20, Stats. However, section 32.19(5), Stats. expressly

SPEAKERS FORUM

September 26, 2007

Nuts and Bolts of Administrative Hearings

The Wisconsin Municipal Administrative Procedures Act - Wisconsin State Bar Conference

Madison, WI

Richard A. Lehmann

Condemnation Awards Deposited With A Court May Be Transferred To Private Accounts

The supreme court, reversing the court of appeals and reinstating a circuit court order, has declared that circuit judges have the authority to order the transfer of condemnation awards deposited with the court to be invested in private accounts for the benefit of the property owners. *HSBC Realty Credit Corp. v. City of Glendale*, 2007 WI 94 (July 11, 2007).

The court of appeal's decision in this case was reported in the August 2006 Boardman Newsletter. The Glendale Community Development Authority had deposited approximately \$14.5 million dollars into the Milwaukee County Clerk of Court's office as part of the redevelopment of the Bay Shore Mall. The deposit constituted the award that Glendale was offering to a number of parties that had an interest in the mall. Pursuant to section 59.40(3)(b), Stats., the clerk deposited the sum in the county's general fund, which earned interest at the rate of 2 percent annually, with the interest being paid to the county.

One of the parties with an interest in the award moved the circuit court to order the clerk to transfer the funds to a private money market account with the interest being retained for the benefit of the persons with interest in the condemned property. The circuit court granted the motion and ordered the transfer.

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provides that nothing in section 32.19 or sections 32.25 to 32.27, Stats. shall be construed as creating any element of damages; thereby obviating monetary liability under those sections. Finally, the court rejected Coakley's argument that the city should be equitably estopped from asserting the two-year limit simply on the grounds that the city had continued negotiating with Coakley without giving notice of the time limit on filing claims.

Both *CC Midwest II* and *Coakley* leave open the question of what happens when there is no comparable replacement property available. *Coakley* touches on it tangentially. It quotes the court of appeals' decision in *CC Midwest* ("*CC Midwest I*") to the effect that the legislature could prohibit a condemnor from displacing an occupant unless the condemnor has identified a comparable replacement property even though the condemnor's financial obligations are limited by the provisions of section 32.19, Stats. However, the *Coakley* decision goes on to quote from *CC Midwest II* that permitting a tenant to remain on a property indefinitely conflicts with the proposition that the complete condemnation of a property terminates the lease. This tension is likely to be the subject of future litigation.

Finally, the limited nature of an occupant's claims for monetary relief may result in more occupants contesting writs of assistance more vigorously than in the past. It will be more important than ever for a municipality to document the occupant's actual needs and the municipality's efforts to identify properties that meet those needs with a view toward litigating that issue.

— Mark J. Steichen

The clerk of court appealed. The court of appeals conducted an analysis of section 59.40 Stats. and 32.05, Stats., and concluded that the circuit court lacked the authority to order the transfer of funds.

The supreme court reversed based on a different view of the statutory analysis. Justice Prosser wrote the decision for the five-person majority. Justices Butler and Abraham concurred in the result, but not in the majority's rationale. Justice Prosser noted that under section 32.05, Stats., condemnation awards are deposited for the benefit of the property owners. Read in conjunction with that section, Justice Prosser gave a broad construction to section 59.40(3)(c) to find that a circuit judge is entitled not only to veto the clerk's authority to invest a condemnation award, but also to direct the clerk to transfer the award into a private account for the benefit of the property owners. He emphasized that the authority is discretionary and should be exercised, if possible, with the consent of all of the affected parties and with assurances that the funds would be deposited in "suitably protected accounts." He gave as examples of such "suitably protected" investments: federally-insured bank accounts and U.S. Treasury securities.

Justice Butler concurred in the result because the funds had already been transferred to a private account and the court had to decide what to do with the funds. He had no problem finding that the interest belonged to the property owners. However, he objected to the majority's broad reading of section 59.40(3)(c), which expressly gives only a veto over investment not a positive grant of power to order the transfer of funds to a private account. Justice Butler had no quarrel with the public policy behind the majority's decision, but preferred to leave it to the legislature to rewrite the statute.

Justice Abrahamson concurred in Justice Butler's decision. She wrote separately to emphasize that the case should have been decided on the narrowest possible grounds. Moreover, she noted that the constitutional nature of the clerk of court's office may come into play in future cases. We should expect that property owners will routinely ask circuit courts to order the transfer of condemnation awards into private accounts with the interest being earned by the property owner. Municipalities who make the deposits have an interest in ensuring that the funds are protected. At the end of a valuation appeal, a court or jury may find that the amount of just compensation is less than the amount deposited. In that case, the municipality is entitled to a refund of the difference. Therefore, municipalities will want to ensure that adequate protections are in place to preserve the principal.

Incidentally, while the *HSBC* case arose under section 32.05, Stats., there is an alternate procedure in section 32.06, Stats. Under that statute, property owners may withdraw condemnation awards deposited with the court on the condition that they post a bond for one-half the amount withdrawn to cover the possibility that the award is found to exceed the value of the property.

— Mark J. Steichen

Wisconsin Supreme Court Denies Property Tax Exemption for Leased Property

The Wisconsin Supreme Court ruled that a child care facility used by Milwaukee Regional Medical Center, Inc. (“MRMC”) that was located on land owned by Milwaukee County and subject to a long-term lease did not qualify for the property tax exemption under Wis. Stat. § 70.11(2) for local government-owned property. *Milwaukee Regional Medical Center, Inc. v. City of Wauwatosa*, Wis. S. Ct. Dkt. No. 2005AP1160 (July 17, 2007). The Supreme Court also ruled that the property did not qualify for the exemption under Wis. Stat. § 70.11(4) for property used by educational organizations. The decision affirmed the decision of the Wisconsin Court of Appeals which had reversed a decision by the Milwaukee County circuit court finding that the property qualified for the government-owned property exemption under Wis. Stat. § 70.11(2). The Supreme Court reaffirmed the test established in prior cases that, in the case of government-owned property subject to a lease, “ownership” is not based exclusively on ownership of legal title but is based on whether the government body or the tenant is the “beneficial owner” of the property, which is determined by weighing all of the indicia of ownership of the parties under the facts and circumstances.

This case involved property tax assessment by the City of Wauwatosa of MRMC’s child care facility, both the land and improvements, for the years 2001-2003. MRMC—a nonprofit, Section 501(c)(3) consortium of health care providers—leased a 1.75 acre parcel of land from Milwaukee County in 1990 for a 50-year term. MRMC was required to construct a child care facility on the land and it held title to the improvements during the term of the lease. At the end of the lease term, title to the improvements would vest in Milwaukee County. The lease provided for payment of annual rent of \$1.00 for the first 30 years; for the last 20 years of the term, the annual rent would be an agreed upon market rate unless the parties were unable to agree, in which case the annual rent would equal 10% of the fair-market value of the land (not including the value of MRMC’s improvements).

Local Government-Owned Property Exemption. Section 70.11(2) exempts property owned by counties and other local governmental entities, including property leased by such local governmental entities, regardless of the nature of the tenant, the activities conducted on the property, or the use of the rent income. The Supreme Court reaffirmed the test established in prior property tax exemption cases, in which ownership of leased property is not determined by ownership of legal title but is determined by ownership of beneficial interest in the property, which determination requires weighing all of the indicia of ownership of the parties under the facts and circumstances. *City of Franklin, v. Crystal Ridge, Inc.* 180 Wis.2d 561 (1994); *Gebhardt v. City of West Allis*, 89 Wis.2d 103 (1979); *Mitchell Aero, Inc. v. Milwaukee*, 42 Wis.2d 656 (1969).

In determining that the County was not the “beneficial owner” of the property, the Supreme Court first recited 14 indicia of ownership that supported the County’s beneficial ownership and 15 indicia of ownership that supported beneficial ownership by MRMC. The Court did not discuss each of the ownership factors but it gave great weight to five factors that it found favored beneficial ownership by MRMC: (1) the 50-year lease term, (2) MRMC’s exclusive use of the property, (3) MRMC’s

legal title to the improvements, (4) MRMC’s payment of only nominal rent for the first 30 years, and (5) the County’s lack of control over MRMC’s child care operations.

Since the question of whether property qualifies for exemption is a question of law which requires interpretation of the exemption statutes under the particular facts, the Supreme Court and the Court of Appeals each made independent determinations without any deference to the county circuit court decision. In light of the nature of the balancing test used for purposes of determining beneficial ownership, and given that each case will have unique facts and circumstances, different judges will reach different conclusions based on the same set of facts, as illustrated by this case, in which five Supreme Court justices and two appellate court judges determined that the property was not exempt, while the opposite conclusion was reached by the remaining two Supreme Court justices, one of the appellate court judges and the circuit court judge.

There are no bright lines that distinguish when a governmental body has transferred too many indicia of ownership to a tenant under a lease causing the property to be taxable, and the only guidance is provided by decisions and the facts and circumstances in other cases, such as *Crystal Ridge, Gebhardt, Mitchell Aero* and *Milwaukee Regional Medical Center*. Even customary commercial real estate lease features may contribute to a finding that the tenant is the beneficial owner and the property is taxable, such as a tenant’s exclusive use of the property, and the absence of control over a tenant’s operations by government body. Although the Supreme Court decisions have not indicated that any particular factors are to be given greater weight, it is noteworthy that in each of the two cases in which the Supreme Court determined that the government body was the beneficial owner and the property at issue was exempt—*Crystal Ridge & Gebhardt*—the tenant was required to pay significant rent during the term of the lease. In contrast, the tenant paid no rent or nominal rent in *Mitchell Aero* and *Milwaukee Regional Medical Center*, in which cases the Supreme Court determined that the tenant was the beneficial owner and the property at issue was taxable.

Educational Organization Exemption. The Supreme Court also affirmed the Court of Appeals decision that the property was not exempt under Wis. Stat. § 70.11(4) because MRMC did not qualify as an “educational association.” Section 70.11(4) provides an exemption for property owned and used exclusively by educational institutions offering regular courses 6 months in the year, and for property owned by “educational or benevolent associations.” Under case law, a property owner must pass a 5-part test to qualify for exemption under Section 70.11(4): (1) the property owner must be an educational association; (2) the property must be owned and used exclusively for the purposes of the association; (3) the property must be less than 10 acres; (4) the property must be necessary for the location and convenience of the buildings; and (5) the property must not be used for profit. To qualify as an “educational association” requires passing a 2-part test: (1) the organization must be a nonprofit organization substantially and primarily devoted to educational purposes; and (2) the organization must be devoted to “traditional” educational activities. The Supreme Court determined that MRMC was not an educational association because it was not substantially and primarily devoted to educational purposes. The Court based its determination on all of MRMC’s activities, not just the activities conducted at the property in question.

—William R. Peck

MUNICIPAL LAW NEWSLETTER

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