

IN THIS ISSUE

- *Wisconsin Supreme Court Provides Guidance to Zoning Boards of Appeals*
- *Zoning Boards of Adjustment Regain De Novo Review Powers*
- *Internal Investigation Documents Shielded from Open Records Law*
- *Important Plan Consistency Question Almost Answered*

Wisconsin Supreme Court Provides Guidance to Zoning Boards of Appeals

Lamar Central Outdoor, Inc. v. Board of Zoning Appeals, Appeal No. 2001 AP 3105, decided July 12, 2005, is significant for two reasons. First, it holds that the new standards for zoning variances that the Wisconsin Supreme Court announced in Spring 2004 apply retroactively, so that earlier Zoning Board of Appeals' decisions that did not anticipate the new standards will be deemed erroneous. Second, it makes clear that local zoning boards must formulate and express reasons to support their decisions to approve or to deny a variance. Merely stating that the proposed variance does not meet the ordinance standards is not enough.

Lamar Advertising sought a variance from the City of Milwaukee to increase the height of an existing billboard by 20 feet, in order to make it visible above certain trees that had grown since the billboard was first constructed. The City rejected the request, and Lamar appealed to the Board of Zoning Appeals.

Three Board members voted to approve the variance and two voted to deny it. Despite the majority's support, the application was denied because Wisconsin law provides that "the concurring vote of four members of the [five member] board shall be necessary ... to decide in favor of the applicant."

The Board issued a cursory written decision in which it concluded that Lamar's application was "not consistent with" the Milwaukee Code

of Ordinances. The Board then recited the provisions of the ordinance. The two Board members who voted against the variance made individual statements during recorded Board deliberations, including: "the criteria for the hardship have not been met," "the exceptional circumstances have not been met," "this is an economic issue," and "there [are] other purposes for this land."

Lamar sought review of the Board's decision in the circuit court, which affirmed, and in the Court of Appeals, which reversed. The Board then appealed to the Wisconsin Supreme Court.

Retroactivity of Ziervogel and Waushara County

The Supreme Court first addressed the retroactivity issue. When the Board took up Lamar's application in March 2001, the controlling law on zoning variances was the 1998 Wisconsin Supreme Court decision in *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998). In *Kenosha County*, the court held that the proper standard for evaluating a request for a dimensional or area variance was whether the landowner was left with any reasonable use of the property without the variance. That is, if the landowner had any feasible use of the property without the variance, the application must be denied.

Just days after Lamar filed its brief with the circuit court, the

Wisconsin Supreme Court Provides Guidance to Zoning Boards of Appeals

Continued from front page

legal landscape for zoning variances began to change dramatically. On June 29, 2001, the Wisconsin Supreme Court issued its decision in *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W. 2d 376, in which the court sharply divided over whether the “no reasonable use” standard should be overruled. No clear majority prevailed in *Outagamie County*, leading to significant confusion over the proper standard for zoning variances.

The Supreme Court revisited the subject in 2004 in *State ex rel. Ziervogal v. Washington County Bd. Of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Board of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514. The decisions acknowledged the confusion left by *Outagamie County* and replaced the “no reasonable use” standard with the “unnecessary hardship” test. Further, the court ruled that each application must be evaluated in light of the purpose of the zoning ordinance at issue, and the zoning board must have flexibility in deciding whether or not to grant an area variance.

In view of this history, the Court in *Kenosha County* concluded that the Board had proceeded on an incorrect theory of law when it rejected Lamar’s application in 2001. The Court observed that at least one of the members had applied the now-overruled “no reasonable use” standard.

Reversal was required even though the application of the “no reasonable use” standard was legally proper back in 2001. The Court explained that “the very purpose of the *Waushara County* decision was to give boards of adjustment guidance in resolving area variance applications,” and therefore, the Milwaukee Board should have “the opportunity to reevaluate [Lamar’s application] under the principles we laid out in *Ziervogel*, *Waushara County*, and *Outagamie County*.”

Necessity to Support and Explain Decision

The Court next addressed the legal adequacy of the Board’s expression of its decision. The Court stated that courts should not disturb the board’s decision if any reasonable view of the evidence supports the board’s findings. However, because an applicant has the right to review in the courts, a board must set forth its reasoning.

The controlling Wisconsin statute provides only that “the grounds of every ... determination [approving what the applicant requests] shall be stated.” The Court ruled under this language, Lamar had the right to know both the criteria under which the Board applied and the reasons the Board decided the specific facts did not meet the criteria.

The Court also noted that where there is no written decision by the Board, the court will review the transcript of the proceedings before the Board. In this case, the Board’s reasoning was circular in that it simply restated the grounds laid out in the ordinance, it lacked evidentiary support, and was tainted by a member’s personal feelings about billboards.

The Court remanded the case to be sent back to the Board to reconsider in conformance with the new legal standards governing area variances. The Court ruled the Board must adequately express its reasoning for approving or denying Lamar’s application under the appropriate legal standard. The Court stressed that the decision does not have to be in writing, but if it is not, a transcript of the proceedings must adequately show the reasoning of the decision.

Implications for Local Zoning Boards - Common Law Additions to Statutory Law

The *Lamar* decision makes it clear that local zoning boards must formulate and express reasons in support of its decision to approve or to deny a variance. This reasoning process either must be expressed in a written decision or reflected on the record of the board meeting.

The *Lamar* decision may also be viewed to have modified or enlarged existing Wisconsin statutory law. Although Wis. Stat. §62.23 (7)(e)(9) provides that a zoning board of appeals must state its reasons for granting a request, the statute is silent as to what the board must do in order not to approve what an applicant requests. *Lamar* fills this gap with a common law requirement of findings for applications that are not approved.

In order for a local zoning board to be confident that its decision will withstand judicial scrutiny, it should take several steps. First, a zoning board should have in place a process whereby appeals and evidence are evaluated. That is, they should have specific evidence that they look for in every case. These steps would demonstrate fairness in the process and that the board’s decision is not arbitrary. Next, after hearing the evidence, each board member should state the reasons for his/her vote. If a board member agrees with a previous board member’s explanation, that board member should explicitly state what he/she agrees with. Because a court will be deferential to a zoning board’s determinations, it will be much less likely for a zoning appeals board’s decision to be overturned if these steps are followed.

Things get interesting when an extraordinary vote requirement results in a minority of board members controlling the decision by voting no on a motion to approve the applicant’s request. If the Board is required to adopt, by a majority vote, a motion to deny a variance application containing reasons and findings, the Board is put in an awkward position, since only a minority of members support denial. One senses from reading the

Continued on next page

Zoning Boards of Adjustment Regain De Novo Review Powers

The Wisconsin Supreme Court has reinstated the *de novo* review powers of county boards of adjustment by reversing the decision of the Court of Appeals in *Osterhues v. Board of Adjustment for Washburn County*, 2004 WI App 101, 273 Wis. 2d 718, 680 N.W.2d 823. *Osterhues*, 2005 WI 92 (June 28, 2005).

Osterhues involves the interpretation of the scope of a county zoning board of adjustment's powers under Section 59.694(8)(a), Stats., which grants those boards "all the powers of the officer from whom the appeal is taken." Traditionally, this language had been interpreted by circuit courts as granting zoning boards the ability to take evidence and decide zoning issues on an independent basis from the decisions reached by a plan commission or zoning administrator. In an earlier unpublished case,

Wisconsin Supreme Court... *Continued from previous page*

Lamar decision that the Court envisions the issuing of the equivalent of a judicial dissenting opinion by two minority dissenters.

Since two dissenting Board members can prevent the securing of four votes to approve the variance, *Lamar* suggests that the two should be allowed to sign or indicate support for a single statement of reasons correlated to the decision criteria. If they cannot agree on a single decision support document, the appeal courts will have to review two individual statements. What if, however, one of the individual statements is adequately expressed, applies applicable standards, supports findings with facts from the record, and the other statement is based on faulty reasoning, irrelevant considerations, mistaken views of the standards and the like? The answer is that if the faulty set of reasons and findings is dismissed legally, there are still not four votes to approve the variance.

Implications for Variance Requests Denied Under the "No Reasonable Use" Test

The clear implication of the remand back to the Appeals Board with a directive that the Board apply the new area variance test that became the law only after the Board had completed its decision on the application is that every applicant turned down for an area variance by application of the *Kenosha County* "no reasonable use" test is entitled to a new variance hearing. Put another way, the ruling makes the new variance standard retroactive. However, applicants who did not timely appeal the denial of a variance application may be barred from reopening their cases. If so, then the new variance standards would apply retroactively only to cases where an appeal is still pending.

— Richard A. Lehmann

the court of appeals had concluded that such boards have powers of *de novo* review. *Wolff v. Grant County Board of Adjustment*, 2002 WI App. 85. In *Wolff*, the court had noted that Section 59.694(8)(a) was based on the Standard State Zoning Enabling Act and that other states with the same statutory language accorded *de novo* review powers to such boards. Nevertheless, the Court of Appeals in *Osterhues* held that boards of adjustment were restricted to reviewing the record made before the officer or commission who made the decision being appealed. Furthermore, the Court held that boards of adjustment were limited to reversing decisions only in situations where errors had been made and that the boards could not exercise their own discretion.

The Court of Appeals decision in *Osterhues* threatened to give rise to a number of new issues that would have to be resolved through litigation. Case law and statutes had long established that any person aggrieved by a zoning decision has the right to appeal to the zoning board. It is not necessary that they have been a party to or participated in the underlying process leading to the zoning decision. In such cases, could a new party be governed by the limited record created below? Would the doctrine of waiver be applied if the appeal issues had not been raised below?

The Supreme Court held the plain language of the statute unambiguously provides zoning boards with *de novo* review powers. It rejected the Washburn zoning board's argument that it had no jurisdiction to act unless it found some error on the part of the planning commission whose decision was on appeal. Instead, the Supreme Court held that all that is required for a zoning board to act is that there be an allegation of error. Moreover, the alleged error could be "procedural, substantive, or equitable" in nature. Accordingly, the zoning board could review the facts and circumstances independently of the underlying zoning officer or commission and reach a different result based on the equities.

This decision undoubtedly extends to zoning boards for cities, villages, and towns that have adopted village zoning powers as well. The zoning enabling statute for these municipalities, section 62.23(7)(e)8, Stats., has nearly identical language to section 59.694(8), including the critical phrase giving such boards "all the powers of the officer from whom the appeal is taken . . ."

The Supreme Court's decision is sound, reinstates the traditional understanding of the zoning boards' powers, and heads off what would have been a morass of litigation over zoning board procedures and powers.

— Mark J. Steichen

Internal Investigation Documents Shielded from Open Records Law

In a 4-3 decision, the Wisconsin Supreme Court recently decided that the City of Baraboo's internal investigatory records regarding sexual harassment complaints need not be disclosed to the officer accused of harassment. *Hal Hempel v. City of Baraboo et al.*, 2005 WI 120 (July 13, 2005).

Facts of Case

In January of 2000, a captain for the Baraboo Police Department received a verbal complaint from a female officer, Kaye Howver, alleging that a male officer, Hal Hempel, had made degrading, gender-based statements about female officers. Howver submitted an 8-page written report detailing the alleged gender-based harassment by Hempel. Hempel was told of the complaint and given Howver's complete, unredacted statement, which included several names of witnesses to Hempel's alleged conduct.

In June of 2000, the Baraboo City Attorney wrote to Hempel's attorney informing him that the Police Chief Loeb would not impose any disciplinary measures against him in connection with Howver's complaint. Chief Loeb indicated that if another complaint against Hempel of a similar nature was received, Howver's complaint would be considered at that time.

In January of 2001, Hempel served the Police Department with a written open records request seeking "any and all written materials gathered or considered by you in connection with [the] complaint against Hal Hempel, including any correspondence or statements received by you in connection with that complaint." Hempel's request sought the records under both Wisconsin's Open Records Law, ch. 19, Wis Stats., and Wis. Stats., §103.13, the statute entitling Wisconsin employees access to copies of their personnel files.

The City sent Hempel all documents pertinent to the complaint that existed in his personnel file. The City denied, however, Hempel's request for any documents related to the Department's "internal investigation," giving the following six reasons for the denial: (1) the City's harassment policy states that investigations of harassment will be "confidential"; (2) disclosure would impair the City's ability to conduct thorough investigations because victims and witnesses would be discouraged from reporting harassment; (3) disclosure would impair the City's ability to ensure employees satisfying careers and fair treatment; (4) nondisclosure protected the privacy of all involved, including Hempel; (5) nondisclosure was required to avoid a loss of morale; and (6) the documents requested may include mistaken or unsubstantiated information, and thus public policy weighs in favor of nondisclosure. The City concluded that, on balance, the public policy in favor of nondisclosure outweighed that in favor of disclosing the documents.

Dissatisfied with the City's response, Hempel filed suit against the City and other related parties seeking a court order directing release of the internal investigation records. Both the circuit court and the Court of Appeals ruled that the City was entitled not to disclose the records, reasoning that the public's right to access was outweighed by the policy of encouraging victims and witnesses to report allegations of employment discrimination.

Supreme Court's Analysis

The Supreme Court recognized that Hempel's request should be analyzed under both Wis. Stats., §19.35(1)(a), the general open records request provision and Wis. Stats., §19.35(1)(am), the provision that allows an individual to request records that contain "personally identifiable information" pertaining to the requester himself. When a general request for information is made under §19.35(1)(a), the record custodian must determine whether any statutory or common law exemptions to disclosure apply. If none apply, then the custodian must apply the well-known balancing test to determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection. By contrast, an individual's right to obtain records about himself under §19.35(1)(am) is broader than under (1)(a) because no common law exemptions to disclosure exist and because (1)(am) is not subject to the public interest balancing test.

The Court first analyzed Hempel's right to the records under §19.35(1)(am), which states that "any requester ... has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or receive a copy of any such information." However, the Court ruled that Hempel was not allowed access to the internal investigation records due to the statutory exemption stated in §19.35(1)(am)1, which provides that an individual is not entitled to access records that are "collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such records that is collected or maintained in connection with such an action or proceeding." Because the City stated that it would consider Howver's complaint if any further complaints regarding Hempel were received, the Court found that the investigation was "to some degree" ongoing. Thus, the exemption in sec. (1)(am)1 applied.

The Court also ruled that the City was correct in refusing to disclose the records under §19.35(1)(am)2.b which exempts from disclosure documents that would "identify a confidential informant." While the Court stated that the scope of the term "confidential informant" is not clear, the Court ruled that giving an individual access to the identity of those who in confidence gave information in connection with an ongoing investigation was not in line with the statute's original purpose of allowing a person access to know what information is being maintained about him and whether the information is accurate.

Balancing Test

The Court then analyzed Hempel's request under the more general open records provision, §19.35(1)(a). Ruling that neither statutory nor common law exemptions to disclosure applied in this case, the Court proceeded to analyze the "balancing of interests" in disclosure versus nondisclosure of the requested records. The Court stated that, in light of the strong legislative presumption in favor of disclosure under the open records law, the balancing test requires the record custodian to determine whether the surrounding factual circumstances create an "exceptional case" not governed by the strong presumption of openness.

The Court first noted that this is an unusual open records case, because generally the individual accused of wrongdoing attempts to prevent public disclosure of pertinent records. Here, it was the accused wrongdoer who wanted access to the records. The Court went on to determine that the factors weighed in favor of denying Hempel access to the records. In making this determination, the Court stressed that the City had already provided Hempel with several documents that identified many witnesses and that identified the allegedly discriminatory behavior. The Court also noted that victims and witnesses might be reluctant to report harassment if their names and information would become open to the public. The Court agreed with the City that disclosure of the internal investigation file could cause a loss of morale, might discourage qualified candidates from entering police work and would negatively impact the privacy interests of the complainant and reluctant witnesses who reported Hempel's alleged behavior. Weighing these factors, the Court concluded that the public interest in nondisclosure of the City's internal investigatory outweighed the public interest of disclosure.

Dissenting Opinion

A strong three-judge dissent opined that the Court erred in denying Hempel access to the records. The dissent first argued that the exceptions to disclosure under §19.35(1)(am) did not apply because there was no ongoing investigation regarding Hempel's conduct and because the "confidential informant" exception did not apply because the witnesses who shared information did not meet the definition of informants and were not given express promises of confidentiality.

Turning to the balancing test under §19.35(1)(a), the dissent stressed that the six reasons relied on by the majority to support nondisclosure (stamp of confidentiality, interference with internal investigations, interference with ensuring satisfying careers and fair treatment, privacy rights of those involved in investigation, prevention of loss of morale, documents disclosed may contain inaccurate information that could lead to harm) are the same six reasons presented by every public entity wanting to maintain the confidentiality of records. Noting that these reasons apply to almost any file involving some sort of governmental investigation in any governmental entity, the dissent argued that if these reasons are sufficient to justify nondisclosure, the open records law will be substantially undercut.

Conclusion

Hempel demonstrates the ongoing struggle in Wisconsin between the public's right to know and issues such as the right to privacy and discouraging individuals to report inappropriate conduct on the job. Municipal entities are reminded that documentation of investigations must be handled thoughtfully and open records requests must be considered thoroughly and carefully.

— Jennifer S. Mirus

Important Plan Consistency Question Almost Answered

Since 1945, the municipal zoning statute (Wis. Stat. §. 62.23(7)(c)), has said that zoning regulations shall be made "in accordance with a comprehensive plan." In *Barnes v. Village of Lannon*, Appeal No. 2004 AP 2413, we almost found out what that phrase means.

In 1985, the Wisconsin Supreme Court said that a community could do zoning without having a comprehensive plan, if the zoning itself had characteristics of a plan. *Bell v. Elkhorn*, 122 Wis. 2d 558, 364 N.W.2d 144 (1985).

This left open the meaning of the "in accordance with" mandate if the community has a plan and that plan disagrees with the zoning.

That fact situation was presented in *Barnes*. The Village of Lannon had a plan as a separate document from the zoning ordinance. It showed a particular parcel as planned for multi-family housing and duplex development. The same year that this plan was adopted, 1999, the Village zoned the property "agricultural/holding." The property owner asked to have the land zoned in accordance with the plan; the Village Board granted single family residential zoning.

The property owner filed a certiorari appeal, arguing that the mismatch between the plan and the zoning made the zoning arbitrary and irrational. The circuit court concluded that the Village was free to ignore the plan because the plan was merely advisory.

The case was appealed. On July 20, 2005, the Court of Appeals issued an unpublished opinion upholding the circuit court's ruling. With respect to the plan consistency issue, the Court of Appeals stated that since having a plan is optional, the plan has merely advisory force. This point was advanced earlier in *Step Now Citizens Group v. Town of Utica Planning and Zoning Committee*, 2003 WI App 109, 263 Wis. 2d 662, 663 N.W.2d 833 (2003). However, we still have no explanation of why the fact that the plan is not mandatory means that the zoning need not be consistent with the plan.

Barnes fails to mention the "in accordance with" statutory language, apparently because that issue was not argued by the parties.

— Richard A. Lehmann

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Municipal Drinking Water Division.

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.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanlawfirm.com.

Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Christopher J. Dodge	283-1777	cdodge@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com
Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com
Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	rlehmann@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Matthew D. Weber	283-1744	mweber@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

This newsletter is published and distributed for informational purposes only. It does not offer legal advice with respect to particular situations, and does not purport to be a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions.

BOARDMAN^{LLP}
LAW • FIRM

© Copyright 2005, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED

BOARDMAN^{LLP}
LAW • FIRM

Boardman, Suhr, Curry & Field LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

PRRSRT STD
U.S. Postage
PAID
Madison, WI
Permit #1400