

WAPA LEGAL UPDATE

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Creating Conservation Easements in Wisconsin

Background

A conservation easement is a legal agreement between a landowner and a land trust or government agency that permanently limits use of the land in order to protect its conservation values. It can be a highly flexible document, tailored to the particular conservation values of the property and the long term interests of the landowner. They provide numerous public benefits including protecting the natural habitat for plant or animal species, protecting the water quality and hydrology, providing esthetic benefits, maintaining working farm operations and providing recreational opportunities. From the landowner's point of view, they can obviously fulfill a conservation ethic, can preserve certain land uses such as agriculture and can be helpful in estate planning since it reduces the value of the land, thus making estate taxes more affordable for heirs.

Legal Creation

The Uniform Conservation Easement Act which is contained in Wis. Stat. § 700.40 is the statutory framework used to establish a conservation easement. The conservation easement is granted to a "holder" which can be a governmental body or charitable cooperation but cannot be an individual because that would negate the perpetual nature of the easement. A "third-party enforcement right" means a right provided in a conservation easement empowering an entity which although eligible to be a holder is not a holder to enforce any terms of the conservation easement.

A conservation easement is treated the same as any other type of easement. Except if it is modified or terminated by a court, a conservation easement is unlimited in duration unless the conservation easement provides for a specific duration. It may not impair a real estate interest existing at the time the conservation easement is created, unless the owner of that interest is a party to the easement or consents to it.

When you draft a conservation easement, it should be drafted with the future in mind. It should also be drafted to restrict only the activities that are important to achieving conservation of open space and natural goals. The easement should be drafted with clear, concise language so that future landowners will understand and abide by the restrictions. Provisions that would require landowners to perform affirmative obligations should be minimized. A survey should be prepared of the property to describe it accurately along with any permitted building areas.

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The landowner has a number of responsibilities when their property contains a conservation easement. The landowner needs to inform the easement holder of any changes to the property which impact the conservation values protected by the easement. In addition, they have the responsibility to seek permission from the easement holder for actions allowable on the property as delineated in the easement. Finally, the landowner should inform the easement holder of any transfers of property ownership. Obviously, they also have the responsibility to continue to pay property taxes.

On the other hand, the landowner has the right to continue to live on and/or use the property as they have, subject to easement restrictions. Also, they have the right to sell, donate, or pass on to their heirs title to the property, subject to easement restrictions.

The easement holder is responsible to regularly monitor the property to insure that the easement restrictions are upheld and to maintain accurate records of the property under easement which includes baseline documentation of property status at the time the easement is recorded, an annual monitoring report acknowledged by the property owner and maps and photos describing the property. The easement holder also has the responsibility to take action to defend the terms of the easement. In order to fulfill these responsibilities, the easement holder has the right to enter the property, with landowner knowledge, to monitor the terms of the easement. In addition, the easement holder has the right to acquire corrective action of the landowner or third party in the event that easement restrictions are violated.

By definition, easement restrictions must run with the land and apply to all future property owners. The easement holder must have the capacity to monitor and enforce the easement restrictions in perpetuity.

The Impact of Having a Conservation Easement

In order to be eligible for conservation easement tax benefits, federal tax requirements under IRC § 170(h) and Treas. Reg § 1.170 A-14(a) must be met. Once that is accomplished, there are tangible tax deductions available to individuals and to corporations whether they are considered to be a real estate developer or not. There are also special tax benefits available when a conservation easement is contributed to the façade to a building in a registered historic district. There are also property tax benefits in that a conservation easement will reduce the amount of property tax owed by a landowner since it reduces the “highest and best use” of the property. Finally, a real estate transfer fee is not applicable to a grant or transfer of a conservation easement. However, the major benefit of a conservation easement for all parties is the comfort that an important natural resource is being protected perpetually.

Can a Town Adopt a Moratorium on the Land Division Approval Process?

Earlier this year I alerted WAPA members to a case to be heard by the Columbia County Circuit Court on the important issue of whether a town can adopt a moratorium in their land division approval process until an updated comprehensive plan was implemented by the town board. Since that summary, the lower court in *Wisconsin Realtors Associates*,

Inc., et. al v. Town of West Point has ruled in favor of the Town but the matter is now pending before the Court of Appeals since the Plaintiffs have appealed the decision. Because moratoria is an essential part of the land use planning process, the outcome of this appeal will be critical to future planning efforts throughout Wisconsin.

Background

On September 20, 2005, the Town of West Point (“Town”) adopted a temporary moratorium on land divisions until March of 2007. The purpose of the temporary moratorium was to forestall new land divisions while the Town updated its comprehensive plan and implementing ordinances. The duration of the temporary moratorium is not an issue but rather the threshold question is whether the Town had the legal authority to take this action. It should be noted that the temporary moratorium only applied to land divisions. It did not impose a moratorium on development generally, including the issuance of building permits, driveway permits or conditional use permits.

Arguments of Plaintiff

Plaintiffs argued that the Town’s ordinance should be declared void since it did not have the legal authority to prohibit acceptance, review and approval of any application for land division or subdivision during the 18 month period of the moratorium.

They argued that because towns in Wisconsin have only those powers expressly delegated to them by statute, the case turns on whether Wis. Stat. §§ 60.61 – 60.62 gives the statutory authority for the Town to enact a moratorium on land division. Moreover, the Plaintiff argue that those statutes do not give sufficient authority to the Town that is reasonably necessary to implement a power expressly granted. As to section 60.61, a town’s land use and planning powers are set forth but the statute does not grant the town the authority to enact a moratorium on land division. It is true that section 60.61(2) authorizes a town to enact a zoning ordinance but that statute expressly limits its applicability to towns located in counties which have not enacted a county zoning ordinance and the facts show that Columbia County has.

Section 60.62 does not confer moratorium authority either. Plaintiffs argue that while the Town has been granted the authority to exercise village powers, it does not have the powers to enact a zoning ordinance pursuant to § 60.62 because the Town’s ordinance has not been approved by the County nor has the Town zoning ordinance been approved at a Town meeting or by referendum vote.

Plaintiffs also argue that if the legislature had intended for towns to have the legal authority to enact a moratorium on development it could have expressed such power by statute. State law expressly grants to cities, “interim zoning power” which is one form of moratorium authority. Therefore, they argue that had the legislature intended for towns to possess the same authority as cities do, it could have done so.

Argument of Town

The essence of the Town's position is that the Town does not rely on zoning power for authority to adopt the temporary moratorium but relies primarily on the authority delegated to it in Wis. Stat. § 236.45 which relates to local regulation of land divisions.

In adopting the ordinance, the Town followed the procedures in Wis. Stat. § 236.45(4) which applies to local land division regulations. While it is generally true that towns have only the powers expressly designated to them by statute and other powers that are necessary to implement the powers expressly granted, towns that have adopted village powers have been granted the very broad general police powers set forth in Wis. Stat. § 61.34. The parties agree that the Town of West Point Board has been granted village board powers.

Specifically, § 236.45 gives the Town the authority to adopt a temporary moratorium on land divisions to carry out the purposes of that section. The purposes of § 236.45 are broadly stated and include, among other things the power to promote the public health, safety and general welfare of the community, to further the orderly layout and use of land and to avoid undue concentration of populations. In other words, one of the main purposes of land division regulations is to control the density of development. The Town argues that there is no question that a temporary prohibition on land divisions during the preparation of a new comprehensive plan serves the above stated purposes. Since the new comprehensive plan is to serve as a guide for land use divisions generally and specifically as a guide for new land divisions affecting the density of future land uses, there is a significant overlap between the purposes land division regulation and the purposes of the new comprehensive plan.

The Town further argues that one way to see that a land division moratorium carries out the purposes of 236.45 is to recognize how those purposes would be defeated if there were no moratorium. In this regard, the Town heavily relies on the United States Supreme Court decision in *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency*, a 2002 decision which held that a moratorium that precluded virtually all development for 32 months while new regulations on development were being prepared was essential to the community planning effort. In effect, the Town argued that *Tahoe-Sierra* supports the Town's position that their temporary moratorium ordinance carries out the purposes of section 236.45. The Town also relied upon the Wisconsin Supreme Court Decision in *Wood v. City of Madison*, a 2003 decision where the Supreme Court held that the City of Madison had the power under § 236.45 to reject a preliminary plat in its extra territorial jurisdiction based upon a subdivision ordinance that considered the plat's proposed use.

The Town's argument comes down to the fact that although a temporary moratorium on land divisions may also be enacted pursuant to zoning authority, it does not detract from the Town's authority to do so under its subdivision powers granted by § 236.45.

Columbia Circuit Court Decision

On September 13, 2006, Judge Bissonnette noted in the decision that the question of whether a town possesses the legal authority to enact a moratorium on subdivision application is an issue of first impression in Wisconsin. After considering the above arguments and briefs, the Trial Court concluded that the moratorium was legally permissible. The Court accepted the Town's position that although zoning and subdividing are complementary land planning tools, they are legally distinct and must be evaluated as such.

The Plaintiffs have appealed this decision to the Court of Appeals and briefs will be filed by both sides in January and February, 2007. If WAPA decides to file an amicus curie brief focusing on the argument that moratoria are an essential tool in effective land use planning, it must do so by no later than February 21, 2007.