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Wisconsin Chapter
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November Case Law Update
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A summary of Wisconsin court opinions decided during the month of November related to planning

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Special Assessments Appropriate After Developer Defaults

First State Bank v. Town of Omro presented the Wisconsin Court of Appeals with the issue of whether a municipality may use its police powers to build roads and levy special assessments after a developer defaults in its obligation to build the roads. The case involved a 74-lot subdivision in the Town of Omro in Winnebago County. The Town approved the final plat for the subdivision in 2004 along with a development agreement that required the developer to construct and pay for all roads in the subdivision. In 2009 the developer defaulted on a loan for the subdivision and First State Bank acquired ownership of 65 unsold lots. None of the roads were paved. Three of the Bank's lots fronted on existing roads outside the subdivision that were already paved.

The unpaved roads became a problem so the Town Board decided to levy police power special assessments to pay for public improvements as enabled under Wisconsin Statutes, section 66.0703(1) to pave the roads. The sum of the special assessments on the lots owned by the Bank totaled $219,641.60. The Bank appealed the special assessment pursuant to the Wisconsin Statutes. The circuit court granted summary judgment to the Town determining that the special assessment was proper. The Bank appealed to the Court of Appeals and raised five issues. The Court of Appeals agreed with the circuit court on four of the issues and reversed the lower court on one issue.

First, the Bank argued that the special assessment was improper because the development agreement required the developer to pay for the roads. The Court of Appeals, however, found that the development agreement did not constrain the Town from exercising its power to levy special assessments. In the words of the Court, the developer's default does not "require the town to abandon the roads or have the general public shoulder the burden of providing finished roads" to the subdivision.

Second the Bank argued the Town's "Road Development Ordinance" only required roads after development of at least 70% of the lots in the subdivision and the subdivision had not reached that

threshold. The Court of Appeals did not agree. The Court found that the Ordinance only established minimum standards and the Ordinance allowed the Town engineer to recommend different specifications, which the Town engineer did.

Next, the Bank argued the special assessment was improper because assessments must be for public improvements and at the time of the assessment the roads were privately owned. Again, the Court of Appeals did not find this argument persuasive. The Court noted that even though the Town had not accepted dedication of the roads at the time the special assessments were authorized, Wisconsin law requires all streets shown on a final plat to be dedicated to the public unless clearly marked as private. The roads at issue in this case were not marked as private so the roads were a public improvement.

The fourth argument raised by the Bank was that three lots (lots 4, 5, and 55) were not specially benefited by the improvements as required by Wisconsin special assessment law. The three lots were not adjacent to the roads at issue in the case and were served by other roads. Here the Court of Appeals determined that there was a question of fact about whether a special benefit accrued to these lots and remanded the case to the circuit court for further proceedings to determine if there was a special benefit.

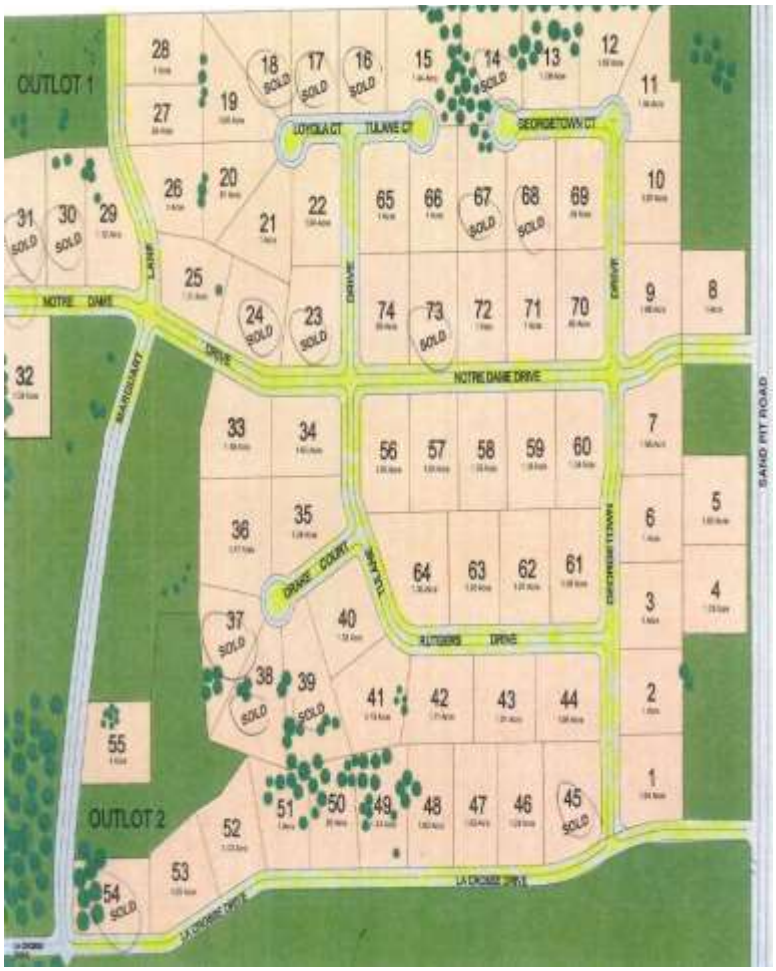

Figure 1 - Image of plat as it appears in the Court's Opinion

The final argument made by the Bank was that the special assessment was not proper because the Town's resolutions did not strictly comply with the statutory requirements. The project described in the final resolution did not exactly match the description in the preliminary resolution. The court noted that the preliminary resolution served the statutory purpose of "generally" describing the "contemplated purpose" of the special assessment and may differ from the final resolution that is based on a more detailed report of the project. The Bank also argued that the final resolution did not match the statutory language that "directs that the work or improvement be carried out." The Court found that the Town's language in the resolution that "[a]ll actions heretofore or hereafter taken for the purpose of carrying" out the special assessment was sufficient under the statute.

The case is recommended for publication in the official reports.

County Obligated to Pay Town Fire Protection Fee

The Town of Hoard in Clark County participates in a joint fire district with several municipalities in the County. Prior to 2014, the Town funded its share of the cost of the fire district by the Town's general tax levy. Properties that were exempt from property taxes did not pay for this cost. In 2013, the Town adopted an ordinance imposing an annual fee on all properties in the Town for the provision of fire protection. Towns are authorized to adopt such a fee under section 60.55(2)(b) of the Wisconsin Statutes.

Clark County owns and operates a medical center within the Town. The Town charged the County $3,327.68 in 2014 for fire protection services for the clinic. The County property was tax exempt and the County refused to pay the fee. The Town initiated this lawsuit to collect the fee.

The County argued the fee is a tax so the County is exempt from paying the charge. The Wisconsin Court of Appeals did not agree. Citing previous case law, the Court of Appeals noted the distinction between a tax and a fee: "the primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." Given the facts of the case, the Court concluded the charge is a fee and not a tax.

The County also made the argument that state law only authorized the Town to charge a fee for fire protection actually provided and not for the availability of fire protection services generally. The Court disagreed: "Here, the presence of a fire district standing by ready to extinguish fires constitutes a fire protection service for which a fee may be assessed."

The case is Town of Hoard v. Clark County and is recommended for publication in the official reports.

Approval of GIP Did Not Establish Vested Rights

McKee Family I, LLC v. City of Fitchburg involved a challenge to a rezoning in the City of Fitchburg. In 1994 the property owner proposed a development project following the City's ordinance for Planned Development Districts (PDD). The City rezoned the property to PDD and approved a general implementation plan (GIP) for the property. In 2008, the property owner submitted a specific implementation plan (SIP) for the construction of an apartment building. Neighboring residents expressed concerns about the development and the City rezoned the parcel to a residential zoning classification that only permitted single-family and duplex structures. The rezoning to preclude apartments occurred before the City Council's review of the SIP.

The property owner sued arguing that they had obtained a vested right to the PDD zoning classification. The Wisconsin Court of Appeals disagreed. Citing Lake Bluff Housing Partners v. City of South Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995), the Court of Appeals held that since the property owner had not submitted an application for a building permit that conformed to the City's ordinances, the property owner did not have a vested right to the PDD zoning. The Court acknowledged that the City's PDD process, like in many communities, involved a two-step process: first the approval of the GIP followed by the approval of a more detailed SIP. The property owner can only apply for a building permit after the City approves the SIP. The City's rezoning the property to preclude the apartment building was therefore allowed.

The case is ***not*** recommended for publication in the official reports.

NOTE: Since the dispute in the McKee case occurred prior to the December 14, 2013, effective date of 2013 Wis. Act 74, the case does not discuss the application of Wisconsin's new vested rights statute within the context of PDD zoning. Among other things, Wisconsin law now requires that "[i]f a project requires more than one approval . . . and the applicant identifies the full scope of the project at the time of filing the application for the first approval required for the project, the existing requirements applicable . . . at the time of filing the application for the first approval required for the project shall be applicable to all subsequent approvals required for the project, unless the applicant and the political subdivision agree otherwise." Wis. Stat. § 66.10015(2)(b). Approvals are no longer limited to building permits. Act 74 defines "approval" as "a permit or authorization for building, zoning, driveway, stormwater, or other activity related to land development." Wis. Stat. § 66.10015(1)(a).