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Wisconsin Chapter
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May Case Law Update
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[A summary of published Wisconsin court opinions decided during the month of May related to planning]

Wisconsin Supreme Court Opinions

Lessee Entitled to Share Condemnation Award

In *The Lamar Company v. Country Side Restaurant*, 2012 WI 46, the Wisconsin Supreme Court reviewed an unpublished decision of the Wisconsin Court of Appeals that affirmed an order by the Winnebago County Circuit Court disbursing to Country Side Restaurant, Inc. (Country Side) $120,000 on deposit with the Clerk of the Circuit Court of Winnebago County.
The case involved the use of the power of eminent domain by the Wisconsin Department of Transportation (DOT) to acquire a 76,628 square foot parcel of land owned by Country Side. Country Side leased a portion of the parcel to the Lamar Company, LLC (Lamar) for the purpose of constructing and maintaining a billboard. As compensation for the taking, the DOT issued to Country Side and Lamar an award of damages totaling $2,000,000. Country Side and Lamar agreed that all proceeds would be transferred to Country Side, save for $120,000 deposited with the Clerk of the Circuit Court of Winnebago County for eventual distribution. Thereafter, Lamar applied for and received from the DOT a relocation payment of $83,525.

Country Side and Lamar were unable to agree on a division of the $120,000. Consequently, Lamar filed a claim for partition, seeking the full amount on deposit, plus interest. Country Side responded by petitioning the circuit court for an order disbursing to Country Side the full amount on deposit, plus interest. The circuit court granted Country Side's petition and ordered the $120,000 to be disbursed to Country Side. The circuit court determined that the DOT had already justly compensated Lamar for the value of its billboard and that Lamar had lost its right to seek a share of the award of damages issued to Country Side and Lamar by failing to join in Country Side's appeal of the award. The court of appeals affirmed, though on slightly different grounds.

Lamar petitioned the Wisconsin Supreme Court for review of the Court of Appeals decision. The Wisconsin Supreme Court granted the petition and reversed the decision of the court of appeals. The Supreme Court held that Lamar had not lost its right to seek a share of the award of damages issued to Country Side and Lamar. The circuit court therefore improperly dismissed Lamar's claim for partition. The Supreme Court concluded that Lamar did not lose its right to seek a share of the award of damages by failing to join in Country Side's appeal of the award. In addition, the Court concluded that Lamar did not lose its right to bring a claim for partition by accepting payment from the DOT for relocation expenses. According to the Court, the DOT's payment for Lamar's relocation expenses is distinct from the DOT's award for the fair market value of the property taken. Lamar has a right to seek both.

Wisconsin Court of Appeals Opinions

Chalenge to Sewer Service Area Plan Untimely

City of Kaukauna v. DNR is an unpublished decision of the Wisconsin Court of Appeals (meaning it has limited precedential value) but is included in the monthly case law summary because it deals with a sewer service area planning dispute, a topic where Wisconsin does not have a lot of case law.

The case involves an appeal by the City of Kaukauna a circuit court judgment affirming a decision by the Department of Natural Resources (DNR) conditionally approving amendments to a regional sewer service plan proposed by the Towns of Harrison and Darboy Sanitary District No. 1. Under the amendments, Kaukauna lost the right to service 89 acres.

City of Kaukauna, several surroundihng villages and the Harrison and Darboy Sanitary District are part of the Heart of the Valley Metropolitan Sewerage District. The Heart of the Valley is part of the Fox Cities 2030 Sewer Service Area Plan prepared by the East Central Wisconsin Regional Plan Commission and approved by the DNR.

The Commission's Community Facilities Committee designated certain areas in the plan as "hold areas." In these areas, ongoing land use or service provision issues make public sewer extensions unsuitable. Accordingly, the Commission does not approve any extensions in these areas and recommends against any development proposal until the issues are resolved. One such hold area is located in the Town of Harrison near county road KK and highway 55. The plan noted that it was undetermined whether the Darboy Sanitary district or the City of Kaukauna would serve the area.

Shortly after the plan was completed, Darboy, anticipating commercial development, requested that the Commission designate 134 acres in the Town of Harrison for sewer service. Darboy proposed that 45 acres be processed as a "swap," in which 45 acres would be added to the service area, while a separate 45 acres would be removed. Darboy also requested that the hold designation be lifted for the 37-acre area in Harrison near county road KK and highway 55. Implicitly, Darboy also sought to service a 52-acre area between the swap area and the hold area that had been previously designated for service by Kaukauna.

The Facilities Committee held a hearing on the proposal on March 14, 2007. Ultimately, the Committee approved Darboy's request, contingent on the developer's submission of a letter of commitment to Harrison. No letter was submitted, however, and the Committee later reconsidered and denied Darboy's amendment proposal. Darboy appealed to the full Commission, which upheld the Committee's decision.

On November 19, 2007, Darboy and Harrison petitioned the DNR to review the Commission's denial of the amendment proposal. The DNR held an informational public hearing, after which it issued a Notice of Intent to Disapprove and Modify the Heart of the Valley Sewer Service Area.

The notice largely approved Darboy's amendment proposal. Kaukauna then requested a public hearing, which was held on August 21, 2008. No contested case hearing was held.

On February 24, 2009, the DNR issued a decision conditionally approving Darboy's amendment proposal. The DNR noted it had not received comments on the proposal from Heart of the Valley, nor did it believe it had received a comprehensive analysis of the effects of the servicing options on downstream sewers. Accordingly, the decision contained the following condition:

1. That the amendment area identified in this approval be successfully annexed into the Heart of the Valley Metropolitan Sewerage District. If the annexation is denied, the Department will review the basis for the denial and subsequently issue a letter to either reaffirm this approval or to designate the entire (134 acre) amendment area as having a "hold status." As described in the *Fox Cities 2030 Sewer Service Area Plan Update*[,] a "hold status" means the area has unresolved planning issues and sewer extensions will not be approved until the issues are resolved.

The DNR's decision concluded, "If you believe you have a right to challenge this decision made by the Department, you should know that Wisconsin statutes, administrative codes and case law establish time periods and requirements for reviewing Department decisions."

In December 2009, Heart of the Valley approved annexation of the amendment area. Kaukauna petitioned for judicial review of the DNR's decision on January 7, 2010. The Court of Appeals dismissed Kaukauna's appeal as untimely. According to the court of Appeals, the February decision of the DNR was a final decision. Under Wisconsin administrative law, a appeal to a final agency decision must be brought within 6 months of the decision. Kaukauna's appeal was four months too late. Kaukauna argued the conditions placed on DNR's decision meant it was not a final decision until the conditions were fulfilled. The Court of Appeals disagreed so Kaukauna lost the right to challenge the sewer service area plan amendment.