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Supreme Court Upholds Municipal Sign Ordinance

In a significant victory for municipalities, the United State Supreme Court upheld the traditional municipal distinction between regulation of on-premises and off-premises advertising signs. The Court rejected a claim that such distinctions necessarily involve discrimination based on content, finding that that the on-/off-premises distinction is a neutral regulation based on place. *City of Austin v. Reagan National Advertising of Austin, LLC,* ___ U.S. ____, 2022 WL 1177494 (No. 20-1029, April 21, 2022).

The City of Austin has an ordinance regulating signs, particularly advertising signs. Like thousands of other municipalities across the country, the ordinance distinguishes between on-premises advertising – a sign located on the very property of the business it is advertising – and off-premises advertising, usually billboards along highways on property unrelated to the company being advertised. Austin subjected off-premises signs to greater regulation, including that such signs could not be expanded or changed to a digital sign.

Reagan Advertising challenged the ordinance when Austin refused a request to change an off-premises sign from a static sign to a digital sign. Reagan relied on the Court's decision in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015). In *Reed,* the Court struck down an ordinance that had extensive sign regulations based on their purpose, finding that it was a content-based violation of the First Amendment, and thus subject to strict scrutiny. The fact that one of the signs at issue in *Reed* was directing people to a religious service could not have benefited the Town of Gilbert's argument.

Since *Reed,* municipal lawyers wondered about future challenges to sign ordinances. Here, Reagan Advertising made a tellingly simple argument: In order to enforce its on-/off-premises distinction, the City of Austin had to read the actual words on the sign in question. That is the only way the City could determine whether it was an on-premises sign. Since the regulation depended on reading the sign to see what it said, it was necessarily a "content" based regulation, subject to strict scrutiny. Subjecting any regulation to strict scrutiny means the regulation almost always falls.

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Court of Appeals Examines Limits on Municipal Exactions

Last month in *Fassett v. City of Brookfield*, 2021AP269, the Wisconsin Court of Appeals affirmed as an unconstitutional taking the City of Brookfield's requirement that a subdivider dedicate a part of her property and pay to construct a new street to connect existing dead-end streets. Citing longstanding precedent, the Court of Appeals held that the City failed to establish that there would be any public problems created or exacerbated by the subdivision, and consequently that the City could also not show that the required dedication and construction was proportionate to the impacts of the subdivision.

BACKGROUND

Fassett owned a roughly 5-are parcel located between two subdivisions in the City of Brookfield. For decades, the two dead-ends of a street named Choctaw Trail terminated in the middle of Fassett's property. In January 2018, Fassett submitted a written request to the City to divide her parcel into three single-family lots and one outlot. Fassett's request identified three options for residential lot access: 1) creating a cul-de-sac on one end and leaving the other as a dead-end, 2) connecting both Choctaw dead-ends with a through street, or 3) keeping both dead-ends with lots accessed via a shared driveway. Fassett stated she preferred the third option. In 2018, after a public hearing at which Fassett reiterated her preference and reasons for a shared driveway, the City plan commission endorsed the through street option and the common council adopted the plan commission's recommendation.

In late 2019, Fassett submitted an application under the City's subdivision code with a renewed request to provide property access via a shared driveway and a legal opinion that requiring dedication of the through street was an unconstitutional taking. Nevertheless, the plan commission rejected Fassett's application and issued specific findings of fact, specifically that: "the previous platting of the streets of the subdivisions on each side of the Property was done in anticipation of the street being connected;" City code requires that dead-end streets and cul-de-sacs

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The Court in *City of Austin* rejected this argument forcefully and, in a 5-1-3 decision, upheld the ordinance. The Court stated (2022 WL 1177494, at 4-5):

> This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in Reed, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.
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> ....
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> Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. Reed does not require the application of strict scrutiny to this kind of location-based regulation.

Justice Sotomayor delivered the opinion, and was joined by Justices Roberts, Breyer, Kagan and Kavanaugh. Justice Alito concurred in the judgment, but dissented on the grounds that some of the majority opinion was stretching *Reed* beyond what was intended. Justices Thomas, Gorsuch and Barrett dissented, arguing the case was controlled by *Reed*.

While this ruling gives municipalities comfort that the on-/off-premises distinction remains valid – having been adopted by thousands of municipalities and in place for decades – expect further challenges to sign ordinances seeking broad interpretation of the *Reed* Decision.

— Michael P. May

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be minimized; a through street provided benefits to public safety and response times and snowplow operations; and a through street shortened distances for transportation and pedestrians and reduced travel demand on arterial streets and collector streets.

In January 2020, the common council adopted those findings of fact and the plan commission's recommendation of denial. Fassett appealed the City's denial to the Waukesha County circuit court and moved for summary judgment. The circuit court granted Fassett's motion, holding that the City's requirement that Fassett construct and dedicate a through street was an unconstitutional taking, and rejecting the City's contention that the appeal was untimely. The circuit court ordered the City to approve Fassett's application using the shared driveway concept. The City appealed the circuit court's determinations.

COURT OF APPEALS DECISION

The City raised two grounds for its appeal: 1) that Fassett's petition for review was untimely because she failed to appeal the City's 2018 approval of the through street concept; and 2) that the City's exaction was not unconstitutional because the through street advanced public benefits.

The Court of Appeals quickly rejected the City's argument that the appeal was not timely. The Court recognized that Fassett's formal application which was denied by the City was a distinct filing from her initial written request and that the City failed "to identify any statute, ordinance, or case that prevents an applicant who first sought a determination of a proposed conceptual land split from submitting a second revised application for approval with a CSM and other supporting documents."

On its second argument, the City fared no better. The Court of Appeals determined that the City failed to show that the property dedication and street-connection conditions were required to mitigate any impacts caused by the proposed subdivision, thus making the City's condition an unconstitutional exaction.

While both the United States Constitution and the Wisconsin Constitution prohibit the taking of private property for public use without compensation, both Federal and Wisconsin law recognize that governments may require constitutionally permitted exactions. An "exaction" is "conditioning approval of development on the dedication of property to public use," which can include "conditioning a development approval ... upon the developer making some financial commitment" for public benefit.

Whether an exaction is constitutional depends on the application of a longstanding two-part test—the *Nollan/Dolan* test—set forth by the United States Supreme Court:

(1) A municipality must first establish that an "essential nexus" exists between a legitimate government interest and the exaction. In other words, that a proposed development would harm the public interest and that the municipality has a legitimate interest in demanding that the developer, rather than the general public, bear the costs to mitigate such harm.

(2) If this "essential nexus" exists, then the municipality must demonstrate that the exaction imposed bears a "rough proportionality" to the harm caused by the development. For example, that the cost of the exaction to the developer is roughly proportional to the cost to the municipality of the harm of the development.

The Court of Appeals found that the City failed to meet its burden of proving either part of the test. While the City identified legitimate problems that a through street could resolve or mitigate, the City failed to demonstrate that these problems—or any others—were **caused by** Fassett's proposed subdivision/development. Rather, they were existing problems caused by the platting of the earlier subdivisions and the "essential nexus" was therefore lacking. Consequently, since the City failed to demonstrate that the subdivision would harm the City, the City could not meet the second part of the test. The Court of Appeals affirmed the circuit court's decision, requiring that the City approve the subdivision without establishing a through street.

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Determining WRS Reportable Earnings with Employee Separations and Settlements

Sometimes, a municipality provides something of value to an employee in exchange for an employee's separation from employment and the employee signing a waiver of potential claims against the municipality. This is often referred to as a separation agreement (but may have different titles). There are a variety of legal issues involved in drafting an effective and enforceable separation agreement. One area of potential confusion is how monetary payments made to employees via a separation agreement should be treated for purposes of the Wisconsin Retirement System (WRS).

A separation payment, whether a one-time lump sum or a series of payments, made at the time of separation of employment does *not* constitute WRS reportable earnings, and neither the employer nor the employee is permitted to make WRS contributions based on such payment. Additionally, unless the municipality has a policy of annually paying employees for their unused vacation or sick leave, paying an employee a certain amount for unused vacation or sick leave upon separation would *not* constitute WRS reportable earnings, and no WRS contributions should be made based on such a payment. To limit potential future disputes, a separation agreement that includes such payment should expressly state that such payment does not constitute WRS reportable earnings and that no WRS contributions will be made based on such a payment.

Note, these payments are generally taxable income to the employee, subject to regular payroll withholding, even though they are not WRS reportable earnings. This might require running a special payroll for the payment to ensure the payment is treated properly for tax and WRS purposes.

If an employee is terminated by the municipality and then is subsequently reinstated following a grievance or legal action (or following the settlement of such a claim) or if the employee settles a wage claim against the municipality, WRS treats these situations differently than payments upon an employee's separation. Any settlement in these situations constitutes a *compromise settlement*. The WRS requires municipalities to submit the compromise settlement to the Department of Employee Trust Funds (ETF) for its review within 90 days of the effective date of the compromise settlement. The compromise settlement must include a breakdown of any hours and earnings and the time period the hours would have covered and the earnings paid. Following ETF's review, ETF will invoice the municipality if a compromise settlement results in the municipality owing additional WRS contributions. Similarly, ETF will make any appropriate corrections to the employee's account. Section 1300 of the WRS Administration Manual provides details regarding how ETF will determine which portions of any compromise settlement constitute WRS earnings. ETF will not pre-review or pre-approve draft compromise settlements.

Municipalities should work carefully with legal counsel regarding any compromise settlement to ensure that the WRS earnings and ETF reporting requirements of the compromise settlement are properly incorporated into any settlement document.

— Brian P. Goodman

Court of Appeals Examines Limits on Municipal Exactions

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CONCLUSION

In the end, the holding in *Fassett v. City of Brookfield*, while potentially troubling precedent for infill development, does not rewrite existing law. Rather, the case emphasizes that a municipality must identify specific anticipated negative impacts caused by a proposed development and the costs to the municipality of those impacts before conditioning approval of the development on an exaction tailored to reasonably mitigate the specific impacts.

— Jared Walker Smith

Wisconsin Supreme Court: Board of Review Properly Classified Nudo Holdings, LLC Property

In a newsletter we issued early last year, we discussed *State ex rel. Nudo Holdings, LLC v. Board of Review for Kenosha,* 2020 WI App 78. In that case, a divided Wisconsin Court of Appeals panel held that the City of Kenosha's Board of Review properly classified a parcel of property as "residential" rather than "agricultural" over the landowner's objection. Since this decision was announced, we have been monitoring the landowner's appeal to the Wisconsin Supreme Court, which has just weighed in.

In a 4-3 decision, the supreme court affirmed the decision of the Board of Review and rejected all arguments the landowner raised in his appeal. For procedural reasons, the supreme court reviews the decision of the Board and not the decisions of the court of appeals or circuit court Thus, the Board's decision will remain in effect.

You may recall that this dispute arose because the City of Kenosha assessed the landowner's property as residential. However, the landowner contended that it should have been classified as "agricultural." Agricultural property is generally assessed at a lower rate than residential property as a benefit to farmers.

After losing before the Board of Review, the circuit court, and the court of appeals, the landowner appealed to the Wisconsin Supreme Court. He raised three arguments as to why the Board's ruling was unlawful: (1) the Board improperly ignored the agricultural uses of the land; (2) the Board improperly considered prospective residential uses of the property; and (3) insufficient evidence existed to support the Board's "residential" classification. The supreme court rejected all three arguments in a 4-3 decision authored by Justice Brian Hagedorn.

The landowner first argued that the land met the definition of "agricultural land" because he was only using it for some agricultural purposes, and so it should have been classified as "agricultural." The supreme court rejected this argument because there was insufficient evidence in the record that enough agricultural activity was occurring to justify that classification. The record showed that the only significant agricultural activity taking place was "a bit of tilling" and casual harvesting of walnuts. There was no livestock on the property nor was there any timber harvesting. Accordingly, the land was not "chiefly given over to agricultural use," and Board's determination was therefore justified.

The landowner's second argument was that the Board improperly considered the prospective residential use of the property in classifying it as residential. The landowner argued that because the statute required the Board to classify the property "on the basis of use," it could not be classified as residential due to the lack of a dwelling or human abode on the property. The supreme court rejected this argument and held that the statutory definition of residential property included but was not limited to land which currently had a dwelling or human abode on it. Guidance from the WPAM also supported this reading, according to the court. Therefore, it was proper for the Board to have considered whether it was reasonably likely or planned for the property to be used for residential purposes in the future.

Finally, the supreme court quickly rejected the landowner's third and final argument that insufficient evidence supported the Board's classification. The supreme court reiterated that the Board only needed "substantial evidence" to justify its determination, which "is not a high bar." The supreme court was satisfied that factors such as the lack of organized agricultural activity and undeveloped nature of the land were enough to support the Board's residential classification. Thus, the decision of the Board was left to stand.

The supreme court's ruling in this matter clarifies the scope of municipalities' exercise of discretion in assessing properties. The Board of Review won, in part, due to its reasoned legal conclusion and proper analysis of the facts. We encourage municipalities to reach out to a member of the Boardman Clark Municipal Law Practice Group with questions regarding the implications of this decision moving forward.

— Storm B. Larson

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