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Certiorari, Not *De novo*, Review Applies to Liquor License Renewals

The November 2012 edition of this newsletter reported on a Wisconsin Court of Appeals decision reversing a circuit court holding that municipal denials of liquor license renewals are subject to *de novo* rather than certiorari review under Wis. Stat. § 125.12. *Nowell v. City of Wausau*, 2012 WI App 100, 344 Wis. 2d 269, 823 N.W.2d 373. The Wisconsin Supreme Court reversed that decision and agreed with the circuit court that certiorari is the appropriate method.

The Nowells operated a tavern known as "IC Willy's." The tavern held a combined intoxicating liquor and fermented beverage license issued by the City of Wausau. Shortly after it was issued the police began receiving noise complaints. After being warned that adult entertainment was prohibited, the tavern held a "Girls Gone Wild" event at which the police witnessed nudity and lewd behavior. The Nowells agreed to a 15-day suspension and offered a 16-point plan to deal with the problems. In May, the city informed the Nowells that it did not intend to renew the license because of numerous police calls and their failure to meet compliance checks or to comply with the plan. A city committee held a 14-hour hearing at which 18 witnesses testified and 42 exhibits were received. The committee issued a decision recommending that the city council not renew the license. After further argument, the council accepted the recommendation.

The Nowells filed an action with the circuit court alleging that the city had unfairly discriminated against them and precluded them from offering evidence of disparate treatment. In addition, they claimed that the city wanted to give the license to another business and therefore exercised its will rather than its judgment. The circuit court held a two-day hearing at which the Nowells were allowed to present evidence on their disparate treatment and arbitrariness claims. The court applied the four-part certiorari test, citing *Marquette Savings & Loan Ass'n v. Village of Twin Lakes*, 38 Wis. 2d 310, 316, 156 N.W.2d 425 (1968), and concluded that the Nowells had failed to prove that their allegations. Accordingly, the court affirmed the city's decision.

The Nowells appealed, arguing that they were entitled to *de novo* review of the denial. The court of appeals agreed, reversed the judgment and remanded for further proceedings. The court of appeals found the issue to be a straight forward matter of statutory construction. At the time Marquette was decided, there were different statutes applicable to fermented beverage and intoxicating liquor licenses. The *de novo* standard applied to fermented beverages. The intoxicating liquor statute did not specify any manner for judicial review and the supreme court adopted the certiorari standard as being generally applicable to the review of municipal decisions. In 1981, the legislature consolidated the alcohol statutes and the court of appeals held that the current version, section 125.12(2)(d), continues the standard for judicial review that applied to fermented beverages when Marquette decision was issued.

In support of its conclusion, the court of appeals noted that the statute provides that review proceedings be treated the same as civil actions; that the parties must file a complaint and answer respectively; that a court hearing may be held within as few as 5 days; that the court has the authority to issue subpoenas and to compel the attendance of witnesses; and that there is no provision for the filing the record from the municipality with the court. While noting that it was a substantial departure from the usual method applied to the review of municipal actions, the court of appeals found that these procedures

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Extraterritorial Density Regulation Deemed Zoning Not Subdivision Control

The distinction between regulations that may be applied as extraterritorial zoning versus extraterritorial subdivision ordinances has been litigated over many years. The difference is significant. Extraterritorial zoning requires a joint body of the city or village and the town to establish regulations. Extraterritorial subdivision regulations are adopted and enforced unilaterally by a city or village over town land. In a decision recommended for publication, the Wisconsin Court of Appeals reversed the denial of an extraterritorial subdivision plat on the grounds that it constituted zoning regulation. *Lake Delavan Property Company, LLC v. City of Delavan*, Appeal No. 2013AP1202 (Ct. App. Feb. 12, 2014).

The plaintiff is a development company that had purchased land in the Town of Delavan with the intention of subdividing it and building about 600 single-family homes. The land was zoned residential by Walworth County. It was in the planned sanitary sewer service area by the Southeast Wisconsin Regional Planning Commission and the city's comprehensive plan designated it as a "traditional neighborhood." The county's and town's comprehensive plans showed the area as urban density residential, with lots smaller than five acres.

Several years later, the city amended its subdivision ordinance adopting a minimum 35-acre lot size for land within its extra territorial subdivision jurisdiction. The following year, the company submitted a preliminary subdivision plat with lots smaller than the 35-acre regulation. The city rejected the plat and the company brought a certiorari action.

The rejection of the plat under these extreme circumstances would most likely have been reversed under previous case law. In general terms, extraterritorial subdivision regulations are intended to make development consistent with the infrastructure and character of development in anticipation of eventual annexation into the neighboring city or village. In this case, the regulation went in the opposite direction and was clearly intended to effectively prevent residential development and keep open space on the city's borders. That is a classic function of zoning law.

The case is significant, because it is written in very broad terms and relies heavily on a 2009 amendment to statutory section 236.45 authorizing extraterritorial subdivision. The amendment prohibits the refusal to approve a plat or CSM on the basis of the "proposed use of the land" unless the regulation is adopted as part of extraterritorial zoning. The case expressly calls into question the validity of prior case law. In practice, distinguishing between "use" regulations that are zoning rather than land division has proven more complicated than just applying labels and generalities. The case begs the question of whether minimum lot size requirements will now be deemed exclusively zoning in nature or whether the particular circumstances of this case rendered the 35-acre provision a zoning regulation. The case is likely to re-energize the debate.

— Mark J. Steichen

Supreme Court Reverses on Sufficiency of Special Assessment Appeal

The May/June 2013 edition of this newsletter reported on a published decision of the court of appeals addressing the applicability of the notice pleading and relation back doctrines of sections 802.02(1) and 802.09 of the Wisconsin Statutes to special assessment appeals. *CED Properties, LLC v. City of Oshkosh*, 2013 WI App 75, 348 Wis. 2d 305, 836 N.W.2d 654. The court held that the doctrines apply. However, by a split decision 2-1, the court found under the facts of the case, the taxpayer's complaint specifically addressing a first assessment was insufficient to appeal a second one.

In a unanimous decision, the supreme court has reversed the outcome. It agreed that the doctrines apply, but found that the complaint encompassed both assessments. *CED Properties, LLC v. City of Oshkosh*, 2014 WI 10 (Mar. 6, 2014).

CED owns a corner property at the intersection of Jackson Street and Murdock Avenue in the City of Oshkosh. In 2010, the city embarked on an improvement project that encompassed both streets at this intersection. The city issued two separate assessments against CED's property, one for each street. The resolutions stated that they "are hereby combined as a single assessment," but went on to state that "any interested property owner shall be entitled to object to each assessment separately or both assessments, jointly . . ." The Jackson Street and Murdock Avenue assessments were listed as separate items with different amounts for each one.

The city's resolutions for the two assessments were published on July 27 and 31, 2010, respectively. CED filed a complaint with the circuit court on September 23, 2010--within the 90 days required by statute. The complaint listed the property's Jackson Street address and tax parcel number. It also recited the amount of the assessment for the Murdock Avenue improvement, but not for the Jackson Street portion. The complaint alleged that the Murdock Avenue amount was "for the street repair of the Jackson Street-Murdoch Avenue intersection improvement project." When CED moved for summary judgment, the city argued that the complaint applied only to the Murdock assessment. On June 28, 2011, CED filed an amended complaint that modified each paragraph to specifically refer to the Jackson Street assessment.

At the circuit court, the city conceded that the assessment process was procedurally flawed and the court granted summary judgment for CED on the Murdock Avenue amount. It granted summary judgment in the city's favor on the Jackson Street assessment. The circuit court reasoned that the notice pleading and relation back rules do not apply to assessments because of the specific statute, Wis. Stat. § 66.0703, that governs assessment appeals.

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are simply incompatible with the common law and statutory certiorari process and that the legislature intended decisions on alcohol licenses to be reviewed on a *de novo* basis.

The supreme court reversed. It went through an extensive statutory review and addressed each of the points on which the court of appeals had relied. It found that the procedures set out in section 125.12 did not conflict with the certiorari procedure. The court emphasized that alcohol regulations in particular are considered the exercise of police power to be enforced by local governments and that these decisions are legislative in character. Consequently, *de novo* review would cause the judiciary to usurp the prerogatives of the legislative branch.

— Mark J. Steichen

REGULATORY WATCH

"Regulatory Watch" highlights federal and state agency actions of interest to municipalities and their utilities. It is presented as a regular feature of the Municipal Law Newsletter *by Anita Gallucci, Rhonda Hazen, Richard Heinemann and Lawrie Kobza.*

Wisconsin Public Service Commission Files Complaint Against Presque Isle Cost Shifts

Responding to a proposed System Support Resource Agreement ("SSR Agreement") intended to subsidize the cost of running the 340 MW Presque Isle coal plant owned by WE Energy and located in the Upper Peninsula of Michigan, the Wisconsin PSC has filed a complaint with the Federal Energy Regulatory Commission (FERC). The PSC complaint alleges that the SSR Agreement, which was submitted to FERC for approval by the Midcontinent Independent System Operator, Inc. (MISO) in January, 2014, unreasonably shifts costs onto Wisconsin ratepayers. FERC regulations authorize MISO to enter SSR agreements with generation owners whenever a proposed plant shut down causes potential reliability concerns. The agreements are intended to allocate the costs associated with running the generation resource to transmission system users for a temporary period until alternative arrangements for the plant or necessary infrastructure investments are made. The Presque Isle plant was slated for shut down by WE Energy in 2013 when two large coal mines previously served by the plant opted to obtain electric service from another supplier in accordance with Michigan retail choice law. Fixed monthly costs to the transmission customers allegedly benefiting from the proposed SSR Agreement are estimated to be over $4 million, and numerous regulatory agencies, utilities, large customer coalitions and environmental groups have protested various aspects of the SSR Agreement, including the proposed method of allocating costs. FERC approved the SSR Agreement on April 1, 2014 and the PSC promptly filed its complaint in order to shift a greater share of SSR Agreement-related costs onto the Michigan customers it purportedly benefits.

FERC Concerned With Unusual Market Conditions This Past Winter

This winter's frigid temperatures, which have wreaked havoc with wholesale energy markets, have prompted a number actions by federal regulators. On March 20th, FERC initiated a proposed rulemaking to improve the coordination and scheduling of natural gas pipeline capacity with electricity markets because of the increasing reliance by electric generators on natural gas as a fuel supply. By starting the natural gas operating day earlier and increasing daily scheduling flexibility, it is hoped that shippers will be able to better adjust to shifting demand. These and related efforts to better coordinate gas and electricity markets are being undertaken alongside an overarching investigation by FERC into the gas and electric markets, which has seen periods of unprecedented spiking in the gas and electric spot markets throughout the winter months. FERC's area of inquiry includes the possibility of market manipulation by market participants, as well as the role played by industrial demand fluctuation, supply shortages, exports to Mexico and a wide range of other market conditions. FERC is also scheduling a technical conference on April 1 to address the challenges presented by the extreme cold this winter.

"State of the Markets" Report Underscores Concern for Dependence on Gas-Fired Generation

According to FERC's "State of the Market" report for 2013 and the first part of 2014, gas demand was up, setting a new daily record of 137 Bcf/d in January. Gas and electricity spot prices increased overall in 2013, even as electricity demand fell for the third consecutive year. Emergency demand response resources were called upon by independent system operators in 2013 more than in any of the past five years. There was also an overall increase in generation capacity by 2,000 MW in 2013, with a 5,000 MW gain in gas-fired generation resources, which offset about 3,000 MW of nuclear and coal plant retirements. Such statistics provide context for recent public comments by FERC commissioners Moeller and Norris expressing concern for increasing dependence on gas-fired capacity in the generation market in the event that industrial demand picks up over the next several years.

Supreme Court Reverses on Appeal

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The court of appeals affirmed but on different grounds. All three judges agreed that that the notice pleading and relation back rules apply to special assessments under Wis. Stat. § 66.0703. The rationale was simple. Section 801.01(2) provides that Chapters 801 through 847 govern practice and procedure in the circuit courts for special proceedings as well as civil actions--unless the statutes governing the particular type of special proceedings provide otherwise. A special assessment appeal is a special proceeding. Section 66.0703 does not contravene the pleading rules of Chapter 802. Therefore, the notice pleading and relation back rules apply to appeals of special assessments.

The dispute between the majority and dissent focused on whether the original complaint was sufficient to refer to the assessments for both streets. For an amended complaint to relate back to a prior complaint for purposes of the date of filing, the original complaint must have given the defendant notice of the facts underlying the claims. The majority noted that the original complaint recited the assessment amount for Murdock Avenue but not for Jackson Street. In addition, the majority focused on the part of the resolution permitting appeals of individual assessments. The dissent argued that, based on the liberal notice pleading rule requiring a complaint to read in the light most favorable to the plaintiff, the reference in the original complaint to the project at the intersection was sufficient to put the city on notice that the appeal concerned both streets.

The supreme court agreed with the dissent and reversed. It confirmed that the pleading rules apply to special assessments. The court went on to find that the initial complaint gave the city sufficient notice that both assessments were being appealed because: (1) the complaint identified the parcel number to which both assessments applied; (2) it identified the improvement project as the "Jackson Street-Murdock Avenue intersection improvement project"; and (3) the city's project name referred to both streets by name.

— Mark J. Steichen

boardman & clark llp
LAW FIRM

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

Certified ABA-EPA Law Office
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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 attorneys listed below who are contributing to this newsletter.

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Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Rhonda R. Hazen	283-1724	rhazen@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Sarah B. Painter	283-1744	spainter@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com