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Wisconsin Supreme Court Addresses Dark Store Evidence & Presumption of Correctness in Tax Assessment Claims

On February 16, 2023, in *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, the Wisconsin Supreme Court ruled that the City of Delavan's ("City") 2016 and 2017 tax assessments of a Lowe's store were not excessive. According to the majority, Lowe's failed to introduce sufficient evidence to overcome the presumption of correctness afforded to municipal assessments pursuant to Wis. Stat. § 74.37. This decision marks a positive development for municipalities because it confirms that municipalities' assessments are presumed correct, and taxpayers ultimately bear the burden to challenge their property tax bills.

A complicated set of rules and statutes govern Wisconsin tax assessment claims. Therefore, some background may be helpful. In a nutshell, municipalities assess properties under a three-tier framework, and each tier corresponds to a set of information that the assessor can consider. Assessors must start at tier 1 and can only proceed to a higher tier if no information is available under the lower tier.

Tier 1 instructs assessors to look to a recent arm's-length sale of the subject property to determine its fair market value. If no recent sale data exists, then the assessor may move to a tier 2 analysis, which examines recent arm's-length sales of reasonably comparable properties. This is often called a "sales comparison" approach. If no data is available from either tier 1 or tier 2, the assessor may move to tier 3, which permits consideration of all factors that collectively bear on the property's value, such as cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus, and appraisals produced by the owner. Once the assessment is complete, the assessed values are deemed presumptively reasonable.

Property owners who wish to dispute their assessment may, pursuant to Wis. Stat. § 70.47(7), file an objection with the relevant municipal board of review. The board of review then decides whether to grant or deny the objection. If the board denies the objection, the taxpayer can appeal that decision through three different avenues: (1) certiorari review pursuant to Wis. Stat. § 70.47(13); (2) a written complaint with the Department of Revenue to revalue the property under Wis. Stat. § 70.85; and (3) an excessive assessment action pursuant to Wis. Stat. § 74.37. With this brief summary in mind, we can turn to the case at hand.

Lowe's Home Centers, LLC v. City of Delavan involved the City's 2016 and 2017 assessments in which it assessed property owned by Lowe's at $8,922,300 for both years. Lowe's challenged the assessment, and the Board of Review disallowed

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the claim. Lowe's then filed an action in Walworth County Circuit Court pursuant to Wis. Stat. § 74.37(3)(d).

Lowe's argued that the property's fair-market value was actually $4,600,000. To arrive at this figure, Lowe's relied upon an expert report that utilized the tier 2 (sales comparison) analysis. After a three-day bench trial, the circuit court rejected Lowe's analysis because nearly all of the properties that Lowe's deemed "comparable" were either "dark" or in economic distress (i.e., in receivership). For context, the Wisconsin Property Assessment Manual defines "dark store" as one that is "vacant beyond the normal time period for that commercial real estate marketplace and can vary from one municipality to another." Thus, a dark store will often be valued at a much lower amount and is often not comparable to a property which is not dark. Because nearly all of the properties were not comparable, the circuit court concluded that Lowe's had not introduced sufficient evidence to overcome the presumption of correctness afforded to municipal assessments. The court of appeals affirmed this decision.

Lowe's appealed to the Wisconsin Supreme Court, which largely adopted the circuit court's analysis. There are two key takeaways from the supreme court's decision. First, it confirmed the principle that the initial presumption of correctness attaches regardless of whether the municipality initially applied the wrong assessment methodology. The supreme court observed that it is up to the taxpayer to overcome that presumption by adducing significant contrary evidence and to point out these flaws.

The second notable takeaway concerns the evidentiary value of dark/distressed property data when used in comparison to a property that is not dark or distressed. In this case, the circuit court disregarded the dark store data and found it too different to be probative. The supreme court ruled that this was a proper ruling. Therefore, moving forward, circuit courts can exclude dark/distressed property data under the tier 2 approach if the subject property is neither distressed nor dark. The supreme court did note, however, that there will be close calls and there may be times when considering a vacant property as opposed to a dark property may be permissible in appropriate circumstances.

Lowe's Home Centers, LLC is an important decision because it resolves some ambiguity in how municipalities can defend tax assessment litigation while still leaving some questions unanswered for another day.

We encourage you to reach out to a member of the Boardman Clark Municipal Law Practice Group with any questions.

— Storm B. Larson

Public Service Commission Rules on Third Party Decisions

The Public Service Commission of Wisconsin ("PSCW") has ruled on two closely watched proceedings pertaining to the following question: can third-party developers own or lease renewable energy facilities on the property of customers in utility territory without being regulated as public utilities (MLN, September/October)?

In Dockets 9300-DR-106 ("Vote Solar") and 9300-DR-105 ("MREA"), solar developers sought declaratory rulings from the PSCW on this question. The petitions were opposed by public utilities, including a coalition of municipal utilities led by Municipal Electric Utilities of Wisconsin ("MEUW"), who argued that installing renewable energy facilities in utility territory owned or leased by anyone other than customers is prohibited by existing law.

The PSCW issued its Final Decision in the Vote Solar proceeding last month. The ruling permitted only a single member, North Wind Renewable Energy Cooperative ("North Wind"), to build and lease a small solar installation on the home of a single residential customer in utility territory. The ruling thus fell short of the broad allowance originally sought by the petitioner that would have allowed a new class of electric service providers to own or lease similar facilities to utility customers in utility territory.

Notwithstanding the narrow ruling, the public utilities, including the MEUW-led coalition, have sought rehearing or reopening on the grounds that there was insufficient evidence in the record on the full scope of North Wind's business activities to provide a basis for the PSCW's ruling on North Wind's public utility status.

In MREA, the PSCW declined to issue a final decision, instead reopening the record and ordering the petitioner, Midwest Renewable Energy Association ("MREA"), to provide additional information on several issues, including (i) the nature of the class of customers MREA or its members intend to serve; (ii) how the equipment to be owned by MREA for its behind-the-meter solar services differs from equipment used to prove solar service in front of the meter; and (iii) the function, intent, and purpose of the various technologies listed by MREA in its petition that would be the beneficiary of third-party financing if authorized by the PSCW. No schedule has been set for this new phase of the proceeding.

— Richard A. Heinemann

Wisconsin Public Records Law: Risk Of Attorney's Fees Remains, Despite Voluntary Release

As those familiar with public records requests may know, Wisconsin's Public Records Law allows a requester to sue for the release of records when requested records are withheld or delayed. If the requester "substantially prevails," the court will award reasonable attorney's fees and other actual costs related to accessing the record.[1] When records are voluntarily released after a suit is pending, often the only issue remaining is the question of attorney's fees. In the past, courts examined if a suit was a cause in-fact for a record's voluntary release to determine whether to award attorney's fees. Last year, the Wisconsin Supreme Court released its decision in *Friends of Frame Park, U.A. v. City of Waukesha,* 2022 WI 57, which imposed the Prevailing-Party Test to determine if attorney's fees should be awarded in such cases.

Under the Prevailing-Party Test, a requester is required to "obtain a judicially sanctioned change in the parties' legal relationship" to be awarded attorney's fees, such as an order for the record's release. However, the Supreme Court was unable to fully apply this test in *Friends of Frame Park,* as the Court ruled that the voluntarily released records were initially properly withheld pursuant to the competitive and bargaining reasons exception to the public records law.[2] Thus, questions remained whether the Prevailing-Party Test would even allow an award of attorney's fees when previously improperly denied records are voluntarily released or whether the doctrine of mootness applied to bar an award of attorney's fees.

In a recent case, *Wisconsin State Journal et al, v. Wisconsin State Assembly et al,* No. 2021AP1196, the Wisconsin Court of Appeals had the first opportunity to apply the Prevailing-Party Test to determine whether attorney's fees should be awarded when previously improperly denied records are voluntarily released.

In *Wisconsin State Journal*, multiple newspapers requested public records relating to a sexual harassment complaint and investigation involving a Wisconsin State Assembly employee and a State Representative. The Assembly denied the request by providing a "High Level Summary for S.G. Complaint." The summary stated an employee made a complaint that the State Representative verbally sexually harassed the employee, that there was an investigation, and remedial actions were required. The Assembly stated it applied the "public records balancing test and determined that the public interest in treating employee internal complaints as confidentially as possible and respecting the privacy and dignity of the complainant/witnesses outweighed any public interest in disclosing." The newspapers sued, seeking a declaration the Assembly violated the public records law, asking for a mandamus order directing the Assembly to release the records, and asking for attorney's fees.

Months after the lawsuit was filed, the Assembly employee, through an interview with one of the newspapers, revealed details about the sexual harassment complaint while remaining anonymous. Due to this changed circumstance, the Assembly subsequently voluntarily disclosed the complaint, investigation report, and a printout of Facebook Messenger texts, with redactions. The Assembly justified the redactions "to protect the identity" of the Assembly employee and witnesses and to protect "protected health information" of the State Representative. The newspapers filed an amended complaint, alleging the records were wrongfully withheld, challenging some of the redactions of the voluntarily released records and, again, asking for attorney's fees.

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Public Service Commission Distributes $10 Million in Energy Innovation Grants

Recipients include Schools and Municipalities

The Public Service Commission of Wisconsin ("PSCW") has made award determinations for the 2022 Energy Innovation Grant Program, funding 32 grant recipients for a total of $10 million. The monies are available through Department of Energy funding originally provided to the State of Wisconsin under the American Rescue and Recovery Act of 2009.

Eligible recipients of the grant money include municipalities, municipal utilities, schools, and other local governments. This year's recipients include the City of Sun Prairie, Madison Area Technical College, Southwest Technical College, the Village of Viola, the City of Antigo, the City of Appleton, the City of Menomonee, and the City of Middleton. Three broad categories of projects were supported: Renewable Energy and Energy Storage, Energy Efficiency and Demand Response, and Comprehensive Energy Planning.

Although applications are closed for this round of funding, another round of funding is expected to occur in 2024. Local governments interested in applying can find additional information at boardmanclark.com/energy-grant.

— Richard A. Heinemann

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The Wisconsin Court of Appeals found that the Assembly violated the public records law twice. First, when it initially denied the release of any records in response to the public records request, and second, when it redacted the identities of a legislator and staffer who were not witnesses to the sexual harassment or interviewed during the investigation. In finding the first violation, the Court emphasized the Assembly's lack of detail in its denial based on the balancing test. When there is no exception to disclosure of a record, a record custodian must perform the balancing test, which requires a consideration of all relevant factors to determine whether the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure. The Assembly failed to properly apply the test in both instances. The Assembly's denial should have described the responsive records and applied the balancing test to each record individually with policy reasons for denial specific to each record, rather than relying on the summary it provided. This is necessary to provide the requester with sufficient notice of the grounds for denial to enable the requester to prepare a challenge to the withholding. The balancing test also requires operating under a presumption in favor of disclosure, rather than in favor of non-disclosure as the Assembly did here.

The Court awarded attorney's fees for each failure under the Prevailing-Party Test. The Assembly had argued that, since the Assembly had voluntarily provided the records after suit was filed but before a court ordered release, the issue regarding the initial denial was moot. If the issue is moot, it argued, the newspapers did not obtain a judicially sanctioned change in the parties' relationship so there is no "prevailing-party," which would result in no award of attorney's fees.

The Court denied the Assembly's argument and found that the newspapers' claim on the initial denial for the release of records was not moot and, even if moot, several exceptions to mootness applied. The Court noted that *Friends of Frame Park* did not address whether the exceptions to mootness would apply to allow a court to reach the merits of whether an initial denial was improper.[3] The Court ruled that a case is not moot if a ruling on the issue would have a practical effect on a legal consequence, and that the award of attorney's fees in the mandamus statute is a legal consequence. In addition, the Court found the following exceptions to mootness apply: the issue is of great public importance, the issue arises often and a decision from the court is essential, the issue is likely to recur and must be resolved to avoid uncertainty, and the issue is likely of repetition and evades review.

One of the three appellate judges, Judge Fitzpatrick, disagreed with the Court regarding the mootness issue. Judge Fitzpatrick argued that the issue regarding the initial denial of release of records was moot because the Assembly later provided the records voluntarily. Therefore, Judge Fitzpatrick disagreed with awarding attorney's fees for that issue. Judge Fitzpatrick opined that for attorney's fees to be awarded, the court must grant relief to the newspaper—in this instance, order the Assembly to provide the records. However, since the records were voluntarily released, even though delayed, attorney's fees are not permitted.

While the majority's application of the Prevailing-Party Test in *Wisconsin State Journal* should provide clarity on whether attorney's fees can be awarded when previously denied records are voluntarily released, the lack of a unanimous decision may suggest otherwise. If anything, *Wisconsin State Journal* shows the limitations of the *Friends of Frame Park* decision. One cannot help but wonder whether the Wisconsin Supreme Court will further clarify the application of the Prevailing-Party Test or if the legislature will amend the law regarding attorney's fees. The State Senate has already introduced a bill that aligns with the Freedom of Information Act, which would allow attorney's fees if a court finds the filing of a lawsuit was a substantial factor for the voluntary release of records.[4] Those who handle public records requests should remain mindful of such potential developments in the public records law.

Municipalities should take away two things from *Wisconsin State Journal*. First, in responding to open records requests, it is important to properly apply the balancing test on a case-by-case basis, with a presumption in favor of disclosure. The response must be thorough and specific, with policy interests specific to each responsive record that is withheld or redacted. It is unacceptable to provide a summary of the information contained in responsive records in lieu of the actual responsive records. Second, until otherwise clarified by the courts or the legislature, municipalities cannot simply voluntarily release records after a suit is filed to avoid paying the requester's attorney's fees. Based on the application of the Prevailing-Party Test in *Wisconsin State Journal*, almost no public records case will be found moot, so attorney's fees will be available in public record cases if the court finds the initial denial or delay to be improper. Therefore, it is crucial to correctly respond to public records requests from the start to avoid risking an award of attorney's fees.

— Eric B. Hagen & Maximillan J. Buckner

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1 See Wis. Stat. § 19.37(2)(a).

2 See Wis. Stat. § 19.85(1)(e).

3 See *Wisconsin State Journal*, 2021AP1196 at ¶¶ 30, 33 and 36, and at footnote 10.

4 See 2023 Senate Bill 117.

Denial of Permit Reversed on Certiorari Review as Being Based on an Incorrect Theory of Law

Sanitary District's Gravel Path a Utility Structure Exempt from County Shoreland Zoning

Delavan Lake Sanitary District sought to lay a gravel path over land near Delavan Lake so that it could bring in heavy equipment to repair its sewer pipes in the area. The District applied to the Walworth County Land Conservation Division for a construction site erosion control permit to lay down the path. The County told the District it needed to petition for rezoning and a zoning variance because the path would be within 75 feet of the ordinary high water mark of the channel to the lake. The District contended that it was not required to obtain rezoning because its path was an exempt utility structure under Wis. Stat. § 59.692(1n)(d)5. The County, and then the Board of Adjustment, denied the District's application for an erosion control permit in part because of the County's conclusion that construction of the path would violate its shoreland zoning ordinance and the District's unwillingness to obtain rezoning.

The District filed a petition for certiorari challenging the Board's decision. The circuit court agreed with Board and denied relief. The District appealed and the Court of Appeals in *Delavan Lake Sanitary District v. Walworth Board of Adjustment*, No. 2022AP289 (Ct. App. Dist. II, March 8, 2023), reversed.

The court's decision, which is recommended for publication, began with a discussion on the standards applicable to certiorari review. The Board's decision is presumed to be valid but the Board must apply the appropriate legal standards and adequately express the reasons for its decision in the record. The court's review of whether the Board applied the appropriate legal standards is de novo. The court is to consider whether the Board (1) acted within its jurisdiction, (2) proceeded on a correct theory of law, (3) acted in an arbitrary, oppressive, or unreasonable manner that represented its will and not its judgment, and (4) could reasonably have reached its decision based on the evidence before it.

The court's decision focused on the second prong of review — whether the Board proceeded on a correct theory of law. Wisconsin statutes require a county shoreland zoning ordinance to establish a setback of 75 feet from the ordinary high water mark. Within the shoreland setback area, a county may limit or prohibit the construction or placement of structures. This authority is subject to certain exemptions set forth in the statute. One of those exceptions is in Wis. Stat. § 59.692(1n)(d)5 and provides that a county shoreland zoning ordinance may not prohibit the construction of "[a] utility transmission line, utility distribution line, pole, tower, water tower, pumping station, well pumphouse cover, private on-site wastewater treatment system that complies with ch. 145, and any other utility structure for which no feasible alternative location outside of the setback exists and which is constructed and placed using best management practices to infiltrate or otherwise control storm water runoff from the structure."

The court's decision turned to interpretating the language of Wis. Stat. § 59.692(1n)(d)5 — and in particular the word "utility" — using numerous statutory construction rules. The court concluded that the term "utility" as used in Wis. Stat. § 59.692(1n)(d)5 includes town sanitary districts and the provision of municipal sewage disposal and treatment. The term is not limited to "public utilities" as defined in Wis. Stat. § 196.01(5). The court thus found that the Board proceeded under an incorrect theory of law when it based its decision on its conclusion that rezoning was required because the gravel path was not an exempt utility structure. The court further found that the Board did not make any findings as to whether a feasible alternative location outside of the setback existed for the proposed gravel path and that denying the permit on that basis now would be arbitrary and unreasonable and would represent the Board's will and not its judgment. The Board's order was therefore reversed.

— Lawrie Kobza

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Municipal Law Newsletter

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