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COVID Local Fiscal Recovery Funds May Impact Levy Limits

On May 5, 2021, the Wisconsin Department of Revenue (DOR) issued guidance on how local governments' receipt and expenditure of federal American Rescue Plan Act - Local Fiscal Recover Funds (LFRF) may impact state-imposed levy limits, shared revenue and the expenditure restraint program (ERP), and tax incremental financing (see Guidance at https://www.revenue.wi.gov/Pages/SLF/COTVC-News/2021-05-05.aspx).

Communities should receive their LFRF allocations in 2020 and 2021 and may spend those funds until December 31, 2024.

Impact on Shared Revenue and ERP. The LFRF has no direct impact on most shared revenue programs, but may impact the ERP. Under ERP, local governments are eligible to receive aid from the State provided that they meet certain criteria - i.e., their multi-purpose tax rate exceeds five mills and general fund budget from one year to the next increases by no more than inflation plus a growth factor. A large expenditure of LFRF funds could, however, cause a municipality to fail to qualify for the program. To avoid disqualification from ERP, DOR recommends that local governments use their LFRF funds for specific identified projects. If the funds are not deposited into and paid out of the local government's general fund, but set up in a restricted special fund, the local government may avoid a negative impact on ERP aid.

Impact on Levy Limits. Avoiding a possible negative impact on levy limits may be trickier. Local governments may only increase their property tax levy based on the prior year's levy, adjusted under a formula for new construction. In addition, identified services funded through property taxes cannot be replaced by fees. Using LFRF to fund operations normally covered by the property tax levy could result in reducing the levy limit in a year. If so, that lower levy limit will restrict the local government's levy in the following year. Conversely, if LFRF are used to fund programs above and beyond the general tax levy, those programs may not be able to continue because of the levy restrictions in the following year. To avoid such a negative impact, the local government may wish to spread out the expenditure of its allocated LFRF over the four-year period during which such funds may be expended.

Impact on TID Projects. As DOR notes, use of LFRF should not impact the value of a tax incremental district (TID). However, if LFRF are used to reduce the tax levy, it may reduce the increment generated in a TID. LFRF may be used for TID project costs if such use is set out in the TID's project plan and if federal law allows LFRF to be used for such a project.

Local governments may wish to review the Interim Final Rule at https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf of the U.S.

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Legal Nonconforming Use Survives if Use Continues in Any Way, Even if Owner Promised to End the Use

In *Village of Slinger v. Polk Properties, LLC*, 2021 WI 29 (April 1, 2021), the Wisconsin Supreme Court reversed lower court decisions and found that an owner must cease all aspects of a legal nonconforming use before the use is considered abandoned. The ruling by the Court is the latest in a series of cases that emphasize the different standards governing the "use" of property under Wisconsin zoning law and tax assessment law.

Polk Properties owned an 80 acre parcel in the Village of Slinger. The property was zoned agricultural, and the owner regularly harvested hay and other grasses from the property. There was no dispute that such harvesting continued throughout the relevant period, including after a zoning change and after two agreements between the Village and the developer.

Polk asked the Village to rezone the property as residential, because he wanted to develop a residential subdivision. The Village not only granted the request, it entered into two agreements with Polk. The Development Agreement stated, among other things, that the property "was zoned only for single-family use." The Declaration of Covenants, Conditions and Restrictions (Declaration) stated that ""[e]ach Lot shall be occupied and used only for single family residential purposes and for no other purpose. No business, commercial or individual activity (except as allowed under applicable zoning codes) shall be conducted on any lot . . . ." Id., 2019 WI ¶ 7. The Declaration also stated that the restrictions on residential use "are enforceable by the Village." See the unpublished Court of Appeals decision reversed by this ruling, *Village of Slinger v. Polk Properties, LLC*, 2019 WI APP 48, ¶ 23.

The Court of Appeals relied on the two Agreements between the Village and Polk, along with the zoning change to residential sought by Polk, as constituting an abandonment of the agricultural use, and thus found it could not be a lawful nonconforming use. The Supreme Court reversed, finding that established Wisconsin law requires both (1) an intent to abandon the use, and (2) an actual cessation of the use. Because all parties agreed that the agricultural harvesting had continued on a portion of the property, the Supreme Court held there was no actual cessation of the use. Thus, it was a legal nonconforming use. The Court reversed the summary judgment for the Village, and all of the related damages and penalties assessed by the Circuit Court.

The Court's decision was a 6-0 unanimous ruling, with one justice filing a concurring opinion. Justice Hagedorn did not take part, as he was in the majority on the Court of Appeals decision that was reversed.

Because the concept of a legal nonconforming use is a creature of Wisconsin zoning law, we on the sidelines can speculate what might have happened if the Village had sued only on the Declaration. That agreement specifically said that Polk agreed that all of the property "shall be occupied and used only for single family residential purposes and for no other purpose." Would this Declaration be enforceable even if there was no zoning violation? That is not clear, especially since the Declaration went on to say that no other activities could take place on the property "(except as allowed under applicable zoning codes)".

The Wisconsin Supreme Court issued a previous decision involving the same property and a related dispute between the Village and Polk Properties. In *Thoma v.Village of Slinger*, 2018 WI 45, the issue was whether the same property could be assessed for tax purposes as residential property. In *Thoma*, the Wisconsin Supreme Court upheld the residential assessment, and ruled that the evidence presented to the Village Board of Review (for the 2014 tax year) showed only that the property was used for "ground cover" and there was no agricultural use. 2018 WI 45 ¶ 6. In this earlier case, Thoma and his attorney asserted multiple times to the Board of Review that there was no farming taking place on the property. *Id.*, ¶ 23.

The Supreme Court makes an oblique reference to these different outcomes in its most recent ruling, citing to the earlier *Thoma* ruling, see 2021 WI 29 ¶ 2 and fn. 4, ¶4 and fn. 6. In the latter footnote, the Court states, "It is therefore not necessary for this court to specifically define "farming," or "agricultural use" in the context of zoning classification versus "agricultural use" for tax assessment purposes."

Given the Court's reluctance to expound on the different definitions for zoning and tax assessment purposes, we will have to discern them as best we can.

See also, "Divided Court Agrees with Kenosha: Property Not Actually Used for Ag Purposes May be Assessed as Residential," *Boardman Municipal Law Newsletter* (January/February 2021 Issue): https://www.boardmanclark.com/publications/municipal-newsletter/divided-court-agrees-with-kenosha-property-not-actually-used-for-ag-purposes-may-be-assessed-as-residential

— Michael P. May

Public Service Commission Launches Road Map to Zero Carbon Investigation

The Public Service Commission of Wisconsin (Commission) has launched a new docket (PSC Docket 5-EI-158) to investigate how the State of Wisconsin transitions to zero-carbon electricity. The investigation intends to evaluate a range of energy-related topics, including recent plans announced by the State's five largest utilities to reduce carbon emissions 100 percent by 2050; recently issued recommendations from the Wisconsin Energy Distribution and Technology Initiative (WEDTI) on how to accelerate clean energy efforts to benefit consumers; recommendations from the Governor's Task Force on Climate Change (*Municipal Law Newsletter,* January 2021); and the Governor's own Clean Energy Plan, which directs utilities and state agencies to work toward achieving 100 percent carbon-free electricity consumption by 2050.

The exact scope of the investigation has yet to be determined, as the Commission seeks input from public utilities, customer groups, environmental groups and others on how best to prioritize the issues.

Potential areas of focus include the continuing transition of utility scale generation resources to renewable energy; the increased deployment of customer-owned energy resources such as roof-top solar; technological innovations in distribution system planning, battery storage and microgrids; new customer-focused programming and tariffs to promote energy efficiency, load management, and the use of electric vehicles, among other things; and advancements of the wholesale power markets and transmission planning.

Some of these areas of focus contemplate a potentially enhanced role for municipalities and local governments. In Joint Comments filed by a coalition of Wisconsin municipalities and local governments comprised of Dane County and the Cities of Green Bay, La Crosse, Racine, Eau Claire, Milwaukee and Madison (Local Government Coalition), the Commission is encouraged to use the investigation to find ways to enable public utilities to partner with local governments interested in taking more control over their energy needs, for example by creating incentives to support energy efficiency in buildings, promoting customer-owned energy generation, developing pilot projects around energy storage and microgrids, and accelerating the electrification of the heating and transportation sectors.

The Local Government Coalition also encourages the Commission to investigate the "utility as conductor" concept developed as part of the WEDTI recommendations. This concept -- also cited by WPPI Energy and Municipal Electric Utilities of Wisconsin in their comments to the Commission-- recognizes the role utilities can play in coordinating new technologies at the distribution system level to enhance reliability, save costs and provide environmental benefits in ways that are fair for all customers.

Although it is as yet unclear how the Commission will proceed, the Roadmap to Zero Carbon investigation promises to generate a great deal of information from a variety of perspectives that may be worth monitoring by municipalities who are in the process of pursuing or developing their own clean energy initiatives.

— Richard A. Heinemann

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Treasury Department (150 pages) giving guidance on the federal limits on the use of LFRF or the 8-page Fact Sheet at https://home.treasury.gov/system/files/136/SLFRP-Fact-Sheet-FINAL1-508A.pdf summarizing the Rule, which was issued on May 10, 2021.

See our previous article, "Local Governments Need to Plan for Covid Relief Funds Under the American Rescue Plan Act" in our March/April issue at https://www.boardmanclark.com/assets/newsletters/marapr_2021.pdf.

— Michael P. May and Anita T. Gallucci

Boardman Clark Welcomes Storm B. Larson

Boardman & Clark is pleased to announce that Storm B. Larson has joined the firm as an associate. Storm graduated in May 2018 from University of Wisconsin Law School. He graduated from the University of Wisconsin-La Crosse in 2015, highest honors, with a degree in English. During law school, Storm served as articles editor on the Wisconsin Law Review and as a judicial intern to the Honorable William M. Conley at the U.S. District Court for the Western District of Wisconsin as well as to the Honorable Ann Walsh Bradley at the Wisconsin Supreme Court.

Storm will be working in the municipal law practice group, as well as a number of other areas in the firm, including labor & employment and civil litigation.

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