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Wisconsin Supreme Court Expands Fair Dealership Law to Municipalities

In a case of first impression, the Wisconsin Supreme Court expanded the Wisconsin Fair Dealership Law (WFDL) to apply to municipalities. Benson v. City of Madison, 2017 WI 65. The decision marks the first time any court in the nation has applied fair dealership law to a local governmental body. The ruling is certain to have a huge impact on municipal contracts with third parties for the provision of municipal services and may give rise to a bevy of new claims against municipalities.

At issue was the contractual relationship between the City of Madison and its golf pros. The City owns four public golf courses and had entered into "operating agreements" with four golf pros to oversee the clubhouse operations at the courses. The City maintained the physical golf courses, while the golf pros performed such tasks as collecting greens fees, hiring and managing attendants, supervising golfing, operating the clubhouse and pro shop, selling concessions, and giving lessons. The golf pros were paid a base contract amount in addition to receiving a percentage of the revenue from concessions, sale of merchandise, golf instruction, and club and cart rentals.

In August 2012, a few months before the contracts were to expire, the City asked the golf pros for new proposals on clubhouse operations for the next contract term. The following October, the City informed the golf pros that the contracts would not be renewed. The golf pros subsequently brought a fair dealership claim against the City, alleging that the City's failure to renew the contracts violated the WFDL. The circuit court sided with the City and ruled the golf pros' contracts were not dealership agreements under the WFDL. The court of appeals affirmed.

The Wisconsin Supreme Court ruled that the contractual relationship between the City and the golf pros constituted dealerships under the WFDL. Wis. Stat. Chapter 135. Writing for the majority, Justice Ziegler found that a dealership relationship was created because: (1) the contracts were between two or more "persons;" (2) they granted the golf pros the right to sell or distribute a municipal service (in this case, access to the City's golf courses); and (3) the golf pros' business of selling City services created a "community of interest." Thus, according to the Court, all necessary elements of a dealership relationship were present.

The cornerstone of the Court's ruling is its conclusion that a municipality is a "person" within the meaning of the WFDL, which defines "person" as "a natural person, partnership, joint venture, corporation or other entity." Wis. Stat. § 135.02(6) (emphasis added). Based on facile reasoning, the Court concludes that, because a municipality is referred to in statutes as a "body corporate" and as a "municipal corporation" in many court decisions, the City of Madison is obviously a "corporation" under the WFDL.

According to Justice Abrahamson's dissent, the majority opinion fails to address the relationship of the WFDL, municipal constitutional and statutory home rule, and other statutes governing governmental entities. The dissent notes that the majority fails to consider that "it is establishing a far-reaching precedent that will produce unreasonable results" and that will have "widespread ramifications for all municipalities in this state and the many contracts on diverse topics to which they are parties."

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Conditional Use Zoning Law in Flux

The Wisconsin Supreme Court rejected an effort to substantially change the rules applicable to conditional use permits. *AllEnergy Corp. v. Trempeleau County*, 2017 WI 52 (4-3, January 11, 2017). What is noteworthy is the narrow majority upholding current law and that a bill circulating in the legislature would adopt the change proposed by the dissent.

AllEnergy involves an application for a conditional use permit for a frac sand mine. The county zoning agency conducted a hearing and denied the permit. The two most significant issues were: (a) whether the designation of a use as conditional within a zoning district conclusively establishes that the use is desirable and in the public interest, and (b) whether conditions may be imposed on a permit to address only those adverse effects that are beyond the normal and expected impacts that the particular use has.

Justice Abrahamson wrote the lead opinion and was joined by one other justice. Two justices concurred in the result, but would have decided the case on narrower grounds; they would not have reached all the issues addressed by the majority and dissent. Three justices dissented. The case reflects the shift in the makeup of the court toward stronger property rights views and weaker local government control.

The lead opinion upheld the existing rule that merely listing a use as conditional is not a legislative determination that the use is inherently in the public interest in that district. Current law allows the zoning agency to take into account all factors in the zoning code and to conclude that the particular proposed use is not in the public interest. The dissent would have adopted a rule that applies in some other states that the local governing body has already taken into consideration all of the normal and expected impacts inherent in the particular type of use and has declared that the use is nonetheless desirable. The dissent would have made it much harder for municipalities to reject or limit conditional use applications. The dissent would not have gone as far as AllEnergy proposed to create a rule that conditions could be imposed to address only adverse impacts above and beyond the usual, expected impacts inherent in the use.

— Mark J. Steichen

Fair Dealership Law Expanded to Municipalities

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After this ruling, any municipal contract that creates a dealership relationship may, under the WFDL, only be terminated for cause after at least 90 days' prior notice. Municipalities would be wise to re-examine contracts with third parties to determine whether they may be subject to the WFDL and should take care not to inadvertently create new dealership relationships with third parties in the provision of municipal services.

— Anita T. Gallucci

Limitations on Interior Property Inspections for Property Tax Assessments

In its recent decision in *Milewski v. Town of Dover,* 2017 WI 79, the Wisconsin Supreme Court held that requiring property owners to either consent to a tax assessor coming inside their home or give up their right to challenge a municipality's reassessment of their property value violates the right to due process guaranteed by the Fourteenth Amendment.

The Milewskis own a home in the Town of Dover, Wisconsin. In 2013, the Town reassessed the value of all the properties in its jurisdiction. In Wisconsin, real property must be valued from actual view or from the best information that the assessor can practicably obtain, when an actual view is not feasible. When the assessor arrived at the Milewskis' home, they allowed him to view their property's exterior but did not allow him to inspect the interior of their home. After the assessor provided a written request to view the interior of their home, the Milewskis again refused. The assessor made no further attempts to view the interior of the property and assessed it at a value that was 12.12 percent higher than the prior year. Accordingly, their property taxes increased.

The Milewskis sought to challenge this revaluation. In order to challenge an assessor's revaluation, a dissatisfied property owner may object to the local board of review. The property owner may do so, however, only after he meets the board of review's filing requirements, which include allowing a tax assessor to view the property. If the property owner has refused a reasonable written request of the assessor to view the property, that property owner cannot appear before the board of review. Importantly, this requirement does not say where the assessor will be when he conducts his view of the property.

The Milewskis appeared before the Dover Board of Review in November 2013. However, because the Board of Review determined the Milewskis had refused a reasonable written request of the assessor to view their property, the Board of Review would not hear their objection. The Town told the Milewskis that they must either submit to the tax assessor's inspection of the interior of their home or lose the right to challenge the revaluation of their property. The Milewskis subsequently brought a lawsuit against the Town claiming that requiring such a choice was unconstitutional. Specifically, the Milewskis argued that the interior inspection was an unreasonable search that violated the Fourth Amendment and their inability to challenge the revaluation violated their right to due process guaranteed by the Fourteenth Amendment.

The court found that while the requirement to allow one's property to be viewed before challenging a valuation was not unconstitutional, the requirement was unacceptably applied in the Milewskis' case. The court noted that if a government agent occupies private property for the purpose of obtaining information, he is conducting a search within the meaning of the Fourth Amendment. A tax assessor who enters a home to conduct an interior view occupies private property for the purpose of obtaining information and is therefore conducting a search within the meaning of the Fourth Amendment. Under these circumstances, without a warrant, consent, or other applicable exception, conducting such a search violated the Fourth Amendment.

The court further noted that while Wisconsin requires real

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County's Courthouse Access Policy Violated First Amendment

In *Higher Society of Indiana v. Tippecanoe County, Indiana*, 858 F.3d 1113 (2017), the Seventh Circuit Court of Appeals held that a County's policy that restricted a group's demonstration on courthouse grounds violated the First Amendment.

The Higher Society of Indiana is a non-profit organization that advocates for the legalization of marijuana in Indiana. The group wanted to hold a rally on the steps of the Tippecanoe County Courthouse in Lafayette, Indiana. In 1999, the Tippecanoe County Board of Commissioners declared the courthouse grounds a "closed forum" and adopted a policy requiring groups to obtain the Board's sponsorship before holding an event on the grounds. The County wanted to only sponsor events that echoed the County's views. Over the years, the Board sponsored various events with diverse viewpoints. However, several groups consistently protested on the courthouse grounds without the Board's permission, and the Board did not object. Due to a County official's misunderstanding, Higher Society held a peaceful event on the courthouse steps without Board sponsorship. A Commissioner asked the group to stop, and the group disbanded. Subsequently, Higher Society asked for permission to hold a second event on the courthouse steps. The Board declined to sponsor the event, citing the closed forum policy and the lack of support from any Commissioner. Higher Society then sued the County and was granted an injunction by a court allowing it to demonstrate.

In *Higher Society*, the County argued that even though its denial of the group's request to demonstrate was clearly viewpoint discrimination, it was permissible under the First Amendment because the events the County sponsors on the courthouse grounds constitute government speech. The Seventh Circuit Court of Appeals disagreed and held that the County's denial of the marijuana advocacy group's request was impermissible viewpoint discrimination and not government speech.

The Court noted there were two ways the County could legally block Higher Society's demonstration from courthouse grounds. First, the County could have argued that the grounds were a nonpublic forum and that its speech regulations were "viewpoint neutral and reasonable." Second, the County could argue that its sponsored events are government speech, which the County could regulate without violating the First Amendment. Because the County admitted that its denial of Higher Society's event was not viewpoint neutral, the County had to argue its event was government speech. The Court noted that government speech occurs when (1) the government has traditionally spoken to the public in the manner at issue; (2) observers of the speech at issue would reasonably attribute the message to the government; and (3) the government maintained editorial control over the speech.

The Court found that events on the courthouse grounds were private speech because the government had not historically used events conducted by private groups to deliver its own messages. Additionally, unlike permanent park monuments or state license plates, a reasonable observer would not attribute Higher Society's views to the County. A reasonable observer would know that protesters like to demonstrate on symbolic public property and, in many cases, the First Amendment guarantees them the right to march peacefully and make speeches, even if the government does not like what they are saying. Finally, the Court noted that the County did not have any editorial control of Higher Society's message. Presumably, anyone at the rally could express a view with which the County did not agree. Without such control, the County could not show that the private speakers were speaking on behalf of the County.

This case should serve as a reminder to municipalities about the requirements of the First Amendment. Even if a municipality designates a certain space as a nonpublic forum, the municipality cannot engage in viewpoint discrimination with respect to access to that space. If a municipality wants to let certain groups demonstrate in that space, then it must allow other groups to assemble in that space, even if the municipality does not agree with those groups' messages. However, a municipality can subject all groups to certain viewpoint neutral restrictions such as reasonable restrictions on the time, place, and manner of the demonstrations. Additionally, when creating policies to restrict demonstrations on government property, municipalities should be mindful of the limitations of the government speech doctrine. Any policy regarding access to public spaces should be enforced consistently to avoid charges of viewpoint discrimination.

— Brian P. Goodman

Interior Property Inspections for Property Tax Assessments

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property to be valued from actual view or from the best information that the assessor can practicably obtain, there is no preference for one over the other. Therefore, while an interior inspection may be "useful, convenient, and expedient" in developing a valuation, it is not required. A homeowner has a right to deny a tax assessor entry, and the assessor must subsequently seek the best information they can practicably obtain to conduct the valuation.

The court held that the Milewskis have a right to challenge the revaluation of their property in front of the Board of Review and a right to prevent the tax assessor from inspecting the interior of their home. The Board of Review cannot require an unconstitutional interior inspection of the property before allowing property owners to challenge a revaluation.

This case should put municipalities on notice of the requirements of the Fourth and Fourteenth Amendments as they relate to tax assessments of real property. First, homeowners have the right to refuse entry to tax assessors, and tax assessors must therefore rely on the best information they can practicably obtain. Second, so long as property owners have met a municipality's board of review filing requirements, a municipal board of review must allow them to challenge a revaluation. Specifically, the view required by the filing requirements does not have to be a view of the property's interior. To that end, if the filing requirements are met, the municipal board of review must allow property owners to challenge a revaluation whether the assessor was provided access to view the property's interior or not.

— Brian P. Goodman

Supreme Court Decides Wisconsin Regulatory Takings Case

Under the Fifth Amendment to the U.S. Constitution, private property cannot be taken for public use without just compensation. This is commonly referred to as the "takings clause." A "regulatory taking" occurs when government regulation so extraordinarily limits a landowner's ability to use his or her private property that it effectively deprives the landowner of the reasonable use or value of the land. Over the years, courts have struggled with one of the first steps in the analysis -- how to define the "land" at issue. In a recent decision -- *Murr v. Wisconsin*, 582 U.S. ____ (2017) -- the U.S. Supreme Court provided guidance to lower courts on this longstanding question.

The case involved two small adjacent parcels of land located along the lower St. Croix River in St. Croix County, Wisconsin. The Murr siblings received both parcels of land from their parents, who had owned one parcel individually and the other in the name of their family business. After the parents purchased the property, but before they transferred it to their children, local ordinances were enacted that established minimum lot sizes and prohibited the individual development or sale of lots that were too small, or "substandard," under the ordinance. The ordinance contained a "grandfather" clause that allowed owners who had purchased their lots before the rule went into effect to build on or sell their substandard lots. It also contained a "merger" provision that treated adjacent substandard lots as a single lot if the adjacent lots were owned by the same person.

The Murrs' parents were not impacted by the ordinance because their adjacent substandard lots were under separate ownership and had been purchased before the ordinance went into effect. When they transferred the lots to their children, however, the grandfather clause no longer applied and the adjacent lots, now both owned by the Murr siblings, were treated as a single lot under the ordinance's merger provision. The siblings wanted to sell off one lot and use the proceeds from the sale to renovate the cabin located on the other lot, but the ordinance prohibited them from selling the substandard lot. The siblings argued that this amounted to an unconstitutional regulatory taking.

In general, if a government restriction deprives the owner of "all, or substantially all, of the beneficial use" of the property, then a regulatory taking has occurred. In determining whether a regulation is so burdensome that it amounts to a regulatory taking, the Supreme Court has directed lower courts to consider the effect of the regulation on the "parcel as a whole." In general, the larger the "parcel as a whole," the less likely a court is to find that there has been a regulatory taking.

The parties to the case offered different theories about how the Supreme Court should define the "parcel as a whole." The Murrs argued that the Court should rely solely on the lot lines established by the property records, and consider the two adjacent parcels separately. Under their logic, because the ordinance prohibited the siblings from selling off one of the lots individually, that lot no longer had any practical use—the hallmark of a regulatory taking. On the other end of the spectrum, the state of Wisconsin argued that the Court should look to state property law to determine whether the lots should be considered separately or not. Because Wisconsin law would treat the two lots as a single unit, the state argued, the Court should do the same in its regulatory takings analysis. St. Croix County offered a third option, urging the Court to reject the simplistic tests put forward by the Murrs and the State of Wisconsin, and instead consider a variety of factors to arrive at an outcome that is just and equitable given the facts of a particular case.

The Supreme Court ultimately sided with St. Croix County and announced a new approach for determining what is meant by the "parcel as a whole." Courts must now apply a three-factored test rooted in the property owner's reasonable expectations about whether his or her lots would be treated as one parcel or as separate lots. Courts must consider: (1) the treatment of the land under state and local law; (2) the physical characteristics of the land; and (3) the prospective value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.

The Court went on to apply these factors to the Murr siblings' land and conclude that the two lots should be treated as a unified parcel for the purposes of the regulatory takings analysis: (1) Wisconsin law would treat the two lots as a single unit; (2) The unique physical characteristics of the property, including the lots' rough terrain, narrow shape, and location along a regulated riverway make regulations like those enacted by St. Croix County predictable; (3) The lots are more valuable when combined. In line with the Wisconsin Court of Appeals, the Supreme Court held that, when the lots were considered as one unified parcel, St. Croix County's regulation did not constitute a regulatory taking.

While the Supreme Court's decision in *Murr v. Wisconsin* did not dramatically rewrite the law of regulatory takings, it did provide some further guidance about how to analyze regulatory takings issues. The Supreme Court's decision to uphold St. Croix County's ordinance and adopt the three-factor test proposed by the County is widely viewed as a victory for local governments.

— Julia Potter

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Wisconsin Supreme Court Addresses Open Meetings Law And Committees

On June 29, 2017, the Wisconsin Supreme Court decided that a school district's Communication Arts I Review Committee (Review Committee) was a governmental body subject to Wisconsin's Open Meetings Law. The Court specifically held that "[w]here a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are 'created by . . . rule' under [Wis. Stat.] § 19.82(1), and the open meetings law applies to them." (*Krueger v. Appleton Area School District Board of Education,* 2017 WI 70).

While this case dealt with a school district, the decision is applicable to all units of government that may have committees or may use committees, subcommittees, or other groups in a similar manner or under similar authority.

There has always existed a tension between the stated policy in the Open Meetings Law that "the public is entitled to the fullest and most complete information regarding the affairs of government" and the countervailing concern that the law must be construed "as is compatible with the conduct of governmental business." The court noted that the "mere inconvenience" of complying with the Open Meetings Law does not exempt a body from the law.

This is the first Supreme Court decision addressing the issue of when a "committee" meets the definition of a "governmental body" under the Open Meetings Law. The decision focused heavily on the definition of a "governmental body."

Governmental Body Two-Part Test: When deciding if an entity is a governmental body one should look at: (1) The form it takes; and (2) The source of its existence in a constitution, statute, ordinance, rule, or order. Whether an entity is a "governmental body" is not determined by examining the purpose behind its formation or by the subject matter of its meetings.

Definition Of "Rule": For purposes of the Open Meetings Law, a "rule" includes any authoritative, prescribed direction for conduct, such as the regulations governing procedure in a governmental body. The recognition by the Supreme Court that the term "rule" should be given a common, ordinary, and accepted meaning undoubtedly encompasses entities created by board policy or other board action, including board approval of entities presented to it via handbooks.

The Essential Elements That An Entity Must Take In Order To Be A Governmental Body Are: (1) A defined membership; and (2) Collective responsibilities, authority, power, and duties vested in the body as a whole, distinct from the individual members.

In this case, the fact the Review Committee had a defined membership was critical because without a defined membership it would not be possible to determine whether a sufficient number of members were assembled to constitute a "meeting" of the body and a necessary characteristic of a governmental body is that collective power has been conferred upon it. The Handbook did not name the members of the Review Committee, but established the framework under which the administration selected regular members for the specific committee.

Ad Hoc Gatherings Not Covered: The Court noted a creation of a governmental body is not triggered merely by "any deliberate meetings involving governmental business between two or more officials." Loosely organized, ad hoc gatherings of governmental employees, without more, do not constitute governmental bodies. For example, the Court noted a meeting between the head of a department and the entire staff of a department was not covered by the Open Meetings Law because the staff did not constitute a body. Rather, an entity must exist that has the power to take collective action that the members could not take individually.

Distinction: The fact that an entity calls itself a committee, keeps minutes, records attendance, and records votes is informative with respect to the determination of a governmental body, but not dispositive.

Distinction In This Case And This Fact Setting: It was the Board's Rule and Board-approved Handbook that provided the legal authority for the Review Committee to exist in this case and set forth the Review Committee's duties and functions, not a directive from either of the administrators who coordinated the formation of the Review Committee. The Board had passed a specific policy dealing with curriculum review committees. The Review Committee in this case used a "modified process" where it followed most, but not all, of the steps and procedures laid out in the Board Policy and Handbook. The Court held that, despite these modifications, in reality, the Review Committee derived its authority and functions from the Board Rule and Handbook and, because of that, it constituted a governmental body.

Reminder: The Open Meetings Law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. A "meeting" is defined as the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body. Wis. Stat., § 19.82(2). The Wisconsin Supreme Court has held that the definition of a "meeting" applies whenever a convening of members of a governmental body satisfies two requirements: (1) There is a purpose to engage in governmental business; and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex. rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987).

Takeaways: While this decision does not provide all the guidance many had hoped for, it does delineate certain principles municipal entities should follow. Municipal entities may wish to re-evaluate their use of committees based on whether they constitute governmental bodies. Not every committee or group of employees will be a governmental body subject to the Open Meetings Law. However, if a committee has a defined membership and is charged with collective responsibilities, authority, power, and duties (by statute, rule, etc.), it is likely to be a governmental body, and the requirements of the Open Meetings Law should be followed. This includes giving proper notice of where and when a committee is gathering, recordkeeping, public access, and identifying any closed session issues that might be appropriate. Committees or its members may not be as familiar with meeting structure and formalities. Municipal entities may wish to provide more formal guidance for committees so that they are fully compliant with the Open Meetings Law.

— Douglas E. Witte

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