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Supreme Court Narrows Condemnation Liability for Change in Road Access

In *118th Street v. Wisconsin Department of Transportation (DOT)*, 2014 WI 125, the Wisconsin Supreme Court scaled back the liability that municipalities and all other bodies with condemnation power faced in condemnation that is indirectly related to road expansion, relocation or abandonment. The ruling overturns the Court of Appeals decision in *118th Street v. DOT*, 2013 WI App 147, 352 Wis. 2d 183, 841 N.W.2d 568.

The case involves a property owner (118th Street Kenosha, LLC) who had a commercial property located on 118th Street in Kenosha. The property had a driveway with direct access onto 118th Street. It had another driveway around the corner onto a private road named 74th Place. As part of a larger construction project, the DOT abandoned 118th Street along the block abutting the property and relocated it a block further east. The DOT acquired a temporary limited easement (TLE) from the owner along 74th Place and built an additional two-lane driveway entrance so that the property now had two driveways onto 74th Place. The owner and the DOT stipulated to compensation for the TLE itself in the amount of $21,000 based on the rental value of the land temporarily used by the DOT to construct the new driveway. The owner's appraiser opined that the property declined in value by $400,000 as a result of the relocation of 118th Street. The owner sought compensation for the diminished value under section 32.09(6g), Wis. Stats., which governs compensation for the taking of easements.

The trial court granted the DOT's motion *in limine* excluding evidence of damages caused by the loss of direct access to 118th Street. The court reasoned that section 32.09(6g) only allows damages that result from an easement. The court found that the loss of direct access was caused by the relocation of 118th Street and not by the acquisition of the TLE. The Court of Appeals reversed. Section 32.09(6g) talks about compensation for an easement comparing its value before the taking and its value after the taking "assuming completion of the public project." The Court of Appeals considered the "public project" to encompass the entire road improvement project, including the relocation of 118th Street. Accordingly, it found that taking the TLE was an "integral part" of the public project and that the owner was entitled to a jury determination as to the impact of the loss of direct access to 118th Street.

The Supreme Court faced three issues: (a) whether a temporary limited easement is compensable under section 32.09(6g)[as opposed to, for example, the Wisconsin Constitution's takings clause]; (b) whether, assuming that 32.09(6g) applies, the diminution in value due to the loss of direct access to 118th Street is compensable on the theory that the TLE caused the loss, and; (c) whether no compensation for the diminished value was required because the relocation of 118th Street was an exercise of the police power. The Court assumed without deciding that section 32.09(6g) applied but rejected the "integral part" theory and held that the taking of the TLE did not cause the loss of direct access and no compensation for diminished value was permitted. Because the Court decided the case based on this narrow issue, it did not reach the question about the police power. The Court did hint that the analysis might be different if the owner's case was based on a different theory. While cryptic, the Court may be referring to an inverse condemnation claim based directly on the relocation of 118th Street.

Issues involving changes in road access is a whole subset of law in eminent domain. The Court reviewed the circumstances in a number of prior cases to distill the rules governing when a taking of property that is part of a larger public project involving changes in a road abutting

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Lower Streetlight Utility Rates May Be Available to Some Municipalities

In the recent Wisconsin Electric Power Company (WEPCO) electric rate case, the Public Service Commission of Wisconsin approved new utility rates for streetlighting that could reduce costs for some municipalities. Municipalities that might be eligible should contact WEPCO to ask about these new streetlight rates.

In the WEPCO rate case, the PSC approved the creation of a new, optional, St2 tariff for streetlights owned by local governmental units. (Final Decision in PSC Docket 5-UR-107.) WEPCO's existing St1 tariff is a time of use streetlight tariff available to governmental units. The St1 tariff has a 14-hour on-peak period from 7:00 a.m. to 9:00 p.m. That means that a local government would pay peak energy rates for streetlighting that is on between 7:00 a.m. to 9:00 p.m. The optional St2 tariff will have a 12-hour on-peak period, so that a local government would only pay peak energy rates for streetlighting that is on between 6:00 a.m. to 6:00p.m. According to WEPCO, local governments currently using the St1 tariff could save between $1.0 and $1.2 million dollars annually in streetlight electricity costs by changing to the proposed St2 tariff.

— Lawrie Kobza

Supreme Court Narrows Condemnation Liability

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the property may be compensable. One of the leading cases on which property owners rely in making claims for damages for change in road access is *National Auto Truck Stops Inc. v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198, which holds, in part, that a property owner is entitled to compensation if its existing access is taken and the substitute access it retains after the taking is "unreasonable." The Court distinguished this case from a number of others. In *National Auto*, the truck stop had two points of access to the highway. The DOT acquired a strip of land encompassing both access points in order to build a new frontage road. In that case, the owner was entitled to "reasonable" replacement access and to compensation if the replacement access was "unreasonable" (what constitutes "reasonable access" is a fact-intensive question for the jury). The Court contrasted *National Auto* with several other cases, including *Carazalla v. State*, 269 Wis. 593, 71 N.W.2d 276 (1955). In *Carazalla*, the owner's property abutted Highway 51 in Marathon County. The county acquired 13.05 acres of land from the Carazallas and Highway 51 was relocated to that land. However, the land that was acquired did not include the property's access point to the highway. Therefore, evidence of a change in value of the property due to the relocation of Highway 51 was not compensable. Since the property that was taken did not access the highway in the pre-existing condition, it did not cause the loss in value. Of critical importance is that the Court did not consider an expansive view of the highway project in comparing the value of Carazalla's entire property before the taking to the value of the entire property afterward.

The Supreme Court's decision in *118th Street* is beneficial to municipalities because it rejects the "integral part" test that was adopted in the Court of Appeals' decision. The "integral part" test opened up potential damages to creative theories by property owners that would be difficult for condemnors to assess in advance. The decision must be viewed with some caution, however. The Court limited its holding to whether the taking of the temporary limited easement under these particular circumstances was compensable under section 32.09(6g). It did not rule out other potential theories for recovery.

— Mark J. Steichen

Town Fire Protection Charge Is Not a Disguised Tax According to Wisconsin's Attorney General

A town's fire protection charge imposed under Wis. Stat. § 60.55(2)(b) is not a tax, but rather is a fee which can properly be charged to a tax-exempt entity such as a county, according to the Wisconsin Attorney General. (OAG-01-15). A town in Clark County adopted an ordinance that charged all real property within the town a fire protection charge using a fee schedule based on the size and type of property (called a domestic user equivalent). Clark County received bills for fire protection under this ordinance. Clark County asked the Attorney General for an opinion on whether this fire protection charge was a fee or a tax, and whether it could be charged to a tax exempt entity like the county.

In reaching his conclusion that the fire protection charge was a fee that could be charged to the county, the Attorney General first opined that the town had the authority to impose a charge under Wis. Stat. § 60.55(2)(b) for "fire protection," and that this charge could be imposed regardless of whether a fire call to a property was actually made.

The Attorney General next addressed the bigger question of whether the charge could be imposed against a tax exempt entity like the county. The answer to that question, he stated, depended upon whether the charge was a tax imposed on property owners to raise general revenues or as a fee assessed for services provided. After analyzing the question, the Attorney General opined that the charge was more in the nature of a fee than a tax. In support of his opinion, he noted that the legislature referred to the charge as a "fee" rather than a tax, and that it would have been reasonable for the legislature to provide a fee mechanism for towns to recover the cost of fire protection services from tax-exempt entities. The Attorney General also stated, with relatively little discussion, that the primary purpose of the charge was to recoup the cost of the expense of providing fire protection to property in the community, and that it was not designed to raise general revenue.

In support of his opinion, the Attorney General cited to *City of River Falls v. St. Bridget's Catholic Church*, 182 Wis. 2d 436, 513 N.W.2d 673 (Ct. App. 1994). In that case, the Wisconsin Court of Appeals concluded that a similar public fire protection charge for water availability imposed under Wis. Stat. § 196.03(3)(b) was a fee, not a tax, which could be charged to tax exempt properties.

In both OAG-01-15, and *St. Bridget's*, the fire protection charges at issue took into account characteristics of the real property provided with fire protection service. In OAG-01-15, fire protection charges were based on the size and type of property using a "domestic user equivalent" methodology. In *St. Bridget's*, fire protection charges were based on property value. In both cases, the charges were upheld as proper fees. Neither case, however, provided much discussion on the use of property characteristics or property value to establish fees.

— Lawrie Kobza

Community Broadband Back in the News Nationally: What Does This Mean for Wisconsin?

In his State of the Union address ("SOTU"), President Obama said he wanted to extend the reach of the Internet "to every classroom, and every community, and help folks build the fastest networks, so that the next generation of digital innovators and entrepreneurs have the platform to keep reshaping our world." The President has made clear that he believes municipal government has a significant role to play in helping the nation achieve that goal.

The Obama Administration recently announced that the Department of Commerce is launching a new initiative, called BroadbandUSA, to promote broadband deployment and adoption. The program will offer online and in-person technical assistance to communities; host a series of regional workshops around the country; and publish guides and tools that will aid communities in addressing problems in broadband infrastructure planning, financing, construction, and operation.

The Obama Administration also supports the removal of state law barriers that prevent or hinder local communities from responding to the broadband needs of their citizens. Toward that end, just a few days after SOTU, the Community Broadband Act ("Act") was introduced in the Senate by a group of Democratic senators. The Act, which will amend the Telecommunications Act of 1996, is intended to remove roadblocks states have thrown up to prevent or delay the creation and expansion of municipally owned broadband networks. About 19 states around the country have passed laws that prohibit or make it difficult for municipalities to create or expand their own broadband networks. The Community Broadband Act seeks to overturn these laws.

The Act's proponents believe that municipal broadband can provide an affordable and reliable means of bridging the "digital divide" that has left many rural and low-income communities across the country without reasonable access to high-speed Internet services.

Wisconsin is often listed as one of the 19 states that has erected administrative hurdles, making it more difficult for municipalities to become community broadband providers. A closer look at the relevant Wisconsin law, however, leads to a different conclusion; namely, that there are no significant legal impediments preventing Wisconsin municipalities from addressing the broadband needs of their community.

To begin with, Wisconsin cities, villages, and towns all have authority to construct, own and operate broadband systems to provide Internet service. However, there are certain procedural steps a municipality must follow under Wis. Stat. § 66.0422 in doing so. That is, before the municipality may enact an ordinance or adopt a resolution authorizing a project to construct, own, or operate any facility to provide broadband service, the municipality must take the following steps:

Step 1: Prepare a Report. The municipality must prepare a report that estimates the total costs of, and revenues derived from, constructing, owning, or operating the facility. The report is to include a 3-year cost-benefit analysis, which examines personnel costs and the costs of acquiring, installing, maintaining, repairing, or operating any plant or equipment. The analysis must include an appropriate allocated portion of costs of personnel, plant, or equipment that are jointly used to provide both broadband services and other municipal services (e.g., electric, water, sewer).

Step 2: Publish the Report. The municipality must make its report available for public inspection at least 30 days before holding a public hearing on the authorizing ordinance or resolution.

Step 3: Hold a Public Hearing. Before adopting the authorizing ordinance or resolution, the municipality must hold a public hearing on the proposed project. Typically, the report would be presented at the public hearing, as well as any other studies the municipality had conducted related to the feasibility, cost, and funding of the project.

These steps do not have to be onerous and most communities would likely do more than what the statute requires before proceeding with a broadband project.

— Anita T. Gallucci

B&C Teams Up with League to Sponsor Energy Workshop for Municipalities

Many municipalities are facing higher energy costs, as well as growing interest from local residents and businesses in efforts to promote energy efficiency, renewable energy and improved air quality. In recognition of this, Boardman & Clark is joining forces with the League of Wisconsin Municipalities to sponsor a special seminar on what local governments can do -- and in many cases, are doing -- to develop a more proactive approach to energy issues. The one day workshop, which is titled "On the Road to Energy Self-Sufficiency: Practical Approaches to Net-Zero," is scheduled to take place on March 4, 2015 at the Olympia Resort in Oconomowoc.

At the workshop, Wisconsin local government officials will conduct working sessions to discuss a wide-range of energy initiatives they are currently undertaking to serve their communities. Scheduled presentations include representatives from: (i) the Sheboygan Regional Wastewater Treatment Plant discussing biogas production at their facility; (ii) the City of Monona discussing their recent solar energy installations; (iii) the City of Racine discussing how they have implemented an LED street light program; and (iv) the City of Janesville discussing a project to use compressed natural gas to fuel city vehicles. The presenters will explain how their community chose the project, how the project was implemented, how it is performing, the costs of the project, and the project's return on investment. Each presentation will be followed by discussion in order to provide attendees with the opportunity to get questions answered and share their own experiences.

The workshop also features a keynote address from Jeff Rich of Gundersen Health Systems in La Crosse explaining how and why they became the first health system in the nation to achieve energy independence. A luncheon presentation by noted municipal energy specialist Mike Bull will highlight the City of Minneapolis's efforts to achieve its energy policy goals by working collaboratively with their electric utility.

The workshop is being offered to registrants at a cost of $49 per attendee and is aimed especially at municipal officials from small to medium-sized municipalities, including municipal utility and city project managers, city administrators, finance directors, and other local officials interested in energy issues. For additional information about the seminar and registration, contact Charlene Beals at 608-283-1723, or go directly to the League of Wisconsin Municipalities website: http://bit.ly/342015ENERGYseminar.

— Richard A, Heinemann

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