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MUNICIPAL LAW NEWSLETTER

Volume 21, Issue 3, May/June 2015

IN THIS ISSUE

- *Zoning Appeals Boards Have Limited Authority to Reconsider Decisions*
- *Condemnor Cannot Rely on Known Material Mistake by Landowner*
- *Regulatory Watch*
- *Seeking Modification May Be a Useful Tool When Municipal Projects Interrupt Private Easements*

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Zoning Appeals Boards Have Limited Authority to Reconsider Decisions

A recent court of appeals decision is of interest to municipalities on two fronts. The decision addresses the authority of zoning appeals boards to reconsider their decisions, and the decision also deals with the application of a relatively new statute allowing "realignment" of nonconforming signs as part of a DOT highway project. *NextMedia Outdoor, Inc. v. Village of Hayward*, 2014AP1005 (April 14, 2015) (not recommended for publication). Although the case involves city zoning under § 62.23, Stats., the reasoning is also applicable to zoning boards of adjustment for counties under § 59.69, Stats.

NextMedia had a nonconforming billboard near a highway intersection. The DOT, as part of a highway improvement project, raised the highway such that the sign would no longer be visible. It condemned the sign and the sign permit rights and paid compensation. NextMedia applied to the Village of Howard for a sign realignment permit to move the sign to another location on the same property. The zoning administrator denied the request because NextMedia was asking to increase the height of the sign and to start using a digital display on one face. The village code allowed for realignment of legal nonconforming signs but any changes had to be limited to what was necessary for relocating it. The zoning board of appeals disagreed and granted the permit. Subsequently, the board conducted a new hearing and reversed its decision on the grounds that, contrary to its earlier understanding, the DOT had acquired the permit rights and had not proposed realignment. NextMedia brought a successful certiorari action based on the argument that the board had no authority to reconsider its decision. The court of appeals reversed the circuit court, thereby reinstating the board's decision denying the permit.

An Act passed in 2011 enacted § 84.30(5r), Stats., and gave the DOT some flexibility in dealing with the relocation of signs affected by highway projects. When a sign is legal, nonconforming, instead of having to pay compensation for removing the sign from the property entirely, the DOT can propose that the sign be "realigned." The word has the specific meaning of moving a sign from one location to another on the same parcel. If a municipality asks the DOT to acquire the sign and permit rights, then the municipality must reimburse the DOT for the cost of acquiring those rights. A municipality, however, is not required to allow realignment in its zoning code.

At the initial hearing on its application for realignment, NextMedia expressly or implicitly misrepresented that it had the rights to apply for a permit and that the DOT had proposed the realignment since those were both prerequisites to an application. When the DOT found out that a realignment permit had been granted, it notified the zoning administrator, who then obtained a new hearing during which testimony was produced showing that NextMedia no longer owned the sign or the permit rights.

Much of the argument on the board's authority to reconsider its decision focused on *Goldberg v. City of Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983). Both sides claimed that the case supported its side. In *Goldberg*,

Continued on page 2

Condemnor Cannot Rely on Known Material Mistake by Landowner

The court of appeals sharply criticized the Wisconsin DOT for trying to evade paying compensation for a piece of land that mistakenly appeared on a recorded certified survey map as "Road Dedication for Future Highway Purposes (Right-of-Way Width Varies." *Somers USA, LLC v. Wisconsin Department of Transportation*, 2015 WI APP 33 (March 25, 2015) (published). It is a cautionary tale for municipalities when determining whether property to be used in a public construction project is in public or private ownership.

Somers owned approximately 47 acres of land adjoining Interstate 94, which it intended to use for the construction of a truck stop. At the time Somers purchased the land, the DOT was planning a highway improvement project. The plans contemplated taking 9.5 acres of Somers' property for a frontage road and another 3 acres for an on-ramp. Somers engaged an engineering company to prepare a certified survey map (CSM) for the site and obtain the necessary approvals. The CSM required approval from Kenosha County under its land division ordinance adopted under the authority granted in Chapter 236, Stats.

The CSM went through several drafts based on conversations with the State refining the highway project plans. The initial draft listed both the 9.5- and 3-acre parcels as "Future Wisconsin D.O.T. Right-of-Way." The Kenosha County Land Use Committee approved this CSM with certain conditions but without requiring the dedication of any of the property for public use. For reasons that are not explained, Somers later recorded a version of the CSM that was different than the one that was approved. The recorded version described the 9.5-acre parcel as quoted above including the words "Road Dedication." The 3-acre parcel was described as a "road reservation for potential future state highway purposes." The key distinction between a dedication and a reservation is that the former transfers legal title to the government, if the dedication is accepted.

All of the people involved in drafting and signing the CSM testified that they did not know how the word "dedication" came to be inserted. All parties to the lawsuit (which included Kenosha County and the Town of Somers at times) agreed that none of the governmental bodies involved in the process of reviewing the CSM had required that the 9.5 acres be dedicated for public use and all parties agreed that Somers never intended to dedicate that land.

The DOT proceeded to use both parcels as part of its highway project without paying any compensation. Somers then filed an inverse condemnation action under § 32.10, Stats. The procedural history was apparently complicated; but ultimately the circuit court held that the DOT was required to pay compensation for both parcels and the parties stipulated to the amount of compensation.

The State argued that, while it owed compensation for the 3-acre "reservation" because no title was transferred, title to the 9.5 acres had been transferred to the public by operation of law under § 236.29(1) and 236.34(lm)(e), Stats. Those statutes provide that, when the appropriate procedures are followed, the recording of a plat or CSM showing easements or tracts as "dedicated" or similar language, has the effect of transferring title and no separate conveyance documents are required. The court rejected the statutory argument on two grounds. First, the procedures for dedicating land, including that the town and the county approve any dedication, had not been followed. On a broader note, the court pointed out that the intent to dedicate land to the public is an essential element and there was no such intent in this case. Finally, the court denied the State's argument that equitable estoppel should be applied against Somers because the State had not relied on the dedication to its detriment. The fact that the DOT had to reimburse Someror its attorney's fees and expenses under § 32.28, Stats., was not a detriment because it was the State's fault for continuing to defend its position.

The moral of the story goes beyond the specific facts in this case. Courts usually bend over backward to protect landowners' rights in condemnation matters. When a landowner makes a mistake, a municipality should consider the strategic advantages and disadvantages of relying on it aggressively. A good initial result can turn into a long court battle with the possibility that the condemnor will have to pay the landowner's attorney's fees. Having knowledge and experience in the eminent domain area goes a long way in choosing which issues to pursue.

— Mark J. Steichen

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Continued from front page

the zoning board of appeals granted a variance, but within a few days--without notice or a new hearing--it decided to make the variance applicable only to the current landowners. The issue arose years later when the landowners sold the property and the new owner was required to file a new application, which was then denied. The *Goldberg* court held that the board had exceeded its authority in reconsidering the decision. However, as the court in *NextMedia* pointed out, the *Goldberg* court recognized exceptions for reconsideration when the initial decision is based on a mistake of fact or law. The *Goldberg* court relied on a New Jersey case, which included additional exceptions for inadvertence, surprise, fraud and a substantial change in circumstances. Although neither *Goldberg* nor *NextMedia* expressly adopt those additional grounds for reconsideration, since they were not at issue in either case, it appears that the court of appeals would be receptive to arguments that zoning boards of appeals could rely on the additional grounds to justify reconsideration in appropriate circumstances.

— 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, Richard Heinemann and Lawrie Kobza.

Public Service Commission Approves We Energy's Acquisition of Integrys

Wisconsin Energy Corporation (WEC) received approval for its proposed acquisition of the Integrys Energy Group from the PSCW at the Commission's April 29, 2015 Open Meeting. The transaction has also been approved by the Federal Energy Regulatory Commission and the State of Michigan. Pending action from the state commissions of Illinois and Minnesota, the transaction is expected to close in late summer or early fall. The combined new company will be the 15th largest utility in the United States in terms of market value. In approving the acquisition, the commissioners unanimously agreed that the transaction would provide tangible benefits to customers, as required by Wisconsin law. The commissioners specifically cited the company's plans to retain its corporate headquarters in Wisconsin as a principal benefit to which the company should be held accountable. They also agreed on requiring a withdrawal of Wisconsin Public Service Corporation's application for approval to construct the Fox 3 Generating Station pending completion of an integrated resource study, and imposed an earnings cap and transmission escrow buy-down mechanism to provide further customer benefits. WEC's other voluntarily imposed conditions, including its commitment to restrict voting rights in the American Transmission Company LLC, were all accepted by the Commission.

D.C. Circuit Court of Appeals Vacates Exception to EPA's RICE Rules

On May 1, 2015, the U.S. Court of Appeals for the District of Columbia Circuit reversed portions of EPA's final rule amending the national emissions standards for hazardous air pollutants (NESHAP) for reciprocating internal combustion engines (RICE). The provisions at issue allowed backup generators to operate for up to 100 hours per year without emissions controls in emergency demand-response programs. The court held that EPA acted arbitrarily and capriciously in setting the 100-hour exemption by failing to adequately address concerns about the rule's impact on the reliability of the grid and by relying on faulty evidence in justifying an increase from the previous exemption of 15 hours. The rest of the 2013 RICE NESHAP remains in effect. In reversing the 100 hour exemption, the court said EPA can file a motion to request that the current standards remain in effect or that it be allowed time to develop interim standards served by organized capacity markets. The appeal, filed by the State of Delaware with support from, among others, the Electric Power Supply Association, had been opposed by the American Public Power Association and the National Association of Rural Electric Cooperatives. Many municipal utilities and cooperatives rely on the 100 hour exception to run the units as emergency units and participate in regional load shedding programs without having to invest in costly environmental controls. Challengers to the rule contend that this distorts the capacity market and detracts from grid reliability. The case is *Delaware Department of Natural Resources and Environmental Control v. EPA*, No. 13-1093.

Seeking Modification May Be a Useful Tool When Municipal Projects Interrupt Private Easements

Municipal street, utility and building projects sometimes prevent the continued use of existing private easements. A recent court of appeals case presents an example of creative thinking to remedy such circumstances rather than potentially incurring claims for substantial compensation even when the easement holders are not unanimous in their approval. *Mullenberg v. DOT*, 2014AP2034 (Ct. App. May 14, 2015) (recommended for publication).

The case involves five adjacent parcels of land located between Wisconsin Highway 35 and the St. Croix River and having five different owners. All five parcels are bisected by a bluff separating them into higher and lower parts. The owners were able to reach the lower tracts by virtue of a reciprocal easement across all parcels that terminated at a driveway for one of the parcels. The driveway gave them access to the highway.

The driveway was within the highway right-of-way. As part of a bridge project, the DOT exercised its regulatory authority to relocate the driveway. It planned to construct a path on state property connecting the driveway to a different point along the easement, thereby restoring access. For unknown reasons, the owner of a parcel without the driveway sued under § 841.01, Stats., seeking a declaration and enforcement of his interest in the original easement. He also sought to enjoin the DOT from relocating the original easement, expanding its scope or interfering with his use of the original easement.

At trial, the court found that the new trail was equal in all material respects to the original easement. Without the new trail, the original easement would have been useless. The court then exercised its equitable powers under property law to modify the original easement, terminating the portion that ran to the old driveway and adding the new trail. The court of appeals affirmed. A key factor in the appellate court's decision was the fact that the relocation of the driveway made it impossible, not merely more burdensome, to fulfill the purpose of the easement.

What municipalities should keep in mind is that it was possible to accomplish this modification even though one of the property owners opposed it.

— Mark J. Steichen

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The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Water Division.

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