BoardmanClark

Municipal Law Newsletter

VOLUME 28, ISSUE 4 JULY/AUGUST 2022

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

Wisconsin High Court Rules Election Drop Boxes Are Illegal; Absentee Ballots May Only Be Mailed or Hand-Delivered by the Voter

In a fractious 141-page ruling, the Wisconsin Supreme Court has found that unstaffed drop boxes may not be used to collect absentee ballots and that such ballots must either be mailed or delivered personally by the voter to municipal clerk. *Tiegen v. Wisconsin Elections Commission,* 2022 WI 64 (July 8, 2022). Justice Hagedorn was the fourth member of the 4-3 ruling, and he only agreed with about 23 pages of the 52-page majority/lead opinion. This leaves lawyers and clerks to sort out what parts of the ruling are the real majority opinion and which parts are only the opinion of 3 judges. Justice Hagedorn wrote a concurring opinion, and three justices dissented.

The case involved the interpretation of several sections of Wisconsin election law, primarily § 6.87(4)(b)1, Wis. Stats., which reads in part:

> The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.

The Court ruled that delivery of absentee ballots to drop boxes authorized by the municipal clerk did not constitute delivery to the clerk. Such delivery had to be at the clerk's office. The Court also ruled that the language about delivery of the ballot "in person" meant that the elector had to make such delivery to the clerk's office. The Court explicitly did not reach the question of whether an absentee ballot must be mailed by the elector or whether another person could put the ballot in a mailbox.

In making its ruling, the Court rejected guidance given by the Wisconsin Elections Commission ("WEC") allowing the use of sealed drop boxes to facilitate voting during the COVID pandemic. The sealed drop boxes had become very popular. WEC and many local clerks had interpreted the phrase "in person" to allow any person to bring the voter's absentee ballot to the Clerk's office. The Court disagreed.

Continued on page 2

Wisconsin Court of Appeals Affirms Town Board's Right to Reconsider Nonconforming Use Recognition and Request Zoning Administrator Decision

A recent decision from the Wisconsin Court of Appeals discusses whether a Town Board can properly withdraw an initial vote to recognize a nonconforming use under the diminishing assets rule and what happens when it does.

The decision, *Meinholz, LLC v. Dane Town Board of Zoning Appeals and Adjustment*, involved a landowner, Meinholz, LLC, which owned a tract of land in the Town of Springfield, Dane County. In 1968, Dane County adopted a zoning ordinance that only allowed quarrying as a nonconforming use if the quarried parcel was registered with Dane County. Meinholz or a related entity operated a quarry on a registered parcel. In 2017, Meinholz acquired three parcels adjacent to the registered quarried parcel with the intent to quarry them. Meinholz submitted a request to the Town in December 2018 to recognize quarrying on the three adjacent parcels as a legal nonconforming use under the diminishing assets rule.

In December 2018, the Town Board voted to recognize quarrying on the three parcels as a legal non-conforming use. However, in May 2019, the Town withdrew its recognition and referred the matter to the Town's zoning administrator for a ruling after local residents complained. The zoning administrator ruled against Meinholz and declared that the quarrying on the parcels was not a legal nonconforming use and that Meinholz would need a conditional use permit to quarry them. Meinholz appealed this ruling to the Dane Town Board of Zoning Appeals and Adjustment ("Zoning Board") which subsequently affirmed the administrator's ruling.

Meinholz then appealed the Zoning Board's ruling to Dane County Circuit Court. Meinholz did not argue that the Zoning Board's decision was incorrect, but rather challenged the Zoning Board's power to decide the nonconforming use status at all. Meinholz also sought a declaration that the Town's initial recognition should be binding on the parcels' status. The circuit court rejected all of Meinholz's claims and Meinholz appealed.

In a lengthy and detailed decision, the court of appeals affirmed the circuit court's decision. First, the court began by rejecting the premise of Meinholz's argument that the Town's recognition vote had conferred a fixed right upon Meinholz. The court noted that the Town's recognition vote did not, and could not, *create* a right to nonconforming use status. Instead, the most the Town's recognition could do is recognize a parcel's nonconforming use status based on its view of the objective facts regarding how the land was used or developed before enactment of the ordinance that prohibited the nonconforming use.

Second, Meinholz argued that the Town's initial recognition vote was binding on the Zoning Board because no party had challenged the Town's vote. The court rejected this argument holding that the *Town* was empowered to revisit its *own* prior decision.

Third, the court rejected Meinholz's argument that the Town's withdrawal of its initial recognition was improper because it did not use the term

Continued on page 3

Wisconsin High Court Rules Election Drop Boxes Are Illegal

Continued from front page

In his concurring opinion, Justice Hagedorn agreed with the outcome but disagreed with many other parts of the majority/lead opinion. He also invited the legislature and governor to clarify the law, which he thought reasonable people could read in different ways.

Left open is the question of whether an elector can have an agent drop off the absentee envelope in a mailbox. Certain portions of the law appear to allow an agent to assist the elderly or disabled in completing an absentee ballot, but the Court explicitly refused to answer the mailing question. After the Court decision, WEC's administrator said that absentee ballots may only be mailed by the elector. Given the Court's ruling and the language of the statute ("The envelope shall be mailed by the elector..."), this is not a surprising reading.

— Michael P. May

Recent Developments Regarding the First Amendment's Establishment Clause

Several recent U.S. Supreme Court cases have illustrated that municipalities should exercise greater caution before prohibiting religious activities out of fear that the municipalities will be sued for violating the Establishment Clause of the First Amendment to the U.S. Constitution. The First Amendment reads in part, "Congress shall make no law respecting an establishment of religion..." In 1971, the U.S. Supreme Court issued a decision in *Lemon v. Kurtzman* that created the three-part "*Lemon* test" for establishing whether a governmental action violated the Establishment Clause. Subsequent case law further developed a test known as the "Endorsement Test" which asks whether, in the totality of the circumstances, a reasonable observer would perceive the governmental action as a religious endorsement.

Earlier this summer, the U.S. Supreme Court issued *Kennedy v. Bremerton* and overruled both the Lemon Test and the Endorsement Test. In their place, the U.S. Supreme Court has left little direction as to what the appropriate legal tests are for the Establishment Clause. In *Kennedy*, the Court stated that in place of those tests, the Establishment Clause must be interpreted by "reference to historical practices and understandings," and that the line that governments draw between permissible and impermissible endorsement of religion has to accord with history and faithfully reflect the understanding of the Founding Fathers.

Unfortunately, this test leaves municipalities with very little practical guidance. Given the uncertainty and rapidly shifting legal landscape surrounding the Establishment Clause, municipalities should be cautious before asserting that any given action constitutes a violation of the Establishment Clause. Municipalities should evaluate the relevant historical practices and understandings surrounding any given activity and also consult with legal counsel.

In general, the current U.S. Supreme Court is hesitant to impute an individual's religious actions and expression to the municipality; this limits the legal risk of the municipality violating the Establishment Clause. Additionally, municipalities should be cautious about banning religious entities from participating in activities and programs within the municipality when the municipality allows non-religious entities to participate in those activities and programs. Finally, municipalities should be careful to treat all religious organizations similarly and not favor any given religion.

— Brian P. Goodman

Wisconsin Court of Appeals Affirms Town Board's Right to Reconsider Nonconforming Use Recognition

Continued from page 2

"withdraw" or "rescind" in its May 2019 vote to refer the matter to the zoning administrator. The court observed that there is no "magic words" requirement for withdrawing a Town Board's action.

Fourth, Meinholz argued that, after the Town Board's initial recognition vote, it possessed a vested right to quarry the land. This vested right, according to Meinholz, was not within the Board's jurisdiction to revoke. The court discussed each instance where Meinholz said the right had become vested and rejected each argument. The court explained that the Town only had the authority to regulate a right and not create one, and so no vested right had ever existed with respect to the parcels because they never had nonconforming quarrying status. Accordingly, the court rejected Meinholz's final certiorari claim.

Fifth and finally, Meinholz asked the court to declare that the Town was equitably estopped from enforcing its zoning ordinance that prohibited Meinholz from quarrying the parcels. Meinholz argued that it had reasonably relied upon the Town's initial vote to allow quarrying and had suffered harm in the form of lost revenue and opportunities. The court quickly disposed of this argument by citing the general rule prohibiting estoppel claims against municipalities. The court was further unpersuaded that the limited exception to this general rule applied to Meinholz because it had not pointed to any egregious or serious harm resulting from the Town's revocation. Accordingly, the estoppel claim also failed.

— Storm Larson

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

Certified ABA-EPA Law Office
Climate Challenge Partner

Municipal Law Newsletter

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.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	286-7255	ehagen@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Storm B. Larson	286-7207	slarson@boardmanclark.com
Michael P. May	286-7161	mmay@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@boardmanclark.com
Catherine E. Wiese	286-7181	cwiese@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com