BoardmanClark

Municipal Law Newsletter

VOLUME 29, ISSUE 4 JULY/AUGUST 2023

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US Supreme Court Finds Minnesota County's Failure to Return Excess Equity to Landowner Unconstitutional — What Does it Mean for Wisconsin?

In *Tyler v. Hennepin County, Minnesota, et al.*, 598 U.S. ___ (2023), a 94-year-old woman lost her home in a tax foreclosure to Hennepin County, Minnesota. She owed $15,000. Hennepin County sold her home for $40,000. Hennepin County used $15,000 of the proceeds to pay the past due taxes and kept the remaining $25,000 for itself. Under Minnesota law this was allowed, until the US Supreme Court's decision. The US Supreme Court, in a decision written by Chief Justice Roberts, found that the County keeping the remaining equity in the property, after paying the tax debt, would constitute an unconstitutional taking under the Fifth Amendment's taking clause.

The State of Minnesota's law gives property owners one year to pay real estate taxes prior to becoming delinquent. After a year, the taxes accrue interest and penalties and the County can obtain a judgment against the property, transferring a limited title to the State. The property owner then has three years to pay all of the taxes, interest, and penalties while retaining an interest in the property. If the property owner does not pay in full at the end of the three years, absolute title vests in the State. The law permits the State to keep the property for public use or to sell it. If the property is sold, any proceeds in excess of the tax debt and the costs of the sale remain with the County, which are split between the County, town, and school district. The former property owner has no opportunity to recover the excess funds.

The landowner argued, in part, that the County unconstitutionally retained the excess value of her home under the Takings Clause under the Fifth Amendment. The Takings Clause under the Fifth Amendment provides that "private property shall not be taken for public use, without just compensation." U.S. Const., Amdt. 5.

The Supreme Court found that the County unconstitutionally retained the excess value of her home stating that the County "could not use the toehold of the tax debt to confiscate more property than was due." The Supreme Court emphasized that "Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has

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transferred to the State, any excess value always remains with the State" and stated "A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed."

The decision is a potential change from how Wisconsin courts have interpreted the Takings Clause as it relates to tax foreclosures.

How does *Tyler v. Hennepin County* apply to Wisconsin?

Wisconsin has a different scheme than Minnesota for foreclosing on properties for the failure to pay taxes. Wisconsin law provides various methods for counties/municipalities to foreclose on delinquent taxes including a tax deed, foreclosure of a tax certificate, and foreclosure of tax liens by action in rem. While the processes are slightly different for the various methods, the end result is the County takes ownership of the property. Once the County takes ownership, it has the option to retain the property, to sell it to the previous owner, to sell it to another municipality (under certain circumstances), or to sell it to another party.

***Tyler v. Hennepin County* is likely to have an impact in several scenarios in Wisconsin.**

First, Wisconsin law does not require the County to resell the property. Based on the Court's analysis in *Tyler v. Hennepin County*, the County retaining property that has a higher value than the taxes owed can constitute an unconstitutional taking. It is not clear what, if any, notice to the former owner is required to give the former owner the opportunity to be paid any equity in the property that remains after taxes are paid. If the County decides to retain such a property, is the County going to be required to appraise every property it retains to determine whether there is excess value? If there is excess value, will the County be required to pay the former owner the difference? It is unclear after *Tyler v. Hennepin* what is required from the County when it retains property. What is clear is that post-*Tyler*, counties risk a Takings Clause argument from former owners.

Second, under current Wisconsin law, when the County decides to sell property after acquiring it through a tax deed, the County is required to provide notice to the former owner that the former owner may be entitled to a share of the proceeds of a future sale. The County is required to pay the net proceeds to the former owner if the County sells the property for more than the taxes plus costs, unless the County cannot locate the former owner within 5 years. This statutory process seems to follow the requirements of *Tyler v. Hennepin County*. The question becomes what efforts must the County undertake to "locate the former owner" in order to protect itself from a Takings Clause argument.

In a foreclosure of tax liens by action in rem, Wisconsin law, before *Tyler v. Hennepin County*, permitted the County to retain excess proceeds of a sale as long as the County provided the statutory notices. *See Ritter v. Ross*, 207 Wis. 2d 476 (Ct. App. 1996) (the court permitted the county to retain all proceeds of a $17,345 sale in an in rem proceeding for $84.43 in tax arrearage). The notice required in an in rem proceeding only requires the County to notify the owner that (1) the County initiated an action to foreclose on the tax lien and (2) that the owner has the right to redeem the property by paying the taxes. The notice does not state that the owner is entitled to excess proceeds of a sale. The court found the in rem statutory notice satisfied all applicable the due process rights of the defendant, and that the County was not required to specifically state that the former owners were entitled to the equity proceeds.

It is not clear whether the in rem proceeding process described above will be considered constitutional under *Tyler v. Hennepin County*. The question is whether the due process described above is sufficient to provide the owner with opportunity to retain the equity proceeds.

Last, Wisconsin law permits a County to sell the tax deeded land to the taxing jurisdiction of special assessments if the special assessments have not been settled in full. In this case, the law permits the County to sell the property to the taxing authority, presumably a municipality, for unpaid taxes and expenses. It is possible that the statutory calculation for the purchase

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Law Enforcement and Fire/EMS Maintenance of Effort Requirements for Shared Revenue Funding

As part of the modifications to shared revenue funding, 2023 Wisconsin Act 12 added a maintenance of effort requirement for law enforcement and fire/emergency medical services (EMS) (Wis. Stat. § 66.0808(2m)). Starting with 2024, municipalities will need to certify to the Department of Revenue (DOR) that law enforcement and fire/EMS efforts have not decreased from the previous year (Wis. Stat. § 66.0608(2m)(a)). Failure to certify maintenance of effort to DOR annually by July 1 will result in the reduction of shared revenue payments by 15% for the next year (Wis. Stats. §§ 66.0608(2m)(1) and 79.039(1)).

Law Enforcement

Cities, villages, or towns with a population greater than 20,000 are subject to the maintenance of effort requirement for law enforcement services (Wis. Stat. § 66.0608(2m)(a)1.). Such municipalities are required to certify that any one of the following factors has not decreased from the prior year:

- Number of sworn officers employed by or assigned to the municipality (excluding officers whose positions are funded by state or federal grants) (Wis. Stat. § 66.0608(2m)(b)1.c.). Only positions that are actually filled can be considered.
- Amount of the property tax levy spent on the employment costs of sworn officers (Wis. Stat. § 66.0608(2m)(b)1.a.).
- Percentage of the property tax levy spent on the employment costs of sworn officers (Wis. Stat. § 66.0608(2m)(b)1.b.).

Cities, villages, and towns where law enforcement services are provided solely by the county sheriff on a noncontractual basis, may provide a certified statement to that effect, in lieu of certification of one of the factors above (Wis. Stat. § 66.0608(2m)(c)4.).

Fire/EMS

All cities, villages, towns and counties are subject to the maintenance of effort requirement for fire and EMS services (Wis. Stat. § 66.0608(2m)(a)2.). Municipalities and counties are required to certify that any two of the following factors have not decreased from the prior year:

- Expenditures for fire protective services and EMS (excluding capital expenditures or expenditures of state or federal grant money) (Wis. Stat. § 66.0608(2m)(b)2.a.).
- Number of full-time equivalent fire fighters and EMS personnel employed by or assigned to the municipality or county (excluding personnel whose positions are funded by state or federal grants) (Wis. Stat. § 66.0608(2m)(b)2.b.). Only positions that are actually filled can be considered. Volunteer personnel who respond to at least 40% of calls to which volunteers responded may be counted as full-time-equivalent personnel.
- Level of training of and maintenance of licensure for fire fighters and EMS personnel providing services within the municipality or county (Wis. Stat. § 66.0608(2m)(b)2.c.).
- Response times for fire protective services and EMS throughout the municipality or county, adjusted for call location (Wis. Stat. § 66.0608(2m)(b)2.d.).

Exceptions

Act 12 included limited exceptions for municipalities or counties facing a change in how law enforcement services, fire protection or EMS are provided (Wis. Stat. § 66.0608(2m)(c)). These exceptions only apply to the year following the change in how such services are provided. In lieu of the normal certification(s) a municipality or county may certify:

- Consolidation of law enforcement services, fire protection services, or EMS with another municipality or county (Wis. Stat. § 66.0608(2m)(c)2.).
- Entry into a contract for law enforcement services, fire protection services, or EMS with a private entity (Wis. Stat. § 66.0608(2m)(c)2.).

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Trustee's Vote to Rezone Family Member's Property not a Violation of Due Process

In a recent unanimous decision, the Wisconsin Supreme Court held that there is no due process right to an impartial decision-maker when a legislative body like a Village Board or Common Council votes to rezone property. The case, *Miller v. Zoning Board of Appeals of the Village of Lyndon Station*, 2023 WI 46, involved a Village Trustee who cast the deciding vote in favor of rezoning property owned by her daughter and son-in-law, the Whaleys, with whom she was living at the time of the vote.

The Whaleys owned a 1.87-acre parcel that was zoned residential. They accepted an offer to purchase the property that was contingent upon it being rezoned to commercial to allow for the construction of a chain store. They submitted an application for rezoning, which went first to the Plan Commission for a recommendation, and then to the Village Board for a public hearing and a final decision. Some members of the public spoke at the hearing against the proposed rezoning, including Thomas Miller, the plaintiff in this lawsuit. Miller opposed the rezoning both because the proposed chain store would compete against the local business he owned and because he felt that the Trustee in question had a conflict of interest. After closing the hearing, the Village Board voted 2-1 to approve the rezoning, with the Trustee in question casting the deciding vote in favor of her daughter and son-in-law's application.

Mr. Miller appealed to the Village's Zoning Board of Appeals, which upheld the Village Board's decision approving the rezoning. He then sued the Zoning Board of Appeals and the Village Board in circuit court, arguing that the Trustee had an obligation to recuse herself from the vote due to a conflict of interest. The circuit court agreed with Mr. Miller, concluding that the Trustee's participation in the vote had violated Mr. Miller's right to due process because the Trustee was not a fair and impartial decision-maker. On appeal, the Wisconsin Supreme Court disagreed, holding that a vote to rezone property does not trigger the due process entitlement to a fair and impartial decisionmaker.

The Wisconsin Supreme Court's decision hinged on the distinction between adjudicative (sometimes also referred to as "quasi-judicial") decisions and legislative decisions. Adjudicative decisions, such as the decision to grant a variance or a conditional use permit, involve applying existing laws or ordinances to individual facts and require a fair hearing before an impartial decision-maker. Legislative decisions, on the other hand, involve making a prospective change by enacting, repealing, or amending a law or ordinance and do not require impartial decision-making. The court pointed out that legislators "often run for office promising to use legislative power to accomplish specific policy objectives" and concluded that partiality among legislators does not violate the due process rights of those impacted by a legislative decision—rather, "the primary check on legislators acting contrary to the public interest when legislating is the political process."

The court determined that decision to rezone the Whaleys' property was a legislative act because it did not involve applying existing ordinances to individual facts or circumstances, but instead involved amending the Village's generally applicable zoning ordinance to make a prospective change to the zoning classification of the Whaleys' property. This was true even though this particular amendment only affected the Whaleys' property and did not rezone any other parcels. Because the court held that the rezoning was a legislative act, it did not trigger the due process requirement of an impartial decision-maker and therefore it was not improper for the Trustee to cast the deciding vote in favor of her daughter and son-in-law's rezoning application.

A word of caution, however: this case was decided solely on the basis of the due process guarantees contained in Article 14 of the US Constitution and Article 1, Section 1 of the Wisconsin Constitution. Many municipalities have adopted local ethics codes that contain more stringent conflict of interest standards and would have required recusal in this case. Local public officials should familiarize themselves not only with the requirements of due process, but also with their municipality's local ethics code (if any) and the statutory code of ethics applicable to local government officials, Wis. Stat. §19.59. Finally, local public officials should be aware that, even if the law does not *require* that they recuse themselves from participating in the vote on a particular matter, they may still choose to do so in order to avoid any appearance of bias or impropriety.

— Julia K. Potter

Maintenance of Effort Requirements

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- Newly establish or join a newly established law enforcement agency, fire protection or EMS agency (Wis. Stat. § 66.0608(2m)(c)3.).

Conclusion

Considering the 15% penalty to shared revenue, municipalities will want to pay particular attention to the certifiable law enforcement and fire/EMS efforts they provide. Fortunately, municipalities do not need to certify the same factors from year to year, which should provide some measure of flexibility to meet the maintenance of effort requirements (Wis. Stat. § 66.0608(2m)(a)3.). Since maintenance of effort for 2024 will depend on law enforcement and fire/EMS efforts in 2023, municipalities should start planning how to meet the maintenance of effort requirements now (Must be certified to DOR by July 1, 2025. See Wis. Stat. § 66.0608(2m)(a)).

— Eric Hagen

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price can be less than the value of the property. In such a case, is the County required to pay the former owner the equity difference. Is the municipality required to do so? The law is unclear.

The above scenarios are just a few of many situations that are called into question after the *Tyler v. Hennepin County* decision. Counties and municipalities must be careful and cognizant that former owners have potential Takings Clause arguments in the event property is taken due to taxes.

— Maximillian J. Buckner

Legislature Preempts Local Passage Requirements for Zoning Amendments

Prior to April 5, 2018, protest petitions were a statutory mechanism for certain property owners impacted by a proposed zoning amendment to require that the zoning amendment only become effective by the favorable vote of three-fourths of the members of the governing body voting on the proposed change.

When the protest petition statute was repealed by 2017 Wisconsin Act 243, municipalities retained the option to create by ordinance a protest petition process similar to the former statute. That option will soon be ending.

On June 23 of this year Governor Evers signed 2023 Wisconsin Act 16 which principally provides a new procedure for certiorari review of local land use decisions regarding residential development. However, the Act also creates Wis. Stat. § 66.10015(3)(a), which states that except for changes to an airport affected area, "the enactment of a zoning amendment shall be approved by a simple majority of a quorum of the members-elect."

The creation of section 66.10015(3)(a) has a delayed effective date of January 1, 2025, so municipalities have time to review their ordinances and prepare their governing bodies for the new approval requirement.

— Jared Walker Smith

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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.

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