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December Case Law Update
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A summary of Wisconsin court opinions decided during the month of December related to planning

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Wisconsin Supreme Court Opinions

Public Records

In Democratic Party of Wisconsin v. Wisconsin Department of Justice, 2016 WI 100, the Wisconsin Supreme Court, in a 5-2 decision, denied the Democratic Party of Wisconsin's public records request for video recordings of training programs conducted by Brad Schimel while he was the district attorney for Waukesha County.

The Wisconsin Department of Justice's (DOJ) records custodian denied the request for the videos, concluding that the presentations contained litigation strategies and included case details that could violate victim privacy rights if disclosed. The circuit court reviewed the presentations and concluded the videos did not contain evidence of misconduct by Schimel and ordered release of the videos concluding the litigation strategies discussed were widely known and release could help parents protect their children from online sexual predators. The circuit court also noted that the videos did not contain victim names, and case details discussed were already publicized through media coverage. The Wisconsin Court of Appeals affirmed the circuit court's decision.

In this decision, written by Justice Rebecca Bradley for the majority, the Wisconsin Supreme Court reversed the decisions of the Court of Appeals and circuit court concluding that the tapes fell under common law exceptions that overcome the presumption favoring disclosure of public records. First the Supreme Court cited the need to protect prosecutorial techniques and law enforcement strategies. Second the Supreme Court majority ruled that Schimel's oral presentation about the details and his thought processes were exempt from a public records request under the exception protecting a prosecutor's closed case files from disclosure.

Justice Shirley Abrahamson wrote a dissenting opinion, joined by Justice Ann Walsh Bradley, concluding that the DOJ offered no evidence that the tapes reveal prosecutorial techniques that are not already publicly known or knowable and that the videos do not disclose the identity of any victims.

Property Tax Assessment for Section 42 Housing

In Regency West Apartments LLC v. City of Racine, 2016 WI 99, the Wisconsin Supreme Court ruled (5-2) that the valuation methodologies used by the City of Racine for Section 42 federally subsidized housing

did not comply with Wisconsin law.

As summarized in the majority opinion, under Wisconsin law assessors have an obligation to follow a three tier assessment analysis. Under the first tier of appraisal methods set out in Wis. Stat. § 70.32(1), an appraiser should rely on recent arm's-length sales of the subject property to determine the property's value. This approach is universally considered the most reliable method of appraising property. Under the second tier of appraisal methods, an appraiser values a property by considering recent, arm's-length sales of "reasonably comparable" properties. If there has been no arms-length sale and there are no reasonably comparable sales an assessor may use third-tier assessment methodologies such as the income approach, which seeks to capture the amount of income the property will generate over its useful life, and the cost approach, which seeks to measure the cost to replace the property.

Regency West Apartments owns 72 residential apartment units in the City of Racine that were constructed using federal tax credits under 26 U.S.C. section 42 for affordable housing. For 2012, the City of Racine assessed the apartments at about $4.4 million and in 2013 the City assessed the apartments at about $4.2 million. Regency West argued that those appraisals were excessive and did not comply with state law.

For the 2012 tax assessment, the City used the income approach. In using this approach the City used a capitalization rate based on market rate properties. Regency West, however, argued that the property should be assessment using capitalization rates based on section 42 properties. Using that method the appraiser hired by Regency West valued the apartments $2,700,000. The Supreme Court majority agreed with Regency West. Writing for the majority, Chief Justice Roggensack wrote: "Appraisers who fail to consider property classified as federally regulated housing and the restrictions attendant thereto when deriving capitalization rates are overlooking major characteristics of such property,".

For the 2013 tax assessment, the City used a comparative sales approach using apartments falling under Section 8 of the federal Housing Act. Regency West argued that Section 8 and Section 42 housing programs are not comparable (Section 42 imposes rent restrictions on the property and Section 8 entitles tenants to rent vouchers) and that the income approach is the most appropriate assessment method (and would result in an assessment of about 2,730,000 for 2013). The majority of the Supreme Court agreed with Regency West. According to the majority, to be comparable, properties must have similar restrictions. The majority determined that Regency West is entitled to a refund for excessive taxation.

Justice Abrahamson dissented, joined by Justice Ann Walsh Bradley, saying the majority's opinion allows assessors of federally subsidized housing to apparently go "straight to an income approach, a third-tier method of assessment, bypassing the best information and other proper assessment methodologies along the way."

Wisconsin Court of Appeals Opinions

Constructing a Pond Constituted a Land-Disturbing Activity

Esselman v. Roach involved a challenge to the Outagamie County Board of Adjustment's determination that constructing a pond constituted a land-disturbing activity in violation of the County's Erosion and

Sediment Control Ordinance. Joyce Esselman filled a natural watercourse and constructed a pond to drain her land for farming. Her actions resulted in water backing up on the neighbors' land. The County zoning administrator cited her for violating the County's Erosion and Sediment Control Ordinance that requires a permit for land-disturbing activities. Esselman appealed the citation to the County Board of Adjustment arguing that her conduct fell within the exemption in the ordinance for "agricultural activity." The Board of Adjustment looked to the intent of the ordinance – to protect watercourses from land-disturbing construction activities and did not agree that the activity fell within the agricultural activity exception. Esselman then appealed the Board's interpretation to the Wisconsin Court of Appeals. The Court of Appeals agreed with the Board's interpretation. According to the Court, "it would be unreasonable to interpret . . . the ordinance as allowing any activity to be completely exempt from regulation, regardless of its effect, as long as the activity was linked to an agricultural end."

The case is not recommended for publication in the official reports.

State Sales and Use Taxes Owed on Environmental Remediation Activities

In 2007, the U.S. Environmental Protection Agency ordered several Wisconsin paper companies to remediate the environmental impact caused by polychlorinated biphenyls (PCBs) the companies had previously released into the Fox River. To comply with the order, the paper companies created Fox River Remediation. Fox River Remediation hired Tetra Tech to perform the remediation. Tetra Tech, in turn, hired SDI as one of its subcontractors. SDI separated the material dredged from the Fox River into its constituent components so that those components could be delivered to, and disposed of, by Tetra Tech.

In 2010, the Department of Revenue conducted a field audit of Fox River Remediation and Tetra Tech. After completing its field audit, the Department issued written notices to both entities. The Department concluded that Tetra Tech owed sales tax on the portion of its sale of remediation services to Fox River Remediation that represented SDI's activities. The Department also concluded that Fox River Remediation owed use tax on the portion of its purchase of remediation services from Tetra Tech that represented SDI's activities. The Department's conclusion was based on its determination that SDI's activities constituted "processing" of tangible personal property which was under taxable under WIS. STAT. § 77.52(2)(a)10.3. On appeal, the Wisconsin Court of Appeals agreed with these conclusions.

The case, Tetra Tech EC, Inc. v. Wisconsin Department of Revenue, is recommended for publication in the official reports.

Housing Discrimination

Jones v Baecker Involved a disparate treatment housing discrimination claim under the federal Fair Housing Act brought by a tenant against a landlord because the landlord refused to rent a unit to the tenant. The discrimination claim rested principally on the landlord's identification of the tenant as "African American" and the landlord's determination that the rental unit was too small to accommodate the tenant's six-person family.

The Wisconsin Court of Appeals acknowledged Wisconsin's "long and proud history of prohibiting racial discrimination in various facets of public life" but was not able to find any reported Wisconsin cases addressing the nature and degree of evidence sufficient to support a claim for racial discrimination in housing. Nevertheless, the Court of Appeals reviewed federal case law related to the issue. That case

law requires the evidence to be sufficiently compelling – a high hurdle to satisfy. The Court of Appeals was unwilling to find that the use of the term "African American" constituted a discriminatory motive. The Court of Appeals also cited federal law that recognizes the legitimate interests of local and state governments to enact non-discriminatory limitations on the maximum number of occupants permitted to occupy a dwelling. Federal law also allows a landlord to develop reasonable occupancy requirements. Based on the evidence provided, the Court of Appeals affirmed the decision of the circuit court that race and family status was not a substantial factor motivating the landlord's refusal to rent to the tenant.

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]