



## May Case Law Update May 31, 2011

[A summary of published Wisconsin court opinions decided during the month of May related to planning]

### ***Wisconsin Supreme Court Opinions***

#### **90-day Period of Appeal Applies to Special Assessments**

In [\*Emjay Investment Co. v. Village of Germantown\*](#), 2011 WI 31, the Wisconsin Supreme Court addressed the issue of whether an appeal of a special assessment can be filed after the 90-day appeal period specified in Wis. Stat. § 66.0703(12)(a) has passed.

The case involved a special assessment issued to Emjay Investment Company (Emjay), which owned two parcels of land in Germantown until 2007. In the late 1990s, Menard, Inc. (Menard) submitted a development plan to the village of Germantown for a proposed retail development that would require several significant road improvements, including widening of the road and reconstruction of an intersection. Menard agreed to install and initially pay for the improvements, while the village agreed to partially reimburse Menard through special assessments levied against benefitted properties, which included the parcels owned by Emjay. Menard significantly completed construction of the improvements by the end of 2003. In June 2004, Germantown adopted its Final Resolution levying the special assessments, explicitly citing its authority to do so as pursuant to Wis. Stat. §§ 66.0701 and 66.0703. The Final Resolution provided that the special assessments would be deferred with interest until commercial development or redevelopment of the property, and was mailed to all interested property owners in July 2004.

When Mark and Donna Lohmann, the owners of Emjay, sold Emjay's two parcels in 2007, they received two letters of special assessment by Germantown, and were required to deposit funds in escrow to cover the special assessment costs. In May 2008, Emjay filed a notice of appeal against Germantown, requesting a judgment annulling the assessments. Germantown requested that the circuit court dismiss Emjay's appeal and complaint because the 90-day period of appeal had long passed. The Court of Appeals affirmed.

Emjay petitioned the Supreme Court for review, claiming that its failure to comply with the 90-day period of appeal specified in Wis. Stat. § 66.0703(12)(a) was irrelevant because the appeal could proceed under Wis. Stat. § 893.72. The Supreme Court disagreed unanimously and affirmed the Court of Appeals' decision.

## **Litigation Expenses in Eminent Domain Cases**

In [\*Klemm v. American Transmission Co.\*](#), 2011 WI 37, the Wisconsin Supreme Court addressed the issue of whether litigation expenses should be awarded to property owners in condemnation proceedings under the negotiated price procedure.

ATC initiated condemnation proceedings against Mark and Jeanne Klemm for an easement to construct an electrical transmission line across their property. The Klemms agreed to convey the easement for the price originally negotiated by ATC. They then filed an appeal and petition with the judge of the Marathon County circuit court, who referred the matter to the county condemnation commission. Following the commission's award of just compensation, ATC and the Klemms negotiated a settlement for compensation for the easement, which provided that neither party would appeal the commission's award but that the circuit court would determine whether the Klemms were entitled to litigation expenses.

The Klemms filed a motion seeking an order awarding litigation expenses. Wisconsin Statutes provide for an award of litigation expenses in cases where a jurisdictional offer has been made. Since this case followed a negotiated price procedure, no jurisdictional offer was made. The circuit court interpreted the Statutes to find that the Klemms were entitled to litigation expenses. ATC then filed an appeal. The Court of Appeals reversed the circuit court's decision, ruling that the Klemms were not entitled to litigation expenses because there was no jurisdictional offer.

Upon reviewing the case, the Wisconsin Supreme Court reversed the Court of Appeals' decision, finding that the statutes allowing the recovery of litigation expenses also applied to those who follow the negotiated price procedure.

## ***Wisconsin Court of Appeals Opinions***

### **Injunctive Relief Not Necessary for Recovery of Bid Preparation Expenses Under Town Competitive Bidding Law**

When the Town of Phelps sought bids to repair its town hall in 2008, the timing of its notices violated Wisconsin's competitive bidding law for towns found in section 60.47 of the Statutes. The Town repeatedly changed the project's scope during the notice period, and the Town's engineering firm sent updated specifications to some potential bidders but not others. North Twin Builders received final specification changes only two days before bids were due, and though the firm tried to incorporate changes, its bid was ultimately denied. North Twin Builders filed a motion for temporary injunction, but withdrew its request for a restraining order after acknowledging that significant progress had been made on the project.

The Town filed a motion to dismiss and, later, a motion for summary judgment, asserting that controlling case law required that a disappointed bidder obtain injunctive relief before recovering the cost of its unsuccessful bid preparation. The circuit court denied both motions, concluding

that existing case law had made no such determination and that the public interest is served allowing unsuccessful bidders to recover costs of preparation when the competitive bidding statute has been violated. The Town appealed the circuit court's denial of its summary judgment motion, and the Court of Appeals affirmed the circuit court's judgment.

The case, [\*North Twin Builders v. Town of Phelps\*](#), is recommended for publication.

### **Town May Not Impose Special Assessment for Trail**

In May 2008, the Town of Menasha charged David and Susan Hildebrand a special assessment for the installation of an asphalt trail abutting their commercial property. Wisconsin law allows a municipality to levy and collect special assessments when special benefits are conferred on that property. The Hildebrands challenged the assessments arguing the trail did not confer any special benefit on their property. The Court of Appeals agreed, finding that the primary purpose of the trail was to complete the trail system in Winnebago County, thereby conferring a general benefit shared by everyone in the community and not a special benefit to the Hildebrand property. The Court nullified the special assessment.

The case, [\*Hildebrand v. Town of Menasha\*](#), is recommended for publication.

### **Dismissal of Inverse Condemnation Claim for Damage Due to Deep Tunnel Project Upheld**

Bostco LLC and Parisian, Inc. (Bostco) sued the Milwaukee Metropolitan Sewerage District (MMSD) for damages to the Boston Store in downtown Milwaukee. Bostco charged that the ground under the Boston Store had been dewatered due to MMSD's negligent maintenance and operation of the Deep Tunnel, an extensive sewage and stormwater tunnel running 300 feet below downtown Milwaukee. Bostco's amended complaint against MMSD included claims of negligence, continuing nuisance, inverse condemnation, and excavation protection. At trial, Bostco only prevailed on the negligence claim. Both parties filed post-verdict motions. The court reversed several findings from the original jury trial and upheld others, including the dismissal of the inverse condemnation claim.

Bostco appealed several of the trial court's decisions, including its denial of inverse condemnation. The Court of Appeals upheld the trial court's dismissal of Bostco's claim for inverse condemnation. It argued Bostco had failed to demonstrate that MMSD had either physically occupied its property or prevented it from leasing the property or utilizing the building for its intended purpose.

The case, [\*Bostco, LLC v. Milwaukee Metropolitan Sewerage District\*](#), is recommended for publication.

## **Conditional Use Permit Unenforceable If Zoning District Revised to Exclude the Conditional Use**

In *Hussein v. Village of Germantown Board of Zoning Appeals*, the Wisconsin Court of Appeals addressed the issue of whether a conditional use permit (CUP) remains enforceable after a municipality amends its zoning code to remove the conditional use that is the basis for the CUP from the zoning district at issue.

In 1973, Germantown Auto Sales received a conditional use permit (CUP) for car sales, repair, and service. The CUP limited the number of cars for sale to 25. In 1988, the village eliminated selling cars as a conditional use in general business districts. Under this zoning change, Germantown Auto Sales' used car lot became a legal nonconforming use.

Hussein acquired Germantown Auto Sales in 2002 and by 2009 wanted to increase the number of parked cars allowed on the property. He requested that the village rezone the property as a "highway business district," which would allow car sales as a conditional use, and if so granted, give him a CUP for an expanded operation. The village denied his requests and demanded that he comply with the 1973 CUP. Hussein went before the Zoning Board of Appeals, which held that the 1973 CUP still applied and that Hussein could not ask for an amendment to the 1973 CUP nor could the village further restrict the terms of the CUP. Hussein contested the Board's decision in the circuit court, which reversed the Board's decision.

The Board appealed the circuit court decision. The Court of Appeals decision reviews the basic law of zoning -- permitted uses allow uses as a matter of right while conditional uses allow uses but only in a controlled manner, and a legal nonconforming use is when there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance that banned the use and which has continued in the same or a related use until the present.

Applying these concepts to the present case, the Wisconsin Court of Appeals found that the 1988 zoning changes, which had eliminated car sales as a conditional use, had the effect of both voiding the 1973 CUP and transforming Germantown Auto Sales into a legal nonconforming use. The village therefore could not enforce the 1973 CUP. As a legal nonconforming use, Germantown Auto Sales could continue operations in accordance with the historical use of the property. The Court of Appeals noted that if there is an identifiable change in the legal nonconforming use, the enlargement is illegal. But if the expansion is a result of a mere increase in the historically allowed use, the expansion will be allowed subject to nonconforming use law.

The case is recommended for publication.

## **In Takings Case, Uneconomic Remnant Issue Must Be Addressed Before Compensation**

American Transmission Co., LLC (ATC) took part of the property of the Wallers to construct a high voltage transmission line. The Wallers contested the partial taking, alleging that it had rendered their remaining property an "uneconomic remnant" as defined in the Wisconsin Statutes. The Wallers argued that ATC was therefore required to pay them full compensation for

the property. The case was split into two parts; the first dealt with the uneconomic remnant issue and the other dealt with the just compensation issue. The circuit court postponed hearing the uneconomic remnant case until after the jury reached a verdict in the just compensation case. Because the jury decided that the value of the property was still greater than \$0, the circuit court dismissed the uneconomic remnant claim.

The Wallers appealed. In an earlier case, the Court of Appeals decided that the uneconomic remnant issue must be resolved prior to the addressing the compensation issue. The Court of Appeals then remanded the case to the circuit court to determine whether the proposed partial taking would result in an uneconomic remnant. The circuit court, however, ordered that a jury determine the amount of damages prior to resolution of the uneconomic remnant issue. The Wallers appealed again, and the Court of Appeals again reversed and remanded the case to follow the proper procedure.

The case, [\*Waller v. American Transmission Co.\*](#), is recommended for publication.

[Lara Rosen, M.S. Candidate in URPL, contributed to this summary.]