Case Law Update WCCA Fall Conference

Atty. Peter Conrad
Devil's Head Resort, Merrimac WI
October 12, 2017

Four Cases

- *Murr v. Wisconsin*
  137 S. Ct. 1933 (2017) – United States Supreme Court
- *McKee Family I, LLC v. City of Fitchburg*
  2017 WI 34 – WI Supreme Court
- *AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee*
  2017 WI 52 – WI Supreme Court
- *Scenic Pit LLC v. Village of Richfield*
  2017 WI App 49 – WI Court of Appeals

Murr v. Wisconsin
137 S. Ct. 1933 (2017)

- Owners or two contiguous parcels located along scenic river brought action against State and county, alleging that ordinance preventing them from separately using or selling parcels, which resulted in an uncompensated regulatory taking

Murr v. Wisconsin
– continued –

- Petitioners' parents purchased “Lot F” in 1960 and built a small cabin on it
- In 1963, they purchased neighboring “Lot E”, which was and remained undeveloped
- Petitioners' parents transferred the two lots to them in the ‘90s
- Both state and county laws prevent the use of a lot as a separate building sites unless its has at least one acre of land suitable for development

Murr v. Wisconsin
– continued –

- The laws also include a "merger provision", which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement
- Though each lot is approximately 1.25 acres in size, due to various site conditions each lots has less than one acre of land suitable for development – the combined buildable are is 0.98 acres

Murr v. Wisconsin
– continued –

- Petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project
- However, the law now barred their separate sale or development
- Petitioners then sought variances from the St. Croix BOA, which was denied

Murr v. Wisconsin
– continued –

- Petitioners filed an action in state court, alleging that the state and county regulations worked a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot"
- The Circuit Court granted summary judgment in favor of the State/County, and the Wisconsin Court of Appeals agreed, the Wisconsin Supreme Court denied review

Murr v. Wisconsin
– continued –

- The thought was that is was going to be a dead issue there, but the U.S. Supreme Court agreed to take the case
- The issue before the Court:

> "What is the proper unit of property against which to assess the effect of the challenged governmental action"

Murr v. Wisconsin
– continued –

- The State argued that the question should be solely decided by state property law – *i.e.* state law said the properties have been merged, that's the end of the analysis
- The Murrs argued that the lot lines define the relevant property

Murr v. Wisconsin
– continued –

- The Court did not agree with either
  - Justice Kennedy explained – to define the property, courts should "determine whether reasonable expectation about property ownership would lead a landowner to anticipate that his or her holdings would be treated as one parcel, or instead, as separate tracts"

Murr v. Wisconsin
– continued –

- To make this determination courts must consider three factors:
  1. The treatment of land under state and local law;
  2. The physical characteristics of the land; and
  3. The value of the land

Murr v. Wisconsin – continued –

- Applying these three factors, the Court held that the Wisconsin courts properly held that the Murr lots were a single parcel, and thus a taking did not occur:
  - First, under Wisconsin law Lots E and F were effectively merged;
  - Second, the physical characteristics of the lots supported treatment as one lot;
  - Third, the Court found that the impact on value was minimal (less that 10% devaluation)

Murr v. Wisconsin
– continued –

- Bottom Line – Good news/bad news decision:
  - The good – St. Croix County won
    - The "merger" was valid, no taking
  - The bad – there is no bright line rule
    - The outcome may be different depending on a different set of facts
  - What do we do – nothing
    - see "the good"

Murr v. Wisconsin
– continued –

- What about legislative changes – impact on takings would be questionable, but could impact ability to regulate

McKee Family I, LLC v. City of Fitchburg 2017 WI 34

- Property owner brought action seeking declaratory judgment that city's rezoning of lots from planned development district (PDD) to residential-medium (R-M), which limited purchaser to developing 28 dwelling units for proposed apartment complex compared to 132 dwelling units, was unlawful

McKee Family I, LLC v. City of Fitchburg – continued –

- In 1994 a property owner in the City of Fitchburg proposed a development project following the City's ordinance for a Planned Development District (PDD)
- The City rezoned the property to PDD and approved a general implementation plan (GIP)

McKee Family I, LLC v. City of Fitchburg – continued –

- The parcels at issue remained undeveloped for a number of years, but in 2008 the property owner submitted a specific implementation plan for the construction of a 128 unit apartment complex
- Neighboring residents expressed concerns about the development and the City rezoned the parcel to a residential zoning classification that only permitted single-family and duplex structures

McKee Family I, LLC v. City of Fitchburg – continued –

- The property owner sued arguing that it obtained a vested right to PDD zoning because of the City's approval of the GIP
- The property owner also argued that the PDD zoning created a contract that gave rise to expectations upon which it could rely
- The property owner also made a takings claim saying that the rezoning constituted a taking under the Fifth Amendment

McKee Family I, LLC v. City of Fitchburg – continued –

- The Wisconsin Supreme Court ruled in favor of the City
- As to the vested right argument, the Court was very succinct
- "Underlying the vested rights doctrine is the theory that a developer is proceeding on the basis of reasonable expectation"

McKee Family I, LLC v. City of Fitchburg – continued –

- Wisconsin applies a "bright-line" building permit rule (contrast with Murr)
- To have a vested right a property owner must have "applied for a building permit conforming to the original classification"

McKee Family I, LLC v. City of Fitchburg – continued –

- *Murr*

  "As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."

McKee Family I, LLC v. City of Fitchburg – continued –

- *McKee*

  "Wisconsin applies the bright-line building permit rule because it creates predictability for land owners, purchasers, developers, municipalities and the courts….

  In contrast, the rule proposed by McKee, which would require a case-by-case analysis of expenditures, would create uncertainty at the various stages of the development process…. According to McKee, "the concept of fair play and protection of settled expectations demands a more flexible and searching inquiry than bright-line rules such as the building permit test can provide….

  For the reasons set forth above, we decline to adopt this approach."

McKee Family I, LLC v. City of Fitchburg – continued –

- As to the creation of a contractual relationship, the Court held no such relationship exists
- There is a strong presumption that legislative enactments do not create contractual rights
- There must be clear indication that the legislature intents to bind itself contractually to overcome the presumption

McKee Family I, LLC v. City of Fitchburg – continued –

- The property owners did not provide any evidence of a contract
- Thus, planned development district zoning does not create contractual expectations upon which a developer may rely

McKee Family I, LLC v. City of Fitchburg – continued –

- Bottom Line – A very clear decision
  - Property owner's rights do not vest until developer has submitted application for building permit that conforms to zoning requirements in effect at time of application, and
  - Planned development district zoning does not create contractual relationship between property owner and government

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee 2017 WI 52

- Silica sand mining company sought certiorari review of county Environment and Landuse Committee denial of its conditional-use permit application for non-metallic mineral mining

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- AllEnergy proposed a 265-acre silica sand mine in the Town of Arcadia in Trempealeau County
- The proposed mine was to be located in an exclusive agricultural zoning district (non-metallic mining is a conditional use)

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- Following a public hearing on the proposed permit, the County Environment & Land Use Committee voted seven-to-one to adopt 37 conditions for the mine, but then voted five-to-three to deny the permit
- Denial was based largely on the concerns raised at the public hearing – negative impacts on public health, public safety, and the aesthetics of the area

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- AllEnergy sued arguing
  1. The Committee did not keep within its jurisdiction when denying the CUP when it based its decision on "legislative concerns implicating public health, safety, and welfare"

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

2. The Committee could not have reasonably made the decision it did based on the evidence
3. The Court should "adopt a new doctrine that where a conditional use permit applicant has shown that all conditions and standards…have been or will be met the applicant is entitled to the issuance of the permit"

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- After both the circuit court and court of appeals found in favor of the County, the Supreme Court accepted review
- In the end the Court did not bite – it upheld the denial

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- The Court held that "no presumption exists that a conditional use is *ipso facto* consistent with the public interest or that a conditional use is a use as of right at a particular site within an area zoned to permit that conditional use"
- "In Wisconsin, and in many states, a conditional use is one that has been legislatively determined to be compatible in a particular area, not a use that is always compatible at a specific site within that area."

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- Bottom Line
  - Business as usual

BUT…

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- This was a plurality opinion
  - Two justices on the lead opinion, two justices on the concurrence, and three justices dissented

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- The dissenting opinion takes the view that local governments have less discretion and concluded that the Committee exceeded its jurisdiction
- According to the dissent, the jurisdiction of the Committee is limited to determining the appropriate conditions to control for the potentially hazardous aspects of the proposed mine

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- "[w]hen the Trempealeau County Board writes its zoning code, or considers amendments, the testimony it needs, and is appropriate to consider, is whether a type of use is compatible with a designated zoning district. This is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property."

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- The dissent believes that the Trempealeau County Board had legislatively determined that sand mining is not inconsistent with the agricultural zoning district:

  "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

- Thus, the dissent concludes that the "Committee exceeded its jurisdiction when it took upon itself the task of determining whether a sand mine, as a general proposition, is an appropriate use of the AllEnergy property"

AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee – continued –

"A proper record, and proper exercise of discretion, would demonstrate the Committee actually engaged with the specifics of AllEnergy's proposal, and then determined whether appropriate conditions would protect against the hazards of this type of conditional use. So for example, after identifying that sand mines in general might threaten Trout Run Creek and surrounding wetlands, the Committee should have informed AllEnergy of the nature of the threat it feared and given it an opportunity to develop an alleviating condition. Flooding is apparently a recurrent event in this area, so the Committee could have, and should have, required AllEnergy to develop a condition that would control for such an eventuality. Blowing dust consequent upon sand mining potentially has adverse health effects, so the Committee should have required AllEnergy to quantify the problem and propose a condition to address it. And so on with each of the specific issues raised by the community or Committee members. **This is the Committee's core function, and it was left undone**."

Scenic Pit LLC v. Village of Richfield
2017 WI App 49

- Operator of solid waste facility brought action against village, seeking declaration that operator need not comply with village's zoning and construction storm water and erosion control ordinances

Scenic Pit LLC v. Village of Richfield – continued –

- Scenic Pit LLC sought to open a clean fill solid waste facility in the Village of Richfield
- The facility was to accept disposal only of certain low hazard wastes
- The Village took the position that Scenic needed to obtain several local approvals, including rezoning, a conditional use permit, and storm water and erosion control permits

Scenic Pit LLC v. Village of Richfield – continued –

- Scenic applied for construction permits from the Village, but it did not attempt to acquire the storm water and erosion control permit or the rezoning
- When the Village denied the construction permits, Scenic sued seeking a declaratory judgment that it was not required to comply with local approvals

Scenic Pit LLC v. Village of Richfield – continued –

- The circuit court granted summary judgment to the Village
  - The circuit court determined that Scenic was required to comply with all local ordinances unless "state and local interests are diametrically opposed"
  - The circuit court found that the Village's ordinance requirements were not diametrically opposed to the state regulations and ruled against Scenic

Scenic Pit LLC v. Village of Richfield – continued –

- On appeal, Scenic argued that the DNR exempted clean fill facilities from needing to obtain the kind of local approvals the Village was requiring
- The Court of Appeals agreed with Scenic
- The court explained that the legislature has designated the regulation of solid waste facilities as a matter of statewide concern
- While a municipality may regulate matters of statewide concern, it may only do so as long as local ordinances do not conflict with state law

Scenic Pit LLC v. Village of Richfield – continued –

- The bottom line:
  - Local governments have limited control over the siting of certain solid waste facilities such as low-hazard clean fill facilities

Other Interesting (but Unpublished) Cases

- *Cook v. Town of Spider Lake Zoning Board of Appeals, 2017 WI App 1*:
  - Cook had an access easement across the land to be divided and objected to a CSM
  - Court of Appeals affirmed decision of BOA
  - Cook was not aggrieved:
    - The CSM did not change the private access road
    - Cook's ability to access his condo unit was not affected
  - Takeaway: In administrative appeals, always consider if the person appeal is actually an "aggrieved party"

Other Interesting (but Unpublished) Cases – continued –

- *Golden Sands Dairy LLC v. Town of Saratoga, 2017 WI App 34 – continued*:
  - The Wisconsin Court of Appeals addressed the issue of whether a large dairy operation proposed for 6388 acres of land had established vested rights to the agricultural use of property when once applied for a building permit to construct seven buildings for the dairy operation
  - At the time of the application, the land was zoned for "unrestricted use"
  - The Town subsequently rezoned the land for rural preservation which prohibited Golden Sands' planned agricultural use

Other Interesting (but Unpublished) Cases – continued –

- *Golden Sands Dairy LLC v. Town of Saratoga, 2017 WI App 34 – continued*:
  - In an earlier decision, the Court of Appeals found that Golden Sands had a vested right to the building permit for the seven farm buildings and ordered the Town to issue the building permit
  - Golden Sands' building permit application indicated that it involved "100 acres of site and 6388 acres total"
  - The issue in the second case was whether Golden Sands had a vested right to the agricultural use of the 6388 acre non-building site acres that Golden Sands intended to use to raise crops and spread manure from its planned dairy operation

Other Interesting (but Unpublished) Cases – continued –

- *Golden Sands Dairy LLC v. Town of Saratoga, 2017 WI App 34 – continued*:
  - Golden Sands argued that the building permit application also established vested rights to the entire 6388 acres
  - The Town argued that Golden Sands had not established a vested right to the agricultural use of all the land, and the Court of Appeals agreed
  - The Court found that the vested rights established by the building permit application applied only to the 100 acre building site and not the entire acreage

Other Interesting (but Unpublished) Cases – continued –

- *Golden Sands Dairy LLC v. Town of Saratoga, 2017 WI App 34 – continued*:
  - According to the Court, Wisconsin's vested right law applies only to having a vested right to construct or alter a building
  - The Court also found that Golden Sands had not established a nonconforming use under Wisconsin law because Golden Sands' use of the land was not actually and actively occurring at the time the Town amended its zoning ordinance

Questions?

Peter Conrad
Manitowoc County Courthouse
1010 South Eighth Street
Manitowoc, WI 54220
(920) 683-4062
peterconrad@co.manitowoc.wi.us