WCCA Case Law Update

Atty. Peter Conrad
Radisson Paper Valley, Appleton, WI
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Bio –


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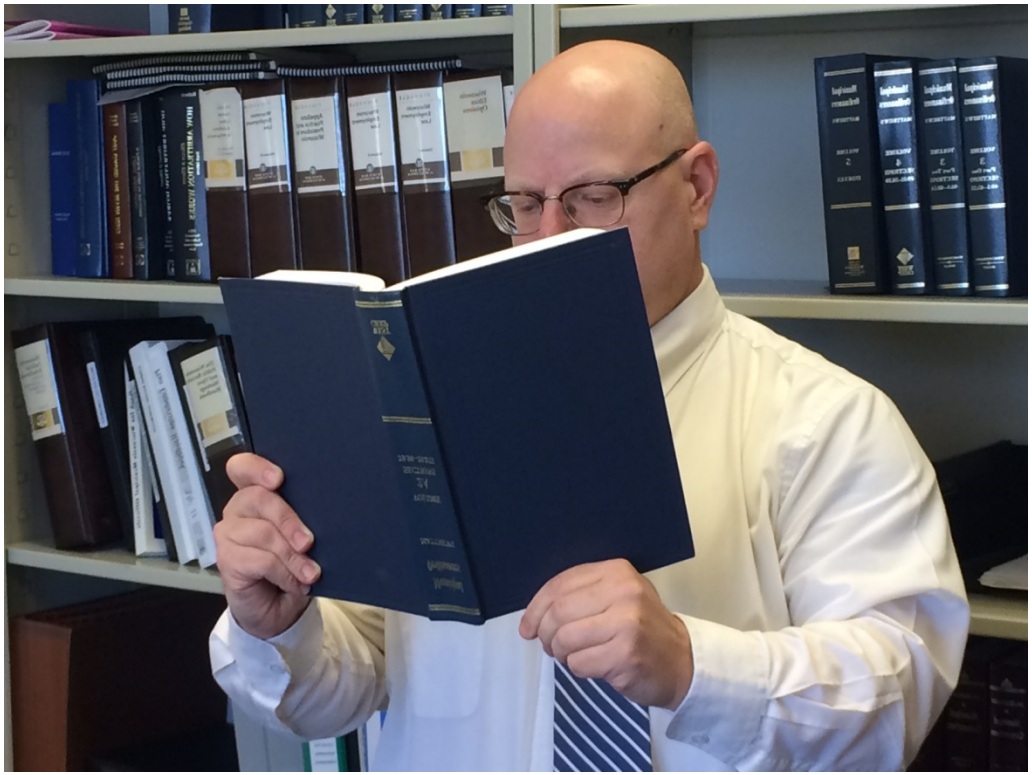

Gerald Earney v. Buffalo County BOA
2016 WI App 66

- Appeal by Earney of BOA's decision to deny CUP for frac sand mining
- Town recommend approval of the CUP
- Earney also filed a reclamation plan
  - Buffalo County had an engineering firm review the reclamation plan
  - The engineering firm concluded "the majority of the reclamation plan" met the requisite intent
  - Apparently the plan was never taken to public hearing, nor was a reclamation permit issued

Gerald Earney v. Buffalo County BOA -continued-

- At the BOA hearing the opposition had five experts testify against the CUP
  - A Dr. and former chair of the Soil Science Department at North Carolina State University (the ag. land has zero probability of producing valuable vegetation after reclamation, and forestland would have a 20% probability of succeeding)
  - Mining and metallurgical engineer and employee of the U.S. Bureau of Mines (concern over the chemicals used to process sand and health risks associated with certain chemicals)
  - Education Director for Nation Eagle Center (the mining project would result in the disturbance, degradation and destruction of winter habitat for Golden Eagles)
  - Statistician (air quality concerns particularly the cumulative effect of increasing diesel emissions near a school)

Gerald Earney v. Buffalo County BOA -continued-

- BOA unanimously voted to deny
  - It considered the factors outlined in its ordinance
  - Cited numerous reasons applying those factors
- Earney filed Cert. action – Circuit Court upheld the decision of the BOA

Gerald Earney v. Buffalo County BOA -continued-

- Earney appealed and argued
  - The Board erroneously denied the CUP based upon reclamation standards which is prohibited by state law
  - Specifically, the reclamation plan provided for effective reclamation of the mining site; thus, the BOA exceeded its jurisdiction by holding the application to a higher than required standard

Gerald Earney v. Buffalo County BOA -continued-

- Earney's argument that the BOA exceeded its jurisdiction was premised on
  (1) The reclamation plan was evaluated by an engineering firm that indicated that the plan provided for effective reclamation of the mining site
  (2) The BOA's consideration of environmental factors such as slope, erosion control, drainage, and land topography was erroneous because those issues were addressed by the reclamation plan.
- Earney argued that the BOA tried to have it both ways
  - It denied the CUP for failing to meet unspecified standards that exceeded both the County ordinance requirements and the maximum requirements allowed by state law
  - While determining (through its agent) that the project satisfied applicable reclamation standards

Gerald Earney v. Buffalo County BOA -continued-

- The Court of Appeals did not buy it, and affirmed the decision of the Circuit Court
  - First, the Court noted that there was no indication that the reclamation was actually approved
  - Second, the Court noted that the zoning ordinance required the BOA to look at a wider range of factors than just the reclamation plan when considering a CUP

Gerald Earney v. Buffalo County BOA -continued-

- The BOA cited numerous reasons for rejecting the CUP
  - negative effect on tourism
  - potential for air pollution
  - degradation of water quality and quantity
  - decrease in surrounding property values
  - sharp corners throughout the haul road
  - number of truck loads & concern for resident safety
  - the proposal did not conform with the Town land use plan
  - concern for the safety of children who attend school near the proposed haul routes

Gerald Earney v. Buffalo County BOA -continued-

- The Court noted that the BOA heard from multiple experts who testified about numerous environmental and safety concerns
- “If the record supports any one of the Board’s findings, we must uphold the Board’s decision”

Gerald Earney v. Buffalo County BOA -continued-

- Takeways:
  - Make sure the BOA is making its decision based on the factors laid out in ordinance
  - Make sure the BOA decision is based on evidence in the record
  - In making its decision, the BOA does not have to be right about everything – if it is right about just one factor the BOA's decision should be upheld

Reed v. Town of Gilbert
135 S. Ct. 2218 (2015)

- U.S. Supreme Court Decision
- Challenge to the Town of Gilbert's sign ordinance
- The sign code for the Town of Gilbert prohibited the display of outdoor signs without a permit, but exempted 23 categories of signs from that requirement
- Three categories of exempt signs based on the content of the sign were relevant to the case
  - Ideological Signs
  - Political Signs
  - Temporary Directional Signs related to a "qualifying event" ("qualifying event" = an event sponsored by a religious, charitable, or other non-profit organization)

Reed v. Town of Gilbert
-continued-

- Temporary Directional Signs were limited in size (6 square feet), the number that may be placed on property (4), and time (12 hours before and one hour after the event).
- Ideological signs could be 20 square feet, allowed in any zone, and unlimited in time
- Political signs could be between 16 to 32 square feet, depending on the status of the property, and allowed 60 days before and 15 days following an election

Reed v. Town of Gilbert
-continued-

- The Good News Community Church, wanted to advertise the time and location of Sunday church services and began placing 15 to 20 signs around the Town early in the day on Saturday and removed the signs around midday on Sunday

Reed v. Town of Gilbert
-continued-

- The Town cited the Church for violating its sign code
- The Church sued the Town arguing that the Sign Code abridged their freedom of speech in violation of the United States Constitution
- Justice Thomas, writing for the Court, found that the regulations were "content-based" because they focused on the message on the sign
- *i.e.* the content was the trigger for different regulations for each category

Reed v. Town of Gilbert
-continued-

- As content-based regulations of speech, the regulations were subject to strict scrutiny by the Court

"Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."

Reed v. Town of Gilbert
-continued-

- The Upshot:
  - Codes that distinguish between the content of signs (*e.g.* political signs, temporary directional signs to certain events) are content-based and probably will not survive strict scrutiny: "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech"
  - Because impact of the Supreme Court's decision, counties should review their sign codes and ask whether you have to read the message to figure out how a sign is going to be regulated

Reed v. Town of Gilbert
-continued-

- Examples include
  - political signs
  - temporary directional signs
  - ideological signs
  - identification signs
  - real estate signs
  - homeowner association signs

Reed v. Town of Gilbert -continued-

- So, what can be regulated – A concurring opinion written by Justice Alito, and joined by Justices Kennedy and Sotomayor, included a non-comprehensive list of rules that would not be considered content-based
  - Rules regulating the *size* of signs
  - Rules regulating the *locations* in which signs may be placed
  - Rules distinguishing between *free-standing signs* and those *attached to buildings*
  - Rules distinguishing between *lighted* and *unlighted signs*
  - Rules distinguishing between signs with *fixed messages* and *messages that change*
  - Rules that distinguish between the *placement of signs on private and public property*
  - Rules distinguishing between the *placement of signs on commercial and residential property*
  - Rules distinguishing between *on-premises* and *off-premises signs*
  - Rules restricting the total *number of signs allowed* per mile of roadway
  - Rules imposing *time restrictions* on signs advertising a one-time event

Reed v. Town of Gilbert
-continued-

- How about as applied:

  10.81 POLITICAL SIGNS. (1) Political signs installed on underlying structures capable of being classified as specific types of signs, such as billboards, directory signs, awning signs, ground signs and the like, shall comply with all regulations applicable to the underlying sign structure.

  (2) Temporary political signs which promote a particular candidate or candidates for a particular election, may be erected and maintained otherwise unrestricted by this ordinance except that all such signs shall conform to the vision triangle requirements, shall not be erected in a highway right-of-way, shall not exceed 32 square feet in sign area, shall not be erected more than 70 days prior to the election and shall be removed not later than 10 days after the election.

Reed v. Town of Gilbert
-continued-

- (b) Construction Signs. A sign that identifies a contractor or a construction project may be erected on the construction site. The maximum size of a construction sign is 100 square feet. No more than two signs are allowed on a construction site. The sign must be removed within 30 days of completion of construction or upon occupancy, whichever occurs first. A construction sign in a residential zoning district may not be illuminated.

Village of Black Earth v. Black Earth Meat Market, LLC 2015AP912 (unpublished)

- Black Earth Meat Market, LLC, operated a slaughterhouse and retail meat market in the Village of Black Earth
- Between October 2013 and January 2014, the Village cited Black Earth Meats for 10 ordinance violations (obstructing a street, street pollution, harboring noisy animals, idling unattended vehicles)
- Black Earth Meats initiated a lawsuit challenging the citations
- Following a motion for summary judgment, the circuit court dismissed the10 citations issued by the Village and the Village appealed

Village of Black Earth v. Black Earth Meat Market, LLC -continued-

- The basis for summary judgment was that Wisconsin's Right to Farm law precluded the Village from issuing the citations
- Wisconsin's right to farm law limits *nuisance actions* targeting an "agricultural use" or an "agricultural practice"
- The Court of Appeals found that the Village did not bring a nuisance action – rather, it issued citations for violations of various Village ordinances
- According to the Court of Appeals, "[n]othing in the right to farm law strips municipalities of any authority they may have to . . . regulate an agricultural use pursuant to their police powers"
- Thus, the Court of Appeals reversed the dismissal of the citations and remanded the case back to the circuit court

Eau Claire County v. Borntreger
2015AP699 (unpublished)

- An unpublished decision by the Wisconsin Court of Appeals
- Potential Freedom of Religion case
- Sanitary (and building) permits are residences for the construction of residences…but, the Amish argued that the use of modern technology required in building and sanitary codes violates their religious beliefs

Eau Claire County v. Borntreger -continued-

- The Borntregers, who are Amish, constructed a residence, but did not obtain required building and sanitary permits due to their religious beliefs
- Borntreger argued that applying for a permit requires signing an application, which includes a statement requiring the signor to agree to adhere to applicable codes
- Signing the application form would constitute a false statement since the Amish have no intent to comply and false statements are prohibited by their religion
- Eau Claire County issued citations for failing to get the proper permits
- The Borntregers moved to dismiss the County's action based on religious freedom grounds

Eau Claire County v. Borntreger -continued-

- The circuit court denied the motion, granted summary judgment to the County, and ordered the Borntregers to apply for building and sanitary permits
- The Borntregers did not appeal the summary judgment decision and they did not obtain the permits as ordered by the circuit court
- The County filed a motion for contempt, which was granted
- The Borntregers appealed the contempt order

Eau Claire County v. Borntreger -continued-

- On appeal, the Wisconsin Court of Appeals acknowledged that the Wisconsin Constitution provides much broader protections for religious liberty than the First Amendment
- But, that was not the issue in the case before the Court
- The Court of Appeals found that the religious liberty issue was decided by the circuit court in the summary judgement action (the Borntregers did not appeal that decision)
- The appeal before the Court of Appeal only dealt with whether the Borntregers were in contempt of the circuit court's order
- The Borntregers did not refute that, so it was an easy decision for Court of Appeals – affirmed
- But, what if the Borntregers had appealed the circuit court's summary judgment decision?

Murr v. State of Wisconsin
-Update-

- U.S. Supreme Court accepted review
- The matter has been briefed, but is awaiting oral arguments

Poteitial Emerging Issue

- **Minnesota Utilities Warn Mobilitie About Misrepresentation**
- *Inside Towers* has been covering the efforts of some wireless companies to site shorter towers in public rights-of-way as a way of expediting the permitting process. Some jurisdictions, like Connecticut, are beefing up their tower siting rules to make them more stringent while others, like Kansas, have tried to speed up the deployment process.
- However, some are asking if shortcuts are being taken. Minnesota Utility regulators have sent a letter to Mobilitie asking that it stop asserting it has the authority from the Minnesota Public Utilities Commission (PUC) exempting it from local regulations in public rights-of-way.
- If the action does not stop, the state "will pursue whatever remedies it may have available to it under Minnesota law," reads a letter from the Minnesota Department of Commerce obtained by *Inside Towers*. The MDOC says it's received "numerous" complaints from municipalities who say Mobilitie representatives tell them the company "holds a certificate of authority issued by the Minnesota Public Utilities Commission to provide telecommunications service." Mobilitie does hold a certificate of authority to "provide local niche service," and the company's application is pending, but that does not give the company "an exemption from the requirements of the local government rules," according to MDOC.
- In a related case, a source tells us Mobilitie has recently installed eight cell towers in Virginia's Prince William County. Each is about 50 feet tall and includes large equipment cabinets at the base of the structure.
- Nearly all of them are located within the Virginia Department of Transportation (VDOT) rights-of-way. Mobilitie has obtained land use permits from VDOT for each that allow Mobilitie to "temporarily install and maintain a freestanding utility pole and temporary battery boxes until a permanent power source is installed and documentation is provided by Prince William County allowing poles to remain in place."
- To date, the company has not submitted any applications to the Prince William County Planning or Zoning Staff that would authorize these facilities to remain in place. The county has sent the company notices of violations about the unauthorized installs. Mobilitie is set to appear before the PWC Board of Zoning later this month to challenge the violations and requirement to submit the requisite applications.
- Meanwhile, *VTdigger.org* reports that in Bennington, Vermont, Mobilitie's regional permitting manager, Jennille Smith, told the local planning commission recently the company is approaching community leaders in every state with the goal of erecting some 70,000 wireless cell towers to meet growing wireless demand. The company wants to reach agreements with towns directly and not go through state Public Service Boards seeking siting permits.
- "Our business model is to be in the public rights-of-way," she said, "and we are asserting ourselves as a public utility." Utility poles are placed on public rights-of-way under direct agreements with communities, according to Smith.
- The company has already scouted potential tower siting locations, but intends to work with communities to find alternative sites. There needs to be a clear line-of-sight in all directions from the pole and the site must meet the power needs, according to the account.
- Mobilitie is trying to site a 120-foot tower in Bennington; more than one carrier would lease space on the tower. City planners object to the pole blocking the view from a battle monument. However, acknowledging they want residents to experience faster internet speeds and better WiFi, they said they would try to find a suitable alternative location.

Source - Inside Towers (https://insidetowers.com/cell-tower-news-minnesota-utilities-warn-mobilitie-misrepresentation/)

Questions?

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