

CASE LAW UPDATE & ANONYMOUS COMPLAINTS

Atty. Dean B. Richards
2014 WCCA Fall Conference

Today's Agenda

- Update & Review
 - *Lake Delavan*
 - *Hegwood*
- Three New Cases
- Anonymous Complaints

Lake Delavan Property Co. v. City of Delavan

- February 12, 2014
- Court of Appeals – District 2
- Walworth County Case
- Petition for Review **DENIED**

Lake Delavan Property Co. v. City of Delavan

- Town of Delavan subdivision
- Ultimate 600 single family home project
- 74 lots on 38 acres

Lake Delavan Property Co. v. City of Delavan

- Walworth County: zoned residential
- SEWRPC: planned sanitary sewer service area
- Town & County Plans: Urban Density residential (less than 5 acres per dwelling)

Lake Delavan Property Co. v. City of Delavan

- City's 1999 Comp Master Plan
 - Traditional Neighborhood Residential Development
- 2010 Project Discussions
 - City to provide municipal water
 - Developer to address neighboring drainage issues

Lake Delavan Property Co. v. City of Delavan

- Nov., 2010 – City revises Comp Plan
 - Draft: "*urban reserve*" – designated for development

Lake Delavan Property Co. v. City of Delavan

- Nov., 2010 – City revises Comp Plan
 - Alderman: More land should be designated for agriculture. Preserve farmland. Inventory of unsold lots within city.
 - New Plan: Developer's land designated Agriculture.

Lake Delavan Property Co. v. City of Delavan

- Feb., 2011- Land division ordinance
 - Extraterritorial land division
 - Density set at one lot per 35 acres
 - Minimum lot size = 1 acre
 - Passed with no discussion or comment

Lake Delavan Property Co. v. City of Delavan

- Extraterritorial Plat Review by City
 - Plan Commission considers plat with memorandum as to density and lot size. Denied without comment or discussion.
 - Common Council considers plat with memorandum as to density and lot size. Denied without comment or discussion.

Lake Delavan Property Co. v. City of Delavan

- *Gordie Boucher 1993*
 - Cannot consider use of land in extraterritorial plat review
- *Wood 2003*
 - Ok to consider use if adopted in ordinance

Lake Delavan Property Co. v. City of Delavan

- 2009 Wis. Act 399 – Sect. 236.45(3)(b)
 - A municipality may not deny approval of a plat on the basis of the proposed use of land.
 - unless the denial is based on extraterritorial zoning.

Lake Delavan Property Co. v. City of Delavan

- Court of Appeals upholds circuit court
 - Extraterritorial land use can only be exercised with extraterritorial zoning.
 - Common knowledge and experience: blanket density requirement precludes residential development.

Hegwood v. Town of Eagle ZBA

- September 25, 2013
- Court of Appeals – District 2
- Waukesha County Case
- Petition for Review ***DENIED***

Hegwood v. Town of Eagle ZBA

- Outdoor fireplace and pergola constructed within 20-foot side yard setback
- After the fact variances

Hegwood v. Town of Eagle ZBA

County BOA

- Request for side yard variance May, 2010
 - Variance denied
 - Removal of fireplace and pergola ordered

Hegwood v. Town of Eagle ZBA

County BOA

- Reconsideration March, 2011
 - Fireplace was not a structure
 - Remove roof from pergola converts to "play structure" and satisfies hardship requirement
- Advised to apply to Town ZBA

Hegwood v. Town of Eagle ZBA

Town ZBA

- Request for side yard variance Sept., 2011
 - Variance denied
 - Fireplace and pergola are structures
 - No hardship shown

Hegwood v. Town of Eagle ZBA

Circuit Court

- Record supplement to include county BOA
- Involvement of County's Corp Counsel
- Town BOA has no jurisdiction

Applicable Statutes

281.31 Navigable waters protection law.

To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters

(2)(c) "Municipality" or "municipal" means a county, village or city.

Applicable Statutes

59.692 Zoning of shorelands on navigable waters.

(2)(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

Applicable Statutes

59.692 Zoning of shorelands on navigable waters.

(2)(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

Court of Appeals Analysis

- Legislature gave shoreland zoning authority to the counties.
- Did the legislature intend for towns to have the same authority?

Court of Appeals Analysis

- § 281.31 – No mention of towns, but towns are mentioned elsewhere (Chpt. 30).
- § 59.692 (2)(a) – Town approval not required and not subject to town disapproval (compare to § 59.69)
- § 59.692 (2)(b) – Specific exemption for preexisting ordinances

Court of Appeals Analysis

- What about towns exercising village powers?
- § 60.22(3) – Town may exercise village powers, except those that conflict with statutes relating to towns.

Conclusion

- Towns do not have shoreland zoning authority except in limited case of preexisting ordinance.
- Town has no authority to consider an application for a variance. Application of a correct theory of law requires dismissal of variance application as unnecessary.

Path Forward

- Later enacted ordinances
- Exercise of police power
- Town cooperation with County

O'Connor v. Buffalo County BOA

- April 22, 2014
- Court of Appeals
- Buffalo County Case
- Petition for Review filed

O'Connor v. Buffalo County BOA

- Frac sand mining CUP
- Land zoned Agriculture
- Hearing #1
 - Public comment
 - Site visit
 - Tabled

O'Connor v. Buffalo County BOA

- Upon reconvening:
 - Applicant clarifies:
Instead of 80 trucks/day, will be 126 trucks/day
 - BOA denies CUP citing traffic safety on STH 88

O'Connor v. Buffalo County BOA

- Second application submitted less than two weeks after last hearing and before written decision issued.
 - Identical application except for:
 - Corrected typo
 - Truck trips increased from 80 to 126
 - Days of operation increased from 5 to 6

O'Connor v. Buffalo County BOA

- New hearing conducted
- Matter adjourned 60 days for WisDOT Traffic Safety Impact Assessment
- DOT: Truck traffic does not move STH 88 into “different statistical range of safety issues.”
- CUP approved – subject to 43 conditions

O'Connor v. Buffalo County BOA

Certiorari review commenced by opponent

- Ordinance interpretation:
 - *Because the Board has advanced a reasonable interpretation of the ordinance's text, we must defer to the Board's interpretation.*

O'Connor v. Buffalo County BOA

- Repetitive Filing of CUP application
 - *An individual is free to submit a second CUP application after the first is denied as long as:*
 - *They are willing to pay application fee*
 - *No rule prohibiting a new application in the absence of substantial change.*

O'Connor v. Buffalo County BOA

- Result:
 - BOA's ordinance interpretation stands
 - Successive filing approved
 - BOA's grant of CUP is sustained.

Golden Sands Dairy v. Fuehrer

- July 24, 2014
- Court of Appeals – District 4
- Wood County Case

Golden Sands Dairy v. Fuehrer

- Town denies building permit for seven farm buildings
- Wood County zoning – “Unrestricted” district
- Town zoning enacted three months after permit application
- Town building code: State Uniform Dwelling Code – *doesn't apply to farm buildings*

Golden Sands Dairy v. Fuehrer

- Writ of Mandamus
 - Clear, specific legal right which is free from substantial doubt (vested right)
 - Duty is positive and plain
 - Substantial damage if not performed
 - No other adequate remedy at law

Golden Sands Dairy v. Fuehrer

- Application complete because Town's only argument is based on dwelling code.
- Proposed building complies with other laws because DOT and DNR permits do not apply to building.
- Knowledge of pending town zoning ordinance does not constitute unreasonable reliance on County code.

Golden Sands Dairy v. Fuehrer

- Result:

Town building inspector had positive and plain duty to issue building permit. Town is compelled to issue permit.

Forest County v. Pasternak

- July 1, 2014
- Court of Appeals – District 3
- Forest County Case

Forest County v. Pasternak

- Uncut lawn as a public nuisance
- Nuisance Ordinance:
 - *A public nuisance is any condition which is injurious to health, offensive to the senses, or interferes with public or private use of the property.*

Forest County v. Pasternak

- *City of Milwaukee v. Milbrew* - 1942

When determining whether a nuisance exists, a conviction should not be sustained without a showing by clear and convincing evidence that a particular use is detrimental or prejudicial to public health or welfare.

Forest County v. Pasternak

- *City of Milwaukee v. Milbrew* - 1942

A municipality's interest is aroused only when the injury is substantial, the facts are weighty and important, and the public is affected.

When a municipality declares something to be a nuisance, all of a kind must be treated with some degree of fairness.

Forest County v. Pasternak

The mere fact that a municipality declares something to be a nuisance does not make it so – otherwise, every house, business, and property would be at the uncontrolled will of temporary local authorities.

Forest County v. Pasternak

- Ordinance did not specifically regulate maximum height of vegetation, rather, alleged violation was uncut lawn of unspecified height
- Something that is disliked or disagreeable does not rise to the level of public nuisance

ANNONYMOUS COMPLAINTS

WARNING!!

- Corporation Counsel hate guys like me.
- I am an attorney, but I am not YOUR attorney!
- Listen to them, please.

Integrity of the System

- Avoid the temptation to self-adjust the system or its rules.
- Without harsh results, no motivation to refine bad rules.

Policy Considerations

- Reveal the identity of complainants because:
 - Fundamental fairness to know your accuser
 - Prevent mistaken assumptions
 - Credibility (Warrants)
 - Chilling effect creates a threshold
 - Transparency is strong public policy

Policy Considerations

- Don't reveal the identity of complainants because:
 - Safety and harassment risk
 - Encourage reporting by eliminating chilling effect
 - Violation is typically a *condition*, not an *action*. Don't need a complaint to establish violation.

Open Records

– § 19.31 Wis. Stats. Public policy of state:

...all persons entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.

Open Records

- § 19.31 Wis. Stats. Public policy of state:

...providing persons with such information is declared to be an essential function of representative government and an integral part of the routine duties of officers and employees...

Open Records

- § 19.31 Wis. Stats. Public policy of state:

...a presumption of complete public access...

The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Open Records

- Protection of confidential informants
§ 19.36(8) Wis. Stats.
 - Law Enforcement Agency = authority to make arrests
 - ...requests confidentiality...
 - ...promise of confidentiality...
 - ...confidentiality would reasonably be implied...

Open Records

- The Balancing Test
 - ...balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure.
 - Do the surrounding circumstances create an exceptional case not governed by the strong presumption of openness?

Open Records

- *Mayfair Chrysler Plymouth* Exception
 - Confidentiality of informant in civil law violation
 - 1. clear promise of confidentiality
 - 2. pledge made to obtain info
 - 3. pledge necessary to obtain info
 - 4. harm of inspection outweighs great public interest in full inspection

Open Records

- § 19.35(1)(am)1. Wis. Stats. Personally identifiable information request
 - Exception:
Any record ...in connection with a complaint, investigation ... that may lead to an enforcement action, administrative proceeding, or court proceeding.

Open Records

- § 19.35(1)(am)2. Wis. Stats. Personally identifiable information request
 - Exception:
 - Any record ... which if disclosed, would
 - Endanger an individual's life or safety
 - Identify a confidential informant

Open Records

- § 19.35(1)(am)1. Wis. Stats. Personally identifiable information request
 - *Limited to personally identifiable information about the requestor*
 - *No balancing test*

Open Records

- § 19.35(1)(am) Wis. Stats.
 - Court test involves records of internal police investigation of an officer
 - But broad language as to “enforcement action” and “administrative proceeding”.

Open Records

BUT –

?? Is property information “personally identifiable information” ??

?? Is a person (or the property) the subject of an investigation as to property use or condition ??

Summary

Generic Request [§ 19.35(1)(a)]

1. Strong presumption favoring disclosure
 - a. Is there a statutory exception?
 - b. Is there a common law exception?
2. Is there a stronger public policy favoring nondisclosure (balancing test)?

Summary

Personally Identifiable Information Request
[§ 19.35(1)(am)]

1. Is there a statutory exception?
2. There is no balancing test.

Bottom Line

- Strong public policy and statutory presumption to release records.
- Protections afforded confidential informants are limited to circumstances in which confidentiality was required to obtain the information.

Bottom Line

- Are zoning disputes the type of records that contain personally identifiable information?
- Should the identity of a complainant who has requested anonymity be a part of the record?

Bottom Line

- Question should not be addressed on an *ad hoc* basis, but each case must be analyzed on its individual facts.
- Develop a policy that begins with the complainant's first contact: our policy is (confidentiality or disclosure)!

Bottom Line

- Can you justify confidentiality in the face of strong public policy and presumption in favor of disclosure?



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