

CASE LAW UPDATE & STORMWATER RUNOFF

Atty. Dean B. Richards
2014 WCCA Spring Conference

Oneida Seven Generations v. City of Green Bay

- March 25, 2014
- Court of Appeals – District 3
- Brown County Case

Oneida Seven Generations v. City of Green Bay

- Tribal corporation
- Conditional use permit granted for "waste-to-energy" facility
- CUP revoked for misrepresentations during application process

Oneida Seven Generations v. City of Green Bay

- Feb. & March, 2011-Plan Commission recommends and Common Council approves CUP with regulatory compliance conditions.
- Aug., 2011 – Building permits issued
- Sept., 2011 – DNR & DOE approvals

Oneida Seven Generations v. City of Green Bay

- April, 2012 – In face of opposition objections, Common Council directs Plan Commission to hear claims of misrepresentation
- Oct., 2012 – Hearing conducted. Plan Commission recommends CUP stand.

Oneida Seven Generations v. City of Green Bay

- Oct., 2012 – Common Council votes 7 to 5 to revoke CUP based upon unidentified misrepresentations.
 - No identification of precise information considered false.
 - No statement of how city determined information was false.

Oneida Seven Generations v. City of Green Bay

- *A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards.*

Oneida Seven Generations v. City of Green Bay

- *A flagrant misuse of discretion has been characterized as capricious, meaning "a whimsical, unreasoning departure from established norms or standards; it describes action which is mercurial, unstable, inconstant, or fickle.*

Oneida Seven Generations v. City of Green Bay

- Response to opposition.
- Ignore Plan Commission finding of no misrepresentation without explanation or comment.
- Failed to identify allegedly false statements.

Oneida Seven Generations v. City of Green Bay

- Allegedly false statements were not as City presented.
- *"No reasonable person could conclude ... that there would be absolutely no emissions from the facility."*
- Alleged concerns were not included in conditions.

Lake Delavan Property Co. v. City of Delavan

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

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 filed

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.

Remaining Questions

- Village powers
- What effect might later amendments to county ordinance have if Town ordinance is on the books? Does "later enacted" refer to first shoreland ordinance or later ordinances?



STORMWATER RUNOFF AND DIVERSION TO NEIGHBORING PROPERTIES

Stormwater Runoff

- Statutory Duties
 - Sections 88.87 – 88.91
 - Related to roadways – Sect. 88.87
 - Related to landowners – Sect. 88.90

Stormwater Runoff

- Common Law Principles
 - *Hocking v. City of Dodgeville*, 2009 WI 70, 318 Wis. 2d 681, 768 N.W.2d 552
- Three Doctrines
 - Common enemy doctrine
 - Civil law rule
 - Reasonable use

Stormwater Runoff

- Civil Law Rule
 - Not utilized in Wisconsin
 - Drainage must be allowed to follow its natural course:
 - upper landowner cannot redirect
 - lower landowner cannot obstruct

Stormwater Runoff

- Common Enemy Doctrine
 - Rule in Wisconsin until 1974
 - *Each landowner had a privilege to deal with, dispose of, block, or divert diffused surface water in any manner as he sees fit, without legal liability for the injurious consequences to his neighbors' lands.*

Stormwater Runoff

- Reasonable Use Rule
 - Adopted in Wisconsin in 1974 (*Deetz* case)
 - Originates in Restatement (Second) of Torts Sect. 822

Stormwater Runoff

– Reasonable Use Rule

- *Each possessor is legally privileged to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, **but incurs liability when his harmful interference with the flow of surface waters is unreasonable.***

Stormwater Runoff

- Use land reasonably.
- Duty to act only when use of land is unreasonable.
- When use of land is unreasonable, positive duty to act to abate nuisance.
- Positive duty to act must exist before liability will arise for failing to act.

Stormwater Runoff

- Basic Tort Concepts
 - Duty to act
 - Breach of the duty
 - The breach is the cause of injury
 - The injury results in damage

Stormwater Runoff

- Reasonableness of use
 - Purchase and occupancy of existing home?
 - Creating a trench?
 - Directing oversized downspouts?
 - Landscaping unreasonably increases water flow?

Stormwater Runoff

– Nuisance

- *A condition or activity which unduly interferes with the use of land.*
- *Conduct that is a legal cause of an invasion of another's interest in the private use and enjoyment of land*
- Private or public
- Intentional or Negligent

Stormwater Runoff

- Typical Stormwater Causes of Action
 - Private nuisance
 - Trespass
 - Negligence
 - Inverse Condemnation

Stormwater Runoff

- Typical Targets
 - Offending landowner
 - Homeowners' Associations
 - Developer
 - Contractor
 - Engineers (developers and municipal)
 - Municipality

Stormwater Runoff

- Procedural Issues
 - Notice of Injury
 - Sect. 893.80(1)(a)
 - Within 120 days of occurrence
 - Municipal Immunity
 - Sect. 893.80(4)
 - Ministerial *versus* Discretionary

Stormwater Runoff

– Procedural Issues

- 3 year limitation on claims under Chapter 88 (date of discovery, not occurrence) – Sect. 88.87(2)(c)
- 10 year statute of repose on land improvements – Sect. 893.89(2)
- Design & approval *versus* maintenance & operation

Stormwater Runoff

- Remedies
 - Money Damages
 - Injunction
 - Equitable relief
 - Remedy at law inadequate
 - Irreparable injury

Stormwater Runoff

- Private Rights of Action
 - Zoning violations can be enjoined by adjacent or neighboring property owners who would be specially damaged by such violation
 - Sect. 62.23(7)(f)2



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