CASE LAW UPDATE

UPDATE: Damages for Inverse Condemnation at Airport

Brenner, et. al. v. City of New Richmond, et. al.

This case is the third appellate court decision arising from the expansion of a runway at the New Richmond Regional Airport. In the fall of 2006, a 4,000-foot runway at this airport was expanded by 1,500 feet. 62 acres of land needed for this expansion was acquired from the Wickenhausers by direct condemnation. In addition, the city acquired a 3.813-acre avigation easement over the airspace above the Wickenhauser's home. An avigation easement allows unimpeded aircraft flights over the land affected by the easement.

The Wickenhausers and several of their neighbors commenced an inverse condemnation action against the city and its airport commission. The claims arose from the allegation that air flights over the landowners' properties, not acquired by condemnation or affected by the avigation easement, were so low in altitude and so frequent as to constitute a physical taking of the landowners' airspace.

The first two appellate court decisions, culminating at Wisconsin's Supreme Court, found that overflights may be the basis for an inverse condemnation claim. The circuit court had found to the contrary, applying the regulatory taking standard that a landowner must be deprived of all beneficial use of a property for a regulatory taking claim to apply. The appellate courts ruled that a physical taking standard should be applied, determining whether flights had been low enough to invade a landowner's superadjacent airspace and frequent enough to have a direct and immediate effect on the use and enjoyment of the person's property. Because the trial court had applied the wrong legal standard, the case was sent back for a trial to determine if there had been a physical taking and, if so, the amount of damages to be awarded.

The Wickenhausers lost their claim at the trial court level. The court determined that they had failed to prove both the existence of sufficient, low altitude flights to constitute a taking and damages arising from such flights. The courts focused on the expert testimony of the Wickenhauser's appraiser. This testimony was found to be deficient because it considered the effect of the runway's proximity to the Wickenhauser's property. Claims of this type are tort claims, such as trespass and nuisance. Instead, the Wickenhauser's needed to show that the value of their property was damaged by overflights. In this regard, the court found that there was no evidence to support the claim and the Wickenhauser's claim was dismissed.

It must be noted that this decision addresses the sufficiency of evidence presented at a trial, not the legal issues supporting the underlying claims. Several neighbors of the Wickenhausers successfully prosecuted their claims and were awarded damages. The key principle of this case is that the inverse condemnation claim arises if a landowner is subjected to low flights (within the superadjacent airspace), that are not permitted pursuant to an avigation easement, and that are of such frequency to have a direct effect on the enjoyment of the property. The landowner must prove the existence of the overflights and the damages that arise from those flights. The focus of this case was activity within the landowner's box of superadjacent airspace, not activity outside of that box, even though the damages may have been the same. Dust, noise, and traffic at or from the airport do not support an inverse condemnation claim.

Prohibition of Short-Term Rentals

Vilas County v. Accola

Accola purchased a single-family dwelling on Rosalind Lake in the Town of Presque Isle. The dwelling was not used as the Accola's primary residence, but rather was advertised for rent for periods as short as two days.

The county notified the Accolas that the dwelling, located in the R-1 zoning district, could not be rented for periods of less than one month. The Accolas created a corporation, A Better Way to Live, and began to allow people to stay at the property in exchange for donations to the corporation. The landowner claimed the donations would be used to defer to costs and expenses of operating the property and the remainder would be donated to charity.

Unmoved by the Accola's charitable business model, the county commenced an enforcement action. The county's position centered on a comparison of permitted uses in two zoning districts. In the R-1 district, the district in which the Accola's property was located, "Single-family detached dwelling units" are a permitted use. There is no explicit prohibition of short term rentals in the R-1 District.

Vilas County also has a Residential/Lodging (RL) district. The RL district purpose statement calls for low density residential use with some low-density Transient Lodging. Transient Lodging is defined as a "commercial lodging establishment which allows rental of sleeping quarters or dwelling units for periods of less than one month." The permitted uses in the RL district include bed and breakfast establishments, resorts with no contiguous multi-family units, and rental of residential dwelling units. The RL district also allows all R-1 district permitted uses.

The Accolas argued that their use of the dwelling was permitted because the R-1 district permits single-family detached dwelling units. Since a zoning ordinance must use clear, unambiguous and peremptory terms, the absence of a specific prohibition allows

Accola to use the dwelling for short-term rentals. Accola's position echoes the recent Court of Appeals decision in *Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals,* 2015 WI App 23.

The county's position was that the Accola's use of the dwelling was transient lodging. Since transient lodging was specifically permitted in the RL district, it is a prohibited use in the R-1 district, since it isn't listed as a permitted R-1 use.

The court adopted the county's position. The decision relies in large measure on the basic rule of statutory construction that seeks to avoid surplus language. The court noted that in the RL district, permitted uses include those uses permitted in the R-1 district. If short term rentals were permitted in the R-1 district, there would be no reason to list the various short term rental uses permitted in the RL district. Because the RL district specifically permitted short term rentals, it is clear that such rentals were not permitted in the R-1 district.

Court Ordered Modification of an Easement

Muellenberg v. State of Wisconsin Department of Transportation, et. al.

Muellenberg is the owner of a property that is bounded on the north by S.T.H. 35 and on the south by the St. Croix River. This property, along with four others, has a bluff that effectively separates the north portion of the lot from the south. Thus, Muellenberg cannot access the river on the south side of his property from the highway frontage on the north side of his property.

Muellenberg and his neighboring landowners held an easement that allowed each to use a trail across the neighboring properties. This trail effectively gave them access to the highway at the northwest corner of the combined properties, travelled across the various properties, and ended with river access at the southeast corner of the combined properties.

The trail easement commenced at a point at which a neighboring property abutted the highway right of way. The easement holders were given permission to use that neighboring property's driveway to access S.T.H. 35. In other words, the easement began at the driveway, not the highway pavement.

The Department of Transportation acquired the two properties at the west of the combined easement holders' properties. This included the property on which the driveway from the easement to the roadway was located. The DOT was to use this land for construction of a bridge abutment. The construction would eliminate the driveway access to S.T.H. 35, and thus similarly terminate the easement holders' access to the roadway. The DOT relocated the highway curb cut and provided driveway access from a portion of the easement to the roadway. Muellenberg was not satisfied with this

accommodation and challenged the DOT's ability to modify by relocation an explicit, recorded easement. He filed an action seeking to declare his rights to the original trail easement and an injunction prohibiting the DOT's disruption of the easement.

DOT argued that it was empowered to relocate the driveway's highway access. I addition, the driveway between the easement and the roadway was all on land acquired and now owned by DOT. Once the driveway curb cut was eliminated, the existing driveway was unusable, and the easement could not fulfill its original purpose. Therefore, DOT could alter the easement under the authority of *Mnuk v. Harmony Homes, Inc.,* 2010 WI App 102.

The courts agreed with the position asserted by the DOT. Muellenberg cited authority that prevents modification of an easement when the easement becomes unduly burdensome. This authority contrasts with *Mnuk.* In this case, as in *Mnuk*, the easement did not become unduly burdensome, it became impossible to fulfill. The doctrine of *Mnuk*, allowing modification of "impossible" easements, was the correct authority to apply.

Muellenberg argued that the DOT should not be allowed to modify the easement because it created the impossibility itself. The courts disagreed, finding that the DOT properly altered the driveway and road access, but did not nothing to alter the easement. The DOT acted properly and within its authority as to the driveway and curb cut, it did nothing directly to the easement. Therefore, the easement was not modified by DOT.

The court of appeals went on to review the manner in which the easement was modified by the circuit court. It found that the circuit court had properly exercised its discretion in evaluating DOT's relocation efforts and finding those efforts to have reasonably accommodated the easement. Because the DOT's acquisition of the driveway and elimination of the original curb cut was proper, the circuit court acted properly in ordering the modification of the easement in order to allow fulfillment of the original purpose of the easement.

Revocation of Conditional Use Permit

Oneida Seven Generations Corp. et. al. v. City of Green Bay

Early in 2011, the City of Green Bay granted a conditional use permit for a waste-to-energy facility. Following the city approval, building permits were issued and approvals were obtained from the Department of Natural Resources and the Department of Energy.

Nearly a year after the initial approval, the city was faced with significant opposition and continuing objections to the facility. In April of 2012, the common council directed the plan commission to conduct a hearing on claims that the facility

owners had misrepresented facts and circumstances during hearings on their permits. In October of 2012, the plan commission found no misrepresentations and recommended that the conditional use permit stand.

That same month, and after a significant turnover in the common council since its original approval, the council voted 7 to 5 to revoke the CUP based upon unidentified misrepresentations. The facility owner appealed the city's decision arguing the absence of basis for revoking the permit. The circuit court disagreed with Oneida Seven Generations and approved the CUP revocation.

The Wisconsin Supreme Court agreed with the Court of Appeals in finding that the city acted improperly in revoking the CUP. The courts based their decisions on a finding that the city's revocation was not supported by substantial evidence.

Typically, appellate court cases involve legal issues. Factual issues, influenced by determinations of witness credibility and the weight to be given evidence, is left for the trial court. But in this case, a substantial and comprehensive factual review of the record was undertaken by the court, resulting in over 50 pages of decision.

Ultimately, the court found that there were not misrepresentations made and, accordingly, the city had no basis for withdrawing its approval. But this decision motivated a dissenting opinion that suggested the court had misapplied the rule that should be used in cases like this.

The city's revocation decision was criticized for failing to identify the alleged misrepresentations that had been made. It was also noted that the common council ruled contrary to its plan commission's recommendation, without explanation. This decision was viewed as being the product of "unconsidered, willful or irrational choice, and not the result of the sifting and winnowing process."

On appeal, the city argued that the facility owner had misrepresented that there would be no emissions, the char would be reusable, there would be no smokestacks, and the facility employed technology that was not new. Both appellate courts determined that there was not substantial evidence of misrepresentation. This conclusion was reached after an exhausting review of the evidence and an analysis that determined there was not substantial basis for the claim of misrepresentation.

The dissenting opinion criticizes the majority decision for not following the proper rule of law. Instead of using the substantial evidence rule, the dissent argued that on certiorari review the underlying decision is afforded a presumption of correctness. The reviewing court is not to substitute its own judgment for the city. Instead, the city's decision must be upheld if *any* reasonable view of the evidence supports the decision.

Ultimately, the majority opinion's use of the substantial evidence rule prevailed. But the dissent raises a very interesting and curious point. The dissent suggests that certiorari review should be nothing more than a search for any reasonable evidence that supports a decision. The majority opinion finds that the court must evaluate the evidence to determine if substantial evidence exists to support the decision.

Reconsideration by Zoning Board of Appeals

NextMedia Outdoor, Inc. v. The Village of Howard, et. al.

This case involves an appeal to the Village of Howard's Zoning Board of Appeals. NextMedia sought to realign a billboard, that is to move the billboard to a different location. The Village denied the request and NextMedia appealed to the ZBA. The ZBA reversed the village's decision and granted permission to realign the sign.

The Department of Transportation objected to the ZBA's decision. Why? Because prior to the ZBA's proceedings, the DOT had acquired NextMedia's right to the sign in condemnation proceedings. The DOT argued that NextMedia did not have standing to request realignment and the relief granted by the ZBA was based on misrepresentation or mistake of facts.

The ZBA reconsidered its decision and ruled against NextMedia. NextMedia brought this action claiming that the ZBA did not have the authority to reconsider its own decision after making a final ruling. The circuit court agreed and reversed the reconsideration.

The Court of Appeals reversed this decision and allowed the reconsideration to stand. The decision is based on an interpretation of *Goldberg v. City of Milwaukee Bd. of Zoning Appeals,* 115 Wis.2d 517, 340 N.W.2d 558 (Ct. App. 1983). In *Goldberg,* the court ruled that it is a preferable rule of law to prohibit a zoning board from reopening a proceeding once it has been terminated. This policy gives finality to decisions.

However, the Court of Appeals noted that the *Goldberg* decision left room for exceptions, none of which applied in the *Goldberg* case. Among these is the principle that reconsideration is justified when the initial decision is based on a mistake of fact or law.

The court ruled:

> (W)e reiterate that a quasi-judicial body, such as the Board in this case, retains limited authority to reconsider its own decisions. The mistake exception to the general rule prohibiting a municipality from revisiting its prior decision has been long established. As *Goldberg* holds, and *Tateoka* suggests, permitting reconsideration in such limited circumstances does not fatally

undermine the need for finality in municipal decisions, but rather ensures decisions are not based on fraud or mistake.

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