



## **September Case Law Update September 30, 2011**

**[A summary of published Wisconsin court opinions decided during the month of  
September related to planning]**

### ***Wisconsin Supreme Court Opinions***

[No planning related decisions to report.]

### ***Wisconsin Court of Appeals Opinions***

#### **City Agreement Loses Priority to Bank in Foreclosure Proceeding**

[\*Baylake Bank v. Fairway Properties\*](#), a Wisconsin Court of Appeals case not recommended for publication (meaning it has little precedential value), is nevertheless interesting to include in the case law update because it reflects the realities of development deals gone bad during these difficult economic times.

Fairway Properties of Wisconsin, LLC, entered into a mortgage agreement with Baylake Bank relating to property for a development in the City of Waupaca. The property was located in a tax incremental district. The City subsequently entered into a development agreement with Fairway whereby Fairway was to develop the property into single-family housing, with a minimum value of \$4,500,000, and the City was to provide improvements (sidewalks, wells, and driveway approaches) for the development. Fairway agreed to meet a graduated development goal each year for eleven years, the last of which was the \$4,500,000 ending goal. For each year, if Fairway did not meet the agreed development goal, Fairway was contractually required to pay the City what was labeled “a liquidated damages penalty.” The damages amount was based on a formula in the contract designed to compensate the City for the difference between the actual property tax levied for a given year and the property tax that would have been levied had the development goal been reached for that year. The development agreement also stated that the damages penalty was “a special charge, which may be entered in the tax roll as a charge against the real property and collected in the same manner as real estate taxes” and that this was “a lien upon the property superior to all other liens.”

Fairway defaulted on its mortgage and the Bank brought a foreclosure action. As part of that action, the City filed a claim for delinquent property taxes of over \$150,000 and for liquidated damages of over \$80,000 under terms of the development agreement. The Bank agreed that under Wisconsin law, the delinquent property taxes had priority over the Bank's mortgage in the foreclosure action. However, the Bank took the position that the liquidated damages were subordinate to the Bank's interest as a mortgagee. The City disagreed and asserted that the damages were a tax and, accordingly, the damages were entitled to priority by statute.

While the circuit court agreed with the City, the Court of Appeals did not. According to the Court of Appeals, the liquidated damages are a creation of contract (the development agreement) and are not a tax authorized by state statute (only the legislature can authorize taxes). The liquidated damages were a contractual “back-up mechanism should the hoped for taxation fall through.” The liquidated damages claim is therefore subordinate to the Bank’s mortgage in the foreclosure proceeding.

### **No Authority to Grant Equitable Relief Under a Certiorari Review Action**

[Guerrero v. City of Kenosha Housing Authority](#) involves a challenge to termination proceedings initiated by the Kenosha Housing Authority due to alleged violations by Guerrero. An earlier proceeding in the Court of Appeals resulted in a determination by the Court that the termination notice violated Guerrero’s due process rights because the notice failed to provide any information regarding the time period of alleged violations and any evidence supporting the allegations. The Court of Appeals sent the case back to the circuit court. The circuit court ordered the Housing Authority to determine the remedy for the wrongful termination.

Guerrero then bought the present appeal, seeking the court’s equitable authority to reinstate her into the section 8 housing program and restore her past rental subsidies. Guerrero’s challenge was brought as a certiorari review under Wisconsin Statutes that allows for a judicial review of administrative proceedings. Citing past cases, the Court of Appeals concluded that a court on certiorari review cannot grant equitable relief. However, the Court noted that Guerrero is able to bring a separate claim for damages under Section 1983 of the federal Civil Rights Act.

The case is recommended for publication.

### **Open Records**

In [Capital Times v. Doyle](#), the Capital Times Company sued former Governor James Doyle and his record custodian for allegedly violating Wisconsin’s open records law and sought punitive damages because of alleged arbitrary and capricious delay. According to the complaint, the Governor’s office failed to respond to a June 4, 2009 request for letters regarding nine judicial candidates until July 8, 2009, ninety minutes before the Governor announced his appointments. The Newspaper brought this civil suit on July 30, 2009, twenty-two days after the requested documents were released. The trial court dismissed the Newspaper’s complaint after concluding that the Newspaper needed to have timely filed a writ of mandamus in order to obtain relief. The Court of Appeals agreed, finding that mandamus is the exclusive vehicle by which the open records law is enforced by our courts. According to the court, the Capital Time should not have waited until after the documents were released to initiate a lawsuit.

The case is recommended for publication.