



April Case Law Update April 30, 2009

Wisconsin Supreme Court

Condominiums

[Apple Valley Gardens v. MacHutta](#) involved a lawsuit brought against condominium owners who rented their unit. At the time they purchased the unit, the declaration of condominium creating the unit contained no restriction regarding rental of the units. However, the condominium association later amended the condominium bylaws to prohibit rental of the condominium units. The owners leased their condominium unit to a new tenant over the association's objection, claiming that the rental prohibition was ineffective because it had not been added to the condominium declaration. The association then filed this lawsuit to enforce the bylaws amendment prohibiting rentals.

The Wisconsin Supreme Court held in favor of the association. According to the Court's decision, a condominium bylaws amendment prohibiting the rental of condominium units is permissible under Wis. Stat. § 703.10(3); the condominium declaration in this case does not conflict with the bylaws amendment prohibiting unit rental and is therefore enforceable; and the bylaws amendment constitutes a mere restriction on the use of the condominium units, and does not in any way affect the quality of the units' title or marketability.

Wisconsin Court of Appeals opinions

Use Variance/Area Variance Distinction

[Driehaus v. Walworth County](#) involves a longstanding dispute between neighbors over the conversion of a garage. Driehaus owns more than seventeen acres of property, with over six hundred feet of frontage on Geneva Lake. The property is zoned C-2, Upland Resource Conservation District and included two residences and an eight-car garage. The garage was built in 1906 and is located less than three feet from the property's boundary line. The Walworth County Shoreland Zoning Ordinance (shoreland ordinance) requires a twenty-foot minimum side yard setback for all dwellings in a C-2 zoning district.

In 1999, Driehaus applied for a building permit to make certain improvements to the garage and convert the upper portion storage area to a single-family residence but the permit was denied because the shoreland ordinance only allows one principal structure to be located on a lot. Driehaus then filed an application for a zoning permit to "rehab" the existing two-story garage with the County and was again unsuccessful.

On April 5, 2000, Driehaus filed an application with the County zoning committee for a conditional use permit (CUP) for a planned residential development for three dwellings. The zoning committee voted to conditionally approve the CUP; however, one of the conditions imposed was that Driehaus obtain all required zoning permits, including a variance to the twenty foot lineal side yard setback requirement found in the shoreland ordinance. The zoning committee then decided to hold further proceedings and to make its own decision on the variance and did not refer the matter to the Board of Adjustment. The committee held a hearing on the variance and voted to grant Driehaus a variance to the twenty foot lineal side yard setback requirement.

The neighboring property owners then filed a lawsuit challenging the zoning committee's decision to grant the variance. The circuit court dismissed the lawsuit but was overturned in an earlier Court of Appeals decision. The Court of Appeals in the earlier action held that the zoning committee had no jurisdiction to consider the variance and sent the case back to the County for a decision on the variance by the Board of Adjustment. The Board of Adjustment denied the variance. Driehaus then challenged the Board's denial of the variance. The Circuit Court upheld the denial. Driehaus then appealed the Circuit Court's decision to the Court of Appeals.

On appeal, Driehaus argued that the Board applied the wrong legal rule to the facts of the case. Rather than focus on the dimensional aspects of the variance, he asserts, the Board denied his petition based on the proposed use of the property. Under *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401, the standard for granting an area variance is "unnecessarily burdensome" while the standard for granting a use variance is the more stringent "no reasonable use" standard.

The Court of Appeals did not agree that the Board applied the wrong standard. The Court of Appeals noted that under *Ziervogel*, use can be a factor in the board of adjustment's consideration of area variances. The Court of Appeals then went on to note that in this case the Board's decision rested on several findings, including: (1) the garage could continue to be used for storage as it has been without a variance, (2) the "hardship" of needing another dwelling was self-created and of a personal nature, (3) the setback requirements were not unnecessarily burdensome to Driehaus' 17.91 acre lakeshore estate, (4) the detriment to the neighboring properties was apparent, and (5) a variance under these facts would undermine the purpose of the zoning law. The Court of Appeals upheld the variance concluding that the Board's findings represented an appropriate application of the law to a reasonable view of the facts, and its decision was neither oppressive nor arbitrary.

City's Actions Did Not Constitute Controlling Influence in Annexation

In [*Sanitary District No. 4 - Town of Brookfield v. City of Brookfield*](#), the Wisconsin Court of Appeals examined the level of a City's influence in an annexation. The City was approached by a property owner seeking annexation to the City. The City helped prepare the legal description and maps for the properties involved in the annexation. The Sanitary district claimed that because of this assistance, the City was the real and controlling influence in advancing the annexation petition in violation of the rule of reason. The rule of reason is a court created

doctrine that requires that annexations meet three requirements: (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness; (2) some reasonable present or demonstrable future need for the annexed property must be shown; and (3) no other factors must exist which would constitute an abuse of discretion on the part of the municipality.

The Court of Appeals concluded that the City's actions merely assisted the property owner's expressed desire to annex property and were not a controlling influence in violation of the rule of reason. The Court also addressed some irregularities in who signed the annexation petition on behalf of the companies that owned the properties and concluded the signatures were not improper.

The case is recommended for publication.