



January Case Law Update January 21, 2009

Wisconsin Supreme Court

No planning related cases to report

Wisconsin Court of Appeals published opinions

Damage to Property Can Be a Taking

[*E-L Enterprises v. Milwaukee Metropolitan Sewerage*](#) involved an inverse-condemnation claim for resulting from the construction of Milwaukee Metropolitan Sewerage District's "deep-tunnel" project. Construction of the project required the dewatering of E-L Enterprises property. The removal of the groundwater from the site caused a building located on the property to settle.

The Sewerage District argued that the damage to property did not constitute a "taking" under Wisconsin law. Citing a long line of cases from the early 1900s on this issue, the Court of Appeals disagreed and held that such damages can constitute a taking.

The case is recommended for publication.

Private Communities: Buyer beware

[*Solowicz v. Forward Geneva National*](#) involved a lawsuit brought by several condominium owners of a development known as "Geneva National" in Walworth County challenging the developers continued control over the development.

Geneva National is a private "master-planned" community comprising 1600 acres with single- and multi-family homes, commercial and recreational property, golf courses and other recreational options. The multi-family residential buildings were developed as condominiums. There is also a restrictive covenant that controls the orderly development of Geneva National.

The restrictive covenant created two governing bodies to control the development: the Community Association and the Geneva National Trust. The restrictive covenant gave the developer significant control over these two governing bodies. The Geneva National Trust has the authority to act in "sole and absolute discretion" to adopt and enforce architectural standards, implementing rules and regulations governing use of the property, and granting variances to restrictions set forth in the Covenant. The Trust's expenses are paid by the unit owners. The Association maintains Geneva National's private roadways, medians, entrances and property, and provides utilities and can levy assessments on property owners to pay for improvements.

The condominium owners who initiated the lawsuit were upset over some significant special assessments for certain improvements. They alleged that Geneva National's governing structure granted the Developer an unreasonable amount of control that violated Wisconsin's Condominium Ownership Act found in Chapter 703 of the Wisconsin Statutes, and argued the actions of the developer amounted to "taxation without representation to infinity." The Condominium Ownership Act limits the duration of a developer's control over a condominium project. A condominium developer may maintain control only for three years or until seventy-five percent of the units are sold, whichever comes first, or ten years for an expandable condominium. WIS. STAT. § 703.15(2)(c). Here, the developer still had control after eighteen years. Only fifty-two percent of the maximum allowable units have sold but the restrictive covenant grants the developer control until eighty-five percent have sold.

In deciding the case, the Wisconsin Court of Appeals made a distinction between "master-planned communities" and condominiums to hold that master-planned communities are not subject to the limitations of Chapter 703. The Court of Appeals noted the distinction under real estate law between a restrictive covenant running with the land and the instruments required under Chapter 703 to create condominiums. The Court also notes that the development included major parts that were not designated as condominiums.

The Court of Appeals' decision also draws an somewhat artificial distinction between the definition of a "condominium" and the definition of a "master-planned community." Rather than rely on Chapter 703 of the Wisconsin Statutes for a definition of a "condominium," the Court adopts the *Random House Dictionary* definition that focuses on condominiums as a building type rather than a form of ownership: "an apartment house, office building, or other multiple-unit complex, the units of which are individually owned, each owner receiving a recordable deed to the individual unit purchased, including the right to sell, mortgage, etc., that unit and sharing in joint ownership of any common grounds, passageways, etc." This definition ignores the fact that in addition to multi-unit complexes, condominiums can also be detached single-family housing developments and can include mixed uses.

Unable to find a definition of "master-planned community" in the dictionary, the Court turns to the *Random House Dictionary* definition of a "master plan" ("A master plan develops or improves '(land, a community, a building complex, or the like) through a long range plan that balances and harmonizes all elements.") and the *Random House Dictionary* definition of a "community" ("a locality inhabited by a group whose members 'share government, and often have a common cultural and historical heritage.") Taking these together, the Court of Appeals develops the following definition of "a master-planned community:" "a private quasi-town that may include different types of homes (even condominiums), commercial property, private streets and parks, and other recreational facilities like golf courses, and is designed to attract a certain kind of person." Not understanding that a community like Geneva National could be structured in its entirety as a condominium, the County found a stark difference between condominiums and master-planned communities and held that Chapter 703 was not intended to include master-planned communities.

Overall, the Court of Appeals is not sympathetic to the plight of the condominium owners. The court notes that the condominium owners "bought-in with [their] 'eyes wide open.' If [they are] now opposed to how the Developer maintains this unique community, . . . then [the] remedy is to

sell [the] condominium to end the contract. We will not void an entire method of community development because a few condominium owners have formed their own ideas about what the future of planned communities should be. Nor will we make a public policy decision to limit this type of development when the Covenant complies with contract principles and provides clear and specific standards . . . “

The case is recommended for publication in the official reports.

Use of Consulting Engineers

In *Becker v. Crispell-Snyder, Inc.*, the Court of Appeals held that the developer in the case had third-part beneficiary status to sue on a contract between the Town of Somers in Racine County and the Town’s engineering firm. The Town of Somers recruited the developer to build a subdivision in the Town. The developer hired one engineering firm to do some work. The Town then forced the developer to use the Town’s engineers, a consulting firm. The Town assured the developer the fees would be within 1 to 2% of the other firm. The fees ultimately charged by the Town’s engineers greatly exceeded what the Town had promised. The Court of Appeals agreed that the developer could sue based on the contract between the Town on the Town’s engineers and what transpired in this case was a breach of that contract.