



September Case Law Update September 30, 2009

Wisconsin Supreme Court

No decisions to report.

Wisconsin Court of Appeals opinions

Statute Limiting Court's Review of Assessments Found Constitutional

In [*Metropolitan Associates v. City of Milwaukee*](#) the Wisconsin Court of Appeals upheld the process under Wis. Stat. § 74.37 for challenging real property assessments.

Section 74.37 originally provided that a property owner for file a claim of excessive assessment with the taxing authority and if the claim was disallowed, the property owner could bring a lawsuit in circuit court to recover the claim. This statute, however, did not apply in Milwaukee County. In Milwaukee County, property owners were limited to an on the record review by the circuit court of the decision of the local board of review regarding the claim.

In *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis.2d 630 N.W.2d 141, the Wisconsin Supreme Court struck down the exclusion of Milwaukee County from the procedures of section 74.37 as an unconstitutional denial of equal protection to Milwaukee County taxpayers. The Legislature subsequently amended § 74.37 to allow any community the ability to opt out of the procedures of § 74.37. The City of Milwaukee decided to opt out of the procedures of § 74.37 and Metropolitan Associates brought this lawsuit claiming the opt out provision also violated equal protection. The Wisconsin Court of Appeals disagreed. The Court found that the opt out provision addressed the concerns raised by the Wisconsin Supreme Court in the *Nankin* case.

The case is recommended for publication.

Development Agreement Waiving Annexation Rights Upheld

[*Town of Waukesha v. Waukesha Limited Partnership*](#) emphasizes the important strength of contract law.

In 2005, a developer proposed a commercial development located in the Town of Waukesha. The developer told the town board chair that the City of Waukesha did not want retail at that location. The scenario was similar to one faced by the town earlier where the City initially did not want development of a grocery store, the Town approved the development, and then the developer petitioned to annex the property to the City, which the City approved. To avoid a

repeat of the earlier scenario, the town board chair asked the developer enter into an agreement waiving the developer's right to annex the property to the City. The developer agreed to the waiver. Under the terms of the agreement, the developer consented to pay \$250,000 in liquidated damages to the Town in the event the developer petitioned to annex the property to the City.

One of the steps in the development approval process was the approval of a certified survey map (CSM) for the development. The Town Board approved the CSM subject to the conditions imposed in the agreement.

Waukesha County then informed the developer that it could not approve the CSM until several requirements were met. Several months later the developer decided to expand the project. The expanded development would require a new CSM approval by the Town. The developer then petitioned the City of Waukesha to annex the property. The Town sued for breach of the development agreement.

The developer argued that because there is no express grant of authority for a town to request an annexation waiver from a property owner, the authority does not exist. The Town countered that there is no express prohibition of this type of agreement and the agreement fell within the broad corporate powers of towns. The Wisconsin Court of Appeals agreed with the Town.

The developer also argued that under *Hoepker v. City of Madison Plan Commission*, 209 Wis. 2d 633, 563 N.W.2d 145 (1997), the Town could not condition approval of the development on an annexation waiver. *Hoepker* involved the City of Madison's conditioning the approval of a plat on the developer annexing the land to the City. The Court of Appeals distinguished the *Hoepker* case, viewing it as a situation where the City coerced the property owner to annex the property. The Court of Appeals did not view the Town's requiring the developer to enter into the annexation waiver as coercive.

The case is recommended for publication.

A Use For 12 Days Does Not Establish a Legal Nonconforming Use

In [*Town of Cross Plains v. Kitt's Korner, Inc.*](#), the Wisconsin Court of Appeals held that the adult entertainment provided at a tavern for twelve days before the effective date of an ordinance amendment prohibiting that use in that zoning district did not constitute a nonconforming use.

In early 2005, a tavern business called Kitt's Korner was operating in the Town of Cross Plains, Dane County. Bow-Wow Entertainment, LLC, owned and operated an adult entertainment tavern in North Bristol, Dane County. As a result of the opening of this establishment, Dane County officials became aware that Dane County ordinances did not contain any provisions regulating adult entertainment and they began to consider proposals to address this. On January 31, 2005, a County Board committee voted to approve an amendment addressing adult entertainment. The proposed amendment was scheduled for action by the County Board on February 18, 2005.

On February 11, 2005, Bow-Wow purchased all of Kitt's stock. A managing member of Bow-Wow, testified that at the time he began negotiations for the purchase of Kitt's Korner, he was aware an amendment requiring a zoning change for an adult entertainment tavern was going to be adopted sometime in early 2005.

On the night of February 11, Kitt's began presenting nude dancers. A manager of Bow Wow acknowledged that he started on this date in order to attempt to beat the ordinance amendment and to be "grandfathered" in under the existing ordinance. Kitt's then offered adult entertainment every night from 5:00 p.m. until 2:00 a.m.

On February 19, 2005, the County Board adopted an adult use amendment to the Dane County Zoning Ordinance. The amendment became effective on February 23. However, on February 21, 2005, Kitt's obtained a building permit and thereafter began remodeling the events area to add balconies, private viewing cubicles, a stage with poles, dressing rooms, lighting, and other improvements. The Town revoked Kitt's liquor license and a dispute arose over the lawfulness of the adult entertainment.

Kitt's Korner looked to Wis. Stat. § 59.69(10)(a) and argued it had vested rights as an established nonconforming use under Wisconsin law. Wis. Stat. § 59.69(10)(a) states that zoning ordinances "may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure, or fixture is used at the time that the [zoning] ordinances take effect." The Town argued the adult entertainment offered by Kitt's was not a legal nonconforming use. The Wisconsin Court of Appeals agreed with the Town.

The Court's decision addressed two issues. The first was: What, if anything, in addition to a use actually occurring on the effective date of the ordinance amendment, is required to constitute a vested interest for purposes of protection as a nonconforming use under Wis. Stat. § 59.69(10)(a)? The Court concluded that, "in order for a use to be protected as a nonconforming use, the business owner must have a *vested interest* in the continuance of that use, meaning that, were the continuance of the use to be prohibited, *substantial rights* would be adversely affected. In the context of § 59.69(10)(a)--relating to trade and industry--this will ordinarily mean that there has been a *substantial investment* in the use or that there will be a *substantial financial loss* if the use is discontinued." (Emphasis Added.)

The Court next noted that to determine whether Kitt's Korner's had established *substantial rights* (had made a substantial investment or would suffer a substantial financial loss) depended on resolution of a second issue. The second issue was: What is the effect of the owners' *knowledge* of the pending ordinance amendment before they began to make expenditures and incur liabilities to establish the new adult entertainment use?

The Court concluded that, in order to acquire a vested interest in a use for protection as a legal nonconforming use under Wis. Stat. § 59.69(10)(a), "the business owner must reasonably rely on the *then-existing ordinance* when making expenditures and incurring liabilities. In the circumstances of this case, we conclude that, because the *owners knew* of the pending ordinance amendment before they made expenditures and incurred liabilities to establish the use, *they did*

not reasonably rely on the then-existing ordinance.” (Emphasis added.) In other words, because of Bow Wow’s knowledge of the proposed ordinance change, the Court of Appeals viewed the proposed ordinance as the “then-existing” ordinance and the last minute efforts by Kitt’s to frustrate the County’s pending ordinance change would not work to establish a nonconforming use.