Court Rejects Substantial Zoning and Planning Law Changes

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The City of Fitchburg (City) and the League of Wisconsin Municipalities (League) recently won an important Wisconsin Supreme Court case for local government control over municipal zoning, planning, and development. *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34. The City and League convinced the Court that it should reject arguments that proposed substantial changes to Wisconsin vested rights and zoning law offered by a land developer and supported by The Wisconsin Realtors Association and Wisconsin Builders Association.

The case involved a proposed residential development in the City submitted by McKee Family I, LLC (McKee) in 2008 that deviated considerably from a Planned Development District (PDD) development plan the City granted preliminary approval to in 1994. The City responded to the new development proposal and very strong neighborhood objections by rezoning the subject property in 2009 from a PDD zoning classification to residential medium (RM) zoning classification, the same classification it had prior to its PDD designation.

McKee challenged the rezoning in circuit court where the court granted summary judgment in favor of the City. On appeal, the court of appeals also ruled in favor of the City.

McKee sought review by the Wisconsin Supreme Court and contended that the court of appeals erred, and it was entitled to summary judgment in its favor. The Court unanimously rejected McKee's arguments in a 5-0 decision with justices Shirley Abrahamson and Rebecca Grassl Bradley not participating.

McKee first argued that it had a vested right in developing land under the zoning classification even though it had not submitted an application for a building permit. It asserted that vested rights accrue when a developer has made substantial expenditures or incurred substantial liability based upon reasonable expectations established by government action. The Court rejected this claim.

The Court concluded McKee did not have a vested right in developing the property under the planned development district zoning classification because it did not apply for a building permit.

The Court declined to limit the application of existing case law and explained that Wisconsin follows the bright-line building permit rule that a developer's rights do not vest until the developer has submitted an application for a building permit that conforms to the zoning or building code requirements in effect at the time of application. *Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis.2d 157, 172, 540 N.W.2d 189 (1995).

The Court noted that the building-permit rule properly "balances a municipality's need to regulate land use with a land owner's interest in developing property under an existing zoning classification" by giving a "municipality . . . the flexibility to regulate land use through zoning up until the point when a developer obtains a building permit" and providing the developer sufficient certainty "once a building permit has been obtained . . . [to] make expenditures in reliance on a zoning classification." In contrast, the Court observed that the proposed change to a case-by-case determination based on expenditures and other factors offered by McKee "would create uncertainty at the various stages of the development process."

McKee also contended that references in City ordinances for PDD zoning as an "agreement" and directing certain approvals in the PDD process provided sufficient intent to make a PDD zoning classification contractual in nature and create expectations upon which developers may rely. The Court rejected this claim and determined that a planned development district zoning classification does not create contractual expectations upon which developers may rely.

The Court reasoned that there is a very strong presumption that legislative enactments do not create contractual or vested rights. *Dunn v. Milwaukee Cty.*, 2005 WI App 27, ¶8, 279 Wis.2d 370, 693 N.W.2d 82. And, in order to overcome the presumption, there must be a clear indication that a legislative body intends to bind itself contractually.

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Nat'l R.R. Passenger Corp. v. Atchinson, Topeka and Santa Fe Ry. Co., 470 U.S. 451, 465-66 (1985).

The Court also noted the substantial amount of time that had elapsed between the PDD designation (1994) and the proposed development (2009) in the case. This necessitated a need to be able to respond to "the changing development needs of the City" rather than be contractually bound to a development plan that no longer fit.

The Court observed McKee provided no evidence of contractual intent by the City other than the minor references in the City ordinances. The Court deemed these insufficient and ruled that Mckee had failed to overcome the presumption that the City did not intend to enter into a binding contract when it enacted an ordinance approving the PDD zoning classification for McKee's property.

Accordingly, the Court affirmed the decision of the court of appeals affirming the circuit court's grant of summary judgment in favor of the City.

About the author:

Daniel Olson is the Assistant Legal Counsel for the League of Wisconsin Municipalities. He provides legal assistance to municipal attorneys and officials through telephone inquiries, written opinions and briefs, workshop presentations, and published articles. He also assists in writing League handbooks and planning the Municipal Attorney's Institute. Daniel joined the League staff in February 2001. Contact Daniel at danolson@lwm-info.org