LEGAL ISSUES

2022 Building Inspectors Institute

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AGENDA

- Fresh off the appeals docket: U.S. Black Spruce Ent. Group, Inc., v. Milwaukee (Decided 3/15/22)
- The powerful and underappreciated Wis. Stat. § 66.0413(2)
- Revisiting the curious case of State v. James, 47 Wis. 2d 600 (1970)

Standard disclaimer: This is not legal advice for any particular situation. Make sure to check with your attorney for specific advice for your circumstances.

I NEED A RAZE

A case study on U.S. Black Spruce Ent. Group, Inc., v. City of Milwaukee

BACKGROUND

- The Northridge Mall located on the far north side of Milwaukee has been abandoned since 2003
- Some parcels owned by the city and some by a foreign investment company
- City issued orders to raze and remove the privately owned buildings under its code, which uses similar standards as the basic raze order statute
- When the owner challenged the raze order, the matter eventually ended up in court
  - Testimony from the city centered around the building's deteriorating condition and criminal activities on site
  - Testimony from the owners centered around their efforts to secure the building and desire to redevelop it
- The circuit court allowed the raze order to go through and found that the "estimated costs … would be appropriate given Black Spruce's desire to rebuild the properties for commercial use"
- The owner took the case to the court of appeals

BACKGROUND

- The court of appeals reversed the circuit court
- The appeals court held that “the appropriate standard is based on Black Spruce's current intended use of the buildings as vacant, unoccupied buildings from which the public is excluded, and the cost of repairs should reflect this current intended use”
- That meant the order to “install operable electrical service to the building and repair the heating and plumbing systems” went too far for a building that was intended to be vacant
- The court found any development plans were not sufficient to say that the owner intend the property to be anything other than a vacant building, so the repairs used to calculate the 50% threshold should have been only those minimal ones necessary to maintain a vacant building
- There was a dissent that saw the conceptual plans as enough to require more than a vacant building

ANALYSIS

- All of the “intended use” language is found in a few published cases now (the Black Spruce case is recommended for publication)
- I argue the weight put on the intended use is overblown
- Breaking the statute down, an inspector may, “if a building is old, dilapidated, or out of repair and consequently dangerous, unsafe, unsanitary, or otherwise unfit for human habitation”
  - and unreasonable to repair, order the owner of the building to raze the building
  - [and reasonable to repair], order the owner to either make the building safe and sanitary or to raze the building, at the owner's option
- My argument has always been the only repairs required under 66.04013(1) are the repairs necessary that make the building no longer “old, dilapidated, or out of repair and consequently dangerous, unsafe, unsanitary, or otherwise unfit for human habitation,” which is what qualified it for the raze order in the first place.

ANALYSIS

- An inspector cannot issue an order under meeting this standard: “old, dilapidated, or out of repair and consequently dangerous, unsafe, unsanitary, or otherwise unfit for human habitation”
- The only question is: Do you give the owner a chance to repair it?
  - Under 50% of AV: you have to give the option to repair or raze
  - Over 50% of AV: you can give the option to repair or raze OR you can require the owner to raze and remove

- Why would an order provide any authority after a building is safe, sanitary, and otherwise fit for human habitation even if it is not in compliance with all codes? Utilize standard code compliance enforcement for that end

- Raze orders are extreme and should only be used when necessary

ANALYSIS

- Focusing on “intended use” misses the underlying issue in the raze order law: potential use
- A building that is inherently unsafe, unsanitary, or otherwise unfit is a danger simply by existing
- If we value human life, whether an owner intends to open a property to the public doesn’t matter. A great deal of people used the Northridge Mall over the years (contractors, buyers, trespassers, etc.)
- This case highlights two extremes that we should all rein in:
  - Don’t let the owner’s intended use matter by focusing repairs ordered
  - Limit the required repairs to those that simply make the property fit for human habitation, nothing more

DON’T FORGET THE DEUCE!

A closer look at Wis. Stat. § 66.0413(2)

What is Wis. Stat. § 66.0413(2)?

- Called the “Public Nuisance Procedure” or “In Rem Procedure”

- Applies to any building that “as a result of vandalism or any other reason, has deteriorated or is dilapidated or blighted to the extent that windows, doors or other openings, plumbing or heating fixtures, or facilities or appurtenances of the building are damaged, destroyed or removed so that the building offends the aesthetic character of the immediate neighborhood and produces blight or deterioration”

- No Wisconsin case discusses this law in any depth

- Infrequently used compared to its big brother – Wis. Stat. § 66.0413(1)

Wis. Stat. § 66.0413(2): the process

- Step 1: the building inspector serves a written notice on the owner of the building and directs the owner to remedy defects within 30 days following service
- Step 2: apply to the circuit court for an order
- Step 3: set up a hearing at least 20 days out because the owner has 20 days to respond
- Step 4: the court sets a deadline to fix the issues. In the alternative, if the order is not complied with within the time fixed by the court, the court will appoint a receiver or authorize the building inspector to raze the building
- Step 5: A copy of the order shall be served upon the owner

- More cumbersome, but that's the trade-off for focusing on **appearance** rather than **safety**

Wis. Stat. § 66.0413(2): the process

- If the owner misses the court's deadline, the court has two options:
  - authorize the building inspector to raze the building
  - appoint a disinterested person to act as receiver of the property

- If the court orders the receiver, that person can either:
  - Remedy the defects and make any repairs and alterations necessary to meet the standards required by the building code or any health order (can even pay for this with a mortgage). If the owner asks, the receiver can even sell this fixed-up building
  - Secure and sell the building to a buyer who demonstrates to the circuit court an ability and intent to rehabilitate the building and to have the building reoccupied in a legal manner.

What's the difference between (1) and (2)?

- Focuses on appearance of the building and not safety
- Requires more procedural steps
- Has more possible outcomes
- Provides more flexibility along the way
  - Inspector decides when and if to go to court, not the property owner
- Usable where 66.0413(1) may not apply
- More efficient if the owner responds to the 30-day notice
  - No need for the owner to file in court right away
- Retains tax base by providing an option to compel the sale to a responsible person

Characteristics

- A building that is visually blighted
  - Vandalism
  - Windows, doors or other openings are damaged or missing
  - Plumbing or heating fixtures, or facilities or appurtenances of the building are damaged, destroyed or removed

- A building that negatively impacts the neighborhood
  - The greater the visual quality contrast with neighboring properties, the better
  - Any influence the building's appearance has had – property values going down? Neighbors moving away? Less foot traffic?
  - Anything that would cause "deterioration" of the neighborhood – give the neighbors a chance to testify. Can be very compelling evidence because they live next to it

Why use this?

- While codes focus on safety, they also focus on practicality of use and functionality
- The purpose is to create a stock of buildings that are attractive for occupants and buyers
- All this work can be undone if there is a nuisance building in the neighborhood that detracts from the work you've put in everywhere else.
- It doesn't require an interested owner!
  - Those shell companies that don't respond to orders or citations can't hide from this
  - The less interested the owner is, the more likely it is that the court will order the property sold
- Can be an excellent response to neighborhood concerns
- Improves quality of life for neighborhood

HEAR NO EVIL, SEE NO EVIL, FORFEIT NO MONEY

How to apply the holdings State v. James, 47 Wis. 2d 600 (1970)

BACKGROUND

- In 1966, a state building inspector noted noncompliance in a Rew Owl store in Plymouth, WI
- He gave that notice to an employee at the store, but not to the out-of-state building owner who had leased the building to the Red Owl company (which was then subleased to another person)
- No notice was sent to the building owner in Minnesota
- When the owner did learn about the violations, they were corrected immediately. But some time had passed since the violations were first observed
- The court found that actual notice is not required, but “there must be notice reasonably calculated to inform the nonresident owner” of the conditions of the building before the state can impose a forfeiture
- The court dismissed the complaint and refused to impose a forfeiture

ANALYSIS

- Notice to the building owner is good practice, but is it a procedural defect to not notice them?

ANALYSIS

- Notice to the building owner is good practice, but is it a procedural defect to not notice them?
- James suggests it might be: “if a forfeiture could be imposed without first giving notice of violation and an opportunity to comply, a serious due-process question would be raised.”
- Subsequent case law focuses on the case’s other holding that statutes imposing forfeitures are subject to strict construction and any ambiguity is resolved in favor of the defendant
- Doesn’t this holding just encourage the worst property owners to ignore their properties as much as possible?

ANALYSIS

- The law that authorized the state to impose a forfeiture – Wis. Stat. § 101.18 (1969-1970) – was worded a little differently back then, but mostly the same in meaning
- In 1970, it said:
  - Every day during which any person, persons, corporation or any officer, agent or employe thereof shall fail to observe and comply with any order of the department or to perform any duty enjoined by Sections 101.01 to 101.29, shall constitute a separate and distinct violation of such order; or of said sections as the case may be.

- That section was renumbered Wis. Stat. § 101.02(12) and reworded to say:
  - Every day during which any person or corporation, or any officer, agent or employee of a person or corporation, fails to observe and comply with any order of the department or to perform any duty specified under this subchapter shall constitute a separate and distinct violation of the order or of the requirements of this subchapter, whichever is applicable.

ANALYSIS

- In the instances in which I've seen the James case cited, it's usually as a last resort by defendants who have no other defenses
- If you've ever issued a citation without advance notice and opportunity to comply, just be careful of this case.
- This is an example of bad facts creating bad law
  - Owner was very responsive after learning of noncompliance
  - State still insisted on forfeitures for a local grocery store even though state could have gotten the repairs done immediately by mailing a letter to the owner's address right away
- Now this case can be (and is) used as a weapon by the most neglectful property owners
- Has not been overruled by any subsequent case

TAKEAWAYS

- Make sure you provide notice to a person before taking them to court
- If you want to go straight to citations without notice for those who abuse that courtesy, know that you may have to argue against the James holding, which was unconditional and broad
- If you get compliance after going to court, make sure you're adjusting the forfeiture accordingly.
- Avoid appealing cases with bad facts

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