

SB387 / AB479 Analysis

CHANGES TO ZONING / CONDITIONAL USE PERMITS

Current Law

Zoning ordinances provide for three types of general uses: allowed, conditional, and prohibited. A conditional use is when a local government with zoning decides that a use, such as mining, “could be” allowed in a zoning district if the proposed use can meet certain “conditions”. Towns have flexibility to identify required conditions after the proposal is submitted because of the situation specific nature associated with the potential use. Right now towns can deny permits in the interest of public health, safety, or general welfare, and attach conditions to the permit related to those and other interests. The public has the ability to play a role in deciding whether to issue permits and what conditions to attach.

Bill Impact: Public Input for Conditional use Permits Rendered Meaningless

The legislation requires towns to hold a public hearing on a conditional use permit (CUP) request; HOWEVER, ironically public comment cannot be the sole basis used to deny a permit. Put simply, public opinion cannot be used as part of the decision making process.

Why WTA is Opposed

One of the most troubling aspects of the bill is the attack on the public’s ability to influence conditional use permits. This elimination of the public’s voice is simply anti-democratic. Furthermore, because the town could not put conditions on the permit based solely on public testimony, it is likely they would have to hire experts to justify attaching conditions to a permit.

Bill Impact: CUP Conditions

This bill would require a zoning ordinance to specify every possible condition that might ever be attached to a permit. Currently, local governments have flexibility to reasonably create conditions based on foundational provisions in the ordinance. For example, a foundational provision that towns can prevent excess and disruptive noise supports the creation of specific conditions applied to a permit applicant on a case by case basis. This bill would take away that flexibility by requiring every single condition conceivable to be spelled out in the ordinance.

Why WTA is Opposed

The bill would make many current zoning ordinance provisions worthless. For example, many towns include a general statement in their ordinance that a project cannot adversely impact traffic. The bill would render such language useless. This is because the ordinance provision would have to specifically state what conditions would accomplish traffic not being adversely impacted. It is impossible to mystically envision such specific conditions for every possible

conditional use and place them in the ordinance in advance.

Bill Impact: Ability to Protect Public Health, Safety, and General Welfare Curtailed

The bill would demand all ordinance requirements to be “measurable”. Many zoning ordinances include a provision that empowers the town to create conditions that protect public health, safety and general welfare. Such a provision would not be realistic under this bill because health, safety, and welfare are often not “measurable”. Furthermore, it would be impossible to crystal ball and state in an ordinance every provision necessary to apply to every possible CUP application.

Why WTA is Opposed

The term “measurable” causes many challenges. Not only would the ability to protect health, safety, and welfare be negatively impacted, but the courts will be forced to determine what “measurable” really means. Towns will undoubtedly be faced with legal ramifications and costs due to this language.

Summary

This bill will reshape zoning laws for the worse. It eliminates the role of the public in community decisions; it greatly diminishes local government flexibility; will render many zoning ordinance provisions throughout Wisconsin useless, and will prompt unnecessary legal battles.

INVERSE CONDEMNATION

Current Law

It is important to first explain inverse condemnation. When government wants to take private property for public use, it must compensate the landowner. This is known as condemnation. Most people will be familiar with the condemnation of land for building roads.

The courts have also said that a government regulation can go “too far” and the negative impact on the private property is so great that the government must compensate the landowner even if the government has not physically taken the property. This is known as “inverse condemnation.”

The courts have established some tests to determine if inverse condemnation has occurred. If the regulation deprives all or substantially all of its beneficial use or if the government physically occupies the property, it is considered an automatic, or categorical, taking of property and just compensation must be paid. For instances that are not as black and white, the court has established a balancing test that includes considering: 1) the economic impact to the property owner; 2) the owner’s reasonable investment backed expectations; and, 3) the nature and character of the government action.

In applying the tests, the court considers the property as a whole. For example, a property might have three zoning classifications, such as, commercial, residential, and conservancy. A property owner cannot argue that the portion of their property in conservancy is worthless and he/she is due compensation because much of their property is still highly valuable.

Bill Impact: Unintended Consequences of Legislative Interpretation of Constitution

The bill *attempts* to turn the court's decisions on constitutional matters into statutes. In other words, the legislature is attempting to codify constitutional law. It does not succeed in doing so.

Why WTA is Opposed

Not only does it not effectively accomplish codification of constitutional law (addressed later), but the mere, albeit unsuccessful effort, is cause for pause. The legislature is attempting to codify a century worth of property law rather than relying on continued court application of judicial precedent. Even if the legislature was successful in codifying every nuance of 100+ years of court made law, one must question if such codification diminishes the court's flexibility to either provide relief to a private property owner or empower government to protect the public. It also begs the question about separation of powers, especially when the legislature is attempting codification of precedent related to the 5th amendment to the U.S. Constitution.

Bill Impact: Unraveling of *Zealy v. City of Waukesha*

This bill attempts to codify a constitutional law case, *Zealy v. City of Waukesha*; however, it actually destroys a critical component of the case. It ends the "property as a whole" analysis. Again, a property might have three zoning classifications, such as, commercial, residential, and conservancy. A property owner cannot argue that the portion of their property in conservancy is worthless and he/she is due compensation because much of their property is still highly valuable. This bill would allow the property owner to look at portions of the property.

Why WTA is Opposed

In the example above the owner could argue that the town owes him/her money for the conservancy portion of his/her land. It is certainly conceivable to envision an argument where the portion of a lot that cannot be built upon because of a front or side yard setback has been taken and money is owed by the government. This provision will undoubtedly expand takings lawsuits and open up local governments to more liability.

Bill Impact: Two Provisions Unconstitutional

The WTA believes there are two potential constitutional issues with this bill.

First, the bill provides two options of relief for property owners if a court finds a taking occurred: 1) compensate the property owner for the decrease in value; or, 2) repeal the law that created the

taking. The second option contradicts US Supreme Court interpretation of the Constitution. *First English Evangelical Lutheran Church of Glendale vs. County of Los Angeles*, states that even a temporary taking is compensable and repealing the law that created the taking is not sufficient.

Towns would have been best served not to point out this unconstitutional provision; however, in addition to towns having a high degree of integrity, it points out the folly of any attempt to codify the intricacies of 100+ years of constitutional law by the legislature.

Second, WTA believes the bill is unconstitutional as it relates to separation of powers. It is widely known that our government has three branches with distinct duties and responsibilities given to each. The judiciary has sole responsibility for interpreting the law and the constitution. This bill spells out specifically how and when a violation of the 5th amendment takings clause occurs. This is something that the courts have determined for 100+ years. It only makes sense that the courts would interpret when the legislative branch has gone “too far”. It defies logic to have the legislature set the limits for when it has itself gone too far with its own laws. This is akin to the fox watching the hen house and is not a role for the legislature, but for the court.