Perspectives on Planning

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Old Music Hall, 925 Bascom Mall, Madison, WI 53706 (608) 262-8990 • FAX (608) 262-9307

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# Court Limits City's Extraterritorial Plat Review Authority

by Brian W. Ohm, J.D.

The Wisconsin Supreme Court recently decided that cities do not have the authority to require that a property owner annex their land to the city in exchange for the city's approval of a subdivision development proposed for the land. The case is entitled *Hoepker v. City of Madison Plan Commission.* The court's opinion was filed on May 16, 1997. The case raises important issues about where development should occur and the type of services that should be available to serve the development.

## THE FACTS OF THE CASE

The Hoepkers sought to subdivide approximately 49 acres into sixty-two single family residential lots with individual on-site septic systems and private water supply wells. The property is located in the Town of Burke in Dane County and is surrounded on three sides by the City of Madison where full urban services, such as sewer and water, are available. Since the property is within three miles of Madison's boundaries, the City has extraterritorial plat approval jurisdiction over the proposed subdivision. The property is subject to county zoning. The nonexclusive agriculture use zoning for the property allows the proposed development.

Both the county and the town approved the proposed subdivision. However, the City of Madison approved the subdivision subject to eight conditions. The Hoepkers brought a law suit challenging two of the conditions.

One condition required that the Hoepkers annex the proposed subdivision to the City of Madison so that the full range of urban services, including public sanitary sewer and public water service, could be provided to the proposed development in a timely manner by the City of Madison. The City's basis for this condition was the City's concern that without public sewer and water, it was reasonable to expect water quality problems due to nitrate concentrations in the private wells. The City was also concerned that by allowing urban development without public sewer and water, the proposed subdivision would result either in urban services never being available or the city providing those services after the subdivision is fully developed at a much greater cost.

Another condition required that the Hoepkers reconfigure the subdivision to reserve an adequate open space corridor for a future recreational trail that would connect City and County park and open space lands. The open space corridor would be reserved for five years after which time the City would either acquire the reservation or release it. The Hoepkers challenged this provision as an unconstitutional taking of their land without just compensation.

The Circuit Court for Dane County held that the City had the authority to condition its subdivision approval on annexation of the parcel to the City and that the requirement that the Hoepkers reconfigure the subdivision to provide for an open space corridor was not an unconstitutional taking.

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The case was then appealed to the court of appeals. That court, however, decided that the City did not have the authority to condition approval of the subdivision on annexation. The court of appeals also concluded that the open space requirement did not constitute a taking. The case was then appealed to the Wisconsin Supreme Court.

## THE SUPREME COURT'S DECISION

The Wisconsin Supreme Court's decision in the case focuses on whether the annexation condition complies with Wisconsin's law of subdivisions. The City of Madison imposed the condition through a provision in its subdivision ordinance that states that the City may require an annexation agreement as part of the subdivision approval process to insure the future provision of required public facilities and services. The City had enacted this provision under section 236.45 of the Wisconsin Statutes which states that a city, village, town or county may adopt ordinances governing the subdivision of land that are more restrictive than the statutory requirements contained in Chapter 236 of the Wisconsin Statutes.

The Wisconsin Supreme Court concluded that the City's requirement places undue influence on a property owner to sign an annexation petition. According to the court, such undue influence is contrary to Wisconsin's annexation laws which promote the voluntary rights of a property owner to support or oppose the annexation of their land. Therefore, the City of Madison could not require, as a condition of approval of the proposed subdivision, that a person seeking to subdivide property annex the property to the City.

The court stressed that its decision does not force the City to approve the proposed subdivision. Under the provisions of Madison's subdivision ordinance, the City may still reject the proposed subdivision if the City determines that the land is unsuitable for the proposed development.

The court did not determine if the reservation for an open space corridor constituted a "taking" of private property because the court decided the case was not "ripe." The court held that it could not decide if the reservation constituted a "taking" until the City makes a final decision applying the City's subdivision regulations to the subdivision. This final decision will determine a number of presently unknown issues such as whether the City will approve the subdivision, the exact location of the open space corridor, etc.

## LIFE AFTER THE *HOEPKER* CASE

The ruling in the *Hoepker* case prohibits cities and villages from conditioning the approval of a plat located in a town on having the property owners annex their property to the city or village. However, cities and villages can still use their subdivision ordinances to influence the design of subdivisions located within their extraterritorial plat review jurisdiction (within three miles of the boundaries of a first, second, or third class city or within 1½ miles of a fourth class city or village.) For example, if the subdivision ordinance provides that land should not be subdivided where land is not suitable for development, the city or village may reject the plat if the lands are in fact not suitable for development.

In addition, cities and villages are not obligated to extend services outside their boundaries. Cities and villages can therefore deny the extension of services to areas within towns unless that area is annexed to the city or village. (In the *Hoepker* case, the property owners were not seeking sewer services.)

Nonetheless, underlying the facts of the *Hoepker* case are numerous issues that are central to the land use and planning debates which are occurring in Wisconsin. These issues include the appropriateness of higher density development served by on-site septic systems; the need for intergovernmental cooperation in the creation of park and open space systems; how services are paid for; and a process for cities and villages to develop more logical boundaries.

During the past eighteen months, the Wisconsin Supreme Court has become active in the land use arena having decided several important land use cases. Given the increased contentiousness behind many of the land use disputes, additional cases will follow. Policy makers need to evaluate whether there is a better way than resorting to the courts to resolve these issues.

Brian Ohm is an Assistant Professor and UWEX land use law specialist at the UW-Madison Dept. of Urban & Regional Planning and can be reached at (608) 262-2098.