BoardmanClark

Municipal Law Newsletter

VOLUME 25, ISSUE 6 NOVEMBER/DECEMBER 2019

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

"You're Picking on Me!"

When is Selective Prosecution Unconstitutional?

Defendants in ordinance prosecution matters often complain that municipalities or law enforcement officers are unfairly targeting them while allowing other individuals to continue to violate municipal ordinances without citing or prosecuting them. They point to the junk in other people's yards and how fast other drivers are driving. They argue that the neighbor pushed leaves or snow into the street, too.

In a recent unpublished Court of Appeals opinion, the Court addressed the issue of selective prosecution and determined that a mere allegation that one individual was prosecuted for an ordinance violation when another individual was not prosecuted for a similar violation was insufficient to support an Equal Protection claim of selective prosecution.

In *Village of Mishicot v. Arseneau,* Case No. 2019AP541 (November 6, 2019), the defendant sought to repair and expand a storage shed on property she owned, which property was located in a floodway. She discussed with the village clerk whether such construction could be undertaken in a floodway. The clerk, after consulting with the Department of Natural Resources (DNR), sent a letter to the defendant in June 2016 stating that such structures were not permitted in the floodway and that she could not do the work.

Despite the letter, Arseneau began construction on the shed. The Village sent a second letter in July 2016 advising her that she was in violation of the Village's floodplain ordinance and building code and needed to stop construction immediately. The letter stated that, if Arseneau refused to comply, she would be subject to ordinance enforcement. She did not comply.

In early August, the Village received a letter from the DNR reminding the Village that it was obligated to enforce its floodplain ordinance and that Arseneau's structure was in violation of the ordinance. The DNR further reminded the Village that, if it failed to enforce its ordinance, the Federal Emergency Management Agency could place the Village

Continued on next page

"You're Picking on Me!"

Continued from front page

on probation or suspend its participation in the National Flood Insurance Program. This could result in Village residents being unable to obtain flood insurance or in residents being required to pay substantially higher premiums, even if the insurance remained available.

Based on other conversations with the village clerk, Arseneau believed that if she put the shed on a trailer, it would comply with the ordinance, as the shed could then be moved if a flood occurred. The village clerk, however, sent a letter to the defendant in mid-August informing her that, according to the DNR, putting wheels on the structure was not an option because it was not a vehicle and because people tend to leave such structures behind when a flood occurs.

In January of 2017, Arseneau was cited and convicted in municipal court for building in a floodplain and violating the building code. Arseneau appealed to circuit court and was again convicted. She then moved for reconsideration claiming that the matter had not been fully tried. Arseneau claimed that the Village had violated her Fourteenth Amendment rights to Equal Protection and that the Village had discriminated against her by selectively prosecuting her. The circuit court scheduled another hearing.

The evidence at the hearing showed that another property owner had been permitted to construct a storage building in the floodway. That property owner had asked, prior to purchasing the building, if it was permissible to build in the floodway and had been told by the village clerk that it was. He then spent over $5,000 moving the building. Later, although he was told that the building was not allowed in the floodplain, he was never prosecuted. Arseneau argued that, because it was feared that the other property owner would sue the Village over the advice he had been given and because she had no basis for a lawsuit, the Village had acted in a discriminatory manner when it prosecuted only her.

The Village presented evidence that other property owners had been directed to move structures and all of them had complied. The Village also emphasized that, in Arseneau's case, the DNR was threatening to take action against the Village if the defendant's building were not removed. This was not the case with the other property owner. Third, the Village noted that Arseneau was told that she could not construct the building before she commenced construction.

The circuit court determined that the village did selectively prosecute Arseneau, violated her Fourteenth Amendment right to Equal Protection and granted her motion to dismiss the citation. Although the circuit court agreed that there was no evidence of well-established discriminatory factors such as race, religion, or gender, the court accepted Arseneau's argument that an "arbitrary classification" was made when the Village did not cite the other property owner only because he could sue the village for the clerk's error while issuing a citation to Arseneau because she had no basis to sue the Village. The Village appealed.

The Court of Appeals reviewed long-standing case law on the burden of proving selective prosecution. The Court noted that before a defendant is even entitled to an evidentiary hearing on a claim of selective or discriminatory prosecution, he or she must make a prima facie showing of both discriminatory effect and discriminatory purpose.

To show a discriminatory effect, the defendant must have been singled out for prosecution while others similarly situated have not. For purposes of showing discriminatory effect, "similarly situated" means that the circumstances show no distinguishable, legitimate prosecutorial factors that might justify making different prosecutorial decisions. To show a discriminatory purpose, the prosecutor's selection must have been based on an impermissible factor (such as race, religion, or other arbitrary classification).

In stand-alone cases such as this case (i.e., where a single individual is alleging a single

Continued on page 5

Eagle Point Solar Case Dismissed by Circuit Court

The Dane County Circuit Court has granted a motion of the Public Service Commission of Wisconsin (PSCW) to dismiss an action filed by Eagle Point Solar (EPS). EPS's complaint had sought declaratory judgment and injunctive relief from the court to confirm the legality of a Solar Services Agreement (SSA), under which EPS had contracted to develop about one megawatt of solar generation for the City of Milwaukee on seven city-owned properties. The SSA provided for co-ownership of the solar installation, with the City of Milwaukee owning approximately 20% of the facilities using a combination of FOCUS on Energy and City funding sources.

EPS filed the circuit court action in response to a PSCW order issued in May of 2019. That order did two things. First, it denied a request by EPS to rule on whether EPS had impermissibly acted as a public utility when it entered into the SSA with Milwaukee, which is a customer of Wisconsin Electric Power Company (WEPCo), to provide solar energy. In the PSCW's view, determining EPS's status as a public utility was more properly within the scope of state lawmakers to decide.

Second, the PSCW set for hearing the separate but related issue of whether WEPCo had acted improperly when it denied EPS's request to interconnect the solar generation facilities EPS had proposed to build for Milwaukee. WEPCo's denial of the interconnection request had been largely based on its assertion that EPS was improperly acting as a public utility when it entered into the SSA with Milwaukee.

The circuit court's dismissal of the EPS request for declaratory and injunctive relief was grounded on the court's discretion to defer to the PSCW as the agency with primary jurisdiction in utility matters, and to require EPS to exhaust its administrative remedies by participating in the interconnection request denial proceeding at the PSCW. The circuit court also cited EPS's failure to state a claim upon which relief can be granted given the absence of a reviewable agency decision.

The EPS case has been closely watched by utilities and renewable energy advocates, as well as by local governments and school groups who have relied on so-called "third party" deals to develop local solar generation projects. SSAs and similar contractual structures have been used by such tax exempt entities to enable them to take advantage of federal investment tax credits by partnering with other parties who can utilize the tax credits.

In the absence of an appeal, further clarity on the issue will likely be left to the legislature. In the interim, local governments interested in developing large scale solar facilities should review tariff options available through their incumbent utilities (MLN, September, 2019: "Local Governments Buy In to Large Scale Solar Projects").

— Richard Heinmann

SPEAKERS FORUM

ENERGY BAR ASSOCIATION WEBCAST

The Butter Solar Project:
Developing Distributed Solar Generation on a Large Scale

JANUARY 14, 2020

Richard A. Heinemann

Seventh Circuit Upholds Ordinances Regulating the Size and Location of Signs

In a recent decision, *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove*, 939 F.3d 859 (7th Cir. 2019), the Seventh Circuit Court of Appeals held the Village of Downers Grove's comprehensive ordinances restricting the size and location of signs did not violate the First Amendment. In doing so, the Court emphasized that the First Amendment does not restrict municipalities from enacting aesthetic limits on signs as long as those limits are not arbitrary, do not discriminate based on content or viewpoint of speech, reflect a significant government interest, and leave open sufficient channels for communication.

Leibundguth Storage & Van Service (Leibundguth) challenged the Village's sign ordinance, claiming that the ordinance was a form of content discrimination in violation of the First Amendment. The ordinance in question prohibited all signs from being painted "directly on wall," and set limits for signs based on how close the building was to the street. Further, the ordinance provided that a business could only have one sign unless the business faced both a street and a railroad. In that case, the business could have a second sign on the railroad side. Finally, the ordinance did not require property owners to apply for permits for several types of signs, including holiday decorations, temporary signs for personal events, noncommercial flags, political and noncommercial signs not exceeding 12 square feet, and memorial signs.

Leibundguth's issues with the ordinance arose because it had one sign that was painted directly on a wall and another sign that was too large. However, the company focused on the exclusions for the basis of its constitutional challenge, arguing that those exclusions showed that the ordinance unconstitutionally discriminated against commercial signs based on their content.

The Seventh Circuit held that the ordinance did not violate the First Amendment by discriminating based on content because the size and no-paint rules applied equally to all signs within the Village. The Court reasoned that the exclusions contained content discrimination because they exempted certain signs from requiring a permit; however, the language of the ordinance still required all signs to comply with the size and no-paint requirements regardless of their content. The Court noted that there was no evidence that the Village allowed any sign to violate the size or no-paint requirements. Therefore, the Court concluded Leibundguth was not injured by the content discrimination because all signs had to comply with the size and no-paint requirements.

Further, the Court clarified that the size, location, and no-paint requirements were a form of aesthetic zoning establishing time, place, and manner restrictions. The Court explained that aesthetic time, place, and manner restrictions were compatible with the First Amendment as long as the restrictions were not arbitrary, did not discriminate based on content or viewpoint, reflected a significant government interest, and left other channels for communication. The Court concluded that the Village met its burden by presenting evidence that painted signs deteriorated faster than other signs and were harder to revise or remove. Because of those factors, painted signs could become unsightly. Additionally, the Court concluded that the size requirement was also justified as many saw smaller signs as more aesthetically pleasing than larger signs. Finally, the Court concluded, and the parties agreed, that the sign ordinance left open several modes of communication as Leibundguth could still advertise using signage within the confines of the ordinance and could also advertise in print or on the internet. This case serves as a reminder that municipalities may enact aesthetic time, place, and manner restrictions on signs as long as those restrictions apply equally to all signs, regardless of content.

— Catherine E. Weiss

"You're Picking on Me!"

Continued from page 5

incident of selective prosecution), the defendant's claim may also be proven by a substantial showing that the decision to prosecute was an attempt to prevent the exercise of constitutional rights, or was prompted by personal vindictiveness. In *Arseneau,* the defendant did not argue that either of these circumstances existed.

Only if a defendant successfully makes a prima facie case of both discriminatory effect and purpose will he or she be entitled to an evidentiary hearing.

The Court of Appeals determined that Arseneau failed to meet her burden as to either prong; she did not present sufficient evidence to show either discriminatory effect or a discriminatory purpose.

Arseneau relied exclusively on the failure to prosecute another property owner as prima facie evidence of a discriminatory effect, claiming they were "similarly situated." The Court of Appeals disagreed, noting that, unlike the other property owner, Arseneau had been told in advance that her construction would violate the ordinance; that, once she began construction, she was told she should stop; and that she was further advised that she would be subject to ordinance enforcement if she did not. Arseneau ignored the Village's correspondence.

By contrast, before purchasing his storage unit, the other property owner made an effort to make sure he complied with the ordinances and the village clerk advised him that the unit was acceptable. When it was discovered later on that the clerk erred and the Village requested that he move the storage unit, the other property owner was cooperative in trying to work out a solution.

The Court also deemed it important that the DNR notified the Village of Arseneau's violation and of the possible consequences to the Village and Village residents if the Village failed to enforce the ordinance. No DNR warnings were received with respect to the other property.

The Court, therefore, determined that there were "distinguishable legitimate prosecutorial factors" that might have justified the non-prosecution of the other property owner.

The Court also noted that Arseneau's "notion that her citation was discriminatory because she could not have brought a lawsuit against the Village," was unsupported by any evidence of a threatened or retaliatory lawsuit by the other property owner. Even had there been evidence of such a lawsuit, the Court opined that the Village could consider the impact of its erroneous advice in that matter that might justify a different approach in that case. Finally, the Court pointedly stated that Arseneau failed to explain how the clerk's mistake in one case conferred the benefit of that mistake on others who are in violation of the ordinance.

In addition, the Court determined that the defendant failed to establish the second prong—discriminatory purpose—because she failed to show that she was cited on account of some impermissible, arbitrary, vindictive, or illicit preferential basis.

The Court reversed the circuit court's decision. Because the defendant failed to make a prima facie showing that the prosecution had either a discriminatory effect or a discriminatory purpose, let alone both, her motion for reconsideration should have been dismissed without any need for an evidentiary hearing.

Takeaways

Municipal prosecutors have great discretion in deciding whether or not to prosecute in a particular case. Not all ordinances can or should be prosecuted and the exercise of discretion always involves a degree of selectivity. In making a claim of selective prosecution, before a defendant is even entitled to a hearing, the burden is on a defendant to make a prima facia showing that he or she was singled out for prosecution while others similarly situated were not, and that such selection was based on an impermissible factor. In the absence of such a showing, the defendant's case will fail.

— *Eileen A. Brownlee*

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

Certified ABA-EPA Law Office
Climate Challenge Partner

Municipal Law Newsletter

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group—Water Division.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Barry J. Blonien	286-7168	bblonien@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	286-7255	ehagen@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Kathryn A. Pfefferle	286-7209	kpfefferle@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Catherine E. Wiese	286-7181	cwiese@boardmanclark.com
Douglas E. Witte	283-1729	dwitte@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com