Property

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REAL PROPERTY

I. RIGHTS IN LAND

All too often the expansive concepts of private and public rights in land are tremendous frictions working against each other generating complex legal problems. Ensuing litigation invariably involves a confrontation between “compelling public interest” on the one hand, and a private landowner’s right to freely use his property on the other. Such a conflict was recently resolved in a landmark decision by the Wisconsin Supreme Court in Just v. Marinette County which prefaces this section on “Rights in Land.”

Just established the right of the state to restrict private land use in order to protect shoreland ecology. At issue, in Just, was the public interest in stopping the despoliation of natural resources versus the landowners asserted right to use their property contrary to an approved zoning ordinance.

In April of 1961 the plaintiff-appellants, Ronald and Kathryn Just, purchased a large tract of land along the north shore of a navigable lake in Marinette County. The controversy involved a remaining portion of the original purchase described as verdant land bordering the lake and extending back six-hundred feet. Over the years the Justs developed and sold parcels of land out of the original tract. Several years after their purchase Marinette County’s Shoreland Zoning Ordinance Number 24 was adopted and put into effect. This ordinance placed the Justs’ remaining property within a conservancy district which, inter alia, required a conditional use permit be obtained from the zoning administrator of the county before fill could be added to “wetlands.”

1. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

The basic purpose of the ordinance is to protect navigable waters and the public rights therein from the degredation and deterioration which results from uncontrolled use and development of shorelands. This public purpose is more definitively stated in §§ 1.2 and 1.3 of the ordinance wherein it considers uncontrolled use of shorelands and pollution of navigable waters to have an adverse effect upon public health, safety, convenience and general welfare while also impairing the tax base. 56 Wis. 2d at 10, 210 N.W.2d at 765. See also, Wis. Stat. § 59.971 (1) (1971) and Whipple, The Necessity of Zoning Variance or Amendments Notice to the Wisconsin Department of Natural Resources Under the Shoreland Zoning and Navigable Waters Protection Act, 57 Marq. L. Rev. 25 (1973).

3. Because this land was located within 1000 feet of the normal high water elevation of the lake it was denominated a wetland under § 2.29 of the ordinance and its use became
months after the ordinance went into effect the Justs added sand fill to their remaining property without first securing the required permit. This violation occasioned the trial court's granting of a mandatory injunction sought by Marinette County restraining the Justs from placing fill upon their property.4

The arguments presented in Just raised constitutional issues and resulted in a holding novel to Wisconsin case law. Simply put, the controversy concerned whether or not the conservancy provisions of the ordinance placing restrictions upon wetland-filling was constitutional because it amounted to a constructive taking of the Justs' land without compensation.5 The Wisconsin Supreme Court held that the restriction imposed upon such use was a valid exercise of police power and that the effect of the ordinance was not unconstitutional. The court's opinion further noted the validity of governmental zoning authority in restricting the use of a citizen's property to prevent a public harm resulting from any change in the natural character of the land.6 In affirming the trial court's granting of an injunction and upholding the constitutionality of the ordinance the court said:

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of police power, in zoning, must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.7

This holding reflects the obvious change in an aroused public's attitude toward the preservation of natural resources. Due to the recognized interrelationship of the natural environment of the shorelands to the purity of the contiguous waters the individual's use of shoreland suddenly has become the public's concern manifesting itself through the state's trusteeship under the trust doctrine.8

subject to county control.

4. 56 Wis. 2d at 9, 201 N.W.2d at 766.
5. Id. at 14, 201 N.W.2d at 767.
6. Id.
7. Id. at 17, 201 N.W.2d at 768. For further discussion see n. 47 et seq., infra.
8. The Just holding has already been applied by the Wisconsin Supreme Court in Town of Salem v. Kenosha County, 57 Wis. 2d 432, 434, 204 N.W.2d 467 (1973).
A. Private Rights

I. Remedies

The plaintiff-appellant, in Kinzer v. Bidwell, purchased a lakefront lot from the respondents in 1955 along with an undivided one-sixth interest in a 75 acre parcel of land. The undivided parcel was located behind the lakefront lots owned individually by Kinzer and the respondents, hereinafter termed the "back property." Subsequent to the conveying of the one-sixth interest to Kinzer the respondents and Kinzer deeded the back property to the First Wisconsin Trust Company to hold the property as trustee subject to the terms of a land trust agreement. Included in the agreement was a provision prohibiting any party from "attempting to sell or partition his interest without first offering to sell it to the other parties at cost.""9

Kinzer occupied the property until 1968 when he put up for sale the lakefront property and his interest in the back property. He was successful in selling the lakefront property but was challenged by the respondents in selling his interest in the back property. As a result the sale of the back property was never consummated. Kinzer then brought suit seeking a partition of the back property. The trial court held that the trust agreement was merely "passive." Being passive, the parties to the back property were considered tenants in common and thus Kinzer was entitled to a partition of his one-sixth interest.10

The Wisconsin Supreme Court noted that the validity of Kinzer's common-law right to partition hinged on whether or not the land trust agreement was "active" or "passive." An active trust would bind the appellant as a shareholder and beneficiary to a valid land trust agreement; unlike a passive trust which merely finds the parties tenants in common. Differentiating between the two the standard applied by the court is consistent with prior Wisconsin case law and stated as follows:

If there are any active duties for the [trustee] to perform with respect to administering the property, and the primary use be expressely or impliedly, by reason of such active duty, vested in the trustee, the trust is necessarily active. . . .12

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9. 55 Wis. 2d 749, 201 N.W.2d 9 (1972).
10. Id. at 750-751, 201 N.W.2d at 10.
11. Id.
The requisite involvement of the trustee was found to be present by the court. Management and control of the back property was left entirely in the trustee's hands. Thus, Kinzer was not allowed a partition and was bound by the land trust agreement.\textsuperscript{13}

Specific performance of a land contract for the purchase of commercial property was sought in \textit{Huntoon v. Capozza}.\textsuperscript{14} The plaintiff-respondents, William and Eleanor Huntoon, entered into a land contract with the defendant-appellant Barbara J. Capozza for her purchase of their restaurant-bar-apartment complex on March 14, 1970. Payment in full was to be on or before April 1, 1973. The land contract provided that upon the vendee's default the vendors, at their option, shall have the right to re-enter. Alternatively, the vendors were given the option of affirming the land contract and upon default demanding that the balance outstanding become immediately due and payable.\textsuperscript{15}

Mrs. Capozza entered into possession and enjoyment of the premises on May 1, 1970 and for approximately ten months tendered the monthly payments pursuant to the agreement. It was in February of 1971 that a fire extensively damaged the premises which caused her to default on subsequent installments. The vendors caused notice to be served upon the vendee stating that the entire balance was due and owing and in May of 1971 commenced suit against the vendee for specific performance of the land contract. The trial court held that the vendors were entitled to specific performance and upon the vendee's appeal the Wisconsin Supreme Court affirmed.

Under Wisconsin law before equitable relief can be granted to a vendor there must be a material breach of the land contract.\textsuperscript{16} The court found that the default by the vendee was substantial enough to allow the vendors an equitable remedy.\textsuperscript{17} As to the var-

\begin{itemize}
\item 13. Land trusts in Wisconsin have been held to be passive where the trustee had no active duties to perform (Boyle v. Kempkin, 243 Wis. 86, 9 N.W.2d 589 (1943)) and where the trust instrument gave management and control of the property to the beneficiaries leaving the trustee with no duties to perform. Janura v. Fence, 261 Wis. 179, 52 N.W.2d 144 (1952). Furthermore, the Wisconsin Legislature has abolished passive trusts. \textit{See} Wis. Stat. § 701.03 (1971) originally enacted in R.S. 1849 c. 57 § 5.
\item 14. 57 Wis. 2d 447, 204 N.W.2d 649 (1973).
\item 15. \textit{See} text accompanying n.n. 79-80 \textit{infra} for additional discussion of this case.
\item 16. 57 Wis. 2d at 452, 204 N.W.2d at 651.
\item 17. The defendant-vendee contended that since her missed installment payments were unintentional, being occasioned by the fire, equitable principles should allow a redemption period. The court noted, however, that other substantial breaches had occurred including the defendant's failure to pay real estate taxes as well as the loss of a liquor license. These
ious equitable remedies available it has long been established in Wisconsin that upon a breach of a land contract the vendor may elect to sue for specific performance. This remedy is not a disaffirmance or forfeiture but rather has been traditionally considered an affirmance of the contract. Where the vendor seeks to affirm the land contract through specific performance his recovery amounts to only the purchase price plus his costs and disbursements. The rule as to the distribution of the proceeds from the sale of the property is stated as follows:

In the event the property sells for a price in excess of the contract price, the surplus belongs to the buyer, but if a deficiency results the purchaser is liable for the deficiency.

The case of Sutter v. Department of Natural Resources presents an interesting twist to the Huntton holding. Here rescission of the contract for the sale of land was sought by the vendors.

Walter and Florence Sutter, as vendors, entered into an option to purchase agreement with the vendees, the Department of Natural Resources (hereinafter D.N.R.). The vendees exercised the option and a local bank was selected to serve as an escrow depository. The Sutters duly delivered a warranty deed to the bank and the D.N.R. deposited the purchase price which was to be due and payable upon examination of an abstract of the Sutters' title finding it marketable. Before the purchase money could be delivered to the Sutters a dispute arose concerning the Sutters continued presence on the property. The D.N.R. then refused release of the purchase money until the vendors would accede to new terms unilaterally offered by the D.N.R. These new terms were substantially at variance with the terms of the option contract. The Sutters then gave notice to the D.N.R. that they elected to terminate the contract and commenced a suit in equity to have the contract rescinded

breaches precluded the protection equity often affords. 57 Wis. 2d at 459, 204 N.W.2d at 656. See, e.g., Martinson v. Brooks Equipment Leasing, Inc., 36 Wis. 2d 209, 223, 152 N.W.2d 845, 154 N.W.2d 353 (1967).

18. 57 Wis. 2d at 459, 204 N.W.2d at 656. See also Kallenbach v. Lake Publications, Inc., 30 Wis. 2d 647, 142 N.W.2d 212 (1966) where the various land contract remedies upon default are extensively discussed. In addition to specific performance the other remedies available to the vendor include (a) suit at law for the unpaid purchase price, (b) declaring the contract at an end and quieting title in the vendor, (c) ejectment, and (d) strict foreclosure.

19. 57 Wis. 2d at 459, 204 N.W.2d at 656.

20. Kallenbach, see n. 18 supra at 651. See also Oconto County v. Bacon, 181 Wis. 538, 195 N.W. 412 (1923).

21. 56 Wis. 2d 376, 202 N.W.2d 24 (1973).
and the title to the property quieted in them. The trial court con-
cluded that the new terms demanded of the vendors, after the 
option was exercised by the vendees, amounted to a repudiation of 
the original contract allowing the Sutters the remedy of rescission. 
The Wisconsin Supreme Court reversed.

The court found error in the trial court granting the vendors 
the remedy of rescission. According to prior Wisconsin case law 
rescission is unquestionably granted to the vendor where the 
vendee of real estate has substantially breached his part of the 
contract by not providing the required performance pursuant to the 
conditions of the agreement. In the instant case, however, the 
court noted that the Sutters had fully executed their part of the 
contract. Thus the mere fact that that the D.N.R. failed to perform 
a promise bargained for under the terms of the contract did not 
amount to a repudiation entitling the vendors to rescission.

Strong policy reasons support the above decision for to allow 
a vendor of real estate to repudiate his deed and recover the land 
upon the vendee's failure to pay the purchase price would render 
real estate titles dangerously uncertain. The nature of the 
D.N.R.'s obligation to pay the purchase money was that of a 
covenant of an executed contract. It was not, as the trial court held, 
a condition of an executory contract for the sale of land. Since the 
contract for the sale was fully executed by the vendors they would 
be required to sue for breach of contract damages unlike Huntoon 
where the contract for the sale of real estate was executory, thus 
allowing the vendor an election of remedies upon breach of a 
condition.

A more novel case is McLoone v. Roberts wherein the 
plaintiff-appellant sought recovery for damages to his property 
from the defendant-respondent who was filling adjoining marsh-
land for a city redevelopment corporation. The plaintiff, after set-
tling with the redevelopment corporation which owned the land, 
sought recovery from the defendant, an independent contractor 
hired by the redevelopment corporation to fill the adjoining marsh-
land. The filling process was accomplished by means of a hydraulic

23. This holding is in accord with preceding Wisconsin case law as established in several 
24. 56 Wis. 2d at 382, 202 N.W.2d at 27.
25. Id.
26. 58 Wis. 2d 704, 207 N.W.2d 616 (1973).
dredging system which gathered fill material from the bottom of a
nearby river. The effect of water runoff was to change the com-
paction of the soil on the plaintiff's property resulting in its loss
of weight-bearing capacity cracking the floor and walls of the
plaintiff's building. Notice was given to the defendant of the dam-
age but the dredging continued under the assumption that as more
fill was placed on the adjoining land the plaintiff's building would
be better protected. The plaintiff sued for damages and the verdict
was returned for the defendant finding that it was not negligent in
performing the dredging.

Upon appeal the plaintiff contended that the defendant dredg-
ing company should, nevertheless, be held liable as an insurer
against damage to the building under the theory of strict liability.
Noting that the courts of other jurisdictions were not in accord as
to one's liability to an adjoining landowner in the absence of negli-
gence, the Wisconsin Supreme Court adopted the following rule as
to the liability of an independent contractor to a landowner:

An independent contractor is liable for injuries caused by his own
negligence or that of his servants in the course of his performance
of the work, or his liability may be stated to be for his breach of
the standard of due, ordinary, or reasonable care. Conversely, a
contractor is not liable for an injury where he was in no way
negligent in doing the work.

The landfilling operation in the instant case was not found, by the
court, to fall within the extraordinary risk situation to which the
doctrine of strict liability is customarily restricted. With this the
Wisconsin Supreme Court denied the plaintiff a recovery under
strict liability against an independent contractor working upon
adjoining land.

2. Covenants

In an action for foreclosure of a land contract in Peterson v.
La May & Johnson a deficiency judgment in favor of the vendors
and adverse to the purchasers and purchasers' assignees was ren-

27. Hydraulic dredging involves the removal of sand and silt from a river bottom and
pumping it through pipes discharging the fill in the desired areas. The large quantity of
water accumulated percolates to the surface of the fill and then is allowed to run off.
28. 58 Wis. 2d at 710-711, 207 N.W.2d at 619-620.
29. Id.; See PROSSER, LAW OF TORTS (Hornbook Series, 4th ed.), § 79, p. 518, stating:
"... in general strict liability has been confined to consequences which lie within
the extraordinary risk whose existence calls for special responsibility."
30. 56 Wis. 2d 145, 201 N.W.2d 507 (1972).
dered by the trial court. Roy A. Peterson and his wife as vendors and Charles Johnson and his wife as purchasers executed a land contract on December 1, 1964 for the sale of a residence. On May 13, 1968 an assignment of the Johnsons' interest in the land contract was made to Lawrence La May and his wife. At no time did the La Mays execute an agreement with the vendors purporting to bind them to the terms of the original land contract. They continued, however, to make monthly installment payments on the land contract until May 31, 1969. On June 5, 1969, the La Mays then executed a quitclaim deed to the original purchasers, the Johnsons, and no further payments were made after May of 1969.

The Petersons brought an action for specific performance of the land contract against both the Johnsons and La Mays and it was granted with the trial court overruling the La Mays' demurrer. Upon a judicial sale a deficiency resulted which was asserted against the La Mays. An appeal was taken by the La Mays from that portion of the judgment which found them liable for the deficiency.

The Wisconsin Supreme Court noted that since the vendor of a land contract retains legal title to the property to secure the balance due on the purchase price upon default one of his options is the affirming remedy of a suit for specific performance.\(^3\) The vendor's right to the contract price can be satisfied out of a judicial sale of the property and the purchaser is liable for any deficiencies as a result of the contractual agreement.\(^3\) As mere assignees of the original contract, however, the La Mays contended that they had no personal liability for the underlying obligation to pay the purchase price. In reversing the trial court the Wisconsin Supreme Court agreed with the La Mays' contention that an assignment alone does not impose personal liability upon the assignee and found it to be in conformity with the great weight of authority.\(^3\)

The basis for this holding is the lack of contractual privity between the vendor and the assignee of the vendee's interest. The La Mays held a bare assignment which created a privity of estate between them and the vendors but not a privity of contract. Since the obligation to pay the purchase price is not a covenant running with the land but is a personal obligation based on contract it is only enforceable against those who have a contractual obligation

\(^{31}\) Id. at 147, 201 N.W.2d at 508. See also Kallenbach supra n. 18.

\(^{32}\) See text accompanying n. 20 supra.

\(^{33}\) 56 Wis. 2d at 148, 201 N.W.2d at 509.
to pay the purchase price.\textsuperscript{34} The court did indicate two possible ways an assignee could be held personally liable for the deficiency judgment. They were (a) negotiation of a contract directly with the vendor, creating a novation, or (b) entering into an express agreement with the purchaser assuming the contract obligations thus making the assignee liable to the vendor under the third-party-beneficiary theory.\textsuperscript{35}

\textbf{B. Public Rights}

The cases reported under this heading concern the protection and securing of public rights in land through the use of zoning and the exercise of eminent domain. Governmental use of these powers results in different public rights being created in property. The protection of public rights may be accomplished by the proper exercise of police power through zoning ordinances. The securing or creating of a beneficial use not presently enjoyed by the public in property is obtained through the power of eminent domain.

Essentially zoning operates to prevent a public harm while condemnation creates a public benefit. The resulting differences markedly affect the landowner whose property is subject to these powers. Where a public benefit is created the property owner is compensated while any damage suffered by a property owner as a result of zoning is considered incidental and no compensation is given. The Wisconsin Supreme Court has considered the distinction between zoning and eminent domain to be a matter of the degree of damage to the property owner.\textsuperscript{36} The loss, then, caused the individual property owner as a result of the government's exercise of its zoning authority must be weighed to determine if it is more than he should bear. The rule followed by the court in determining whether a zoning ordinance may or may not be a constructive taking of property was stated in \textit{Stefan Auto Body v. State Highway Commission} as follows:

\textit{\ldots [I]f the damage is such as to be suffered by many similarly situated and is in the nature of a restriction on the use to which land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is said to be a reasonable exercise of police power, but if the damage is so great to the individual that he}

\textsuperscript{34} Id. at 149, 201 N.W.2d at 509.
\textsuperscript{35} Id., See text accompanying n.n. 81-82 infra for a further discussion of this case.
\textsuperscript{36} Just v. Marinette County, see supra n. 1.
ought not to bear it under contemporary standards, then the courts are inclined to treat it as a "taking" of the property or an unreasonable exercise of the police power.\(^3\)

This rule is widely applied in zoning and eminent domain disputes as the following cases illustrate.

1. Zoning

The Just\(^3\) case upheld the Marinette County shoreland zoning ordinance as being a valid exercise of police power. The ordinance restricting the use of shoreland property was considered a reasonable exercise of police power well within the ambit of zoning authority since a public harm was prevented by limiting the use of private property to its "natural uses."\(^3\) The public harm sought to be prevented was the change in the natural character of the shoreland causing a disruption to the indigenous surroundings. According to the Wisconsin Supreme Court the preventative effect of the zoning ordinance preserves nature as "created and to which the people have a present right."\(^4\)

When a city is incorporated and until such time as a comprehensive zoning plan is prepared what zoning is proper to restrict and regulate property use? Such a situation was presented in City of New Berlin v. Stein\(^4\) where the city sought to perpetually restrain the defendant from accumulating junk and operating a dump contrary to the city's municipal code. The property in question was acquired in April of 1960 and previously had been zoned agricultural by the town of New Berlin. By operation of law the city, upon its incorporation in February of 1959, adopted the town of New Berlin's zoning ordinance\(^2\) and shortly thereafter, with some amendments, enacted what was entitled an "Interim (city) Zoning Ordinance." Under this ordinance, enacted in May of 1959, the

\(^3\) 21 Wis. 2d 363, 369-370, 124 N.W.2d 319, 323 (1963).
\(^3\) See supra n.1.
\(^3\) The Wisconsin Supreme Court in commenting on natural uses said:
This is not a case where an owner is prevented from using his land for natural and indigenous uses. The uses consistent with the nature of the land are allowed and other uses recognized and still others permitted by special permit. . . .[n]othing this court has said or held in prior cases indicate that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.
\(^56\) Wis. 2d at 17-18, 201 N.W.2d at 768.
\(^40\) 56 Wis. 2d at 23-24, 201 N.W.2d at 771.
\(^41\) 58 Wis. 2d 417, 206 N.W.2d 207 (1973).
zoning and use restrictions on the defendant's premises remained agricultural.

The defendant claimed that the interim zoning ordinance lapsed in May of 1961 and until the city adopted its comprehensive zoning ordinance in June of 1962 there was no valid ordinance in effect. Thus he would have a lawful non-conforming use upon the adoption of the June, 1962 zoning ordinance. His defense was based upon section 62.23 (7) (da) of the Wisconsin Statutes (1957) which section is entitled "Interim Zoning." According to the provisions of this section interim zoning is only to be effective for two years. The court, however, indicated that the term "Interim Zoning" as used by the city in its 1959 enactment was erroneous because the resolution specifically provided that the town of New Berlin's ordinance would remain in full force and effect until modified or repealed. The city thus had, in the court's view, adopted an intermediate ordinance in May of 1959 which validly existed until June of 1962 when modified.

The court stated that the word "interim" in the city's 1959 enactment did not control nor work to bring the enactment under Chapter 62 of the Wisconsin Statutes. The nature of a zoning ordinance was considered controlling by the court and not what it is entitled. The nature of section 62.23 (7) (da) was construed as that of a "stopgap" ordinance which neither reclassifies land nor changes zoning restrictions. It merely freezes the right to make use of the property effected only as it is presently used for a period of not more than two years. This was distinguished from the intermediate zoning scheme adopted by the city of New Berlin which permitted reasonable use of land within set classifications and thus was not invalidated by operation of chapter 62.

Where a comprehensive zoning ordinance is in effect a prop-

44. Wis. Stat. § 62.23 City Planning.
(7) Zoning.
(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the planning commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment. (Emphasis added).

This provision remains unchanged.
45. 58 Wis. 2d at 422, 206 N.W.2d at 209.
46. See Edelbeck v. Town of Theresa 57 Wis. 2d 172, 203 N.W.2d 694 (1973).
47. 58 Wis. 2d at 423, 206 N.W.2d at 210.
48. Id.
roperty owner may be required to have a conditional use permit authorized which allows him to use his land within the limits of the existing ordinance but only when certain conditions have been met. In *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield* 49 such a conditional use permit was requested by appellant-Skelly Oil at a hearing before the City of Delafield Plan Commission. This body rejected the request and pursuant to the City of Delafield's ordinance Skelly Oil appealed to the Common Council who eventually affirmed the Plan Commission's rejection. By writ of certiorari the property owners petitioned the Waukesha circuit court for a review of the Common Council's action. It was specifically claimed by the petitioners that the common council of a city is not, by statute, the correct body to review decisions of the plan commission. 50 The trial court did not agree and dismissed the petitioners' action. The Wisconsin Supreme Court, however, reversed citing the clear and unambiguous language of section 62.23 (7) (e) of the 1971 Wisconsin Statutes. 51 This section, according to the Wisconsin Supreme Court, vests exclusive authority in the board of zoning appeals to pass upon conditional uses or special exceptions and not the common council or plan commission. 52

It is important to note that even though the retention of zoning authority by the Common Council and the Plan Commission of Delafield was in direct derogation of state law the Wisconsin Supreme Court felt that in spite of section 62.23 (7) (e) of the Wisconsin Statutes "it may well be that such a procedure might be better suited to the complicated task of providing for effective city planning." 53

The case of *Rogers v. Village of Menomonee Falls* 54 concerned the issue as to who has standing to protest a proposed rezoning ordinance. Even though the plaintiff-appellants were resident property owners adjacent to the property owned by the party seeking

49. 58 Wis. 2d 695, 207 N.W.2d 585 (1973).
50. Id. at 698, 207 N.W.2d at 588.
51. This section provides as follows:
(e) Board of appeals. 1. The council which enacts zoning regulations pursuant to this section shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.
52. 58 Wis. 2d at 703, 207 N.W.2d at 588.
53. Id. See also CUTLER, ZONING LAW AND PRACTICE IN WISCONSIN, § 11, p. 37 (1967).
54. 55 Wis. 2d 563, 201 N.W.2d 29 (1972).
the zoning change there standing to protest the rezoning was denied by the Wisconsin Supreme Court. The controversy centered around the construction of section 62.23 (7) (d) of the Wisconsin Statutes. This section creates a permissible area of protest to rezoning ordinances by allowing the landowners within its bounds standing to challenge zoning changes. The appellants contended that the 100 foot boundary line for protest should be construed as extending 100 feet from the outermost limits of the property owned by the party seeking the zoning change. The effect would be to put the appellants in a position to protest the change. A contrary construction of the section, however, was adopted by the Wisconsin Supreme Court. The party seeking the rezoning had left a 150 foot strip between the outermost boundary of its property which bordered the appellants' property and the inner boundary of land which was to be rezoned. The effect was to create a 150 foot "buffer zone" which remained completely consistent with the zoning of the appellants property bordering it. The court held that the 100 foot area prescribed in section 62.23 (7) (d) extended from the land which was to be rezoned thus placing the permissible area of protest within the "buffer zone." In accordance with the express language of the statute only landowners adjacent to the land rezoned and not those adjacent to the borders of a whole district in which a specific area is being rezoned are valid protesters under the statute. The Wisconsin Supreme Court has previously rejected any interpretation of section 62.23 (7) (d) as embracing the "district concept" for permissible protest.

55. The language of this statutory provision has remained unchanged in the 1971 Wisconsin Statutes. The pertinent language of § 62.23 (7) (d) allows for protest of rezoning ordinances as follows:

In case of a protest against such change, duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed change, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council. (Emphasis added).

56. 55 Wis.2d at 567, 201 N.W.2d at 32.

57. See Prescher v. Wauwatosa, 34 Wis. 2d 421, 431, 149 N.W.2d 541, 546 (1967) wherein the court stated:

The purpose of sec. 62.23 (7) (d), Stats., was to permit protest by landowners directly affected by zoning changes. Landowners whose property borders on land to be rezoned are directly affected because their land value and enjoyment of their property decreases. People on the periphery of areas to be rezoned are not so directly affected.
2. Eminent Domain

The appellants in Just\(^{58}\) argued that the enforcement of the zoning ordinance restricting the use of their land amounted to a constructive taking and thus entitled them to compensation. It was claimed that the zoning restrictions as applied to their property caused a depreciation in the value of their land and that they should be compensated for this "loss."\(^{59}\) Stating that while loss of value is to be considered in determining whether a restriction is a constructive taking of land the Wisconsin Supreme Court went on to say that this was not a controlling factor where land value is inflated by development at the expense of harm to public rights.\(^{60}\) Furthermore, the court noted that the claimed depreciated value was not based on the use of the land in its natural state but on what the land would be worth if it could be filled and developed.

The court resolved the issue of whether there was a constructive taking by stating:

The ordinance does not create or improve the public condition but only preserves nature from the despoilation and harm resulting from the unrestricted activities of humans.\(^{61}\)

Thus the zoning ordinance was found to be well within the reasonable exercise of police power and did not create a public benefit in the zoned land requiring compensation to be paid by the plaintiff.\(^{62}\) In this context, to find a constructive taking, the court indicated it is dependent upon whether "the restriction practically or substantially renders the land useless for all reasonable purposes."\(^{63}\)

Litigation arising in the area of eminent domain invariably concerns the inadequacy of the compensation offered to the landowner—condemnee and the following case is no exception.

*Bembinster v. State*\(^{64}\) involved the quality of evidence that is

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58. See *supra* n. 1.

59. See Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W.2d 403 (1966) wherein the court held that the mere depreciation of property value was not a sufficient ground to enjoin the county from enforcing a zoning ordinance. But see State v. Herning, 17 Wis. 2d 442, 117 N.W.2d 335 (1962) and Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966) where the court indicated that if the limitation on the use of land is in the nature of a taking in whole or in part for public purposes, then the constitution requires compensation to be paid to the property owner.

60. 56 Wis. 2d at 23, 201 N.W.2d at 771.

61. *Id.*

62. See text accompanying n.n. 36-37 supra.

63. Buhler, *supra* n. 59 at 143 and 146 N.W.2d at 406. See also Nick v. State Highway Commission, 13 Wis. 2d 511, 109 N.W.2d 71, 111 N.W.2d 95 (1961).

64. 57 Wis. 2d 277, 203 N.W.2d 879 (1973).
proper in a determination of just compensation in condemnation proceedings. The Wisconsin Supreme Court stated the underlying rule concerning assessment of compensation as follows:

It is well established that market value in an eminent domain proceeding is to be based not necessarily on the use to which property was being put by its owner at the time of the taking but rather on the basis of the highest and best use, present or prospective, for which it is adapted and to which it might in reason be applied.65

Where, however, a zoning ordinance prohibits the most advantageous use of the property, the landowner’s evidentiary burden in proving “highest and best use” is increased. Bembinster presented such a situation and the Wisconsin Supreme Court held that the landowner may meet his burden by showing there is a reasonable probability of rezoning so as to allow for the “highest and best use.”66 The court stated that in proving a rezoning so as to create a greater use one cannot use possibility or an assumption but must use facts justifying a reasonable probability of change.67

C. Creditors’ Rights

The issue in the first case, Exchange Corporation of Wisconsin v. Kuntz,68 was whether a court of equity, in a strict foreclosure action after the original period of redemption had expired, can extend the time for which the vendee may relieve himself from forfeiture. Exchange Corporation of Wisconsin (Exchange) as vendor brought suit for strict foreclosure of a land contract against the vendee Arvin Kuntz. The judgment of foreclosure which was entered provided for a six month period of redemption ending June 1, 1971. Upon Kuntz’ failure to redeem Exchange sought a writ of assistance on July 6, 1971. At a subsequent hearing on July 26,

65. Id. at 283, 203 N.W.2d at 900. See e.g., Utech v. Milwaukee, 9 Wis. 2d 352, 101 N.W. 57 (1960) and Muscoda Bridge Co. v. Grant County, 200 Wis. 185, 227 N.W. 863 (1929).
66. 57 Wis. 2d at 284, 203 N.W.2d at 901.
68. See 57 Wis. 2d at 284-285, 203 N.W.2d at 901 wherein the court stated:
The type of evidence which has been admitted as material tending to prove a reasonable probability of change includes the granting of many variances which showed a continuing trend that will render rezoning probable, the actual amendment of the ordinance subsequent to the taking, and an ordinance rezoning neighboring property.
69. 56 Wis. 2d 555, 202 N.W.2d 393 (1972).
1971, the trial court ordered Kuntz to pay the balance on the land contract before noon the day following and ordered Exchange to convey by warranty deed the property to Kuntz.

The power and jurisdiction of the equity court to extend the time of redemption was appealed to the Wisconsin Supreme Court by Exchange. The court held that after the time for redemption had expired the lower court was without power or jurisdiction to grant an extension within which the vendee could make full payment of the purchase price. Thus Exchange, the creditor on the land contract, could retake possession of the property free of all claims by Kuntz.

It is important to note that the Wisconsin Supreme Court considered it possible for a court in a strict foreclosure case to reserve power to extend the period of redemption even after the original period of redemption had expired. This is contrary to the dicta in *St. Joseph's Hospital v. Maternity Hospital*, of which the court in *Exchange* expressly disapproved.

The holding in *Mutual Federal S&L Assn. v. Wisconsin Wire Works* explains Wisconsin's view of a mortgagee's right in mortgaged real estate when the mortgagor sells the land to a third party. Since Wisconsin applies the lien theory to mortgages the mortgagee is not considered to have legal title but is merely the holder of a security interest or a lien holder. Wisconsin Wire's interest, as mortgagor, in the mortgaged property was subject to Mutual's security interest. According to the Wisconsin Supreme Court when Wisconsin Wire entered into a land contract the third party vendee, by process of equitable conversion, became the owner of the land in equity while Wisconsin Wire retained legal title to secure the balance due on the purchase price from the vendee. The equitable title acquired by the vendee was held not only to remain subject to

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70. *Id.* at 563, 202 N.W.2d at 397.
71. *Id.* at 561, 202 N.W.2d at 396.
72. 224 Wis. 422, 272 N.W.2d 669 (1937). The dicta contained therein stated essentially that a court of equity has inherent jurisdiction after the expiration of the period of redemption to extend the redemption period even without reserving the right to do so.
73. 56 Wis. 2d at 562, 202 N.W.2d at 396.
74. 58 Wis. 2d 99, 205 N.W.2d 762 (1973). *See* the text accompanying n.83 et seq. infra for further discussion of this case.
76. *Osborne, Mortgages* (Hornbook Series 2nd ed.) § 127 p.207.
77. 58 Wis. 2d at 104, 205 N.W.2d at 765. *See also*, Church, *Equitable Conversion in Wisconsin*, 1970 Wis. L. REV. 404.
the legal title possessed by Wisconsin Wire but also to the lien held by Mutual.78

II. CONVEYANCING

A. Real Estate Contracts

Many of the problems surrounding real estate contracts are common to other contractual relationships. Assuming that a valid contract exists questions may arise concerning the construction of the contractual provisions. The following cases all involve specific contract provisions which the court was required to construe.

The first reported case is Huntoon v. Capozza79 wherein the vendors sought specific performance of a land contract. The vendee claimed that the vendors had a contractual duty to utilize the value of certain stocks they held as collateral in the event, as occurred here, the vendee missed an installment payment. The land contract provision relating to the stock stated it was to be deposited with the vendor "as and for further security for the faithful carrying out of the terms and conditions of the contract." Further, the stock, according to the provision, was to be returned when the vendee had fully performed all of the contract "terms, conditions, and covenants." In holding that the vendors did not have a contractual obligation to utilize the value of the stock the Wisconsin Supreme Court applied established construction principles.80 The express terms of the contract were held sufficient to indicate the parties intended the stock as security and not as a substitute installment payment.

A different sort of construction problem was presented in Peterson v. La May & Johnson.81 The vendors sought the balance due of the purchase price under a land contract from the assignees of the purchaser. The vendors relied on a clause in the original contract that purported to bind any assignee of the purchaser to

78. 58 Wis. 2d at 104, 205 N.W.2d at 765.
79. See supra n. 18 and accompanying text.
80. The court was guided by the following established principles as found in prior case law. In the construction of contractual provisions the prevailing idea is to glean the intent of the parties at the time such contract was executed. Aero Motive Sales Corp. v. Wausau Motor Parts Company, 256 Wis. 586, 590, 42 N.W.2d 141, 143 (1950). Preferably this is done by resorting to the contract itself. Green v. Donnor, 198 Wis. 122, 124, 223 N.W. 427, 428 (1929). Occasionally this is insufficient and other indications of the meaning of contractual provisions are utilized. See, e.g., H & R Truck Leasing Co. v. Allen, 26 Wis. 2d 158, 131 N.W.2d 912 (1965). Important contractual provisions are not ordinarily left to implication. Ratcliff v. Aspros, 254 Wis. 126, 129, 35 N.W.2d 217, 218 (1948).
81. See supra n. 30 and accompanying text.
all the provisions within the contract. The La Mays, assignees of
the purchaser Johnson, were not privy to the original contract.
Because of this the Wisconsin Supreme Court held that the La
Mays could not be bound by the original contract clause to pay
the purchase price. The court went on to say that in order for the
La Mays to be bound the assignment must have incorporated the
"purchase price" clause of the original contract.82

Mutual Federal S&L Assn. v. Wisconsin Wire Works83 involved the construction of clauses found in a mortgage and mort-
gage note. The mortgage was entered into by the respondent Wis-
consin Wire, as mortgagor, and appellant Mutual, as mortgagee.
The mortgage note provided that it shall, at the option of Mutual,
become due and payable if Wisconsin Wire conveys away the prop-
erty without Mutual's consent.84 The mortgage itself provided: "all
the terms and conditions of the note. . . are incorporated herein
. . . including duty to. . . have due date accelerated. . . ."85 Less
than two years later Wisconsin Wire, by a land contract, conveyed
the mortgaged property to Megal Development Corporation. Nei-
ther of the parties sought or obtained Mutual's consent to this
transaction causing the acceleration provisions of the mortgage to
be invoked. The loan to Wisconsin Wire became due and payable.
An action to foreclose the mortgage was commenced based solely
on the breach of the "due on conveyance" clause; at no time during
pendency of this lawsuit were the mortgage payments delinquent.
The trial court found the "consent to transfer" clause ambig-
uous and unclear and construed the note and mortgage against
Mutual. Accordingly, the trial court concluded that Wisconsin
Wire had not violated the terms of the mortgage and that the
balance due on the note was not to be accelerated.

The Wisconsin Supreme Court, in reversing the lower court,
concerned itself with the following areas: The nature of the lan-

82. 56 Wis. 2d at 150, 201 N.W.2d at 510.
83. See supra n. 74.
84. The clause and heading read as follows:
Consent Required to Transfer.

It is expressly understood and agreed, that this mortgage shall become due and
payable forthwith at the option of the Association if, at any time during this loan
the Promissors and Mortgagors shall convey away said mortgaged premises or if the
title thereto shall become vested in any other person or persons in any manner
whatsoever, unless the consent is in writing of the Association herein, or its succes-
sors or assigns, is first obtained. (Emphasis added).
85. Id.
58 Wis. 2d at 101, 205 N.W.2d at 764.
85. Id.
language contained in the mortgage note and whether or not the acceleration clause of the type used in the mortgage was contrary to public policy.

The specific language found ambiguous was the phrase "conveying away" contained in the "consent - to - transfer" clause of the mortgage note. The phrase was found to be ambiguous by the trial court with respect to the scope of the restriction on conveying. Doubt was raised as to whether this restriction was intended to limit the transfer of equitable title as well as legal title since only equitable title was transferred to the land contract purchaser Megal. Using prevailing construction principles the Wisconsin Supreme Court found the term "convey" to apply to any transfer of title of mortgaged property whether legal or equitable.

Holding the phrase to be unambiguous the court then considered whether the due - on - sale acceleration clause or, to use the term of the mortgage note, "due. . .if. . .convey(ed) away. . .or if title thereto shall become vested in any other," was against public policy. Prior Wisconsin cases have generally upheld the use of acceleration clauses as not against public policy and the instant holding is in accord. Mutual, however, states that the enforcement of an acceleration clause is dependent upon whether or not its invocation would be inequitable.

According to the Wisconsin Supreme Court the hazards that may well accrue to the mortgagee if possession of mortgaged land is allowed to be transferred to a subsequent purchaser who is a stranger to the original security transaction are manifest. The court cited strong public policy as supporting the due-on-sale acceleration clause to protect the mortgagee's senior security interest from a junior encumbrance given by the mortgagor to a third party.

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86. See supra n. 84.
87. See supra text accompanying n. 74.
88. 58 Wis. 2d at 105, 205 N.W.2d at 766.
89. Grootemaat v. Bertrand, 192 Wis. 519, 521, 213 N.W. 294, 295 (1927) wherein the court discussed acceleration clauses generally saying: . . . it may be said that such provisions are neither penalties nor forfeitures. They are merely conditions of the contract entered into by the parties. They result only in an acceleration of the time of payment. The duties and obligations of the mortgagors remain the same. They must pay that which the mortgage was given to secure. By reason of the terms of their own contract the time of payment has hastened.
90. 58 Wis. 2d at 106, 205 N.W.2d at 762.
91. Id. at 109, 205 N.W.2d at 768.
B. Deeds

1. Boundaries

The action for ejectment in Beduhn v. Kolar\(^2\) arose out of a boundary dispute without equal. The Wisconsin Supreme Court, in its holding, sought a definitive end to the controversy between neighboring landowners of lake lots north and south of the disputed intervening parcel of land.\(^3\) The two adjoining lots were originally part of a tract known as the "Feuerstein lot" with the southern boundary of the land deeded to the plaintiff-respondent Beduhns being described in terms of the northern boundary of the defendant-appellant Kolars' lot. In 1966, the Kolars sought to determine the location of their northern lot line and in so doing it was necessary that the original Feuerstein lot be reconstructed. The surveyor who platted the property took the description in the old Feuerstein deed and interpreted "south," "east" and "west" to mean "due south," "due east" and "due west." The resultant survey described the Kolars' property as a rectangular area with an east boundary 55.5 feet from the shoreline and extending due east and west through a wooded lot claimed by the Beduhns and cutting across the Beduhns' cottage lot. The Beduhns subsequently brought suit for ejectment. As a result of the survey's placement of the Kolars' lot, the Kolars' cottage, and their water well were not part of the "resurveyed" property nor were they left with any lakeshore. In character with this type of dispute the Kolars contended that this did not matter because "the Beduhns must stand on the strength of their deed and not on the weakness of their (the Kolars') title."\(^4\) While the Wisconsin Supreme Court agreed that the Kolars contention was a valid defense in ejectment actions they held that the Beduhns' title was strong enough to support their ejectment suit.

The difficulty in this case arose because of the literal interpretation given to the words "south," "east" and "west" as contained in the Feuerstein deed. It was noted by the court that a less literal interpretation of the directions would describe the lots as fitting the land's topography and natural monuments. This less literal use, the court held, was intended by the parties. Noting that the deed was ambiguous and thus extrinsic evidence was admitted to ascertain

\(^2\) 56 Wis. 2d 471, 202 N.W.2d 272 (1973).
\(^3\) This case has had a rather tortured history of litigation through the courts. See 39 Wis. 2d 148, 158 N.W.2d 346 (1968).
\(^4\) 56 Wis. 2d at 476, 202 N.W.2d at 275.
the intent of the parties the court said:

A description is not necessarily unambiguous because on paper one can draw or illustrate the description. A description of land is just what it purports to be, a word representation of boundaries in reference to land, and to be unambiguous must reasonably fit the topography of the land to which it refers when it uses natural monuments. . . . [A] description which describes land in reference to natural monuments in part is ambiguous if there are internal inconsistencies in laying it out, and thus extrinsic evidence is necessary.95

Since the deeds held by both the Kolars and Beduhns made reference to the shoreland and gave riparian rights the court felt that these references went to the very essence of a lake lot. That they should not be over-ridden by a literal interpretation of a deed description where the result is an unreasonable layout of the land leaving no lake frontage.96 In ascertaining the intent of the parties to resolve the ambiguity the court stated that “their use of the words in the description in reference to the land” must be considered as controlling.97

2. Escrows

West Federal S&L Association v. Interstate Investment, Inc.98 affirmed Wisconsin’s long standing position concerning the legal force of a deed held in escrow being delivered contrary to the depository contract. It is generally held, in Wisconsin, as well as other jurisdictions, that where a deed held in escrow is delivered without satisfaction of the conditions of the escrow agreement no valid deed passes. Many states, however, allow a valid deed to pass where the rights of a bona fide purchaser have intervened.99 Wisconsin does not follow this view and has long held that where there was no negligence in selecting a depository, the improper delivery by the escrow depository provides no protection to subsequent bona fide purchasers.100 West Federal reaffirms this principle.101

95. Id. at 476-477, 202 N.W.2d at 275.
96. This is in accord with prior Wisconsin case law, holding that natural monuments control over courses and distances. See, e.g., Timme v. Squires, 199 Wis. 178, 225 N.W. 825 (1929) and Du Pont v. Davis, 30 Wis. 170 (1872).
97. 56 Wis. 2d at 477, 202 N.W.2d at 275.
98. 57 Wis. 2d 690, 205 N.W.2d 361 (1967).
100. Franklin v. Killilea, 26 Wis. 88, 104 N.W. 993 (1905).
101. 57 Wis. 2d at 694, 205 N.W.2d at 363.
3. Recording

The Wisconsin Supreme Court, in *Mutual Federal v. Wisconsin Wire Works*, upheld Mutual's enforcement of the "due on sale" clause which was invoked as a result of Wisconsin Wire's conveyance of mortgaged property to Megal Development without Mutual's consent. Wisconsin Wire, however, argued that Mutual had constructive notice of the conveyance by virtue of the recording of the land contract by Megal. In so claiming, Wisconsin Wire contended that because of the recording Mutual had notice but failed to exercise their contractual rights for two and one-half years causing Mutual's acceleration rights to lapse. The essence of this line of argument is that the subsequent recording of the land contract could effect the rights of Mutual, a prior encumbrancer, since recording is "notice to all the world." The Wisconsin Supreme Court, however, held that the effect of the recording statute was nearly the converse of Wisconsin Wire's position. As a result Mutual was not charged with notice of Megal's subsequent recording but rather Mutual's recorded mortgage was considered notice to Megal, the land contract vendee, that it took the land subsequent to a mortgage.

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**TAXATION**

I. PRIMARY JURISDICTION OF THE TAX APPEALS COMMISSION

The authority of the Wisconsin Tax Appeals Commission was examined and clarified in *Sawejka v. Morgan*. Administrative review of Wisconsin tax matters, before 1969, was performed by the Board of Tax Appeals whose function was restricted solely to reviewing applications for abatement and claims for refund. The Board's jurisdiction was later expanded to review "all questions of law and fact" arising out of determinations by the secretary of the

102. See supra n. 74.
103. See supra n. 84.
104. 58 Wis. 2d at 112, 205 N.W.2d at 770.

1. 56 Wis. 2d 70, 201 N.W.2d 528 (1972).
2. Created by Wis. Laws 1939, ch. 412, to perform quasi-judicial functions, Wis. Stat. § 73.01(6)(c), renumbered § 73.01(5)(g) by Wis. Laws 1969, ch 276, sec. 333; Kaukauna v. Department of Taxation, 250 Wis. 196, 26 N.W.2d 637 (1947).