

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0823

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF SPECIAL ASSESSMENT
#R-98-32 OF THE CITY OF CHIPPEWA FALLS,
WISCONSIN OF JUNE 16, 1998:**

EDWIN D. MOEHAGEN AND KATHY J. MOEHAGEN,

PETITIONERS-APPELLANTS,

v.

CITY OF CHIPPEWA FALLS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Chippewa County:
THOMAS J. SAZAMA, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Edwin and Kathy Moehagen appeal from a summary judgment granted in favor of the City of Chippewa Falls. The Moehagens argue that the circuit court erred by dismissing their claim as time-barred by a forty-day statute of limitations. The Moehagens assert that the City’s notice of public hearing on special assessments violated principles of due process as it failed to sufficiently enable them to determine the time limit allowed for their appeal. Because the City’s notice is ambiguous and should be construed in favor of the Moehagens, the recipients of the notice, we reverse the judgment and remand to the circuit court for further proceedings consistent with this opinion.

BACKGROUND

¶2 The facts relevant to this appeal are undisputed. On June 4, 1998, the City published a notice of public hearing on special assessments.¹ The notice had additionally been mailed to the Moehagens on June 3, as they owned property affected by the special assessments. Pursuant to the notice, a public hearing was held on June 16, and thereafter, the final resolution authorizing construction and levying special assessments was adopted by the City’s Common Council. After its adoption on June 16, the resolution was published on June 20, and a copy was mailed to the Moehagens on June 23.

¶3 On September 11, the Moehagens filed suit in circuit court, appealing the final resolution—this appeal was filed seventy-two days after publication of the final resolution. The City subsequently moved the circuit court

¹ The special assessments were to be levied for the following improvements to Bridgewater Avenue: (1) water main connection charges; (2) water services from the main to the boulevard; (3) removal and replacement of curb and gutter; and (4) removal of existing driveways followed by replacement with concrete driveways between the curb and the house side of the proposed sidewalk.

for summary judgment, arguing that the Moehagens' claim was time-barred, as it fell outside the forty-day statute of limitations provided by § 66.62, STATS. The circuit court agreed and this appeal followed.

ANALYSIS

¶4 The Moehagens' due process rights arise from both our state and federal constitutions.² "Due process is a flexible concept that requires procedural protections as the particular situation demands." *In re Estate of Wolff v. Weston Town Bd.*, 156 Wis.2d 588, 594, 457 N.W.2d 510, 512 (Ct. App. 1990). Further, due process is implicated where, as here, "state action deprives a citizen of a property interest." *Id.* at 596, 457 N.W.2d at 513. A notice must sufficiently enable its recipients to determine what they must do "to prevent the deprivation of [their] interest[s]." *Id.* Whether the City's notice provided sufficient procedural protections to comport with due process is a question of law that this court determines de novo. *See Jocz v. LIRC*, 196 Wis.2d 273, 304, 538 N.W.2d 588, 598 (Ct. App. 1995) (application of facts to constitutional standard is question of law).

¶5 There are two methods by which a municipality may impose special assessments—one is to follow the statutory scheme of § 66.60, STATS., and the other is to adopt an ordinance under § 66.62, STATS. In the first instance, one has ninety days to appeal from a special assessment of his or her property. *See* § 66.60(12), STATS. In the second, the appeal time is forty days. *See* § 66.62,

² "Article I, sec. 1, of the Wisconsin Constitution is the substantial equivalent of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution." *In re Estate of Wolff v. Weston Town Bd.*, 156 Wis.2d 588, 594, 457 N.W.2d 510, 512 (Ct. App. 1990).

STATS. The manner for appealing under both forms of special assessments is prescribed in § 66.60(12), STATS. See §§ 66.60(12) and 66.62, STATS.³

¶6 Here, the City sought to impose special assessments by ordinance as authorized under § 66.62, STATS. The City’s notice of public hearing on special assessments provided “that the Common Council ... has declared its intention to exercise its police power *in accordance with Section 66.62 Wisconsin Statutes and Chapter 3.08 of the Municipal Code.*” (Emphasis added.)

¶7 The Moehagens concede that the time limits set forth by §§ 66.60(12) and 66.62(2), STATS., when read independently, are not ambiguous.

³ Section 66.62, STATS., provides:

Special assessments. (1) Except as provided in s. 66.60 (6m), in addition to other methods provided by law, the common council of any 2nd, 3rd or 4th class city, a village board or a town board may, by ordinance, provide that the cost of installing or constructing any public work or improvement shall be charged in whole or in part to the property benefited thereby, and to make an assessment against such property in such manner as such council or board determines. Such special assessment shall be a lien against the property from the date of the levy.

(2) Every such ordinance shall contain provisions for reasonable notice and hearing. Any person against whose land a special assessment is levied under any such ordinance *shall have the right to appeal therefrom in the manner prescribed in s. 66.60(12) within 40 days* of the date of the final determination of the governing body.

(Emphasis added.)

Section 66.60(12), STATS., provides that:

If any person having an interest in any parcel of land affected by any determination of the governing body ... feels aggrieved thereby that person may, *within 90 days* after the date of the notice or of the publication of the final resolution ... appeal therefrom to the circuit court of the county in which such property is situated (Emphasis added.)

They claim, however, that the notice and the City's ordinance are ambiguous. The notice referred them to § 66.62 *and* ch. 3.08 of the City's ordinance. It is the notice's reference to the ordinance that creates the ambiguity.⁴

¶8 Chapter 3.08 of the City's Municipal Code governs special assessment procedures and sub. (7) of that chapter addresses appeals. It provides: "The provisions of §§ 66.60(12) *and* 66.62(2), relating to appeal, *shall apply* to any special assessment levied under this section." CHIPPEWA FALLS, WIS., MUNICIPAL CODE ch. 3.08 (7) (1989) (emphasis added). The ordinance, by mandating the application of both statutes, creates confusion about which time limit applies to an appeal.

¶9 By way of illustration, the League of Wisconsin Municipalities publishes a handbook on special assessments. It recommends a form for an ordinance relating to special assessment procedures. The section of this form dealing with appeals recommends the following language: "Any person against whose property a special assessment is levied under this ordinance may appeal therefrom in the manner prescribed by § 66.60(12), STATS., within 40 days of the date of the final determination of the governing body." JEAN SETTERHOLM, LEAGUE OF WISCONSIN MUNICIPALITIES, SPECIAL ASSESSMENTS IN WISCONSIN (1996). This language clearly sets forth the appeal time without confusion. In contrast, the City's ordinance simply refers to two statutes without limitation, each containing a different appeal time.

¶10 The Moehagens argue that the principles of *Wolff* and *DOT v. Peterson*, 226 Wis.2d 623, 594 N.W.2d 765 (1999), should be applied to the

⁴ If the notice had referred solely to § 66.62, STATS., the ambiguity may not have arisen.

instant case. We agree. In *Wolff*, a landowner attempting to appeal a special assessment asserted that the town's notice violated principles of due process because it failed to include information as to whether it was applying the statutory procedures of §§ 66.60 or 66.62, STATS. See *Wolff*, 156 Wis.2d at 591-92, 457 N.W.2d at 511. Although the town did not specify whether the assessment was pursuant to §§ 66.60 or 66.62, it had followed the procedures of § 66.60, but sought to apply the forty-day time limit of § 66.62(2). See *id.* at 594, 457 N.W.2d at 511. This court, concluding that the notice violated due process requirements, held that "a notice must be sufficient to enable the recipient to determine what he must do to prevent the deprivation of his interest." *Id.* at 596, 457 N.W.2d at 513 (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970)).

¶11 In *Peterson*, an ambiguity arose from the interpretation of §§ 32.05(9) and 32.01, STATS., regarding the procedure for appealing a condemnation of property. The service of process provision in § 32.05(9)(a) provided that notice be given "to the clerk of the court and to all other persons ... who were parties to the award." The court recognized that because the property had been condemned by the Department of Transportation, "[s]ervice on the DOT would seem intuitively correct." *Peterson*, 226 Wis.2d at 632, 594 N.W.2d at 770. However, the term "person" in § 32.05(9) was defined in § 32.01, STATS., as "the state" and not as any particular department of the state. Rather than serving the DOT, the landowners served the attorney general, as the designated service agent for the State of Wisconsin. See *id.* at 626, 594 N.W.2d at 767.

¶12 The *Peterson* court held that "where an ambiguity exists, '[p]rocedural statutes are to be liberally construed so as to permit a determination upon the merits of the controversy if such construction is possible.'" *Id.* 226 at 633, 594 N.W.2d at 770 (quoting *Kyncl v. Kenosha County*, 37 Wis.2d 547, 555-

56, 155 N.W.2d 583, 587 (1968)). The *Peterson* court further held that “where a procedural statute does not provide specific direction for compliance, the ambiguity is to be resolved in favor of the [landowner].” *Id.*

¶13 Although *Wolff* and *Peterson* are distinguishable, their principles are nevertheless applicable to the instant case. Here, unlike in *Wolff*, the City’s notice did specify that it was exercising its police power in accordance with § 66.62, STATS. Nevertheless, the procedural ambiguity created by its simultaneous reference to the ordinance (ch. 3.08) effectively thwarted the Moehagens’ ability to sufficiently determine the time limit allotted for appealing the special assessment. The circuit court, in fact, recognized this ambiguity when it stated: “The confusion ... is there. The potential for confusion is there, but I think that a reasonable person in your shoes would have perhaps sought some professional advice regarding that.” Although it recognized the ambiguity, the circuit court mistakenly assumed that the Moehagens bore the burden of retaining counsel to interpret the statutes implicated by the City’s notice. On the contrary, the notice should have been sufficiently clear to its “recipients.” See *Wolff*, 156 Wis.2d at 596, 457 N.W.2d at 513. As such, and consistent with our supreme court’s decision in *Peterson*, the procedural ambiguity created by the City’s notice must be resolved in favor of the Moehagens.⁵ See *Peterson*, 226 Wis.2d at 633-34, 594 N.W.2d at 770.

⁵ The Moehagens additionally argue that summary judgment was inappropriate because disputed facts existed as to whether the property was benefited by the construction work funded by the special assessment. However, as the trial court did not address this issue, we will not do so for the first time on appeal. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

