

Apartment Owner Wins at the Wisconsin Court of Appeals for Refund of Unlawful Business Improvement District Assessments

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The Wisconsin Court of Appeals recently issued a decision requiring the City of Milwaukee to refund more than \$350,000 in Business Improvement District (BID) assessments, plus interest to the owner of a large downtown apartment complex. The decision, *DJK 59 LLC v. City of Milwaukee*, No. 2015AP2046 (Nov. 22, 2016), soundly reaffirms the limits of a BID's authority to assess property used exclusively for residential apartment use, but it restricts the extent of the refund to six years based on a statutory limitations period.

The case turned on two legal issues raised by the City as a defense to the owner's claim for refund: (1) whether the "voluntary payment" doctrine barred the apartment owner's claim for refund, and (2) if not barred, whether the owner's refund was limited to a certain number of years based on a statutory limitations period. Significantly, the court held that the "voluntary payment" doctrine does not bar such a claim, but that a 6-year limitations period applies; and therefore, the owner's refund is limited to six years of assessments.

The case points up details of the BID law that owners of multifamily and other residential properties should be aware of.

BIDs are special districts created by municipalities pursuant to state law, which serve to accomplish specific goals determined by the property owners located within a BID district pursuant to annually adopted operating plans. Often a group of commercial property owners, like the stores in a downtown, will propose a BID district to the local governing body by describing which parcels they want in the district, what the district wants to accomplish, and what assessments will be collected from the property owners in that district to carry out the plan. Once approved, a BID has the authority to impose assessments on certain (but not all) property within the district; assessments are then placed on the tax roll as special assessments and collected by the local municipality through the tax bill. BID assessments may be used to fund small area improvements, such as holiday decorations or large infrastructure improvements like parking structures. There are at least 85 local BIDs in the State of Wisconsin and at least 30 in the City of Milwaukee alone.

The BID law is a flexible special financing tool; however, it has its limitations. One such limitation – and the one central to the apartment owner’s claim for refund in the Court of Appeals case – is that a BID cannot assess “real property used exclusively for residential purposes.” Although the legislative history of this section of the BID law does not make a distinction between single family, owner-occupied real estate and, for example, apartment buildings, the law has consistently been interpreted to say that buildings that are used exclusively as rental apartments cannot be assessed.

It follows that mixed-use buildings containing ground floor retail, for example, with apartments above are not by definition “used exclusively for residential purposes,” and, therefore, can be assessed. Some BID plans make equitable adjustments for mixed-use buildings, but many do not. There are, however, legal mechanisms such as condominiums that can be used to make such adjustments when the BID plans do not.

One other interesting concept to keep in mind is that a BID plan is essentially a municipal ordinance which is adopted or renewed each year, with assessments levied for the following year, even though the BID budget is set in the fall, and usually incorporated into the tax bill for that property which is issued in December. Unlike real estate taxes, which are billed in December and payable starting in January but have a lien against the property since the prior January 1 – BID assessments are essentially billed in advance and collected by the end of January for use in the upcoming year’s prospective budget. Therefore, when closing on the sale of a property in a BID district, the real estate taxes should be prorated to charge the seller for that portion of the year of closing which has elapsed prior to the closing date, but the BID assessment should be reverse prorated as a refund of a prepayment.

Lastly, there is a companion authorization for creating a similar district called a NID, or Neighborhood Improvement District, under Section 66.1110 of the Wisconsin Statutes, which can include non-contiguous property, and both residential and commercial properties.

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