

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1642
STATE OF WISCONSIN**

Cir. Ct. No. 01 CV 1752

**IN COURT OF APPEALS
DISTRICT I**

**CITY OF MILWAUKEE POST #2874, VETERANS
OF FOREIGN WARS OF THE UNITED STATES,**

PLAINTIFF-APPELLANT,

v.

**REDEVELOPMENT AUTHORITY OF THE
CITY OF MILWAUKEE,**

DEFENDANT-RESPONDENT,

MAHARISHI VEDIC UNIVERSITY, INC.,

DEFENDANT.

**APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM J. HAESE, Judge. *Affirmed.***

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. The City of Milwaukee Post #2874, Veterans of Foreign Wars of the United States (VFW) appeals from an order granting summary judgment to the Redevelopment Authority of the City of Milwaukee (RACM), dismissing its challenge to the acquisition, by condemnation, of the VFW's ninety-nine-year leasehold interest to 5,200 square feet of space in property located at 2601 West Wisconsin Avenue, Milwaukee, Wisconsin, pursuant to WIS. STAT. § 32.05(5).

¶2 The VFW claims the trial court erred when it granted summary judgment because: (1) RACM has not filed an adequate relocation plan as required by WIS. STAT. § 32.25(1); (2) RACM has not filed an adequate relocation assistance service plan and has not implemented that plan as required by § 32.25(2); (3) RACM should have been required to issue separate awards for the fee owner and the tenant (VFW), who had 160 years remaining on its lease; and (4) there are disputed issues of material fact, which preclude summary judgment.

¶3 Because the VFW has waived any challenge to whether the requirements of WIS. STAT. § 32.25(1) and (2) have been satisfied and, as a result, whether there are disputed material issues of fact is not properly before this court, we affirm.

I. BACKGROUND

¶4 A bit of history will supply the factual background for this appeal. The VFW owned real estate located in the 2600 block of West Wisconsin Avenue, Milwaukee, Wisconsin. In 1962, it conveyed its property to Towne Metropolitan, Inc. (Towne Realty). Towne Realty constructed a 113,000 square foot hotel on the site. In exchange for the conveyance of the real estate, VFW received a ninety-nine-year lease to a 5,200 square foot area in the hotel structure facing the west

side of North 26th Street, just south of Wisconsin Avenue. The lease granted an option to the VFW to renew for an additional ninety-nine years. The annual rent was \$1.00. The lease further provided that the lessor would pay all real estate taxes, provide heat, air conditioning, and maintenance at no cost to the VFW. In 1986, Towne Realty sold the property to Marquette University, which used the property as a dormitory. In 1994, Marquette sold the building to Maharishi Vedic University, Inc. The latter never occupied the building. At all times, both Marquette and Maharishi substantially complied with the terms of the lease to the VFW.

¶5 On February 4, 1998, RACM held a public hearing to consider the creation of a redevelopment district for parcels of land including the property located on Wisconsin Avenue between 26th and 27th Streets. On January 4, 1999, RACM created a redevelopment district and issued a relocation order pursuant to the provisions of WIS. STAT. § 32.25(1). The hotel structure, which encompassed the VFW leased premises, was included in the district. The relocation plan for the entire project referred to the long-term lease of the VFW. RACM located three comparable properties and filed the plan with the Department of Commerce on April 20, 1999. It was approved on May 3, 1999. The VFW disputed the comparability of the three properties cited in the plan, but did not appeal the determination of the Department of Commerce. On January 18, 2001, RACM issued a jurisdictional offer in the sum of \$440,000, naming Maharishi Vedic University and the VFW as the owners of the subject premises. An award of damages in the same amount was issued on February 21, 2001, and was duly filed with the clerk of courts for Milwaukee County.

¶6 As pertinent to this appeal, the VFW filed this action on February 21, 2001, pursuant to WIS. STAT. § 32.05(5)¹ challenging the right of RACM to acquire its leasehold interest at 2601 West Wisconsin Avenue. RACM moved for summary judgment. The trial court granted RACM's motion for summary judgment. The VFW now appeals.²

II. ANALYSIS

¶7 This court reviews summary judgment decisions de novo, applying the same standards as the trial court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¹ WISCONSIN STAT. § 32.05(5) provides:

COURT ACTION TO CONTEST RIGHT OF CONDEMNATION.
If an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, the owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of post-mark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant.

² Two cases involving the condemnation of this same property are currently pending in the circuit court of Milwaukee County: Case No. 01-CV-001802 and Case No. 01-CV-008011. The former involves the disbursement of the award for damages after the determination of the respective rights of the VFW and Maharishi Vedic University. The latter involves the appropriateness of the identified comparable replacement properties.

¶8 The VFW first contends that the trial court erred because RACM did not file an adequate relocation plan as required by WIS. STAT. § 32.25(1), and RACM did not implement the relocation service assistance plan as required by § 32.25(2). The VFW argues that because RACM disregarded the mandate of §§ 32.25(1) and (2), which requires municipalities to prepare and *implement* an adequate relocation plan and an adequate relocation assistance plan *before* proceeding with acquisition, this case must be returned to the trial court with directions that RACM may not proceed with the acquisition of the subject property until it has satisfied the requirements of the statute. We are not persuaded.

¶9 As relevant to the disposition of this appeal, WIS. STAT. § 32.25(1) reads: “[N]o condemnor may proceed with any activity that may involve the displacement of persons, business concerns or farm operations until the condemnor has filed in writing a relocation payment plan and relocation assistance service plan and has had both plans approved in writing by the department of commerce.”

¶10 Initially, it is uncontraverted that RACM filed plans for relocation payment and assistance service and they were subsequently approved without objection by the Department of Commerce. On appeal, the VFW now appears to be challenging the adequacy or sufficiency of the approved plans. It bases this contention on WIS. STAT. § 32.25(2)(a) and (b), which require:

(2) The relocation assistance service plan shall contain evidence that the condemnor has taken reasonable and appropriate steps to:

(a) Determine the cost of any relocation payments and services or the methods that are going to be used to determine such costs.

(b) Assist owners of displaced business concerns and farm operations in obtaining and becoming established in suitable business locations or replacement farms.

¶11 The VFW apparently wishes to dispute the reasonableness or propriety of the steps taken to accept the plans. A reasonable reading of § 32.25(2)(a) and (b), however, provides no express remedy. The approval process was executed by the Department of Commerce, an administrative agency. It is further undisputed that the VFW has a long-term leasehold interest in the condemned premises and was included as an interested party in the relocation plans submitted to the Department of Commerce. The VFW's status more than qualified it as a party with standing for the purposes of a Chapter 227 administrative appeal. *See* WIS. STAT. § 227.53(1) (A person "aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision"). The VFW, however, did not pursue an administrative review on the reasonableness and propriety of the relocation plans. Thus, we deem a waiver to have occurred. *See State v. Mudgett*, 99 Wis. 2d 525, 530-31, 299 N.W.2d 621 (Ct. App. 1980). In addition, we can find no basis in the statutes or case law that would prevent vesting of title in the condemning authority once the Department of Commerce has approved the relocation plans.

¶12 Regardless of the foregoing application of the waiver doctrine, the VFW is not without a remedy for its qualitative and quantitative challenges to the condemnation result. First, WIS. STAT. § 32.05(8)(c) contains a proviso that a "condemnor may not require the persons who occupied the premises on the date that title vested in the condemnor to vacate until a comparable replacement property is made available." The qualitative nature of a proposed comparable property therefore, can be tested in a Writ of Assistance action. We take judicial notice of a pending action in Milwaukee County Circuit Court, *Redevelopment*

Authority of the City of Milwaukee v. VFW Post 2874, Case No. 01-CV-008011, wherein the replacement comparables RACM has identified are being challenged by the VFW.

¶13 Second, as to the quantitative result, we take additional judicial notice³ of Case No. 01-CV-001802, with the same title stated above, which, pursuant to WIS. STAT. § 32.05(7)(d),⁴ has under consideration a determination of the respective rights of the VFW and Maharishi Vedic University and the allocation of the award of damages on deposit with the clerk of court's office. If the VFW feels aggrieved by the circuit court's division of the award, it may appeal the decision of the circuit court pursuant to WIS. STAT. §§ 32.05(9) and (11).

¶14 Because the vesting of title to the subject premises at the time of the award of damages was not defective and the substantial rights of the VFW have been assured by the procedures it has followed in other pending judicial notice cases, we conclude that the VFW's statutory challenge to the trial court's granting of the summary judgment must fail.⁵

¶15 Lastly, the VFW claims the trial court erred when it rejected the VFW's claim that disputed issues of material fact exist which preclude summary

³ See WIS. STAT. § 902.01(2)(b) (A court may take judicial notice of a fact if the fact is not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

⁴ WISCONSIN STAT. § 32.05(7)(d) provides in pertinent part: "[o]n or before said date of taking, a check ... shall ... be deposited with the clerk of the circuit court The clerk shall give notice thereof by certified mail to such parties. The persons entitled thereto may receive their proper share of the award by petition to and order of the circuit court of the county."

⁵ The VFW challenges the application of the "Unit Rule" by RACM. Because this is an issue more properly before the circuit court in case No. 01-CV-00182 and the appellate rights attaching thereto, we eschew consideration of this issue.

judgment. We reject this contention. This claim of error is essentially based upon the proposition that the relocation issue is fact-intensive. Concededly, the relocation issue might have been fact-intensive, but it was never properly challenged as we have explained earlier in this opinion. Therefore, the only question before the trial court was a question of law, which the court decided correctly. The same may be said for the issue of comparability. This case was not the proper forum to address those alleged issues of material fact. Rather, the issue has been preserved in the Writ of Assistance action presently pending in the circuit court. Thus, the VFW's last claim of error fails.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

