

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2003

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. 02-3229
STATE OF WISCONSIN

Cir. Ct. No. 01-CV-488

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN EX REL. DAVID BURCH AND
BONNIE BURCH,**

PETITIONERS-APPELLANTS,

v.

VILLAGE OF HAMMOND,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

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

¶1 PETERSON, J. David and Bonnie Burch appeal from a judgment that the Village of Hammond's impact fee ordinance applies to the lots they own and wish to develop. The Burches contend the impact fee only applies to five new developments named in Hammond's needs assessment, and their lots are not part

of these five developments. We disagree with the Burches and affirm the judgment.

BACKGROUND

¶2 The Burches own two lots in the Village of Hammond in St. Croix County. There are also five large developments that have been proposed in Hammond. Because of the anticipated growth in the Village population, a needs assessment was conducted, as required by WIS. STAT. § 66.0617,¹ regarding

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 66.0617(2)(a) states:

Subject to par. (am), a political subdivision may enact an ordinance under this section that imposes impact fees on developers to pay for the capital costs that are necessary to accommodate land development.

Further, WIS. STAT. § 66.0617(4)(a) states:

Before enacting an ordinance that imposes impact fees or amending an ordinance that imposes impact fees by revising the amount of the fee or altering the public facilities for which impact fees may be imposed, a political subdivision shall prepare a needs assessment for the public facilities for which it is anticipated that impact fees may be imposed. The public facilities needs assessment shall include, but not be limited to, the following:

1. An inventory of existing public facilities, including an identification of any existing deficiencies in the quantity or quality of those public facilities, for which it is anticipated that an impact fee may be imposed.
2. An identification of the new public facilities, or improvements or expansions of existing public facilities, that will be required because of land development for which it is anticipated that impact fees may be imposed. This identification shall be based on explicitly identified service areas and service standards.

(continued)

additional sewer, water and park services. The assessment mentioned the five proposed developments by name, but did not mention existing lots in Hammond. Hammond then adopted an impact fee for new construction based on 485 new units mentioned in the needs assessment.

¶3 In June 2001, the Burches applied for building permits to construct a duplex on each of their lots. Hammond informed them they would have to pay the impact fees. They paid the fees for the first duplex in protest pending resolution of an appeal to the Village board.

¶4 In their appeal, the Burches argued their lots were part of an old plat created and approved in 1966. They therefore maintained that any fees would have been determined and paid at that time. They also argued Hammond had not determined that imposition of the fees was related to the impact of their development. The Village board voted to deny the appeal, concluding that the ordinance applied to the Burches because it applied to all new development within the Village. The St. Croix County Circuit Court reviewed and upheld the board's decision. The Burches appeal.

STANDARD OF REVIEW

¶5 In an action for certiorari review, our review is the same as in the circuit court. *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93,

3. A detailed estimate of the capital costs of providing the new public facilities or the improvements or expansions in existing public facilities identified in subd. 2., including an estimate of the effect of recovering these capital costs through impact fees on the availability of affordable housing within the political subdivision.

102, 604 N.W.2d 870 (Ct. App. 1999). “We confine our review to whether (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question.” *Id.* at 102-03.

DISCUSSION

¶6 The Burches argue Hammond did not apply the correct legal theory in its application of the impact fee ordinance to the Burches’ lots. The Burches maintain that the heightened standard of scrutiny developed by the United States Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should apply here. In *Dolan*, a case dealing with Fifth Amendment takings, the Supreme Court established the “rough proportionality” standard. This standard requires that a municipality may pass on the cost of public facilities only to the extent the cost is related in nature and extent to the impact of the proposed development. The rough proportionality standard was applied to exactions of money, such as impact fees, in *Ehrlich v. City of Culver City*, 911 P.2d 429 (1996), after the United States Supreme Court remanded the case for consideration in light of *Dolan*.

¶7 The Burches argue the impact fee ordinance may apply only to the five proposed developments listed in the needs assessment. They contend that, unlike these five developments, the development on their lots will not result in any need for new sewer, water or park facilities. Consequently, the Burches maintain Hammond cannot show the required nexus between the need for the impact fees and the Burches’ development.

¶8 Hammond concedes that the rough proportionality standard may apply to impact fee ordinances, but argues that it does not apply in this case.

Hammond argues that *Dolan* and *Ehrlich* apply only when an impact fee is imposed on a case-by-case basis, as opposed to on a municipality-wide basis. In cases where a fee is generally applied, Hammond argues for a lesser standard of “reasonable connection,” which requires a reasonable connection between the need for additional public facilities and the growth generated by the development.

¶9 We do not determine which standard applies here because we conclude that under either test, Hammond prevails. Although the needs assessment refers only to the five new developments, these developments are merely examples used to determine the amount of the fee that would be charged to each new user. Indeed, the focus of the needs assessment is on new users, rather than on the five specifically listed developments. For example, the needs assessment states, “The estimated costs are distributed among 485 new users.” Additionally, the assessment refers to the “total cost per new residential unit,” and that the costs are to be “based on the new number of residential units.” The residents of the Burches’ new duplexes will be new users and the duplexes themselves are new units.

¶10 Additionally, the enabling statute, WIS. STAT. § 66.0617(4)(a), is quite thorough in what is required for the imposition of impact fees:

1. An inventory of existing public facilities, including an identification of any existing deficiencies in the quantity or quality of those public facilities, for which it is anticipated that an impact fee may be imposed.
2. An identification of the new public facilities, or improvements or expansions of existing public facilities, that will be required because of land development for which it is anticipated that impact fees may be imposed. This identification shall be based on explicitly identified service areas and service standards.
3. A detailed estimate of the capital costs of providing the new public facilities or the improvements or expansions in

existing public facilities identified in subd. 2., including an estimate of the effect of recovering these capital costs through impact fees on the availability of affordable housing within the political subdivision.

Nowhere does the statute require a needs assessment to specifically list all developments to which the fee will apply. Where a statute lists items included in its purview, omission of an item is evidence that the legislature intended to exclude it. *Gottlieb v. Milwaukee*, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979).

¶11 The Burches note that their lots were part of a plat created and approved by Hammond in 1966. Consequently, the Burches argue that any fees would have been paid at that time. However, whether any fees were paid is speculation because, as the Burches concede, there is no record of any fees actually being paid. Furthermore, the impact fee legislation was not effective until 1994, nearly thirty years after the Burches' lots were created. Therefore, impact fees could never have been paid for the Burches' lots. *See* WIS. STAT. § 66.0617.

¶12 Finally, we note that the Burches' property was undeveloped for over thirty years. Although the needs assessment was based on the five proposed new developments, there is no certainty when, or if, all these areas will actually be developed. They also may remain undeveloped for thirty years. As a result, some of the next 485 users may very well come from outside these five developments. If 485 new developments occur before the five new areas are completely developed, a new needs assessment will be required to take any additional new users into account. Indeed, the needs assessment anticipates this. The last sentence states, "It is also recommended that the impact fee is reviewed annually or bi-annually for inflation and any changed needs in the Village of Hammond."

¶13 Hammond acted under its statutory authority to impose impact fees under WIS. STAT. § 66.0617. The fees were not applied arbitrarily to the Burches' property but are applied to new developments within Hammond generally. We are therefore satisfied that the Village board acted reasonably and according to the law in applying the impact fee ordinance to the Burches' development.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

