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Wisconsin Supreme Court Delivers a Blow to Economic Development Activities

High Court Rules Against the Beaver Dam Area Economic Development Corporation in Open Meetings/Public Records Decision

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Introduction

On Friday, July 12, the Wisconsin Supreme Court handed down its decision in [*State of Wisconsin v. Beaver Dam Area Economic Development Corporation, et al.*](#) in which it determined that the Beaver Dam Area Economic Development Corporation (BDADC) is a “quasi-governmental” corporation subject to Wisconsin’s open meetings and public records laws. The Court, however, provided minimal guidance to local economic development entities by declaring that a determination of whether or not an entity is a “quasi-governmental” corporation requires a case-by-case analysis.

The Decision

The Majority opinion was written by Justice Ann Walsh Bradley who was joined by Chief Justice Shirley Abrahamson and Justices Pat Crooks and Louis Butler. (Justice David Prosser filed a lengthy dissent, in which he was joined by Justice Patience Roggensack, which is briefly discussed below. Justice Annette Ziegler did not participate in the decision.) Writing for the Court, Justice Bradley penned the following finding/determination:

“We determine that an entity is a quasi-governmental corporation within the meaning of Wis. Stat. ss.19.82 (1) and 19.32 (1) if, *based on the totality of the circumstances*, it *resembles* a governmental corporation in function, effect or status. Such a determination requires a *case-by case analysis*.” (We have used italics for emphasis.)

The Court looked to the dictionary to examine the “vernacular understanding” of quasi: “Having a likeness to something; resembling,” so that a “quasi-governmental corporation” has a likeness to or resembles a governmental corporation but is not a governmental corporation. The Court went on to examine a number of factors which it determined relevant, in making the determination, including the source of financing and:

“Additional factors include whether it serves a public function, whether it appears to the public to be a governmental entity, whether the entity is subject to government control, and the degree of access that government bodies have to the entity’s records.”

The Court then found that at least a majority of the funding for BDADC came from local government; the BDADC had previously rented space in the Municipal building, giving the “appearance” to the public of being a public entity; the city maintains some degree of control over the entity since two (out of 12 voting members of the Board, with the other 10 being private citizens) are city officials that serve as *ex officio* members; BDADC serves a public function and has no private function; and, the city has access to BDADC’s financial information and management plan.

The Court did recognize that the BDADC has no authority to bind the city, but apparently considered it relevant that BDADC negotiates on behalf of the city.

Thus the Court concluded that no one of these factors alone was sufficient to reach its conclusion. It did, however, find that *based on the totality of the circumstances*, BDADC *resembles* a governmental corporation and, therefore, is a quasi-governmental body subject to the state’s open meetings and public records laws. The Court did opine that BDADC could have chosen to organize and operate differently and that other situations involving local economic development corporations would have to be determined on the basis of a *case-by-case analysis*.

The Court did apply its decision/determination *prospectively*, meaning that the individual defendants in the BDADC case are not subject to forfeitures for past violations and none of the actions taken at past meetings are voided. This would appear to apply to any other economic development corporations in similar situations.

Critique

The Wisconsin Economic Development Association (WEDA)* filed an [amicus curiae \(“friend of the court”\) brief](#) supporting the trial court’s finding that BDADC was not a “quasi-governmental” body under Wisconsin statutes and thereby was not subject to Wisconsin Open Meetings and public records laws.

Following is the primary argument advanced in the brief:

“Amici contend that the clearest and most concise way to examine a corporation’s function, effect, and status and therefore determine whether a corporation is quasi-governmental, is to pose two questions: (1) whether *the governmental unit has control* over the actions, conduct, or decisions of the corporation; and (2) whether *the corporation has the power to bind* the governmental unit by any of its actions or decisions.” (We again have used italics for emphasis.)

We believed and continue to believe that the other factors considered by the Court should not be, by themselves or *based on the totality of the circumstances*, determinative of a finding of quasi-governmental status thereby subjecting an entity to the open meetings and public records laws in

Wisconsin. *The Majority on the Wisconsin Supreme Court appears to care more about what an economic development corporation “looks like” than what it does and what power and authority is exercised over its functions or what power and authority it has to bind a governmental body!*

Also disturbing is the Majority’s treatment of the “importance” it gives to economic development, including its apparent subservient status to open meetings and open records. The Court gives lip service to “...the realities of economic development and the need, at times, for flexibility and confidentiality” – but, as noted above, the Court attaches greater emphasis to what an economic development corporation looks like than what its functions are and what power it has, or has not, to bind governmental bodies.

Attorney Eric McLeod, who drafted the WEDA *amicus* brief, has also noted a very troubling premise underlying the Court’s decision, which suggests that the Majority views economic development as strictly a government function. In its opinion, the Majority cites cases from other jurisdictions, including New York, to aid its analyses and conclusions, including the following:

“Both BDADC and Buffalo Enterprises work to encourage development and economic opportunity, which the New York Court of Appeals (New York’s highest Court, equivalent to Wisconsin’s Supreme Court) determined to be ‘undeniably governmental’.”

The suggestion that promoting economic development is strictly a government function would appear to make it quite difficult for any economic development corporation to avoid being classified as a quasi-governmental corporation. Indeed, following its suggestion that economic development is solely the province of government, the Majority reaches the conclusion that BDADC does not appear to have any private function.

The Wisconsin decision provides little in terms of guidance for any economic development corporation which may wish to operate independently of the Wisconsin open meetings and public records laws. The Court does say that BDADC could have organized differently, citing some of the considerations listed above that make it *resemble (look like)* a governmental corporation. Does this require elimination of all of the factors? Some? A majority? The Court has only said that the determination will be *on a case-by-case basis, based on a totality of the circumstances*.

If an economic development entity does not wish to operate as a quasi-governmental corporation, it may attempt to structure itself in such a manner that it does not *resemble* a governmental corporation based on the *totality of the circumstances*. Under the Court’s decision, however, it does so at its own peril. If the entity fails to choose the proper structure, given the lack of any clear guidance from the Court, the entity and its members may be subject to fines and sanctions for failing to comply with the open meetings and public records law.

*[*WEDA was joined in its “friend of the court” brief by the Wisconsin Realtors Association, the National Association of Industrial & Office Properties, Wisconsin Chapter, and the Wisconsin Association of Manufacturers and Commerce. The Wisconsin Builders Association also provided financial support to the brief.]*

The Dissent

Justice Prosser, joined by Justice Roggensack, takes issue with the approach and conclusions of the Majority's decision. While the dissent represents the minority view, the opinion can be useful as we explore our next steps. The portion of the dissent that explores statutory interpretation and concludes that the Legislature never intended to include under quasi-governmental body any entity not created by government, is good reading but can only be useful if it is persuasive in having the Legislature explore and clarify its original intent.

The dissent agrees with the WEDA *amicus curiae* brief in giving greatest weight to the fact that:

“...BDADC has no authority to bind the city of Beaver Dam in contract or to create obligations on the City's behalf. No municipal action can be taken by BDADC, and any agreements it negotiates with other corporations and entities are subject to normal legislative process (including open meetings and public records laws) before being officially approved and adopted by the City as policy.”

The dissent also recognizes that the application of open meetings and public records laws will present obstacles to the appropriate pursuit of economic development as well as enormous compliance burdens. Rules of compliance that make sense for governmental bodies can provide virtually insurmountable burdens to small corporations, many of which have a staff of one!

Finally, the dissent articulates the lack of guidance provided by the majority:

“However, the majority fails to provide realistic guidance on how a non-profit economic development corporation can avoid conducting business in the fishbowl of the open meetings and public records statutes without severing its cooperative relationship with its municipal beneficiary and paying for all of its economic development initiatives with private money.”

What Next?

WEDA and others will explore avenues to address the Wisconsin Supreme Court's very troubling decision. The cleanest and safest will be to attempt a legislative solution - which is where public policy is supposed to be established. This will require a coordinated and active grassroots effort reinforcing the critical role that economic development plays in the vitality of the state's future.