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Lesaffre Yeast Corp. v. Milwaukee Metro. Sewerage Dist., Appeal No. 02-1685, 2003 Wisc. App. LEXIS 219 (Wis. Ct. App. Mar. 4, 2003)

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On appeal the landowners maintained that the charge in question was a tax rather than a regulatory fee. The court of appeals applied three factors to determine whether the fee in question was regulatory or a tax. First, it reviewed whether the County's primary purpose to raise revenue with a tax, or to regulate with a regulatory fee. Second, it considered whether the County allocated the money collected only to the authorized regulatory purpose of regulating storm water quality. And third, it assessed whether there was a direct relationship between the fee charged by the County and the service received by those who paid the fee, or between the fee charged and the burden produced by the fee payer. Applying these factors to the charge in question, the court of appeals determined the fee was regulatory and not a tax.

The court of appeals found the language of the ordinance clear. The fee imposed would specifically fund activities related to the *regulation* of issues impacting storm water quality; any additional funds would be used *only* for the acquisition and construction of new storm water facilities. All the funds collected would be utilized solely in the unincorporated areas of Clark County. Because the charge met the criteria for a regulatory fee the court held it was not an impermissible tax, and affirmed the County's cross-motion for summary judgment.

Jason V. Turner

WISCONSIN

Lesaffre Yeast Corp. v. Milwaukee Metro. Sewerage Dist., Appeal No. 02-1685, 2003 Wisc. App. LEXIS 219 (Wis. Ct. App. Mar. 4, 2003)
(holding summary judgment improper when issues of material fact remain regarding the source of well contamination, frequency of contamination, and knowledge that operation of a tunnel would result in ground water contamination).

Lesaffre Yeast Corporation ("Lesaffre") filed suit against the Milwaukee Metropolitan Sewerage District ("MMSD") in the Milwaukee County Court alleging inverse condemnation and nuisance. The court granted summary judgment in favor of MMSD because Lesaffre failed to satisfactorily plead all the elements necessary to constitute a taking in an inverse condemnation action. The court also found MMSD was entitled to governmental immunity on the nuisance cause of action. The Court of Appeals of Wisconsin, District One, reversed the judgment and remanded the case because disputed issues of material fact existed.

Lesaffre's Red Star Yeast and Products plant installed a 1700-foot deep, high-capacity production water supply well, in 1948, to draw water from two aquifers. MMSD constructed a tunnel within 660 feet of the Red Star well to relieve peak flow demand on an existing sewer system by collecting and storing storm water overflow and excess

sewage until MMSD could transport it to the sewage treatment plants. Lesaffre contended that MMSD knew that the operation of the tunnel would contaminate Red Star's well because the tunnel walls were hewn through unlined bedrock. Lesaffre also alleged that fractures in the bedrock wall provided a channel through which sewage containing *E. coli* and other fecal coliform bacteria could migrate in and out of the tunnel, flow into the aquifer, and into the Red Star Well.

MMSD began operation of the tunnel in 1994 and by the spring of 1999, samples from the Red Star well consistently tested positive for total coliform bacteria, fecal coliform, and *E. coli*. Red Star consequently discontinued use of the well and increased its use of city water. Lesaffre alleged that MMSD failed to properly operate the tunnel so as to prevent the contamination of its well and that MMSD's action constituted a taking. The circuit court ruled that the facts alleged fell into a category of cases described as "constructive takings with physical invasion" which constituted a "regulatory taking."

The appellate court determined that the allegations presented in the complaint were closer to a physical taking than a regulatory taking. Applying the case law for physical takings, the court concluded that it was premature to dismiss the case on summary judgment because there were several issues of material fact in dispute. Specifically, whether the operation of the tunnels was the source of the contamination of the Red Star well, the frequency of the contamination, and whether MMSD had the knowledge to create the conditions that caused the contamination of the well. The court also ruled that the doctrine of immunity did not generally bar a claim for the creation of a private nuisance.

Regan Rozier

Wisconsin v. Fedler, 2002 WL 31193360 (Wis. Ct. App. Oct. 3, 2002)
(holding that where a property owner dredges in wetlands or ponds without a permit, civil forfeitures and restoration of property to the condition before alteration may be required even where there is no direct connection to a navigable waterway).

In December 2000, Ronald G. Fedler ("Fedler") received two tickets from the Department of Natural Resources ("DNR") for enlargement of a waterway without a permit. Fedler plead not guilty to both citations. The Circuit Court of Iowa County found Fedler guilty and ordered him to pay civil forfeitures and either remove the lower pond or obtain a permit for its construction. Fedler appealed to the Wisconsin Court of Appeals, District Four where the court upheld the verdict. The court found that Fedler violated a Wisconsin statute and was required to restore the land to the condition previous to dredging.

Fedler's property contained two ponds that the previous owner created in 1963. The water from the ponds flowed out of the ponds down through a culvert and eventually met up with a Class-II trout