

# MUNICIPAL LAW NEWSLETTER

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## Public Service Commission to Hear Dispute over Utility Relocation Costs

Wisconsin Public Service Corporation ("WPSC") has brought complaints against the City of Manitowoc ("City") and two other municipalities at the Public Service Commission of Wisconsin ("PSC"), seeking to pass the cost of utility facility relocation work to the municipality.

In WPSC's case against Manitowoc (*Wisconsin Public Service Corporation v. City of Manitowoc* (PSC Docket No. 9300-GI-102)), WPSC based its complaint on Wis. Stat. §196.58(4) and Wis. Adm. Code Chapter PSC 130. WPSC alleged in the complaint that Manitowoc required WPSC to permanently relocate gas facilities at WPSC's expense to accommodate certain City roadway reconstruction projects. WPSC claimed that the relocation costs should be borne by City residents, not by WPSC's ratepayers or shareholders. The City has responded to the complaint by asserting that the Commission lacks jurisdiction to review the matter and, even if the Commission has jurisdiction, WPSC's demands are contrary to governing law. It is the City's position that, under the common law, it is the public utility, not the municipality, which must pay for utility relocation costs when the public utility must permanently relocate its facilities in the right-of-way to accommodate such public works projects as roadway reconstruction

or the changing of the street grade.

The impact of this case may be wide-ranging. At the time that WPSC filed its complaint against Manitowoc, it also filed similar complaints against the cities of Oshkosh and Oconto regarding who should bear utility facility relocation costs. Combined, these cases are important because they may be the first time that the Commission's rules pertaining to municipal authority over public utility facilities in local rights-of-way (Chapter PSC 130) will be tested.

In addition, these cases may result in WPSC having to cease implementing its "cost recovery policy," which it adopted in 2005. This policy requires municipalities to pay for relocations costs under many circumstances. WPSC has stated in filings with the Commission that more than fifty municipalities have accepted WPSC's cost recovery policy, and that for projects that began in 2006, municipalities have reimbursed or agreed to reimburse WPSC for approximately \$707,050 for utility facility relocations.

The Wisconsin Utilities Association, Dairyland Power Cooperative and the Wisconsin State Telecommunications Association have been granted leave to file a "non-party" brief in the Manitowoc proceeding.

Hearings in the Manitowoc case are scheduled for April 24 and 25, 2007.

—Mark A. Neuser & Anita T. Gallucci

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## Court of Appeals Decision Narrows Exception to Open Meetings Law

Municipalities engaged in commercial negotiations may need to be extra cautious before invoking statutory exceptions to the open meetings requirements under sections 19.81 to 19.98 of the Wisconsin statutes. That's the conclusion to be drawn from an important District IV Court of Appeals decision issued on March 8, 2007 in *State of Wisconsin ex rel. Citizens for Responsible Development v. City of Milton and Milton City Council* (Appeal No. 2006AP427).

The case involved 10 closed meetings held by the Milton City Council and Milton Plan Commission ("Milton") to consider a proposal by a private interest to build an ethanol plant in Milton. The closed meeting minutes indicated that discussions concerned the land purchase and development agreement negotiations, as well as issues associated with having an ethanol plant in Milton. At the final meeting, Milton approved a development agreement with the private interest. Citizens for Responsible Development brought suit when the plans for the ethanol plant became public, alleging that Milton had violated the Open Meetings Law by holding all the meetings concerning development of the plan in closed session.

Wisconsin's Open Meetings Law requires that all meetings of state and local governmental bodies be publicly held "unless otherwise expressly provided by law." Section 19.81(2), Wis. Stats. The only expressly stated exceptions to the open meeting requirement are contained in Section 19.85. In accordance with the policy of open government embodied in the Open Meetings law, these exceptions are to be construed narrowly.

Section 19.85(e) was invoked by Milton to justify its decision to hold the ethanol project discussions in closed session. That exception allows for closed meetings for the purpose of "deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Citing the only previous case interpreting this exception (*State ex rel. Journal Sentinel, Inc. v. Pleva*, 151 Wis. 2d 608 (Ct. App. 1989)), the Court of Appeals placed the burden squarely on Milton to show that competitive or bargaining interests *required* closed sessions; merely asserting that the exception was warranted did not suffice. Milton did succeed in articulating specific reasons for its invocation of the

exception, but the Court of Appeals held that the statutory reasons Milton cited were insufficient.

Specifically, Milton asserted that the city had invested millions of dollars in creating an incremental finance district to encourage private investment in the city; that the developer in this instance had requested confidentiality throughout the negotiation process; that negotiations on the project also involved negotiations over transfer of private property; that the city did not want to publicize its discussions as that might encourage other municipalities to pursue negotiations with the same developer; that it did not want to disclose its negotiating position to the developer; and that the agreement specifically contained a provision requiring public input at a later date.

According to the Court of Appeals, these reasons did not justify closing the meetings. First, the Court rejected the notion that a private developer's desire for confidentiality trumps the public's right to maximum access to the government. The Court emphasized that the common definition of "require" means that the Legislature intended to limit the exception only to those situations where the government's competitive or bargaining reasons "leave no other option than to close meetings" (*Id.* at ¶ 14). That a reason might be valid does not mean it is sufficient.

Second, the Court rejected Milton's argument that the fear of losing the project to another municipality justified closing the meetings. Whether or not closing the meetings may have in fact deterred the developer from pursuing other potential opportunities, the Court reasoned that any such deterrence would be inconsistent with the policy behind the Open Meetings Law. Citing trust in the free market, the Court opined that a governing body's belief that secret meetings will produce cost savings for its citizens does not justify contravening the public's right to full information, even though public scrutiny may add expense and cause delays or hassles. Neither did the Court put much stock in the city's fear of potentially

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***In the wake of this decision, municipalities engaged in deliberations over potential development projects or commercial negotiations will need to be extra cautious before invoking the competitive bargaining exception to the Open Meetings Law.***

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# Limits On Recovering “Litigation Expenses” In Condemnation

In a decision recommended for publication, the court of appeals has clarified and reinforced certain limitations on recovery of “litigation expenses” under section 32.28, Stats., in condemnation proceedings. *DSB Evergreen F.L.P. v. Town of Perry*, 2006 AP 585 (March 1, 2007).

In *DSG Evergreen*, the Town of Perry served a jurisdictional offer on December 23, 2003, for land to be included in its historic district park. When the offer was not accepted, on January 19, 2004, the town filed a petition for condemnation proceedings under section 32.06(7), Stats. The circuit court assigned the matter to the Dane County Condemnation Commission to determine the value of the land. On January 30, 2004, DSG filed an action under section 32.06(5), Stats., contesting the town’s

right to condemn DSG’s land and seeking a temporary injunction restraining the town from proceeding with a hearing before the county condemnation commission. The court denied the motion for the injunction. At the hearing before the condemnation commission on March 11, 2004, the town discovered that there was a substantial error in the legal description of the property it sought to condemn and withdrew its jurisdictional offer. It then restarted the process, providing a corrected appraisal to DSG. After the commission hearing, the town submitted an answer and motion to dismiss some claims in DSG’s right-to-take lawsuit and moved for costs under the old frivolous claims statute, 814.025, Stats., alleging there was no reasonable basis in law for the complaint. DSG moved to dismiss its complaint on the grounds that the town had abandoned its condemnation proceedings. DSG also sought its litigation expenses under section 32.28, Stats. The court denied the town’s motion for sanctions and awarded DSG \$13,976 of the \$56,854 in litigation expenses it had requested.

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*The rule against recovery of litigation expenses incurred before a jurisdictional offer is served is a bright-line test.*

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## Court of Appeals Decision Narrows Open Meetings Law

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disruptive, statutory debate, or the contractual promise of permitting future public input.

The only reason that the Court affirmed as a justification for invoking the competitive bargaining exception was the city’s concern over revealing its negotiation strategy: “Developing a negotiation strategy or deciding on a price to offer for a piece of land is an example of what is contemplated [by the competitive bargaining exception].” (*Id.* at ¶ 19). However, the Court cautioned that, while closing some portion of some meetings might be appropriate, a municipality is not justified in closing all parts of all meetings with respect to a given negotiation.

In the wake of this decision, municipalities engaged in deliberations over potential development projects or commercial negotiations will need to be extra cautious before invoking the competitive bargaining exception to the Open Meetings Law. While the case does underscore the legitimacy of closing at least some portions of meetings for the consideration of actual negotiation strategy, governing bodies should be careful to open discussions at the early stages of project planning, particularly in instances where public controversy may be stirred. Governing officials or their legal representatives should remind developers at the onset of negotiations that municipalities are limited in their ability to protect confidentiality. Municipalities should also make sure to involve their city attorneys and/or special counsel throughout the negotiation process.

DSG raised three issues on appeal regarding the award of litigation expenses. First, DSG argued that the circuit court had failed to liberally construe section 32.28 to make the property owner whole. Specifically, it contended that the court should have awarded expenses incurred before the jurisdictional offer was served. In *Kluenker v. DOT*, 109 Wis. 2d 602, 327 N.W.2d 145 (Ct. App. 1982), the court held that, under section 32.28, only litigation expenses incurred after the service of a jurisdictional offer could be recovered. The rationale was that, within the plain meaning of the statute, there are no “actual” or “anticipated” condemnation proceedings until a jurisdictional offer is served. Before that, there is no assurance that a condemnor will decide to proceed with a taking. In reaching its holding, the court in *Kluenker*

—Richard A. Heinemann

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# Two Takings Cases That Challenge Airports For Generating Overflights and Noise Conditions Affecting Nearby Properties Reach Different Results

Two cases—one from the Nevada Supreme Court and the other from the Indiana Supreme Court—reached vastly different results on takings claims concerning low and frequent aircraft overflights.

In *McCarran International Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006), cert. denied 75 U.S.L.W. 3435 (U.S. Feb. 20, 2007), the Nevada Supreme Court affirmed a decision holding that height ordinances designed to protect the airspace around Las Vegas' McCarran International Airport constituted a taking under the Nevada and United States Constitutions.

The facts of the case are these. The owner of vacant commercial property just under a mile from the airport complained that flights frequently flew over the property within 500 feet of the ground level. The property was subject to height limitation ordinances restricting building heights to 66 feet and to an aviation easement granted by a previous owner in exchange for permission to build. The easement purported to grant permission for overflights and noise impacts.

The property owner brought a takings case in state court. The court held that the height limitation ordinances constituted a per se taking. A jury awarded damages of \$6.5 million based on the inability to construct buildings over 66 feet in height and the resulting diminution of property value. The trial court added \$10.1 million in interest, costs and attorney fees, bringing the total award to over \$16.6 million.

The case reached the Nevada Supreme Court, which upheld the \$16 million judgment in July, 2006. The court held that, under Nevada law, property owners have a right to airspace up to 500 feet. The height ordinances effected a regulatory per se taking of the owner's property because they "exclude the owners from using their property and, instead, allow aircraft to exclusively use the airspace." "Although the airplanes flying over [the] property are not constantly occupying the airspace in a temporal sense, the invasion is nonetheless permanent because the right to fly through the airspace is preserved by the ordinances and expected to continue into the future," the court wrote.

The court rejected, as a defense to the takings claim, the airport's argument that it had obtained an aviation

easement from the property owner's predecessor in interest as a condition of approving a development application. "[R]equiring an uncompensated easement as a condition to development is improper and cannot be used by the County as a defense to the taking of the landowner's airspace without compensation," the court concluded.

The fact that the taking was classified as a per se taking meant that the airport was unable to argue that the airport was there when the current owner bought the property and, therefore, the owner had to know the effects of the airport on the property when he bought it, especially in light of the aviation easement.

The airport argued that federal regulation of flight patterns required flights at elevations below 500 feet, particularly when aircraft are taking off and landing. The court acknowledged this fact, but said that flights that pass over private property at the lower elevations must result in the airport compensating the affected property owners.

The airport then sought to bring the case to the United States Supreme Court in order to argue that federal (FAA) regulation of aviation overrides the ability of local courts to demand compensation for flights that comply with federal aviation laws and regulations. The United States Supreme Court rejected the petition for certiorari on February 20, 2007.

It is suspected that other property owners near McCarran International Airport will bring similar cases.

Another airport overflight and noise case was decided—with a very different result—on January 23, 2007 by the Indiana Supreme Court. In *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, (Ind. 2007), the court affirmed a trial court ruling that rejected takings claims by homeowners based on aircraft noise from airplanes taking off from a new runway at the Indianapolis International Airport. The homeowners lived roughly three miles from the airport. The lowest overflights over the homes of the plaintiffs were at altitudes of 1,300 feet.

In rejecting the homeowners' takings claims, the Indiana Supreme Court chose to follow a line of reasoning in earlier federal court cases on airport noise, holding that

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## Limits On Recovering "Litigation Expenses" In Condemnation

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had observed that statutes for taxation of costs against the sovereign are in derogation of the common law and are strictly construed. Several years later, the supreme court ruled in *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 80, 715 N.W.2d 213 (1984), that section 32.28, Stats., is to be construed liberally in favor of property owners. DSG argued that this change in the standard of construction meant that *Kluenker* was no longer viable. The court of appeals disagreed, concluding that the core holding in *Kluenker* was based on the plain language of the statute, rather than the result of deciding for or against alternate reasonable interpretations on the basis of strict or liberal construction. The court also rejected DSG's argument that *Kluenker* was distinguishable because it was a just compensation, rather than a right-to-take case. Section 32.28 applies generally to all condemnation proceedings.

Second, DSG argued that the circuit court had erred in failing to award litigation expenses that had been incurred after the abandonment of the condemnation proceeding. The abandonment occurred when the town withdrew its petition before the condemnation commission. The circuit court found as a factual matter that both parties were responsible for unnecessarily continuing the litigation after the proceeding had been abandoned and, therefore, the expenses were unnecessary and unreasonable. The court of appeals deferred to the circuit court's factual findings and upheld the exercise of discretion.

Finally, DSG argued that the circuit court had erred in

## Two Takings Cases Challenging Airports

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overflights constitute a taking only if their impacts are so severe as to substantially impair reasonable existing or potential use of the underlying properties. Applying that standard to the facts at hand, the Indiana Supreme Court affirmed the trial court's conclusion, based on the evidence, that aircraft noise at elevations of 1,300 feet or higher above the ground level of the plaintiffs' homes was not capable of causing noise impacts that "practically destroyed" or "substantially impaired" the use of their homes.

Interestingly, there is no mention in the Indiana case of the Nevada decision.

— Richard A. Lehmann

denying recovery of its appraisal expense on the grounds that DSG did not submit supporting materials to justify those fees. It asserted that there was no reason to believe that the town was objecting to the reasonableness of the amount of the fee. The town's objection to the fee had been centered on whether the services had been provided within the time frame set by the court. Nevertheless, the court of appeals again deferred to the circuit court's exercise of discretion in finding that the issue of the reasonableness of the fee amount was raised, that DSG had been provided ample time to submit evidence to support its \$6,000 appraisal fee, and in rejecting a request for additional time to submit evidence.

The rule against recovery of litigation expenses incurred before a jurisdictional offer is served is a bright-line test. *DSG* confirms its continued validity even with liberal interpretation of the statute. The reasons for denial of the other litigation expenses in the *DSG* case, however, were fact specific. Appraisal fees are clearly recoverable, subject to proof as to their reasonableness. Expenses incurred after abandonment of the proceedings might be recoverable in some instances where necessary to wrap up the proceedings. Presumably, the expenses for filing a motion to dismiss DSG's complaint regarding the right-to-take case, without extensive argument or briefing, would have been recoverable. The circuit court in this case appears to have been upset over a two-day evidentiary hearing the parties engaged in even after the condemnation proceeding had been abandoned.

— Mark J. Steichen

### SPEAKERS' FORUM

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| May 1, 2007  | Utility Facilities in Municipal Rights-of-Way<br>Water Supply Regulatory Affairs Seminar, Madison, WI<br>Anita T. Gallucci |
| May 4, 2007  | The State of Cable Franchising<br>WAPC Spring Conference<br>Madison, WI<br>Anita T. Gallucci                               |
| May 11, 2007 | Eminent Domain Update<br>State Bar Annual Convention<br>Milwaukee, WI<br>Mark J. Steichen                                  |
| May 11, 2007 | Municipal Utilities<br>State Bar Annual Convention<br>Milwaukee, WI<br>Lawrie J. Kobza                                     |

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Richard L. Bolton	283-1789	<a href="mailto:rbolton@boardmanlawfirm.com">rbolton@boardmanlawfirm.com</a>
Christopher J. Dodge	283-1777	<a href="mailto:cdodge@boardmanlawfirm.com">cdodge@boardmanlawfirm.com</a>
Anita T. Gallucci	283-1770	<a href="mailto:agallucci@boardmanlawfirm.com">agallucci@boardmanlawfirm.com</a>
Robert E. Gregg	283-1751	<a href="mailto:rgregg@boardmanlawfirm.com">rgregg@boardmanlawfirm.com</a>
Rhonda R. Hazen	283-1724	<a href="mailto:rhazen@boardmanlawfirm.com">rhazen@boardmanlawfirm.com</a>
Richard A. Heinemann	283-1706	<a href="mailto:rheinemann@boardmanlawfirm.com">rheinemann@boardmanlawfirm.com</a>
Lawrie J. Kobza	283-1788	<a href="mailto:lkobza@boardmanlawfirm.com">lkobza@boardmanlawfirm.com</a>
Richard A. Lehmann	283-1719	<a href="mailto:rlehmann@boardmanlawfirm.com">rlehmann@boardmanlawfirm.com</a>
Jennifer S. Mirus	283-1799	<a href="mailto:jmirus@boardmanlawfirm.com">jmirus@boardmanlawfirm.com</a>
Mark A. Neuser	283-1725	<a href="mailto:mneuser@boardmanlawfirm.com">mneuser@boardmanlawfirm.com</a>
Jon C. Nordenberg	283-1739	<a href="mailto:jnordenberg@boardmanlawfirm.com">jnordenberg@boardmanlawfirm.com</a>
William R. Peck	283-1732	<a href="mailto:wpeck@boardmanlawfirm.com">wpeck@boardmanlawfirm.com</a>
Catherine M. Rottier	283-1749	<a href="mailto:crottier@boardmanlawfirm.com">crottier@boardmanlawfirm.com</a>
Mark J. Steichen	283-1767	<a href="mailto:msteichen@boardmanlawfirm.com">msteichen@boardmanlawfirm.com</a>
Cynthia A. Van Bogaert	283-7543	<a href="mailto:cvanbog@boardmanlawfirm.com">cvanbog@boardmanlawfirm.com</a>
Steven C. Zach	283-1736	<a href="mailto:szach@boardmanlawfirm.com">szach@boardmanlawfirm.com</a>

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Boardman, Suhr, Curry & Field LLP  
Fourth Floor  
1 South Pinckney Street  
P.O. Box 927  
Madison, WI 53701-0927

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