

MUNICIPAL LAW NEWSLETTER

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Wisconsin Supreme Court Upholds Retirement System Law

On June 11, 2001, the Wisconsin Supreme Court upheld the constitutionality of legislation that significantly modifies the Wisconsin Retirement System ("WRS"). The legislation at issue, 1999 Wis. Act 11 ("Act 11"), had been challenged by the Wisconsin Professional Police Association, Inc. ("WPPA") and the State Engineering Association ("SEA") (together, "Petitioners"). In a decision anxiously awaited by the WRS's approximately 460,000 employee participants and a host of other interested parties (see Municipal Law Newsletter, March 2001), the Court rejected all of the Petitioners' claims.

Act 11 was signed into law by former Governor Tommy Thompson in December of 1999. The legislation sought a number of significant changes relating to benefit improvements, interest crediting, variable annuity options, contribution credits for employers, death benefits, credit for legislative service, recognition of income and capital gains and losses in the fixed retirement trust and various actuarial assumptions and liabilities under the WRS.

The Petitioners' suit centered on the Act's accelerated distribution of \$4 billion from the Transaction Amortization Account ("TAA") and its distribution of \$200 million of total funds to the employer reserve to be earmarked as a credit to employers for unfunded liability. These modifications were alleged to constitute takings of participant property and unconstitutional impairments of contract. In addition, the Petitioners alleged that the Act's modification of the statutory assumed rate and across-the-board salary increase usurped the Employee Trust Fund Board's authority. WPPA also alleged that raising the 65 percent benefit cap by 5 percent for all employees except protective occupation employees violates the equal protection clause of the state and federal constitutions. Finally, SEA claimed that the Act was unconstitutional because it failed to

pass the legislature by the required three-fourths vote of all members of both houses of the legislature.

The Court's decision began by dismissing SEA's procedural allegation on the grounds that the legislature did not intend that the 3/4 majority be met by each house of the legislature, but by the total vote as cast by both houses taken together.

The Court then turned to the Constitutionality of Act 11. In rejecting the Petitioners' substantive claims, the Court found that while every participant has interests and rights in the WRS, and therefore a broad property interest in the system as a whole, different classes of participants have different interests such that participants in one category (*e.g.*, active participants) might oppose a legislative proposal perceived as a benefit by other participants in the system (*e.g.*, retirees). Hence, different participants have different property interests. All participants, however, according to the Court, have property interests in the preservation of rights in the system, the safeguards that ensure the trust is used for proper purposes, and the integrity and security of the system.

Applying these principles to the Petitioners' substantive claims, the Court held that Act 11 was constitutionally sound on all grounds. For example, with regard to the \$4 billion distribution, the Court found that similar distributions had been sanctioned by the legislature in the past, without serious challenge, in order to stabilize the system. In rejecting the Petitioners' challenges to the equity of the distribution, the Court emphasized that no accrued benefits would be curtailed by the distribution and that to block the distribution would be to "paralyze" the TAA from performing its duty of reducing annual fluctuations in contribution and benefits.

Similarly, the distribution of funds into the employer reserve was held by the Court

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Supreme Court Upholds Retirement System Law

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to be necessary to ensure the fulfillment of future benefit commitments to participants at the lowest possible cost. Because Act 11 does not abrogate the obligation of employers to pay accrued benefits, the Court held that no property rights are infringed. The Court rejected the notion that participants have a property right in any particular regimen of employer funding.

In sum, the Court found that the Act is not constitutionally infirm and that, rather than violating trust principles, it strengthens the hand of the ETF Board. Consequently, the Court denied the Petitioners' requested relief and lifted an injunction that had been imposed in December on implementation of the Act. A copy of the decision may be obtained on the ETF Web site at <http://badger.state.wi.us/agencies/etf>.

— Richard A. Heinemann

FERC Finally Sets Price Caps in Western Markets

After several attempts to bring some order to the chaotic western electricity markets, the Federal Energy Regulatory Commission ("FERC") finally set price caps for transactions in those markets.

The FERC order was extraordinary in that it covered a number of the western states, although the complaints had originally come out of the California deregulation fiasco. Because one of the factors influencing the California market was the possibility that a price cap in that market alone would cause sellers to make sales in other western states, FERC was compelled to include most of the western transmission system.

FERC also brought municipally owned electric utilities within its jurisdiction for the first time. Some municipals have questioned the legality of the FERC order.

In its order of June 19, 2001, the FERC for the first time imposed a price cap that would be effective 24 hours a day, seven days a week. The cap is based upon the cost for the least efficient generating unit operating at that time. While far from a traditional utility rate that is based on cost of service and a reasonable return to the generator, the FERC order had the immediate effect of reducing prices in California.

Meanwhile, other developments in California and the western markets continue unabated. California is pushing its claim at the FERC for refund of claimed overcharges, but the state and the generators are miles apart. In another development, some employees of generating companies claimed that generators were kept off line to increase profits.

— Michael P. May

Chicago, Other Munis to Save In Switch From ComEd

The City of Chicago and some suburban communities recently announced that they were moving a significant part of their electric load from Commonwealth Edison ("ComEd") to Enron. The municipalities claimed they would save over \$3 million annually by the switch.

The City of Chicago and the Chicago Transit Authority represent about 300 of the 400 MW which would be moving off the ComEd system. The municipalities also agreed to purchase a significant portion of "green power" from ComEd.

At the same time that the switch was announced, ComEd announced that it would free up 240 MW of its capacity, which it would resell on the wholesale market. The arrangements still need approval of the various governing bodies.

— Michael P. May

Street Dedication Offer Could Not Be Revoked After Decades of Public Use

In a decision recommended for publication, the District II Court of Appeals recently held that property owners in a subdivision could not revoke an offer for dedication of public roads after decades of public use. *Cohn v. Town of Randall*, 2001 WI App. ___ (July 3, 2001).

The town of Randall proposed a substantial improvement to streets located in an early subdivision, which would result in a per parcel assessment of over \$13,000. Owners of forty-five parcels subsequently filed notifications with the Town Board that any purported dedication of land owned by them to the Town for public use was revoked. The Town had never formally accepted the dedication of the roads as public property. The owners proposed an alternative, less costly improvement plan, but the Town Board voted to approve its initial plan and declared the subdivision roads to be public. The owners challenged the plan and the circuit court held that subdivision plats disclosed an intent to create private rather than public roads.

The court of appeals noted that Wisconsin recognizes both statutory and common law dedication of property for public use. Intent to dedicate is an essential element of both types. With common law dedication, the threshold issue is the intent of the grantor at the time the subdivisions are created. The language in the plats referred to "certain streets dedicated as common property to the owners of this subdivision and of any future adjacent subdivision." The court found this language to be ambiguous. Currently, any platted streets that are not marked private are presumed to be public. Wis. Stat. § 236.20(4)(c). However, this was not the law at the time the subdivision at issue was developed in the 1920s. Therefore, the court looked to extrinsic evidence. A deed for lots sold later mentioned payments to be made for upkeep of roads until the subdivision "shall be organized into a municipality" and "roadways . . . maintained for the use of the Public . . ." The court found this to be evidence of an intent to dedicate the roads for public use.

The next issue is whether there was an acceptance by the proper public authorities or by general public users. The court assumed for purposes of the opinion that the Town had not formally accepted the offer of dedication. However, the court found that the public had used the roads for over seventy years without objection and that the roads had never been posted as private until after the lawsuit was commenced. The owners had also made efforts over the years to have the Town take over and maintain the roads as public roads. The court characterized the situation as a continuing offer to dedicate the roads for public use.

The court rejected the owners' argument that the Town should be estopped from accepting the offer of dedication of roads based on the passage of time since the subdivision was developed. The court explained that estoppel is seldom applied against a municipality and only where there has been some affirmative action taken or where there has reasonable reliance by other parties on some affirmative action or great negligence or delay by the municipality.

— Mark J. Steichen

Tax Assessment Review Procedure Violates Equal Protection Clause

In a 4-2 decision with ramifications for many other statutes, the Supreme Court declared section 74.37(6), Stats., unconstitutional as a denial of equal protection. *Nankin v. Village of Shorewood*, 2001 WI 92 (July 6, 2001). In doing so, the court expressly noted that its holding was in “direct contrast” to the result reached in *S.C. Johnson & Son, Inc. v. Town of Caledonia*, 206 Wis. 2d 292, 557 N.W.2d 412 (Ct. App. 1996).

Under section 74.37, Stats., all property owners in the state have two means of appealing a board of review decision on a property tax assessment. First, an owner may file a certiorari action with the circuit court. Second, an owner may submit a complaint to the department of revenue requesting that the department revalue the property. The department’s decision is, in turn, subject to certiorari review. Subsection (6) provides that property owners in counties with a population less than 500,000 (all counties except Milwaukee) have the third option of filing a claim for an excessive assessment against the entity that collected the tax and then may commence an action for *de novo* review in the circuit court if the claim is denied.

In *Nankin*, the trustee of a trust that owned property in Milwaukee brought a declaratory judgment action seeking to declare the section unconstitutional under the Equal Protection Clause, as well as Article IV, section 18 of the Wisconsin constitution and seeking the right to bring a claim for *de novo* review. The court of appeals affirmed the entry of summary judgment in favor of the village sustaining the validity of the statute in a reported decision. *Nankin*, 238 Wis. 2d 841, 618 N.W.2d 273. On review, Justice Sykes did not participate, because she had been the circuit court judge who dismissed the lawsuit initially. Justice Bablitch wrote the majority opinion and Judge Crooks wrote a lengthy dissent in which Justice Wilcox joined.

The court found substantial differences between review by certiorari and *de novo* review that rendered the treatment of property

owners in different counties unequal. Because there was no protected class at issue, the supreme court applied the rational basis test in determining whether the statute was constitutional. The court acknowledged that, while the legislature had failed to articulate a rationale for the distinction between counties, it was the court’s obligation to construct a rationale if possible. The court went on to find that population did not constitute a substantial distinction between the two classes of property owners. The court noted that populous counties did not afford any additional means to address property tax assessments such that subsection (6) was unnecessary in such counties. It noted that the population of the county was not rationally related to a function performed on a municipal level. Moreover, it stated that judicial resources are equally burdened in all counties and that it cannot be said that populous counties require greater relief from their case loads.

Justice Crooks wrote a lengthy dissent in which he noted that there are at least 175 Wisconsin statutes that classify according to population, of which at least 24 explicitly regulate activity based on the same population classification of “counties having a population of 500,000 or more.” Justice Crooks criticized the majority for not giving due weight to the presumption of validity carried by the statute, which has been in place for forty-five years.

The court’s decision will certainly open many other state statutes to challenge under the Equal Protection Clause. It is not clear whether challenges to other statutes making distinctions based on county population will be successful. The result will depend on whether the legislature has expressed a rationale for the distinction or whether a rationale can be conceived for other distinctions based on the subject matter and content of the other statutes. The more the statutes deal with functions of county governments rather than local governments, the more likely the statute will survive scrutiny under the majority’s reasoning.

— Mark J. Steichen

New Zoning Decision Clarifies Distinction Between Variances and Special Exceptions

A recent Wisconsin Court of Appeals case, *Fabyan v. Waukesha County Board of Adjustment*, 2001 WL 687625 (June 20, 2001), raises the issue of how to draw the distinction between variances, which require application of the strict hardship test, and special exceptions or conditional uses, which do not.

At issue was the Waukesha County Shoreland Zoning Ordinance, which allowed variations in the maximum floor area for accessory buildings. The maximum is expressed as a percentage of the total lot area, called the Floor Area Ratio (“FAR”). The variations were allowed by special exception, with standards that did not include an undue hardship test. In this case, the County Board of Adjustment granted a special exception for a proposed two-story detached garage to allow a 4.2% FAR, which exceeded the 3% FAR standard in the Shoreland Zoning Ordinance.

The plaintiff, who opposed the construction, charged that the granting of the exception was an illegal circumvention of the undue hardship test. She claimed that this matter should have been considered under variance procedures, but was handled

instead as a special exception in order to escape the undue hardship test. The circuit court upheld the Board’s decision. The Wisconsin Court of Appeals agreed that the 4.2% FAR was, in fact, a special exception, and did not require a showing of undue hardship.

The Court said the decisive difference between variances and special exceptions is that a variance is “authority extended to a property owner to use his property in a manner forbidden by the zoning enactment,” while an exception “allows him to put his property to a use which enactment expressly permits.” The Shoreland Zoning Ordinance reflects this distinction in its definition of special exception: “A special or unique situation, excluding a change in use prohibited in a zoning district, which may be authorized by the board of adjustment.”

In this case, the owners’ desire to use the accessory building for storage is not a prohibited use under the applicable zoning. Therefore, the owners did not need a variance. Instead, the owners’ proposed structure conflicted with the FAR requirements of the ordinance. The proper avenue of relief was by special exception.

— Richard A. Lehmann

State Supreme Court Issues Long-Awaited Floodplain Variance Decision

On June 29, 2001, the Wisconsin Supreme Court issued its decision in *State v. Outagamie County Board of Adjustment*, 2001 WI 78, an important zoning case. The case involved an area variance granted to a property owner. The variance survived judicial review, but the Court's multiple opinions provided only limited clarification of Wisconsin's variance laws.

The property at issue is a single-family home located in the Town of Bovina in Outagamie County. It is in the 100-year flood fringe district. The basement floor falls below the flood protection elevation required by the county's floodplain zoning ordinance.

In 1980, the owners applied for and received a permit from the Outagamie County Zoning Committee to fill the lot and place a mobile home on the property. The mobile home complied with the flood proofing requirements. In 1984, the owners applied for and received a building permit from the town building inspector to replace the mobile home with a permanent single-family home. The building inspector issued a building permit to the owners, but did not advise them that they needed to obtain a zoning permit from the Outagamie County Zoning Department. Without contacting the county zoning office, the owners constructed the house with a basement that fell 3.7 feet below the 100-year regional flood elevation. This violated a county ordinance. Still later, the owners wanted to add a sun porch to their home, but were denied a permit because of the basement floor violation. They sought and obtained a county variance to allow the nonconforming basement to continue to exist.

The DNR initiated certiorari review in the circuit court, contending that the basement was illegal and the variance improperly granted. The circuit court affirmed the issuance of the variance, but the court of appeals reluctantly reversed, believing reversal was required by *State v. Kenosha County Board of Adjustment*, 218 Wis.2d 396, 577 N.W.2d 813 (1998). In Kenosha County, the Wisconsin Supreme Court eliminated the previous distinction between area and use variances and established a "no reasonable use of the property" standard for the issuance of either type of variance, thereby making all variances nearly impossible to obtain. The owners appealed.

The Wisconsin Supreme Court reversed the court of appeals and upheld the variance, but the seven-member Court split 3-2-2. The lead opinion by Justice Sykes, joined by Justice Bablitch, says *Kenosha County* should be overruled. Justice Prosser, in concurrence, supports the lead opinion's call to overrule *Kenosha County*, and also emphasizes that the DNR did not play fair in seeking retroactive application of an administrative rule that did not exist when the owners built their basement. Justice Crooks, in concurrence, joined by Justice Wilcox, sees no reason to overrule *Kenosha County*, but determines that the owners' reliance on the town building permit, when the town officials failed to tell them they were also subject to county flood plain zoning, was grounds for the Board to grant the variance as a form of equitable relief. Finally, Chief Justice Abrahamson, joined by Justice Bradley in dissent, laments that the case ignores earlier precedent and makes bad law.

A critical issue in the case is the proper standard for measuring "unnecessary hardship" in variance cases. Since 1998, all variances are subject to the "unnecessary hardship" standard set

forth but not defined in Wis. Stat. §59.694(7)(c). *Kenosha County* held that, in order to obtain a variance, a property owner must prove "unnecessary hardship" by showing: (1) no feasible or reasonable use can be made of the land without the variance, (2) there is a unique condition affecting the parcel, and (3) the variance is not contrary to the public interest.

The lead opinion would overrule *Kenosha County* as to area variances and establish or restore a distinction between use and area variances. The lead opinion points out that a consequence of *Kenosha County* is that any property owner currently putting a property to some use is disqualified from obtaining a variance to legalize even a minor zoning violation, and is, therefore, effectively precluded from making otherwise fully legal improvements on the property. According to these justices, the rule established in *Kenosha County* "defies practical workability, lacks sufficient justification, and is detrimental to the coherence of the law of zoning in this state."

The dissent is not inclined to deviate from the plain meaning of the statute to adopt two hardship standards for two categories of variances. The dissent asserts that there is no good Wisconsin authority for the proposition that the "unnecessary hardship" test in Wis. Stat. §59.694 (7)(c) should be interpreted differently depending on whether the court is considering an area or use variance.

Wisconsin Administrative Code § NR 116.13(2) prohibits boards of adjustment from granting any variance for residential floor levels below the regional flood elevation, unless the Federal Emergency Management Agency (FEMA) has granted a community-wide exception, a circumstance not present here.

A 5-person majority of the Court concludes this rule is illegal since it prohibits all variances in a certain class of cases and conflicts with the general grant of authority to county boards of adjustment over variance decisions. An agency cannot exercise its rulemaking authority contrary to the will of the legislature. Thus, to the extent that NR 116.13(2) prohibits county boards of adjustment from granting variances from flood elevation requirements where the generic statutory standards for such variances have otherwise been met, it is invalid.

The dissent calls the lead opinion's conclusion a "judicial grant" of "plenary power" to boards of adjustment that undermines the DNR's ability to regulate floodplains. The dissent contends that, in Wis. Stat. §87.30, the legislature gave the DNR, not a county board of adjustment, ultimate authority over floodplains. According to the dissent, the wisdom of the DNR rule allowing no variance for a floor below the regional floodplain is not for the Court to decide.

The concurring opinion of Justices Crooks and Wilcox finds no reason to overrule *Kenosha County*. These Justices seem to say that *Kenosha County* establishes a flexible hardship standard governed by the purpose of the zoning provision from which a variance is being sought.

Justices Crooks and Wilcox focus on equitable estoppel. The Town of Bovina issued a building permit to the owners for the house without notifying them that they also needed a floodplain zoning permit from the County. For the County to reject the variance request eleven years later would be akin to rescinding

(Continued on next page)

U.S. Supreme Court Issues New Takings Case

In its latest takings case, the U.S. Supreme Court in a 5 to 4 decision reversed, in part, and affirmed, in part, a Rhode Island Supreme Court decision. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (U.S. June 28, 2001). While the Court ultimately concluded that the claimant's takings claim under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), failed because the claimant had not shown that there had been a "total taking" of his property by operation of certain state wetland regulations, the Court remanded the case for further consideration of the claimant's takings claim under *Penn Central Transp. Co. v. New York City*, 483 U.S. 104 (1978).

In 1971, Rhode Island enacted legislation creating an agency charged with the duty of protecting the state's coastal properties. Anthony Palazzolo, a Rhode Island developer, became owner of 18 acres of waterfront property in 1978. Five years later, he proposed to fill the wetlands and build a beach club, but the agency denied his proposal. Palazzolo's second attempt to gain approval of his development plans failed in 1985. This time Palazzolo appealed the agency's decision to the Rhode Island courts. The agency's decision was affirmed. Palazzolo then filed an inverse condemnation action asserting that the Rhode Island's wetland regulations, as applied by the

agency, resulted in a taking of his property without compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. The suit alleged a "total taking" under *Lucas*.

Ultimately, the Rhode Island Supreme Court rejected Palazzolo's suit. The Court ruled that: (1) the case was not ripe, (2) Palazzolo had no right to challenge regulations predating 1978, when he became the sole owner of the property, and (3) that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property. Further, the Rhode Island Court found that Palazzolo could not recover under the more general test of *Penn Central*. The Court did not consider this claim because Palazzolo acquired the property after the challenged regulations were adopted. The Court held that Palazzolo could have "no reasonable investment-backed expectations that were affected by this regulation" because it predated his ownership.

The U.S. Supreme Court, in an opinion written by Justice Kennedy (joined by Chief Justice Rehnquist and Justices Thomas, Scalia, and O'Connor), ruled that the case was ripe and that Palazzolo could challenge the regulations predating 1978. The Court then remanded the case for further consideration of Palazzolo's takings claim under the principles set forth in *Penn Central*.

First, in ruling that the case was ripe, the Court relied on its earlier decisions holding that a land use takings case is not ripe until a "court knows the extent of permitted development on the land in question." Here, the Court found no ambiguity in the record regarding the extent of permitted development — one single family home. (The estimated value of this site was \$200,000.) The state also argued that Palazzolo's failure to apply for a 74-unit subdivision that formed the heart of his takings claim at trial rendered the case unripe. The Court said this failure went only to damages, not ripeness.

Secondly, the Court rejected the Rhode Island Court's conclusion that Palazzolo had no right to challenge regulations predating his acquisition of the property. The Court said that "the State may not put so potent a Hobbesian stick into the Lockean bundle" of property rights. The Court determined that such a "sweeping rule" against a takings claimant's recovery would "put an expiration date on the Takings Clause." In her concurrence, Justice O'Connor stressed that the timing of the claimant's acquisition bears on the *Penn Central* analysis; all four dissenters agreed with O'Connor on this point.

Finally, the Court affirmed the Rhode Island's Supreme Court's conclusion that Palazzolo failed to establish his total takings claim under *Lucas*, finding that Palazzolo was "not deprived of all economic use of his property because the value of the uplands portion is substantial." While a "token interest" is not sufficient to avoid a *Lucas* total takings, the Court found that Palazzolo's \$200,000 interest in the property was not token. However, because Palazzolo's claims under *Penn Central* were not examined by the Rhode Island Court, the U.S. Court remanded the case so that Mr. Palazzolo's *Penn Central* claim could be considered.

Floodplain Variance Decision

(Continued from previous page)

a permit after the owners had long relied on it. Therefore, according to this concurrence, the board proceeded on a correct theory of law in concluding that it was estopped from denying the variance.

The Court now has four justices who have expressed a willingness to recognize equitable estoppel, the three dissenters in *Willow Creek Ranch v. Town of Shelby*, 235 Wis.2d 409 (2000) (Prosser, Crooks and Bablitch), and now Justice Wilcox in *Outagamie County*. The question is, why did Justices Prosser and Bablitch not sign on to the estoppel portion of the concurrence by Justice Crooks and Justice Wilcox in this case? Was it because this case was a certiorari review and not a zoning enforcement action?

In the *Outagamie County* dissent, Chief Justice Abrahamson and Justice Bradley contend equitable estoppel is only appropriate in an enforcement action, which was the posture of *Willow Creek* but not the posture of *Outagamie County*. Justice Crooks says that equitable estoppel concerns would typically be considered in an enforcement action, but that this case presented unique circumstances that required the Outagamie County Board of Adjustment to consider estoppel in concluding that the owners faced an unnecessary hardship.

What we have, after the *Outagamie County* decision, is no revision or overturning of the strict hardship test, but a minority block of three of seven justices in favor of overturning it. Perhaps as many as five justices are unsatisfied with the results of the "unnecessary hardship" standard. We have a 5-person majority holding administrative rule § NR 116.13(2) to be invalid. We also have Justice Wilcox expressing a pro-property owner view of equitable estoppel. The permutations of the decision are complex and bewildering.

— Richard A. Lehmann

— Richard A. Lehmann

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Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Christopher J. Dodge	283-1777	cdodge@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com
Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com
Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	riehmann@boardmanlawfirm.com
Michael P. May	283-1737	mmay@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

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Fourth Floor
1 South Pinckney Street
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