

MUNICIPAL LAW NEWSLETTER

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St. Croix County Wins Challenge To Cell Tower Denial

In a decision issued on June 17, 2002, the federal district court in Madison upheld St. Croix County's denial of a conditional use permit for the construction of a communications tower. *VoiceStream Minneapolis, Inc. v. St. Croix County*, No. 01-0504-C (W.D. Wis. 2002).

VoiceStream filed an application to build a 185-foot wireless tower just outside the boundaries of the Lower St. Croix National Scenic Riverway and across the river from the historic district of the city of Marine on St. Croix. The Lower St. Croix was one of the original rivers designated a scenic river in 1972 under the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq. The Scenic Riverway consists of a cordon of land running ¼ mile in from the banks of the St. Croix River and is designed to protect the scenic integrity of the river. The tower was designed to provide service along state highway 31 in Wisconsin, state highway 95 in Minnesota across the St. Croix River, and boat traffic on the river. VoiceStream presented the tower as being the best option for providing coverage to the area with a single tower. Because the tower was under 200 feet, the FAA did not require that it be lit at night. However, the tower would be visible for miles along the Scenic Riverway. It would be significantly higher than any other structure in the area and would not have been able to be effectively camouflaged or concealed.

Town of Somerset approved the application on a split vote in April, 2000. The St. Croix County Board of Adjustment heard the matter in September, 2000. The National Park Service as well as the city of Marine on St. Croix and other groups and many residents opposed the application due to its adverse impact on the Scenic Riverway. The County hired an independent consultant to review the application. According to his review, it was possible to achieve VoiceStream's coverage goals using multiple, shorter towers that could

be more easily concealed. The Board voted to postpone a final decision on the application and directed VoiceStream to provide additional information, including a detailed environmental assessment, evidence of any impact on historical sites in Wisconsin or Minnesota, and a detailed plan for lessening the visual impact of the tower, including the feasibility of using multiple, shorter towers.

VoiceStream took considerable time to respond to the Board's information request and a second hearing was eventually held in July 2001. After another extensive record was made in support of and against the application, the Board voted to deny a permit on the grounds that the tower would be visible from the Scenic Riverway, that it would be inconsistent with the spirit and intent of the ordinance, and that VoiceStream had not adequately researched or produced information on the alternative of using multiple sites.

VoiceStream then brought an action under the Telecommunications Act of 1996 (TCA) and 42 U.S.C. sec. 1983. The company alleged that the denial of the permit constituted an effective prohibition on wireless services and that the Board's decision was not supported by substantial evidence in the record. The parties filed cross motions for summary judgment. The court rejected both of VoiceStream's claims and granted the County's motion.

On the prohibition of service claim, the court found that it might be possible for VoiceStream to provide coverage through the use of multiple sites. The carrier bore the burden of proving that it had no other effective means to provide service. VoiceStream's failure to respond fully to the Board's information request as to reasons why a multiple site option would or would not be feasible, coupled with information in the record supporting the contention that this alternative might be feasible, prevented VoiceStream

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from showing that the Board's decision effectively barred the provision of wireless services in this area.

With respect to the substantial evidence test, the court stated that the party seeking to overturn a decision bears the burden to prove that the record lacks substantial evidence. The court found VoiceStream failed to do this. Numerous witnesses testified about the adverse effects the tower would have on the extraordinary scenic beauty of the region. Representatives of the National Park Service testified about the extent to which the tower would be visible throughout the viewshed and that the federally designated Scenic Riverway warranted special protection.

The court's decision is in keeping with Seventh Circuit precedent upholding the power of local governments to make determinations on siting and design of cell towers, notwithstanding the requirements of the TCA. The court expressly notes that these decisions can be based on aesthetic grounds where the local ordinance contains standards on aesthetics and where the evidence supports a finding that the tower would have a genuine impact on the surrounding area. The case also highlights the importance of local and state law in the outcome in setting standards for review of cell tower cases. VoiceStream relied heavily on favorable decisions it had received from district courts in Minneapolis. However, a careful review of the law by the County pointed out significant differences between the deference paid to local decisions and between the types of evidence considered credible under Wisconsin versus Minnesota law. Moreover, federal courts around the country have reached different interpretations of the TCA on some critical issues. The Minnesota district courts applied different standards than the Seventh Circuit on issues of burden of proof and the weight to be accorded to aesthetics.

The federal courts are fairly evenly split on whether a carrier may bring a separate claim under section 1983 for violations of the TCA. A section 1983 action would permit a carrier to recover attorney's fees and damages if it succeeds in establishing a violation of the TCA. The County and VoiceStream briefed the section 1983 issue extensively. Because the court dismissed VoiceStream's TCA claims on the merits, it did reach this issue.

St. Croix County was represented by the Boardman Law Firm. As of the date this article was written, VoiceStream has not filed an appeal, but the time for appeal has not run.

— Mark J. Steichen

Court of Appeals Weaves Through the Thickets of Nonconforming and Conditional Uses

The Court of Appeals in *Lessard v. Burnett County Board of Adjustment*, Appeal No. 01-2986 (Ct. App. Dist. II, June 25, 2002), tackled the issue of nonconforming and conditional uses. The case involved a campground in Burnett County that once allegedly had 44 campsites, but now has 21 campsites. The campground owners sought permission to go back to the 44 campsites, by adding 23 new campsites. None of the campsites involved structures.

The zoning on the property was Residential-Recreational, with campgrounds listed as a conditional use. Camping was prohibited within the 75 foot shoreland setback area. The campground, however, pre-dated the zoning ordinance. The campground had no conditional use permit, and it had six campsites in the shoreland setback area, which was a nonconforming use.

The owners applied for a conditional use permit to expand the campground by 23 new campsites. The County granted the conditional use permit for the expansion on the condition that the six campsites near the water be moved inland within five years. These six campsites near the water were not part of the proposed expansion.

The owners sued to invalidate the condition and/or to assert that the County had no zoning jurisdiction over the expansion. They made four different arguments. First, the property owners argued that a non-structural expansion was not regulated by ordinance. The ordinance had only one statement expressly addressing expansions of nonconformities, and it only said that nonconforming structures cannot be expanded beyond 50% of market value. The court rejected this argument, however, and focused on another sentence in the ordinance which said that pre-existing uses can be continued. The court held that this means that pre-existing uses can be continued within the footprint of the area actually and actively used at the time the zoning took effect, but it does not mean that pre-existing uses can be expanded to additional land area, regardless of whether a structure is involved.

Second, the property owner argued that *Waukesha County v. Seitz*, 140 Wis.2d 111, 409 N.W.2d 536 (Ct. App. 1994), (usually referred to as *Seitz I*) allows a nonconforming use to expand to accommodate increased volumes of customer demand. The Court of Appeals, however, rejected this argument in a footnote and stated that *Seitz I* sanctioned only increased volume and frequency of use, not physical expansion of a nonconforming use.

Third, the property owner argued that its continued operation of the campground which began before the zoning ordinance was adopted and which has continued since, grandfathers all parts of the property that had ever been used for camping. This argument attempts to invoke the doctrine of "diminishing assets," announced in *Sturgis v. Winnebago County*, 141 Wis.2d 149, 413 N.W.2d 642 (Ct. App. 1987). This doctrine holds that a nonconforming mineral expansion use is grandfathered as to the whole of the mineral deposit on the same parcel even though parts of the deposit were not actually being mined when the ordinance took effect. The Court of Appeals rejected the property owner's argument that the diminishing assets rule should be expanded beyond the realm of mineral deposits.

Finally, the property owners challenged the condition that required the six campsites on the water to be moved. The property owners argued that this condition was arbitrary and unreasonable. The Court of Appeals disagreed finding the condition reasonably related to the legitimate goal of bringing the site into conformity with the ordinances and with the "spirit of zoning ... to restrict and ...eliminate (nonconforming) uses as quickly as possible." The case has been recommended for publication.

— Richard A. Lehmann

SPEAKERS FORUM

September 20, 2002

The Latest Issues in Wisconsin Land Use Law

State Bar of Wisconsin, Madison, WI

Richard A. Lehmann

Lawrie J. Kobza

September 26, 2002

National Growing Smart Legislative Reforms

Wisconsin Chapter of the American Planning Association

Madison, WI

Richard A. Lehmann

Matthew D. Weber

Farmland Use Value Upheld By Supreme Court

In a decision issued June 25, 2002, the Wisconsin Supreme Court upheld the immediate implementation of use value assessments for Wisconsin agricultural land. *Mallo v. Dept. of Revenue*, Case No. 00-3252.

In the 3-2 decision, a sharply divided court differed on the interpretation of the use value statute. The majority found that the statute was unambiguous, but relied primarily on what the legislature failed to say and do, rather than on the language of the statute. The statutory language had a phase-in period during which the statute provided that the assessment "shall be as follows," followed by the phase-in language. Nonetheless, the majority, relying upon a portion of the statute which stated that full use value would be implemented "no later than January 1, 2008," found that the Department of Revenue had been given discretion to implement full use value sooner than January 1, 2008.

The dissent also found the statute unambiguous, and found that it gave no such discretion to the Department of Revenue. Justices Prosser and Wilcox did not participate in the decision.

By upholding the immediate move to full use value assessment, the Court rendered moot a challenge to the constitutionality of the statute in another case.

The full implementation of use value means that the property tax burden will continue to shift from agricultural land to urban land. The cases did not involve any of the issues related to purported problems in the agricultural land description, and whether use value benefits developers more than farmers.

The Boardman Law Firm represented the Mallos, farmers in Jackson County whose property faced increased valuation under the statute, in the lawsuit.

— Michael P. May

Supreme Court Holds Permit Requirement for Door-to-Door Religious Solicitors Unconstitutional

The United States Supreme Court has affirmed that it is unconstitutional to require a person to ask the government's permission before exercising the right to free speech. In a decisive 8-1 opinion, the Court held in *Watchtower Bible & Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. ____ (2002), that a village ordinance requiring all door to door "canvassers" to first obtain permits from the mayor's office before going upon private property was an overbroad restriction on First Amendment privileges.

In 1998, the Village of Stratton, New York, enacted an ordinance prohibiting "canvassers" and others from entering private property for the purpose of promoting any cause without first obtaining a permit from the mayor's office. Permits were to be issued at no cost after the applicant filled out a form which listed among other things, the applicant's name, nature of the business or services offered, and identity of any affiliation. The ordinance required the "canvassers" to then carry the permit and produce it upon request of a resident or police officer.

The petitioners in *Watchtower Bible* were an organization of Jehovah's Witnesses, a group well known for its proselytizing activities, which include door-to-door dissemination of pamphlets describing their ministry. The Watchtower Bible Jehovah's Witnesses refused to obtain a permit and sought an injunction preventing enforcement of the ordinance on the grounds that the ordinance violated religious freedom.

Declaring that the ordinance affected not only religious canvassers, but those with business and political purposes as well, the lower courts found that the ordinance was content-neutral regulation and denied the injunction. Content-neutral regulations are permissible when enacted to protect valid public interests, and the lower courts acknowledged the Village's interest in preventing criminal activity and protecting the privacy of residents.

The U.S. Supreme Court granted certiorari on the issue of whether the ordinance violated the First Amendment protection

accorded to anonymous pamphleteering or discourse since it required the disclosure of a door-to-door advocate's identity. On this issue, the Court declared the ordinance unconstitutional, following a long line of decisions invalidating restrictions on canvassing and pamphleteering and emphasizing the historical importance of door to door canvassing as a means of disseminating ideas.

The Court confirmed that such speech may be regulated when a town has specific interests, especially when the solicitation of money is involved. While agreeing that the Village of Stratton's interests in preventing fraud and crime, as well as protecting privacy, are indeed important interests, the Court found that the ordinance could not stand because it was not narrowly tailored to serve such interests without unduly curtailing First Amendment rights. Had the ordinance been written to apply only to commercial activities and the solicitation of money, the Court opined that it would have been sufficiently tailored to serve the purported interests. As written, however, the ordinance applied to a broad range of canvassers who would not pose a significant threat to safety or privacy, including even girl scouts and trick or treaters.

The Court further emphasized that the ordinance did not effectively serve the purported interests of the Village since a permit requirement appeared unlikely to stop potential burglars. Similarly, persons intending to defraud unsuspecting residents could easily do so by obtaining a permit with false information. Finally, the Court observed that, with regard to protection of privacy, a knock on the door is just as annoying with a permit as it is without.

In light of this decision, municipalities concerned about the proliferation of door-to-door canvassing must take heed before promulgating ordinances which potentially can be construed as limiting free speech. Such ordinances must be narrowly tailored to serve specific public interests.

— Richard A. Heinemann

Neighbors Lack Standing to Challenge Annexation and Intergovernmental Agreement

Where town territory is annexed to a city pursuant to an intergovernmental agreement, property owners adjoining the annexed area lack standing to challenge the annexation and the agreement absent a showing of a legally protectible interest. Harm to their property values and their quality of life from expected development in the annexed area is not sufficient to establish such an interest. Nor is a showing that the town has bargained away its right to challenge the annexation via the intergovernmental agreement. Accordingly, the Wisconsin Court of Appeals affirmed the dismissal of adjoining property owners' challenge to an annexation ordinance in *Village of Slinger, et al., v. City of Hartford, et al.*, Case No. 01-CV-147, decided June 26, 2002. The decision has been recommended for publication.

The case involved claims by Dr. Kent and Mary Schaefer (the Schaefers) against the City of Hartford (the City) challenging the annexation of 67.7 acres from the Town of Hartford (the Town). The Schaefers were Town residents and owners of property adjoining the annexed territory. The City annexed the property and rezoned it for residential use at the request of a developer, which proposed a high-density, single- and multi-family development for the area. The annexation was in accordance with a pre-existing intergovernmental agreement between the City and the Town, under which the Town agreed to not challenge the annexation. The Schaefers subsequently filed suit to block the annexation. The circuit court dismissed their claims for lack of standing and the Schaefers appealed.

On appeal, the Schaefers argued that they satisfied the standing requirement of having a legally protectible interest in the annexation. They claimed the proposed development would diminish the value of their adjoining property as well as the quality of their life and the community in which they lived. They also asserted an interest in protecting the Town's right to challenge the City's annexation procedures. The Court of Appeals rejected the Schaefers' arguments on all counts.

The court found that annexation would not injure the Schaefers' property values and quality of life. It noted that any such injury would result from development on the annexed property, not from the annexation itself. Accordingly, the claimed injury did not confer rights to challenge the annexation. The court also noted that the Schaefers had not cited any authority that allows a neighbor to mount a legal challenge to development of adjoining property merely because it diminishes property values. The court suggested that the appropriate place for the Schaefers to raise such arguments is a public zoning hearing.

The court also rejected the Schaefers' effort to advance any right to challenge the annexation on behalf of the Town. The court noted that, historically, the right to challenge an annexation has been very limited. Prior to 1933, only town residents who resided or owned property within the limits of the territory being annexed could challenge an annexation. Towns themselves could not challenge an annexation, nor could adjoining property owners. In 1933, the Legislature granted towns the right to challenge annexations of land within their territory. However, the Legislature was silent as to the rights of adjoining property owners.

Accordingly, the court concluded that the Legislature has not similarly authorized adjoining property owners to challenge annexations.

The court also refused to hear the Schaefers' challenge to the validity of the intergovernmental agreement. The court observed the general rule in contract law that only a party to a contract may enforce or challenge it. It also noted the exception to the rule, which allows a challenge to a contract by a third party who is the intended beneficiary of a contract. Finding that the Schaefers had made no claim to being either parties to the contract or third party beneficiaries thereof, the court held that they lacked standing to challenge the agreement.

Village of Slinger should limit challenges by adjoining property owners to annexations to which a City and Town have agreed. Few claimants will be able to allege damages beyond impairment of property values and quality of life. Accordingly, few will be able to show the requisite "legally protectible interest" that *Village of Slinger* demands.

The case also strengthens the enforceability of intergovernmental agreements against collateral challenge. It bars claims by residents challenging the validity of the agreements unless the residents can show that they were third-party beneficiaries of the agreements. This ruling should allow parties to intergovernmental agreements to negotiate and execute the agreements with greater confidence.

— Matthew D. Weber

Budget Repair Bill Preserves Municipal Revenue Sharing —For Now

The budget repair bill approved by the Wisconsin Senate and Assembly—each with the barest of margins—preserves municipal revenue sharing, at least for now. 2002 Special Session Assembly Bill 1.

The bill, awaiting vetoes and approval by Governor McCallum, used the funds received in Wisconsin's tobacco settlement as the major source for closing a \$1.1 billion deficit. The Governor's proposal to slash funds to municipal governments was roundly criticized, and the current budget does not impact those funds.

The budget does set aside \$45 million to go to municipalities who consolidate services. This provision has also raised some concern from municipal officials, since it will not take effect until 2004. Consolidation worked out before that could actually work to a municipality's disadvantage.

It also appears that the bill may have slashed the amount which municipalities will receive in payment for utility property, again commencing in 2003.

Although the budget repair bill fixes the immediate problem, the budget to be addressed following elections this November poses more significant concerns. It is estimated that the deficit will be at least as large as that in the current budget, but there will not be a pot of tobacco settlement funds available to close the gap.

— Michael P. May

Wisconsin Supreme Court Expands Municipal Immunity

The Wisconsin Supreme Court has greatly narrowed the “known danger” exception to municipal immunity in its recent decision in *Lodl v. Progressive Northern Insurance Co.*, 202 WI 71 (June 25, 2002). The *Lodl* case involves a motor vehicle accident that occurred when a storm knocked out traffic control lights at an intersection in the town of Pewaukee. The town police department had dispatched an officer to investigate the blackout at the intersection. The officer testified in a deposition that he had unfolded stop signs attached to the traffic control polls. He then called dispatch to have another officer sent to the intersection. Another officer arrived about two minutes later, put on a bright rain coat and grabbed a flashlight. He also called for backup and requested portable stop signs to be brought to the intersection. There was a dispute between the parties as to whether the officer attempted manual traffic control before the collision. *Lodl*’s witness testified that no officer was directing traffic at the time of the collision.

Lodl sued, claiming that the second officer was negligent in the manner of directing traffic and that the town was liable under respondeat superior. The Circuit Court granted the town’s motion for summary judgment on the ground of municipal immunity. The Court of Appeals reversed, stating that the uncontrolled intersection presented a known danger, giving rise to a duty by the officer to act. The Court of Appeals found that the factual dispute as to whether the officer took any action prevented summary judgment and remanded for trial.

The Supreme Court reversed the Court of Appeals and reinstated the summary judgment in favor of the officer and the town. The Court reasoned that the focus must be on whether the act that was allegedly negligently performed or omitted can be characterized as ministerial due to the known dangerous circumstances. *Id.* at ¶42. The Court of Appeals had stated the issue on remand as being whether the officer had taken any action in response to the circumstances. The Supreme Court explained that it was not enough to require the officer to “do something.” Instead, the dangerous situation must compel “a particularized, non-discretionary action on the part of the responding officer.” *Id.* at ¶46. *Lodl* contended that the officer had a duty to perform manual traffic control. Because there were a variety of actions that could have been taken by the officer, and because there was no duty by statute or regulation that the officer undertake manual traffic control, the Supreme Court found that there was no exception from immunity under the “known danger” rule.

Justice Bradley, joined by Justice Abrahamson, filed a dissenting opinion. They criticized the majority for collapsing the “known danger” rule into the ministerial duty exception to immunity. The dissent’s careful analysis appears to correctly describe the effect of the majority’s ruling, which is to effectively almost eliminate the “known danger” rule and to expand municipal immunity.

Before *Lodl*, there was a trend toward plaintiffs arguing that accidents were caused by dangerous situations known to a municipality and arguing that the “known danger” rule created an exception to municipal immunity. This will be much more

difficult after *Lodl*. It is now incumbent on plaintiffs to establish that there is only one course of action that can be taken to remedy the danger. If there are alternatives available to the public official for responding to the dangerous circumstances, then discretionary immunity will apply. There may still be some distinction between the ministerial duty exception and the “known danger” exception. This may occur in circumstances where, although no manuals or regulations prescribe a particular course of action, the time for response and the circumstances are such as to narrow the options available to the official. For example, in *Linville v. City of Janesville*, 174 W.2d 571, 497 NW.2d 465 (Ct. App. 1993), aff’d 184 W.2d 705, 516 NW.2d 427 (1994), the known danger exception was applied to abrogate immunity for a negligent failure to attempt an immediate rescue of occupants of a van submerged in a park pond. However, these extremely exigent circumstances are unlikely to occur frequently. The overall effect of the Supreme Court’s decision in *Lodl* is to severely curtail the usefulness of the “known danger” rule for plaintiffs.

— Mark J. Steichen

FCC Seeks Rehearing of Telco-Competition Case

In July, the Federal Communications Commission (“FCC”) filed a request for rehearing with the U.S. Court of Appeals of the D.C. Circuit. The Commission wants the federal court to reconsider its ruling in *United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”), a decision that will limit the FCC’s authority to create rules to promote competition in the local telephone and high-speed data markets.

In *USTA*, the Court placed limits on the number of network elements incumbent local exchange carriers (“ILECs”) must make available to their competitors, competitive local exchange carriers (“CLECs”). The Court also overturned an FCC order requiring the unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services. According to the Court, the FCC’s order “completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).”

In its request for rehearing, the FCC complained that the Court’s decision was contrary to decisions of the United States Supreme Court upholding the FCC’s authority to set the prices that ILECs may charge CLECs to lease the incumbents network elements. The FCC claims the Court overstep its authority “especially in a case like this one involving disputed economic arguments and a complex technical and regulatory background.” Pointing to a recent Supreme Court decision, the FCC argued that the D.C. Circuit had adopted specific economic and policy assumptions rejected by the Supreme Court as a basis for imposing limitations on an ILEC’s obligation to make its network elements available to CLECs at cost-based prices.

— Anita T. Gallucci

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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