

# MUNICIPAL LAW NEWSLETTER

**BOARDMAN**<sup>LLP</sup>  
LAW • FIRM

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## Wisconsin Supreme Court Splits on Attorney-Client Privilege Exception to the Public Records Law

On June 22, 2004, an equally divided Wisconsin Supreme Court affirmed the District III Court of Appeals' ruling in *GPS Inc. v. Town of St. Germain* without addressing the merits. Justice Sykes did not participate. The court of appeals decision, which was reported in the August 2003 newsletter (available on the Boardman website), remains unpublished and without precedential effect.

The case arose out of an open records request to the Town of St. Germain for documents pertaining to the denial of a zoning variance application. The town withheld three documents on the grounds that they were protected by the attorney-client privilege. The documents included a cover letter from the zoning board chairman to the board's attorney, a legal memorandum drafted by the

attorney, and proposed findings of fact and conclusions of law regarding the specific requests for variances. The circuit court held that the documents had to be disclosed because they actually represented actions of the appeals board that are required to be open records under Wisconsin law, and because none of the records in question contained communication that was intended to be confidential. The appeals court reversed, finding that the documents were privileged, and the town was entitled to invoke attorney-client privilege to prevent disclosure.

Due to the split by the Supreme Court, municipalities are wise to remain cautious in relying on the confidentiality of communication with an attorney regarding facts that are otherwise publicly available.

— Mark J. Steichen

### Boardman Seminar on New Overtime Rules: Key Impacts on Public Employers

Are you ready for the new Department of Labor overtime rules that will be effective August 23? It's not too late to get up to speed on how these rules will affect your employees and what steps you need to take. We will cover key issues including:

- Can your office staff be exempt?
- Can you dock an employee's pay for disciplinary reasons?
- What are the new "safe harbor" rules?

Please join us on Thursday, August 5, for this complimentary seminar to review the new rules and get your questions answered!

**SEMINAR LOCATION:**  
Lower Level Conference Center, U.S. Bank  
One S. Pinckney Street  
Madison, Wisconsin

**TIME:**  
Registration 8:00 a.m.  
Seminar 8:30-10:30 a.m.

**TO REGISTER:**  
Call Rita Heyerholm (608) 293-1794 or  
E-mail Rita at [rheyholm@boardmanlawfirm.com](mailto:rheyholm@boardmanlawfirm.com)

## Courts Embrace New, More Liberal Standard For Area Variances

This newsletter has chronicled the explosion of litigation over the standards for obtaining area and use variances ignited by the Supreme Court's decision in *State v. Kenosha County*, 218 Wis. 2d 396 (1988). Most recently, the June issue reported on the Supreme Court's decision in *State v. Waushara County*, 2004 WI 56, confirming the distinction between use and area variances and the application of the "unduly burdensome" test in place of the "no reasonable use" test. Decisions wending their way through the appellate system continue to demonstrate the real, practical consequences of the new test, which is easier for property owners to meet.

On June 22, 2004, in an unpublished decision, the third district court of appeals affirmed a judgment upholding variances granted to two applicants in Sawyer County. *Town of Bass Lake v. Sawyer County Bd. of Appeals*, Appeal Nos. 03-2386 and 03-2387. The variances issued by the board allowed the property owners to remove dilapidated buildings and replace them with new buildings that violate the lot size and setback restrictions contained in the county zoning ordinance. The lots had been created long before the zoning ordinance was established. The lots are very small and irregularly shaped and were subject to setback restrictions from every side. It would have been impossible, in the absence of the variance, to build any reasonably-sized structure.

The town challenged the variances under the old "no reasonable use" standard before the Supreme Court's decisions in *Ziervogel* and *Waushara County* were issued. In addition to arguing that the owners failed to meet the prior standard, the town contended that: 1) the owners failed to prove that the variances were in the public interest; and 2) that the board had considered improper factors when it approved the variances - namely the fact that the area had been subdivided long before the zoning ordinance was enacted.

As to the public interest, the court found that the primary purpose of the ordinance was to promote aesthetics. Because the buildings were legal nonconforming uses and could not be substantially repaired without spending more than 50% of their current fair market value, the court found that granting variances to raze the old buildings and construct new ones would improve the appearance of the area and increase property values in line with the purpose of the ordinance. Finally, the court rejected the town's argument that *Clark v. Waupaca County Bd. of Adj.*, 186 Wis. 2d 300, 303, 519 N.W.2d 782 (Ct. App. 1994), precluded the board from considering, in its discretion, the timing of the zoning ordinance in relation to when the buildings were constructed.

While the decision is not recommended for publication, it does emphasize that the court of appeals has readily embraced the spirit of the new standard, which has imbued boards of adjustment with great discretion.

— Mark J. Steichen

## Uniform Rule Established in Tax Assessment of Federally Subsidized Housing

The Wisconsin Court of Appeals recently limited the discretion of tax assessors in determining the value of federally subsidized housing. *See Mineral Point Valley Limited Partnership v. City of Mineral Point Board of Review*, Appeal No. 03-1857, decided July 15, 2004. It held that, when an assessor uses the income approach to assess such housing, he or she must use a capitalization rate that includes the actual rate of mortgage interest, rather than the federally-subsidized rate. The effect of the decision will be to substantially reduce the assessed value of such properties.

The case involved an apartment complex in the City of Mineral Point that was built by a limited partnership in 1990 under the Rural Rental Housing Program, § 515 of the federal Housing Act of 1949. The partnership financed the project with loans bearing interest at a rate of 8.75%. Under the Rural Rental Housing Program, the federal government subsidized the loans, so that the net interest rate paid by the partnership was 1%. In return, the property was subject to numerous conditions and restrictions, including a provision limiting the partnership from receiving annual income from the property exceeding more than 8% of the owner's original equity payment.

The City assessor used the income approach to determine the value of the property. The income approach converts the future benefits likely to be derived from the property into an estimate of its present value. It is often used for subsidized housing due to the difficulty of finding comparable sales data. One of the steps in applying the income approach is to determine a capitalization rate, which is based in part on the mortgage rate.

The Mineral Point City Assessor used the 1% interest rate in determining the capitalization rate for the partnership property. As a result, he valued the property

at \$491,200. The partnership objected, arguing that the assessor should have used a figure closer to the market rate of 8.75%. Applying the partnership's figure would yield a value of \$178,000 for the property.

On appeal, the Court of Appeals acknowledged that "the amount at which property is valued can vary depending on matters of judgment and expertise." Accordingly, the court ordinarily defers to assessors and boards of review. However, the court rejected the idea that an assessor should have discretion in choosing whether to use the subsidized interest rate or the market interest rate in determining the value of a property. As the court explained:

"A property cannot, at the same time be worth both \$491,200 and \$178,100, when the only difference in the values is whether a subsidized mortgage interest rate or a market interest rate is used. Two identical and adjacent real estate properties cannot have full values that differ by over 100% whether they lie in the same or adjoining municipalities."

The court emphasized that a uniform rule is particularly important for federally subsidized housing because it is harder to value. Often the programs that subsidize housing also restrict its resale. Consequently, there is less market data available for such properties. Moreover, by definition, it is not comparable to commercial, unencumbered property. As a result, subsidized housing tends to be vulnerable to more diverse assessments.

In determining what uniform rule should govern the assessment of federally subsidized housing, the court turned to its earlier decision in *Bloomer Hsg. Ltd. v. City of Bloomer*. In that case, the court of appeals affirmed a trial court's determination that a city assessor should have used the market rate of interest to determine the value of housing developed under the § 515 program, instead of the subsidized interest rate. Similarly, in this case, the Court of Appeals held that, consistent with *Bloomer*, "a capitalization rate based on a subsidized interest rate is impermissible, and that a market rate must be used, together with 'all the other factors influencing value,' to produce the fair value of the partnership's real estate."

Although the *Mineral Point Valley* court chose to follow *Bloomer*, it clearly was not required to do so. The *Bloomer* case involved an unusual situation in which no deference was due to the assessor or board of review. Thus, the fact that the Court of Appeals in *Bloomer* upheld the use of a market rate of interest in determining a tax assessment did not necessarily mean that it would strike down the use of a subsidized rate in another case, where it typically shows deference to a tax assessor and board of review. The fact that the court did choose to strike it down is an indication of how strongly it is committed to the principle of bringing uniformity to such assessments.

This decision is expected to be published in the official reports.

— Matthew D. Weber

## New Case on Paying Overtime

The Court of Appeals recently ruled that language in a collective bargaining agreement did not trump Wisconsin's wage statute that requires wages to be paid within 31 days of when they are earned. *Milwaukee Police Ass'n v. Hegerty*, (Case No. 03-3081, June 2, 2004).

Under Wisconsin law, employers must pay employees all wages within 31 days of when the wages were earned. Wis. Stat. §109.03(1). The requirement to pay all wages within 31 days does not apply if a collective bargaining agreement establishes a different frequency of wage payments. The affected employees in this case were paid bi-weekly, but were not necessarily paid for all overtime earned in the 12 days immediately preceding their bi-weekly paychecks. Rather, they received all overtime pay within 31 days of when the overtime wages were earned. The employees contended that their respective collective bargaining agreements established that all wages, including all overtime wages, were required to be paid within twelve days of being earned rather than the statutory 31 days.

The collective bargaining agreements ("CBAs") included language stating that if provisions of the CBA conflicted with other applicable laws, then the CBA would be subject to or "trumped" by the applicable laws. The employees argued that this language in the CBAs effectively incorporated a provision in the Milwaukee City Charter Ordinance that requires officers and employees of the City of Milwaukee to be paid bi-weekly. They argued that the "bi-weekly paycheck" provision meant that their bi-weekly paychecks must include all overtime earned within the twelve days preceding issuance of the bi-weekly check.

The Court of Appeals rejected the employees' argument, ruling that there was no conflict between the ordinance and the CBAs. Specifically, the Court ruled that the ordinance's requirement that employees be paid bi-weekly did not conflict with the CBA in any way because nothing in either the CBA or in the ordinance said how soon overtime compensation must be paid after it was earned. Thus, the 31-day provision under Wis. Stat. §109.03(1) was, by default, the applicable time frame by when overtime wages must be paid.

— Jennifer S. Mirus

# MUNICIPAL LAW NEWSLETTER

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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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