

MUNICIPAL LAW NEWSLETTER

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FCC Approves Pass Through of Cable Franchise Fees

In a decision released in early October, the Federal Communications Commission ("FCC") announced that cable operators may pass through to consumers the entire amount of the franchise fee assessed by the local franchising authority, including franchise fees from non-subscriber related revenue, such as income from advertising sales and home shopping commissions. The FCC also ruled that such amounts may be itemized on monthly subscriber bills. The FCC's action was in response to separate petitions filed by the cities of Pasadena, California; Nashville, Tennessee; and Virginia Beach, Virginia, challenging such practices by their local cable operators.

Under the Telecommunications Act of 1996, cable companies pay franchise fees to the local franchising authorities (usually a municipality) to compensate the municipality for the companies' use of the public rights-of-way. Pursuant to the Communications Act, calculation of franchise fees is limited to 5% of the cable company's gross revenues derived from providing service within the franchise

area. The FCC determined that the federal franchise fee statute does not prohibit a cable operator from passing through the full amount (or any portion) of the franchise fee to subscribers, including the portion derived from non-subscriber revenues. The FCC also clarified that, under the statute, cable companies may itemize franchise fees separately on subscriber bills to inform subscribers about the portion of their bill that is paid to the local franchising authority.

The FCC said it hopes that both cable operators and local franchising authorities will use this decision as an opportunity to negotiate reasonable franchise agreements and franchise fees that put consumers at the forefront of their discussions. The FCC stated that if local franchising authorities and cable operators do not want to burden subscribers with higher franchise fee pass throughs, they may modify their franchise agreements by expressly omitting certain items, such as advertising revenue and home shopping commissions, from the gross revenue definition.

— Anita T. Gallucci

Municipality As Developer

Can a local government become a subdivider/developer of land it owns, when the product will be platted lots that will be sold as homesites to private buyers?

This is what the Town of Beloit embarked upon with a "greenfield" parcel it owned on the Rock River north of the City of Beloit. The Town claimed it did not need the land for governmental purposes and that it could not find a private developer to develop it. Some City offi-

cially doubted that the 20 acre waterfront parcel had no attraction to private developers and speculated that the real issue was that the Town could not find a private developer who could be trusted not to annex the land to the City.

In any event, the Town invested in surveying and engineering and plans for extension of utility services to the site, hoping to increase the tax base of the town.

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Municipality As Developer

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The Town was not able, however, to reach agreement with the County over subdivision review standards. Among other things, the County wanted a buffer strip to protect the Rock River and its shoreline. The Town resisted and sued to challenge the conditions of County plat approval. Citizens and a local environmental group intervened in support of the County conditions, and also questioned whether a Town can become a subdivider. The Circuit Court held that the town government had no authority to act as a developer of lots for sale.

A Court of Appeals decision upheld the Town's role as subdivider and sent the case back to the local court to hear the Town's challenge to the County's conditions. The decision will likely be petitioned for appeal to the Supreme Court.

The Court of Appeals found authority for the Town to act as a subdivider under the village powers in Wis. Stat. s. 61.34(1), (3), and (5). Section 61.34 (1) states that a village's enumerated powers are limited only by express language and the court found no express limitation.

Another issue is whether the Town may assume the dual role of subdivider and reviewer of a proposed plat under Wis. Stat. ch. 236. The court decided that nothing in ch. 236 expressly prohibits a town from subdividing lands it owns. Once again the court noted that a town's general powers to act for the good order of the town, for its commercial benefit, and for the health, safety, welfare and convenience of the public are to be limited only by express language. Moreover, a review of statutory law led the court to conclude that the legislature has considered and approved municipal bodies acting in the dual role of subdivider

and reviewing authority. Lastly, the Town board is not the sole reviewing authority: the Town's Plan Commission, the City of Beloit Plan Commission, the Rock County Zoning Committee, and the State must also review the subdivision. Therefore, the court concluded that the Town was not prohibited by Wis. Stat. Chapter 236 from both proposing and reviewing the subdivision plat.

Finally, the court found that Town did not violate the public purpose doctrine by expending public funds for a private purpose. The Town claimed public purpose in the open space buffer, even though the Town was contesting that buffer. While the court agreed with the Interveners that the Town has and will expend significant tax revenues for its efforts to develop the subdivision, it cited the Town's arguments that the development of a subdivision will promote orderly development of the area, increase tax base, and likely result in profit to the Town. The Court found these considerations comparable to those previously found by Wisconsin courts to constitute a public purpose.

The court did not address the issue of a local government putting taxpayer dollars at risk in a speculative commercial venture. Courts in the distant past did express concern with officials who have a fiduciary responsibility with respect to the tax dollars taking the kind of business risks ordinarily undertaken by players in the private marketplace.

Wisconsin was once the national leader, at least rhetorically, in what the "sewer socialists" of decades ago called "public enterprise." At least for now, public enterprise lives to see another day.

Attorney Richard Lehmann advised the City of Beloit in reviewing the Town's subdivision submittal, although that review was not part of the lawsuit.

— Richard A. Lehmann

LEGISLATIVE UPDATE

BILL TOPIC/STATUS

AB 113 Municipal Residency Requirements

Introduced 2/13/01. Referred to Committee on Urban and Local Affairs. Public Hearing held 4/3/01. Recommended for passage, as amended, 4/11/01 (3-2 vote). Referred to Committee on Rules 4/18/01. Assembly Amendment 2 offered by Representative Stone, which inserts the following language: "(d) This section does not affect any local ordinance or resolution that requires a village manager to reside within the village for which he or she is the village manager."

AB 233 Sale of a Municipal Utility

Introduced 3/20/01. Referred to Committee on State and Local Finance. Public Hearings held 3/29/01, 4/12/01, 4/20/01 and 4/26/01.

AB 518 Municipal Telcos Ban

Introduced 9/28/01. Referred to Committee on Information Policy and Technology.

SB 23 Municipal Cable TV

Introduced 1/23/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs. Public Hearing held 4/11/01. Recommended for passage (9-0 vote) 5/2/01.

SB 248 Municipal Telcos Ban

Introduced 9/20/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs.

These bills were discussed in previous Municipal Law Newsletter articles. You may check the current status of a bill on the Internet at <http://www.legis.state.wi.us/billform.html>.

Insurance Coverage for Environmental Claims: The Saga Continues

Cases involving insurance coverage for environmental claims continue to percolate through Wisconsin appellate courts. On October 2, 2001, the District III Court of Appeals issued a per curiam decision in *State of Wisconsin v. City of Rhineland*, Appeal No. 00-2666, a landfill remediation case. The State had sued the City and other defendants seeking damages and cleanup of a landfill that was polluting a nearby stream and the groundwater. The City tendered the defense of the lawsuit to the insurance companies that had provided liability coverage to the City over the span of several years. The companies denied that their policies afforded coverage, but did provide the City with counsel to represent the City's interest. Nonetheless, the City continued to retain and pay its own attorney to assist with the lawsuit.

The insurers sought summary judgment on the grounds that the claims in the lawsuit did not constitute "damages," as that term had been defined in the *Edgerton* case, 184 Wis. 2d 750 (1994). The Court declined to grant summary judgment, concluding that at least part of the State's claim was for "damages" covered by the policies. Thereafter, the parties negotiated a settlement. The City agreed to pay part of the cost of remediating the landfill and the State agreed to forego collection of damages.

Once the settlement was completed, the insurance companies providing primary coverage renewed their motions for summary judgment. This time the trial court agreed with the insurance companies. The Court reasoned that the liability

policies did not promise to indemnify the City for losses arising out of the settlement for the very reason that the stipulated settlement did not include payment of anything defined as "damages."

The result was different for General Casualty, the insurance company that had written an umbrella liability policy for the City. The umbrella policy did not limit its coverage to "damages," but instead promised to pay "losses" for which the City was liable. The trial court held, and the Court of Appeals agreed, that the term "losses" is broader than the term "damages."

General Casualty also sought to avoid coverage under the umbrella policy by relying on the "known loss" doctrine. This doctrine provides that insurance coverage does not extend to losses already known or in progress when the policy begins. On this issue, the court determined that summary judgment was unavailable because there was a factual dispute as to whether the City knew or should have known when the policy term began that a claim was likely.

The Court of Appeals affirmed all of the decisions of the trial court. It found that the primary insurers were entitled to summary judgment under the *Edgerton* standard. It also found that the primary insurers were not obligated to pay for the attorney specially retained by the City since they had paid for competent counsel of their own choice to represent the City's interest. The Court of Appeals further affirmed the trial court's reading of the umbrella policy. It held that the umbrella policy afforded coverage for the amounts paid in settlement even though the primary policies did not.

This decision highlights the importance of carefully checking the language of all potentially applicable policies when searching for insurance coverage of environmental claims.

— Catherine M. Rottier

Eugene, Oregon Wins ROW Fee Case

The Oregon Court of Appeals recently upheld two gross revenues based fees imposed by the City of Eugene on telecommunications companies for use of local rights-of-way ("ROWs"). *AT&T Communications of the Pacific Northwest, Inc., et al v. City of Eugene*, No. 16-98-12672; A105861 (Or. Ct. App. October 31, 2001). Challenging the ROW fees were AT&T Communications and AT&T Wireless, who argued that Eugene's 2% annual registration fee and its 7% annual license fee on all telecommunications companies using local ROWs exceeded the city's state law authority and violated Section 253 of the Telecommunications Act of 1996. The court of appeals upheld Eugene's ROW fees, reversing a lower court decision invalidating the fees. The court found that Eugene had state law authority to impose the ROW fees under the city's home rule authority. Eugene's home rule charter confers upon the city "all authority not specifically denied

by state or federal statute or constitution." The court found that such broad home rule authority included the power to impose taxes and the challenged ROW fees.

With respect to federal law, the court found that the ROW fees were not preempted under Section 253 of the Telecommunications Act of 1996. The court rejected the companies' argument that Section 253 restricts municipal ROW fees such that municipalities may only recover the costs associated with ROW use. The court next rejected the companies' claim that Eugene's ROW ordinance was unlawful because it established licensing and regulation requirements. The court also rejected the companies' claim that municipalities may only impose ROW regulations, ruling that local ordinances should not be invalidated unless they actually prohibit or have the effect of prohibiting entry into the telecommunications market.

— Anita T. Gallucci

An Interpretation of Covenants With Lessons for the Interpretation of Ordinances

On June 1, 1999, the Pertzsches' purchased property on Upper Oconomowoc Lake. As required in the controlling covenants, they provided the Upper Oconomowoc Lake Association's Architectural Control Committee (Committee) with plans for the construction of a home and a detached, lakeside boat house. The Committee denied their request for the boat house.

The Pertzsches challenged the Committee's decision and won in the trial court. The court reasoned that the Committee's reliance on the fact that no other lakeside boat house existed rendered its decision arbitrary and capricious since the covenants allowed boat houses. The Wisconsin Court of Appeals affirmed.

The covenants were contained in an agreement executed in 1961. The paragraphs relevant to this dispute provide in part:

- (1) "No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single family dwelling ...except that a boat house may be permitted with consent of the Architectural Control Committee."
- (2) "No building shall be erected, placed, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Architectural Control Committee as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation and setback..."

The Court of Appeals concluded that under the explicit terms of the covenants, the Committee is authorized to approve or deny a request for a boat house exclusively on the basis of the standards set forth in paragraph two. The court found no merit in the Association's assertions that paragraph one expressly prohibits detached structures and that paragraph one is a "stand alone" provision that authorizes the Committee to make determinations without regard to the standards in paragraph two.

The grounds for the Committee's refusal included the boat house's failure to conform to existing structures and its failure to be in harmony of external design with existing structures with respect to topography, elevation, and setback.

Under paragraph two of the agreement, the first criterion the Committee is to consider is quality of workmanship and materials. However, the Committee's denial letter does not state that the workmanship and materials are unacceptable. Therefore, the court assumed the Committee had no objection to the boat house based on this criterion.

The second criterion is harmony of design with existing structures. The Committee construed this standard to mean that

it can deny a detached boat house because it is out of character with the existing structures in the community. Under this interpretation, the Pertzsches' boat house would fail because there are no other detached, lakeside boat houses. The Court of Appeals found that the Committee misconstrued their mandate. The key word according to the court is "design." In order for the Committee to deny the boat house within the terms of this criterion, it would have to make a decision based on the specific external design of the boat house compared to the design of other existing structures. The denial letter is silent with respect to this matter.

The third criterion that the Committee must consider is location with respect to the "topography and finish grade and setback, front, back and side." Under the court's interpretation, the Committee can reject a building design or plan if the Committee does not approve of the configuration of its surface features with respect to its surroundings. The denial letter showed that the Committee mistakenly believed it was authorized under this standard to reject the boat house because it was within fifty feet of the lake. The explicit language of paragraph five states that this restriction applies only to dwellings: "No dwelling shall be located on any lot nearer than fifty feet to the lakeshore." To assume that "dwelling" includes a boat house strains the language beyond its logical meaning. Later in this paragraph it states: "No building shall be located nearer than ten feet to an interior lot line." This later sentence would include boat house while the former sentence would not.

The court found that the Committee's grounds for refusal expressed in the denial letter show that the Committee misconstrued its mandate. The Committee has no authorization to use the standards in the covenant to effectuate an express prohibition of detached, lakeside boat house when the agreement expressly allowed such structures to be built. The Committee failed to base its denial on the three standards set forth in paragraph two of the agreement. The court cited the Wisconsin rule that deed restrictions must be strictly construed to favor unencumbered and free use of property and any derogation of such use must be expressed in clear, unambiguous and preperemptory terms. Finding that the Committee was not authorized to refuse the Pertzsches' request for a boat house for the reasons stated in the denial letter, the Court affirmed the order of the trial court.

While this is a covenant case, and, therefore, does not deal with governmental rules on boat houses and lakeshore setbacks, it does have lessons for wording and interpreting regulations.

This case is recommended for publication. *Pertzsch v. Upper Oconomowoc Lake Association*, Case No. 00-2514.

— Richard A. Lehmann

Sheboygan Not Liable for Flooding

The City of Sheboygan is not liable for flood damage arising from the failure of its storm sewer system to capture all the storm water from a 1998 storm event. Such is the decision of the Court of Appeals, District II, in *Anhalt v. Cities and Villages Mutual Insurance Company*, Case No. 00-3551 (decided October 24, 2001).

Eighty City residents brought an action against the City after sustaining damage to their homes and personal property due to flooding. The residents alleged that the City was responsible for the flooding based on claims of: (1) negligence, (2) private nuisance, (3) inverse condemnation, (4) waste, and (5) deprivation of property in violation of 42 U.S.C. §1983. The trial court dismissed all claims, and the Court of Appeals affirmed.

The storm sewer system in the area the residents all lived in was designed by the City engineer's office in 1944. One subsequent study of the storm sewer system concluded that the storm sewer was adequate to convey the runoff from a 2-year rainfall event, but not a 5-year event. Another study recommended improvements to the sewer system to provide for protection from 100-year events.

On August 6, 1998, there was an unusual and abnormally heavy rain in the City of Sheboygan which caused significant damage to personal and real property. Residents commenced this litigation thereafter.

The residents asserted that the City failed to design, construct, maintain and operate a storm sewer system with sufficient capacity to drain storm water, and that the City failed to follow the recommendations of its consultants who advised implementing a system to handle a 100-year storm event. The court held, however, that the acts of designing, planning and implementing a sewer system are discretionary legislative acts for which a governmental body cannot be held liable. The residents contended that this municipal immunity should not persist once the City has knowledge that a dangerous condition exists. The court rejected this argument stating:

the conception of the original plan for designing and installing the sewer system was an exercise of official judgment. Whenever, thereafter, serious flooding began to appear, governmental judgment and discretion had to be exercised with respect to whether and how to remedy the situation. The rising cost of providing a remedy compared to other exigencies facing the City are fiscal determinations for responsible city officials to make. While the decision to refuse to implement a 100-year storm event system has become increasingly untenable, it is nonetheless an exercise of legislative judgment and discretion. The remedy for the residents, therefore, lies in their power to vote rather than in the judicial system.

The residents' private nuisance claim was dismissed on the grounds that the City has no obligation to collect stormwater. The court noted that if the City does collect stormwater, it then takes possession of such water and assumes responsibility for it, and in that case the City may be liable in nuisance for subsequently discharging the water onto adjoining property. But where the City never collects the storm water, the City is not liable for damage caused by that uncollected water.

The inverse condemnation claim was dismissed because the flooding at issue involved a temporary invasion of property, rather than a permanent invasion of the land. Again the court noted the distinction between this case and collected water cases where the City's collection of water in the sewer system and its act of discharging water it had collected onto private property could constitute a taking.

The residents' §1983 claim was based upon their claim that their equal protection rights have been violated because the City used different design criteria for the storm sewer system for different areas in the City. The court quickly rejected this argument saying that the fact that the City implements different design standards in various parts of the City does not create any inference of an intent to discriminate or indicate that the City has acted irrationally.

— *Lawrie J. Kobza*

Wisconsin Assembly Approves Increased Utility Shared Revenue Payments to Municipals

On November 6, 2001, the Wisconsin Assembly approved a bill which would increase the shared revenue payments to municipalities within which utility property is located. By a 96-2 vote, the Assembly approved Substitute Amendment 1 to AB-584.

Under current law, utility property is not taxed by the local unit of government. However, local units receive shared revenue from the state utility shared revenue fund. Current law limits the amount of property used to calculate the shared revenue to \$125 million in any municipality, and also includes a limitation on the total payments to any municipality of \$300 per resident.

AB-584 increases the limit of property used to calculate the utility shared revenue payment, commencing in 2003, until it reaches a maximum of \$250 million in 2006. In addition, if the utility plant is built on an existing site or a brownfield site, an additional payment is made to the municipality. The bill also increases the limit on the payment per resident.

The bill has been referred to the Senate Utilities Committee.

— *Michael P. May*

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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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