

MUNICIPAL LAW NEWSLETTER

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U.S. Supreme Court Issues Important Pole Attachment Decision

The U.S. Supreme Court, in an opinion released January 16, 2002, determined that the Federal Communications Commission (“FCC”) has jurisdiction over pole attachments used by (1) cable operators to provide both cable service and high-speed Internet access service and (2) wireless providers of telecommunications services. *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, Case No. 00-832 (January 16, 2002). In so holding, the Court reversed a decision by a federal court of appeals, which had overturned the FCC on both determinations, holding that neither cable operators providing Internet access service nor wireless providers of telecommunications services are covered by the federal statute governing access to utility poles and attachment rates. See *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) and Section 224 of the Communications Act of 1934 (“Pole Attachment Statute”).

At stake are the attachment rates privately owned electric and telephone utilities may charge cable operators and wireless providers for use of their poles, as well as the type of service providers to which the utilities must allow access to their poles. The Pole Attachment Statute mandates that pole owners allow certain providers of cable television and telecommunications services access to utility poles. The Statute also gives the FCC authority to determine just and reasonable rates for “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or con-

trolled by a utility.” In making such determinations, the FCC must apply two different rate formulas set out in the Statute: one applies to pole attachments “used by a cable television system solely to provide cable service” (the “cable rate formula”), and one for attachments “used by telecommunications carriers to provide telecommunications services” (the “telco rate formula”).

The effect of the Supreme Court’s ruling is two-fold. First, pole owners must grant access to their poles to both wireless providers of telecommunications services and cable operators providing Internet access service. Second, the rates pole owners can charge such providers are regulated by the FCC. Thus, pole owners are not free to charge “market rates” for use of their poles. The Supreme Court decision leaves in place a previous FCC ruling that it would apply the Pole Attachment Statute’s cable rate formula in determining the reasonableness of pole attachment rates charged to a cable provider of Internet access service. Thus, pole owners cannot unilaterally charge such cable operators rates in excess of the cable rate formula. The cable rate formula generally results in rates that are as much as 67% less than the rates that can be charged under the telco rate formula. While the FCC has previously concluded that wireless providers of telecommunications services have the same attachment rights as wireline providers, it has not as yet determined whether either of the two rate formulas applies to wireless providers.

— Anita T. Gallucci

Supreme Court Flexes Muscles in Carpal Tunnel Case

In a trend favorable to municipal employers, the United States Supreme Court continues to narrowly interpret the Americans With Disabilities Act (“ADA”). In *Toyota Motor Manufacturing v. Williams*, 534 US (2002), the United States Supreme Court was asked to decide whether or not an employee with carpal tunnel syndrome was a “qualified individual with disability” under the ADA. The Supreme Court held Williams was not disabled because she failed to show that she was substantially limited in performing “manual tasks” that are of central importance in her daily life.

Ella Williams worked in an automobile manufacturing plant. Toyota required employees in the plant to rotate through four of the manufacturing processes. Two of those processes involved use of the arms in a constant repetitive motion at or above shoulder height. Whenever Williams worked in these two areas, she began to experience pain in her neck and shoulder. She was diagnosed as having nerve root compression that caused pain in the upper extremities. Because of this, Williams requested that Toyota accommodate her condition by allowing her to perform these two processes that did not involve work with extended or raised arms. Toyota rejected this request and required Williams to continue to work through the processes. Williams’ physician then restricted her from work of any kind at the plant and Toyota terminated her employment on the basis of poor attendance.

The issue in the case was whether Williams was disabled under the ADA so as to require Toyota to reasonably accommodate her disability.

Under the ADA, an employer is required to provide reasonable accommodations to those employees that have “a physical impairment that substantially limits one or more major life activities.” In this case, Williams contended she was substantially limited in her ability to perform several life activities including “manual tasks.” The Federal Court of Appeals had earlier decided that Williams was substantially limited in her ability to perform a class of manual activities. In reaching this conclusion, the Court of Appeals interpreted the ADA expansively.

The Supreme Court overruled the Court of Appeals’ expansive interpretation. The Supreme Court carefully examined the ADA’s language and interpretations of the statutory language put out by the agencies empowered to enforce the ADA. In doing so, the supreme court provided substantive guidance as to the definition of various terms used in analyzing whether an employee is disabled within the terms of the ADA.

For example, the ADA requires that any physical impairment substantially limit the employee. The Supreme Court defined the phrase “substantially limited” as meaning the employee is “unable to perform a major life activity that the average person in the general population can perform.” Factors to be considered in making that assessment include the nature, severity, duration and impact of the impairment. The Supreme Court specifically stated that those impairments which only interfere in a minor way with the performance of manual tasks are not “substantial.”

The central issue in the Williams case was to what extent the ability to perform “manual tasks” must be impaired in order to

qualify the individual as disabled. The Court of Appeals concluded that an employee only had to show the impairment affected a “class” of manual activities related to work. The Supreme Court concluded that rather than just affecting a “class” of manual activities, the physical impairment has to severely restrict the individual from doing activities that are of central importance to most people’s daily lives. It also concluded that such impairment must be either long-term or permanent.

In reaching this conclusion, the Supreme Court stressed that manual tasks performed in the workplace (e.g., squeezing a hydraulic punch machine) by an employee because of a physical impairment are not “necessarily important parts of most people’s lives.” In particular, the Supreme Court noted that “occupation-specific tasks may have only limited relevance to the manual task inquiry.” Thus, just because an employee is unable to perform certain aspects of his or her job does not necessarily lead to the conclusion that the employee is substantially limited in performing manual tasks.

In this case, the employee was able to perform all activities of daily living outside of the workforce notwithstanding her physical impairment. The Supreme Court noted that symptoms related to carpal tunnel syndrome are usually occupationally related and generally do not interfere with a person’s ability to perform those central tasks that an average person performs in daily living.

The significance of this decision for municipal employers is that we now have definitive guidance regarding the meaning of the ADA in a particular class of cases which are routinely seen in municipal settings. The fact the Supreme Court has narrowly defined the scope of what constitutes a substantial limitation of manual tasks makes it more likely that municipal employees will not fall within the scope of the ADA protection.

It is important to note what the Supreme Court did not decide in this case. The Supreme Court specifically addressed whether or not there was a substantial limitation in Williams’ ability to perform manual tasks. It did not decide whether or not Williams was substantially impaired in her ability to perform the daily activity of “working.” In order to show she was disabled under this category of daily activities, Williams would have to show that she was disqualified from a broad range of jobs for which she was eligible. Although it is unclear from the opinion, we suspect that she would have a hard time proving she was disqualified from a broad range of eligible occupations.

The Supreme Court directed the Court of Appeals to continue its analysis of the case in light of the definitions and rulings made by the Supreme Court. We suspect the Court of Appeals will address the issue of whether or not the employee who exhibited the carpal tunnel syndrome was substantially limited in the activity of working.

The ADA continues to evolve through interpretation by the United States Supreme Court. The ADA requires a particularized and individualized assessment of the applicability of its provisions to each employee claiming rights under the ADA. We strongly suggest consultation with counsel when analyzing the rights of any employee who has a physical impairment and makes a request for accommodation with respect to his or her job task.

— Steven C. Zach & Jennifer S. Mirus

Court of Appeals Upholds Annexation Decision Against Town of Windsor

In a Per Curiam opinion, the Wisconsin Court of Appeals has upheld a lower court decision dismissing a challenge by the Town of Windsor to annexation of 234 acres of town property by the Village of Deforest. In dismissing the challenge, the Court held that applying the rule of reason to review an annexation does not include evaluating whether the annexing municipality is pursuing reasonable growth policies or has adequately researched its decision. In addition, the Court rejected the town's estoppel challenge to the annexation on the grounds that, among other things, the village did not have the authority to bargain away its annexation powers, as the town contended.

The case involved a portion of 723 acres owned by the former ABS Global, Inc. (ABS). Under a previous development agreement, the parties agreed that the village would annex only a 489 acre parcel of the property, leaving the other 234 acres in the town's jurisdiction. The village annexed the 489-acre parcel in 1998. However, after ABS and the town developed differences, at ABS's request, the village annexed the remaining 234 acres in 1999.

The town brought several claims against the village's annexation of the 234-acre parcel. First, it argued that the annexation violated the rule of reason because the village allegedly had no present or future need for it. Second, it asserted breach of contract and estoppel claims against the developer and the village. The trial court dismissed all these claims and the town appealed.

In its decision, the Court of Appeals reaffirmed that the rule of reason test applied to annexation requires that the annexation involve no arbitrary exclusions or boundary irregularities; that there be some reasonable present or demonstrable future need for the annexed property; and that there be no other factors that would constitute an abuse of discretion. Applying this test, the Court found that the village's longstanding policy to increase tax base through industrial and commercial development, combined with evidence that the annexation would improve the balance of commercial and residential development in the village and that the village board believed it would have few other opportunities to annex commercial land, constituted a *prima facie* case that there was some reasonable need for the annexation. In so finding, the court rejected as immaterial the town's assertions that the economic benefit was questionable and that the village had not adequately researched the project. The court held that the village "is free to pursue the policy of balanced development, whether economically wise or not."

The Court also rejected the town's argument that the village did not have the authority to annex the 289-parcel by virtue of its previous agreements with the town and the

developer. As described in the briefs and the appellate decision, these intergovernmental agreements were informal. The development agreements were more formal, but the town was not a party. Instead, the town sought recognition as a third-party beneficiary. The Court found reason to dispute the town's reading of the agreements, and then, tracking an argument raised by the village itself, reasoned that even if the village had agreed by contract not to annex the parcel in question, such an agreement would not invalidate a subsequent annexation since municipalities may not bargain away their governmental functions or powers.

A copy of the decision may be obtained on the web at <http://www.wisbar.org/res/capp/2001/00-3421.htm>.

—Richard A. Heinemann

Federal Court of Appeals Upholds FERC RTO Policy

A federal appeals court decision issued on December 11, 2001 rejected challenges to the Federal Energy Regulatory Commission's "Order 2000," which lays out the Commission's regional transmission organization ("RTO") policy. In its decision, the U.S. Court of Appeals for the D.C. Circuit cited a lack of "injury in fact" in rejecting appeals by two investor-owned utilities. However, the decision permits the utilities to make their case in other forums.

One of the appeals challenged the Commission's alleged presumption in Order 2000 that RTO's will be cost-effective and argued that the Order violated the Federal Power Act because it does not require RTO applicants to demonstrate cost-effectiveness as a means of ensuring that only RTOs in the public interest are approved. The Court of Appeals rejected this argument since FERC agreed that cost-benefits must be considered in evaluating specific RTO proposals. The Court then found that the proper forum to consider the argument was in a proceeding to evaluate the merits of such a proposal.

In the second appeal, the utility challenged Order 2000 for not prohibiting outright the passive ownership of RTOs by market participants. This argument was rejected by the Court on the grounds that the appellant suffered no injury by the mere possibility of passive ownership. Once again, the Court found that the argument was best considered in the context of a specific proceeding to evaluate an actual RTO application.

The Court of Appeals' decision affirms the authority of the Commission to continue developing its RTO policy. However, the decision's emphasis on the right of utilities to challenge aspects of the RTO policy in other fora suggests that the Commission's future RTO decisions are likely to undergo vigorous legal scrutiny.

—Richard A. Heinemann

Updated Recycling Operation Remains Legal Nonconforming Use

The Court of Appeals recently held that the addition of a modern rock crushing machine to a road construction business did not deprive it of its legal nonconforming use status. *Racine County v. Cape*, Appeal No. 01-0740 (Ct. App. 12/5/01) (publication recommended).

Cape operated a road and utility construction business since the early 1960's. It removes concrete from construction sites, stockpiles the materials on its property and eventually reuses it in future projects. Cape had utilized a variety of methods to break the concrete into smaller pieces for recycling. In 1992, Cape added a portable concrete crusher to its operations and neighbors complained about the noise it created.

The county brought an action for a zoning violation and sought a declaration that the rock crusher represented an illegal expansion of the use that invalidated the entire nonconforming use. The county argued that the crusher was a new use, because it produced gravel, rather than the larger and more irregular pieces created by earlier methods. The circuit court granted summary judgment to the county.

On appeal, the court addressed the standards for legal nonconforming uses. The court analyzed the facts in the light of *Waukesha County v. Seitz*, 140 Wis. 2d 111 (Ct. App. 1987) (Seitz I) and *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18 (Ct. App. 1994) (Seitz II). In Seitz I, a marina owner operated a lake resort providing cottage rentals, boat livery, and fuel and bait services. The court held that expanding the resort by enlarging the pier and docking more boats did not constitute an illegal expansion of the nonconforming use. In that case, the court held that "a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it." 140 Wis. 2d at 117-18. By the time of Seitz II, the marina owner had added a retail store and an entertainment lounge, and was also engaging in boat sales. The court held that the expansion into new uses at the marina constituted a change of the nonconforming use that rendered it invalid. The court explained that an identifiable change occurs when the type of goods or services provided changes. 187 Wis. 2d at 27. The addition of the retail store, lounge, and boat sales constituted a significant change in the character of the services offered to the public.

In applying the Seitz I and Seitz II rationale, the court in *Cape* rejected the county's argument that the reduction of concrete to gravel was an identifiable change in use. The court acknowledged that the gravel crusher was significantly more efficient than other methods of breaking concrete, but noted that the law allows a nonconforming business to incorporate modern technology. The court also rejected the argument that Cape's continuing use of older methods together with the rock crusher represented a change in the essential character of the use.

The court considered it significant that the gravel produced by the crusher was still used by Cape in its own projects and was not sold to outside customers. The court also noted that the ordinance did not prohibit the production of gravel, but rather the

crushing and stockpiling of concrete. The particular uses prohibited by the ordinance, therefore, were not changed. Concrete was still brought to the site, stored, broken into smaller pieces and recycled at Cape's own projects just as it had been in the past.

The Cape decision clarifies the scope of permissible changes to nonconforming uses. The key issue is what uses are prohibited by the ordinance and identifying the essential nature of the nonconforming use. Modernizing an operation or expanding the volume or frequency of a nonconforming use will not render it invalid. However, adding new uses, changing the products or services generated by a nonconforming use, or the outlet for the products or services (industrial versus wholesale or retail) may subject it to being declared invalid.

— Mark J. Steichen

Dismissal of \$100 Million TV Tower Lawsuit Affirmed on Appeal

Skycom, Inc. has a long history of attempting to place a massive 1700 foot television tower in the middle of the rural Town of Elba in Dodge County. Skycom first obtained an FCC permit for the tower in 1988, but had met with refusals for permits from the Wisconsin DOT Bureau of Aeronautics and other bodies. In the mid-1990's, the Town denied an application for rezoning of 200 acres of farmland from exclusive agriculture to extended commercial to allow for the tower. Skycom sued and the decision was affirmed by the circuit court and, in 1997, it was affirmed by the court of appeals.

In Spring, 1999, Skycom filed new applications for a zoning text and zoning map amendment to allow for construction of the tower. The town was considering modifications to its zoning ordinance and adopted a moratorium on any zoning changes. Skycom then sued the town board and the town board chairman and a supervisor individually for adopting the moratorium and for failing to approve the zoning change. The complaint alleged various constitutional claims including takings and denials of due process and equal protection. Skycom sought \$100 million in compensatory damages for lost earnings over the life of the proposed tower.

The town and individual defendants moved to dismiss the action for failure to state a claim. The circuit court agreed with the town and dismissed all claims. Skycom then moved the circuit court for reconsideration and for leave to file an amended complaint. The circuit court denied the motions. Skycom filed an appeal of the order of dismissal, but its appeal was dismissed as untimely. It then appealed the circuit court's decision denying its motion for reconsideration and for leave to amend its complaint. The court of appeals held that the issues raised by the motion for reconsideration were barred by the untimely appeal of the underlying order for dismissal. The court of appeals did address Skycom's motion for leave to amend its complaint, but affirmed the denial of the motion as a reasonable exercise of the circuit court's discretion.

The Town of Elba and the individual defendants were represented by the Boardman Law Firm.

— Mark J. Steichen

City Potentially Liable for Razing Buildings

The City of Milwaukee faces potential liability for damages arising out of the razing of three commercial buildings after the Court of Appeals reversed the entry of summary judgment for the city. *Smith v. Williams*, Appeal No. 00-3399 (Ct. App. 11/29/01) (recommended for publication).

Smith, a property owner, sued the City of Milwaukee, its building inspector and Chinn, a contractor hired to demolish several commercial buildings. Smith's property had been condemned and the City obtained an order to raze the buildings under Wis. Stat. § 66.05(1m). Smith pursued an administrative appeal, but was unsuccessful. He then applied for a permit allowing him to raze the buildings, which the City denied. Instead, the City contracted with Chinn to raze the buildings and required him to remove all debris from the property and to grade the site to the level of the adjoining lots.

Smith's complaint alleged that Chinn used improper "fill" on the property, including rubber and oil-based materials, truck tires, scrap wood and trash imported to the site. It further alleged that the property was graded higher than the adjoining property, that the property's drainage ditch was filled and that Chinn negligently pierced storage tanks. Smith alleged claims based on negligence, nuisance, trespass, waste, takings and breach of contract as a third-party beneficiary.

The City and Chinn each moved to dismiss the complaint on the grounds that section 66.05(3) was the exclusive remedy for challenging the raze order. The circuit court granted the motions. In reversing the dismissal, the court of appeals distinguished between claims relating to the City's authority to raze the buildings and claims relating to the manner in which the razing was carried out. The court noted that the entry onto a property pursuant to a raze order entered under section 66.05 is legislatively sanctioned and could not be considered a trespass. Under the plain language of that section and section 893.76, Stats., an application for a restraining order is the exclusive remedy to challenge the reasonableness of a raze order and such an application must be filed within 30 days of service of the order. However, the court noted as a matter of logic and statutory language, that claims relating to the manner in which a raze order is carried out could not be asserted in an action for a restraining order because these actions occur before the razing is accomplished.

Smith also complained that Chinn had not credited him for valuable salvage materials on the property. Under section 66.05(2)(a), when a raze order is issued, a municipality must sell salvage and valuable materials at the highest price obtainable and the net proceeds after deducting the costs of razing and restoration must be remitted to the circuit court for distribution. The municipality may obtain a lien against the property for the expenses incurred in razing and restoring the property. Again, claims relating to credits for salvage materials and the amount of any lien could not be addressed in an action for a restraining order, which occurs before the property is razed.

The court of appeals did not decide whether any of the claims raised by Smith stated a cause of action and remanded the matter for further proceedings. The court of appeals limited its decision to the issue of whether section 66.05(3), Stats., provided the exclusive remedy for all issues relating to razing of property because that was the sole ground relied upon by the circuit court. The court held that section 66.05(3) is the exclusive remedy for claims relating to the reasonableness of the raze order, but not to claims arising out of the manner in which razing is carried out and to issues regarding salvage credits and the amount of any lien for expenses. On remand, the City and contractor are free to pursue any other defenses they have to the claims.

— Mark J. Steichen

Supreme Court Hears Argument on Seniority/ADA Issue

The Supreme Court recently heard oral argument on an ADA case which addressed the issue of whether a company-wide seniority plan for company vacancies trumps ADA provisions which require as a reasonable accommodation the placement of a disabled person under the ADA in a vacant position for which the employee is qualified to work. The conflict exists between the most senior, qualified employee eligible for the position and the disabled employee attempting to secure his or her ADA rights of accommodation. Under negotiated labor contracts between an employee union and management, the Seventh Circuit Court of Appeals has held that the negotiated seniority system trumps the right of ADA applicants for a vacant position. The issue in this case involves seniority systems established outside the scope of a collective bargaining process.

We will publish the holding in that case as soon as the Supreme Court announces its decision.

— Steven C. Zach

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.

AB 584 Utility Share Revenue Payments

Introduced 10/18/01. Referred to Committee Energy and Utilities. Assembly Amendment 1 offered and public hearing held 10/25/01. Recommended for passage (9-0 vote) and referred to Committee on Rules 10/29/01. Assembly Substitute Amendment 1 offered, amendment 3 to Assembly Substitute amendment offered and adopted 11/1/01. Amended Assembly Substitute Amendment 1 passed (96-2 vote) 11/6/01. Received in the Senate 11/14/01. Referred to Committee on Health, Utilities, Veterans and Military Affairs. Public hearing held 12/5/01.

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) 5/7/01.

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>.

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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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