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### SPEAKERS' FORUM

February 16, 2005

**Variance Law and Practice**  
American Planning Association  
Zoning Clinic  
National Audio/Web  
*Richard A. Lehmann*

April 7 & 8, 2005

**Practical Guide to Zoning and Land Use Law in Wisconsin**  
National Business Institute  
Milwaukee & Madison, WI  
*Matthew D. Weber*

## TABOR Returns Would Also Impact Municipal Utilities

The legislature is expected to take up the so-called Taxpayers Bill of Rights (TABOR) early in the 2005-2006 legislative session. TABOR is a proposed constitutional amendment which would impose spending limits on the state, school districts, and local governmental units. Electoral approval would be required before a governmental unit could exceed the constitutional spending limits or issue bonds.

Governmental spending would be limited to the prior year's spending plus inflation as measured by the Consumer Price Index, plus for local governments an increase related to new construction. The term 'governmental spending' is not defined in the proposal being floated around. However, a representative from the office of Rep. Frank Lasee, the author of the proposal, indicated that all types of governmental spending are intended to be covered by the amendment—even spending by a municipal utility.

The proposed amendment also requires, generally, that a govern-

mental unit receive electoral approval to increase taxes, issue new bonds, or exceed its spending limit. For a municipal utility, this would mean that a referendum would have to be held if the utility needed to spend more than its constitutional limit (the prior year's expenses plus inflation) even if this spending would be paid for by utility rates approved by the Public Service Commission. A referendum would also be required to issue bonds for a utility construction project.

The proposed constitutional amendment provides that a local governmental unit may exempt itself from any new mandate imposed by the state that is not fully funded. However, this exemption would not apply to federal mandates. This means that a new federal mandate would have to be paid for out of existing revenue—or the public would have to pass a referendum authorizing increased expenditures.

A proposed constitutional amendment requires adoption by two successive legislatures and ratification by the people before it can become effective.

—*Lawrie Kobza*

## Property Tax Exemption Committee in Disarray

The Legislature's Special Committee on Tax Exemptions for Residential Property is in disarray. Six months after it first met, the Committee still has no clear idea of its policy goals, let alone how to achieve them.

The Committee was formed in response to the Supreme Court's decision in *Columbus Park Housing Assoc. v. City of Kenosha*, 2003 WI 143, which held that benevolent organizations that rent

affordable housing to the poor are not entitled to a property tax exemption for that housing. The Supreme Court's ruling was politically unpopular, and the Legislature almost immediately adopted a law granting the exemption that the Supreme Court declared did not exist. It simultaneously directed the creation of the Special Committee on Tax Exemptions for Residential Property.

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## Property Tax Exemption Committee in Disarray

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The Committee's charge is to study the effect of granting a property tax exemption for residential properties that benevolent associations own and lease to others, and to develop proposed legislation. Specifically, the Committee is to consider the effect of such an exemption on: municipalities, property taxpayers, residents of tax-exempt housing, the availability of financing for development of low-income housing, and the benevolent activities of tax-exempt organizations. Legislators, nonprofits, developers, municipal officials, and residents of currently exempt housing serve on the Committee.

### Senior Housing

Chief among the issues that divide the Committee is the proper treatment of senior housing. Although most on the Committee would grant a property tax exemption for modest housing rented to poor seniors, there is presently no agreement on what some deem "luxury" housing for seniors. At issue are retirement communities that provide substantial services and facilities for their residents. Often, these developments charge a substantial up-front fee for the privilege of living there. In return, residents are assured that they will receive the medical care and assistance they may require as they age.

Some on the Committee feel that these senior housing developments do not deserve a subsidy. They want to reserve the property tax exemption for the truly needy. Others on the Committee argue that these senior housing developments provide an important social benefit by ensuring that seniors will be cared for as they age, rather than becoming dependent on the public welfare. These members also contend that to eliminate the property tax exemption for such developments is to punish seniors who have planned responsibly for their future.

### Low-Income Housing

There is also no agreement on whether, and what, low-income rental housing should be exempt from property taxes. Some feel that those who provide housing, without additional services, should not be entitled to a tax exemption. Others would grant an exemption to such providers, so long as "low income" is properly defined. In that regard, some on the Committee want to follow the IRS guidelines on what is deemed "low-income," while others want to use the household income limit that the State uses for the homestead tax credit (\$24,500). There is no indication yet on how a mixed-income development might be treated.

### Implementation

Even if the Committee members could agree on what properties to exempt from the property tax, they may

## Seventh Circuit Finds No Constitutional Violation In Sale of Religious Monument By City of LaCrosse

On January 3, 2005, the Seventh Circuit Court of Appeals issued its decision in *Mercier v. Fraternal Order of Eagles*, a case testing the constitutionality of the sale by the City of LaCrosse to the Fraternal Order of Eagles of a small plot of land in a city park. That small plot of land was home to a monument depicting the Ten Commandments. The Eagles had erected the monument in 1964 and donated it to the City the following year. The monument was dedicated to the LaCrosse area youth who helped protect the City against the ravages of floods in 1965.

For many years, the City maintained the public park and the monument without objection. In June 2001, however, the Freedom From Religion Foundation

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not be able to agree on how to do it. Some would allow the more "upscale" senior housing to be exempt from property taxes, but nevertheless require them to pay a fee for the municipal services they use. Others would require the fee to be equal to the value of the property times the municipal tax rate. Still others would set the fee equal to the municipality's cost of service per occupied dwelling unit times the number of occupied dwelling units in the development. Each of these formulas would yield a different result.

### Limited Agreement

Despite these and other areas of disagreement, a consensus does seem to be forming on some issues. Almost all Committee members would grant a property tax exemption to licensed nursing homes, licensed community-based residential facilities, certified or licensed adult family homes, certified residential care apartment complexes, domestic abuse shelters and homeless and transitional housing shelters.

### Next Steps

Committee Chair Jeff Fitzgerald (R-Horicon) seemed close to throwing in the towel at the Committee's meeting on January 14, 2005. However, Committee members pressed for continued efforts. Rep. Fitzgerald appointed a subcommittee to create another draft bill for the Committee's consideration, in the hope that a smaller group might make more progress. He did not give the subcommittee any express guidance as to what the next draft bill should contain. Nor did he establish another meeting date for the Committee. What happens next, and when, will depend on the progress that the subcommittee is able to make.

— Matt Weber

asked the City to remove the monument from the park, contending that its maintenance there violated the Establishment Clause of the First Amendment to the U.S. Constitution. The First Amendment provides in part that Congress shall make no law respecting an establishment of religion. This constitutional provision is applicable to the states and their subdivisions through the Fourteenth Amendment.

Seeking to avoid a constitutional violation, the City of LaCrosse in 2002 sold the small parcel of the public park on which the monument stood to the Eagles, who maintained a chapter house nearby. The Eagles purchased the plot of land for the fair market price assigned by the city assessor. The Eagles took over all responsibility for maintenance of the site and they installed a fence, stating that the monument on the property belonged to them. The City confirmed this information with signage on its own fence around the plot it had sold. The City elected these measures rather than pursuing the option of selling the monument to any of those parties who had offered to buy the monument and move it to private property.

The question before the Seventh Circuit was whether the City's sale of the small parcel and the monument to the Eagles was still an implied endorsement of a religious message and thereby a violation of the Establishment Clause. At the District Court level, Judge Barbara Crabb had found a constitutional violation, concluding that the City's transfer of a small portion of a city park to a fraternal organization so that a religious monument could remain in its historic location was, by itself, a governmental endorsement of religion.

On appeal, the Seventh Circuit disagreed. The Court held that a sale of real property by a governmental entity is usually an effective way for a public body to end its inappropriate endorsement of religion. The Court noted that the parcel sold by the City in this case was not land inextricably linked with the seat of government. The Court carefully explained that it was not endorsing the sale of patches of government land to various religious denominations as a means of circumventing the Establishment Clause. For example, no city could sell space under the dome of its city hall or the sidewalk in front of the courthouse steps to a private party that might choose to display a religious monument there. Such a sale would be an unconstitutional sham, the Court said, but the sale by the City of LaCrosse was not.

A three-judge panel decided the case. Judge Bauer dissented, opining that the solution selected by the City to correct its improper endorsement of religion was one that bordered on being a fraud. Municipalities will get further guidance on the constitutionality of religious displays on public property when the United States Supreme Court decides two cases that it accepted for review in October 2004. Those cases are *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*. Decisions in those cases are expected later this year.

— Catherine M. Rottier

## PSC Votes to Reopen Its Kewaunee Docket

On January 13, 2005, the Public Service Commission of Wisconsin unanimously decided to reopen the Kewaunee proceeding. The subject of the proceeding is an application by Wisconsin Public Service Corporation and Wisconsin Power & Light Company ("Applicants") to sell their Kewaunee Nuclear Power Plant ("KNPP") to Dominion Energy Kewaunee, Inc. ("DEK"), a special purpose entity affiliated with Dominion Resources, Inc., a Virginia holding company. In its December 16, 2004 Final Decision, the Commission declared that the proposed sale was not consistent with the public interest and rejected the application. Principal among the Commission's concerns was the loss of its regulatory jurisdiction over the plant. As the Commission explained:

Nuclear waste storage, decommissioning, and the reliability of Wisconsin's electric system will remain major concerns of Wisconsin citizens regardless of who owns KNPP. A loss of a meaningful role for the Commission oversight in these areas as a result of selling KNPP would significantly damage the interests of the public, and that concern outweighs the benefits associated with the proposed sale. Wisconsin deserves a local voice in these matters, but the terms of this proposal do not effectively preserve that voice. Accordingly the Commission concludes that the proposed sale is not consistent with the public interest. *Final Decision at 20.*

The Commission reopened the proceeding in response to a motion filed by the Applicants and DEK. The reopening request was based on three new conditions that DEK would be willing to accept should the Commission approve the sale. The conditions are supposed to give the Commission a more meaningful role in reviewing any subsequent sale of the facility and address decommissioning and reliability concerns.

The Commission has decided to consider the three new conditions without holding an evidentiary hearing. Rather, the parties and intervenors will have an opportunity to submit written arguments to address a list of issues that is to be prepared by the Commission's staff. The Commission may also hear oral argument in the case. The matter is on a fast track and a final decision by the Commission on the sale is expected in two to three months.

— Anita T. Gallucci

# 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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