

IN THIS ISSUE

- *Cities Must Produce Original Audio 911 Recordings for Copying*
- *A Wisconsin Election Controversy*
- *Time Limits on Conditional Uses*
- *New Lawsuit Required to Enforce Variance After Certiorari Review*
- *Midwest ISO Future Clouded by Withdrawal Announcements*
- *Wisconsin Municipals to Join Transmission Company*
- *PSC Denies Madison Water Utility's Request to Include Cost of Reimbursement Program for Private Lead Pipe Replacement in Water Rates*
- *Preventive Action With Respect to Future Flooding*

Cities Must Produce Original Audio 911 Recordings For Copying

The Wisconsin Court of Appeals recently ruled that cities must release copies of its digital audio tape recordings of 911 calls *State Ex Rel Milwaukee Police vs. Jones*, _____ Wis. 2d _____, _____ N.W.2d _____ (Ct. App. 2000) (No. 98-3629).

The Milwaukee Police Chief had received a public record request from Milwaukee Police Association (MPA) for a copy of a 911 call emanating from a particular address on June 18, 1997. The request specified that the copy was to be "in its original form - unaltered, unmodified and otherwise uncensored in any fashion." The Chief provided an analog tape recording which to the naked adult human ear was substantially as audible as the original tape. Counsel for the MPA submitted the tape to an expert who concluded that the original tape was necessary to conduct spectrographic and waveform review and enhancement of the tape. Thus the association asked that its expert be allowed access to the original 911 tape for the purpose of non-destructive analysis and/or the making of a digital analog tape. The Chief denied the second request.

The Court ruled that the chief had initially complied with the public records with public records law when the Chief denied the second request for access to the original tape for purposes of making a digital audio tape. The court commented at length that as technology advances and computer systems are refined, it would be sadly ironic if courts disabled Wisconsin open records law by limiting its reach. The court noted that under sec. 19.36(4), Stats, material produced as a product of a computer program is subject to the right of examination and copying. The court concluded that under this statute, the MPA was clearly allowed access to the 911 "source material" and the opportunity for examination and copying. Here, the MPA sought access to the original tape because it believed there were discrepancies between the original tape and the copy it received. The court was clear to clarify that the department was not required to utilize any special equipment for the purpose of copying. Rather, it had to make the tape available so that the MPA could bring in its own equipment to copy the tape.

- Laura Sutherland

A Wisconsin Election Controversy

Florida is not the only state to generate election controversies. In a decision issued on December 5, 2000, the Wisconsin Court of Appeals for District III weighed in on a challenged election for a seat on the Oconto County Board of Canvassers, District 20. The case is *Everett Carlson v. Oconto County Board of Canvassers and Barbara Smith*, Appeal No. 00-1788.

The election for the seat on the County Board of Supervisors resulted in 125 votes for Barbara Smith and 123 votes for Everett Carlson. Relying on Wisconsin Statute sec. 9.01, Carlson petitioned the Board of Canvassers for a recount. The Board found that one vote for Smith was not properly initialed. It was therefore set aside, reducing the margin of victory to one vote. The Board also found that two ballots had been cast by voters who did not reside in the district and had voted there by mistake. The Board took no further action because Carlson had already announced his intention to appeal to the circuit court.

Before the circuit court, Carlson called as witnesses the two voters who had voted in District 20 by mistake. Carlson did not ask them for whom they had voted. Thereupon, the trial court ruled that Carlson had failed to show that the challenged ballots would have made a difference in the election outcome. The court declared Smith the winner. Carlson appealed.

On appeal, Carlson argued that he did not have the burden of proving that the challenged votes would have changed the election results. The court disagreed, noting that an election honestly conducted ought generally to stand, notwithstanding individual electors may have been deprived of their votes or unqualified voters may have been allowed to participate. The Court held that, to challenge an election successfully, the challenger must show the probability of an altered outcome in the absence of the improper votes. Therefore, Carlson needed to show that the votes of the two illegal electors had been cast for Smith and not for him.

Carlson claimed that forcing such a burden of proof on him was unreasonable because a Wisconsin voter has an absolute right to ballot secrecy. Again, the court disagreed, citing sec. 905.07 of the Wisconsin Statutes, which provides that "Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally." Since the two voters in question had cast their ballots illegally, the privilege of nondisclosure did not apply to them.

Carlson's last argument was that it would be unreasonable to allow people to testify about how they had voted because they would know in advance how their testimony would affect the election outcome. The court acknowledged that Carlson's concerns were not unfounded and that such questioning might create a "potential for mischief," but nonetheless declined to prohibit such voter testimony. Where questions about the credibility of a voter's testimony arise, those questions may be addressed on cross examination, weighed by the fact finder and reviewed on appeal.

This decision is significant in emphasizing the standard a challenger must meet to overturn an election. Some states utilize a "reasonable uncertainty test," under which the chal-

lenger need demonstrate only that the outcome of the election is uncertain because the number of voided ballots exceeds the margin of victory between the candidates. Other states, including Wisconsin, adhere to the "outcome test," under which a challenger must show that the outcome would probably have been changed if the challenged votes were not counted. In Wisconsin, the outcome test applies in all cases except those rare circumstances where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness. In such exceptional circumstances, the election must be set aside even where the outcome of the election might not be changed.

— Catherine M. Rottier

Time Limits on Conditional Uses

A long-running land use controversy in Pierce County has produced four decisions of the Wisconsin Court of Appeals in the past 31/2 years. The decisions have dealt with a number of interesting legal issues, but all of the decisions have been unpublished and, therefore, do not have "precedent value."

The latest Court of Appeals decision was issued November 21, 2000. It contains two rulings on conditions placed on conditional uses.

The land use in question is a private airstrip. One of the conditions placed a 2-year limit on the permit itself. The purpose of the two-year limit was to allow the zoning board to monitor compliance with the other conditions, some of which dealt with operations of the airstrip. The permit was renewable at the end of the two-year term, but that renewal was not automatic. The order appeals upheld the condition, reasoning that the holder of the permit will not have investment-back expectations or a claim to equitable estoppel, since they know at the beginning that the permit will be reviewed in two years. This is a different situation than the zoning board pulling the permit or modifying the permit on its motion, with no provision for such cancellation or modification in the initial grant of the permit.

Another condition changed the alignment of the runway. The court could not identify any safety reason for the realignment. Instead, the court determined that the realignment was done as a political compromise to take the flight pattern away from a vociferous objector's property. This was not a sufficient reason to impose the condition.

Riviera Airport, Inc. v. Pierce County Board of Adjustments, 2000 WL 1725156 (Wis. App.)

— Richard A. Lehmann

New LawsUIT Required To Enforce Variance After Certiorari Review

In a recent decision, the District II court of appeals held that a town was required to file a new action in order to enforce the terms of a variance after they had been upheld in an earlier certiorari action. *Winkleman v. Town of Delafield*, 2000 Wis. __ (Ct. App. Oct. 25, 2000)(publication recommended).

The Winklemans owned a lot containing two non-conforming houses in the town of Delafield. The town zoning board of appeals granted the Winklemans a variance permitting them to exceed fifty percent of the fair market value of the property in repairs, but required as a condition that they raze one of the houses within three years. The Winklemans brought a certiorari action challenging the board's authority to impose this condition, but the circuit upheld the board's decision. After three years, the Winklemans failed to raze the house and the board sought to enforce the condition. The board brought a motion entitled "Motion for Further Relief" before the court that heard the certiorari case requesting that the court order the Winklemans to raze the house or permit the town to do so. The circuit court granted the motion, but the court of appeals reversed on the grounds that the circuit court lacked personal jurisdiction over the Winklemans. The court held that, in order to obtain personal jurisdiction over the Winklemans in an enforcement action, the board would have to commence a new lawsuit and serve the Winklemans with a summons and complaint.

The court of appeals is undoubtedly correct under the circumstances of this case. The Winklemans subjected themselves to the personal jurisdiction of the court during the pendency of the certiorari action. The certiorari court's personal jurisdiction over the Winklemans ended when it rendered its decision upholding the condition imposed as part of the variance. See *State ex rel. Iushewitz v. Personnel Review Bd.*, 176 Wis.2d 706, 710, 500 N.W.2d 634 (1993) (no continuing jurisdiction after determination of 1st certiorari case). In order for a court to obtain jurisdiction over the Winklemans again to enforce the variance after three years had passed, it was necessary to serve them with a new summons and complaint.

Some of the language in the decision, however, may mislead municipalities to infer that an enforcement decision could never be brought against a property owner in a certiorari action and that a separate lawsuit must always be filed. The court notes the limited nature of the statutory certiorari review remedy and then states that "the Board did not and could not have counter-petitioned the court on certiorari review to enforce the condition of the variance." *Id.* at ¶3. Later in the decision, the court distinguishes the review

nature of certiorari from the coercive nature of a civil enforcement action and concludes that "personal jurisdiction

in such a civil action must be established by service a summons and complaint or an original writ." *Id.* at ¶6. The court went on to state that "the reason is that this is an action in which the government, not the landowner, is seeking a remedy." *Id.*

While the language may seem to suggest this result, the court's decision should not be read to mean that an enforcement action may never be joined with a certiorari action or that the government must always serve the landowner with a summons and complaint in order to bring an enforcement claim when a landowner has commenced a certiorari action. It is important to note that the Winklemans were not yet in violation of the terms of the variance at the time the certiorari action was pending, so the board had no need to bring an enforcement claim at that time.

When landowners commence a certiorari action in the circuit court, they subject themselves to the personal jurisdiction of the court, not just for the remedy they are seeking against the municipality, but also for any counterclaims asserted by the municipality against the landowners. Rule 801.06. When a government is made a party to a certiorari action, it has the right to join any claims for relief it has against the landowners even if the relief sought is different in kind from the relief sought by the landowners. Rule 802.07. See *City of Racine v. Waste Facility Siting Bd.*, 216 Wis.2d 616, 575 N.W.2d 712 (1998)(counterclaim for declaratory relief brought in certiorari case).

This distinction is of some significance. The *Winkleman* court states that it takes no more appreciable time to serve a summons and complaint than it does to serve a motion. This is not necessarily true. A motion can be served by regular mail and can be heard as soon as the court is available. Rule 801.14. Service is complete on mailing whether it is received or not and may be sent to the plaintiffs' last known address. *Id.* Having to commence and serve a new lawsuit involves the payment of filing and service fees and no answer is due from the property owner for 45 days from the date of service. Moreover, it may take time to locate the landowner to personally serve the summons as required by Rule 801.11(1)(a).

The result in the *Winkleman* case is correct under the circumstances of the case. However, the language of the decision should not be read to prohibit enforcement actions from being filed as counterclaims in certiorari actions as a matter of law.

— Mark J. Steichen

Midwest ISO Future Clouded By Withdrawal Announcements

A recent spate of defections has clouded the future of the Midwest Independent System Operator ("Midwest ISO"). The exodus began in October when Illinois Power, citing the merger of its parent company (Dynergy Inc.) with Illinova Corp., announced its intention of withdrawing from what had been the nation's largest independent transmission system operator. Two other Illinois members of the Midwest ISO, Commonwealth Edison and Ameren, followed suit in November. On December 15th, six more members announced plans to withdraw, and the company's president and Chief Executive Officer, Matt Cordaro, resigned, leaving the company in the hands of its Executive Vice-President and Chief Financial Officer, James P. Torgerson.

As yet, there is no official word on what impact the intended withdrawals will have on the organization. Although the Midwest ISO operating agreement permits members to leave, withdrawals cannot take effect without a Federal Energy Regulatory Commission ("FERC") finding that such withdrawals are in the public interest. In their protest of the Illinois Power withdrawal announcement, Midwest ISO officials urged the FERC to reject the withdrawal application on the grounds that allowing utilities to switch from one regional transmission owner to another too rapidly or too frequently would undermine regional reliability.

There is also uncertainty as to when withdrawal can take effect. While Ameren, for example, has asked that its withdrawal take effect on November 1, 2001, the Midwest ISO, in its official protest of the withdrawal announcements, has maintained that there is no contractual basis for the effective date of any withdrawal earlier than five years after the execution date of the withdrawing member's original agreement to join the organization.

The uncertainty over the Midwest ISO's future has emerged at a time when FERC policy regarding regional transmission organizations ("RTOs") has become increasingly contested. In its RTO rule ("Order 2000") issued earlier this year, FERC offered utilities an opportunity for financial incentives to encourage RTO participation. The incentives generally take the form of "innovative" transmission rates designed to ease utility concerns about losing money on assets being owned or operated independently. In comments submitted to FERC in the Alliance Regional Transmission Organization compliance filing in October, the Midwest ISO protested the availability of such incentives for some utilities but not others, particularly members of existing utilities. In its comments, the Midwest ISO warned that the situation could become chaotic if existing RTOs began losing members because of the availability of

incentives elsewhere.

Despite the withdrawal announcements, the Midwest ISO remains on track to begin market testing in June, 2001 and become operational in November, 2001. Options currently being considered in response to developing market conditions include the Midwest ISO becoming a for-profit entity, advocating for rapid formation of a single RTO to encompass the entire Midwest, and continuing to recruit new members. The Midwest ISO will formally file with the FERC to be approved as an RTO by January 16, 2001.

— Richard A. Heinemann

Wisconsin Municipals To Join Transmission Company

As part of the reliability legislation included in the last Wisconsin Budget Bill, 1999 Wisconsin Act 9, a new company was created to own, construct and operate transmission facilities in eastern Wisconsin. The new company, American Transmission Company LLC (ATC) begins operation on January 1, 2001.

Under Act 9, Wisconsin municipalities that own and operate electric utilities have the ability to become equity owners in ATC, and through ATC, in the state transmission system. In addition to Wisconsin Public Power Inc., a municipal electric company with 30 members, at least twelve other municipalities in Wisconsin have taken advantage of this opportunity. The municipalities are: Algoma, Kaukauna, Manitowoc, Marshfield, Menasha, Oconto Falls, Plymouth, Reedsburg, Sheboygan Falls, Sturgeon Bay, Sun Prairie, Wisconsin Rapids, and Badger Power Marketing Authority (Badger is another municipal electric company, made up of the municipalities of Shawano and Clintonville).

Obtaining an ownership interest in the transmission grid will be used by most municipalities to reduce their cost of providing electricity to their customers — the residents and businesses located in those municipalities. ATC remains a public utility subject to regulation by the Federal Energy Regulatory Commission, which will set its rates for transmission service to utilities throughout the state.

— Michael P. May

PSC Denies Madison Water Utility's Request To Include Cost of Reimbursement Program for Private Lead Pipe Replacement in Water Rates

The Madison Water Utility (MWU) applied to the Public Service Commission (PSC) for authority to increase its water rates in the form of a 5.5 cents surcharge per hundred feet of water consumption. The intent of the surcharge was to reimburse customers with lead pipe laterals for one-half of the cost of their lead service replacement from the curb stop to the house, not to exceed \$1,000. MWU estimated the surcharge would result in an annual charge to an average residential customer of \$5.10 per year.

The lead service replacement program was required because MWU exceeded the action level for lead under the Lead and Copper Rule. The action level for lead is exceeded if more than 10% of customers sampled have concentrations above the action level of 15 ppb. Because of this exceedence, the law requires the addition of chemicals to the water in order to optimize corrosion control. The addition of chemicals in MWU's case, however, caused other problems, particularly with the sewerage district and the possible discharge of phosphorus to Madison's lakes.

As an alternative to chemical treatment, MWU obtained EPA and DNR approval to replace lead services provided that MWU ensured that private lead laterals were also replaced. Since MWU had no ownership interest in the private lead laterals, it could not undertake the replacement of these services itself. However, the City, by ordinance, could require homeowners to replace their lead laterals.

Requiring propertyowners to replace their lead laterals became a controversial issue in the City. Ultimately, however, a compromise was reached whereby the City would reimburse private propertyowners 50% of the cost of lead lateral replacement up to \$1,000. The Madison City Council passed this ordinance. Subject to PSC approval, the rebate program was to be funded primarily from the 5.5¢ surcharge.

The PSC in an October 18, 2000 order, denied MWU authority to include the surcharge in its rates. While the PSC agreed with MWU's decision to undertake lead line replacement as opposed to adding chemicals, the PSC felt that "it would be unreasonable and unjustly discriminatory if public program dollars generated through utility rates were to be authorized as a subsidy to furnish a direct benefit to an exclusive group of private property owners."

"The city passed the ordinance requiring property owners to replace their lead laterals. It therefore is the appropriate body with the necessary authority to provide any subsidy to assure the success of the replacement program. The Commission believes it would establish an unwise precedent for cash flows generated from charges to public utility customers to be put toward a subsidy which clearly and directly benefits a specific group of pri-

vate property owners."

The PSC's decision calls into question a municipal water utility's ability to address compliance issues in the most practical way possible. If MWU had determined to add chemicals to its water to comply with the lead rule, the cost of the chemicals would be included in utility rates. However, MWU was not able to include in rates an alternative compliance mechanism that would not have been required (the replacement of the private lead laterals) but for the violation of the lead rule.

- Lawrie Kobza

Preventive Action With Respect to Future Flooding

An unpublished decision of the Wisconsin Court of Appeals upholds the granting of injunctive relief calling upon a residential developer to modify a man-made pond so it will contain and direct a 25-year storm event without flooding down-slope properties.

The case was not brought under a stormwater management ordinance. It was a common law tort case between two neighboring private property owners, both of whom were real estate developers.

The key point of interest in the case is that the injunction was issued and subsequently approved by the Court of Appeals before any 25-year storm event resulted in any flooding. The basis for the issuance of the injunction was expert testimony that the parcel with the pond and the arrangements for waters discharging from the pond were inadequate in relation to the prevailing standard of the 25-year storm event.

The trial court held that injunctive relief can be granted at the discretion of the court where there is reasonable likelihood of future irreparable injury.

Future 25-year storm events were reasonably probable. Given the inadequate design of the discharge system (a fact that was not contested), it was reasonably probable that 25-year storm events would damage the neighboring residential development. While such damage could theoretically be "repaired" by the assessment of damages, the individual property owners who suffer the damages may not have damages that are individually huge in dollar value, and they may need to pursue repeated claims from one storm after another. This could make the pursuit of "repair" impractical. Therefore, before-the-fact injunctive relief is appropriate.

This case demonstrates that municipal stormwater and flood control programs with a preventive emphasis are on sound legal footing, especially in newly developing areas where there is no history of flooding on which to base the measures. Preventive measures require competent technical support, but do not necessarily require prior history of flooding, especially under future land use conditions.

Hubbard v. Peot Const., Inc., 2000 WL 1460765 (Wis. App. 2000)
— Richard A. Lehmann

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, (608) 257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin (MEUW) and the Municipal Environmental Group - Municipal Drinking Water Division.

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.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanlawfirm.com.

Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Christopher J. Dodge	283-1777	cdodge@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com
Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com
Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	rlehmann@boardmanlawfirm.com
Michael P. May	283-1737	mmay@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Laura M. Sutherland	283-1774	lsutherland@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

This newsletter is published and distributed for informational purposes only. It does not offer legal advice with respect to particular situations, and does not purport to be a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions.



© Copyright 2001, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED



Boardman, Suhr, Curry & Field LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

PRRSRT STD
U.S. Postage
PAID
Madison, WI
Permit # 1400