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SPEAKERS' FORUM

January 17, 2004:
Legal Liabilities and Responsibilities of Policymakers
APPA Policymakers Workshop
Scottsdale, AZ
Michael P. May

January 21, 2004:
Municipal Telecommunications Options for Your Community
MEUW & REC Joint Superintendent's Conference, Wisconsin Dells, WI
Anita T. Gallucci

Arrowhead-Weston Line Gets PSC Nod

The Wisconsin Public Service Commission has approved the 220-mile high-voltage power line from Wausau to Duluth, Minnesota known as the "Arrowhead-Weston" line. The Commission originally approved the line in October, 2001, but when the American Transmission Company LLC ("ATC") announced that anticipated costs had more than doubled, from \$165 million to \$420 million, the Commission had to take another look.

The Commission's 3-0 decision, issued on December 15, 2003, confirms the significance of the state's reliability concerns. It is widely believed by industry stakeholders, including the Energy Lifeline Coalition of Wisconsin, that the line will substantially improve the state's transmission infrastructure by reducing constraints on the state's only other 345 kV connection from the west, the King to Arpin line, which tripped in the summer of 1997 and was badly strained the following summer. The Energy Lifeline Coalition is an organization of customers and transmission end-users, including the Municipal Electric Utilities of Wisconsin.

The significant increases in cost have been linked to rising land acquisition costs, engineering upgrades and higher licensing fees. However, the Commission's approval reflects a finding by an independent auditor that the cost estimates for the project are reasonable. An alternative and potentially cheaper line from Eau Claire to Minnesota had been proposed, but the PSC expressed concerns about the viability of that

line, which was projected to affect more property owners and raise intense opposition, meaning that completion of the needed infrastructure improvement would have been considerably delayed.

While industry stakeholders applauded the Commission's decision, a vociferous and angry opposition immediately decried it. Representatives of a property-owners group known as Save Our Unique Lands ("SOUL") vowed that the line would never be built and repeatedly disrupted the Commission's public deliberations.

In addition to SOUL's opposition, which is expected to lead to additional litigation, numerous obstacles remain before construction of the actual project can begin. Approval from several county boards in northwestern Wisconsin are needed, as well as at least four county permits. Boards in several of these counties have expressed opposition to the project. The line also will need permission from the National Park Service to cross the Namegon River, which is a federally designated wild and scenic river.

Despite the Commission's unanimity, the approval process has itself raised questions about the state's infrastructure planning. According to PSC chairperson Burneatta Bridge, who was appointed to her position this year by Governor Doyle, the case underscores significant problems with how Wisconsin sites transmission lines. According to Ms. Bridge, the outcome of the case might have been different in the Eau-Claire-Minnesota alternative had been studied

Arrowhead-Weston Line Gets PSC Nod

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in greater depth. Nonetheless, the question the Commission decided was whether the Arrowhead-Weston line represented a reasonable choice to address a serious reliability need.

The Arrowhead-Weston decision is the second major infrastructure decision issued by the Commission this year. In November, the Commission approved the second phase of PTF-2, Wisconsin Energy's controversial plan to construct three new coal plants in Oak Creek, Wisconsin (see MLN, December, 2003). Some opposition groups argued that the PTF-2 approvals have obviated the need for the Arrowhead-Weston line, which is designed to facilitate the importation of power from the West. However, that argument was rejected by the Commission as short-sighted.

—Richard A. Heinemann

Two New Commissioners at the FERC

Joseph T. Kelliher and Suedeen G. Kelly are the newest members of the Federal Energy Regulatory Commission ("FERC"). Commissioners Kelliher and Kelly join Commission Chair Pat Wood III and Commissioners Nora Mead Brownell, and William L. Massey.

Commissioner Kelly's term expires on June 30, 2004. She was previously Professor of Law at the New Mexico School of Law and served as regulatory counsel for the California Independent System Operator. She also served previously as Chair of the New Mexico Public Service Commission.

Commissioner Kelliher's term expires on June 30, 2007. He was Senior Policy Advisor to Secretary of Energy Spencer Abraham. Before that, he served as majority counsel to the House Energy Committee, and also served on the Bush/Cheney transition team.

—Michael P. May

No Property Tax Exemption for Nonprofit Affordable Housing Providers

Nonprofit organizations that provide affordable rental housing to low-income families must pay property taxes for that housing, the Wisconsin Supreme Court ruled in November. See *Columbus Park Housing Corporation v. City of Kenosha*, 2003 WI 143.

At issue in *Columbus Park* was housing that the Columbus Park Housing Corporation ("CPHC"), a nonprofit organization, leased to qualifying low-income families who might otherwise be homeless. All of the occupants had incomes below the federal poverty level. CPHC provided the housing pursuant to the federal Section 8 housing program, under which CPHC received fair market rent for the units, but tenants paid no more than 30% of their income in rent. The difference was made up by subsidies paid by the Kenosha Housing Authority, which also required the tenants and CPHC to comply with certain other Section 8 conditions.

The general rule in Wisconsin is that all property is subject to taxation, unless a specific exemption is granted. CPHC argued that § 70.11(4), Wis. Stats., provides a specific exemption for nonprofit affordable housing providers, particularly those who participate in the Section 8 program.

Section 70.11(4), Wis. Stats., exempts from taxation "[p]roperty owned and used exclusively by . . . benevolent associations." It also extends this exemption to property that a benevolent association leases to others, provided that certain conditions are met. One of these conditions—the "lessee identity condition"—is that "the lessee would be exempt from taxation under this chapter if it owned the property." The Supreme Court explained in another case that the effect of this condition

is that "if the lessee itself is not an exempt organization but rather a for-profit organization, no exemption can be claimed on the leased part of the property." *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 93, 591 N.W.2d 583 (1999).

CPHC argued that its rental of housing to low-income occupants via the Section 8 program satisfied the lessee identity condition. It reasoned that although the occupants themselves were not exempt entities, the public housing authority was an exempt entity, and its substantial role in and control over the rental relationship justified extending the exemption to CPHC. Both the trial court and the court of appeals agreed with this analysis. The Supreme Court rejected it.

The crux of the court's analysis is that the public housing authority is not a "lessee" of the property, and therefore the lessee identity condition is not satisfied. The court emphasized that the authority does not occupy the property, and obtains no possessory interest in the property. Rather, the occupants sign leases directly with CPHA, making CPHA the lessor and the occupants the lessees. Under the plain language of § 70.11, the property tax exemption did not apply.

As a secondary argument, CPHA asserted that it should be exempt from property taxes as a matter of public policy. To this end, it emphasized that its tenants would likely be homeless but for the housing provided by CPHA. The court acknowledged that "Columbus Park's efforts to serve the poor are indeed laudable," but declined to create an exemption where the plain language of the statute provided none. Property tax exemptions are a matter of "legislative grace," not judicial fiat.

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In sum, “the legislative history of § 70.11(4) indicates that the legislature intended to exempt property owned and leased by benevolent organizations from taxation only when the property was leased to another tax-exempt organization under § 70.11.”

Justice Abrahamson stood alone in dissent. She noted that the majority’s interpretation leads to “an absurd result,” in that CPHA is deemed a benevolent association because it provides low-cost housing to the poor, and yet it “qualifies for a tax exemption [only] so long as it does not rent its properties to low-income individuals.” To avoid this result, Justice Abrahamson would adopt the analysis used by the Court of Appeals.

Columbus Park will have a substantial impact on the finances of nonprofit rental housing providers in those communities that previously granted tax exemptions to such providers. Due to restrictions imposed under the specialized financing the providers typically use, they have little ability to raise additional revenue by, for example, increasing rental fees. Nor is it likely that they will be reimbursed for property tax payments under federal housing programs. For CDBG and HOME grantees, payment of property taxes would be eligible only if considered a soft cost as part of a development project or other type of assistance. For Section 8 and Supportive Housing Program (“SHP”) grantees, who provide housing for the homeless, property taxes are generally not eligible for reimbursement.

However, because a property tax exemption for nonprofit rental housing providers was not clearly mandated by statute, it is not clear how wide-spread the practice of granting an exemption has been. Those communities that have granted an exemption in the past should notify recipients that the practice will not be continued so that the organizations can begin planning to meet their tax obligations next year. Communities should also review the terms of any agreements related to payments-in-lieu-of-taxes and take action to terminate them.

— Matthew D. Weber

Land Use Day In the Supreme Court

The Wisconsin Supreme Court scheduled three land use cases for oral argument on December 4, 2003—*State ex rel. Ziervogel v. Washington County Board of Adjustment*, Appeal No. 02-1618; *State v. Waushara County Board of Adjustment*, Appeal No. 02-2400; and *Town of Delafield v. Winkelman*, Appeal No. 02-0979.

All three cases involved older homes or cottages, small by today’s standards, that the owners want to upgrade and expand. The structures have nonconforming status. They do not comply with current zoning regulations, and the modifications proposed by the property owner go beyond the level of repairs that a nonconforming structure is allowed. Therefore, zoning variances were requested.

The first two cases heard by the court involved lakefront lots. The building expansion proposed in one case (*Ziervogel*) was a vertical addition that would comply with the maximum building height standard. The building footprint was entirely within the 75 foot lakeshore setback. The building expansion proposed in the second case (*Waushara County*) was a sideways expansion and parallel to the lakeshore. The footprint of the existing house was also within the shoreland setback. Neither of these expansions would move the footprints closer to the shore.

In the vertical expansion case, the Board of Adjustment denied the variance. In the sideward expansion case, the Board of Adjustment approved the variance, but the Circuit Court reversed when a court appeal was brought by the DNR. The Board denial of the vertical expansion variance and the Court denial of the sideways expansion variance were both based on the Wisconsin Supreme Court’s 1998

decision in *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), holding that a variance cannot be granted if the property retains a reasonable use without the building expansion. Both of the houses are habitable and, therefore, the properties have a reasonable use.

The two lakeshore variance cases heard on December 4th were the second opportunity the Court had to revisit the law established in the Kenosha County case, the first having been *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376, where the court divided into a group of justices who called for reversal of the Kenosha County rule and another group who joined in an opinion supporting a variance, but felt that estoppel factors in that case supported the variance, and a dissenting group that supported the Kenosha County rule.

The vertical expansion case was heard by five justices; Chief Justice Abrahamson and Justice Bradley did not participate. The sideways expansion case was heard by six justices, only Justice Roggensack did not participate.

Oral arguments were heard by the court. The arguments tended to bounce and ricochet from one question to another. The following issues emerged in the dialogues between the court and counsel:

1. If variances can only be granted where the regulations allow no reasonable use on the entire property, which may be a tougher test than the no economic use test for regulatory takings, then variances serve only to allow relief where regulatory takings would also allow relief. In a sense, they are redundant.

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2. The variance process should be able to ask: is there material harm to the lake from the building addition? How does this balance against the regulatory impact on the property owner. If the regulation really restricts the property owners to additions that will “not stick out like a sore thumb,” or impact public values in waters, shouldn't this alone be a basis for relief?
3. Is it a function of variances to authorize substantial compliance where full compliance creates too much burden on the property owner and where the public consequences of less than full compliance are acceptable? The State residential building codes, for example, require substantial compliance in construction, not strict compliance. Wis. Adm. Code Comm. 20.09(6) and allow variances that “will not (lower) the level of health, safety and welfare intended by the rule after overall impacts are assessed.” Comm. 20.19 intro. and (7)(c). One justice asked, whether building expansions of the sort in these cases aren't instances where the government could just look the other way?
4. In the sideways expansion case, there is no legal building envelop on the lot. The Lakeshore and road setbacks overlap. If there were no house there, the combined setbacks would allow no house to be built. If this would meet the no reasonable use test, a variance could be granted to allow....what? A minimal house, a normal (for the neighborhood) house? This issue snuck in because a normal house might be what each of these houses would be after the requested expansions.
5. Who should define variances? If variances are solely a safety valve for regulatory takings, then the court defines by defining regulatory takings. If variances are a statutory creature to grant relief in situations short of regulatory takings, then shouldn't the legislature define the tests to be met?
6. Are there different variance tests depending on whether property is in a city, village or town, or whether it is in the shoreland jurisdiction or uplands, or whether it is a local voluntary shoreland standard? The statutes for city/village zoning do have different wording than the statutes for county zoning, and Ch. NR 115 adds its own wrinkles. See § NR 115.05(6)(e), Wis. Admin. Code. Should the court blend a single test, as a matter of treating variance as a constitutional matter or a common law matter?
7. Should variances be harder to get if the variance is waiving or modifying application of a regulation that has a high public purpose? How will public purposes be ranked?
8. Aren't variances needed to counteract the government's constant pushing to reduce property rights? It was noted that NR 115 states a test for variances that is more liberal than the Kenosha County test, yet DNR pushed the courts to go beyond the test in its own administrative rule in the Kenosha County case and many later cases.
9. There was an undercurrent of effort to build an answer to the dilemmas created by the Kenosha County decision on the foundation of the Crooks/Wilcox concurring

opinion in Outagamie County. But, Chief Justice Abrahamson noted twice that that concurrence turned more on equitable estoppel than on variance law, and the two shoreland variance cases heard on December 4th had no issues of estoppel.

10. How does one read the failure of the Legislature to respond to the Kenosha County ruling? Has the Legislature acquiesced in the judicial legislating that was done in that case?

The third of the three cases had underlying issues in common with the first two, but major differences. For one thing, the lot was across the road from the lake. For another, the zoning in question was general town zoning, not county shoreland zoning. A single lot had two older cottages. Zoning does not allow two principal structures on a single lot, but the situation was grandfathered/nonconforming. However, remodeling/expansions are limited. The owner began remodeling/expanding one of the structures, with a permit that the town then essentially withdrew when it woke up to the nonconforming status. Eventually, a variance was granted to allow one cottage to be expanded if the other cottage was removed in three years. This condition was appealed to circuit court, but the appeal failed and the litigation was dropped.

At the end of the three years, the other cottage was not removed, the property owners arguing that the condition was unfair for several reasons, including the fact that they needed to rent it out to pay for the costs of the remodeling the cottage that got the variance. These are what the law calls equitable arguments.

The Town then sued for enforcement of the condition. The property owners asked the court to hear their equitable arguments, since the Town was asking for both a fine and a raze

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order. The Wisconsin Supreme Court held in 1998 (*Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715) that a court can consider equitable arguments by a zoning violator who is facing a governmental demand to move or raze a building. The Town argued that the property owners had the opportunity to argue their fairness points in the certiorari appeal of the variance. Granting that chance again allows “two kicks at the cat.” The Court of Appeals said the “we need the income” issue was raised and decided in the variance appeal, but the enforcement action court should hear any other equitable arguments that had not already been decided.

The situation was made more murky by the fact that the property owners hired a different lawyer at the enforcement stage, so the new lawyer could at least drop hints that, while a new hearing on equitable issues is a second kick at the cat, it’s at least a different kicker. And the murkiness increased when the new lawyer told the Supreme Court that the property is under County Shoreland zoning, which arguably trumps Town zoning, so maybe the Town never had jurisdiction to issue or withdraw the permit or even to consider the variance and the tear-down condition. And why wasn’t that issue raised years earlier in earlier proceedings? The new lawyer said, don’t blame me, I was not representing these people back then.

The Supreme Court justices who spoke seemed surprised that a single property might have two layers of zoning. Maybe appalled is more accurate. The justices seemed to sense that these cottages were not in tune with the current size and fanciness of lakeshore homes being built in Waukesha County’s lake country. The question of how limiting remodeling and forcing teardowns impacts housing affordability was raised and momentarily considered.

— Richard A. Lehmann

TRANSLink Suspends Development Activities

TRANSLink Management Development Co. announced a decision last month to formally suspend further development activities with regard to the formation of TRANSLink Transmission Company, a proposed independent transmission company. According to press statements, TRANSLink utility participants had asked the board and management to put development and operational activities on hold “due to continued regulatory and market uncertainty.”

TRANSLink participant utilities included Interstate Power and Light Co, of Iowa, a subsidiary of Alliant Energy; Xcel Energy; Dairyland Power Cooperative, Great River Energy and the Midwest Municipal Transmission Group, an association of Iowa and Minnesota municipal utilities. Plans had called for the company to operate and own transmission systems in portions of Colorado, Illinois, Iowa, Kansas, Michigan Minnesota, Nebraska, New Mexico, North Dakota, South Dakota Texas and Wisconsin, and to join the Midwest Independent Transmission System Operator (“MISO”).

TRANSLink’s demise further blurs the transmission picture in the Midwest region, which is continuing to wrestle with the problems of the MISO/PJM interface. The proposed independent transmission company had received general approval from the Federal Energy Regulatory Commission, as well as praise from a wide spectrum of industry stakeholders for its innovative highway/zonal transmission pricing model. However, the company ran into a number of state jurisdictional roadblocks, as well as increasing difficulties in coordinating its integration into MISO.

It is as yet unclear what direction TRANSLink’s utility participants will now pursue.

— Richard A. Heinemann

Interesting Attack on a User Fee Rejected

Wood County, Wisconsin decided to relieve workload of its sanitary inspection department by contracting with a private company that would install alarm monitors on holding tanks that would emit signals when the tanks were full and needed pumping. The County then legislated an annual fee of \$36 on each tank owner.

Gerald Swank, a holding tank owner, resisted and the County sued Swank in small claims court for a \$500 forfeiture, which was ordered. Swank appealed arguing, among other things, that the fee was really an illegal tax, because it allowed existing County staff to perform other services, benefitting the public generally, and because because preventing overflowing tanks protected the general public from pollution and health risks.

This argument, if accepted by the courts, would undercut a growing list of user fees being imposed to keep local governments going in the face of resistance to or limits on funding public services through general taxes. Not the least of which are court filing fees.

But, alas for Mr. Swank, the Court of Appeals rejected the argument, saying, “Common sense tells us that this charge recovers costs rather than raising revenues (as a form of tax).”

Wood County v. Swank, Appeal No. 02-3347, Court of Appeals Dist. 4, November 26, 2003. Not recommended for publication.

—Richard A. Lehmann

MUNICIPAL LAW NEWSLETTER

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