

IN THIS ISSUE

- *Judge Invalidates PSC's Approval of WE's "Power the Future" Plants*
- *Governmental Employee Held Immune from Liability for Assembly of Office Chair*
- *The Public Service Commission Of Wisconsin Approves New Wireless 911 Rules*
- *U.S. Supreme Court Preview*
- *U.S. Supreme Court to Decide Availability of Attorney's Fees in Cell Tower Cases*
- *Milwaukee's Lawsuit Against Lead Paint Manufacturers Allowed To Proceed*

Judge Invalidates PSC's Approval of WE's "Power the Future" Plants

A Dane County Circuit Court judge ruled on November 29th that the Public Service Commission ("PSC") did not follow the law in issuing a certificate of public convenience and necessity ("CPCN") to Wisconsin Electric Power Company, Wisconsin Energy Corporation and W.E. Power, LLC (collectively, "WE") to build two new electric generating units to be located at WE's existing Oak Creek Power Plant. The plants are to supply much needed base-load generating capacity for Wisconsin. Acting on several petitions for review of the PSC's CPCN order approving the two plants, the court vacated the order, requiring that WE submit a new application for a CPCN and that the administrative review process begin anew.

The court ruled that the PSC erroneously acted on the CPCN application before the application was complete. According to the court, the application was incomplete because the applicants failed to present at least two alternative sites for the proposed power plants, WE had not obtained all required regulatory approvals before the PSC acted on the application, and the application did not include

certain transmission line agreements required under state law.

Because of the profound impact the circuit court's ruling has not only in this matter, but also on other current and future CPCN applications, PSC staff and WE immediately asked the Wisconsin Supreme Court to take the case and decide it on an expedited basis. In its request to the Supreme Court, PSC staff explained that the case was important in that "the outcome of this appeal will determine the validity of a number of practices of the PSC related to many other projects." Specifically, the "PSC does not require CPCN applications to propose distinct and specific parcels of land to meet the alternative "sites" requirement of the CPCN application rule, "nor does it" require applicants to obtain other regulatory approvals or to execute transmission agreements before determining that an application is complete." Because several CPCN projects at various stages of construction may be affected by the circuit court's decision, staff argued that the PSC needs to know as soon as possible whether it has been misinterpreting the law.

The Supreme Court has yet to decide whether it will take the case.

— Anita T. Gallucci

Governmental Employee Held Immune from Liability for Assembly of Office Chair

The court of appeals took a restrictive view of the ministerial duty exception to governmental immunity in *Meyers v. Schultz*, Appeal No. 04-0542 (Nov. 24, 2004) (recommended for publication). In *Meyers*, an employee of the Department of Workforce Development picked up an office chair at Office Depot and assembled it for another state employee. When the chair tipped back and “rocked wildly”, injuring the recipient, she sued, claiming that the defendant had failed to follow the manufacturer’s instructions in putting the chair together. The plaintiff argued that governmental immunity did not apply, because the defendant had a ministerial duty to follow the instructions.

Municipal employees are immune from liability for actions taken “in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions.” Wis. Stat. § 893.80(4). This language is generally deemed to be synonymous with “discretionary” actions. The general rule of immunity is subject to a few exceptions, one of which is for “ministerial” acts of employees.

Actions are generally deemed “ministerial” when there is no discretion involved and the employee is simply carrying out a specific set of instructions.

In some instances, immunity has been rejected even in the absence of clearly defined requirements for particular action. For example, a municipality is generally deemed immune for negligence in the approval of a design for a sewer system, because there is quasi-legislative or quasi-judicial discretion in setting the requirements for the system. However, once the system is built, the municipality is generally not immune from liability for creating a private nuisance through inadequate maintenance. *See Hillcrest Golf v. Altoona*, 135 Wis. 2d 431, 441, 400 N.W.2d 493 (Ct.App. 1986).

In some cases, the courts have distinguished between governmental and non-governmental functions and held that immunity applies only to the former. In *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 292 N.W.2d 816 (1980), for example, a medical examiner was held not to be immune for negligence in exercising

medical discretion in conducting an autopsy. However, this governmental/non-governmental distinction has been limited to the area of medical decision-making. *Linville v. City of Janesville*, 174 Wis. 2d 571, 584, 497 N.W.2d 465 (Ct.App. 1993).

Meyers continues the trend of narrowly interpreting exceptions to immunity. The decision adds to the law by expressly stating what is assumed in many earlier cases, i.e., that a ministerial duty exists only when the non-discretionary actions that an employee must take are imposed by law. Since the DWD employee was not required by law to follow the manufacturer’s instructions in assembling the chair, the instructions did not give rise to a ministerial duty.

— Mark J. Steichen

The Public Service Commission Of Wisconsin Approves New Wireless 911 Rules

Last year, the Wisconsin legislature created a three-year grant program designed to reimburse local governments and wireless telephone service providers certain costs related to providing enhanced 911 service (“E911 service”). E911 service provides public safety answering points (“PSAPs”) with important information, including the telephone number and location of the 911 caller. While many Wisconsin PSAPs have E911 capabilities for calls from land-line telephones, PSAPs and wireless provider facilities need additional equipment and software to provide those same capabilities for wireless calls.

Pursuant to 2003 Wisconsin Act 48, the legislature established a grant system which allows local governments and wireless providers to be reimbursed for certain costs they incur for operating or maintaining a wireless PSAP, and for installing and maintaining the facilities necessary to provide wireless E911 service. Funding for the grants is to occur through a customer surcharge that is expected to begin in late 2005 to early 2006, and to continue for a three-year period. Act 48 directs the Public Service Commission of Wisconsin (“PSC”) to administer the grant program and to establish rules requiring the imposition of the surcharge.

Continued on next page

The PSC recently adopted these rules in Chapter 173. Together, Act 48 and the new PSC rules set up a reimbursement period which began on September 3, 2003, and will continue throughout the three-year period during which the customer surcharge is imposed. Local governments and wireless providers may submit applications to the PSC to receive a grant for reimbursement of covered costs that they have incurred or will incur during this reimbursement period. Applications must generally be filed before April 1, 2005, as later applications will warrant a reduction in the grants. To encourage the consolidation of PSAPs and services, only one grant is allowed per county, and will go to the local government that the county Board of Supervisors designates by resolution. The PSC can, however, make supplemental grants to multi-county PSAPs.

Once the PSC receives an application for a grant, it will allow opportunity for interested parties to comment on whether the application should be approved. Also, if the PSC does not approve an application, it must explain the reasons for the denial, and allow the applicant to resubmit the application.

With respect to the surcharge, the PSC can request that each wireless provider file a report setting forth the number of wireless telephone numbers (with billing addresses) in Wisconsin that are billed or subject to a pre-paid service agreement. The PSC will then determine the amount of the wireless surcharge by dividing the total amount of money requested in the grant applications, plus administration costs, by the total number of numbers served by the wireless providers. The providers must uniformly impose the surcharge on their customers. The surcharge amounts are then turned over to the PSC for fund administration. The surcharge will sunset three years after it is first applied, and any amounts that the PSC does not disburse through the grant program are to be returned to the wireless providers and, ultimately, to current customers. The fund is to be discontinued after this process is completed.

— Rhonda R. Hazen

U.S. Supreme Court Preview

Cases pending in the United States Supreme Court promise to impact local government operations on many fronts. The Court will consider limits on the exercise of eminent domain powers; the deference due to a legislative body on takings issues, and where such claims may be litigated; whether the federal government can force state and local governments to adjust their rules to accommodate religious practices; and when the display of the Ten Commandments on government property violate the 1st Amendment's Establishment Clause.

Eminent Domain

In *Kelo v. New London*, the U.S. Supreme Court is expected to determine whether the 5th Amendment limits governments' power to condemn private property for economic development purposes. The City of New London, Connecticut exercised its eminent domain powers for just such purposes when it condemned Susette Kelo's house to make way for a research facility that pharmaceutical giant Pfizer planned to build in the city. Kelo's house and the surrounding neighborhood were not blighted. Nevertheless, the City determined that the jobs and tax base that the Pfizer project promised warranted the condemnation. Kelo argues that taking private properties and transferring them to private parties in the hope that the new owners will put the properties to more economically beneficial uses, violates the 5th Amendment requirement that private property be taken only for public purposes.

Takings

Two U. S. Supreme Court cases involve takings claims, but in both cases the Court's ruling is likely to address takings only tangentially.

In *Lingle v. Chevron*, the Court will consider the extent to which a court, in response to a takings claim, can second-guess a legislative body's determination concerning the effectiveness of economic legislation. At issue is a Hawaiian rent control law that limited the amount of rent that oil

Continued on page 4

U.S. Supreme Court Preview

Continued from page 3

companies could charge to independent dealers for the use of company-owned gas stations. Based on expert testimony, the district court and the Court of Appeals held that the law amounted to a takings because it would not “substantially advance a legitimate state interest.” In its appeal to the U.S. Supreme Court, Hawaii argues that it is up to the publicly-elected legislature, and not judges, to determine the usefulness of economic policy. Thus, Hawaii asserts that the Court should have deferred to the Hawaiian legislature on this issue.

The plaintiff in *San Remo Hotel v. City & County of San Francisco* finds itself in something of a Catch-22. It alleges that a city ordinance that charges owners fees for converting residential hotels to tourist hotels constitutes a taking under both the California and U.S. Constitutions. The plaintiff would like to litigate its federal claim in federal court. However, when it tried to bring suit in federal court in the late 1990s, it was told that it would have to first litigate its state law claims in state court.

The plaintiff did just that, litigating all of the way up to the California Supreme Court, where it lost. The plaintiff then returned to federal court, to litigate its federal takings claim. However, the federal court ruled that the California court’s decision on the plaintiff’s state takings claim was an “equivalent determination” of its federal claims, so that it was precluded from re-litigating the claims in federal court. The U.S. Supreme Court in this matter is asked to decide when, if ever, a plaintiff alleging state and federal takings claims can have them resolved in federal court.

RLUIPA

The constitutionality of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) is at issue in *Cutter v. Wilkinson*. RLUIPA requires state officials to lift governmental burdens on the religious exercise of prisoners unless they can demonstrate a compelling interest necessitating

the imposition. Comparable provisions require the lifting of unnecessary land use restrictions that interfere with religious practices. The *Cutter* case arises under the RLUIPA provisions applicable to prisoners. At issue is whether the accommodations that RLUIPA requires for religious practices violate the 1st Amendment’s Establishment Clause because they amount to a governmental endorsement of religion. The Court’s ruling should provide guidance on the application of RLUIPA in the land use context, where the same question has been raised.

Establishment Clause

Two other cases also involve Establishment Clause questions. At issue in both *McCreary County v. ACLU* and *Van Orden v. Perry* is the constitutionality of a display of the Ten Commandments on government property. The cases differ in the way the Ten Commandments are displayed. In *Van Orden*, the Ten Commandments appear by themselves on state property between the Texas Capitol and the Texas Supreme Court. By contrast, in *McCreary*, the Ten Commandments are displayed with nine other historical documents, such as the Magna Carta and the Bill of Rights, in a display entitled “Foundations of American Law and Government.” Text accompanying the display explains the documents’ significance. The plaintiffs in both cases charge that the display of the Ten Commandments amounts to an endorsement of religion in violation of the Establishment Clause.

Telecommunications Act

Also this term, the Court will consider whether plaintiffs who prevail on claims under the federal Telecommunications Act are entitled to attorneys fees. That case, *City of Rancho Palo Verdes v. Abrams*, is discussed in detail elsewhere in this newsletter.

Be sure to review future issues of the Municipal Law Newsletter for the outcome of these important cases.

— Matt Weber

U.S. Supreme Court to Decide Availability of Attorney's Fees in Cell Tower Cases

Since the enactment of the 1995 federal Telecommunications Act, federal law has played an important role in the zoning process for siting wireless communication towers. The Act imposes requirements for prompt review and written decisions spelling out the reasons for denials of permits. It also restricts the grounds on which applications for siting towers may be denied and requires that a municipality be able to show substantial evidence in a written record to support any denials.

From the beginning, telecommunications companies have claimed that violations of the Telecommunications Act also give rise to a claim for damages and actual attorney's fees under 42 U.S.C. §§ 1983 and 1988. The threat of large damage awards, and even the potential for having to pay the often substantial attorney's fees of the applicants, in the event that a denial of a permit is deemed to violate the Act can chill a municipality's willingness to scrutinize tower applications.

The federal district courts and circuit courts of appeal have split almost evenly on the issue of whether a section 1983 claim can be based on a violation of the Telecommunications Act. The debate centers on whether Congress intended there to be a private right of action for damages. This issue turns on whether the courts view the Telecommunications Act as creating a comprehensive remedial scheme for violations of the Act, which would imply the exclusion of additional remedies under section 1983.

The U.S. Supreme Court recently accepted certiorari review in *City of Rancho Palos Verdes v. Abrams*, a Ninth Circuit decision, which sided with the courts finding that section 1983 claims are available. An *amicus* brief was filed on behalf of the National League of Cities, National Association of Counties, Council of State Governments, U.S. Conference of Mayors, and others in support of the petition for certiorari and opposing the availability of section 1983 remedies. The Supreme Court's decision should provide a definitive answer to this important question.

— Mark J. Steichen

Milwaukee's Lawsuit Against Lead Paint Manufacturers Allowed To Proceed

The Court of Appeals has allowed the City of Milwaukee to proceed with its public nuisance lawsuit against two manufacturers of lead paint. *City of Milwaukee v. NL Industries, Inc.*, 03-2786 (Ct. App. 2004, decided November 9, 2004). The City asked that the defendants be required to pay the costs associated with the City's lead paint abatement program. The trial court originally dismissed the claims holding that the City could not prove that these particular defendants were a cause of the alleged damage.

In order to prevail on a claim of creating a public nuisance, a plaintiff must prove that the defendant's conduct was a substantial cause of the existence of a public nuisance and that the nuisance was a substantial factor in causing injury to the public. The defendants argued that the City could not show that their paint was present in the specific properties being abated, or that their conduct caused the paint to become a hazard to City children. The City asserted, however, that where a community-wide health threat is the alleged public nuisance, the City should only have to prove community-wide marketing and sales of lead paint by defendants in the City at times relevant to the creation of the nuisance. The Court agreed that this was enough to survive summary judgment.

In a public nuisance action brought by the City, the focus is on the injury to the City. The Court noted that the City itself is injured if defendants knowingly and intentionally sold and promoted a dangerous product to a community and that product caused a serious public health problem in the community which the City is left to attempt to remedy.

— Lawrie Kobza

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 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.

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