

IN THIS ISSUE

- *Effect of Fear of Natural Gas Pipeline On Market Value Admissible In Condemnation For Pipeline Easement*
- *Some Practical Advice from the Court of Appeals*
- *A Content Neutral Restriction of Demonstrations On Expressway Overpasses Is Constitutional*
- *FCC Classifies Broadband Over Power Lines As "Information Service"*

Effect of Fear of Natural Gas Pipeline On Market Value Admissible In Condemnation For Pipeline Easement

The Wisconsin Court of Appeals provided additional guidance on the admissibility of evidence in valuing a taking of easements. The case consolidates three separate actions involving condemnation of easements in Walworth County for the same natural gas pipeline. *Hoekstra v. Guardian Pipeline, LLC*, 2003 AP 2809 (Nov. 30, 2006) (recommended for publication).

The decision addresses four issues. The first issue is whether evidence other than of comparable sales is admissible in determining the fair market value. Section 32.09(6g), Stats., provides that compensation for the taking of an easement is calculated by deducting the fair market value of the whole property immediately *after* the taking from the value of the whole property immediately *before* the taking. The difference is generally referred to as "severance damages." In *Hoekstra* (the three cases are discussed jointly here), the pipeline company's appraiser found two properties to be comparable to the landowners' properties and concluded that there was no difference in the market value with or without the pipeline easement. The landowners offered two appraisers who opined that they could find no properties that

were comparable. Instead, they relied on discussions with developers, the results of a telephone survey of residents in Walworth and Jefferson Counties, and studies regarding the effect of a natural gas pipeline on prospective buyers. They concluded that the stigma of a natural gas pipeline would reduce the market value of the landowners' properties by 15%.

The trial court excluded the landowners' appraisers' testimony on grounds that evidence of comparable sales, where available, is the only evidence admissible as to fair market value of a property. The appeals court reversed that decision, relying heavily on *Arents v. ANR Pipeline Co.*, 2005 WI App 61, 281 Wis. 2d 173, 696 N.W.2d 194. In *Arents*, the court had explained that, in addition to evidence of comparable sales, a court may consider any factor affecting the value of property that could influence or sway a decision of a prospective buyer as long as the evidence is relevant and not speculative. The pipeline company argued that the information on which the landowners' appraisers relied was not the type normally relied upon by experts in the field. The court rejected this argument, however, based on Wisconsin's liberal approach to expert testimony. Once they were "qualified" as expert

Effect of Fear of Natural Gas Pipeline On Market Value Admissible In Condemnation For Pipeline Easement

Continued from front page

appraisers, any such weaknesses in their testimony was a matter of credibility that could be probed on cross examination.

The second and third issues involve the trial court's exclusion of expert testimony related directly to the risks posed by natural gas pipelines and the public's fear of such pipelines. The landowners argued that section 709.02(1), Stats., would require them to disclose to potential buyers of their properties not only the existence of the pipeline, but also all hazards associated with a pipeline, and details such as the odorless, high pressure, flammable, and explosive nature of the gas running through it. The landowners offered testimony from several expert witnesses on this issue. These included: (a) a UW-Whitewater marketing professor to discuss the results of a telephone survey in Walworth and Jefferson Counties about the effects of various disclosures on a property's value, (b) the president of a pipeline consulting firm to testify about the effects of natural gas pipeline leaks, ruptures, and explosions, and examples of past accidents, (c) a witness with over 30 years of experience in environmental safety and fire equipment to testify about hazards of gas pipelines, causes and effects of leaks, and the general impact it would have on property values, and (d) a former attorney for the U.S. Justice Department to testify about deficiencies in the federal pipeline safety program.

The appeals court upheld the exclusion of this evidence. It began by finding, for purposes of this case (but not as precedent), that the presence of a natural gas pipeline would qualify as a "defect" within the meaning of Chapter 709. However, the court then found that a seller's duty would be to disclose simply the presence of the natural gas pipeline, but not all the potential hazards associated with such a pipeline. The court went on to uphold the exclusion of these experts' testimony on the grounds that none of them related their testimony directly to the landowners' properties. The court noted, however, that, if the appraisal experts had relied on the excluded expert opinions in reaching their opinions on market value, the underlying experts' testimony might have been admissible. Thus, a smart practitioner who wants to introduce such evidence in future cases would seek to have the landowner's appraiser incorporate the opinions of other experts into their valuation opinions. In that case, the government might still object to the testimony of the underlying experts as cumulative and a waste of time.

The fourth issue concerned the landowners' claims for the value of trees that had to be removed to lay the pipeline. They offered the testimony of two experts regarding the value of the trees separate from the overall market value of the property before and after the taking of the easement. The trial court excluded this evidence and the appeals court affirmed on the grounds that the "unit rule" in condemnation prohibits the valuation of individual components of a property. Since there was no evidence that the removal of the trees affected the overall value of the property with the easement as compared to the whole property without the easement, there could be no damages awarded for the loss of the trees.

— Mark J. Steichen

Some Practical Advice from the Court of Appeals

While not significant in terms of substantive municipal law that affects the actual day-to-day practices of municipal employers, a recent dissenting opinion in court of appeals decision shows that at least some judges have a sense of humor and some measure of practicality.

The case is *Helgeland v. Department of Employee Trust Funds* (Case No. 2005AP2540) and the writer of the dissent is Judge Dykman. The case involved a suit by a group of gays/lesbians challenging the constitutionality of several Wisconsin statutes which provide benefits to state employees if they are in heterosexual marriages. Several municipalities asked to intervene in the lawsuit because they believed that the Attorney General's office would not adequately defend the lawsuit. Their belief had root in several public comments made by the then Attorney General in support of extending marital-type benefits to same-sex couples.

The two-judge majority for the court of appeals concluded that the municipalities were not entitled to intervene in the lawsuit because their interests would be adequately protected by the Attorney General's office.

In dissent, Judge Dykman noted that:

"For me it is practical to allow the municipalities to participate here because it does not hurt anything. Trying to keep interested parties out of a lawsuit is like trying to teach a pig to sing. All that does is waste your time and annoy the pig."

Judge Dykman continued this line of thought by expressing some words of wisdom applicable to all municipal decision-making:

"A good way to create mistrust is to deny participation in government."

His argument articulates the message that while there must be an end point to participation, in other words, limits by which participation frustrates the orderly administration of government and its agents, municipalities ought to examine whether allowing people some level of participation would, in the long run, create any problems. In this case, Judge Dykman noted that "the parties have already wasted more time arguing about whether the municipalities should be allowed to intervene than they would have expended had the municipalities been allowed to intervene in the first place."

These are sound words of advice to any public official who interacts with the public and to whom the official is ultimately accountable.

— Steven C. Zach

A Content Neutral Restriction of Demonstrations On Expressway Overpasses Is Constitutional

On two occasions in the Fall of 2003, Ralph Ovadal staged demonstrations to express his opposition to homosexuality on pedestrian overpasses that span Madison's Beltline highway, an expressway where the average speed exceeds 60 mph. On both occasions, the demonstrations included large, colorful signs and banners and had a noticeable adverse effect on traffic below. Both times, the Madison police forced Ovadal to move the demonstration from the overpass because those activities were causing a traffic hazard for the motorists traveling on the Beltline. In June 2004, Ovadal sued in the federal district court in Madison, asserting that the City and its police officers had unconstitutionally abridged his rights to free speech and freedom of religion.

The City moved for summary judgment, a motion that the district court granted in November 2004. Ovadal appealed and, the first time around, the Seventh Circuit Court of Appeals reversed, concluding that dismissal was improper because factual issues were in dispute and needed more development. The case returned to the district court, where a bench trial was held in December 2005. At the conclusion of the trial, the district court again ruled in favor of the City and its officers. Ovadal appealed a second time. This time, the Seventh Circuit affirmed. In a decision issued on November 20, 2006, the Court upheld the district court's factual finding that the traffic congestion that occurred at the time of Ovadal's demonstrations was not caused by the content of his speech, but rather by the spectacle created by the unexpected presence of the band of protesters on the overpass.

Ovadal argued that the traffic congestion was caused by motorists' reaction to his message. He characterized the Beltline drivers as hecklers fuming at the content of his rabble-rousing speech. In such circumstances, First Amendment law requires that the police control the crowd, rather than the speaker, because free speech is not subject to a heckler's veto.

The Court of Appeals agreed with the City's argument that its officers had acted in a content neutral way in discontinuing Ovadal's demonstrations on the Beltline overpasses only on those two occasions when the demonstrations created a significant traffic hazard. On numerous other occasions in 2002 and 2003, both before and after the two incidents in question, Ovadal had demonstrated on Beltline overpasses without police interference. On those occasions, there was no substantial impact on traffic safety and, therefore, no reason the demonstrations could not continue. The fact that Ovadal demonstrated on Beltline overpasses without police interference on numerous other occasions proved that Madison had not imposed an absolute ban on Ovadal

protesting in such locations, as he had claimed.

In deciding the first appeal, the Seventh Circuit had observed that, if Madison had a policy that prohibited not just Ovadal's activities, but all protests and all signs on all Beltline overpasses, then the restriction would be clearly content neutral and constitutionally permissible. After the first appeal, the City took that part of the Seventh Circuit's decision to heart and passed an ordinance that bans any display of signs or graphics on Beltline overpasses if the display is visible from the highway. *See* MCO §31.04(6)(m), effective December 21, 2005.

The message of the Seventh Circuit decisions appears to be that municipalities wanting the ability to control demonstrations that can create dangerous traffic safety problems should consider the adoption of a content neutral ordinance or policy that creates a justifiable restriction on free speech rights in an evenhanded manner. Any such ordinance or policy must still make sure that plentiful avenues for the exercise of First Amendment rights remain available to all.

The Boardman Law Firm represented the City and its police officers throughout the Ovadal litigation.

— Catherine M. Rottier

FCC Classifies Broadband Over Power Lines As "Information Service"

On November 3, 2006, the FCC decided to classify broadband over power lines, or BPL, as an information service. BPL, which is still under development, would allow electric companies to become a third alternative to the cable and telephone companies providing high-speed internet access. BPL uses the radio frequency signals sent over medium and low voltage AC power lines to connect customers over the internet. BPL is capable of delivering internet connection speed comparable to most DSL (digital subscriber line) offerings.

By classifying BPL as an information service, the Commission places BPL on an equal regulatory footing with cable modem and DSL, which the FCC already classifies as information services. In addition to leveling the regulatory playing field, the decision is intended to help calm utilities' regulatory concerns over BPL and thereby encourage utilities to begin offering the service. "In reaching these determinations, the Commission provides regulatory certainty regarding the classification of this service, thereby encouraging deployment of BPL-enabled Internet access to consumers," the FCC said in announcing the decision.

Thus, the FCC's recent order provides a significant push for BPL, helping clear the path for utilities to enter the internet service industry.

— Mark Neuser

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.

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
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Mark A. Neuser	283-1725	mneuser@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
William R. Peck	283-1732	wpeck@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@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.

BOARDMAN^{LLP}
LAW • FIRM

© Copyright 2007, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED

BOARDMAN^{LLP}
LAW • FIRM

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