

MUNICIPAL LAW NEWSLETTER

BOARDMAN^{LLP}
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Volume 13, Issue 1, January/February 2008

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Wisconsin's New Video Franchise Law Took Effect January 9th

Wisconsin's controversial new video franchise legislation (2007 Wisconsin Act 42) went into effect on January 9, 2008. Governor Jim Doyle signed the bill at the end of last year, using his partial veto authority to change several provisions of the bill as passed by the Wisconsin legislature.

The new law replaces the current system of local municipal franchises with statewide franchises that are to be granted by the Department of Financial Institutions ("DFI"). Using his veto authority, the Governor gave DFI the authority to adopt rules that pertain to the franchise application process and that set forth criteria to be used for DFI to determine whether a franchise applicant has the legal, financial, and technical qualifications to provide service. The Governor also struck from the bill provisions that would have required DFI to grant without scrutiny any application from AT&T or a major cable company and that would have required DFI to act on all applications within 15 days.

AT&T may continue providing its U-Verse service, provided that it applies for a state franchise by March. Other competitive video providers who are not currently providing service will have to wait until they obtain a franchise from DFI before commencing the provision of video service. Since the DFI must issue new rules before granting any state-wide franchises, no one knows how long the wait will be.

Incumbent cable operators, such as Time Warner and Charter Commu-

ications, may also apply for state franchises or opt to operate under their municipal franchise agreements until those franchises expire. Until they are issued a new state franchise, however, incumbent cable operators are subject to their existing local franchise requirements.

The new law still allows municipalities to collect a franchise fee of up to 5% of the provider's gross receipts derived from providing video service within the municipality. Nonetheless, municipalities may receive smaller franchise fee payments given the new law's somewhat restrictive definition of gross receipts. In addition, the new law allows video service providers to deduct certain right-of-way permit fees from the franchise fee payment.

Municipalities retain the right to audit the franchise fee payments to determine whether the company has paid the correct amount. They may bring a court action to resolve disputes over underpayments that cannot be resolved through settlement with the video service provider.

Supporters of public, education, and government ("PEG") channels were disappointed that the Governor's vetoes did not do more to protect PEG. Under the new law, all PEG support payments cable operators currently make to municipalities must end in three years. Not only will PEG stations lose this source of funding, but the bill also places certain potentially very costly equipment requirements on such stations. In an effort to soften the

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Court of Appeals Considers Prejudgment In Zoning Case

Not infrequently, controversies arise in the context of land use hearings, about whether members of plan commissions or governing bodies had their minds made up before the meeting began. The legal term for this issue is “prejudgment.”

One thing that sometimes triggers consideration of this issue is if a member appears to have drafted a motion before the hearing began. The Wisconsin Court of Appeals recently dealt with a variation on that fact scenario. *Beverly Materials v. Town of LaPrairie*, 2007 AP 1051 (Dec. 27, 2007)(publication not recommended).

In the case in question, a landowner had two parcels separated by a road. One was zoned for mineral extraction and had been mined for gravel in the past. The landowner applied for rezoning of the other parcel and a conditional use permit to permit mineral extraction. The town plan commission (which is called the Planning and Zoning Committee in the Town of La Prairie, Rock County, where the case arose), held a hearing on applications. Following the hearing, the committee discussed the applications and voted to recommend denial. During the discussion, members articulated reasons supporting denial and it was clear that these reasons drove the votes to deny. The town board was present during the committee deliberations and vote, as was the town’s land use counsel.

The town board then convened itself into formal meeting. Following discussion, a board member moved to have the town board deny the applications based on the recommendation of the committee. After the motion was made and seconded, the chair asked the counsel to articulate reasons that could be made part of the motion to deny. Counsel did so. The town board denied the application for rezoning and for the conditional use permit.

The applicant filed a certiorari law suit challenging the outcome of the town board meeting. On certiorari,

Wisconsin’s New Video Franchise Law Took Effect January 9th *Continued from front page*

financial blow to PEG stations, the Governor used his partial veto authority to allow commercial advertising on PEG channels.

With respect to consumer protection, municipalities may require video service providers to comply with certain standards set out in Federal Communications Commission regulations. In addition, the video service provider must comply with any applicable standards set out in state statutes or established by rule by the Department of Agriculture, Trade and Consumer Protection.

As of yet, no company has applied to DFI for a new state franchise.

— Anita T. Gallucci

the applicant raised several grounds to support its claim that the outcome had been prejudged. One portion of the challenge asserted that the town board had not discussed reasons to deny, but instead had relied on reasons articulated upon request by town counsel. The applicant contended that those reasons had been prepared by counsel before the hearing and meeting began.

The court of appeals rejected this portrayal of the situation, pointing out that there was no evidence that counsel had come to the hearing and meetings with prepared reasons to deny. Instead, the minutes reviewed by the court showed that counsel had been instructed to base his reasons on the reasons stated by members of the committee, which he had observed being articulated by those members, and that he formulated his articulation of reasons based on what occurred at the Planning and Zoning Committee meeting.

Second, the town had an ordinance allowing it to demand that an applicant deposit funds to pay for out of pocket expenses the town may incur for experts to evaluate or study various issues arising from the application, such as potential ground water contamination. The town demanded and the applicant make such a deposit before the applicant submitted a revised application. When the town received the amended application, it decided it did not need to fund studies and the deposit was eventually paid back to the applicant. The applicant claimed in the court appeal that this also demonstrated prejudgment, arguing that the failure to conduct expensive studies meant that the town officials were against the mining operations from day one. The Court of Appeals rejected this claim as well, saying that nothing in state law or local ordinances mandated that the studies be done, so long as the deposits were refunded.

Third, during the course of the application process, the town amended its zoning ordinance to prohibit mineral extraction in its “special purpose district” except for operations that were in existence before the amendment. The new ordinance also made an express exception for any court order in the pending certiorari case requiring rezoning and the issuance of a CUP. Nevertheless, the applicant argued that the adoption of this amendment demonstrated a prior intention on the town’s part to deny any application for mineral extraction. The court found that there was no evidence to suggest that the town had prejudged the matter given the exceptions in the ordinance for the applicant’s project. In addition, the court noted that the applicant had made no objection about the impartiality of the town board when the amendment was passed or before the board’s final vote on the applications.

Boardman attorney Mark Steichen represented the Town of LaPrairie in the litigation.

— Richard A. Lehmann

Court Rebuffs Challenge To Immunity for Design of Sewer and Water Facilities

Under governmental immunity, the long standing rule is that municipalities are immune for discretionary acts, but are liable for ministerial acts. Wis. Stat. § 893.80(4) (“quasi-legislative” is synonymous with discretionary). A ministerial act is one that is “an absolute and certain duty imposed by law, which prescribes the manner in which it is to be performed.” *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶127, 235 Wis. 2d 409, 424-25, 611 N.W.2d 693. Within the specific area of water and sewer utilities, the courts have held that the design of facilities as well as the schedule on which they are maintained are generally discretionary acts. See, e.g., *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 652, 691 N.W.2d 658). Once a facility is designed, it is generally a ministerial duty to construct facilities as called for in the approved design plans.

These rules were challenged in a recent court of appeals case. *DeFever v. City of Waukesha*, Appeal No. 2006 AP 3053 (November 28, 2007)(recommended for publication). In *DeFever*, a water main was located under the entrance ramp to an underground parking lot of an apartment building. The main burst causing property damage. Tenants sued the Waukesha Water Utility, because the main was only three feet below the surface of the ramp, less than required by state code, and too shallow to be protected from the cold. The circuit court dismissed their claims on summary judgment on grounds of governmental immunity.

The water main was installed in 1998. DNR regulations required water mains to be laid at least five to seven feet deep. An on-site inspector confirmed that the main was eight feet deep. However, the entrance ramp was installed at a later date and the design called for the soil to be graded to a point that left the water main covered with only three feet of ground. It is not clear from the court decision whether Waukesha had any involvement with the design of the ramp.

In affirming the dismissal of the case, the court of appeals agreed with the plaintiffs that Waukesha had a ministerial duty initially to bury the water main at least 5-7 feet deep, but found that Waukesha did not breach that duty. However, the court found no laws or regulations requiring Waukesha to monitor, inspect, repair, or replace the water main after it had been installed. The city had the discretion to decide how and when to do so and, consequently, was immune from liability for not altering the water main in conjunction with the construction of the entrance ramp.

The *DeFever* plaintiffs argued further that there should be an exception for engineering discretion. The Supreme Court created such an exception to governmental immunity for the acts of medical professionals who perform work for the government in *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980)(medical examiner held liable for negligent performance of autopsy). In that case, the court reasoned that, although there was discretion involved in the medical examiner's performance of the autopsy, it was medical discretion, not governmental discretion. In *DeFever*, the plaintiffs argued that the exception should be broadened to distinguish engineering discretion from governmental discretion. The court of appeals declined to expand the exception on grounds that it is solely an error-correcting court. Similar attempts to broaden the exception have failed in the past.

— Mark J. Steichen

Residential Property Tax Assessment Upheld

The Wisconsin Court of Appeals affirmed a decision by the Milwaukee County Circuit Court upholding a 2005 property tax assessment by the Village of Greendale Board of Review levied against residential property.

Krukowski v. Village of Greendale,
Appeal No. 2007AP330 (Nov. 14, 2007).

The property was a two-story colonial building built in 1987 and located on a 0.694 acre tract of land. The Greendale assessor had determined that the fair market value of the property was \$651,200, including land valued at \$86,000 and improvements valued at \$565,200. The assessor's valuation was based upon the comparable sales approach, comparing three similar residential properties to arrive at the value of the Krukowski's property. The Krukowskis argued that the assessed value should have been reduced by (1) \$31,134.72 because of the assessor's inaccurate computation of the square footage of the building as 5,354 sq. ft., and (2) an additional \$77,334 on account of the assessor's failure to consider the age of the building and its depreciated fixed assets and the replacement values of such assets.

A member of the assessor's staff in 2001 had computed the square footage of the building as 5,354 sq. ft. based on exterior measurements of the building. Relying on exterior measurements was dictated by the instructions in the Wisconsin Property Assessor's Manual and reflected the common practice in the industry. The Krukowski's expert computed the square footage as 5,098 based on exterior measurements, and also calculated an interior measurement of 4,808.9 sq. ft. by eliminating areas that were not living or usable space, including the area of a vaulted-ceiling living room, a two-story entryway, the front and rear

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Governor's Veto Impacts Police and Fire Commission Status

Among Governor Doyle's partial vetoes in the recent biannual budget bill was one which significantly impacts the procedures by which police officers and firefighters are suspended, demoted or discharged and which raises a host of questions about how such discipline should take place in the future.

Prior to the veto, police officers and firefighters could only be suspended, demoted or discharged for cause after a hearing. For cities other than Milwaukee, the process involved the filing of charges and a due process hearing before a police and/or fire commission pursuant to §62.13(5), Wis. Stats. Villages were required to hold a hearing for an officer or firefighter, not covered by a collective bargaining agreement which provides for a fair hearing before the imposition of the discipline, by either a three-person committee or a person appointed for the task who is not an elected or appointed official of the Village. Section 61.65(am), Wis. Stats. Both City and Village hearings were required to address whether discipline was warranted under seven due process standards set forth in §62.13(5)(em), Wis. Stats. The commission or hearing committee or officer's decision was appealable only to a circuit court.

This statutory process has been in place for over 100 years and was intended to ensure that disciplinary decisions affecting police officers and firefighters were removed from the daily operations of municipal management and politics. Unions have long lobbied the legislature for a change in the statutory scheme because they felt, among other reasons, that the process was skewed in favor of the police and fire chiefs through commissions or hearing officers appointed by the municipality.

As a result of that lobbying, this year's budget bill contained the following provision related solely to fire fighters which was vetoed, as indicated by the overstrikes:

A collective bargaining agreement entered into between fire fighting personnel and a municipal employer may, notwithstanding s. 62.13(5), contain dispute resolution procedures, including arbitration, that address the suspension, reduction in rank, suspension and reduction in rank, or removal of such personnel. If the procedures include arbitration, the arbitration hearing shall be public and the decision of the arbitrator shall be issued within 180 days of the conclusion of the hearing.

The veto, which now has the effect of law, seems to suggest that police officers and fire fighters have the legal ability to negotiate into their collective bargaining agreements the right to contest disciplinary suspensions, demotions and termination through a grievance arbitration process.

Another portion of the budget bill contains a provision which prohibits a municipality from bargaining a prohibition of arbitration as an alternative to the §62.13(5) process.

The legislation as amended by Governor Doyle's vetoes, raises many questions, including the following:

1. Is a municipality still required to proceed with a §62.13(5) hearing anytime it wishes to suspend, demote or terminate a police officer or fire fighter? Nothing in the new language eliminated the requirement found in §62.13(5) that a hearing must be held before the commission or appointed panel or examiner. Nothing in the new legislation states that the municipality can bargain out of the §62.13(5) process.
2. Most police and fire contracts have grievance arbitration procedures in them which deal with discipline short of those enumerated in §62.13(5). Do the new provisions automatically give the police officers or fire fighters the right to choose forums or do they have to bargain new arbitration provisions which specifically address the right to arbitrate suspensions, demotions and terminations?
3. Are two hearings going to take place; i.e., the §62.13(5) hearing and the arbitration hearing if the officer files a grievance? If so, what happens if they result in different outcomes? Does the police officer or fire fighter have the right to select which forum in which to proceed?
4. If charges are filed by a citizen, as allowed by law, does the police officer or fire fighter have the right to arbitrate any discipline arising from the commission or hearing committee or examiner, even though the citizen is not a party to the collective bargaining agreement?
5. If the collective bargaining agreement contains a provision, as some do, that the grievance procedure in the agreement does not apply to §62.13(5) hearings, is the municipality forbidden to utilize that language? Can the municipality insist in the next bargaining that it stay in the contract?

These are just a few of the questions which have been raised in light of the budget bill, as vetoed by Governor Doyle. There are several legislative attempts underway to secure some answers and clarity to the situation, which at this time is bereft of either. The fact that so many questions exist with respect to this matter speaks volumes as to the wisdom of creating public policy through the budget and veto process.

—Steven C. Zach

Marshfield First Wisconsin Municipality To Establish a Permanent Pharmaceuticals Collection Site

The City of Marshfield has been working with the local Groundwater Guardians to collect and dispose of household pharmaceuticals in order to protect local surface water and groundwater from pharmaceutical contamination. Typically unwanted household pharmaceuticals are flushed down the toilet, poured down the drain, or thrown in the trash. Recent studies have found low levels of these pharmaceuticals in surface water and groundwater.

Marshfield Groundwater Guardians have held four pharmaceutical collection days since May 2006. During these collections, the group collected 1,193 pounds of non-controlled substances and 103 pounds of controlled substances, from 582 households. A pharmacist was on site during the collections to identify controlled substances which were disposed of at a site licensed to incinerate controlled substances. All collected materials were under the control of law enforcement officers at all times.

Just recently, the Groundwater Guardian group streamlined its process for collecting and incinerating pharmaceuticals, and established the State's first permanent municipal pharmaceutical collection site. This improved process was possible due to the cooperation of the Marshfield Police Department and the ability to incinerate all pharmaceuticals (both controlled and non-controlled) at an incinerator in Barron, Wisconsin at a cost of \$30 per ton. Because the Wisconsin State Patrol has a contract with the incinerator in Barron for the incineration of controlled substances, the Police Department is also able dispose of controlled substances at the incinerator for the same rate.

Since police have the legal authority to handle controlled substances, Marshfield's permanent collection point is located in the police department. Residents may drop pharmaceuticals in a stainless steel collection box located in the reception area, but accessible only through the reception area window. The drop box is only accessible during the hours the reception area window is open. Both controlled substances and uncontrolled substances may be dropped off since all materials will be handled as if they were controlled substances. This eliminates the need for a pharmacist to separate the controlled substances from the uncontrolled substances. The police department collection site will not take inhalers, oxygen tanks, nebulizers, sharps, or radioactive cancer medications at the collection point.

The police department has agreed to periodically unlock the collection box and take the contents to the evidence room. The contents of the collection box will be logged and stored in the evidence room until they are transported to the incinerator. Marshfield anticipates that the collected pharmaceuticals will be transported by the police to the Barron incinerator approximately three to four times per year. Contributions are being solicited from Marshfield Water Utility, Marshfield Wastewater Utility, and the local Clinic and Hospital to fund the program costs of \$2000 annually for police staff, transportation, and incineration costs.

The efforts of the City and local Groundwater Guardians to protect surface water and groundwater through this collection program have been recognized throughout the nation. This newest program provides a good model other municipalities may consider emulating. For more information about Marshfield's program, contact Cathy Lotzer at 715-5387-1195, ext. 314.

— Lawrie Kobza

Residential Property Tax Assessment Upheld

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garages, and the porch. The Court upheld the Board of Assessors determination to accept the square footage calculation based on the assessor's exterior measurements because it was supported by evidence and was not arbitrary, unreasonable or erroneous.

The Krukowski's second challenge related to the refusal to make adjustments to the assessed value on account of evidence of depreciation, obsolescence and replacement costs of the fixed assets (roof, HVAC systems, carpeting, built-in appliances), and on account of the presence of an outdoor pool and hot tub, which the Krukowskis argued constituted negative factors for most people with children. The Court upheld the Board of Assessors acceptance of the assessor's valuation because the Krukowskis had failed to present any evidence of comparable sales that supported a diminution of the value of their property; the Krukowski's expert witness presented no testimony to prove any specific decrease in value because of the presence of a hot tub or swimming pool on the property; and the Krukowski's evidence of the replacement cost of the fixed assets did not suggest any diminution in overall value of the property. In contrast, the three comparable sales identified by the assessor were appropriate and the assessor properly had presented evidence that represented the subject property in age, condition, use, type of construction, location, number of stories, and physical features.

— William R. Peck

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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