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“Comments” Agenda Item is Inadequate Descriptor for Open Meeting Purposes

Items on a city council agenda called “Staff Comments,” “Alderman Comments,” and “Mayor Comments” probably do not describe the subject matter of what will be discussed with sufficient detail to satisfy the requirements of the open meetings law, a recent informal opinion by the Wisconsin Attorney General holds.

Mayor Charles Rude of the City of Lake Geneva requested the opinion. He explained that the City includes such items on its council agenda to give staff and officials “an opportunity to comment about such things as forthcoming events or other informational items.” He assured Attorney General Lautenschlager that under the council’s rules, “there can be no action, discussion, or vote of any kind, on any comments made” pursuant to these agenda items.

Despite this assurance, Lautenschlager found that the City’s practice is “at best, at the outer edge of lawful practice, and may well cross the line to become unlawful.”

Her concern stems from the requirement in Wis. Stat. sec. 19.84(2) that meeting notices give the “time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof.”

She explained that while this provision does not require the notice of a meeting to include a detailed agenda, it should be sufficiently descriptive that “a person interested in a specific subject would be aware, upon reading the meeting notice, that the subject might be discussed.”

Lautenschlager also contrasted the time the City sets aside for comments from staff or officials, and the public comment period typically included in the agenda. She noted that public comment periods are specifically permitted by the open meetings law (see secs. 19.83(2) and 19.84(2)), despite the fact that subjects may be raised and discussed during this period that are not specifically included in a public notice. She views this deviation from typical open meeting law principles as an accommodation of an equally important and competing public policy, that of allowing governmental officials to hear from their constituents.

A similar accommodation is not necessary for public officials or staff. Whereas “citizens do not have access to [a public] body’s process for creating meeting notices,” members of governmental bodies and staff do. They have regular access to the presiding officer, who establishes the meeting agenda.

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Lautenschlager suggests that officials and city staff who know in advance of a meeting that they wish to discuss a particular matter, even if no action will be taken, should ask that it be placed on the agenda. She implies that if it is not placed on the agenda, it should not be discussed.

Applying these principles, Lautenschlager suggests that the City may wish to substitute "Forthcoming Events" for "Comments" as an agenda item. Such a listing would be "minimally adequate" to give notice that such events will be discussed.

As for the "informational items" City officials and staff had discussed under "Comments," Lautenschlager urged the City to specify the subject matter to which these informational items relate. Lautenschlager explained that even if no action is taken, the inadequate notice of "Comments" deprives members of the public who are interested in the subject the opportunity to hear what is said. "At the extreme end, an alderperson or the mayor might provide enough information on a subject during one of the comment periods that the members of the body have all the information they need to take action on the subject, eliminating the need for any discussion of the matter at a subsequent meeting where the noticed subject is brought up for action."

Lautenschlager's opinion is not expected to be published as a formal Attorney General opinion. If you would like a copy of the opinion, please contact our office.

— Matt Weber

Board of Adjustment Has No Power to Conduct De Novo Review

A recent court of appeals case reported in last month's issue of the Boardman newsletter has been ordered for publication. *Osterhues v. Bd. of Adj. for Washburn County*, Appeal No. 03-2194 (April 27, 2004). The *Osterhues* decision contains a broad statement that county boards of adjustment have no authority under sec. 59.694(7)(a) and (8), Stats., to conduct *de novo* reviews of plan commission decisions. The court's decision is based on a strict statutory construction. The court found the statute to be unambiguous despite the language in subsection (8) granting the board all the powers of the underlying decision-maker. The same language is found in sec. 62.23, Stats., applicable to cities, villages, and towns which have adopted zoning powers.

A petition for review of *Osterhues* is pending at this time. The holding is contrary to the result in an earlier unpublished decision in *Wolff v. Grant Cty. Bd. of Adjustment*, 2002 WI App 85, 252 Wis.2d 766, 642 N.W.2d 645. The *Wolff* case was mistakenly reported as being published in the previous issue of this newsletter.

In *Osterhues*, both parties to the appeal had participated before the plan commission and a full record had been made. If the decision is not reversed or modified, it is likely to engender additional litigation to resolve newly created issues where the parties to a zoning appeal were not present at or given notice of the underlying zoning hearing.

— Mark J. Steichen

More Personal Liability For Public Sector Managers and Officials - ADA Retaliates

Last year a federal court ruled that a mayor, city attorney and city council member could be held *personally* liable for retaliation under Title II of the Americans With Disabilities Act covering "public accommodations." This was because the public accommodation language was different than the rest of the ADA, such as Title I - Employment. *Now* a court has ruled that **public employment** is a form of "public accommodation" and cases can be brought under Title II. So, government managers and officials may now be sued *personally* for retaliation related to public employment. This is a huge step up in liability, since most retaliation cases are about employment issues. *Transport Workers Local 100 v. N.Y. City Transit Authority* (S.D. NY, 2004).

Last year, in the case of *Schotz v. City of Plantation, Florida*, the 11th Circuit Court ruled that government officials could be held individually liable for acts of retaliation under Title II of the ADA. See the Article, *Court Finds Personal Liability under ADA (Mayor, Council Member and City Attorney Can be Sued Personally)*, Boardman Municipal Law Newsletter.

The court found that Title II covering public services had anti-retaliation language which was different than the other parts of the ADA and allowed personal liability instead of just governmental liability. The ruling was limited in scope to only public services issues, in which retaliation claims are rare.

Continued on next page

At that time, it seemed, there was no carry-over into the other ADA areas, such as Title I employment cases, in which retaliation claims are far more frequent, and far more costly.

Now the *Transport Workers* case has expanded Title II to include employment discrimination.

The *Transport Workers* case was not about retaliation. It was a basic challenge of the Transit Authority's sick leave and medical verification policies. The plaintiff argued that though Title II is silent on employment, the federal Title II regulations do mention employment, **and** the Title II legislative history shows an intent to have the same scope as §504 of the Rehabilitation Act of 1973, which also covers employment. The court adopted that argument.

This is not the first time this issue has arisen. Other circuits indicated that Title II should be applied to employment, but did not actually decide the cases on that basis. This case now adds the weight of another jurisdiction, and shows a growing trend.

Retaliation Provision/Personal Liability Concern

Though basic Title II discrimination does **not** generate personal liability, the anti-retaliation provision **does**. So, now that more courts find that Title II covers employment issues, any public sector employment retaliation case may be brought under Title II.

Retaliation claims are frequent in employment. Plaintiffs often lose an original ADA discrimination claim and then **win** a subsequent retaliation case. Any adverse employment action following the raising of an employment disability issue can be seen as retaliatory and generate such a case against both the government entity and the individual managers or public officials involved.

Another difference between Title II and Title I of the ADA is in procedure. Title II does not require exhaustion of any administrative procedure, such as filing with the EEOC, prior to filing suit. There is no "screening" device, and no warning. The plaintiff has a quicker process.

Finally, Title II has broader language on who can sue, allowing more sorts of plaintiffs. "Any person alleging discrimination on the basis of disability" has standing. Thus, in the *Transport Workers* case, the court found that a union has the right to sue on behalf of member employees. Title II suits can be brought by advocacy groups, citizens groups, family members, etc.

— Robert E. Gregg

Ordinary Court Procedures Satisfy "Prompt Judicial Review" Requirement for Adult Business Licensing Ordinances

The U.S. Supreme Court's latest pronouncement relating to municipal regulation of sexually-oriented businesses should have little impact in Wisconsin. In *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. ____ (2004), decided June 7, 2004, the Court ruled that a content-neutral licensing ordinance for sexually oriented businesses is constitutional, even though it does not establish a firm deadline by which a court must rule on an appeal of a decision to deny a license. The federal and state courts in Wisconsin had reached the same conclusion in other cases. See, e.g., *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), and *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999).

Nevertheless, *Z.J. Gifts* is significant because it resolves a split among the federal circuit courts of appeals regarding the impact of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In that case, the Supreme Court held that local ordinances that require sexually-oriented businesses to obtain licenses must provide for "prompt judicial review" of licensing decisions. Some courts had interpreted the "prompt judicial review" requirement as a requirement that courts handle appeals on an expedited basis. Thus, the court of appeals in *Z.J. Gifts* held the licensing ordinance unconstitutional because expedited review was not mandated, although it could be granted in the court's discretion.

In reversing, the Supreme Court held that in most cases involving content-neutral licensing schemes, a state's ordinary judicial review rules suffice to assure a prompt judicial decision. It also found no reason to doubt that, on the whole, judges will use their powers to avoid serious threats of delay-induced First Amendment harm. Moreover, insofar as content-neutral licensing schemes involve the application of objective criteria, the Supreme Court anticipated that most cases would be simple enough to allow expeditious review. Consequently, on the whole, access to ordinary judicial review procedures is all that is required to satisfy First Amendment requirements.

In reaching this conclusion, the Court held out the possibility that foot-dragging by courts in individual cases may be sufficiently severe that it amounts to undue delay in violation of the First Amendment. However, insofar as *Z.J. Gifts* involved a facial challenge to an ordinance, rather than an as-applied challenge, the Court was not presented with any evidence of actual foot-dragging by the courts. The Court suggested allegations of undue delay would have to be reviewed on a case-by-case basis.

— Matt Weber

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.

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