

IN THIS ISSUE

- *Recent Amendment To the Impact Fee Law Raises Concern*
- *Noncompliant Retaining Wall Allowed To Stand Based, In Part, On Landoner's Good Faith Reliance on Contractor*
- *Supreme Court Narrows First Amendment Protection of Public Employee Speech*
- *Court of Appeals Confirms That A Navigable Stream Does Not Divide A Parcel Into Two Lots*
- *Good Faith Negotiation Essential Before Condemning Property*

Recent Amendment To the Impact Fee Law Raises Concern

There has been a flurry of communications about 2005 Wis. Act 477, formerly Senate Bill 681, which became law on June 14, 2006. Act 477 amends several provisions of Wis. Stat. §66.0617, the impact fee enabling law.

One question raised by the amendment is whether impact fees can still be collected by municipalities to pay for park improvements, such as the construction of fields and courts for particular sports activities. The question arises because of a change in the listing of "public facilities" that impact fees can fund. Before the amendment, the statute provided that "public facilities" included, among other things, "parks, playgrounds, and other recreational facilities." Under the newly amended version, the phrase "other recreational facilities" has been eliminated and replaced with the phrase "land for athletic fields." Thus, the new version identifies "parks, playgrounds and land for athletic fields" as "public facilities."

Some have wondered whether the change in phraseology alters the purposes for which impact fees can be used. While there may be some "recreational facilities" that do not fit under the broad general categories of parks, playgrounds and

land for athletic fields—community centers—most will. The statutory language remains broad. Impact fees can fund both acquisition of park lands and lands for athletic fields and can fund improvement of such lands. Turning bare dirt into a baseball field clearly seems to be an eligible improvement. Thus, a strong argument can be made that impact fees can fund a wide variety of recreational facilities.

2005 Wis. Act 477 also amends the enabling statute for local land subdivision ordinances, Wis. Stat. §236.45. The amendment forbids a municipality from imposing subdivision fees to fund the acquisition or improvement of land, infrastructure or other real or personal property. It appears the legislature intends such fees to be governed by the impact fee enabling law and not the subdivision ordinance.

The amendment to Wis. Stat. §236.45 can be read to mean that municipalities cannot require subdividers to pay toward public improvements outside of the subdivision, such as widening streets or bridges, installing traffic signals, constructing a storm water pond serving several subdivisions, and the like. This new statute should be considered in conjunction with another statute, Wis. Stat.

Noncompliant Retaining Wall Allowed To Stand Based, In Part, On Landowner's Good Faith Reliance on Contractor

In an unpublished opinion, the Court of Appeals recently upheld a circuit court order allowing a retaining wall running on or near a property line to remain despite its violation of County setback requirements.

The underlying facts are these. The Barthels and the DeWitzes are neighbors. The DeWitzes built a lakefront home in 1998 using a building permit their general contractor obtained. To prevent erosion, they built an eight-foot retaining wall on or near the property line dividing their lot from the Barthels' lot. They built the wall without realizing that it violated lake and side lot setback requirements. They also failed to obtain a permit for the wall, as their contractor mistakenly believed that the wall was exempt from the permit requirement.

The wall went up without objection. The Barthels were present as the wall was built, and Mr. Barthel suggested that the lake end of the wall curve around onto his property—a suggestion that the DeWitzes followed. Also, while the house was being built, but after the wall was completed, a county zoning officer visited the property but made no comments regarding the wall.

Four years later, the County commenced enforcement proceedings against the DeWitzes, which the Barthels joined as intervening plaintiffs. The circuit court found a violation of the setback ordinances, but continued the matter to allow the DeWitzes to either comply with the setback requirements or obtain a variance. The DeWitzes applied for a variance, proposing that they reduce the wall from eight feet to four feet and make other modifications as well. The County denied their application.

The circuit court affirmed the County's variance decision on certiorari review, but held that it would grant the DeWitzes equitable relief. The court ultimately entered an order allowing the wall to stand, but with the modifications that had been part of the DeWitzes' variance proposal.

The Barthels appealed. The Court of Appeals, in a per curiam opinion, held that the circuit court properly exercised its equitable powers in this case, citing the following factors: the wall was not a deliberate violation of the ordinance; the DeWitzes relied in good faith on their contractor; the County was aware of the wall early on but made no objection to it until four years after its completion; removal would cause substantial erosion problems for both the Barthels and the DeWitzes; the Barthels acquiesced in the construction, to the point where part of it was built on the Barthels' property; and removing the wall might cause runoff into the adjacent lake.

Recent Amendment To the Impact Fee Law Raises Concern

Continued from front page

§236.13(2)(a), which provides that a municipality may require a subdivider to make and install any public improvements reasonably necessary. This usually applies to improvements that will be built by the subdivider within the subdivision and turned over to the municipality.

A troubling aspect of 2005 Act 477, from a municipal perspective, is its provision that impact fees can only be imposed when a building or occupancy permit is requested and shall be due within 14 days of the issuance of the permit. Apparently, the applicant can decide when to pay within a 28-day time period centered on when the permit is issued. There is a question of what security the municipality has to assure the payment if it does not occur before permit issuance. The statute does not indicate that the fee becomes a lien on the property until paid.

Cautious municipalities may want to consider amending their codes to say either that: (1) a permit for a development that causes an impact fee to be due will expire 15 days from issuance if the fee is not paid; or (2) the permit will have a delayed effective date, that date being the day the fee is paid.

— Richard A. Lehmann

— Mark A. Neuser

Supreme Court Narrows First Amendment Protection of Public Employee Speech

The United States Supreme Court recently decided a case that will likely have significant implications for First Amendment protection of public employee speech.

In *Garcetti v. Ceballos*, decided May 30, 2006, the Supreme Court ruled that statements made by public employees in the course of performing their job duties are not protected by the First Amendment and may be the basis for disciplinary actions.

Ceballos was a Supervising Deputy District Attorney for the Los Angeles County District Attorney's Office. A defense attorney contacted Ceballos to report inaccuracies in an affidavit used to obtain a critical search warrant in a pending criminal case. The defense attorney asked Ceballos to review the case. Ceballos examined the affidavit and visited the location described in the affidavit. He determined that the affidavit contained serious factual misrepresentations.

Ceballos spoke about the affidavit with the individual who made the statements in the affidavit, but was not satisfied with the individual's explanation of the perceived inaccuracies. Ceballos relayed his findings to his supervisors and followed up by preparing a disposition memorandum in which he recommended dismissal of the criminal case. In a meeting regarding Ceballos' memo, county employees sharply criticized Ceballos' handling of the case.

Despite Ceballos' concerns about the affidavit, his supervisors decided to proceed with prosecution of the case. Defense counsel filed a motion to suppress the warrant due to the inaccurate affidavit. The trial court rejected the motion, ruling that there were grounds independent of the challenged material sufficient to show probable cause for the warrant.

Ceballos claimed that following these events, he was subjected to a series of retaliatory employment actions, including reassignment, transfer to another courthouse, and denial of a promotion. He initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Ceballos then brought suit, claiming

that his supervisors violated his free speech rights by retaliating against him based on his speech.

Justice Kennedy wrote for the majority, noting that public employees do not surrender all their First Amendment rights by reason of their public employment. The First Amendment, in certain circumstances, protects public employee speech when the employee speaks as a citizen on matters of public concern. To determine whether such speech is afforded First Amendment protection, the question becomes whether the government entity in question had an adequate justification for restricting the employee's speech to a greater degree than that of the general public. In other words, when a public employee is speaking as a citizen about matters of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."

Turning to the case before it, the Supreme Court drew a "bright line:" when a public employee makes statements pursuant to his official job duties, those statements are not protected by the First Amendment and, accordingly, the employee is not insulated from discipline in regard to those statements. In Ceballos' case, the Court found that his statements regarding the inaccuracies in the warrant affidavit were made in the course of his official job duties. Ceballos was not acting as a citizen when he reported his findings. Rather, he was performing the tasks he was paid to perform as a government employee. Because Ceballos' statements were made as part of his daily professional activities, those statements did not fall under the umbrella of First Amendment protection. As the Court explained, "The fact that [Ceballos'] duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.... If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."

Continued on page 4

Court of Appeals Confirms That A Navigable Stream Does Not Divide A Parcel Into Two Lots

In an unpublished opinion, the Court of Appeals recently upheld a circuit court decision that concluded that, when a creek physically bisects a parcel of land that is owned by a single owner, the creek does not legally divide the parcel into two lots.

The underlying facts are these. FAS built a four-unit condominium building on a parcel with 103 continuous feet of lakeshore frontage. The lakeshore frontage included the mouth of a creek that meandered through the parcel.

The Town of Bass Lake contended that the creek divided the parcel into two lots. Thus, the Town argued, the mouth of the creek could not be included in the lakeshore frontage calculation and the parcel lacked the requisite 100 feet of frontage. The Town based its position on a 1977 attorney general opinion, 66 Wis. Op. Atty. Gen. 1 (1977).

The Sawyer County Zoning Committee rejected the Town's argument, holding that the parcel at issue consisted of a single lot that satisfied the minimum lakeshore frontage requirement.

The Sawyer County Board of Appeals disagreed, holding that the Committee erred by not following the attorney general opinion. Based on this attorney general opinion, the Board held that the creek divided the parcel into two lots, both of which failed to satisfy the minimum lakeshore frontage requirement.

FAS sought certiorari review in the circuit court. The circuit court reversed the Board's decision. Concluding that the attorney general opinion at issue was of questionable authority, the court held that the creek did not divide the parcel into two lots and that the mouth of the creek could be included in the lakeshore frontage calculation.

The Town appealed. The Court of Appeals, in a per curiam opinion, concluded that the attorney general opinion at issue lacked sufficient legal authority to support its ultimate conclusion that a navigable stream divides a parcel into two lots. The court noted that, under established case law, an owner of land that abuts navigable streams holds title to the center of the creek. Because the abutting landowner owns title to the center of the creek, where a single landowner owns both banks, the landowner "owns" the entire creek bed. Applying that principle to the facts of this case, the court held that although a creek physically divides FAS's parcel, legal ownership is unified and the parcel constitutes a single lot for purposes of the lakeshore frontage calculation.

— Mark A. Neuse

Supreme Court Narrows First Amendment Protection of Public Employee Speech *Continued from page 3*

The Court recognized that future cases may require a framework to determine whether a public employee's statements were made pursuant to the employee's duties. However, since it was undisputed that Ceballos made the statements at issue in carrying out his official duties, that question was not before the Court. Finally, the Court stressed that its decision did not undermine the importance of exposing "governmental inefficiency and misconduct of employers" or the idea that employers should be receptive to constructive criticism offered by their employees. The Court pointed to state and federal legislative whistle-blower protection to provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

Three separate dissenting opinions sharply criticized the majority's "bright line" rule that statements made pursuant to the employee's official duties are not protected speech. Justice Stevens, for example, rejected the notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment. He also noted the perversity of the Court's new rule that will, in his view, give employees an incentive to voice their concerns publicly before talking frankly to their supervisors out of fear of reprisals.

The *Garcetti* decision raises many issues regarding public employee speech. What is the scope of speaking in the course of one's "official duties?" How will the Court's ruling intersect with whistle-blower protections? How will public employers encourage employees to openly discuss potentially controversial matters without fear of retaliation? The *Garcetti* decision will certainly be subject to debate for the foreseeable future.

— Jennifer S. Mirus

Good Faith Negotiation Essential Before Condemning Property

The Wisconsin Supreme Court, in a 5-2 decision, has ruled that the government's failure to negotiate in good faith with a property owner prior to commencing a condemnation proceeding is a fundamental defect. It not only deprives the government of the right to take the property until the defect is corrected; it also subjects the government to payment of the property owner's litigation expenses, including attorney's fees in seeking the dismissal of the condemnation proceeding.

The Warehouse II, LLC v. Wisconsin DOT, 2006 WI 62 (June 6, 2006).

Section 32.05(2a), Stats., requires that a condemnor negotiate in good faith before issuing a jurisdictional offer to purchase property. In *Warehouse*, the circuit court held an evidentiary hearing and ruled that the DOT had not negotiated in good faith and this issue was not disputed on appeal. The decision does not describe what actions, if any, DOT took to negotiate or why it was held not to have acted in good faith. The only discussion of what constitutes good faith negotiation is the statement, based on prior case law and a treatise on eminent domain, that there must be "a *bona fide* attempt on the part of the condemnor to induce the owner to sell the land at a reasonable figure."

The key issue in the case was whether a condemnee who succeeds in obtaining dismissal of a condemnation proceeding based on the government's failure to engage in good faith negotiations before issuing a jurisdictional offer is entitled to recover litigation expenses, including attorney's fees, under section 32.28(3)(b), Stats. The majority concluded that expenses are recoverable, because the government lacks the right to condemn property until this precondition is met.

In a lengthy dissenting opinion, Chief Justice Abrahamson argues that the majority decision "muddies the law and will foster litigation." She lays out five reasons why the majority decision is internally inconsistent and contradicts the language of the statute on recovery of litigation expenses. Moreover, she notes that the majority limited, but did not overrule, *Wieczorek v. City of Franklin*, 82 Wis. 2d 19, 260 N.W.2d 650 (1978), in which the court had held that, when a jurisdictional offer is defective, the government may start new condemnation proceedings and no litigation expenses can be

recovered. The distinction created by *Warehouse* is that expenses can be recovered when the defect is fundamental, rather than technical—a distinction the Chief Justice finds arbitrary.

As a practical matter, the *Warehouse* decision should not change the manner in which condemnors ought to be conducting themselves. Good faith negotiation has long been a statutory prerequisite. If anything, the *Warehouse* decision emphasizes the need to document the efforts a condemnor makes to negotiate a purchase. Offers to purchase should be reduced to writing. Records should be kept of meetings and conversations with the landowner during negotiation. Offers ought to be supportable by the appraisals the condemnor has obtained of the property. In addition, it is advisable to have the negotiations conducted by someone other than the attorney the condemnor expects to handle any subsequent condemnation litigation to avoid the "lawyer as witness" quandary.

The *Warehouse* decision may encourage landowners to bring more challenges to the government's right to condemn property based on procedural defects in hopes of delaying the outcome and recovering litigation expenses for the challenge. The decision invites litigation on the issue of what defects are "fundamental" versus "technical." Challenges to the condemnor's right to take must be brought early in the process—within 40 days of the issuance of the jurisdictional offer under section 32.05(5), Stats. Therefore, the best practice for the condemnor in the event that any defects are raised may be to start the process over and to correct the alleged defects rather than to litigate them in a right-to-take action.

— Mark J. Steichen

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 2006, 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