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## Wisconsin Supreme Court Sets Standards For Public Meeting Notices

In a very significant and much anticipated decision, the Wisconsin Supreme Court recently interpreted the public notice provisions of the Wisconsin Public Meetings statute and set forth guidelines for municipalities to follow when noticing public open and closed meetings. *Buswell v. Tomah Area School District*, Case 2005 AP 2998 (June 13, 2007).

The Public Meetings Law (Section 19.81, Stats, *et. seq.*) establishes the State's policy that the "public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business" and that to implement that policy, municipal meetings shall "be publically held in places reasonably accessible to members of the public and shall be open to citizens at all times unless otherwise expressly provided by law." Toward that end, municipalities are required to publically post notices of their meetings and such notice must "set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, *"in such form as is reasonably likely to apprise members of the public and the news media thereof."* §19.84(2), Wis. Stats. (emphasis added).

The issue of what level of detail must be included in a published meeting agenda to comport with the statute's requirement that the public be "reasonably apprised of the meeting's subject matter" had been

governed by a Court of Appeals' decision, *State ex. Rel H.D. Ent. II, LLC v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W. 2d 72 (Ct. App. 1999). The issue in *H.D. Enterprises* was whether an agenda item listed merely as "licenses" was sufficient to meet the statutory standard of informing the public that the City Council would be considering the liquor licensure of a grocery store and, later, a reconsideration of the initial denial of that license. The Court of Appeals held in *H.D. Enterprises* that the agenda item met the statutory standard and that "the statute does not require that the subject matter of a meeting be explained with any more specificity." The Supreme Court majority noted that *H.D. Enterprises* established a "brightline" standard for municipalities; namely, a municipality only needed to set forth in its agendas "the general topic of items to be discussed."

It was under this standard that the Tomah School Board posted a notice of a closed session meeting scheduled for June 1, 2004, related to negotiations it was involved in with its teachers' union. The notice stated:

Contemplated closed session for consideration and/or action concerning employment negotiations with District personnel pursuant to Wis. Stat. §19.85(1)(c).

One of issues in those negotiations was the hiring procedures for athletic coaches. This was of interest to community members, including Buswell, who had expressed their

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position by letter to the Board of Education prior to the June 1 meeting.

At the June 1 meeting, the Board of Education tentatively approved the contract, which included a provision regarding the hiring of coaches. The Board's regularly scheduled meeting was June 15, 2004 and included an agenda item to ratify the contract which stated:

*New Business -*

*Consideration and/or Action of the Following:*

*TEA Employee Contract Approval.*

At the June 15 meeting, the Board ratified the contract, including the coaches' hiring provision.

Under the standard set forth in *H.L. Industries*, the June 1 and June 15 notices complied with the Open Meetings Law. Buswell, however, filed suit against the Board alleging that the notices failed to reasonably apprise District residents that it was considering the teachers' contract and the coaches' hiring issue at the June 1 meeting and that the contract for ratification at the June 15 meeting included a provision related to the coaches' hiring issue. Both the circuit court and Court of Appeals applied the *H.L. Industries* standard in dismissing Buswell's law suit.

The Wisconsin Supreme Court, however, overruled those decisions and established a standard for evaluating the sufficiency of public meeting notices different than *H.L. Industries*.

The new standard announced by the Supreme Court establishes a "reasonableness" standard for evaluating public notices, rather than a standard that requires a municipality to merely list the general topics of discussion. Under the "reasonableness test," a municipality must post a notice which is "reasonably specific under the circumstances." To meet this standard, three factors must be balanced:

1. The burden of providing a detailed notice;
2. Whether the subject matter of the notice is of a particular public interest; and
3. Whether the subject matter involves non-routine action that the public would be unlikely to anticipate.

The Court provided some insight as to how each of these factors should be balanced.

With respect to the municipality's burden of providing detailed notice, the Supreme Court stated that a balance must be struck between the policy of providing greater information to the public about municipal meeting and the need to efficiently operate the government business. Factors to be assessed in this regard include the time and effort in assessing what information should be provided to the public. The court noted that "the demands of specificity

should not thwart the efficient administration of government business."

The second factor addresses the level of public interest in a topic before the municipality, including the number of people interested and the intensity of that interest.

The third factor considers whether the subject matter recurs regularly. If so, there will be less need for specificity in the public notice since citizens "are more likely to anticipate that it will be addressed." Significantly, the measure of the level of public interest for the purposes of assessing the adequacy of the notice should be based upon the information available to the person who drafts the meeting notice and what it would have been reasonable for that person to know at the time the notice is drafted.

The Supreme Court noted that sometimes a general subject heading may suffice "in cases where a general heading reasonably apprises members of the public and in other cases may not be adequate." It further stated that:

While ... a reasonableness standard will at times require the bodies to anticipate and account for public interest when noticing meetings, it will not impose a per se requirement to predict and gauge public interest on each subject at every meeting. Where predicting and gauging public interest imposes an unreasonably burden, the bodies will not be required to do so.

Applying this standard, the Supreme Court found that the June 1 notice of the closed session violated the Open Meetings Law for two reasons. First, the notice cited the wrong statutory provision for contract negotiations. Second, the notice did not specify that the negotiations were with the teachers' union. Providing the correct statutory citation and being precise in defining the parties at the session would not have burdened the Board. Also, the topic was of interest to the public as evidenced by the fact that some District residents had sent the Board a letter outlining their interest in a topic likely to be considered in the bargaining and that issue was not routinely something considered by the Board. Therefore, under the reasonableness standard, the Board should have provided more detail in its agenda so as to apprise the public of the fact that it would be negotiating the teachers' contract at the June 1 closed session.

The Supreme Court, however, rejected Buswell's argument that the Board should have specifically listed that it was considering the coaches' hiring provision at the June 1 meeting or that that provision was part of the contract which was being approved at the June 15 meeting. In this regard, the Court stated:

Requiring that school boards, or other similarly situation bodies, anticipate and list all of those provisions in a public notice would likely consume a disproportionate amount of their limited time and may require a significant effort. Moreover, as the School District argues, requiring that public notice

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## Pending Case in the Wisconsin State Supreme Court Puts Tort Claims Status of State and Local Authorities at Risk

An unpublished Court of Appeals decision issued on October 4, 2006 decided that the University of Wisconsin Hospital and Clinics Authority, created by Wisconsin Stat. §233.02, a 1995 enactment that characterized the Authority as “a body corporate and politic,” is a “political corporation,” and does fall under the tort claims procedures and limitations on recovery found in Wisconsin Statutes §893.80. *Rouse v. Theda Clark Medical Center, Inc. and University of Wisconsin Hospital and Clinics Authority*, and other defendants, 2005 AP 2743.

The Court of Appeals found itself bound by a 2001 decision of the Wisconsin Supreme Court, *Lewis v. Physicians Insurance Co.* 243 Wis.2d 648, 627 N.W.2d 484, that found the same Authority to be a political corporation.

The Court of Appeals was not happy with the result and attempted unsuccessfully to certify the issue to the Wisconsin Supreme Court.

The issue is now at that Court because the Supreme Court has accepted an appeal of the Court of Appeals decision.

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list which individual provisions of a collective bargaining agreement will be discussed in closed session could serve to undermine the governmental bodies' bargaining positions, which would place a substantial burden on them.

The ruling in this regard gives municipalities some indication of when more detailed agenda items are required. On the one hand, it is not going to be enough in matters of public interest that are not routine to continue to use general topic headings. On the other hand, the decision shows that providing details as to every item that will be before the governing board will not be required.

This decision is significant. It changes the interpretation most municipalities were using to assess the sufficiency of its public notices. The decision is prospective in application and, thus, does not affect notices issued before its publication. Furthermore, the standard to be applied in the future is a subjective standard based upon a balancing of three factors, all of which are subject to different interpretations. This creates the prospect that those public members on the “losing end” of controversial issues before municipal bodies will have an additional avenue to attack such decisions; namely, the adequacy of the public notice. Thus, if there is any question about whether a notice meets the new standards and the issue is one which has the prospect of opposition, more detail should be the general rule.

— Steven C. Zach

The case involves alleged medical malpractice. The claims were dismissed when the plaintiffs failed to file the notice of claim required under §893.80(2)(b).

The following entities at the state, regional and local levels are described as “bodies politic and corporate,” or closely similar characterizations, and have their status under §893.80 at risk in the case before the Wisconsin Supreme Court:

- The Milwaukee Center District, the Southeast Wisconsin Professional Baseball Park District, the Green Bay Brown County Professional Football Stadium District and the Madison Cultural Arts District, all created under Wisconsin Stat. Ch. 229;
- The Fox River Navigational System Authority, created by Wis. Stat. Ch. 237;
- The World Dairy Center Authority, created by Wis. Stat. Ch. 235;
- The Central Brown County Water Authority, created under Wis. Stat. §66.0823;
- The Bradley Center Sports and Entertainment Corporation, created by Wis. Stat. Ch. 232;
- Several other state-level “authorities.”
- Towns are also characterized in the Statutes as bodies “corporate and politic.” Wis. Stat. §60.01(1).

The briefs in the case in the Wisconsin Supreme Court identify one federal appellate case, a March, 2005 decision of the Seventh Circuit Court of Appeals holding that (i) the University of Wisconsin Hospital and Clinics Authority was a private entity; (ii) tracing the history of its formation; and (iii) showing that the intent of the University was to privatize the UW medical complex in order to better compete in the medical marketplace. The Court of Appeals did not find this decision to have precedential authority, especially in light of the earlier decision of the Wisconsin Supreme Court. The Seventh Circuit decision is *Takle v. University of Wisconsin Hospitals and Clinics Authority*, 402 F.3d 768 (2005).

One final note: the appellants in the case in the Wisconsin Supreme Court raised an additional issue when the case was accepted in the Supreme Court, an issue that was not raised at the Circuit Court or the Court of Appeals level, that being whether the \$50,000 limit on tort claims recovery in Wis. Stats. §893.80(2) is constitutional when applied to medical malpractice recoveries, citing cases in which the Wisconsin Supreme Court found statutory caps on medical malpractice claims to be unconstitutional.

The late-breaking insertion of this issue into the case will be of special issue to local governments that conduct ambulance and related programs.

— Richard A. Lehmann

## Court of Appeals Upholds Property Tax Assessment of Walgreen Buildings

The Wisconsin Court of Appeals rejected an appeal by Walgreen Company of the City of Madison's 2003 and 2004 property tax assessments of two rental retail properties. *Walgreen Co. v. City of Madison*, Appeal No. 2006AP1859 (May 17, 2007).

The City assessor's valuation was based on the income approach, and relied on the above-market rent under 20-year leases. Walgreen had contracted with the developer to construct retail buildings to Walgreen's specifications. The rent under the leases was substantially above-market because the rent was intended to cover the developer's costs of land acquisition, construction and financing, plus a return on the developer's investment. The assessor calculated the assessed value of the properties by taking the total rent for one year, deducting amounts representing annual risk of vacancy and expenses to arrive at an annual net operating income amount, and applied an 8.4% capitalization rate (based on the rate of return a purchaser would normally get for an investment in similar property). The assessed values of the two properties were \$3,860,000 and \$4,618,000. The assessor determined that the above-market rent caused the buildings to be more valuable than comparable properties without such leases.

Walgreen challenged the assessor's valuation method, arguing that the assessments should have been based on several factors, including comparable sales. In addition, to the extent that the income approach was relevant, Walgreen argued that the assessor should have disregarded the actual rent under the leases and should have valued the properties as if Walgreen was paying market rent. Walgreen's valuation expert had valued one of the properties at \$1,790,000, which the City had assessed with a value of \$4,618,000. The City argued that there were no comparable properties because of Walgreen's atypical leasing arrangement with the developer, and that the income approach was the only appropriate assessment method in light of the available information.

The Court concluded that the City assessor correctly relied on the actual rent paid under the leases in establishing assessed values because the leases were negotiated pursuant to arm's-length transactions. The Court noted that the assessment of a property with a long-term lease need not always be based on the actual rent under the lease rather than on market rent. However, as a general rule, the Court ruled that it is appropriate to rely on actual rent rather than on market rent when the actual rent is negotiated pursuant to an arm's-length transaction. The Court also held that it was appropriate to ignore Walgreen's allegedly comparable sales for the reason that they were not comparable because the sales did not involve properties with comparable leases with above-market rent. Finally, the Court rejected Walgreen's argument that the assessments violated the rule of uniformity under Article VIII, Section 1 of the Wisconsin Constitution, which requires that the method of taxing real property must be applied uniformly to all classes of property within the tax district.

— William R. Peck

## Court Of Appeals Enforces Sewer And Water Connection Fees, Despite PSC's Claims For Primary Jurisdiction

The Court of Appeals recently concluded that a contract between a municipality and a hospital for water and sewer service in exchange for the payment of over \$1 million in sewer and water fees was enforceable, despite the Public Service Commission's claim that it should have primary jurisdiction over the decision.

St. Joseph's Community Hospital of West Bend, Inc. and the Village of Jackson entered into a contract whereby the Village agreed to provide water and sewer service to the Hospital in exchange for \$1,080,000 in fees. The Hospital then refused to pay the fees arguing the charges were actually impact fees which the Village could not legally enforce because it did not comply with the impact fee statute. The Village filed suit against the Hospital to enforce the contract.

Shortly after the Village filed suit, the Hospital filed a complaint with the PSC alleging that the Village was requiring it to pay fees that were not in the Village's filed rates and that were unjust, unreasonable and discriminatory. The PSC took jurisdiction over the complaint, and maintains that it has primary jurisdiction over the dispute between the Hospital and the Village because it has expertise regarding disputes over municipal water and sewer service rates and conditions.

On May 30, 2007, the Court of Appeals in *Washington County v. Village of Jackson*, 2006 AP 943, rejected the PSC's claims of primary jurisdiction given that the case involves the interpretation of a contract. The Court also rejected the argument that the fees constituted illegal impact fees, stating that: "Here, the contract does not even mention impact fees. Rather, the document on its face unambiguously classifies the water and sewer REU charges as 'connection fees'. In view of this lack of ambiguity as to the nature of the REU charges, we will not permit the Hospital to circumvent its obligations under the negotiated contract. The Hospital does not have a defense of duress or coercion. Further, the Hospital has not demonstrated that the Village lacked the authority to impose connection fees. The contract provision is enforceable as it stands." An appeal of the decision is expected.

As an interesting aside, the Hospital (which argues for PSC jurisdiction) was previously represented by Attorney Lauren Azar, who was recently appointed as a PSC Commissioner.

— Lawrie Kobza

## Service of Notice of Disallowance On Claimant's Daughter Not Sufficient To Trigger 6-month Limitation On Claim

The courts have reaffirmed that strict compliance with the letter of the law is necessary for municipalities to trigger the 6-month statute of limitations when denying notices of claims under section 893.80, Stats. The Supreme Court affirmed a Court of Appeals ruling that the signature of a claimant's daughter on the certified mail receipt was not sufficient to prove "service on the claimant" under 893.80(1g), Wis. Stats. *Pool v. City of Sheboygan*, 2007 WI 38. The Court of Appeals decision, published at 2006 WI App. 122, 293 Wis. 2d 725, 719 N.W.2d 792, was discussed in the June 2006 edition of the Boardman Municipal Law Newsletter.

The case arose out of a dispute over the removal of Pool's fence as part of a widening of highway 28 in the City of Sheboygan. Pool filed a notice of claim with the city on May 25, 2004, alleging that the removal of the fence constituted an inverse condemnation and seeking damages. The city sent him a notice of disallowance of the claim by certified mail on September 8, 2004. The city did not check the box on the certified mail receipt stating "restricted delivery." The next day, Pool's adult daughter signed the receipt and checked the box for "agent" rather than "addressee." When Pool filed a petition for compensation on March 22, 2005, the city moved to dismiss the proceeding as being outside the 6-month limitation in section 893.80(1g), Stats. The circuit granted the dismissal, but the judge made a point of saying that it was "quite troubling" that the city had not checked the box for restricted delivery.

The Court of Appeals reversed the circuit court's judgment and remanded the case for further proceedings. It concluded that the service of the notice was deficient because it was received by the claimant's daughter. The plain language of section 893.80(1g), Wis. Stats. requires that the notice be "served on the claimant" by either registered or certified mail. The court split on whether a receipt for a certified letter signed by the claimant was necessary to prove service, with the majority deciding that it was not essential. The city argued that proof of actual notice on the claimant was sufficient, but the court rejected this argument as contrary to the plain language. The court noted that allowing proof of actual notice would effectively shift the burden of proof to the claimant and convert the determination of whether service was made into a fact intensive one involving issues of credibility, rather than a simple matter of documentation.

The Wisconsin Supreme Court affirmed the Court of Appeals' decision. The Court noted that the fact of service on a claimant and proof of that service are two distinct concepts. Unlike the requirement that proof of service of summons be filed when an action is commenced, section 893.80(1g) does not require that proof of service of a notice of disallowance be filed. If the claimant contests service, however, the municipality will need to prove that service was accomplished. The subsection identifies examples that are proof of service, namely

## Conservation Water Rates Approved for Waukesha

The Public Service Commission has approved Waukesha Water Utilities' request for conservation water rates for its residential customers. Under the new rate structure—called an inclining block rate structure—a residential customer's water rates will increase if they use more than 10,000 gallons of water per month. This is in contrast to the typical water rate structure—called a declining block rate structure—in which water rates decrease as more water is used. This is the first time the PSC has approved a conservation based rate structure for residential customers of a water utility.

Under the approved rates, the residential class would pay (a) \$1.95 per 1,000 gallons, for the first 10,000 gallons used per month or 30,000 gallons used per quarter; (b) \$2.20 per 1,000 gallons, for the next 3,333 gallons used per month or 10,000 gallons used per quarter; and (c) \$2.70 per 1,000 gallons, for over 13,333 gallons used per month or 40,000 gallons used per quarter. The commercial, industrial and public authority class of water users would continue with a declining block rate structure. Waukesha has estimated that about 20 percent of water sales during peak period usage and about 9 percent of the water sales in winter months would be subject to the conservation rate structure, and that the new rate levels will generally apply to discretionary outdoor usage without affecting the majority of other residential usages.

In approving the conservation rate structure, the PSC commended Waukesha on taking the initiative to be the first water utility in the state to implement a conservation based rate structure for its residential customers. The PSC noted that the inclining block rate structure represents an important new policy direction for the State. In order to evaluate the effects of the conservation rate structure on water usage, the PSC asked Waukesha to submit a report to the PSC in a year that evaluates the impact and effectiveness of the conservation rate design.

— Lawrie Kobza

a receipt signed by the claimant for either registered or certified mail and the return of a registered letter. However, the Supreme Court did not adopt the dissenting judge's position that these were the only permissible means of proving service. The Court implies that an admission of service signed by the claimant would also be suitable proof.

— Mark J. Steichen

# MUNICIPAL LAW NEWSLETTER

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