

MUNICIPAL LAW NEWSLETTER

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Prevailing Wage Law Requirements Substantially Extended

Wisconsin's 2009-2010 budget (Act 28) substantially extends prevailing wage law requirements. The changes fall into three main categories.

Lowering of Prevailing Wage Threshold

Beginning January 1, 2010, the threshold for applying the prevailing wage requirements to public works projects is lowered to \$25,000, regardless of whether the project is a single or multi-trade project. The requirement for annual inflationary adjustments is repealed. In contrast, the 2009 threshold for applying the prevailing wage requirements to public works projects is \$234,000 for multiple trade projects and \$48,000 for single trade projects.

Extending Requirements to Public Works Dedicated to Municipality

Act 28 extends the prevailing wage requirements to public infrastructure (*i.e.* roads, streets, sanitary sewer, water mains, and bridge projects) paid for and constructed by private developers and dedicated to the municipality.

This change codifies recent Wisconsin Department of Workforce Development (DWD) decisions finding the prevailing wage rate law applies to public infrastructure to be constructed as part of a private development. In each of the cases, the municipality entered into an agreement with a private developer for a development, such as a large commercial store or residential subdivision. The agreements required the developer to construct the public roads, water facilities, sewer facilities and similar infrastructure needed to serve the development, and then to

dedicate those improvements to the municipalities after completion. DWD opined that public infrastructure constructed pursuant to these agreements were covered by the prevailing wage law. Municipalities strongly objected to this interpretation and had sought administrative review to reverse the DWD's decision. Act 28 now places the DWD's interpretation into statute.

Extending Requirements to Private Construction Projects Which Receive Public Assistance

Act 28 also creates a new statute, §66.0904, which extends prevailing wage requirements to private construction projects that receive \$1 million or more in direct financial assistance from a municipality. "Direct financial assistance" means the local government directly provides or makes available money to a private entity to assist in the erection, construction, repair, remodeling, or demolition of a private facility. The money may be provided in the form of a grant, or pursuant to a agreement such as a redevelopment agreement or economic development, or any other arrangement. Private projects not covered by this requirement include residential property containing four or fewer dwelling units; residential property supported by affordable housing grants, home improvement grants, or grants from a local housing trust fund; and residential property intended to increase the supply of affordable housing in a community.

—Laurie Kobza

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Statute of Repose Bars Stormwater Damage Claim Based Upon City's Approval of Development More Than Ten Years

The Court of Appeals, 4th District, has held that plaintiffs' stormwater damage claims against the City of Dodgeville are barred by the ten year statute of repose set forth in Wis. Stat. § 893.89. *Hocking v. City of Dodgeville*, 2008 AP2812 (decided 6/4/2009, 4th District Court of Appeals. Plaintiffs sued the City alleging it was negligent in the design, plotting, approval, and development of an adjacent subdivision, and as a result plaintiffs' property was damaged by excessive storm water runoff from the adjacent subdivision. The development occurred between 1989 to 1992.

The City moved to dismiss the lawsuit alleging that the suit was barred by § 893.89, which provides that no action may be commenced against any person involved in improving real property more than ten years after the substantial completion of the improvement, for any injury to property arising out of any deficiency or defect in the design, land surveying, planning, supervision of construction of, or construction of the improvement to real property. Plaintiffs conceded that the date of the substantial completion of the improvement in its case was more than ten years before the filing of their complaint, but they argue that the statutory bar did not apply, however, because (1) the City provided an express warranty or guarantee of the improvement under § 893.89(4)(b), and (2) the City was negligent in the maintenance, operation, or inspection of the improvement under §893.89(4)(c). The Court of Appeals rejected Plaintiffs argument and affirmed the dismissal of the lawsuit against the City.

According to the Court, the exception under §893.89(4)(b) does not apply in this case because the City never provided any enforceable express warranty or guarantee to plaintiffs. The common council is the only entity authorized by statute to act on behalf of the City, and, while the common council may delegate its authority, it must do so clearly and specifically. That did not occur here. Although plaintiffs had numerous conversations with city officials over the years regarding the stormwater issues, these statements made by city officials did not constitute action by the common council, and did not become an express warranty or guarantee to plaintiffs. Therefore the §893.89(4)(b) exception did not apply.

The Court also concluded the §893.89(4)(c) exception, which provides that the statutory bar does not apply to owners or occupiers of real property "for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property" did not apply. Plaintiffs argued that this

exception applied because the City owns the streets in the subdivision and, the City failed to alter the streets to alleviate the ongoing water damage to the plaintiffs' property. The Court rejected this argument, refusing to consider the failure to repair a nuisance originally caused by an improvements to be the negligent maintenance of an improvement. According to the Court such an interpretation would eliminate the protection provided by the statute of repose, and an owner or occupier would remain liable for every failure to remedy continuing damage that resulted from an improvement.

In order for the §893.89(4)(c) exception to apply, the City must have been negligent in its maintenance of the streets within the subdivision. Here there was no factual submission showing that the City did or failed to do something with respect to keeping the subdivision streets in repair that caused water damage to their property. Therefore the §893.89(4)(c) exception did not apply.

-- Lawrie Kobza

State Budget Adopts Water Fees

The State's 2009-2010 budget was signed by Governor Doyle on June 29, 2009. The budget includes three new fees on water users. Collection of the fees is scheduled to begin January 1, 2011. The three new fees are:

Annual Fee on All High Capacity Users

All entities with water supply systems capable of making a water withdrawal averaging 100,000 gallons per day or more in any 30-day period will be required to pay an annual fee of \$125. The Department of Natural Resources ("DNR") may increase this fee in the future by administrative rule.

Fee for Water Diversion Approval

Any entity applying for approval to divert water out of the Great Lakes Basin must pay a \$5,000 fee. This fee is to be paid by communities located on the Great Lakes divide or just outside the divide that seek approval to use Great Lakes water in their communities and then return the wastewater back to the basin.

Water Use Fee Within the Great Lakes Basin

All water users within the Great Lakes Basin that withdraw more than 50,000,000 gallons of water from the Great Lakes Basin in a year will be required to pay a water use fee. The budget did not establish the amount of the fee but instead gave the DNR the authority to establish the amount of the fee by rule.

-- Lawrie Kobza

Neighboring Property Owner Owes No Duty To Prevent Stormwater From Flowing Onto Adjacent Property

The Wisconsin Supreme Court has held that property owners have no absolute duty to prevent stormwater from flowing from their property onto adjacent property. In *Hocking v. City of Dodgeville, et. al*, 2007AP1754 (July 9, 2009), plaintiffs brought a claim against uphill landowners who plaintiffs claimed were liable for causing stormwater runoff onto plaintiffs' property. Plaintiffs originally purchased their home when there were no neighbors nearby. After the land around them was developed as a residential subdivision, significant water problems developed at their home. An engineer testified that the increased stormwater runoff flowing onto their property was due to the way in which the residential subdivision was developed.

Plaintiffs filed a complaint against the neighboring property owners and others. (*See related article regarding action against the City of Dodgeville.*) The complaint against the neighboring property owners alleged that although the defendants were not involved with the development of the property, they negligently maintained a nuisance by owning the uphill property. The circuit court dismissed the claim against the neighboring property owners. The Supreme Court upheld the circuit court's decision, holding that under the circumstances of this case the neighboring property owners had no duty to abate the nuisance.

The Court reached this conclusion based upon its analysis of the "reasonable use" doctrine as applied to the facts of the case. Under the reasonable use doctrine, a landowner is entitled to make a reasonable use of his or her land, even if the use alters the surface water flow from the land and causes some harm to others. A landowner is liable under the reasonable use doctrine only if his or her interference with the surface water flow is unreasonable. As a corollary, the Court stated, a property owner has a duty to act under the reasonable use rule only when he or she uses

his or her property unreasonably. If the property is being reasonably used, the landowner will have no duty to abate a nuisance.

In this case, the Court stated that the defendants' use of their property did not alter the flow of surface water, and was not unreasonable. As the Court described it, defendants merely purchased a home in a development and lived there. Since the defendants' use of the property was reasonable, the Court held that defendants had no duty to act to abate any nuisance to plaintiffs' property.

— *Lawrie Kobza*

Court of Appeals Reaffirms Powers of Town Boards To Regulate Aspect of Land Development Through Adopted "Village Powers"

Towns that are under county zoning can, nonetheless, adopt and enforce building permit ordinances, driveway regulation ordinances and the like under a statute defining Village Board powers that are available to towns that have adopted "Village Powers."

A town in Dane County applied such a town ordinance to determine where a property owner could locate an agricultural accessory building on a parcel zoned for agricultural use.

The property owner argued that building location was something that could be regulated under the zoning and that the Town Board was really attempting to exercise zoning powers, which it did not have, since the Town was under county zoning.

The Court of Appeals drew upon earlier case law, particularly *Town of Clearfield v. Cushman*, 150 Wis.2d 10, 440 N.W.2d 777(1989), to hold that, since the Town had "Village Powers," it could use the authority of Wisconsin Statutes sec. 61.34(1), which allows villages and towns with Village Powers to "act for the good order of the(Town) by enactment and enforcement of regulatory ordinances."

State ex. rel. Gebl v. Town Board of Perry, Appeal No. 2007AP1076. A petition for review has been filed with the Wisconsin Supreme Court.

— *Richard A. Lebmann*

Court of Appeals Strikes Down Restrictive Wind Turbine Ordinance

In a decision issued on July 15, 2009, (*Ecker Brothers v. Calumet County*, Appeal No. 2007AP2109) the Wisconsin Court of Appeals (District II) has struck down a Calumet County ordinance that imposed broad and generalized minimum setback, height and noise requirements for wind systems being proposed for development anywhere in the county. The decision, widely regarded as a victory for proponents of wind development, expressly affirms a legislative intent to promote alternative energy systems, such as wind and solar, and to disfavor wholesale local control over such systems.

The case came about when local farmers sought to expand an existing wind facility on their property in order to generate more electric energy to sell back to their local electric provider. The farmers applied for a grant to support the expansion but failed to secure the necessary letter of support from Calumet County, which instead passed a moratorium on further wind turbines and, ultimately, an ordinance that imposed uniform restrictions on all wind energy systems based on a classification of a proposed system as either large or small. The ordinance required the farmers to apply for a county permit and comply with the ordinance's restrictions. The farmers proceeded to seek declaratory judgment from the circuit court that the ordinance was unlawful on the grounds that the County exceeded its authority under Wis. Stat. §66.0401. The County argued that the farmers' claim was barred for failure to serve proper notice of claim under Wis. Stat. §893.80. The circuit court agreed and the farmers appealed.

In reversing the circuit court, the Court of Appeals' decision first rejects the County's notice of claim argument by reasoning that, even though the farmers failed to provide formal notice of claim to the County within the required 180 day time frame, the County (i) had *actual* notice of the claim by virtue of a two year correspondence with the farmers in which the dispute was fully aired; and (ii) was not prejudiced since it had notice of the farmers' claim even before the County enacted the ordinance. The Court of Appeals found further that a series of letters from the farmers to the County constituted substantial, albeit

not, strict, compliance with the requisite notice of claim procedures.

With respect to the substantive issue, the Court of Appeals' decision finds that Section 66.0401 allows local control of wind and solar energy systems as long as such restrictions satisfy one of three conditions: the restriction must either (i) serve to preserve or protect the public health or safety; (ii) not "significantly increase" the cost of the proposed system or "significantly decrease" its efficiency; or (iii) allow for an alternative system of comparable cost and efficiency. According to the Court of Appeals, the statutory scheme does allow political subdivisions to issue "wind access permits," but these are intended to benefit and protect wind energy developers from impermissible interference from other property owners. The statute does not require wind energy system owners to obtain permits or prior approvals from the applicable governing bodies.

As analyzed by the Court of Appeals, the problem with the Calumet County ordinance is that it imposes the same restrictions for all systems, rather than providing for a case-by-case consideration of a specific proposal along the lines of a conditional use permit application. Implementation of such "across the board" regulations has the effect of substituting a judgment by the county board for that of the state legislature with respect to the desirability of alternative energy systems and goes beyond the administrative and procedural authority expressly delegated by the legislature to political subdivisions of the state: "When a political subdivision creates restrictions without sufficiently developed facts about *a* particular wind energy system, it is impossible for it to determine if its ordinance is in conflict with the statute. We therefore conclude that Wis. Stat. §66.0401(10) requires a case-by case approach . . . and does not allow political subdivisions to find legislative facts or make policy." The Calumet County ordinance is thus held to be *ultra vires* and the case remanded to the circuit court to reconsider the farmers' declaratory judgment action accordingly.

In view of its wide scope, *Ecker Brothers* is likely to have the effect of chilling ongoing efforts by local authorities and community groups to use local restrictions as a means of retarding wind development. Numerous restrictive ordinances have been adopted by counties, towns and other local governments, all of

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Condemnation: No Bright-line Test for Project Influence Rule

The District II Court of Appeals has declined to adopt a bright-line test for administering the project influence rule (“rule”) set forth in section 32.09(5), Stats. *Spanbauer v. DOT*, 2009 WI App. 83 (May 27, 2009).

The rule provides that in determining the amount of just compensation for a taking of property, any increase or decrease in its fair market value caused by the public improvement cannot be taken into account. The rule applies to influence caused either by the completion of the project itself or the knowledge by the buyer or the public in general that plans for the public improvement have been made and that the taking is likely to occur.

In *Spanbauer*, the Wisconsin Department of Transportation (“DOT”) was acquiring property for a project on highway 41 in Oshkosh to create a round about at an interchange. The landowner’s appraiser used as a comparable property a purchase of a lot by the Kwik Trip chain of gas stations. The property was near the subject property and was adjacent to where the round about would be constructed. Kwik Trip acknowledged that it bought the lot because of its location relative to the public project for which Spanbauer’s property was being taken.

Two days before trial, the DOT moved the trial court to exclude any evidence regarding the Kwik Trip purchase. The motion was heard the morning of trial and would have required the landowner’s appraiser to

completely revise his report that day. DOT argued that the trial court should apply a bright-line test. Under DOT’s formulation, any sales of property that occurred within the foot print of the public improvement project and that occurred after the public or the buyer became aware of the plans should be categorically excluded.

Spanbauer argued that the issue was one of weight and credibility for the jury. His appraiser included the Kwik Trip purchase as a comparable sale in his report. He concluded the price Kwik Trip paid for it was not influenced by the project. The basis for his opinion included that: a) the sale price was in line with sales of other commercial property in Oshkosh; b) it was not the highest value among his selected comparables; c) there was uncertainty whether the project would actually be completed such that the public was unwilling to pay a premium; and d) that using the comparable made little difference in his opinion on value. If the sale were removed and he included a factor that DOT’s appraiser included in his report, the net result would be almost identical.

The trial court treated the issue as a dispute of fact involving an evidentiary ruling. Based on the liberal admission of expert testimony in Wisconsin and Spanbauer’s appraiser’s opinion that the Kwik Trip sale price was not influenced by the project, the issue would have to be presented to the jury to assess the credibility of the appraisers’ opinions. The court instructed the jury not to include in their decision on value any effect the public improvement might have on the fair market value of Spanbauer’s property. The jury returned a verdict very close to Spanbauer’s appraiser’s conclusion on value.

On appeal, the DOT again requested the adoption of a bright-line test. The appeals court rejected the request. It concurred with the trial court that the issue was a dispute of fact to be determined based on the evidence. The appeals court applied the very high standard of review necessary to overturn a trial court’s discretionary ruling on the admissibility of evidence and found that the trial court’s decision was rational. In addition, the Court of Appeals noted that section 32.09(5), Stats., prohibits the inclusion of any increase or decrease in the fair market value attributable to the project in the determination of just compensation. However, it says nothing about excluding evidence regarding whether a proposed comparable sale price was affected by the project. The issue will continue to be addressed case-by-case depending on the facts of each case.

Court of Appeals Strikes Down . . .

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which have been effectively nullified by the Court of Appeals’ decision in *Ecker Brothers*.

The decision may also intensify public attention on wind uniformity legislation currently under consideration in the legislature that would require the Public Service Commission to set uniform rules for wind projects statewide and expressly prohibit local governments from adopting greater restrictions. Such a bill was passed in June by the Assembly Committee on Energy and Utilities by a wide margin, supported by a broad coalition of business, labor, environmental and farm groups.

— Richard A. Heinemann

— Mark J. Steichen

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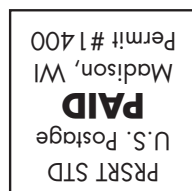


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