

# MUNICIPAL LAW NEWSLETTER

**BOARDMAN**<sup>LLP</sup>  
LAW · FIRM

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## New Legislative Districts Released By Federal Court

New legislative districts for the Wisconsin Assembly and Wisconsin Senate were established in a decision by the United States District Court for the Eastern District of Wisconsin on May 22, 2002. *Baumgart, et al., v. Wendelberger, et al.*, Case No. 01-CV-0121.

Every ten years, legislative districts must be re-drawn to meet the Constitutional mandate of one person-one vote. That task is committed to the state legislature. However, the Wisconsin legislature has not been able to approve and have signed by the Governor a redistricting plan since the 1970’s.

This year was no different. The request for the Court to draw the legislative boundaries was filed with the federal court in Milwaukee in 2001. In January, 2002, Republican leaders asked the Wisconsin Supreme Court to take jurisdiction of redistricting, but the state Supreme Court declined.

A trial was held in Milwaukee on April 11-12, 2002.

The new districts do not make significant changes from the 1992 districts. Milwaukee County lost two Assembly districts, due to a loss in population. The most surprising aspect of the Court’s decision is that a number of incumbent legislators will now reside in the same legislative districts. This will require them to either move, run against another legislator, or retire. It already appears there will be significant turnover in legislators, particularly in the Assembly.

A copy of the Court’s decision and the maps of the new districts can be obtained on the website for the Eastern District of Wisconsin, [www.wied.uscourts.gov](http://www.wied.uscourts.gov).

The Boardman Law Firm represented the State Legislative Democrats in the redistricting litigation.

— Michael P. May

## Alliant Energy Loses Challenge to Utility Holding Company Law

The U.S. District Court for the Western District of Wisconsin (Judge Shabaz) rejected a challenge by Alliant Energy Corporation and Wisconsin Power and Light Company to the Wisconsin Utility Holding Company Act (“WUHCA”). The companies filed suit against the Public Service Commission of Wisconsin claiming that four provisions of the Act pertaining to in-state incorporation, takeovers, the asset cap and securities as well as the statutory prohibition against the transfer of any license, permit or franchise to own, operate or control any utility operations to a foreign corporation were unconstitutional.

Judge Shabaz issued his decision on the merits of the case on May 20, 2002. After rejecting the companies’ constitutional arguments and upholding the challenged laws, the district court also determined that even if

the challenged laws were unconstitutional as the companies claimed, Alliant could not challenge the constitutionality of WUHCA because an entity may not challenge the constitutionality of the law to which it owes its existence. Since Alliant was formed pursuant to WUHCA, it was barred from challenging the validity of the Act.

The federal district court had previously dismissed the case after ruling that because of the vague allegations Alliant/WPL presented in their complaint, they lacked standing to pursue their claims. The Seventh Circuit reversed that decision earlier this year, concluding that more definite allegations were not required for the complaint stage of the case. The case was then sent back to the district court for decision.

— Anita T. Gallucci

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# Joint Legislative Council to Study Open Records Law

The Joint Legislative Council is reviewing topics for Legislative Study Committees, including examining Wisconsin's Open Records Law. Study committees are established by the Joint Legislative Council to examine major issues and problems identified by the Legislature. The study committees are made up of Legislators and citizens who are interested in or knowledgeable about the study topic. Legislative Council Study Committee topics are generally introduced as legislation for the next session.

The Special Committee to review the Open Records Law will be headed by Sen. Jon Erpenbach and Rep. Mark Gundrum. The Committee has been directed to review the Supreme Court decisions in *Woznicki v. Erickson*, 202 Wis.2d 178, 549 N.W.2d 699 (1996), and *Milwaukee Teachers' Educational Association v. Milwaukee Board of School Directors*, 227 Wis.2d 779, 596 N.W.2d 403 (1999) and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions. In addition, the Special Committee has also been directed to recommend changes in the Open Records Law to accommodate electronic communications and to consider the sufficiency of an Open Records request and the scope of exemptions to the Open Records Law.

In the *Woznicki* case, the Wisconsin Supreme Court held that a district attorney must notify any individual who is the subject of a record which the district attorney proposes to release to a requester prior to release, and that the individual may appeal a decision to release the record to circuit court, which must determine whether permitting access would result in harm to the privacy or reputational interests of the subject individual that outweigh the public interest in allowing access. The records requested in this case were *Woznicki's* public employee personnel records

In the *Milwaukee Teachers Education Assn.* case, the issue was whether public employees are entitled to *de novo* judicial review under *Woznicki*, when a record custodian who is not a district attorney decides to release information from the employees' personnel records in response to an open records request. The court held that the *de novo* judicial review recognized in *Woznicki* applies in all cases in which a record custodian decides to disclose information implicating the privacy and/or reputational interests of an individual public employee, regardless of the identity of the record custodian.

During the last legislative session, a bill (Assembly Bill 175) was introduced that would have reversed the *Woznicki* decision so that no custodian of a public record would be required to notify an individual who is the subject of a record prior to providing to a requester access to a record containing information pertaining to that individual and that no person would be entitled to judicial review of the decision of a custodian to provide a requester with access to a public record. The bill, however, would have created a statutory procedure under which individuals who are the subjects of certain public records could seek a court order to block the release of the records if the individuals can demonstrate that the harm to their privacy or reputational interests resulting from disclosure of the information contained in those records outweighs the public interest in providing access to those records. While Assembly Bill 175 failed to pass, it is expected that the Special Committee will recommend adoption of a similar bill in the coming session.

— Anita T. Gallucci

## Matthew D. Weber Joins Boardman Law Firm

Matthew D. Weber joins Boardman Law Firm from the University of Michigan Law School, where he served as visiting clinical assistant professor at the Legal Assistance for Urban Communities Clinic. Weber's work focused on inner-city redevelopment initiatives, including the development of affordable housing and in-place industrial parks in Detroit, Michigan. Weber has extensive experience assisting nonprofit organizations with projects funded by the HOME Investment Partnership Program, the Low-Income Housing Tax Credit Program, and the Community Development Block Grant Program.

Weber is a *cum laude* graduate of the University of Wisconsin Law School and also holds an M.A. from the University of Wisconsin La Follette Institute of Public Affairs. Throughout his career, Weber has been active in community development, affordable housing, and environmental and nonprofit law.

Please join us in welcoming Matthew D. Weber to Boardman Law Firm LLP.

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# “Known Danger” Exception to Municipal Immunity Continues to Generate Litigation

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The municipal governmental immunity statute, section 893.80(4), Stats., provides broad immunity to local governments from liability for their discretionary acts. The courts have found exceptions to this immunity, including the “known and present danger” rule first enunciated in *Cords v. Anderson*.

*Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977).

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In *Cords*, a park manager knew that a hiking trail in a state-owned recreational area known as Parfrey’s Glen passed within inches of a ninety-foot gorge. One misstep would cause a hiker to slide down a twenty-one foot steep incline to a direct eighty-foot drop-off to a rock bottom. Despite knowledge that the trail was dangerous, particularly at night, the park manager took no action to place warning signs or to advise his superiors. A hiker fell and received very serious injuries. The Supreme Court held that these circumstances presented a known and present danger of such a degree that the park manager’s duty to act became ministerial. Accordingly, the manager was not immune from liability.

The *Cords* exception was applied again in *Domino v. Walworth County*, 118 Wis. 2d 488, 347 N.W.2d 917 (1984). A sheriff’s dispatcher was advised that a tree had fallen during a storm and was blocking a town road. The dispatcher initially assigned a squad to investigate the incident, but diverted the officer to a personal injury accident. The dispatcher failed to assign another county officer to scene or to alert the town officials of the situation. Domino struck the tree with her motorcycle and was injured. The court held that the dispatcher’s failure to act in response to a known danger precluded immunity for her actions.

Most recently, in *Lodl v. Progressive Northern Ins. Co.*, 2001 WI App. 3, 240 Wis. 2d 652, 625 N.W.2d 60, the court of appeals reversed a summary judgment entered in favor of the Town of Pewaukee on immunity grounds. In *Lodl*, a storm knocked out the traffic control signals at a busy intersection. An officer was dispatched to the scene, but a collision occurred and a lawsuit was brought against the officer and the town. In support of summary judgment, the town offered the officer’s testimony that he tried to control

traffic by donning a blaze orange rain coat and standing in the center of the intersection with a flashlight. Because no cars were yielding, he went back to his squad to call for assistance. In response, the injured driver testified that he saw the officer standing on the side of the road not making any attempt to control traffic. The court of appeals found there was a dispute of fact and sent it back to the circuit court. The case is now pending before the Supreme Court and a decision is expected soon.

Although rarely applied successfully, and although the courts have declared that the “known danger” rule is a very narrow exception, the rule continues to generate fair amount of litigation. In *Keiko v. Madison Metropolitan Sch. Dist.*, Appeal No. 99-2305 (Ct. App. 2000)(unpublished), a special education student was sexually molested twice by a fellow student. The plaintiff alleged that the school district employees were aware of the risk the other student posed. The court of appeals affirmed a summary judgment that the school district was immune from suit. In a very brief decision, the court stated that, while the “other student obviously presented some possibility of danger, nothing in the record indicates that the threat was as compelling as the cases cited.” *Id* at ¶ 4.

Vilas County was held immune from liability in *Parrett v. Sudeta*, Appeal No. 00-2446 (Ct. App. 2001)(unpublished), for a collision with a squad car. A sheriff’s deputy made a traffic stop of on a four-lane stretch of highway 70. Because of large snow banks along the road, the squad and the other vehicle blocked the right hand lane of travel. The squad’s emergency lights were activated. A truck came up from behind and struck the squad, propelling into the stopped vehicle and injuring its passenger. Because the road was straight, the left lane remained open, and the emergency lights were visible, the court held that the stop did not create an extreme danger of the magnitude presented in *Cords*.

In *Woychik v. Ruzic Construction Co.*, Appeal No. 01-0022 (Ct. App. 2001)(unpublished), a driver and passenger brought suit against the Wisconsin DOT and its contractor

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## “Known Danger” Exception to Municipal Immunity Continues to Generate Litigation

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for injuries they incurred while driving through a road construction site. The contractor had a temporary gravel ramp system installed while repairs were made to pavement. The project manager drove over the ramp and determined it was safe for traffic at 55 mph. There was a dispute as to whether there were any warning signs or lights placed at the scene. The court held that the DOT and contractor were immune, because the extent of danger was not sufficiently clear and absolute as to give rise to a ministerial duty. Moreover, the contractor had taken action to test the ramps and found them passable.

A recent police dispatch case raised a *Cords* issue, but with a different result from *Domino*. *Hoskins v. Dodge County*, 2002 WI App. 40, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_ (Jan. 31, 2002). On a stormy evening on May 4, 1999, the Kruegers observed a boat with three people having motor difficulties in the area of a neighbor’s pier near Beaver Dam. The couple called out to the occupants of the boat to ask if they needed help. The boat motor started again and one occupant waved as if to indicate that everything was alright. The Kruegers called their neighbor Block and told him they had seen the boat strike his pier. Block called the city of Beaver Dam police department and reported the incident. The police verified that the address was outside the city limits and passed the information to the Dodge county sheriff’s department. The report was that it was unknown if anyone was hurt and unknown if the boat was damaged. The county dispatched a deputy to interview the Kruegers and Block. While the deputy was investigating, the dispatcher called a DNR warden and reported that a boat had struck two piers, was probably damaged, and that the county was worried about it sinking. When the dispatcher asked if he should send out a rescue boat to search, the warden advised against it and recommended that the county treat it like a “regular hit and run” and have the deputy check the boat landings. It turned out that the boat had swamped in the heavy wind and waves and two of the boaters died. Nevertheless, the court affirmed a summary judgment for the county on immunity grounds. The information made available to the dispatcher did not indicate a “known, present danger,” only the possibility of danger. Moreover, the dispatcher took action to investigate the incident.

The *Cords* exception was argued in a group home setting in *Jones v. Wisconsin County Mut. Ins.*, App. No.

01-1946 (April 9, 2002)(not recommended for publication). Jones sued Shawano county for injuries she received when she fell at a county-owned group home. When the county purchased the home, in 1998, the front entrance had two steps leading up to a concrete landing. The county hired a contractor to install a ramp on one side. The contractor installed it made the ramp two-and-three-quarter inches higher than the side leading up from the steps, leaving a ridge down the middle of the landing. Jones was standing on the landing when the door opened and she fell, sustaining severe head injuries. Affirming summary judgment for the county, the court found that the level of danger presented by the uneven landing was not comparable to the danger presented by the sheer drop in *Cords* or the traffic hazards in *Domino* and *Lodl*.

Most recently, the court of appeals reversed a denial of summary judgment for the city of Menomonie in a wrongful death action. *Caraher v. City of Menomonie*, Appeal No. 01-2772 (Ct. App. June 4, 2002)(recommended for publication). The city constructed a sewer pipe running across Galway Creek about eight feet above the water. A public sidewalk also crossed the creek some distance away. After complaints from neighboring property owners that trespassers were using the pipe as a footbridge, the city had a fence erected to block travel on the pipe. Within days, trespassers had torn down the fence. The city decided not to replace the fence because vandals would be likely to destroy it again. Michael Caraher was walking to a friend’s home from a bar, used the pipe as a shortcut across the creek, fell and struck his head on the cement streambed and drowned. The court found two key distinctions from the *Cords* case. First, the sewer pipe was not designed or intended to serve as a footbridge and the public was not invited to use it as such. Second, in *Cords*, the danger was not readily apparent to hikers on the trail. Here, the danger was obvious to would be users. In the absence of a *Cords* situation, the court held that the decision not to replace the fence was discretionary as was the decision to erect one in the first instance.

Municipalities should expect to see the “known and present danger” exception raised as a counter to immunity defenses. To date, the exception has been kept to very limited circumstances where the likelihood of serious injury is high and action is needed on an immediate basis. The exception is not applicable to situations where the danger is open and obvious to the public. Moreover, the existence of a “known and present danger” gives rise to a ministerial duty to act. Where the municipality has various means of responding to the danger, as long as it takes action, it will have discretionary immunity as to its choice of options.

— Mark J. Steichen

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# Court Dismisses Million Dollar Claim Based on Mayor's Ejection of Protester from City Council Meeting

A landlord in the city of Rice Lake had a history of failing to comply with a city's rental housing code. In 1995, he was convicted of failing to obtain rental housing licenses for his properties, but forfeitures were waived. In 1996, the landlord asked to speak at a city council meeting regarding his request for suspension of garbage pick-up at one of his rental units pending repairs. His item was placed on the agenda for the August, 1996 meeting. The landlord appeared at the meeting and spoke in support of his request. After deliberation, the council approved his request with conditions. When the landlord attempted to speak again to protest the terms of the city's garbage contract in general, the mayor told him his agenda item was over and asked him to sit down. There is some dispute as to what followed, but the landlord claims he was removed from the meeting by a city police officer at the mayor's order.

In 1997, the city prosecuted the landlord for a second time for his continuing failure to pay rental licensing fees and to have his rental properties inspected and brought into compliance with the city rental housing code. The landlord was convicted in August, 1997. The court imposed a substantial forfeiture after the landlord failed to comply with the court's order to have the properties inspected promptly and brought into compliance. Ultimately, the landlord was jailed for failure to pay the forfeitures. The city ordered his rental properties vacated for failure to obtain rental licenses and to bring his properties into compliance with the city rental housing code. During this time, banks began foreclosing on mortgages on the landlord's rental properties and he sold most of the properties.

In December, 2000, the landlord brought an action in federal court in Madison against the city, the former

mayor, and the former building inspector. He claimed that the mayor violated his First Amendment right of free speech by having him ejected from the council meeting in 1996. In addition, the landlord claimed that the city's prosecution of him in 1997 singled him out among landlords in retaliation for his exercise of his First Amendment rights during the council meeting. The landlord sought over a million dollars in damages, asserting that he had lost his rental properties due to the city's illegal actions.

Federal district judge Barbara Crabb granted the defendants' motion for summary judgment dismissing all claims. The court agreed that the city had a right to place reasonable time, place, and manner restrictions on a person's exercise of free speech. In the context of a city council meeting, the city was entitled to hold speakers to the topics on the council's agenda in order to ensure orderly meetings. Turning to the claim of retaliation, the court found no evidence that the mayor or other city officials were motivated by retaliation in prosecuting the landlord in 1997. The city established a long history of attempts to gain compliance with the rental housing code before the 1996 council meeting and continued refusal by the landlord to comply with the code. In the absence of any other evidence of retaliatory motive, the court found that the length of time between the council meeting in August, 1996 and the conviction in August, 1997, was too long to support any reasonable inference of retaliation.

Judgment was entered in favor of all defendants on May 30, 2002. *Dietrich v. Ferguson, Dishno, and City of Rice Lake*, Case No. 00-C-671-C. The city and its officials were represented by the Boardman Law Firm.

— Mark J. Steichen

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# 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 (MEUW) 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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