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## FERC White Paper: The Long and Winding Road Continues

On April 28, 2003, the Federal Energy Regulatory Commission (FERC) issued its long awaited "White Paper" on its standard electricity market design (SMD). In the White Paper, the FERC steps back from some of the more controversial aspects of its SMD proposal. The White Paper represents another twist in the long and winding road of transmission open access and the changing regulation of the wholesale electricity market.

Following passage of the National Energy Policy Act in 1992, the FERC issued two subsequent orders dealing with transmission open access. Order No. 888 required utilities to develop standard open access transmission tariffs (OATT). Order 2000 set out the requirements for creation of regional transmission organizations (RTO), but did not require all utilities to join an RTO. As a practical matter, since that time, nearly all utilities have been associated with organizations that either are, or are seeking to become, RTOs under the FERC Order 2000.

On July 31, 2002, the FERC issued its notice of proposed rulemaking in Docket No. RM01-

12-000, the SMD proposal. The FERC received mountains of paper commenting on the proposal, much of it negative. In particular, smaller municipal utilities that are dependent on the transmission system would be forced to purchase congestion revenue rights (CRR) or financial transmission rights (FTR), and the SMD included the controversial locational marginal pricing (LMP).

The FERC also received much political pressure to back off the SMD proposal. Some provisions in the pending energy bill in Congress would limit the FERC's ability to implement the SMD.

In the White Paper, the FERC clearly steps back from its proposal to create a standard market design that would be imposed in every part of the country. Instead, FERC is proposing a "wholesale market platform," consisting of a series of principles, but allowing different parts of the country to develop different responses to meet those principles. The White Paper also includes a much heightened attempt at involving states, and obtaining interstate cooperation, in the development of rules for the operation of the transmission

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# Notice of Claim Not Required for Appeal of Condemnation Award

Almost a decade ago, the state supreme court boldly held that the notice of claim provision of section 893.80(1) “applies to all causes of action, not just those in tort and not just those for money damages.” *DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994). Since then, the courts have been busy carving out exceptions to this general rule. See *Auchlinek v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996)(actions under Open Meetings and Open Records laws); *Little Sissabagama Lake v. Town of Edgewater*, 208 Wis. 2d 259, 559 N.W.2d 914 (Ct. App. 1997)(actions to appeal county board determination of tax-exempt status under § 70.11(20)(d)); *Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 571 N.W.2d (Ct. App. 1997)(actions to appeal special assessments under § 66.60(12)); *Gillen v. City of Neenah*, 219 Wis. 2d 615, 593 N.W.2d 822 (Ct. App. 1999)(actions to enjoin violations of public trust doctrine under § 30.294)); *Town of Burke v. City of Madison*, 225 Wis. 2d 615, 593 N.W.2d 822 (Ct. App. 1999)(actions objecting to annexation of land under § 66.021)).

The most recent addition to the list of exceptions was added by the court of appeals in *Nesbitt Farms, LLC, et al. v. City of Madison*, Appeal No. 02-2212 (Ct. App. May 8, 2003)(recommended for publication). The case holds that the notice of claim provision

does not apply to appeals from condemnation awards under Wis. Stat. § 32.05(11).

In *Nesbitt*, the city condemned a 17.853-acre parcel for public use as a storm water detention pond. The city recorded an Award of Condemnation for the parcel under § 32.05(7)(c). The owners of the parcel then filed an appeal from the award within two years as provided by § 32.05(9). The city moved for summary judgment to dismiss the appeal due to the owner’s failure to file a notice of claim under § 893.80(1) specifying the amount they sought as compensation. The circuit court granted the motion and dismissed the appeal. The court of appeals reversed.

The court of appeals applied its three-part test in *Town of Burke* to analyze the issue. The factors are: (1) whether the proposed exception to § 893.80 involves a specific statutory scheme, (2) whether enforcement of the notice of claim provision would hinder a legislative preference for prompt resolution of the type of claim under consideration, and (3) whether the purposes behind the notice of claim statute would be furthered by applying it under the circumstances. *Town of Burke*, 225 Wis. 2d at 625.

The court of appeals had no trouble in concluding that § 32.05 provides a specific statutory procedure for review of condemnation awards. With respect to the second factor, the court acknowledged the city’s argument that — unlike previous cases where short statutory deadlines for filing actions could not be met if plaintiffs were forced to comply with § 893.80 — the eminent domain statute allows landowners sufficient time to comply with the notice of claim provision and still file an appeal. However, the court also noted that there can be multiple parties with the right to appeal a condemnation award. In such cases, parties interested in joining an appeal filed by another party must do so within ten days of receiving notice of the appeal. Wis. Stat. § 32.05(11). This would be precluded if such parties had not already filed a notice of claim and had it disallowed by the municipality. The court found that § 32.05(11) demonstrated the legislature’s policy of achieving efficiency and consistency in resolving appeals of condemnation awards and of permitting all interested parties the right to file an appeal.

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## FERC White Paper: The Long and Winding Road Continues

*Continued from front page*

systems. Among the principles enunciated by FERC are regional independent grid operation, regional transmission planning process, fair cost allocation for existing and new transmission, market monitoring and market power mitigation, spot markets to meet customers’ real-time energy needs, transparency and efficiency in congestion management, firm transmission rights, and a resource adequacy approach. FERC explicitly states that RTOs will not be required to use the LMP process if they have alternative ways of addressing congestion management.

A copy of the White Paper may be obtained at the FERC website: <http://www.ferc.gov/Electric/RTO/mrkt-struct-comments/discussion paper.htm>.

— Michael P. May

Regarding the third factor under *Burke*, the city argued that applying the notice of claim requirement would further the purposes of the statute. The city pointed out that, under condemnation procedures, it must make an award based on its own analysis of the property's value and that the landowner is not required to participate in negotiations or respond in any way to the jurisdictional offer before an appeal is taken. If a notice of claim were required, the landowner would have to provide an itemized statement of the relief sought, which would enable the city to limit its exposure for interest and attorney's fees by offering some or all of the additional compensation requested. The court agreed with this argument, but also agreed with the landowners who argued that the absence of any requirement in § 32.05 for input from landowners showed that the legislature did not intend to require any pre-appeal disclosure of a demand for additional compensation. Moreover, requiring a landowner to file a notice of claim would give the condemnor an incentive to "lowball" the jurisdictional offer in the hope that some landowners would accept an inferior offer and that those who objected could be dealt with through the notice of claim procedure. In addition, the court found that the purpose behind § 893.80(1) of providing notice to the municipality is not at furthered in condemnation matters, because the municipality is the one which initiates the claim by acting to acquire the property.

The *Nesbitt* case is interesting in that it adds an exception to the application of § 893.80(1) where it is not necessarily in conflict with § 32.05 on its face. Nevertheless, the result is not surprising given the comprehensive procedure and the allocation of burdens set out in § 32.05.

— Mark J. Steichen

## Courts Edge Around Issue of Mandatory or Optional Status of Comprehensive Plans In 2010

State legislation adopted in late 1999 says the following:

Beginning on January 1, 2010, any program or action of a local governmental unit that affects land use shall be consistent with that local governmental unit's comprehensive plan. . . .

Wis. Stat. § 66.1001(3)(b) (emphasis added).

It is unclear whether this means that consistency will be required if the local governmental unit chooses to have a comprehensive plan or whether the local governmental unit must have a plan by which consistency will be determined.

Since June of 1941, at least with respect to cities and villages, the law has said that zoning "shall be... in accordance with a comprehensive plan." Wis. Stats. § 62.23(7)(c).

The dictionaries define "in accordance with" as meaning the same as "consistent with."

The Wisconsin Supreme Court has held that the requirement that zoning be in accordance with a plan does not necessarily mean there must be a formal, adopted plan. *Bell v. City of Elkhorn*, 122 Wis. 2d 558, 364 N.W.2d 144 (1985).

The 1999 comprehensive planning legislation phrases its consistency mandate in virtually the same way as the statutory statement interpreted in the *City of Elkhorn* case, and fails to say expressly that there must be both a plan and consistency.

Will it be necessary to wait until 2010 or later to get a court ruling on the new language?

Two recent appellate cases have, in fact, addressed the 2010 language, albeit in dicta.

In the April 11, 2003 *Wood v. Madison* case (2003 Wis. 24, Case No. 01-1206), the state supreme court observes that its decision on extraterritorial land use regulation through an extraterritorial subdivision ordinance will displease the regulated property owner, as well as the town government advocates and real estate industry groups that supported the regulated property owner. The court goes on to say that blame for this outcome should be placed not on the courts, but on the legislature. "The remedy for change of this policy . . . lies with the legislature." The court then notes "The legislature recently enacted new "Smart Growth" legislation, Wis.

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## Section 1983 Claim for Damages and Attorney's Fees Not Allowed for Violations of Telecommunications Act

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*The Eastern District of Wisconsin has joined a growing list of courts that have concluded that violations of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7), ("TCA") does not give rise to a separate cause of action under 42 U.S.C. § 1983. Klemm v. Manitowoc County, et al., Case No. 02-C-888 (April 29, 2003)(Judge Griesbach).*

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The TCA imposes procedural and substantive limits on the ability of local governments to control the siting of telecommunications towers within their jurisdictions. The Act has generated considerable litigation by telecommunications carriers when they have been denied zoning permits. The TCA permits expedited review of these local zoning decisions by federal courts, which tend, in practice, to give less deference to local zoning authorities than state courts. Plaintiffs in TCA cases often plead claims under section 1983 based on alleged violations of the TCA. Section 1983 provides remedies of damages and attorney's fees for violations of federal constitutional and statutory provisions that confer rights on individuals. The TCA itself only provides for judicial review of the underlying decision with the usual remedy being an order for issuance of the requested permit.

The early district court decisions from around the country were equally split on whether a separate claim could be made under section 1983. The first federal circuit court to address the issue decided that a separate claim was permitted, but the three-judge decision was subsequently vacated. *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3D 1322 (11th Cir. 2001)(vacated at 260 F.3d 1320). In the past several years, the tide has begun to turn against finding a separate cause of action. As a general rule, section 1983 does not provide a separate remedy for violations of a statutory scheme where the statute itself either expressly excludes other remedies or where it provides such a comprehensive remedy that Congress impliedly foreclosed other remedies. The courts that have scrutinized the remedial scheme and the Congressional purposes behind

the TCA have concluded that the TCA provides a comprehensive remedy for violations of the statute. The only federal circuit decision on the issue has ruled against a separate remedy under section 1983. *Nextel Partners, Inc. v. Kingston Township, et al.*, 286 F.3d 687 (3d Cir. 2002).

The Seventh Circuit as well as other federal courts have stated that the TCA represents a careful balancing act between the federal goal of expanding competition in the telecommunications industry and preserving local control over zoning decisions. *See Aegerter v. City of Delafield*, 174 F.3d 886, 887 (7th Cir. 1999). The courts which have held that the TCA precludes a separate remedy under section 1983 have reasoned that the adding damage remedies to the TCA would upset that balance. They note that the usual plaintiffs in TCA cases are large, well-financed corporations while the defendants are often small municipalities without much experience in dealing with the complexities of the TCA. *See Primeco Personal Communications, L.P. v. City of Mequon*, 242 F. Supp. 2d 567 (E.D. Wis. 2003)(Judge Adelman). Readers should note that, to date, neither the Western District of Wisconsin, nor the Seventh Circuit have addressed the issue of the applicability of section 1983 to TCA claims.

The *Manitowoc* case presented an unusual twist in that the plaintiffs were a couple that owned farmland that they wished to lease to a wireless carrier for the purpose of constructing a tower. When the county denied their application for a conditional use permit, the wireless carrier went on to find another location for their tower. The Klemms waited over two years and then brought suit under the TCA and section 1983. The carrier did not join in the suit. The Klemms argued that the reasoning behind Judge Adelman's decision in *Primeco* did not apply to them, because they were individuals, not corporations. Judge Griesbach rejected this distinction and concluded that the comprehensive remedy provided by the TCA precludes any claims under section 1983.

*Manitowoc* also addressed the issue of the timeliness of filing a lawsuit under the TCA. The Klemms' application for a CUP was denied on

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## Courts Edge Around the Issue of the Mandatory or Optional Status . . . *Continued from page 3*

Stat. § 66.1001, which requires municipalities to adopt comprehensive plans that include land use provisions. . . . [T]his legislation will not take effect until 2010 and does not apply in this case.”

Less than a week later, the Court of Appeals, District II, decided a case involving a rezoning by a town to accommodate an ethanol plant. (*Step Now Citizens Group, et al. v. Town of Utica Planning & Zoning Committee*, Appeal No. 02-2760, April 16, 2003). One of the attacks on the rezoning in this case was inconsistency with a town plan. This attack withered when it was revealed that the plan had not yet been adopted. Nonetheless, the court discussed plan/zone consistency, noting that the *City of Elkhorn* case did not require the community to have a comprehensive plan in order to do zoning, and in order to test zoning against the “in accordance with” standard. The court then reasons that if a plan does not need to exist, then when a plan does exist, it has only advisory force.

The basis for this view, according to the court

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### Section 1983 Claim for Damages and Fees Not Allowed for Violations of TCA

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September 20, 1999. They moved for reconsideration, which was denied on October 19, 1999. The Klemms did not file their action in federal court until September 10, 2002. The TCA states that an action for review of a zoning decision may be filed within 30 days of the final action or failure to act by the local government. This provision has been held to be a 30-day statute of limitations on the filing of claims. The Klemms alleged in their complaint that the county board of adjustment had failed to issue a written decision setting out its reasons for denial of the CUP and, therefore, had not taken any final action. They argued, therefore, that the statute of limitations had not started to run. Judge Griesbach rejected their arguments and held that the time ran from the time the Klemms received written notice of the denial of their application.

Manitowoc County was represented by the Boardman Law Firm.

— Mark J. Steichen

is Wis. Stat. § 66.1001(3)(b) under the following reasoning:

A logical interpretation of this statute is that until January 1, 2010, a local governmental unit’s program or action affecting land use does not need to be consistent with that local governmental unit’s comprehensive plan and thus currently a land use plan is merely advisory.

*Step Now Citizens Group*, Slip Opinion at ¶ 46.

This reasoning completely guts the “in accordance with” mandate. We knew that a community did not have to have consistency if it did not have a plan and that it did not have to have a plan. Now, we are told in dicta, that a community with a plan does not have to have consistent zoning, because the plan is optional.

This court of appeals does not state the view of the court on whether the statute says a comprehensive plan must exist starting January 1, 2010 in order for a locality to have zoning. It acknowledges the one thing the 2010 statute does say clearly, which is that plans that do exist then will have force through the consistency mandate. The court hints at a reverse logic: if a plan will have force, then the existence of a plan must be mandatory.

However, like the court’s note in *Wood*, this statement and the underlying reasoning have no precedential value.

In general, the case for saying that a comprehensive plan is mandatory for a community that wants to regulate land use starting in 2010 is weak. There is no clear language in any statute or court opinion stating such a mandate. There would seem to be no facial ambiguity to open the door to a search for legislative intent, and even if there were, there is almost no recorded legislative history to search. More importantly, the wording of the legislation fails to distinguish the “consistent with” language from the “in accordance with” language to allow, much less to encourage, the courts to elude the *City of Elkhorn* decision which **does** have precedential value.

But, perhaps the courts will dribble out enough nuggets of dicta over the next six-plus years to strengthen the case.

— Richard A. Lehmann

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# Videotape Surveillance of Employees Is a Mandatory Subject of Bargaining

We are occasionally asked whether it is permissible for an employer to install hidden surveillance cameras to monitor the company's physical premises and/or the activities of its employees. The Seventh Circuit Court of Appeals has recently held that the use of hidden surveillance cameras is a mandatory subject of bargaining and must be discussed with the union prior to installation of the cameras. *National Steel Corporation v. NLRB* (Nos. 01-3798 and 01-4149, 4/7/03).

There are a number of different ways in which surveillance cameras are used by employers. Some employers deploy them visibly throughout the workplace. Used this way, the cameras serve as a visible deterrent as well as an accurate recorder of events which occur in the workplace. In such situations, however, we have counseled that video cameras not be placed in areas where employees may have fundamental expectations of privacy under Wisconsin privacy laws and the constitution; namely, bathrooms, locker rooms and employee break areas.

Some employers use hidden surveillance cameras. Such usage can be on a permanent basis, for example, when an employer wishes to secretly monitor sensitive areas of the workplace. Cameras can also be installed on a temporary basis when there is reasonable suspicion to believe that improper or criminal activity is occurring in a specific location in an effort to identify the perpetrator. As with the use of open cameras, use of hidden cameras must be evaluated with respect to privacy issues.

The *National Steel* case dealt with the company's use of hidden cameras to investigate issues of theft, vandalism or other wrongdoing in certain areas of the company's plant. It had reasonable suspicion to install the cameras and the cameras were located in areas in which there was no reasonable expectation of privacy. If left at this point in the analysis, the use of such cameras would not cause any legal problems.

The bargaining units of employees of National Steel, however, asked National Steel whether it was using hidden surveillance cameras. This set in motion proceedings before the National Labor Relations Board about whether the company not

only had to reveal its use of hidden cameras but also whether it had a duty to bargain the issue with the union before installing the cameras.

The Seventh Circuit first considered an employer's duty to bargain with its union. The duty to bargain arises out of Sec. 8(a)(5) of the National Labor Relations Act ("Act") and governs issues related to wages, hours and other terms and conditions of employment. The Act has been interpreted to define other conditions of employment as matters that are both "plainly germane to the working environment" and "not among those managerial decisions which lie at the core of entrepreneurial control." Such issues have been considered to be mandatory subjects of bargaining.

The Seventh Circuit held that the use of hidden surveillance cameras is germane to the employees' working environment and does not lie at the core of the company's fundamental and basic direction of the business. Therefore, the Court concluded that the use of hidden surveillance cameras is a mandatory subject of bargaining and must be discussed with the labor union.

The Court noted that National Steel raised a significant issue; namely, that bargaining over the use and location of hidden surveillance cameras would make their usage meaningless. The Court was quick to note that the duty to bargain only required the company to negotiate over the installation and use and did not necessarily dictate that the company had to disclose the whereabouts of those cameras. The Court indicated that disclosure of location could be conditioned upon reaching a confidentiality agreement or protective order with the union's negotiating team. The Court also noted that even though the company had to bring the issue to the table, there was no obligation that it reach agreement with the union on the use of hidden surveillance cameras and that the standard bargaining impasse procedures were available for unilateral implementation of the practice upon reaching impasse.

While Wisconsin municipal employers are not bound by the Act or the Seventh Circuit *National Steel* decision, the Wisconsin Employment Relations

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# Judicial Give and Take On Subdivision Regulation

The April 11, 2003, Wisconsin Supreme Court decision in *Wood v. Madison*, (2003 WI 24, No.01-1206), reported in the May 2003 *Municipal Law Newsletter*, rejected the landowners' claim that the city had improperly used its platting authority to perform a zoning function. The *Wood* court concluded that a municipality has authority to reject a preliminary plat under its extraterritorial jurisdictional authority based upon a subdivision ordinance that considers the proposed use of the plated lots. In so concluding, the supreme court agreed with the court of appeal's that the intermediate court's previous decision to the contrary in *Gordie Boucher Lincoln-Mercury v. Madison Plan Comm'n*, 178 Wis. 2d (Ct. App. 1993) was wrongly decided.

Nineteen days after *Wood* was released, the court of appeals issued a decision holding that only the host municipality (in unincorporated areas, this means a town) can regulate the location and dimensions of public improvements within a subdivision. *Rogers Development, Inc. v. Rock County Planning and Development Committee*, No. 02-0017 (Ct. App. May 1, 2003). In so holding, the court of appeals relied on a 1989 supreme court case that had determined that regulation of the specifications of public improvements (e.g., deciding that internal stormwater management would be done by surface ditches rather than storm sewers) is solely the province of the host municipality. *See Rice v. Oshkosh*, 148 Wis. 2d 78, 81 (1989).

The *Rice* case was decided under Wis. Stat. § 236.13(2)(a), which addresses "install(ation) (of) public improvements." At issue in *Rogers*

*Development*, however, was a county's authority to regulate the size of cul-de-sacs, the length of blocks and location of town roads. The court of appeals, nonetheless, analyzed the issue under § 236.13(2)(a). The court phrased the issue as follows: ". . . if the regulations at issue are part of a public improvement, then under the terms of the statute, only a town or a municipality [i.e., city or village] may impose them when the parcel of land at issue lies within the town or municipality." The court ultimately concluded that the term "public improvements" within the meaning of § 236.13(2)(a) includes the size of cul-de-sacs, the length of blocks and location of town roads. Accordingly, the court concluded that a county could not regulate such matters.

While the issues raised in *Rogers Development* are subdivision design issues, not infrastructure improvement issues, the court of appeals concluded that a county may not regulate either. The court explained: "In or view, the right to designate a public improvement necessarily envelops the right to determine the size, shape and location of the improvement." Accordingly, since only towns, cities, and villages have the right to designate a public improvement under § 236.13(2)(a), these entities also have the exclusive right to determine the location and dimensions of such improvements. Thus, the authority to determine the design of an improvement is governed by § 236.13(2)(a), just as much as the authority to establish specifications for the construction of the improvement.

*Rogers Development*, which has been recommended for publication, undercuts regulation by counties and municipal extraterritorial regulation of the length of cul-de-sacs, street inter-connectivity between adjoining developments, maximum slope of roads, road locations in relation to prime farmlands, and regulation of internal drainage ways when these will be dedicated to the public. This case weakens the empowerment given to all regulating entities by the *Wood* case (i.e., the ability to veto subdivisions on land use grounds), by limiting those grounds to grounds that do not address public facilities. If *Rogers Development* is not overturned, all regulations that have anything to do with features that will become infrastructure of the host municipalities are reserved to the towns, cities and villages.

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## Videotape Surveillance of Employees is a Mandatory Subject of Bargaining

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Commission often looks to judicial interpretations of the Act in enforcing parallel Wisconsin provisions. Therefore, in the future, Wisconsin municipal employers should not only examine the privacy aspects of the use of hidden or visible surveillance cameras, but also the duty under the Municipal Employment Relations Act to bargain with its unions regarding the use of such devices.

— Steven C. Zach

# MUNICIPAL LAW NEWSLETTER

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