

# MUNICIPAL LAW NEWSLETTER

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## Dane County Judge Rejects Comm. 83 Challenge

Citing the need to “move the process along,” Dane County Circuit Court Judge Gerald Nichol issued an oral decision on February 14, 2001, finding the Department of Commerce acted within its authority in promulgating Wis. Admin. Code chapter Comm 83 (“Comm 83”), which is intended to regulate private on-sight wastewater treatment systems (“POWTS”). The rules, which became effective in July, 2000, are vigorously opposed by the League of Municipalities and a host of state environmental and land use advocacy organizations who contend that the rules will encourage a proliferation of development throughout the approximately 9,000,000 acres of state land where soil conditions have precluded installation of private septic systems under previous regulations.

Together with 1000 Friends of Wisconsin, the Municipal Environmental Group, Citizens For a Better Environment, River Alliance, Inc. and the Town of Calidonia, the League had sought a declaratory judgment that Comm 83 fails to comply with chapter 160, Wis. Stats., because it does not require that the design of POWTS meet the state’s groundwater standards, as laid out in Admin. Rule chapter NR 140. The League, et al., also alleged that Comm 83 impermissibly delegates to the Department of Commerce authority to permit noncompliance with the state groundwater standards for nitrate; illegally authorizes the Department to grant variances to new POWTS; and fails to include adequate enforcement mechanisms.

In explaining his decision, Judge Nichol took the view that, because the rules were the subject of numerous public hearings and the agency has had extensive experience with regulating and enforcing the state’s plumbing code, the Department should be accorded “great deference” in its promulgation of Comm 83. As stated by Judge Nichols, although the groundwater standards required by chapter 160 are “not specifically set forth” in Comm 83, these standards must be regarded as having been “incorporated” into the code: “[I]t is my belief that you can’t look at [Comm] 83 as isolated. The agency is bound to accept its responsibility both under Chapter 160, and under NR [140], which gives you specific standards [for POWTS.]”

Judge Nichols also rejected the plaintiffs’ argument regarding the lack of a practical enforcement mechanism in Comm 83 as premature. According to Judge Nichols’ decision, enforcement issues must arise in the context of an actual failure of an approved system to meet groundwater standards. The plaintiffs have expressed concern that once system failures are detected in groundwater, it is too late for adequate responsive enforcement action.

The Judge also affirmed the Department’s assertions that Comm 83 is within the scope of departmental authority both with regard to granting variances for new systems and failing to require compliance with state groundwater standards for nitrate.

The plaintiffs are evaluating whether to appeal Judge Nichols’ decision.

– Richard A. Heinemann

## Many Anxiously Await Decision Regarding the Wisconsin Retirement System

The Wisconsin Supreme Court is currently deciding a case that will significantly impact almost all aspects of the Wisconsin Retirement System (WRS). Underlying the case is legislation, signed Governor Thompson in December 1999, that would radically change the funding mechanism of the WRS and would impact all retired and active participants in the retirement system. The challengers to the legislation claim that it is unconstitutional on several grounds.

The legislation at issue, 1999 Wis. Act 11, would make extremely complex changes to the WRS. Some notable changes (although by no means an exhaustive list) include the following:

- Transfer \$4 billion from the Transaction Amortization Account (TAA) to three Fixed Trust Fund Reserves, raising the 1999 fixed effective interest rate for retirees;

- Create \$200 million "credit balance accounts" for WRS employees to offset required monthly contributions;

- Phase out TAA and create a new accounting mechanism (Market Recognition Account) that will result in faster recognition of gains and losses that occurs under the TAA;

- Provide certain benefit improvements for active participants for services performed before 2000;

- Reopen the Variable Trust to active employees.

Shortly after Governor Thompson signed Act 11, a temporary injunction was issued preventing the law from taking effect. That injunction will remain in place until the supreme court issues its decision. The court heard oral arguments in October of 2000; a decision likely will be issued before the end of June.

We will continue to follow this case. For more information on 1999 Wis. Act 11 and the lawsuit *Wisconsin Professional Police Ass'n, Inc., et al. v. Lightbourn, et al.*, No. 99-3297-OA, see the Employee Trust Funds' web site at <http://badger.state.wi.us/agencies/etf>.

– Jennifer S. Mirus

## Failure to Notify Insurance Company Results in Loss of Coverage

The importance of maintaining accurate lists of insurance policies and promptly giving notice of all claims to any carrier who might conceivably provide coverage was highlighted in a recent court decision: *Town of Mt. Pleasant v. Hartford Accident and Indemnity Co.*, Appeal No. 00-0480 (Ct. App. Jan. 17, 2001)(publication recommended).

In 1995, Mt Pleasant was sued in *Hunt's Generator Committee, et al., v. Town of Mt. Pleasant*, Case No. 95-C-0754. Upon service of the complaint, Mt. Pleasant notified its current insurance carriers, Wausau and Sentry Insurance, which advised that there was no coverage. The town hired counsel and defended the claims. The case was eventually settled.

The town was insured by Hartford from October 10, 1979 through October 10, 1982. The policies covered the claims brought later in *Hunt's Generator*. In 1998, after the settlement, the town discovered the Hartford policies and demanded that Hartford reimburse the town for settlement costs, fees and disbursements. Hartford refused, arguing that the town had failed to tender the defense of the underlying case to Hartford and that the town violated conditions of coverage by making voluntary payments and controlling the defense without Hartford's consent. The town sued, alleging that Hartford knew or should have known of the claims against the town, because Hartford represented another party in the *Hunt's Generator* case.

Granting summary judgment for Hartford, the court rejected the proposition that an insurance company defending one party to a lawsuit has any obligation to determine if any other named insured in the lawsuit desires a defense. The court also noted that there is a rebuttable presumption of prejudice where an insured gives notice more than a year after the time required by the policy. Moreover, the court held as a matter of law that notice to Hartford more than thirty months late was prejudicial, because Hartford did not have the chance to participate in prelawsuit mediation and could not select defense counsel and control the defense.

There is no harm in tendering defense of a lawsuit to every insurance carrier who could possibly provide coverage, and great risk in failing to do so. Since some insurance policies, especially older ones, provide coverage based on the date that the injury or event occurred, rather than on when the claim is made, it is important to search back through all policies that were in force during the time of the events alleged in the complaint.

– Mark J. Steichen

### SPEAKERS FORUM

March 17, 2001  
**Legal Rights and Responsibilities of Policymakers**  
 APPA Policymakers Workshop  
 Denver, Colorado  
 Michael P. May

Municipalities Community Development Institute  
 Madison, WI  
 Richard A. Lehmann & Lawrie J. Kobza

March 26, 2001  
**Zoning Enforcement**  
 Univ Extension  
 Charlotte, NC  
 Richard A. Lehmann

April 27, 2001  
**Dealing with the Aggressive Applicants and Opponents**  
 Town Lawyers Institute  
 Madison, WI  
 Richard A. Lehmann

April 6, 2001  
**Denying a Cable Renewal Request: A Legal Perspective**  
 WAPC Conference  
 Wisconsin Dells, WI  
 Anita T. Gallucci

May 7, 2001  
**Zoning Enforcement**  
 Univ Extension  
 Madison, WI  
 Richard A. Lehmann

April 26, 2001  
**Stormwater Management and Stormwater Utilities**  
 League of Wisconsin

May 16, 2001  
**Stormwater Utilities**  
 Water Law Institute  
 Stevens Point, WI  
 Richard A. Lehmann

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## Immunity for Traffic Control Presents Factual Issue

In a decision likely to have repercussions for municipalities throughout the state, the court of appeals has held that whether a police officer is entitled to immunity under statutory section 893.80 for his performance of traffic control duties during a storm will depend on the determination of a factual issue of whether he exercised his discretion. *Lodl v. Progressive Northern Ins. Co.*, 2001 Wis. App. 3.

A storm knocked out the traffic control lights at the intersection of County Highway J and Capitol Drive in the town of Pewaukee. Susan Lodl was a passenger in a car eastbound on Capitol Drive, which was struck broadside by a vehicle being driven southbound by Young on County Highway J. Lodl sued the town and Fredericks, a town police officer, alleging that Fredericks negligently directed traffic at the intersection. The town filed an answer including affirmative defenses of judicial, quasi-judicial, legislative and quasi-legislative immunity, and then moved for summary judgment on immunity grounds.

The court began by noting that public employees are immune from personal liability for injuries resulting from the negligent performance of a discretionary act within the scope of their employment. Exceptions to immunity exist where: (1) the duty is ministerial, i.e., where the law prescribes the time, mode, and manner of performance with such certainty that there is no room for discretion; and (2) there exists a present, known danger of such importance that a public official has a duty to respond. *Id.* at ¶ 6. Lodl, citing a Pewaukee traffic control manual and a state statute on using a whistle while directing traffic, argued that the technique for directing traffic was so specific that Fredericks had no discretion and that his duty was ministerial. The court rejected this argument noting that the manual directed what an officer "should" do and that the Pewaukee police chief who had written the manual testified that it was impossible to give a black and white rule to deal with the various circumstances an officer might encounter.

Turning to the second exception, however, the court held, as a matter of law, that "an intersection without operating traffic control signals during an evening storm is a compelling and known danger of such force that it creates a ministerial duty in the performance of traffic control." *Id.* at ¶ 1. In support, the court cited to *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977) and *Domino v. Walworth County*, 118 Wis. 2d 488, 490-92, 347 N.W.2d 917 (Ct. App. 1984). In *Cords*, the supreme court held that a park manager had an absolute duty to place warning signs or close a public trail that people regularly used at night and that passed a few inches from a ninety-foot gorge. In *Domino*, the court of appeals held that a police dispatcher had a duty to send a police squad to investigate when informed of a downed tree across a road.

On summary judgment, there was a disputed issue about what Fredericks had done to control traffic at the intersection. Fredericks testified that when he arrived at the scene, he put on a blaze orange trench coat with reflective stripes, took a flashlight, and went to the center of the intersection. The problem was that no one was yielding or obeying his signals, so he called for assistance and portable stop signs. Young testified that Fredericks was standing on the shoulder of the

road without a flashlight and gave no indication of directing traffic. His squad car was parked nearby, but without its lights operating.

The trial court granted summary judgment on immunity grounds. The court of appeals reversed and remanded stating: "the factual issue at trial will be whether the police officer in fact tried to alleviate a dangerous situation or whether he simply sat at the intersection and did nothing." If the court concludes that Fredericks exercised some discretion in an attempt to remedy the situation, he would be immune from suit even if he acted negligently in his choice of options or his performance.

The court of appeals' decision may make it harder for municipalities to obtain summary judgment on immunity grounds. The two stories of the Young and Fredericks are not necessarily contradictory because the timing of the two accounts is not clear. The court seems to bend over backward to permit the plaintiffs to get their day in court, but the victory is probably a pyrrhic one. As long as Pewaukee can show that Fredericks did something to try to direct traffic, they will be immune even if his performance was negligent. In light of this case, and since the situation of traffic lights being knocked out by storms is a recurring problem, it would advisable to have police officers and dispatchers record all actions taken in response to traffic control emergencies.

— Mark J. Steichen

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## Municipal Cable TV Bill Reintroduced

The Wisconsin Cable Communications Association ("WCCA") is again seeking legislation that would place new requirements on new municipal cable television operators. A bill pertaining to municipal cable television systems was introduced in the state Assembly (2001 Assembly Bill 89) and Senate (2001 Senate Bill 23) early this year. The bill is the same as a proposal that failed to pass during the last legislative session.

The bill would prohibit a municipality that owns and operates a cable television system from passing on the cost of the system to nonsubscribers. There are two exceptions to this prohibition. First, the prohibition does not apply to a municipality that began operating a cable television system before the effective date of the bill. The City of Oconto Falls is currently the only Wisconsin municipality that offers cable television service and, thus, would likely be the only municipality exempt from the bill. Second, any municipality wishing to offer cable television service may pass on: 1) the cost of public, educational, and governmental access channels; and 2) the cost of debt service on public improvement bonds for the construction, renovation, or expansion of the municipal cable television system.

The bill also contains certain record keeping requirements. A municipal cable television operator would be required to prepare and maintain records that include: 1) the cost of franchise fees, pole rentals, and all other expenses that the municipality would incur if it were a nonmunicipal cable television operator that had been granted a franchise by the municipality; and 2) the amount, source, and cost of working capital used for the municipality's cable television system. This requirement also does not apply to a municipality that began operating a cable television system before the effective date of the bill.

— Anita T. Gallucci

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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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