

## IN THIS ISSUE

- *What Municipalities Should Know About the New PSC Right-of-Way Rule*
- *A New Constitutional Standard for Municipal Regulation of Adult Establishments?*
- *PSC Reverses Course, Approves Payments To Municipality*
- *Midwest ISO Market Redesign Proposal Proceeds Full Throttle*

## What Municipalities Should Know About the New PSC Right-of-Way Rule

The Public Service Commission of Wisconsin (“Commission” or “PSC”) has adopted a new rule relating to municipal regulation of public rights-of-way (“ROWS”) and covering such areas as the fees and charges a municipality may impose on public utilities for their use of local ROWs and the types of bonding and insurance requirements a municipality may impose on such ROW users. The rule is expected to go into effect later this year.

### History of the PSC Rulemaking Process

The PSC ROW rule stems from a June 1998 request by several privately owned public utilities (the “Utilities”) for Commission action to resolve issues that were raised in discussions between the Utilities and the Alliance of Cities (the “Alliance”) regarding a model ROW ordinance the Alliance was preparing for its members. The Utilities wanted the Commission to address several issues raised by the Alliance's model ordinance, including ROW fees and charges, bonding and insurance requirements, and facilities mapping requirements.

Against the recommendation of its staff, the Commission began a rulemaking proceeding to address the Utilities' concerns. An advisory committee to the Commission was formed. The committee was comprised of municipal representatives, including

the League of Wisconsin Municipalities (represented by the Boardman Law Firm), and representatives from the gas, electric and telecommunications industries. After a series of advisory committee meetings, in which the municipalities and the Utilities carried on heated debates on a variety of ROW issues, Commission staff produced a set of draft rule provisions. A formal rulemaking hearing was held on that draft on July 27, 2001. The rule generated considerable interest, and several municipal organizations and individuals testified against the rule, while the Utilities and their supporters testified in favor of the rule. Based on the public comments received, the Commission revised the rule and submitted it to the legislature for approval early this year.

### Application of the PSC ROW Rule

It is important to understand how the rule is to be applied. Under sec. 196.58(4) of the Wisconsin Statutes, the Commission is authorized to hear complaints that a public utility may bring challenging a city, town, or village ROW regulation as applied to the public utility's access to and use of ROWs under the municipality's jurisdiction. On setting the matter for hearing, the Commission is to determine whether the challenged

*Continued on page 2*

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## What Municipalities Should Know about the New PSC Right-of-Way Rule

*Continued from front page*

contract, ordinance, or resolution is reasonable. If the Commission concludes the challenged municipal ROW regulation is unreasonable, the contract, ordinance or resolution at issue is void. According to the Commission's Order Adopting Proposed Rules, the rule is to create "several criteria for the Commission to apply when considering a complaint involving utility access to and use of ROW within a municipality."

As stated above, the rule provisions only come into play when challenged at the PSC by a public utility. The term "public utility" includes privately and municipally owned water, electric, and gas utilities, as well as telecommunications providers. The rule does not apply to cable television operators, wireless carriers, or other ROW users. Second, the rule provisions have no legal function outside the complaint process. That is, the rule is to guide the Commission's ruling on a complaint. The rule does not apply directly to municipalities.

### Description of the Rule Provisions

Some of the most important provisions of the rule are discussed below.

**Management Function Costs.** Traditionally, Wisconsin law has held that municipalities may not impose a ROW fee on a ROW user if the purpose of the fee is to generate revenue. While no Wisconsin court has considered the issue in recent times, it is generally accepted that Wisconsin municipalities are limited to recovering just the costs they incur in managing local ROWs. The proposed rule recognizes this limitation and provides that a municipality may recover its "management function costs," which are "identifiable costs that are reasonably incurred" in managing local ROW.

These management function costs may be recovered in one of two ways: through permit fees (e.g., \$50 fee for a street opening permit) or by direct charge (e.g., charge to a particular utility for inadequate restoration of the ROW). The proposed rule lists examples of management function costs the municipality can recover. The examples include costs associated with registering public utilities, processing permit applications, job site inspections, and maintenance of ROW-related databases.

The list set out in the rule is not exhaustive. Rather, the list illustrates the types of ROW-related costs a municipality can recover. As long as the ROW fee or charge is cost based and attributable to the

ROW user's use of the ROW, the fee or charge can be imposed on the user. Thus, even if a cost is not listed as a management function cost in the rule, the municipality may still recover that cost as long as it is a quantifiable and verifiable ROW-related cost.

Of concern to many municipal water utilities is that part of the rule as adopted by the Commission declaring unreasonable any municipal requirement that a public utility "be responsible for any costs incurred by the municipality as a member of the one-call system under s. 182.0175, Stats." These are the costs associated with responding to Diggers Hotline requests for a municipal utility to locate and mark its underground facilities to accommodate an excavation project by a privately owned utility. The issue for many municipal water utilities is that privately owned utilities often abuse the one-call system by requesting that the same facilities be located and marked several times during one project. Due to the efforts of the Municipal Environmental Group—Water Division and the League of Wisconsin Municipalities, this provision will be modified to address only costs a municipality pays directly to Diggers Hotline. The rule will be silent with respect to the costs incurred to locate and mark municipal facilities.

### *Special Design and Construction Conditions.*

A rule provision that has caused concern for many municipalities is the one restricting the imposition of special design and construction conditions on public utilities in the ROW. Under the rule, a municipality may not "require [a] utility to install, at the utility's expense, transmission or distribution facilities which are not consistent with the utility's practice for design or construction of utility facilities...unless there is an adequate health, safety, or public welfare justification for the requirement." If the requirement is to install utilities facilities underground, the rule provides that "aesthetics alone is not an adequate basis to justify [such] a requirement."

The key issue is who must pay for the special design or construction conditions. For example, suppose a city, as part of an effort to attract more tourists to its historic downtown area, adopted an ordinance requiring that all aerial utility facilities (e.g., electric and telephone lines) be placed underground at the utilities' expense. This ordinance would be subject to challenge under the proposed rule. The issue before the Commission would be whether there was an adequate health, safety, or public welfare justification for the requirement or whether the undergrounding requirement was motivated purely by aesthetics. If the Commission concluded that aesthetics was the sole justification

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for the undergrounding ordinance, then presumably the Commission would apply its rule and void the ordinance. As a result, the municipality would have to pay for the cost of the undergrounding.

Municipal water utilities are also concerned that this rule may be applied to negate municipal ordinance provisions that prohibit underground communications lines from being installed over municipal water facilities or require that such facilities be encased in protective material so that the water utility can use mechanical excavators to reach its facilities for maintenance and repair purposes. It is not clear whether, under the rule, the PSC would declare unreasonable an ordinance that restricted the placement of underground utility facilities to certain corridors of the ROW or that required protective casing for underground communications facilities. If such municipal regulations were challenged, the Commission would have to determine whether there was an adequate health, safety, or public welfare justification for the requirement. If the commission declared the requirement unreasonable, the municipality would have to pay for the cost of the requirement or forego the requirement all together.

*Facilities Mapping.* The facilities mapping provision appears to be rather limited in its scope. The provision declares unreasonable any municipal regulation that, as part of the permitting process, “requires a utility to submit a map indicating the location of utility facilities, other than utility right-of-way construction plans and field sketches in the format maintained by the utility, for facilities that are the subject of the permit.” The provision appears limited to mapping requirements that can be imposed as part of the permitting process. Under the rule, municipalities can ask for the utility’s construction plans and field sketches for the facilities that are subject to the particular permit.

The rule, however, does not address the reasonableness of requiring a utility to submit, in a format dictated by the municipality, updated maps of all the utility's underground facilities in local ROWs as part of an annual registration process. Nor does the rule address whether it is unreasonable for a municipality to charge back to the utility the cost to convert the information provided by the utility to a format that the municipality actually uses. On its face, the proposed rule does not address either type of requirement. Other states have explicitly allowed such requirements.

*Bonds and Insurance.* The proposed rule declares reasonable a municipal regulation that imposes “reasonable bonding and insurance

requirements on a utility seeking a permit to use a municipal right-of-way, provided the municipality has reasonable grounds to question the financial responsibility or compliance ability of the utility.” This attempt to limit a municipality's ability to impose insurance requirements on only those public utilities in uncertain financial health is of questionable validity. Requiring a financially sound public utility or its contractor to obtain a certain level of insurance coverage or to post a bond during ROW construction is likely not *per se* unreasonable, as the proposed rule suggests. Moreover, the rule does not address how the municipality is supposed to obtain financial information about the public utility. However, given the number of recent bankruptcies by telecommunications providers and the weakened financial health of the utility industry generally, a municipality arguably has ample reason to question the “financial responsibility or compliance ability” of any public utility occupying local ROWs. Accordingly, this rule should not pose great concern to municipalities.

*Discrimination.* The provision regarding discriminatory access is interesting in how and why it was changed from its original formulation. The provision as currently proposed states that, “[u]nless there is an adequate health, safety, or public welfare justification, it is unreasonable for a municipality to deny a utility access to a municipal right-of-way or to discriminate between utilities seeking access to municipal rights-of-way.” Previously, however, the rule was to provide that, where ROW space was limited, a municipality could give preference to a utility that had an obligation to serve any customer in its service territory that requested service. The Commission, however, was concerned that federal law would prohibit such discrimination among service providers, and the rule was revised.

*Restoration.* While administrative regulations in other states have adopted detailed restoration requirements, the provision on restoration is relatively benign and largely leaves it to municipalities to determine their own restoration requirements. However, the proposed rule sets out one limitation on such requirements; namely, the municipality cannot require a “utility to restore a municipal right-of-way to a condition that improves upon the pre-excavation condition.”

*Permanent Relocation of Utility Facilities.* The relocation provision declares unreasonable any municipal regulation that “requires a utility to permanently relocate transmission or distribution facilities in a municipal right-of-way at the expense

*Continued on page 4*

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## What Municipalities Should Know about the New PSC Right-of-Way Rule

Continued from front page

of the utility . . . unless there is an adequate health, safety, or public welfare justification for the requirement.” Wisconsin's case law addresses the circumstances under which a municipality can require a public utility to permanently relocate its facilities at the utility's expense, and it is questionable whether the rule is consistent with that case law. Moreover, the rule is not written in a way that would aid the Commission in a complaint proceeding because the rule says nothing more than a municipality may require a utility to permanently relocate its facilities at the utility's expense when it is reasonable to do so.

Advanced Excavation Workplans and Abandonment. Not all of the rule provisions are directed at “unreasonable” municipal regulations. Some provisions declare certain types of municipal regulation to be reasonable. For example, regarding a utility's ROW workplans, the rule deems it reasonable for a municipality to require a utility to submit “future construction or excavation workplans” so that “the municipality [may] coordinate work within a municipal right-of-way.” Likewise, regarding abandoned facilities, a municipality may require “a utility to notify the municipality of the utility's intent to abandon transmission or distribution facilities and require[] the utility to provide a map, at the utility's expense, depicting the location of any facility within that municipality that the utility intends to abandon.” These workplan and abandonment provisions will likely prove useful to municipalities in carrying out their obligation to manage local ROWs.

### Conclusion

The long awaited ROW rule may soon become law. The rule will likely not have a great impact on municipal ROW regulation in Wisconsin. Nonetheless, municipalities would be well advised to develop a good working knowledge of the rule and to understand the scope and limitations of the rule. While the rule is only to apply in PSC complaint proceedings, the rule will play a greater role as a bargaining tool to be wielded by public utility ROW users. The better a municipality's understanding of the rule, the better able it will be to resist a utility's attempt to weaken the municipality's exercise of its regulatory authority over local ROWs.

— Anita T. Gallucci

## A New Constitutional Standard for Municipal Regulation of Adult Establishments?

In *Ben's Bar, Inc. v. Village of Somerset*, Appeal No. 01-4351, decided January 17, 2003, the Seventh Circuit Court of Appeals provided an old answer to an old question. The question was whether a municipality may prohibit the sale or consumption of alcohol in adult entertainment establishments without violating the First Amendment. The United States Supreme Court faced this same question in 1972 in *California v. LaRue*, 409 U.S. 109, where it upheld such a prohibition. The Seventh Circuit similarly upheld the ordinance at issue in *Ben's Bar*. However, in order to reach the same outcome, the Seventh Circuit found that a new analysis of the issues was required. The court reviewed the constitutionality of the ordinance under standards applicable to adult entertainment zoning ordinances and those applicable to public indecency statutes. Significantly, the court treated these separate standards as equivalent. In doing so, it may have signaled the adoption of a single, unified standard applicable to all municipal regulation of adult establishments.

The dispute in *Ben's Bar* arose shortly after the Village of Somerset, located in St. Croix County, Wisconsin, adopted an ordinance prohibiting the sale, use, or consumption of alcohol on the premises of “Sexually Oriented Businesses.” Before the ordinance could take effect, *Ben's Bar* and two of its nude dancers filed suit, contending that the ordinance effectively required the dancers to wear clothing during their performances, interfering with their First Amendment right to convey an erotic message. The District Court rejected this argument and the Seventh Circuit affirmed.

The Seventh Circuit began its analysis by noting that the United States Supreme Court had already addressed the very issue presented in *Ben's Bar* in its 1972 decision in *LaRue*. At issue there was a state regulation that prohibited bars from featuring adult entertainment. In upholding the regulation, the Supreme Court noted that the state “has not forbidden these performances across the board . . . [but] has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.” The Court found reasonable the state's conclusion that “certain sexual performances and the dispensation of liquor by the drink ought not to occur” on the same premises. These considerations, when combined with the

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presumption of validity accorded to actions taken pursuant to States' power to regulate "intoxicating liquors" under the Twenty-first Amendment, led the Court to find the regulations constitutional.

However, in 1996, the Supreme Court expressly disclaimed the *LaRue* Court's reliance on the Twenty-first Amendment. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). At issue in *44 Liquormart* was a state ban on the advertisement of liquor prices. The Court struck down the ban and, in doing so, rejected the state's argument that the ban was entitled to a presumption of validity under *LaRue*. The Court found that the *LaRue* court was mistaken in attaching any enhanced presumption of validity to state action under the Twenty-first Amendment, but concluded that the *LaRue* Court nevertheless would have upheld the ban on alcohol sales in adult establishments had it relied solely on the States' inherent police powers. In support of this conclusion, the Court cited *Young v. American Mini Theaters, Inc.*, 427 U.S. 560 (1976), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Thus, the Seventh Circuit found that *LaRue* was not dispositive of the issues raised in *Ben's Bar*. Rather, the court must review the constitutionality of a municipality's adult entertainment liquor regulations under the standards established by *American Mini Theaters* and *Barnes*. Significantly, these cases represent distinct lines of constitutional analysis.

*American Mini Theaters* and its progeny set forth the standards for evaluating the constitutionality of adult entertainment zoning ordinances, while *Barnes* and its progeny establish the framework for analyzing the constitutionality of public indecency statutes. However, a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments falls somewhere in between. It is neither a zoning regulation nor a public indecency statute.

Nevertheless, the Seventh Circuit observed that, in practice, the analyses used in these separate lines of cases are "virtually indistinguishable." Accordingly, the court announced a single standard that it would apply to such liquor regulations, based on its synthesis of the *American Mini Theaters* and *Barnes* lines of cases:

[W]e conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if (1) the State is regulating pursuant to a legitimate governmental power; (2) the regulation does not

*Continued on page 6*

## PSC Reverses Course, Approves Payments To Municipality

At its open meeting on Thursday, February 6, 2003, the Public Service Commission of Wisconsin ("PSC") reversed course and authorized payments of approximately \$500,000 per year to the city of Port Washington, Wisconsin.

The issue arose out of the proposal by Wisconsin Energy Company and its electric utility subsidiary, Wisconsin Electric Power Company ("WEPCO") to build additional natural gas fired generation in the city of Port Washington. WEPCO proposed that, as part of the cost of the facilities, it would make a payment of approximately \$500,000 to the city annually.

In originally approving WEPCO's application, the PSC, on a two-to-one vote, rejected the payment to the city of Port Washington. The city asked the PSC to reconsider and, with new Commission Chair Burnie Bridge having replaced Commissioner Joe Mettner in the interim, the Commission voted 2-1 to approve the payments.

All three Commissioners believed that these types of payments were sound public policy in that they reimburse municipalities for the cost of having utility facilities in the municipality. However, Commissioner Bert Garvin dissented on the grounds that the Commission had no statutory authority to approve such payments. Garvin argued that Wisconsin statutes provided for payments to municipal governments through the state's shared revenue program. State law did not explicitly allow these types of payments. However, both Chair Bridge and Commissioner Ave Bie found that the Commission had sufficient statutory authority to allow the payment.

The discussion came as part of the Commission's consideration of the first phase of WEPCO's Power the Future program. Consideration of WEPCO's proposal for coal plants will be taken up some time this year.

— Michael P. May

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## A New Constitutional Standard for Municipal Regulation of Adult Establishments?

Continued from page 5

completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available; or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. (Citations omitted.)

Applying this analysis, the court quickly disposed of the first three prongs, noting that (1) banning alcohol sales and consumption in “inappropriate locations” is clearly within the Village’s police powers, (2) the ban only prohibits nude dancing where alcohol was served, and (3) legislative pronouncements indicated that the Village was motivated by concern that the consumption of alcoholic beverages exacerbates the adverse secondary effect of adult establishments.

With regard to the fourth prong, the Seventh Circuit first considered whether the evidentiary record supported the Village’s proffered rationale for the regulation. The Village ordinance cited a lengthy list of studies and judicial decisions that linked adult entertainment with adverse secondary effects. The court concluded that these studies were sufficient to show that the ordinance was designed to serve and further a substantial government interest. In doing so, the court rejected an argument by Ben’s Bar that the Village could not rely on studies conducted in other communities, but had to conduct its own. The court noted that this argument has been expressly and repeatedly rejected by the Supreme Court.

The court also rejected the argument that the Village had to produce studies expressly linking the serving of alcohol with the adverse secondary effects of adult establishments. The court observed that in *LaRue*, the Supreme Court had accepted as reasonable the state’s conclusion that alcohol and nude dancing should not mix. Insofar as the Village sought to regulate the same conduct, the Seventh Circuit found it similarly reasonable for the Village to

link alcohol and enhanced adverse secondary effects, even absent studies showing such a link.

The court next turned to whether the ordinance was narrowly tailored. Ben’s Bar argued that the ordinance went beyond the constraints of narrow tailoring by dictating that dancers wear more than pasties and G-strings. However, the court observed that the ordinance was not directed at what the dancers wore, or at expressive conduct in general. Rather, the ordinance addressed nonexpressive conduct—the serving and consuming of alcohol—during the presentation of expressive conduct. As such, it did not violate the First Amendment because “the First Amendment does not entitle Ben’s Bar, its dancers, or its patrons, to have alcohol available during a ‘presentation’ of nude or semi-nude dancing.”

Finally, the court concluded that, as a practical matter, a complete ban on the sale or consumption of alcohol on the premises of adult establishments was the only way the Village could advance its interest in curbing the adverse secondary effects that barroom nude dancing causes. Allowing alcohol to be served and consumed only when nude dancing was not presented was unworkable because patrons and bar tenders could not be relied on to observe the ban. Accordingly, the Seventh Circuit deemed the Village’s prophylactic solution to be no greater than what was essential to further the Village’s substantial interest.

*Ben’s Bar* is open to both narrow and broad interpretations. Narrowly construed, it adopts a special legal analysis that applies only to “liquor regulation[s] prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments.” As such, it may have little impact. Since the *LaRue* decision in 1972, it has been clear that such regulations are constitutional. Although *44 Liquormart* cast doubt on the rationale of that holding, it expressly endorsed *LaRue*’s outcome. Accordingly, *Ben’s Bar*, narrowly construed, provides a new rationale for an outcome that has been established for more than 30 years.

More broadly construed, *Ben’s Bar* adopts a unified standard that applies to all local regulation of adult establishments, whether they be zoning regulations or public indecency regulations. Support for this broader interpretation is found in the court’s

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# Midwest ISO Market Redesign Proposal Proceeds Full Throttle

Last December, the Midwest Independent System Operator ("MISO") filed a petition for a declaratory order with the Federal Energy Regulatory Commission ("FERC") regarding its proposed redesign of the Midwest transmission market. The petition requests preliminary approval from FERC on the general concepts that will govern the MISO's implementation of the nation's largest wholesale energy market in December of 2003. Despite the fact that the market rules have yet to be fully developed, let alone vetted by stakeholders, plans for implementation appear to be going full speed ahead.

In general terms, MISO has proposed developing both a day-ahead and a real-time transmission market. The day-ahead market will provide a projection of congestion charges in order to ensure some degree of price certainty. The real-time market will be settled after-the-fact, at a point where congestion charges cannot be hedged.

Both markets will employ the concept of "locational market pricing" ("LMP"). LMPs are market clearing marginal prices for energy at particular points where energy is delivered or received. The difference

in LMPs at various points on the system will reflect the value (or cost) of congestion. In essence, load serving entities which participate in the system will have the option of bidding into the market, self-scheduling their loads, or a combination of both. Complex, computer-generated settlement programs will determine the actual cost of transmission, based on the degree of congestion and the sufficiency of energy resources. The ability to hedge against congestion charges will be provided through the allocation of Financial Transmission Rights ("FTRs") to existing firm transmission customers. These FTRs will also be subject to auction and trading, and will also not provide a hedge for any real-time charges.

In theory, the implementation of the market will provide for new sources of energy supply and opportunities for selling excess generation. However, numerous questions have been raised about how the market will actually work in practice. Moreover, although the status of existing long term transmission contracts will not be affected, transmission customers may be subject to additional costs.

The proposed rules will empower MISO to take on a new role in dispatching generation across the region, one which was not envisioned when it was set up and approved as a regional transmission operator ("RTO"). In addition, MISO and the region's other main RTO, PJM have yet to agree on how to fully (and cost-effectively) integrate operation of their respective systems. Finally -- and crucially for transmission dependent entities such as municipal utilities -- the accuracy and fairness of the FTR allocation process has yet to be fully ensured. In addition to these more global issues, numerous technical, procedural and operational issues remain to be resolved, as well.

Yet while similar concerns already have begun to retard development of FERC's Standard Market Design initiative (see MLN, September, 2002), which would employ similar wholesale market concepts on a national scale, MISO's market initiative shows no signs of slowing down. According to MISO's timetable, system design and configuration will be complete by mid-March, with market trials set for August and operation in December, 2003. For these reasons, the next few months will be crucial as the market rules continue to evolve amidst the scrutiny of transmission owners, regulators and customers alike.

—Matt Weber

—Richard A. Heinemann

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## A New Constitutional Standard for Municipal Regulation of Adult Establishments?

*Continued from page 6*

statement that the analyses applied under the *American Mini Theaters* and *Barnes* lines of cases are "virtually indistinguishable." Consequently, all future regulations may have to be analyzed under the *Ben's Bar* standard.

The adoption of a unified standard may not produce the benefits that it would seem to promise. Rather than simplify the constitutional analysis, it may make that analysis more complicated by requiring reference to cases decided under both the *American Mini Theaters* and *Barnes* lines of cases, regardless of the issue involved. Moreover, while the Supreme Court's analysis in these lines of cases may be "virtually indistinguishable," subtle differences in the way they have been interpreted by lower courts could prove problematic. Accordingly, if the Seventh Circuit intends the *Ben's Bar* decision to bring a single constitutional standard to the circuit, it may have to tolerate some "growing pains" as we try to harmonize the pre-*Ben's Bar* case law.

# MUNICIPAL LAW NEWSLETTER

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