

IN THIS ISSUE

- *Status of Great Lakes Compact Legislation Uncertain*
- *Wisconsin Appeals Court Upholds Special Assessment Plan for Road Improvements*
- *Denial of Rezoning Cannot Be Based On Applicant's Reputation History*
- *Complete Text of New Ordinances No Longer Needs to be Published in Newspaper*
- *Town-Wide Moratorium on Development for Planning Purposes Upheld*
- *No Appeal for Municipal Default Judgments*
- *Sheriff Cannot Withhold Records Merely Because They Have Been Sent to DA*
- *Condemnation: Unit Rule Held Unconstitutional as Applied*

Status of Great Lakes Compact Legislation Uncertain

The Legislature completed its 2007-2008 regular legislative session on March 13, 2008 without passing the Great Lakes Compact. While all bills not passed before the end of the session are dead, the Governor could call a special legislative session to work on passage of the Great Lakes Compact, and he has indicated a willing to do so.

The last version of a Great Lakes Compact implementation bill is SB 523. This bill was introduced on February 21, 2008, and was passed by the Senate, with amendments, on March 6, 2008. The bill was not acted on by the full Assembly before the end of the session, although discussions are still continuing on the bill.

While SB 523 is referred to as the Compact legislation, it is really much more than that. SB 523 would do several things. It would:

- Ratify the Compact in Wisconsin, and provide how the Compact would be implemented once it is ratified by Congress;
- Establish a new regulatory program for water users located within the Great Lakes Basin which would apply prior to the time the Compact is approved by Congress, and which would continue to apply if the Compact is never approved;
- Authorize the DNR to develop rules for conservation both inside and outside the Basin; and
- Authorize the DNR to develop a process for regional water supply planning throughout the State.

In general, water withdrawn from the Great Lakes basin may only be

used in the Great Lakes basin, although the Great Lakes Compact and SB 523 provide some limited exceptions to this rule for communities that lie on the dividing line of the Great Lakes basin, or that lie in a county which lies on the dividing line of the Great Lakes basin. In order to withdraw water from the Great Lakes basin for use within the basin, SB 523 would require a water user to obtain a withdrawal permit. A permit would be required no later than seven years after the effective date of the legislation.

Withdrawals of between 100,000 gallons per day up to 1 MGD (averaged over 30 days) would be covered by a general permit. Withdrawals of 1 MGD and over would be covered by an individual permit. The permits will include requirements for monitoring and reporting, a withdrawal amount authorization, and water conservation requirements. Permits will be for 10 years. Reissuance of the permit would be automatic unless there is a proposal for an increased withdrawal. In general, the initial withdrawal amount authorized in the permit will be established by the DNR based upon existing facilities. If a user wants to increase its withdrawal above the authorized amount, the user must apply for a permit increase.

SB 523 also requires the DNR, in consultation with the PSC and the Department of Commerce, to specify water conservation and efficiency goals for the entire state of Wisconsin. Goals are to include promotion of environmentally sound and economically feasible water conservation

Status of Great Lakes Compact

Legislation Uncertain *Continued from front page*

measures, water conservation and efficiency measures that the PSC requires a water utility to implement, and water conservation and efficiency measures that the Department of Commerce requires be implemented under its authority. The DNR is to promulgate rules specifying water conservation and efficiency measures. These rules, however, may not require retrofitting of existing fixtures, appliances or equipment.

A new concept included in SB 523 is that of water supply service area planning. This requirement is intended to be similar to that required for sewer service area planning. By no later than December 31, 2025, all municipalities (not just those in the Great Lakes basin) making a water withdrawal to service populations of 10,000 persons or more must have a water service area plan approved by the DNR. A community within the Great Lakes basin may need a plan sooner if the community is seeking a new or expanded withdrawal, interbasin transfer, or diversion.

The DNR is to establish and administer this water supply planning process for public water supply systems. SB 523 requires a water supply plan to include all of the following:

- delineation of the area for which the plan is being prepared and proposed water service areas for each public water supply system making a withdrawal covered by the plan;
- an inventory of the sources and quantities of the current water supplies in the area;
- a forecast of the demand for water in the area over the period covered by the plan;
- identification of the existing population and population density of the area, and forecasts of the expected population and population density;
- identification of the options for supplying water in the area that are cost-effective based upon a cost-effectiveness analysis of regional and individual water supply and water conservation alternatives;
- an assessment of the environmental, social, and economic impacts of carrying out specific significant recommendations of the plan;
- a demonstration that the plan will effectively use existing water supply storage and distribution facilities and wastewater infrastructure to the extent practicable; and
- an analysis of how the plan supports and is consistent with any applicable comprehensive plans and applicable approved areawide water quality management plans.

The plan must be approved by the governing body of each city, village, and town whose public water supply is addressed by the plan. The plan must also be approved by the DNR, and the DNR may not approve the plan unless all the requirements listed above are met. The plan may not cover a period longer than 20 years. If the DNR approves a utility's water supply plan, the utility's withdrawal permit will be modified to be consistent with the plan. The expectation is that this will allow utilities to obtain the withdrawal authorizations needed to implement their water supply plans without having to go back to the DNR every time a new component of the plan is installed.

— Lawrie Kobza

Wisconsin Appeals Court Upholds Special Assessment Plan for Road Improvements

In two phases over the course of a decade, the City of Mequon made major improvements to Port Washington Road, a heavily traveled, mostly commercial street. Ozaukee County and WisDOT were involved in the project. The work was contracted by WisDOT, which assigned a portion of the costs to the City as the local share.

The City decided to special assess approximately \$490,000 of its share of the costs against abutting commercial properties. The assessments were apportioned to the commercial properties on the basis of estimated trip generation rates. The City chose not to assess residential properties that abutted the Road.

Owners of several abutting commercial properties sued the City. Their lawsuit ended in a Court of Appeals decision issued on February 20, 2008, called *Park Avenue Plaza v. City of Mequon*, 2006AP2339. The Court addressed three challenges to the assessments.

The first was that the City waited until the project was constructed before initiating the formal process of making the assessment, including the preliminary-stage and final-stage engineering reports, and the required public hearing. Only an informal informational meeting was held before the formal process began.

The circuit court and the court of appeals reviewed the order of proceedings and concluded that it is legal for a city to conduct proceedings to levy police power special assessments after the public works project is finished.

The second challenge was to the trip generation formula for allocating assessments. The court had little difficulty upholding this allocation method, especially since the plaintiffs apparently conceded that the method was widely accepted.

The third and final challenge addressed the decision not to assess abutting residential properties. The City won this argument as well because of its showing that the bulk of the congestion-reducing benefits of the street improvements would be derived by the businesses.

The Mequon case does not break new ground in terms of articulating standards for special assessments, but it does uphold, for the first time at the appellate court level, a set of assessment policies that have been employed in several Wisconsin municipalities on projects expanding the capacity and safety of major thoroughfares. The municipal law practice group at the Boardman Law Firm has assisted several of these municipalities over the years.

— Richard A. Lebmann

Denial of Rezoning Cannot Be Based On Applicant's Reputation History

A recent Court of Appeals decision presents a rare example of a denial of rezoning that is overturned on grounds of bias. *Staege v. Town of Norway*, Appeal No. 2007AP231 (March 5, 2008) (not recommended for publication).

In *Staege*, a landowner applied for rezoning of his property from M-2 (general industrial) to M-3 (heavy industrial) and for a conditional use permit for outside storage of certain materials and equipment. The property was subject to County zoning, which requires that zoning requests be approved by both the County Board and Town Board. At a Town Board meeting, a Town supervisor and the Town attorney gave "background information" on the landowner, including disputes with the County over alleged violations of zoning restrictions on other property as well as storage of junk material on the subject property.

A first round of certiorari litigation resulted in a remand to the Board to set out its reasons for denying the rezoning because an audio recording of the Town Board meeting was inaudible and could not be transcribed. The Board then set out nine statements that it characterized as a "partial list" of its reasons for denying the rezoning request. These included the existence of wetlands, the "Petitioner's history," "past business practice" that the landowner prefers to operate beyond approved conditions, his transfer of junk onto the subject property before he had conditional use to operate a business there, and the fact that junk was not a part of the landowner's welding and supply business for which the approvals were sought. The Board also reasoned that denying the request would keep a buffer zone between M-3 and residential property.

On a second certiorari action, the circuit court affirmed the denial of the rezoning application. The Court of Appeals reversed. It began by noting that the general purpose of zoning power is to control land use and development. Thus, the Court's focus is on whether the rezoning is consistent with long range planning and based upon considerations that effect the entire community.

The Court noted that the Town's statement of reasons cited facts like the existence of wetlands but never explained why rezoning from M-2 to M-3 would diminish those characteristics. Moreover, the Court found that the rationale of creating a buffer zone had no basis in the record as the subject property was not adjacent to any residential property and there were eight residences in the Town closer to M-3 property than the closest residence to the subject property.

The Court also found that the extensive references to the landowner's history of land use disputes and his behavior with respect to the subject property in terms of

storage of materials demonstrated a predisposition by the Board Members to decide issues based on the landowner's character, not on the use to which the land would be put. To the extent that the Town Board had concerns about particular aspects of the landowner's future use of the property, these could be addressed by setting conditions of any conditional use permit that might be granted.

Staege is a good reminder that applications for zoning and rezoning of property must be decided on the basis of the characteristics of land, not of the landowner. Moreover, those approving or denying a zoning request should explain the connection between the legal factors governing the rezoning and the characteristics of the land that support or oppose the application. Finally, it is also important to note the remedy in *Staege*. It was to remand the decision to the Town Board for reconsideration of the rezoning requests and to issue a new decision supported by the record. The Court of Appeals did not order the Town Board to approve the rezoning requests, but rather to reconsider them.

— Mark J. Steichen

Complete Text of New Ordinances No Longer Needs to be Published in Newspaper

In the past, a city, village, town, county, or town sanitary district was required to publish the complete text of an ordinance enacted by it in a local newspaper. If no newspaper existed in a village, the ordinance could be posted in at least three public places in the village. Towns were also allowed to post ordinances in the same manner. Wisconsin Act 72, which was signed by the Governor on March 11, 2008, now allows a local governmental unit to either continue to publish the complete text of an enacted ordinance or publish a "notice" of the ordinance in a local newspaper. If a notice of the ordinance (as opposed to the full text of the ordinance) is published, the notice must contain at least all of the following information:

- (1) the number and title of the ordinance;
- (2) the enactment date of the ordinance;
- (3) a summary of the ordinance, which shall be a brief, precise, and plain-language description that can be easily understood; and
- (4) information about where the full text of the ordinance may be obtained.

The new law makes no change to current law regarding the posting of ordinances in villages or towns. It is expected that this change will result in a cost savings to local governments who elect to publish the notice, instead of the entire text of the new ordinance.

— Lawrie Kobza

Town-Wide Moratorium on Development for Planning Purposes Upheld

In a case on which the Supreme Court deadlocked 3-3, the Court of Appeals, on remand, unanimously upheld a Town's temporary town-wide prohibition on land divisions, pending the adoption of a Smart Growth plan. *Wisconsin Realtors Association, Inc. v. Town of Westpoint*, 2006AP2761 (February 28, 2008) (recommended for publication). In September 2005, the Town of Westpoint adopted an ordinance establishing a town-wide temporary moratorium on the acceptance of new applications for land divisions in the Town, with limited exceptions. The moratorium was to last for two years while the Town developed a comprehensive plan under Section 66.1001, Stats., the Smart Growth statute. The ordinance recited that the moratorium would give the Town an opportunity to stabilize growth and continue the planning process without creating development pressures to rush through projects before a new plan was adopted.

The Wisconsin Realtors Association and the Wisconsin Builders Association sued the Town for a declaration that the moratorium was illegal and for an injunction against its enforcement. The moratorium was enacted under Section 236.45 (2), Stats., which authorizes any municipality, town or county which has created a planning agency to "prohibit the division of land in areas where such prohibition will carry out the purposes of this section."

The Associations first argued that the phrase "in areas" in Section 236.45(2) limited the Town to prohibiting land division only within portions of the Town. The Court rejected this argument as unreasonable. The Court could find no reason why extending a land division

moratorium to an entire Town would promote the purpose of the statute any less than a moratorium limited to a subset of the Town.

The Association next argued that allowing a town-wide prohibition on land division would be inconsistent with the portion of Section 236.45(2) requiring land division ordinances to make "all of the provisions of" Chapter 236 applicable. Once again, the Court of Appeals could not reconcile the Associations' argument that this Section specifically authorized some land division prohibitions but not the particular prohibitions the Town had chosen.

Finally, the Associations contended that interpreting Section 236.45(2), Stats. to permit town-wide prohibitions on land division would render superfluous the express authority created in Section 62.23(7)(d)(a) to enact interim zoning ordinances freezing existing uses while a comprehensive zoning plan was being prepared. While the Court acknowledged that the two statutory provisions are interrelated in practice, nevertheless they are separate and distinct grants of power by the legislature.

The decision in *Town of Westpoint* does not signal a broad authority for towns to place moratoriums on development in general. The Court of Appeals upheld the moratorium because the ordinance expressly referred to its need to put a hold on land divisions while a comprehensive plan was prepared. This is an express purpose of the statute. Moreover, the Court of Appeals emphasized that the moratorium was limited in duration.

— Mark J. Steichen

No Appeal for Municipal Default Judgments

City of Glendale v. Lawrence C. Stearns, Appeal No. 2007AP973. This case presents the issue of whether an appeal is possible from a municipal default judgment. The answer is "no."

The facts of the case are these. Police ticketed Lawrence Stearns for making an illegal u-turn. Stearns contested the matter. The matter was scheduled for pre-trial three different times, with Stearns requesting the various adjournments for health reasons. A trial date was set. Stearns failed to appear, resulting in the entry of a default judgment. Stearns moved to reopen the judgment. The municipal court granted Stearns' motion. After the court set several new dates for a trial and Stearns failed to appear, the municipal court set one last trial date, ordering Stearns to either appear in person or submit "a legitimate verifiable medical excuse." He failed to do either. The municipal court again entered a default judgment. Stearns never brought a new motion to reopen the default judgment.

He appealed the matter to the trial court.

The trial court refused to hear the appeal and dismissed the case. The trial court held that an appeal from a municipal default judgment is not allowed under Wis. Stat. § 800.14, a statute which governs appeals from the municipal court to the trial court. Stearns appealed the matter to the Court of Appeals.

The Court of Appeals affirmed the trial court ruling. Citing the drafting records for Wis. Stat. § 800.14, the appellate court concluded that all alleged violators must go to municipal court first and try their issues in that forum. If they lose at the municipal court trial, then they may file an appeal with the trial court.

In Stearns' case, because no trial was held in municipal court due to Stearns' failure to appear, Stearns was precluded from appealing the resulting default judgment. By failing to exhaust his options in the municipal court, he waived his right to review at the trial court.

— Mark A. Neuser

Sheriff Cannot Withhold Records Merely Because They Have Been Sent to DA

Sheriffs are not entitled to rely on the common law exception available to District Attorneys to withhold documents in their custody. *Portage Daily Register v. Columbia County Sheriff's Department*, 2007AP323 (January 31, 2008) (recommended for publication).

In 2006, the Columbia County Sheriff's office investigated a complaint of illegal campaigning based on flyers that appeared in mailboxes throughout the County. The *Portage Daily Register* made a request under the open records law for a copy of the investigation report. The Sheriff's Department denied the request on the ground that the report had been forwarded to the District Attorney's office and was part of an open investigation. The Circuit Court found that this reason was sufficiently specific and that the Department properly withheld the report under the public records balancing test. The Court of Appeals reversed.

The Sheriff's Department relied on *State ex rel. Richards v. Foust*, 165 Wis.2d 429, 477 N.W. 2d 608 (1991), in which the Supreme Court held that District Attorneys have a categorical exception to the open records law for records in their custody. The Court of Appeals began by explaining the two-step process for deciding whether a custodian may properly withhold a record. First, a Court decides whether the custodian's reasons for withholding have been made with the requisite specificity. If so, then the Court decides whether the stated reasons for withholding the records are sufficient to outweigh the strong public policy favoring disclosure. The Court of Appeals acknowledged the exception for DAs but concluded that the exception did not extend to law enforcement agencies.

The Sheriff's Department also relied on *Journal/Sentinel, Inc. v. AAGRUP*, 145 Wis.2d 818, 429 N.W.2d 772 (Ct. App. 1988), which upheld a coroner's denial of access to a portion of an autopsy report on the grounds that the report was implicated in ongoing crime detection efforts. The Court of Appeals rejected the Sheriff's Department argument, because its denial had simply stated that the investigative report had been forwarded to the DA and it did not provide a public policy reason why the report should be withheld. The Court rejected the argument that the existence of an ongoing investigation was sufficient by itself to justify nonproduction. The Court noted that, in *AAGRUP*, the coroner had explained that the withheld portion of the autopsy report would have revealed the crime detection strategy being pursued by the police. According to the Court, records can also be withheld if they would disclose the identity of a confidential informant or otherwise prejudice an ongoing investigation.

The lesson from this case is that Sheriff's Departments do not have the same broad authority as District Attorneys to withhold records in their custody. Sheriffs may still withhold records or portions of records, but they must conduct a balancing test and be more specific in explaining the public policy grounds behind their decisions.

— Mark J. Steichen

Condemnation: Unit Rule Held Unconstitutional as Applied

The Court of Appeals has held the "Unit Rule" to be unconstitutional as applied to the particular circumstances in *VFW Post No. 2874 v. Redevelopment Authority of Milwaukee*, 2006AP2866 (January 23, 2008) (recommended for publication). The Unit Rule is a fundamental principle of valuation in condemnation proceedings. It provides that real estate is to be valued as a whole, rather than the sum of the value of the individual interests in the property.

The VFW held a 99-year lease of space on the ground floor of a dilapidated eleven-story hotel building. As part of a redevelopment project, Milwaukee made a combined offer of \$440,000 for the entire property, including the VFW's leasehold interest. A court apportioned \$300,000 of the total award to the VFW with the remainder going to the building owner. The VFW appealed to the Condemnation Commission, which found that the property as a whole was worth \$425,000. The VFW then appealed to the Circuit Court, where a jury found that the building as a whole had no value. Not unexpectedly, the VFW appealed again.

The Court of Appeals opinion traces the history and purpose of the Unit Rule and discusses the allocation of condemnation awards between landlords and tenants. The Court also addresses a line of cases in which fair market value has been held to be an insufficient standard for measuring damages in condemnation.

In holding that the particular circumstances of the VFW case precluded application of the Unit Rule, the court noted that the VFW had a long term lease with no forfeiture clause, but the fair market value of the property had been found to be zero dollars. Thus, fairness required that the VFW be given an opportunity to prove the value of its separate interest. The opinion does not give specific guidance on how that is to be accomplished.

The appellate decision is problematic. If the particular area of the building leased by the VFW has a positive net worth while the building as a whole is worthless due to its condition, depriving the tenant of any compensation whatsoever for its leasehold interest would seem unreasonable. However, the Court of Appeal's vague references to the leasehold interest having great value because it is long term and for below market rent are troublesome. If the leased space is uninhabitable due to its condition and has no fair market value because of the cost of bringing it into compliance with codes, then the leased space has no value. To the extent that the Court of Appeals focused on the VFW's rights against the landlord under its lease, rather than on the value of the physical space being taken by the redevelopment authority, the decision may be misguided.

— Mark J. Steichen

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 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.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanlawfirm.com.

Richard L. Bolton	283-1789	rbolton@boardmanlawfirm.com
Anita T. Gallucci	283-1770	agallucci@boardmanlawfirm.com
Robert E. Gregg	283-1751	rgregg@boardmanlawfirm.com

Rhonda R. Hazen	283-1724	rhazen@boardmanlawfirm.com
Richard A. Heinemann	283-1706	rheinemann@boardmanlawfirm.com
Lawrie J. Kobza	283-1788	lkobza@boardmanlawfirm.com
Richard A. Lehmann	283-1719	rlehmann@boardmanlawfirm.com
Jennifer S. Mirus	283-1799	jmirus@boardmanlawfirm.com
Mark A. Neuser	283-1725	mneuser@boardmanlawfirm.com
Jon C. Nordenberg	283-1739	jnordenberg@boardmanlawfirm.com
William R. Peck	283-1732	wpeck@boardmanlawfirm.com
Catherine M. Rottier	283-1749	crottier@boardmanlawfirm.com
John P. Starkweather	283-1708	jestarkweather@boardmanlawfirm.com
Mark J. Steichen	283-1767	msteichen@boardmanlawfirm.com
Cynthia A. Van Bogaert	283-7543	cvanbog@boardmanlawfirm.com
Steven C. Zach	283-1736	szach@boardmanlawfirm.com

This newsletter is published and distributed for informational purposes only. It does not offer legal advice with respect to particular situations, and does not purport to be a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions.

BOARDMAN^{LLP}
LAW • FIRM

© Copyright 2008, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED

BOARDMAN^{LLP}
LAW • FIRM

Boardman, Suhr, Curry & Field LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

PRRSRT STD
U.S. Postage
PAID
Madison, WI
Permit #1400