

IN THIS ISSUE

- *State Gears Up Effort to Tap Federal Stimulus Money—Opportunities Abound for Municipal Projects in Energy Efficiency, Water Conservation, Green Development, and Other Areas*
- *American Recovery and Reinvestment Act of 2009 - COBRA Impacts*
- *Court Takes Broad View of “Known Danger” Exception to Governmental Immunity*
- *Contract for Construction of Town Fire Station Held Invalid Without Electors’ Approval*
- *Speakers Forum*
- *Court Rules Assessment Procedures Statute Unconstitutional*
- *Constitutional Requirement of Uniformity in Property Taxation Applied in Challenge to Assessment of an Individual Property*
- *Anita Gallucci will be Recognized by the Wisconsin Association of PEG Channels*

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State Gears Up Effort to Tap Federal Stimulus Money—Opportunities Abound for Municipal Projects in Energy Efficiency, Water Conservation, Green Development, and Other Areas

According to current estimates from Wisconsin’s Office of Recovery and Reinvestment (ORR), Wisconsin is set to receive approximately \$3.8 billion in federal recovery funds made available by the American Recovery and Reinvestment Act that passed in February (ARRA). The challenge now is to find the most efficient way of channeling those dollars to eligible recipients, including municipalities and local government units.

Because the ARRA is designed to utilize existing programs to channel federal funds, rather than to administer straight block grants to states or governmental subunits, local communities need to assess how their needs fit into 130 specific programs being currently administered through a variety of state and federal agencies. For example, a community seeking federal dollars for improvements to the local library may need to target energy efficiency to become eligible for stimulus money to help that library.

To assist potential recipients in this process, the ORR has set up a webpage to serve as a clearinghouse of necessary information pertaining to eligibility requirements, application procedures and applicable state and federal agency contact information. The webpage can be found at: www.recovery.wisconsin.gov. Although the rules of the road for specific

program opportunities are still being developed by both the state and federal governments, local governments interested in potentially applying for stimulus money should begin now by visiting the ORR’s webpage.

With respect to timing, the only firm requirement is that project monies derived from the ARRA be spent or committed to no later than October, 2010. Otherwise, application deadlines and project milestones will vary depending on the specific program through which the money is allocated.

The ORR website includes a program search function divided into 12 specific program areas: education, environment and water, housing, science and technology, transportation, energy, health care, individual and family assistance, public safety and justice, tax relief and incentives, workforce, and “miscellaneous.” The search function allows potential recipients to look for specific funding opportunities within these program categories. Each program listing includes a brief description of the program, key state and federal agency contact information, the types of entities eligible to receive funding through that program, and an identification of the level of government (federal, state, or local) responsible for project selection and

Continued on page 2

State Gears Up Effort to Tap Federal Stimulus Money—Opportunities Abound . . .

Continued from front page

fund disbursement. The program function will be updated by ORR as more information on application and reporting requirements becomes available.

Among the areas being targeted for stimulus relief, several may be of specific interest to municipalities.

In the energy area, targeted programs of interest to municipal utilities or local governments include programs designed to encourage recipients to make buildings more energy efficient and boost the use of renewable energy sources such as wind turbines, solar panels, and biomass. In addition, there are programs to promote low income weatherization, alternative fueled vehicles, and smart grid investment. These programs take the form of block grants as well as zero or low-interest loans and bonding.

Clean Energy Renewable Bonds, for example, are available to finance electric generation from wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation, hydropower, landfill gas, marine renewable, and trash combustion facilities. Of the \$1.6 billion allocated for such bonding, one-third has been specifically designated for use by public power providers to finance such facilities. Qualified energy conservation bonds are also available to local governments to finance initiatives designed to reduce greenhouse gas emissions. Funds from the sale of such bonds may be used by utilities to finance programs that provide ratepayers with energy-efficient property and equipment, as well as “green” community programs.

Small cities and counties are also eligible for Energy Efficiency and Conservation Block grants, which are targeted for projects that reduce energy use and emissions. Such funds may be used for strategic planning, consultant services, energy audits, implementing building codes and inspection services, energy efficiency retrofits, and onsite renewable technology installation.

In the area of water and the environment, stimulus money for which local governments are eligible has been made available for brownfields assessment, cleanup, and revolving loans. Funding has also been provided for water quality planning through the Clean Water Act Program and for water and wastewater construction projects through the Safe Drinking Water Revolving Fund and the Clean Water State Revolving Fund.

Local governments, including small municipalities, are also eligible for community development block grants, which provide funding for community and economic development projects, as well as for grants designed to promote diesel emission reductions and clean-up related to underground tank storage.

In addition to stimulus-related money, the ORR is committed to pursuing federal dollars available through existing federal grant programs and will continue to compete for such funding to promote key initiatives that further the governor’s stated energy independence goals. For many projects, the governor’s Wisconsin Energy Independence Fund, which is administered by the Wisconsin Department of Commerce, may be the most promising program. Although applications are not being taken now because funds for the current fiscal year have been exhausted, the governor’s budget includes \$14 million of additional funding for this effort, beginning July 1, 2009.

The variety of state and federal funding initiatives has created an unprecedented opportunity for local governments to develop projects and undertake initiatives in a wide array of sectors. However, the rules of the road are evolving at a rapid pace. Local officials should undertake efforts now to familiarize themselves with available programs using the resources available through ORR and elsewhere and make sure to tailor project development accordingly.

— *Richard A. Heinemann*

American Recovery and Reinvestment Act of 2009 - COBRA Impacts

The American Recovery and Reinvestment Act of 2009 (“ARRA”) affects virtually all employers that provide group health plans. This includes private and governmental employers that are subject to the federal COBRA (the Consolidated Omnibus Budget Reconciliation Act). Under the ARRA, the federal government will subsidize 65% of the COBRA premium that an “Assistance Eligible Individual” (“AEI”) is required to pay. An AEI is a qualified beneficiary who becomes eligible for COBRA continuation coverage between September 1, 2008, and December 31, 2009, as a result of the involuntary termination of a covered employee.

The law went into effect on February 17, 2009, and the subsidy applies to the first period of coverage beginning on or after that date, which for most plans was March 1, 2009. The ARRA also imposes notice requirement to all AEIs along with strict deadlines as to when these notices must be given. Most all of the initial notices are required to be given to all AEIs by April 18, 2009.

This is a very brief summary of the COBRA impacts of the ARRA. Should your municipality be affected by the Act, you are urged to contact your employee benefits professional immediately because the deadline for compliance is coming up fast: April 18, 2009, and there is a lot of work that needs to be done prior to sending out the required notices.

— *Clifford D. Bobholz*

Court Takes Broad View of “Known Danger” Exception to Governmental Immunity

A recent court of appeals decision seems to greatly expand the scope of the “known danger” exception to governmental immunity potentially exposing municipalities to greater risk of liability. *Pries v. McMillon*, 2008AP89 (October 28, 2008) (recommended for publication).

Officials, employees, and agents of governmental entities enjoy the protections of governmental immunity for their legislative, quasi-legislative, judicial, or quasi-judicial acts. These terms are often referred to as discretionary act immunity. Immunity for the state and its employees is derived from common law, while immunity for municipalities and their employees is governed by section 893.80(4), Stats.

There are four judicially-created exceptions to governmental immunity: (1) for ministerial duties imposed by law; (2) duties to address a known danger; (3) actions involving non-governmental or professional discretion; and (4) actions that are malicious, willful and intentional.

In this case, Pries was one of a crew of inmates taking apart horse stalls at the Wisconsin State Fair Park under the supervision of McMillon, a state employee. These horse stalls are designed to be portable and consist of heavy 10-foot by 10-foot metal walls held together with pins and chains. The proper method of disassembly is to remove the front wall first while the sides and rear are still held together by chains. If the chains are removed prematurely with no one to hold up the walls, there is a significant risk that the walls will fall over and injure bystanders. After a bench trial, the circuit court found that McMillon knew that the chains on the side and rear walls had been removed and, nevertheless, he jumped up and down on a bar connected to the stall. The walls fell over and Pries suffered a broken foot.

The circuit court held that the ministerial duty exception applied to the case and entered judgment for Pries. A ministerial duty is one that does not involve discretion; one that is “absolute and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for performance. . . .” *Pries*, ¶16 (quoting *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶25, 253 Wis. 2d 323, 646 N.W.2d 314). The court of appeals, in a 2-1 decision, declined to address the ministerial duty exception and, instead, affirmed the judgment on the grounds that the “known danger” exception applied. In reaching its conclusion, the court

explained that the “known danger” rule is based on the principle that some circumstances present sufficient danger to require an explicit, non-discretionary municipal response.

Judge Fine dissented, arguing that the majority decision expands the exception to governmental immunity in tort actions to the extent that it swallows the rule. He noted that negligence, by definition, requires that the actor do something that creates an unreasonable risk of danger. Accordingly, in his opinion, the majority decision would encompass all negligence actions within the “known danger” rule.

Judge Fine’s dissent appears to be better reasoned than the majority decision. In *Lodl*, the Wisconsin Supreme Court called the “known and compelling danger rule” a “narrow” exception. It explained that the danger had to be sufficiently compelling to require a specific response. “In a footnote, the majority quotes from *Urmansky v. ABC Ins. Co.*, 2008 WI App 101, ¶67 as follows: “There are very few cases in which the courts have concluded the know danger exception applies.” The footnote goes on to quote from ¶70 to the effect that: “The known danger exception as applied in the case law has been reserved for situations that are more than unsafe, where the danger is so severe and so immediate that a specific and immediate response is demanded.”

The known danger exception was first recognized in a case involving a park manager who failed to place a warning sign or to advise his superiors about an unguarded hiking trail adjacent to a ninety-foot gorge. *Cords v. Anderson*, 80 Wis. 2d 525 (1977). Three other cases cited by the majority involved paramedics who failed to attempt an immediate rescue of the occupant of a submerged van, *Linville v. City of Janesville*, 174 Wis. 2d 571; a dispatcher who failed to have the sheriff’s department investigate a night time report of a downed tree across a road, *Domino v. Walworth County*, 118 Wis. 2d 488; and a teacher having students use vision-distorting goggles without taking any precautions to prevent injury or to stop the activity. *Voss v. Elkhorn*, 2006 WI App. 234. All of these situations presented a risk of severe injury or death. The court failed to note the circumstances of many cases in which the severity of the risk was much greater than the instant case, but the courts nevertheless found it insufficiently compelling to apply the exception. See, e.g., *Lodl* (summary judgment granted on immunity grounds where plaintiff alleged police officer was negligent in directing traffic at an intersection where the traffic lights were not functioning due to a storm). Judge Fine is correct in stating that the circumstances of the *Pries* case present a run of the mill negligence action.

— Mark J. Steichen

Contract for Construction of Town Fire Station Held Invalid Without Electors' Approval

A town board's steadfast determination to purchase land for and build a new fire station despite repeated rejection by the majority of town electors ended in failure. *Town of Clayton v. Cardinal Construction Co.*, 2008AP1793 (March 11, 2009)(recommended for publication). In this case, a contractor sued to enforce a contract signed by the town board to build a new fire station. The appeals court affirmed the circuit court's judgment that the contract with Cardinal Construction Company (Cardinal) was invalid because it was *ultra vires*, i.e., beyond the board's power.

The majority of electors of the Town of Clayton, in an annual meeting and a later special meeting, voted not to authorize the purchase of land and the construction of a new fire station. At the spring election, the town board chairman did not run for office and 2 of the 4 board members were not reelected. Nevertheless, within days of the expiration of their terms, the town board voted unanimously to enter into a contract for a new station and signed a contract with Cardinal. Within days, another annual town meeting was held and the electors again rejected various motions for a new station. A week later the new town board voted unanimously to cancel the contract and notified Cardinal. The town then brought a declaratory judgment action against Cardinal asserting that the contract was *ultra vires* and therefore unenforceable. The circuit court agreed and the court of appeals affirmed.

The court of appeals based its decision on statutory interpretation of section 60.10(2)(e) and (f), Wis. Stats. That section delegates the power to authorize the purchase of land and the construction of buildings to town electors. Cardinal offered several other statutes that it argued gave the town board the power to approve the same without approval by the electors. In each case, the court relied on the well established rule that specific statutes govern over more general ones.

Cardinal relied first on section 60.55, Wis. Stats., which requires town boards to provide fire protection and gives them various options for doing so. These include establishing a town fire department, contracting with a third party, and joining with another municipality to establish a joint fire department. Cardinal relied on subsection (2)(b) providing that town boards "may provide for the equipping, staffing, housing and maintenance of fire protection services." The appeals court found that nothing in section 60.55 requires that fire protection be provided through purchasing land or constructing a building. Therefore, this option would still require approval by the electors.

Next, Cardinal cited section 60.23, Wis. Stats., spelling out miscellaneous powers of town boards. The company

specifically cited subsections (1) and (28). The court found both subsections inapplicable, because both deal with cooperation with other units of government or joint safety buildings. In addition, subsection (28) expressly states that its provisions are effective except to the extent they are in direct conflict with other statutes.

Finally, Cardinal argued that the town's adoption of village powers under section 60.10(2)(c), Wis. Stats., gave the town board the power under section 61.43(3), Wis. Stats., to "acquire property" and "construct . . . buildings." Once again, the court noted that section 60.22(3) expressly limits the ability to exercise village powers when those powers conflict with statutes "relating to towns or town boards." Since the court held that section 60.10(e) and (f) requires elector approval to purchase land and construct buildings, it concluded that the village powers were in conflict and accordingly did not bestow such power on the town board.

— Mark J. Steichen

SPEAKERS FORUM

April 14, 2009

401(k) Plans, Employee Benefits Institute of America, Atlanta, GA
Cynthia A. Van Bogaert

April 24, 2009

Town Board Exercise of Veto Power Over County Rezonings
Wisconsin Town Lawyers Conference, Madison, WI
Richard A. Lehmann

April 28, 2009

401(k) Plans, Employee Benefits Institute of America, Boston, MA
Cynthia A. Van Bogaert

May 1, 2009

Marking a Profit as a Non-profit, WAPC Annual Conference, Waukesha, WI
Anita T. Gallucci

May 5, 2009

401(k) Plans, Employee Benefits Institute of America, Cleveland, OH
Cynthia A. Van Bogaert

May 6, 2009

Eminent Domain Update: Are Dotty Dumpling and 'Unit Rule' Passè?
State Bar of Wisconsin Annual Convention, Milwaukee, WI
Mark J. Steichen

May 7, 2009

Rights of Participants to Your Attorney's Advice and Other Pitfalls
Midwest Claim Conference, Lake Geneva, WI
Cynthia A. Van Bogaert

May 14, 2009

HIPAA Privacy Training, Boardman Law Firm, Madison, WI
Cynthia A. Van Bogaert

May 19, 2009

401(k) Plans, Employee Benefits Institute of America, Chicago, IL
Cynthia A. Van Bogaert

June 2, 2009

401(k) Plans, Employee Benefits Institute of America, Minneapolis, MN
Cynthia A. Van Bogaert

Court Rules Assessment Procedures Statute Unconstitutional

Recently, in *Metropolitan Associates v. City of Milwaukee*, 2008CV 9866, the Milwaukee County Circuit Court, Judge Jean DiMotto presiding, declared part of Wisconsin's property assessment statute unconstitutional.

Municipalities assess the value of real property each year. Property owners may object to assessments by filing an objection with the local board of review and participating in the board of review hearing. Prior to 2001, Wisconsin allowed property owners to appeal from a board of review determination in three ways: by an action for certiorari to the circuit court under Wis. Stat. §70.47(13), by written complaint to the / Department of Revenue requesting that the department revalue the property, under §70.85(1), (4)(b), or under Wis. Stat. §74.37 by filing a claim for an excessive assessment against the taxation district or the county, depending on which entity collected the tax. The property owner can challenge a denied claim by bringing an action in circuit court to recover the amount of the claim not allowed. §74.37(3)(d). The §74.37 review procedure is a broader *de novo* proceeding in which the property owner can introduce evidence not considered by the board of review. However property owners in counties with populations greater than 500,000 could not use the §74.37 process.

In *Nankin V. Village Of Shorewood*, 2001 WI 92, the Wisconsin Supreme Court held that this restriction was unconstitutional. The court found the statute unconstitutional "because it violates the constitutional guarantee of equal protection of the law, that is, it treats owners of property located in populous counties differently than owners of property located in other counties without a rational basis."

In 2008, the legislature enacted 2007 Wis. Act 86, which established new procedures for judicial review of property tax assessments. Act 86 gave taxation districts the option of adopting an ordinance that would preclude property owners from challenging assessments under §74.37.

Milwaukee County enacted an ordinance as permitted by Act 86, which had the effect of limiting property owners' options for review of board determinations. Milw. City Ord. §307-4. In *Metropolitan Associates*, a property owner challenged the constitutionality of Act 86, on the ground that, by allowing municipalities to enact ordinances that would result in the disparate treatment of property owners, the statute violates the equal protection clause of the state constitution. The circuit court agreed with the plaintiff and held the statute unconstitutional.

The City of Milwaukee has filed a notice of appeal.

— James E. Bartzan

Constitutional Requirement of Uniformity in Property Taxation Applied in Challenge to Assessment of an Individual Property

A property owner in the City of Milwaukee challenged an assessment in excess of \$10 million on an 8.7 acre commercial parking lot located near General Mitchell International Airport in Milwaukee. The property owner argued that the correct valuation was roughly 1/3rd of the City's valuation. The board of review upheld the City's valuation, but the Circuit Court sided with the property owner and ordered a refund of the excess taxes that had been paid.

One of the findings that the Circuit Court made was that the assessment violated Article VII, Section 1 of the State Constitution, since it was not made on a uniform basis with other properties in the City.

The Court of Appeals determined that the City's assessment was done correctly. That assessment was based on the net income generated from the commercial parking use of the property, a methodology that is appropriate when there has been no recent arm's length sale of the property being assessed and no recent sales of comparable properties.

The evidence of income that can be used to determine value of the land is income from a business activity that is intertwined with the land. In this case, the location of the site near the airport is what creates customer demand and, therefore, income, rather than factors such as the skill and expertise of the owner.

The property owner then argued and the Circuit Court held that the per square foot assessment set by the City was higher than the per square foot values placed on the land portions of other properties within the same commercial zoning and that this was a violation of the Constitutional Uniformity requirement.

The Court of Appeals rejected the Constitutional argument, saying that the Constitutional standard addresses the process of assessment detailed in the State Assessment Manual; that it addresses the total assessment, not components, such as land and improvements; and that the standard certainly does not require that all properties within a particular zoning district be assessed the same value as either the land or the improvement components of total value.

— Richard A. Lebmann

Anita Gallucci will be Recognized by the Wisconsin Association of PEG Channels

On May 1, 2009 Boardman's Anita Gallucci will be awarded the 2009 WAPC Friend of Access Award in recognition of her continuing work in support of public education and government access television stations in Wisconsin.

MUNICIPAL LAW NEWSLETTER

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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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