

MUNICIPAL LAW NEWSLETTER

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Pending Legislation Would Make Selling Municipal Utilities Easier

Assembly Bill 233 (“AB 233”), which is currently pending before the Wisconsin legislature, would radically change the way in which municipal utilities may sell or lease their entire assets. Under the present law, a city, village or town owning a public utility may not sell or lease any complete public utility plant it owns without first following a number of steps proscribed by statute. See Wis. Stats. § 66.0817. Specifically, under current law, a municipality may not sell or lease one of its public utilities without first adopting an ordinance or resolution that summarizes the proposed terms of the sale or lease and that authorizes the negotiation of a preliminary agreement with a prospective purchaser. The municipality must then submit a preliminary agreement to the Public Service Commission of Wisconsin (“PSC”) for a determination of whether the sale or lease is in the public interest. The PSC is to fix the price and terms of the transaction, if the transaction is found to be in the public

interest. Finally, the municipality must submit the proposed transaction to the electors of the municipality for a referendum. If the referendum is approved, the sale or lease must be consummated within one year of the referendum, unless the time is extended by the PSC. These procedural protections; however, are to be repealed under the proposed bill. Under AB 233, a municipality could sell or lease any public utility plant it owns “in any manner” that the municipality “considers appropriate.”

The legislation is opposed by the Municipal Electric Utilities of Wisconsin (MEUW) and the League of Wisconsin Municipalities. Language similar to AB 233 was included in the Governor’s Budget Bill at the request of the City of Milwaukee. However, the Milwaukee City Council has voted to oppose this change in state law; the change is believed to have been proposed to ease a sale of Milwaukee’s water utility.

— Anita T. Gallucci

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Violent Video Games, Nude Dancing and Parade Restrictions: Municipal Ordinances and The First Amendment

A primary function of municipal government is to protect the health, safety and well-being of its citizens. To advance that objective, municipalities routinely enact ordinances to regulate conduct and activity. When those ordinances impinge on the free expression of opinion, however, constitutional challenges often follow. Three recent cases have examined the tension between the First Amendment guarantee of free speech and a municipality's desire to legislate in the public interest. Two were decided by the Seventh Circuit Court of Appeals, the circuit that includes Wisconsin. The third decision was authored by the Wisconsin Court of Appeals, District IV.

Violent Video Games

The City of Indianapolis, Indiana passed an ordinance seeking to limit the access of minors to video games that depict violence. *American Amusement Machine Association v. Kendrick*, Appeal No. 00-3643, (7th Cir. 3/23/01). The ordinance defined the term "harmful to minors" to mean "an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community...., lacks serious literary, artistic, political or scientific values" and contains either "graphic violence" or "strong sexual content." The ordinance was enacted in 2000 but never went into effect because it was stayed pending a decision on its constitutionality.

The ordinance was premised on the City's belief that participation in violent video games engenders violence on the part of the players, at least when they are minors. As support for that premise, the City relied on two studies by psychologists which found that playing a violent video game tends to make young persons more aggressive in their attitudes and behavior. The City also cited other literature suggesting that violence in the media engenders aggressive feelings.

To justify regulating conduct otherwise protected by the First Amendment, the City had to demonstrate compelling grounds to believe that violent video games cause harm either to the game players or to the public at large. Here, the Seventh Circuit found that the City's proof failed. The court noted that most of the video games the City cited as violating the ordinance were stories involving animated cartoon characters. The court rejected the social science evidence on which the City relied because the psychological studies addressed video games not shown to be similar to the ones submitted to the court. Concluding that the City's claim of harm to its citizens from these games was "wildly speculative" at best, the

court held the ordinance unconstitutional, noting that it curtailed freedom of expression significantly without proof of a compelling justification.

Nude Dancing

The Town of Lyndon, Wisconsin adopted ordinance 18b prohibiting nude dancing in licensed establishments on July 3, 1999. *See Town of Lyndon v. Beyer*, Appeal No. 00-2125, (Wis. Ct. of App. 3/15/01). Adoption of the ordinance coincided with the opening in the town of an establishment called "Cruisin'". To comply with the ordinance, Peter Beyer, the operator of Cruisin', required his dancers to be attired in pasties and G-strings. He also sued to challenge the constitutionality of the ordinance. His challenge succeeded.

In 1991, the United States Supreme Court concluded that nude dancing is expressive conduct that falls within the First Amendment's protection. States could regulate such conduct, but only to combat the "secondary effects" that shadow establishments where nudity occurs, such as prostitution, sexual assault and other criminal activity. For such regulation to be constitutionally permissible, the ordinance must be drafted in a manner that addresses the secondary effects of adult entertainment and does so in a way that is not overly broad. If the ordinance is promulgated in an overly expansive fashion, having the collateral effect of chilling the constitutionally protected expression of third parties, the ordinance will be held invalid.

The town ordinance at issue in this appeal did not survive the overbreadth challenge. The Town claimed that the ordinance only regulated nude dancing in bars and taverns, but the court noted that the words "bars" and "taverns" appeared only in the preamble and not in the text of the ordinance itself. Because the text was plain

and unambiguous, the court could not alter its terms to include the limiting language contained in the preamble.

By its terms, the ordinance did not apply to four specified kinds of licensed establishments: theaters, performing art centers, civic centers and dinner theaters where performances of serious artistic merit are offered on a regular basis. The court found the exemptions too limited to save the ordinance from unconstitutional overbreadth. The court noted, for example, that the ordinance might even be applicable to acts of nudity between married people in a hotel room, since many hotels have liquor licenses and hotels are not within the ambit of the ordinance's exemptions.

The court declined the Town's invitation to sever the offending portions of the ordinance, concluding that to do so would require rewriting the ordinance, a legislative role the court declined to undertake.

Parade Restrictions

In *MacDonald v. City of Chicago*, Appeal Nos. 98-3836, 98-3919 and 99-1429, decided March 12, 2001, the Seventh Circuit upheld a Chicago ordinance regulating the issuance of parade permits. The ordinance was challenged by Robert MacDonald, a vocal advocate for the legalization of marijuana. In order to spread his message, MacDonald organized marches and political rallies. He requested a permit to hold a march in downtown Chicago. The commissioner of the Chicago Department of Transportation denied MacDonald's application for a parade permit, concluding that the parade would substantially and unnecessarily interfere with traffic, require more police officers than the City could make available, and jeopardize proper fire and police protection and ambulance service along the route.

MacDonald sued, claiming that portions of the City's parade permitting ordinance violated the First Amendment. His constitutional challenge proceeded on three fronts. First, he argued that the ordinance unconstitutionally vested the commissioner with unfettered discretion to grant or deny a parade permit. Second, he asserted that the ordinance constituted a prior restraint on speech and was unconstitutional because it did not guarantee prompt judicial review. Third, MacDonald argued that, because the ordinance constituted a prior restraint on speech, the ordinance had to place the burden of seeking judicial review of any permit denial on the City, something the ordinance did not do.

The court rejected each of MacDonald's arguments and upheld Chicago's parade permitting ordinance. The court noted that Chicago's ordinance provided some

Municipal Residency Requirements May Be Prohibited

On Wednesday, April 11, the Assembly Urban and Local Affairs Committee, by a 3-2 vote, recommended passage of Assembly Bill 113 ("AB 113"), prohibiting municipalities from imposing residency requirements on municipal employees.

AB 113, with some exceptions, would prohibit cities, villages, towns, counties, and school districts from requiring, as a condition of employment, that any nonelective employee or prospective employee reside within any jurisdictional limits. Exceptions would be made for certain public officials appointed by the mayor of Milwaukee as well as certain school board officials.

The prohibition would also not apply to any other state law requiring residency for a municipal position or to any state or municipal requirement for state residency. AB 113 would allow a local governmental unit to impose a residency requirement on police officers or firefighters, provided that such personnel are not required to live closer than fifteen miles outside of the boundary of the local governmental unit. The League of Wisconsin Municipalities opposes the proposal.

— Anita T. Gallucci

flexibility to the commissioner, but nonetheless limited his discretion by requiring that a parade permit be granted unless specifically articulated public-safety concerns exist. Next, the court found that the ordinance was not a prior restraint of speech, but was instead a legitimate governmental effort to regulate the time, place and manner of speech. Finally, the court concluded that Chicago's parade-permit ordinance did not need to incorporate the procedural safeguard of requiring the City to go to court to justify a decision to deny a permit. As the court noted, the practical reality was that such a requirement would be completely unworkable in the context of a parade-permit process.

Taken together, these three recent decisions demonstrate the continuing tension between governmental efforts to regulate conduct perceived to be harmful and the constitutional promise of largely unfettered free speech and expression.

— Catherine M. Rottier

State Supreme Court Reverses Decision on Procedural Maneuver to Rescue Rezoning Stalled in Committee

In a divided opinion, the Wisconsin Supreme Court has concluded that the Common Council of Milwaukee did not violate the zoning statutes or due process when it sent a proposed zoning amendment to its designated zoning committee for hearings, which were properly held, but recommendations were never reported back to the Council, and then the Council took up and passed the same amendment by having a separate committee make a recommendation to the Council on an identical, but separate proposal. The second committee did not give the duplicate proposal a full, class 2 noticed hearing.

The question is whether a hearing by committee A and a recommendation by committee B add up to the required procedure. Based largely on a view that cities should be in control of their legislative procedures, the Supreme Court says yes.

A dissent by Justice Prosser finds the procedure too tricky. He calls it "legislative gamesmanship." The public is accustomed to watching zoning proceedings before the plan commission or some equivalent standing committee that always does zoning hearings. If a proposal dies there, concerned citizens think the controversy is over. They shouldn't have to watch other committees that are not usually in the zoning loop looking for a back door way of reviving the proposal, especially when that maneuver does not provide normal hearing notices.

Justice Prosser, a former speaker of the State Assembly, says the proper procedure would have been for the Common Council to pull the "hostage file" out of the first committee. Agenda-watchers would have spotted the move and been able to protest. The dissent appears to be grounded in statutory, not constitutional principles.

Oliviera v. City of Milwaukee, 233 Wis. 2d 532, 608 N.W. 2d 419, 2000 WIS App 49, April 3, 2001.

— Richard A. Lehmann

Court of Appeals Clarifies Municipal Zoning Authority Over Windmills

Wind energy systems are controversial land use issues in several parts of Wisconsin. A March 7, 2001, decision of the Wisconsin Court of Appeals arising in Mequon, a decision that likely will be published and have precedent value, deals with two adjacent one-acre residential lots on which the owners sought to erect eighty-foot tall towers topped by wind energy generators with fifteen-foot blades.

The municipal zoning required a conditional use. The plan commission denied. The board of appeals upheld the denial, based on noise, possibility of collapse, property values, quality of life and disharmony with residential character of the neighborhood.

The denial was appealed to the circuit court, which upheld the denial even after taking the narrow view of allowable municipal inquiry, as discussed below.

The case then came to the court of appeals. The primary issue at the appeals court was whether one of two statutes on local zoning in relation to wind energy systems controlled. That statute, sec. 66.031 at the time the case began but now renumbered to s. 66.0401(1), says that no local government can restrict a solar or wind energy system unless the restriction serves to protect public health or safety or does not increase the cost of the system or decrease its efficiency significantly or allows for an alternative system of comparable cost and efficiency.

There is a companion statute, old s. 66.032, now s. 66.0403, that allows an owner of a wind system to ask for a permit from the local government that will control tree plantings or development of neighboring properties that would block the wind. That statute uses traditional public welfare language. No such permits were requested by the Mequon lot owners.

The legal question in the case was whether the second statute's broader public welfare language can be used to interpret the narrower public health and safety language of the first statute.

The court of appeals answered that question forcefully:

The first statute described in this article "represents a legislative restriction on the ability of local governments to regulate solar and wind energy systems. Local restrictions are permitted only if they serve the public

Two States Dump Electric Deregulation Proposals

Two more states, staring at the disaster in California, have dumped proposals to deregulate their electric utilities.

In Nevada, the legislature approved, and the governor has signed, a law that delays any move toward electric deregulation. The law also prohibits the spin-off of utility assets, and places a temporary freeze on consumer rates.

A proposal before the Minnesota legislature to allow limited retail wheeling was removed from proposed reliability legislation in committee.

Several bills designed to improve reliability in the Minnesota electric utility industry are pending in the legislature. The proposals include a streamlined permitting process and conservation and renewable requirements. At the urging of the Chamber of Commerce, one bill initially included a provision that large customers (over 5 MW) would be given retail choice. However, the House Environmental Policy Committee of the Minnesota legislature deleted the deregulation provision.

Municipal utilities in Minnesota lobbied strongly against the retail competition option, according to Jack Kegel of the Minnesota Municipal Utilities Association.

In Oklahoma, a state that has a 2002 deadline for commencing deregulation, legislation delaying any deregulation plan until at least 2005 has been introduced and is expected to be approved.

— Michael P. May

Court of Appeals Clarifies Municipal Zoning . . .

(Continued from page 4)

health or safety, do not significantly increase the cost or decrease the efficiency of the system, or allow for an alternative system of comparable cost and efficiency. Beyond those, no other restrictions are allowed. The statute is not trumped, qualified or limited by (the second, "permit" statute) or by a municipality's zoning and conditional use powers."

Thus, the court says that sec. 66.0403 means what it says, with no "wiggle room."

The appeals court then sent the case back to the board of appeals to have the narrow terms of the only applicable statute applied to the record.

State ex rel. Numrich v. City of Mequon Board of Appeals, decided by the Wisconsin Court of Appeals March 7, 2001, case number 00-1643.

— Richard A. Lehmann

Under What Circumstances Can Administrative Searches Be Made of Private Properties Without Search Warrants?

The Wisconsin Court of Appeals has held that the portions of a campground and innertube rental business that are open to the public can be entered by municipal officials for public health, safety and welfare purposes during hours and under conditions that the same areas are open to the public, albeit for a fee. An exception would be inside a tent used for camping (but not the whole campground) or the business office of the establishment.

The business held a city license and the licensing ordinance said that the holder of such a license "shall be deemed to have consented to entry...(by municipal agencies such as police, firefighters and ems squads.)" The court deliberately did not rely on that language "because a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, or, as in this case, an innertube rental business license, on an agreement to refrain from exercising one's constitutional rights."

Float-Rite Park, Inc. v. Village of Somerset, 2001 wl 315646 (Wis.App.) (April 3, 2001).

— Richard A. Lehmann

SPEAKERS FORUM

May 2-3, 2001

Whose Groundwater Is It and What Can You Do With It?

Regulatory Affairs Seminar on Safe Drinking Water
Oshkosh & Madison, WI
Lawrie J. Kobza

May 4, 2001

Land Use Law Update

State Association of County Corporate Counsel
Lake Delton, WI
Richard A. Lehmann

May 7, 2001

Zoning Enforcement

Univ Extension
Madison, WI
Richard A. Lehmann

May 8-11, 2001

401(k) Plans Employee Benefits

Institute of America
Minneapolis, MN
Cynthia A. VanBogaert

May 16, 2001

The Conceptual and Legal Issues Associated With Shaping a System of Stormwater Sewer Services Charges Water Law and Policy Conference

Stevens Point, WI
Richard A. Lehmann and Lawrie J. Kobza

June 15, 2001

Religious Land Use and Institutionalized Persons Act: What Does it Mean for Your Municipality? 2001 Municipal Attorney Institute

Delavan, WI
Richard A. Lehmann

June 15, 2001

Municipal Concerns Relating to Regulation of Railroads and Railroad Property

2001 Municipal Attorney Institute
Delavan, WI
Mark J. Steichen

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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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