

IN THIS ISSUE

- *School District Required to Release Porn CD*
- *Affordable Housing Coop Denied Property Tax Exemption*
- *City of Manitowoc Challenges Wisconsin Public Service Corporation's Policy Regarding Utility Facility Relocation Costs*
- *Proposed Constitutional Amendment Would Allow Dual Property Tax Rates for Municipal Consolidations*
- *Speakers Forum*

School District Required to Release Porn CD

The Wisconsin Supreme recently issued another decision interpreting and applying the Open Records Law. *Zellner v. Cedarburg School District and Milwaukee Journal Sentinel*, 2006 AP 1143 (May 2007). The issue involved an open records request filed by the Milwaukee Journal Sentinel for an internal memo issued by and a CD created by the Cedarburg School District related to its contention that Zellner, a teacher in the District, viewed pornographic web sites on his school computer.

Zellner was a science teacher in the Cedarburg Schools. The school district fired Zellner after a public hearing on the basis that Zellner viewed pornographic pictures on his school computer. Zellner's union filed a grievance regarding the dismissal. The district and Zellner met in closed session a month after his termination to discuss settlement of the grievance. At that meeting, the district presented Zellner with a memo which contained a forensic analysis of Zellner's computer completed after Zellner was terminated. The district also presented Zellner with a CD which contained pornographic images which the district contends Zellner viewed on his school computer.

The issue involved an open records request filed by the Milwaukee Journal Sentinel for an internal memo and a CD created by the school district relating to its contention that Zellner, a teacher in the district, viewed pornographic web sites on his school computer.

The Milwaukee Journal Sentinel filed an open records request seeking a copy of the memo and the CD. The district decided to release that information, however, Zellner filed an action in circuit court seeking to bar the release of the material. The circuit court agreed with the district's decision and ordered the release of the memo and CD. The case was appealed and certified directly to the Wisconsin Supreme Court.

Three issues were raised on appeal. The first is whether the compact disk constitutes a "record" under the Wisconsin Open Records Law since it contains copyrighted

School District Required to Release Porn CD

Continued from front page

images. The second issue is whether disclosure is exempted under the “investigation” exception to disclosure. The third issue is whether the harm to Zellner’s personal reputation outweighed the public’s interest in the release of the memo and the CD.

The Wisconsin Open Records law requires the disclosure of “any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” However, a record subject to disclosure does not include any materials “to which access is limited by copyright.” The pornographic sites Zellner visited contained copyrighted information. Zellner argued, therefore, that the district was prohibited by federal copyright law from disseminating the CD to the public since it contained images from copyrighted sights. The Supreme Court quickly dispensed with this argument. The Supreme Court held that the information on the disk fell within the copyright law’s “fair use” exception because the disk was not commercial in nature since the images could be viewed free on the internet and because the district would not profit by dissemination of those images.

Zellner further argued that release of the memo and CD fell within an exemption to disclosure which prohibits the disclosure of records which are related “to the current investigation of ... possible misconduct connected with employment by an employee *prior to the disposition of the investigation.*” Zellner contended that the memo and the disk were records which pertained to an investigation of his alleged misconduct presented to him during the course of discussions about his employment status, particularly given the fact that there was an on-going grievance. In fact, the sequence of events was as follows: the district performed its investigation; held a public hearing; terminated Zellner; and collected more information which was summarized in the memo and on the disk.

In *AFSMCE v. Rock County*, 2004 WI App 21, the court of appeals held that “investigation” as used in the exemption to the open records law meant only those records collected by an employer *prior to* possible employee disciplinary action. However, *Rock County* contained language which suggested that the exemption might apply if the employer collected additional

information in preparation for the defense of a disciplinary action. The Supreme Court declined to follow this lead, holding that any records created after the initial investigation and employment decision did not fall within the scope of the exemption from disclosure. In particular, the Supreme Court held that the memo and the disk were not records which were “connected with employment by an employee prior to disposition of the investigation” regardless of the fact that there was an on-going disciplinary action in which the material would be relevant evidence.

...the Zellner case continues the trend in appellate court cases setting forth a strong public policy favoring the disclosure of municipal records and narrowly construing the statutory exceptions to disclosure contained in the Wisconsin Open Records Law.

Finally, Zellner argued that under the balancing test used by authorities in determining whether to release records subject of an open records request, release of the memo and disk would harm his reputation given the nature of the material contained in the memos and on the disk. The Supreme Court rejected this argument noting that while proper balancing requires an analysis of the public interest in the protection of the reputation and privacy of citizens, that is not the equivalent to an “individual’s personal interest in protecting his or her own character and reputation.” While release of the memo and disk would be embarrassing to Zellner, their release did not impact the public interest in the protection of the privacy and reputation of citizens generally. Therefore, the Supreme Court ordered release of the memo and the disk to the Journal Sentinel.

In addition to the precise issues addressed by the Supreme Court, the *Zellner* case continues the trend in appellate court cases setting forth a strong public policy favoring the disclosure of municipal records and narrowly construing the statutory exceptions to disclosure contained in the Wisconsin Open Records Law.

— Steve Zach

Affordable Housing Coop Denied Property Tax Exemption

The Wisconsin court of appeals ruled that a 9-unit residential facility (“Housing Facility”) owned by Ridge Side Co-Operative (“Ridge Side”) was not exempt from property taxes under Wis. Stat. § 70.11(4). *Ridge Side Cooperative v. City of Madison*, Appeal No. 2006AP1100 (March 1, 2007). The decision affirmed a decision by the Dane County circuit court, which ruled that Ridge Side was not a “benevolent association” within the meaning of Section 70.11(4).

Ridge Side is a Wisconsin cooperative which provided housing to low- and moderate-income households. Its members were the residents of the Housing Facility. The members did not own the housing units but purchased occupancy rights by paying a \$3,200 transfer fee pursuant to an occupancy and membership contract that entitled them to reside in a unit. A departing member could sell his or her occupancy rights back to Ridge Side, subject to approval by the board of directors, for an amount not greater than the transfer fee plus a 5% annual increase (*i.e.*, approximately \$150 per year over the transfer fee).

Section 70.11(4) exempts property owned and used by a variety of organizations, including religious, educational and benevolent associations. This case focused on the exemption for benevolent associations. To qualify for the benevolent association exemption, an organization must establish: “(1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.” *Deutsches Land, Inc. v. City of Glendale*, 225 Wis.2d 70 (1999); *University of Wisconsin Medical Foundation, Inc. v. City of Madison*, 267 Wis.2d 504 (Ct. App. 2003). The court of appeals in this case based its denial of exemption on the first factor, finding that Ridge Side did not qualify as a benevolent organization.

There is no clear-cut test or definition of a benevolent association for purposes of the exemption, and the applicability of the exemption depends upon the facts and circumstances. In prior cases, the benevolent association exemption has been limited to organizations which are free from the possibility of profits accruing to founders, officers, directors or members. *St. John’s Lutheran Church v. City of*

There is no clear-cut test or definition of a benevolent association for purposes of the exemption, and the applicability of the exemption depends upon the facts and circumstances.

Bloomer, 118 Wis. 2d 398 (Ct. App. 1984); *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis.2d 284 (1969). This interpretation is consistent with the section 501(c)(3) rule prohibiting inurement of net earnings for the benefit of a tax-exempt organization’s insiders.

The court of appeals held that Ridge Side was not a benevolent association because it viewed the 5% annual return to be equivalent to a distribution of Ridge Side’s profits which violated the prohibition against accrual of profits to members under the Wisconsin case law test for benevolent associations. The court’s interpretation of the 5% return on a member’s ownership rights as equivalent to a distribution of profits is questionable in the absence of evidence that the repurchase price exceeded the fair market value of the ownership rights. For purposes of the section 501(c)(3) private inurement rule, the courts have interpreted the term “net earnings” as applying to more than the excess of an organization’s gross income over its expenses, including payment of excessive compensation to insiders for goods or services. Under this approach, if Ridge Side paid more than fair market value for the repurchase of a member’s ownership rights, such excess value might be viewed as violating the prohibition against accrual of profits under the benevolent association test. However, the decision in the Ridge Side case does not discuss the fair market value of the repurchased ownership rights and it merely states that Ridge Side did not assert that the 5% annual return was not a “profit” for the members.

Continued on page 5

City of Manitowoc Challenges Wisconsin Public Service Corporation's Policy Regarding Utility Facility Relocation Costs

At a hearing before the Public Service Commission, the City of Manitowoc challenged Wisconsin Public Service Corporation's ("WPSC") "cost recovery policy" concerning utility facility relocation costs in a case currently pending at the Public Service Commission of

...this case is the first to test the Commission's Chapter 130 rules regarding municipal authority over public utility facilities in local rights-of-way.

Wisconsin (*WPSC v. City of Manitowoc*, PSC Docket No. 9300-GI-102). WPSC is an electric and gas utility headquartered in Green Bay.

This case began with a complaint filed by WPSC against the City of Manitowoc pursuant to Wis. Stat. §196.58(4) and PSC Chapter 130. WPSC alleged in the complaint that the City unlawfully required WPSC to permanently relocate gas facilities at WPSC's expense to accommodate two City roadway reconstruction projects. WPSC claimed that the relocation costs should be borne by City residents, rather than WPSC ratepayers and shareholders.

This case is important in two respects. First, this case is the first to test the Commission's Chapter 130 rules regarding municipal authority over public utility facilities in local rights-of-way.

Second, this case may test the legitimacy of WPSC's "cost recovery policy" concerning utility facility relocations. WPSC has distributed to many municipalities a chart that explains its "cost recovery policy." Under WPSC's "policy," a municipality must pay the cost to relocate WPSC's facilities in the street right-of-way caused by a road reconstruction project unless the

municipality can prove to WPSC's satisfaction that the project was for a public purpose. According to WPSC's testimony in this case, more than fifty municipalities have accepted WPSC's cost recovery policy. For projects that began in 2006, municipalities have agreed to reimburse WPSC for approximately \$707,050 for utility facility relocations.

Manitowoc has argued that this case belongs in circuit court, not at the Commission, because the legal authorities under which WPSC brought this case (Wis. Stat. §196.58(4) and PSC Chapter 130) do not allow the Commission to award the monetary relief WPSC seeks. If, however, the Commission decides it has authority to decide this case, it is the City's position that WPSC's cost recovery policy is wrong. Under the common law, the rule is that if the purpose of a municipality's road improvement is to serve the public, then the utility pays for the facilities relocation. Moreover, when a municipality has determined that an improvement serves the public welfare, the utility must comply unless the utility can prove in court that the municipality's determination was arbitrary and unreasonable.

On April 24th, the Commission's Administrative Law Judge ("ALJ") held a hearing at which both the City and WPSC presented testimony. The parties will next be submitting briefs on the issues. The Wisconsin Utilities Association, Dairyland Power Cooperative, the Wisconsin State Telecommunications Association and the League of Wisconsin Municipalities all received authority to file non-party briefs in the matter. Briefing is expected to be completed by July, 2007.

Now that road construction season is here, and given that WPSC and other public utilities are actively pursuing "cost recovery policies" concerning relocation costs, it is important for municipalities to carefully review any demand to pay for utility facility relocation costs. Keep in mind that, under the common law, it is the utility not the municipality that must pay for the cost of relocating utility facilities to accommodate a road improvement project.

— Anita T. Gallucci & Mark A. Neuser

Affordable Housing Coop...

Continued from page 3

Since the court denied the exemption under the first factor of the 3-part test for benevolent associations, the decision did not address the other factors in the test, including the “exclusive use” requirement. Ridge Side used the Housing Facility to furnish housing to both low- and moderate-income households. The IRS has ruled that furnishing housing to low-income households qualifies as a charitable purposes for section 501(c)(3) purposes, but that furnishing housing to moderate-income households generally does not. Rev. Rul. 70-585, 1970-2 C.B. 115. Under IRS safe-harbor guidelines for section 501(c)(3) low-income housing projects, up to 25% of the housing units of a project may be provided at market rates to individuals who have incomes in excess of low-income limit, provided that at least 75% of the units are occupied by low-income residents and other requirements are met. Rev. Proc. 96-32, 1996-1, C.B. 717. The Ridge Side decision does not indicate the percentage of units furnished to low-income households compared to moderate-income households, or whether the housing furnished to moderate-income households was at fair market value. Although the IRS guidelines for section 501(c)(3) charitable low-income housing are not directly applicable for purposes of the benevolent association property tax exemption, it is possible that Ridge Side may not have satisfied the exclusive use requirement unless only a couple of the units were furnished at fair market rates to moderate-income households.

— *William R. Peck*

SPEAKERS FORUM

June 13, 2007

State Video Franchise Legislative Update

MEUW Municipal Telecom Seminar

Appleton, WI

Anita T. Gallucci

June 20, 2007

Cable Update and Utility Relocation Fees and PSC 130

League of Wisconsin Municipalities Municipal Attorneys Institute

Green Lake, WI

Anita T. Gallucci

August 1, 2007

Legal Implications During Emergency Operations

WWA & the Wisconsin Section of Central States Water Environment Association's 2007 Management Seminar

Richfield, WI

Jennifer S. Mirus

August 1, 2007

Wisconsin Bidding Law

WWA & the Wisconsin Section of Central States Water

Environment Association's 2007 Management Seminar
Richfield, WI

Lawrie J. Kobza

Proposed Constitutional Amendment Would Allow Dual Property Tax Rates for Municipal Consolidations

Assembly Joint Resolution 39 (AJR 39), introduced by Representative Newcomer (R-Delafield), would amend the uniformity clause in the Wisconsin Constitution to allow for dual property tax rates in the event of municipal consolidations and boundary changes under cooperative agreements. Under the Constitution's uniformity clause, all property owners in municipalities or other taxing districts must be taxed at the same rate, subject to certain exceptions allowed by the Constitution. According to Rep. Newcomer, this provision discourages municipal consolidations because when communities with different tax rates merge, residents in a municipality with a lower tax rate almost always pay more in property taxes.

AJR 39 would permit the governing body of a city, village, town, or county to set different property tax levy rates on parts of cities, villages, towns, and counties, added to the cities, villages, towns or counties by consolidations and boundary changes under cooperative agreements. The different tax rates would be allowed to exist for not more than 12 years, and the rates for each part of the city, village, town or county must be uniform. Rep. Newcomer contends this change would promote consolidation and could lead to less government and lower taxes by eliminating duplication of services.

This is the first consideration for AJR 39. The proposed amendment would have to be approved by lawmakers in two consecutive legislative sessions and by voters in a statewide referendum before it could become effective.

— *Lawrie J. Kobza*

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
Christopher J. Dodge	283-1777	cdodge@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
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.



© Copyright 2007, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED



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