

# MUNICIPAL LAW NEWSLETTER

**BOARDMAN**<sup>LLP</sup>  
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## Governor Signs Great Lakes Compact

Wisconsin officially approved the Great Lakes Compact on May 27, 2008 when the Governor signed Special Session Senate Bill 1 in Milwaukee and Green Bay. Lawmakers overwhelmingly approved the Compact, passing it out of the Senate with a 32-1 vote, and out of the Assembly 96-1.

Wisconsin joins Minnesota, Illinois, New York, and Indiana in completing their legislative approval. Legislation is moving forward in Ohio, Pennsylvania and Michigan. In order for the Compact to become effective, each of the eight Great Lakes states must ratify the Compact and Congress must give its consent.

While the bill approved by Wisconsin ratifies the Compact and establishes how the Compact will be implemented once it is approved by Congress, it also goes beyond what the Compact requires because it will require water withdrawals in the Great Lakes basin to meet Compact-like requirements regardless of whether the Compact is ever approved by Congress. The bill requires water withdrawal permits for most withdrawals of surface water or groundwater from the Great Lakes basin, and it places limitations on transfers of water outside the Great Lakes basin.

The bill contains two provisions that apply statewide. The bill requires

the DNR, in consultation with the PSC and the Department of Commerce, to develop water conservation goals. The goals must include a voluntary statewide program, and mandatory and voluntary conservation and efficiency measures for the basin.

The bill also establishes a new requirement for water supply 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. In some cases, 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. This requirement is intended to be similar to that required for sewer service area planning. The DNR is to establish and administer this water supply planning process for public water supply systems.

Boardman Attorney Lawrie Kobza, who serves as legal counsel and lobbyist for the Municipal Environmental Group - Water Division, represented the interests of municipal water utilities in the development of this historic legislation.

— Lawrie J. Kobza

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## PSC Decision Rejects Utility Position on Utility Relocation Costs

The Public Service Commission of Wisconsin (the “Commission”) recently issued its decision dismissing a complaint filed by Wisconsin Public Service Corporation (“WPSC”), a large gas and electric utility, against the City of Manitowoc (the “City”) challenging the City’s refusal to reimburse the utility for costs the company incurred to relocate certain gas mains to accommodate two city road reconstruction projects. (*WPSC v. City of Manitowoc*,

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***Under the statute, the Commission has authority to review municipal regulations . . . that determine the terms and conditions under which a public utility may use local rights-of-way.***

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PSC Docket No. 9300-GI-102, April 18, 2008). WPSC filed its complaint pursuant to Wis. Stat. § 196.58(4). Under the statute, the Commission has authority to review municipal regulations (specifically, resolutions, ordinances or contracts) that determine the terms and conditions under which a public utility may use local

rights-of-way. After noting that WPSC had dropped its claim for money damages and that the reconstruction projects requiring the relocation had been completed, the Commission concluded that “the Complaint should be dismissed as [WPSC] did not state any basis upon which a remedy could be granted.”

The Commission’s jurisdiction was a contested issue in the case. The City argued that the Commission lacked jurisdiction because WPSC’s Complaint did not challenge any resolution, ordinance, or contract within the meaning of Wis. Stat. § 196.58. In fact, WPSC argued that the City could not require WPSC to relocate its facilities without adopting a resolution or ordinance mandating such relocation and suggested that the City’s failure to do so was an unlawful attempt to avoid Commission jurisdiction. The Commission, however, ignored the fact that the Complaint did not challenge any municipal regulation adopted by the City and determined that it had jurisdiction based on a resolution the City had adopted that approved all the road and sewer work to be done in the City for 2006 and the Bid Award, awarding the construction work to the contractor who worked on the two 2006 reconstruction projects affecting WPSC’s facilities. According to the Commission, the resolution and Bid Award were sufficient to confer jurisdiction on the Commission because they had “the effect of requiring [WPSC] to relocate.”

The Commission then went on to address certain issues it believed would give guidance to utilities and municipalities that might be involved in future such disputes. In that regard, the Commission rejected WPSC’s position that the municipality has the burden to prove that its requirement that the utility relocate its facilities at the utility’s expense was a reasonable exercise of the municipality’s police power authority. According to the Commission, WPSC’s position was contrary to the “governing statute, Wis. Stat. § 196.58(1)(a),” which provides that “the municipality’s regulation is presumptively reasonable.”

That Commission’s ruling on the burden of proof clearly undermines the legitimacy of WPSC’s so-called “cost recovery policy” concerning utility facility relocations. Under WPSC’s “policy,” a municipality must pay the cost to relocate WPSC’s facilities in the road 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 erroneous cost recovery policy. For projects that began in 2006, municipalities have agreed to reimburse WPSC for approximately \$707,050 for utility facility relocations.

Finally, the Commission urged both municipalities and utilities to work together to avoid future disputes. Specifically, the Commission advised that municipalities should not be “indifferent to [a] utility’s needs and reasonable requests.” Likewise, the Commission exhorted utilities facing a relocation request to “seek to first work with the municipality to obtain reasonable relief before presenting a complaint to this Commission.”

With the deadline for filing an appeal of the Commission’s decision soon to expire, WPSC has not as of this writing submitted a petition for circuit court review. Boardman Law Firm represented the City in the complaint proceeding for the Commission.

— Anita T. Gallucci

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# HIPAA Privacy Compliance

## Tips for Municipal Employer Benefit Plans

HIPAA privacy does not just apply to hospitals, doctors, or other health care providers. In particular, municipal employers that sponsor health benefit plans for their employees should be aware of HIPAA privacy compliance requirements that apply to their benefit plans. Municipal employers should keep HIPAA privacy on their list of items for regular, ongoing compliance review.

HIPAA stands for the Health Insurance Portability and Accountability Act of 1996. Municipal employers, like other employers, have had to deal with the flurry of implementation requirements for the medical, dental, vision, health flexible spending account, and other health-related benefit plans offered to their employees. HIPAA rules relating to handling health information have been rolling in with different effective dates over the last several years. For example, May 23, 2008 is the deadline for compliance with the HIPAA NPI (National Provider Identifier) for small plans. However, HIPAA requires ongoing attention from employers. As a reminder, the compliance “opt-out” that applies to HIPAA portability provisions for some governmental plans does not apply for HIPAA privacy purposes. (This article does not address HIPAA privacy issues for other departments of a municipality that may handle protected health information. This article also does not address state law privacy restrictions.)

Here are some compliance tips to help municipal employers keep on top of HIPAA:

1. Conduct an annual HIPAA self-audit. Establish a date (at least annually) to review and evaluate whether your HIPAA compliance program is complete and accurate.

The extent of compliance will vary depending on your plans and situation, but a partial list of questions might include:

- Are you referring back to your HIPAA documentation in ongoing plan administration?
- Do you have a list of employees with access to protected health information? Is it complete?
- Do you have procedures for routine and recurring uses and disclosures of protected health information?
- Are you in compliance with the EDI (Electronic Data Interchange) requirements?

- Are HIPAA security protections in place to handle electronic information? Is there a procedure for regular monitoring and reporting of information system activity?
2. On an ongoing basis, make adjustments to deal with changes in the law, your benefit plans, your business, your workforce, your outside vendors, and anything that may affect your plan’s health care information.

A partial list of questions might include:

- Has your Privacy Official, Security Official, or Contact Official changed?
- Have your benefit plans or service providers changed?
- Have you had any changes in your employees who work on employee benefit matters?
- Have you trained new employees (and temporary employees) working with benefit plans about HIPAA privacy?
- Have your HIPAA policies and procedures been reviewed for changes and evolution in this new law?
- Has your location or business changed?
- Does your record retention (including that of your service providers and storage facilities or personnel) meet any applicable HIPAA requirements?

This is not a complete list of questions, but it should give you an idea of what issues will be included in a HIPAA self-audit. You can contact Cindy Van Bogaert, Partner and Chair of the Employee Benefits Practice Group at Boardman Law Firm LLP at (608) 283-7543, if you have questions or need assistance, such as help in training employees, preparing documentation, or conducting a HIPAA privacy review of your plans.

*Nothing in this article is intended to be used, and no information can be used, for the purpose of avoiding penalties under the Internal Revenue Code, or promoting, marketing, or recommending to another party any transaction or matter addressed in this article.*

— Cynthia A. Van Bogaert

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## Campus Bars Not Liable For Antitrust Violation In Implementing Drink Special Ban at the Behest of City Regulators

*Beginning in 1999, the City of Madison began to address issues of high risk drinking in areas around the University of Wisconsin campus. The City was concerned because over-consumption of alcohol by UW students was leading to more frequent conveyances of students and others to detox facilities in life threatening circumstances. The City had also noted an alarming increase in the need for expensive police response services in the campus area.*

In an attempt to deal with these problems, the City began imposing restrictions on new campus bars as a condition of granting them an alcohol license. These restrictions included a ban on drink specials, such as offers of two drinks for the price of one or a set price for an unlimited amount of alcoholic drinks on a given night. In addition, the City's Alcohol License Review Committee (ALRC) applied pressure on campus bar owners to deal with problems of student over-consumption.

Among other things, the ALRC discussed an ordinance banning all drink specials at all bars citywide, something the bar owners opposed. No such ordinance was ever enacted, but campus bar owners felt pressure to institute limitations on drink specials themselves in order to forestall an ordinance they thought would be much more onerous. Accordingly, in September 2002, a number of campus bars announced at a press conference that they were voluntarily agreeing to eliminate drink specials at their establishments after 8:00 p.m. on Friday and Saturday nights.

In late March 2004, three current or former UW students filed an antitrust class action lawsuit against 24 campus bars that allegedly participated in the "voluntary" drink special ban. The plaintiffs described the drink special ban as a price fixing conspiracy for which they sought to recover damages "anticipated to be in the tens of millions of dollars."

In December 2004, the defendant bars moved for summary judgment, arguing that their actions in implementing the drink special ban were immune from Wisconsin antitrust law. The Circuit Court agreed and dismissed the lawsuit in April 2005. Plaintiffs appealed, but they lost again when the Court of Appeals affirmed the lower court decision. In 2006, plaintiffs petitioned for review by the Wisconsin Supreme Court and that petition was granted. After more briefing and oral argument, the Court issued its decision on May 6, 2008, affirming the dismissal of the case. The case is called *Eichenseer v. Madison-Dane County Tavern League*, 2008 WI 38, *aff'g*, 2006 WI App. 226, 297 Wis. 2d 495.

In *Eichenseer*, the Supreme Court did not address whether an antitrust violation had actually occurred. Instead, the Court considered whether the bar owners would be immune from liability even if the drink special ban constituted an antitrust violation. The Court

concluded that the bars were entitled to immunity given the specific factual context of their actions.

Most of the *Eichenseer* decision is spent detailing the City of Madison's formal and informal efforts to address the problems of alcohol over-consumption in the campus area, efforts that included imposing license restrictions on new campus bars and pressuring both new and existing license holders to restrict or eliminate drink specials. Although the City was not a defendant in the lawsuit, the Court went out of its way to establish the wide scope of authority the City enjoyed under Chapter 125 of the Wisconsin Statutes to impose anticompetitive restrictions on the sale of alcohol within its borders. The Court specifically held that the City's action in imposing license restrictions, including a prohibition of drink specials, on at least eight campus taverns was immune from antitrust liability under the implied repeal doctrine. This doctrine addresses situations in which there is no explicit statutory exception to antitrust law, but it is nonetheless reasonably clear that the Wisconsin Legislature intended to allow municipalities to undertake anticompetitive actions. Such, the Court found, was the case with municipal regulation of alcohol consumption at bars and taverns.

Though the City was not a defendant, its regulatory power over alcohol licensees formed the reason for the Court's ultimate conclusion that the bar owners' actions in implementing a limited drink special was immune from antitrust liability. The Court phrased the question before it this way:

In reality, we must determine whether private parties are eligible for antitrust immunity when they act in concert, in an anticompetitive manner, in direct response to pressure bordering on compulsion from a municipality with the power to condition or non-renew their licenses.

*Id.* at ¶71. The Court answered that question in favor of immunity for the bar owners.

Three justices recused themselves from the case, so *Eichenseer* was decided by a four-person court that split three to one in favor of upholding dismissal of plaintiffs' complaint. Justice Butler wrote a long dissent, essentially accusing the majority of misusing precedent to achieve a favored result.

— Catherine M. Rottier

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# Zoning of Highway Signs Not Entirely Preempted By State Law

The Town of Spring Valley in Iowa County banned “directional” highway signs in areas zoned other than industrial or business. *Donaldson v. Town of Spring Valley*, 2007AP 1418 (Mar. 20, 2008)(recommended for publication). Directional signs include signs marking historical and scenic attractions. A landowner wanted to erect a sign directing motorists to an attraction on his land agricultural-zoned and challenged the zoning ordinance. The sign would be visible from a state highway. The landowner asserted that the ordinance was preempted by state law.

Through financial incentives, federal law encourages states to enact laws limiting the lighting, number, size, and spacing of signs visible to interstate or federal-aid highways. In response, the legislature enacted section 84.30, Stats., Subsection (3)(a) prohibits signs other than those “which are required or authorized by law” and allows the Wisconsin Department of Transportation (“DOT”) to adopt regulations that are not inconsistent with nor more restrictive than standards that may be promulgated by the U.S. DOT.

The landowner submitted that the state and federal law were intended to create a “window” of permissible signs. Since the zoning ordinance was more restrictive than the state regulations, the landowner argued, it was preempted. The court rejected these arguments for several reasons. First, it found no support in the language of the statute for the general intent suggested by the landowner. The landowner had argued that the phrase “required or authorized by law” referred only to other state or federal law that might authorize the placement of signs, but he offered no authority for that position. The court found that there was no reason that why it could not also include law created by local governments.

Second, the court concluded that the town’s ordinance was not inconsistent with or narrower than state regulations, because it dealt with different criteria altogether. The federal and state laws concerned the lighting, number, size, and spacing of signs. The ordinance addressed the zoning districts which were appropriate for signs. Indeed, the court intimated, an ordinance requiring a different size or spacing of signs within a given zoning district might be distinguishable from the ordinance at issue and might be preempted.

Based on the parties’ arguments or silence, the court made several assumptions in reaching its decision. The town’s ordinance applies only to off-premises signs, which refer to attractions not located on the same premises as the sign. This was not an issue in the case, so the court did not address whether the restriction is significant. The court assumed, without deciding, that towns have the authority to regulate signs. The court also noted that the statutory phrase “directional and other official signs” might be read to include only governmental signs, but the parties did not dispute that the statute applied to the landowner’s private sign, apparently based on the wording of related state administrative regulations.

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***Municipal ordinances regulating signage should be directed toward the same criteria as state and federal law: lighting, number, size, and spacing.***

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In summary, it is clear that state law does not completely preclude local governments from regulating the placement of signs visible from federal or federal-aid highways. Ordinances may not set more restrictive conditions than allowed by state or federal law with respect to lighting, number, size, and spacing of such signs. However, ordinances are not considered more restrictive or inconsistent with state law and thereby preempted merely because they have the effect of prohibiting signs that would otherwise be allowed under state or federal law. The preemption question is more narrowly directed at whether the ordinance attempts to regulate the same criteria as state and federal law.

— Mark J. Steichen

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## **SPEAKERS FORUM**

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June 26, 2008  
Protecting Municipal Concerns in the Wake of Wisconsin’s New Cable Franchise Legislation  
League of Wisconsin Municipalities  
Municipal Attorneys Institute  
Sturgeon Bay, WI  
Anita T. Gallucci

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# 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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