

MUNICIPAL LAW NEWSLETTER

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End of Legislative Session Brings New Laws Affecting Municipalities

The final general business floor period of the 2009-2010 legislative session concluded on April 22. All bills not approved by both the Assembly and Senate by April 22 are dead and are no longer available for legislative consideration.

Governor Signs Numerous Municipal Land Use Bills

Several bills limiting or clarifying a municipality's land use authority were recently signed by the Governor.

Extraterritorial Subdivision Approval Limited

Act 399 (AB 260) establishes limits on a municipality's authority to deny approval of a subdivision plat located in the municipality's extraterritorial jurisdiction area.

Currently, a municipality with extraterritorial plat approval jurisdiction may require a subdivision plat within the municipality's extraterritorial area to be in compliance with the municipality's local ordinances, and its comprehensive, master, or development plan. In *Wood v. City of Madison*, 2003 WI 24, 260 Wis. 2d 71, 659 N.W. 2d 31, the Wisconsin Supreme Court determined that this statutory authority allowed a city with extraterritorial plat approval jurisdiction to object to a plat on the basis of the proposed use of land outside the city limits. *Wood* overruled *Boucher Lincoln-Mercury v. Madison Plan Comm.*, 178 Wis. 2d 74, 503 N.W. 2d 265 (Ct. App. 1993),

a case which held that extraterritorial plat approval or denial based on the use of the land in the plat is unilateral land use control (or zoning) and that the statutes require extraterritorial zoning to be a cooperative effort between the city and the town in which the zoning ordinance is in effect. In overruling *Boucher Lincoln-Mercury*, the *Wood* court concluded that the subdivision regulation statute left no doubt that subdivision ordinances may consider the proposed use of land and that, if a policy change is desired, that change must be undertaken by the legislature.

Act 399 represents the legislature's response to the *Wood* decision. Act 399 codifies new language which explicitly prohibits a city or village from denying approval of a plat or certified survey map on the basis of the proposed use of land within the extraterritorial plat approval jurisdiction of the municipality unless the denial is based on a plan or regulations adopted under Wis. Stat. § 62.23 (7a) (c), the extraterritorial planning and zoning section of the city planning statute, which sets out the requirements for the cooperative effort between the municipality and the town for extraterritorial zoning.

Changes to Subdivision Approval Process

Under current law, a county, town, city, or village has the right to approve or object to the plat of a subdivision. Approval of a plat is conditioned,

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End of Legislative Session

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among other things, on the plat's compliance with the local ordinances and comprehensive, master, or development plan of the approving authority or authorities that have the right to approve the plat. Act 376 (SB 626) specifies that the local ordinances with which a plat must comply are those in effect when the preliminary plat is submitted or when the final plat is submitted if a preliminary plat is not.

Current law also allows an approving authority to enact ordinances governing the subdivision of land that are more restrictive than the provisions in the statutes. Act 376 provides that local ordinances may not be more restrictive than the provisions in the statutes with respect to time limits, deadlines, notice requirements, or other provisions that provide protections for subdividers.

If a preliminary plat is submitted, an approving authority may refuse to approve the final plat if it is not submitted within 24 months after the last required approval of the preliminary plat. Act 376 increases the time for submitting the final plat to 36 months after the last required approval of the preliminary plat and provides that any approving authority may extend this time.

If a preliminary plat is submitted and approved, the final plat is entitled to approval if it substantially conforms to the preliminary plat. Act 376 requires a professional engineer, planner, or other person charged with the responsibility to review plats to provide the approving authority with his or her conclusions as to whether the final plat substantially conforms to the preliminary plat and with his or her recommendation on approval of the final plat.

Currently, as a condition of approval, an approving authority may require a subdivider to execute a surety bond or provide other security to ensure that certain improvements will be made. Act 376 provides that any required security for improvements may not be required sooner than is reasonably necessary before the commencement of the installation of the improvements and that, if the project will be constructed in phases, the amount of the security must be limited to the phase of the project that is being constructed.

A subdivider is required to record the final plat in the office of the register of deeds in the county where the subdivision is located. However, the register of deeds may not accept the final plat for recording unless it is offered for recording within six months after the last approval and within 24 months after the first approval. Act 376 extends the times for recording to within 12 months after the last approval and within 36 months after

the first approval.

Act 376 clarifies that a subdivider may elect to construct the project in phases, if the governing body approves. The governing body's approval may not be unreasonably withheld.

Smart Growth Modifications

Under the current "Smart Growth" statute, if a city, village, town, county, or regional planning commission creates a development plan or master plan (comprehensive plan) or amends an existing comprehensive plan, the plan must contain the following required planning elements: housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; land use; and intergovernmental cooperation. Beginning on January 1, 2010, if a local governmental unit undertakes certain actions, those actions must be consistent with that local governmental unit's comprehensive plan.

Act 372 (SB 601) specifies that the actions that must be consistent with the local governmental unit's comprehensive plan are ordinances related to official mapping, local subdivision regulation, and zoning, including zoning of shorelands or wetlands in shorelands. "Consistent with" is defined to mean "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan."

Under Act 372, if a local governmental unit has not adopted a comprehensive plan, it may be exempt from the consistency requirement if either: (a) the local governmental unit has not received a comprehensive planning grant from the Department of Administration (DOA) and the local governmental unit adopts a resolution to adopt a comprehensive plan by January 1, 2012 or (b) the local governmental unit has received a comprehensive planning grant and an extension from DOA.

Act 372 also authorizes a town to adopt a comprehensive plan whether or not it exercises village powers.

Annexed Territory Must Be Contiguous

Under current law, one method under which a city or village may annex territory is if all the electors residing in the territory and all the owners of the real property in the territory file a petition for direct annexation of the territory with the city or village. This method is called direct annexation by unanimous approval. Act 366 (SB 172) clarifies that no territory may be annexed by a city or village under the direct annexation by unanimous approval process unless the territory is contiguous to the annexing city or village.

—Lawrie J. Kobza

Policy Regarding Courthouse Displays Moots Challenge to Nativity Scene

The enactment of a written policy governing displays on a courthouse lawn rendered moot a complaint about an annual nativity scene, according to the United States District Court for the Eastern District of Wisconsin. In *Freedom From Religion Foundation v. Manitowoc County*, the Foundation complained about a nativity scene displayed on the Manitowoc County Courthouse lawn, which the Catholic Women's Club has annually erected during the Christmas season. During the pendency of litigation, however, the County enacted a written policy governing the placement of such displays on the Courthouse grounds. The District Court, by Judge William Griesbach, concluded that the written policy rendered moot the Foundation's complaint.

The policy enacted by Manitowoc County is intended to allow all citizens equal access to the Courthouse grounds. Because citizens will have open access under the new policy, "any nativity scene displayed in the future would be seen not as a government-sponsored message but simply as the message of a citizen group taking advantage of an open forum." This would cure any Establishment Clause violation going forward, according to the Court.

The District Court further concluded that the policy enacted by Manitowoc County passed constitutional muster. The only substantive limitation on displays under the policy is that any display must "be consistent with the intent and decorum of the seat of county government and the appropriate, non-disruptive use of a public facility." The policy further indicates that a permit does not constitute endorsement by the County of any message. The County is further required to enforce the policy in a non-discriminatory manner that does not favor or discourage any religious display.

Apart from the decorum requirement, the Court found that Manitowoc County's new policy involved no discretion as to which displays are judged. The decorum requirement, moreover, could presumably be met by anyone seeking to display something on the Courthouse lawn, according to the Court. As a result, if the Catholic Women's Club nativity scene is displayed in the future, "all that means is that the Club made a timely application and complied with the policy's other requirements. There is not even the specter of government endorsement of the group's religious message."

Judge Griesbach also concluded that Manitowoc County's new policy could not be challenged at this time on grounds that it might be discriminatorily applied. The

Municipalities Authorized to Make Energy and Water Efficiency Loans to Residents and Businesses

Under current law, as created by 2009 Wisconsin Act 11, a political subdivision may make a loan to a resident of the political subdivision for making or installing an energy efficiency improvement or a renewable resource application to the resident's residential property. The political subdivision can collect the loan repayments from the resident as a "special charge" included on the resident's property tax bill.

Act 272 (SB 624) expands a municipality's authority by authorizing the municipality to make energy efficiency loans to include commercial and industrial premises located in the municipality and to make similar loans for water efficiency improvements. All loan repayments may be collected as a special charge, paid in installments, and be included on the loan recipient's property tax bill. If a special charge is not paid within the time specified by the municipality, the special charge is delinquent and becomes a lien on the property against which it is imposed.

Act 272 also authorizes a municipality to enter into a loan repayment agreement with the owner or lessee of premises located in the municipality under which the owner or lessee obtains a loan from a private lender for energy or water efficiency improvements, or a renewable resources application, to the premises. The municipality can then act as a conduit by collecting the loan repayment as a special charge and forwarding the amount collected to the lender.

— Lawrie J. Kobza

Freedom from Religion Foundation argued that the new policy gave County officials unfettered discretion to approve or disapprove displays. Judge Griesbach noted that the policy itself prohibits any discrimination for or against religion. The Judge further refused to speculate that the County might apply the policy in a discriminatory fashion.

The Court's decision in *Freedom From Religion Foundation v. Manitowoc County* highlights the value of having written policies relating to the approval of displays on or around public buildings. Without a written policy, government officials run the risk that they will be accused of favoring or disfavoring particular displays. Written policies, however, must be view-point neutral, both on their face and in practice. In addition, government bodies must carefully evaluate whether particular areas should be opened up as public forums before adopting such a policy.

— Richard L. Bolton

Petitioners May Challenge WPDES Permit's Compliance with Federal Law

Issues Need Not Be Raised First During Public Comment Period

In a recent case, the Court of Appeals for District III held that a challenge to a Wisconsin Pollutant Discharge Elimination System permit need not be first raised during the public comment period and that the Department of Natural Resources has the authority to consider a challenge to the WPDES permit's compliance with federal law. *Anderson v. Department of Natural Resources*, Appeal No. 2008 AP3235, decided April 13, 2010.

The DNR issued a public notice of its intent to reissue a WPDES permit to Fort James Operating Company in Green Bay. The public notice directed interested citizens to submit written comments or request a public hearing on the proposed permit within thirty days. Petitioners submitted written comments objecting to certain provisions in the WPDES permit. The DNR subsequently issued a final decision on the permit, determining that none of the Petitioners' objections merited further action.

Petitioners petitioned the DNR for review pursuant to Wis. Stat. § 283.63(1) and requested a public hearing. Wisconsin Stat. § 283.63 provides individuals aggrieved by a wastewater discharge permit the ability to challenge the permit after its issuance if within sixty days of the DNR's action on the permit, 5 or more persons petition for DNR review of any permit denial, modification, suspension or revocation, [or of] the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit" Upon receipt of a petition, the DNR must schedule a public hearing at which "the petitioner shall present evidence to the department which is in support of the allegation made in the petition. All interested persons ... shall be afforded an opportunity to present facts, views or arguments relevant to the issues raised by the petitioners, and cross-examination shall be allowed."

In its § 283.63(1) petition, Petitioners renewed their earlier objections raised during the public comment period and asserted new objections. The DNR denied the petition with respect to the new objections not previously raised during the public comment period. The DNR also denied the Petitioners a public hearing on a number of their challenges that were based upon

the WPDES permit's alleged failure to comply with federal law. The DNR took the position that it lacked the authority to resolve any challenges based on federal law. Petitioners sought judicial review of the DNR's decision limiting the issues for hearing. The circuit court ruled for the DNR, and the Petitioners appealed.

The Court of Appeals, however, completely rejected the DNR's arguments and reversed the circuit court's decision. The Court held that the DNR and circuit court: (1) incorrectly interpreted Wis. Stat. § 283.63(1) to require that contested issues be raised during the public comment period to preserve them for consideration during later proceedings and (2) improperly concluded the DNR lacks authority to determine whether the permit violates federal law. The Court remanded the case for a contested case hearing on the Petitioners' objections.

On the first issue of whether contested issues must first be raised during the public comment period in order to preserve them for consideration during later proceedings, the Court found that nothing in § 283.63 limited the contested case hearing and that to limit contested case hearings in such a way would be contrary to the legislature's desire to achieve significant public participation in the permit process.

On the second issue of whether the DNR has the authority to determine whether the WPDES permit violates federal law, the court concluded that the DNR possesses the authority to determine whether provisions within a state-issued WPDES permit comply with federal law. Under Wisconsin statutes, all WPDES rules promulgated, and permits issued, must comply with federal law, and the DNR acts within its statutory authority when determining whether they do so. According to the Court, "these statutes require the DNR to assess whether proposed permit provisions violate federal law. A contrary interpretation would allow the DNR to determine whether rules or permit terms comply with federal law at the time of their

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SPEAKERS FORUM

June 28, 2010

HIPAA Privacy: Tougher Rules; Tougher Enforcement

Society for Human Resources Management

San Diego, CA

Cynthia A. Van Bogaert

Medical Marijuana OK?

A recent Wisconsin Court of Appeals decision sheds some light on the legal status of the medical use of marijuana in Wisconsin. In *Grand Chute v. Kettner*, 2009AP2369 (April 20, 2010), Kettner, a Wisconsin resident, was arrested and charged under Grand Chute's ordinances for possession of two grams of marijuana and two pipes containing marijuana residue. He contested the charges in municipal court. At the hearing, Kettner stipulated to his possession of the marijuana and pipes but argued that he was legally entitled to possess the drug under state statutes. He produced a typewritten document purporting to be an authorization signed by a California doctor for medicinal quantities of marijuana. The court received the document as an exhibit and found that it was genuine. Kettner did not argue any separate defense for possessing the pipes, but the appeals court subsequently concluded that, if he prevailed on the drug charge, he would also prevail on the drug paraphernalia charge by extension of the same section. Nevertheless, the municipal court entered a judgment for a municipal forfeiture on both counts on the grounds that Kettner was not a California resident at the time he obtained the prescription.

On appeal, the court addressed Wis. Stat. § 961.41(3g), which criminalizes marijuana possession. The section includes an exception where the person obtains the drug "directly from or pursuant to a valid prescription or order from a practitioner who is acting in the course of his or her professional practice . . ." The trial court had avoided discussion of the statute by applying – albeit erroneously – California law.

The town argued that the exception cannot apply because marijuana is classified as a schedule I drug under state law and that physicians may never prescribe schedule I drugs. The court rejected this argument on three grounds. First, the town did not show that out-of-state physicians could not prescribe schedule I drugs in the states in which they are licensed. Second, if anything, Wisconsin states indicate that marijuana may be prescribed for medical purposes. Contrary to the town's argument, drugs may be classified under schedule I because of federal mandates (Wis. Stat. §§ 961.11(4) and 961.13(2m)) rather than a finding by a state board that the drug has no medicinal value. Section 961.34 makes it legal, under certain circumstances, for

practitioners to write prescriptions for marijuana and for pharmacies to fill such prescriptions. Finally, the court rejected the town's argument because it dealt only with practitioners, not with users acting under a prescription.

Next, the court turned to Kettner's argument that the section does not require the prescription to be issued by a Wisconsin practitioner. In response, the court noted that Wis. Stat. ch. 961 defines "practitioner" as a physician "licensed, registered, certified or otherwise permitted" to dispense controlled substances "in the course of professional practice . . . within this state." Accordingly, the prescription issued by a California doctor did not meet the requirements for the exception.

Despite this holding, the court nevertheless reversed the judgment as to the as marijuana charge and remanded it for trial, but affirmed as to the paraphernalia charge. The court reached this result based on the difference in wording between the statutes and Grand Chute's ordinances. Kettner had been cited only under the ordinances. The town's ordinance on drug paraphernalia tracked the language of the statutes; since Kettner did not fall within the statutory exception for possession of marijuana, he was not entitled to possess the pipes either. The town's ordinance on possession of marijuana, however, differed from the statute. It barred possession except for amounts consistent with personal use rather than distribution. The ordinance also required that the drug be obtained through a valid prescription from a licensed practitioner, but did not specify that the practitioner be licensed in Wisconsin. Based on the small quantity in Kettner's possession – 7/100ths of an ounce -- the court of appeals expressed doubt that the town could prove on remand that it was intended for distribution.

The decision, issued by a single judge under the procedure for appeals from municipal courts, will not be published and, consequently, does not create binding precedent. It would appear nonetheless that Wisconsin practitioners, as defined in Chapter 961 may have the authority to prescribe marijuana to patients for medical purposes. In order to avoid the issue of prescriptions from out-of-state doctors, municipalities should check whether their ordinances track the state statute in all respects.

—Mark J. Steichen

Seventh Circuit Addresses Confidentiality of Material Produced by Attorney Investigators

A recent decision by the Seventh Circuit, *Sandra T.E. v. South Berwyn School District*, provides important guidance for governmental entities that hire attorneys to conduct internal investigations. The decision addresses whether materials produced by attorneys during the course of an investigation are protected by the attorney-client privilege and the attorney work-product doctrine. And, although the court found that these doctrines applied in the case at hand, the decision indicates that the doctrines do not automatically apply just because an attorney is involved. Instead, whether those doctrines apply depends on the nature of the services for which attorneys are engaged, the manner in which the attorneys conduct their investigation, and whether the investigation is made in response to any actual or prospective litigation. As such, governmental entities should consider issues of

privilege and confidentiality when they engage an attorney to conduct an investigation, if they want the attorney's work related to the investigation to be protected under either or both doctrines.

In *Sandra T.E.*, a school district hired attorneys from Sidley Austin LLP to conduct an investigation related to sexual molestation charges filed against an elementary-school music teacher. The district engaged Sidley after some of the victims filed a civil law suit against the district and a principal who allegedly knew of the abuse. During the investigation, Sidley attorneys interviewed many current and former district employees and various third-party witnesses. The attorneys took handwritten notes during the interviews, which they later summarized in written interview memorandums. The attorneys presented their ultimate findings and legal advice to the school board in an oral report and a written executive summary.

During the discovery phase of the civil lawsuit, the plaintiffs subpoenaed the documents in Sidley's possession that were related to the investigation. Sidley provided the plaintiffs with over a thousand pages of documents, but it retained the interview notes and memoranda and other internal legal memoranda related to the investigation. Sidley asserted that these documents were protected by the attorney-client privilege and the attorney work-product doctrine. The plaintiffs insisted, however, that those doctrines could not apply, since Sidley was hired to provide investigatory, not legal, services (although Sidley conducted the investigation, it did not represent the defendants in the civil suit). The district court agreed and ordered Sidley to produce the notes and memoranda.

Sidley appealed the district court's order to the Seventh Circuit, which reversed the district court. The Seventh Circuit found that the district court had mistakenly concluded that the Sidley attorneys were hired as investigators and not as attorneys. After noting this mistake, the Seventh Circuit evaluated the nature of the services that Sidley provided and found that both privileges were applicable to Sidley's investigation.

The Seventh Circuit first addressed the application of the attorney-client privilege. The court noted that the attorney-client privilege protects communications made in confidence by a client and a client's employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice. The court

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creation, but not when challenged. We decline to interpret the statutes in such an illogical fashion."

The Court also found that no contrary evidence was provided which demonstrates that the EPA has the exclusive right to determine state compliance with federal environmental legislation or rules. The DNR had argued that, while Wis. Stat. ch. 283 directs the DNR to conduct certain activities in accordance with federal law, only the EPA may determine whether permit provisions comply with federal requirements. The Court, however, concluded that, while EPA may object to a permit's provisions, its lack of objection is not a conclusive determination that no objection exists. The Court stated that "[w]hile the lack of objection may indicate the EPA has found no violation of federal law, it may also mean the EPA has found a violation it does not deem substantial enough to warrant a veto, or it may mean the EPA has abdicated its oversight duties altogether. . . . The state's theory would allow the DNR to promulgate rules and issue permits violating federal law as long as it can successfully skirt the EPA's discretionary review. We reject this contention."

—Lawrie J. Kobza

cited the Supreme Court's decision in *Upjohn Co. v. United States*, which held that the attorney-client privilege applies in the case of factual investigations performed by attorneys *as attorneys*. Thus, the court analyzed Sidley's investigation to determine whether the district retained Sidley to provide legal services and whether Sidley actually provided legal services. The court began by reviewing Sidley's engagement letter, which specified that Sidley had been retained to "investigate the response of the school administration and allegations of sexual abuse of students" and "provide legal services in connection with the specific representation." The court found this to be a strong indication that in conducting the investigation, the Sidley attorneys were acting as attorneys.

Still, the court acknowledged that it was also important to analyze the nature of the services actually provided by Sidley, because "an engagement letter cannot reclassify nonprivileged communications as 'legal services' in order to invoke the attorney-client privilege." According to the court, the facts confirmed that Sidley had provided legal services. The court found it significant that the Sidley attorneys involved in the investigation acted as if they were providing legal services. For example, in conducting their interviews, the attorneys explained to the witnesses that they were representing the district, not the employee, and that the district had control over whether the conversations remained privileged. The Sidley attorneys were also careful to maintain the confidentiality of their interviews by not allowing third parties to be present. In addition, the Sidley attorneys communicated with the district in a manner that indicated that they were acting as attorneys by marking correspondence and investigation-related materials as "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product." Given these facts, the court found that in conducting its investigation, Sidley was performing legal work and, therefore, the attorney-client privilege applied.

The court also addressed the application of the attorney work-product doctrine. As the court explained, the work-product doctrine protects documents prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client's case. In the circumstance of an attorney investigation, therefore, the work-product doctrine will apply when the documents at issue were prepared or obtained because of the prospect of litigation. With

this framework in mind, the court reviewed the circumstances surrounding Sidley's investigation. The court found that the chronology of events indicated that Sidley's investigation was related to litigation, since the district retained Sidley after the civil lawsuit was filed. The court also noted that Sidley's interview notes and memoranda were "plainly" prepared "with an eye toward" the pending litigation. Thus, the court concluded, even if the investigation served other purposes, such as quelling public uproar over the alleged sexual abuse, the attorney work-product doctrine applied.

As *Sandra T.E.* demonstrates, a governmental entity that hires an attorney to conduct an investigation should address the confidentiality of the investigation at the outset. If the entity wants the attorney-client privilege to apply to the investigation, it should structure its engagement of the attorney to clearly indicate that the attorney is being retained to provide legal services. In addition, the entity should be aware that the application of the attorney work-product doctrine may be limited if the investigation is not related to any actual or prospective litigation.

—Andrew N. DeClercq

Deadlines Extended For Safe Drinking Water Loan Program

2009 Wisconsin Act 217 changes the application deadline for a loan from the Safe Drinking Water Loan Program from April 30 to June 30. The Act further provides that a local governmental unit that applies after June 30 may receive a loan from the Safe Drinking Water Loan Program if funds are available after funding is allocated for all of the eligible projects for which applications were submitted by June 30. Act 217 also changes the deadline for closing on a loan under the Safe Drinking Water Loan Program from April 30 to June 30.

—Lawrie Kobza

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