

MUNICIPAL LAW NEWSLETTER

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Ban Proposed on Municipal Telcos

Bills were introduced last month in both the Senate (SB 248) and Assembly (AB 518) that would outlaw municipal telecommunications providers in Wisconsin. These bills represent a second attempt by the Wisconsin State Telecommunications Association (“WSTA”) to quash competition in advanced telecommunications services, especially in the more rural areas of the state where close to two dozen relatively small municipalities have been certified by the Public Service Commission of Wisconsin (“PSC”) to provide telecommunications services in their communities. WSTA sponsored similar legislation in the last legislative session.

The bills were introduced just four months after a federal district court in Virginia struck down a Virginia law that prohibited municipalities from providing telecommunications services. The court found that the Virginia law was preempted by the Telecommunications Act of 1996, which prohibits a state from adopting a law that would bar any entity from providing telecommunications services.

The proposal would prohibit cities, villages, towns and counties from providing telecommunications and Internet access services to the public. Municipalities would also be prohibited from selling or leasing a telecommunications system (e.g., fiber optic backbone) if that system will be used to provide a telecommunications or Internet access service to the public. In addition, the proposal would strip the PSC of any authority to grant municipalities certification to provide services as a competitive provider, an incumbent provider, or telecommunications carrier.

The bills contain three exceptions. Municipalities may enter into intergovernmental agreements to provide services to local governmental units where the municipality would not require PSC certification to provide the service. However, due to the economic impact of the other restrictions in the bills, it is doubtful that many municipalities would be in a position to provide such services.

A municipality may also sell its entire system (“substantially all”) to a privately owned telecommunications services provider. This exception, however, only allows a sale of the facilities. It would not allow a municipality to build a system and lease dark fiber to a telecommunications provider. This exception appears to allow municipalities to dispose of existing telecommunications systems they would no longer be able to operate.

The bills also contain a limited grandfather clause. If, prior to the effective date of the bills, a municipality has entered into a contract that is “inconsistent” with one of the three prohibited activities, then the municipality can engage in the prohibited activity in performing its obligations or exercising its right under the contract. However, the municipality may only engage in the prohibited activity “until the contract expires, or is extended, modified, or renewed, whichever occurs first.”

Opponents of the bills include the Municipal Electric Utilities of Wisconsin, the Alliance of Cities, the League of Wisconsin Municipalities, Wisconsin Towns Association, the Wisconsin Counties Association, Wisconsin Education Association Council.

— Anita T. Gallucci

Consistency Between Planning and Zoning

Starting in 2010, all zoning and other land use actions must be consistent with a comprehensive plan. This rule is on the books, with the delayed, 2010 effective date (Wisconsin Statutes sec. 66.1001(3)). Enforcement, as the law is currently written, will be by the courts. There is no precedent in Wisconsin, so the handling of consistency issues by courts in other states is of great interest.

On September 26, 2001 the Florida Court of Appeals decided a case in which a County Commission had issued zoning approval for a group of two story, 8-unit apartment buildings located next to a low density single family neighborhood. The County's comprehensive plan designated the apartment area for medium density multiple family residential at up to 8 units per acre. The zoning approval was for roughly 6.5 units per acre. There was, however, no transitioning of the density and the comprehensive plan called for the multiple family tract to keep its edge nearest the single family development in single family development as a means of transitioning.

A single family residential neighbor sued on grounds of lack of consistency between the approval and the plan. The neighbor initially lost at the trial court after a certiorari-type review. At this point, the developer took out permits for 5 of the buildings and started construction. The neighbor sent a letter saying the construction was at the developer's risk and that the neighbor intended to seek a court order of demolition if the trial court's ruling were to be reversed.

An appeals court sent the case back for a second look, under a de novo review standard. This time the trial court struck down the zoning approval under the plan consistency test. The trial court then ordered the five constructed and partially constructed buildings removed. Three of the buildings had been occupied by that point.

The developer appealed, but the court of appeals affirmed and upheld the trial court's drastic remedy. The appeals court forbade more construction and more leasing, but allowed the existing leases to expire. The appeals court found that, because the plan was specific as to the density transition, the municipality could not substitute landscaping for the density transition buffer, nor could the buffer be ignored.

As to remedy, the court notes that Florida law mandates each local government to have a comprehensive plan and that all zoning to be consistent with those plans. It authorizes suits by aggrieved property owners to enforce the mandates. It allows those suits to ask for injunctive relief. These laws mean that consistency is a public policy command by the legislature that the courts should not be able to waive. The courts are not allowed their usual power to "balance the equities" when these mandates are violated.

Here the developer had \$3.3 million invested in the buildings. The dollar value of the alleged property value reduction suffered by the property owner who brought the case was \$26,000. These comparisons do not matter, says the court. If they did, then developers will often be able to avoid injunctive relief by building costly buildings and then pleading about the loss threatened by court-ordered removal.

The outcome of the Florida case has similarities to the recent Wisconsin case of *Lake Bluff Housing Partners v. South Milwaukee*, (2001 Wisc. App. LEXIS 598), except that in the Wisconsin case,

the court did weigh equities, as authorized in the earlier *Forest County v. Goode* case from our Supreme Court, 219 Wis.2d. 654, 579 N.W.2d 715 (1998). These cases were reported on in the September 2001 issue of this newsletter.

The Florida case traces the history of land use and development problems in that state and stresses the elevation of the comprehensive plan to the central role in land use, and the allowance of third party enforcement actions, in the form of citizen/property owner actions.

The following ringing words conclude the Florida case:

The statute says that an affected or aggrieved party may bring an action to enjoin an inconsistent development The statutory rule is that if you build it, and in court it later proves inconsistent, it will have to come down. The ... injunction enforces the statutory scheme as written. The County has been ordered to comply with its own Comprehensive Plan and restrained from allowing inconsistent development; and the developer has been found to have built an inconsistent land use and has been ordered to remove it. The rule of law has prevailed.

Pinecrest Lakes, Inc. v. Shidel, 2001 WL 1130885 (Fla. App. 4 Dist).

— Richard A. Lehmann

Wisconsin Municipals Face Wholesale Rate Increase

Alliant Energy of Madison, Wisconsin recently informed its municipal wholesale customers that they will likely face a rate increase in 2002. A number of Wisconsin municipalities will be impacted by the rate increase.

Alliant's wholesale rates have been frozen since its merger in 1998. That rate freeze ends in April, 2002. Alliant has not announced the likely level of the wholesale rate increase, but has scheduled meetings with customers in October to inform them of the filing. Alliant recently filed for an 18% rate increase at retail with the Public Service Commission of Wisconsin.

Alliant's increase will impact those municipalities that purchase directly from Alliant, and Wisconsin Public Power Inc. (WPPI), which also purchases at wholesale from Alliant. Individual Wisconsin municipalities impacted by the potential increase include: Belmont, Benton, Black Earth, Elkhorn, Evansville, Gresham, Hazel Green, Juneau, Kiel, Mazomanie, Mount Horeb, New Glarus, Plymouth, Princeton, Sauk City, Sheboygan Falls, Shullsburg, Wisconsin Dells, Wisconsin Rapids and Wonewoc.

Alliant expects to make the filing with the Federal Energy Regulatory Commission later this fall or early 2002.

— Michael P. May

January 1, 2002 Deadline To Adopt Traditional Neighborhood Development Ordinance

A component of the 1999 Legislative adoption of Comprehensive Plan and so-called Smart Growth legislation was a no-penalty mandate that all incorporated municipalities that have 12,500 or more inhabitants as of the start of 2002, or that reach that population later, must adopt ordinance provisions allowing a "traditional neighborhood development." The law defines this as a compact, mixed-use neighborhood where residential, commercial and civic buildings are in close proximity to each other.

University Extension was directed to develop a "model ordinance." The mandate for municipalities of 12,500 or more population is to enact an ordinance similar to the model. The ordinances are not required to be mapped.

The Extension model has been published. Extension's version of a zoning district for this form of development is 38 pages long, with illustrations. The model includes specifics, which include residential densities of up to 8 single family dwelling units per acre and 40 dwelling units per acre in multi-family, with a density bonus for inclusion of affordable housing units, served by neighborhood streets with pavement widths of 20 to 22 feet maximum.

The Extension model contemplates that the District will be treated as a Planned Development, available within the text of the zoning code. Extension says it took this approach because the Legislature did not mandate advance districting of areas for this style of development. The Planned Development provisions of the state enabling laws on municipal zoning are the only place where mixed use districts are expressly authorized. Wisconsin Statutes sec. 62.23(7)(b).

The Boardman Law Firm Land Use Law Practice Group is not recommending that client municipalities enact 28 pages of text describing a single zoning district, partly because of the length of the model, and because of many of the details of the Extension model need careful discussion before being applied. Instead, we are recommending that municipalities consider something simpler, such as the draft at the right.

If the municipality does not have a "boilerplate" section describing the process for considering and approving planned developments, usually through a rezone process, those boilerplate procedural provisions will also be needed. It should be noted that planned development districts require the consent of the owners of property in the district. Traditional neighborhood development districts could also be done as overlay zoning districts. A future article in this Newsletter will describe recent experience of this firm with overlay zoning districts.

— Richard A. Lehmann

ORDINANCE NO. _____

CREATING ZONING ORDINANCE SECTION

_____ : PLANNED DEVELOPMENT DISTRICT:

TRADITIONAL

NEIGHBORHOOD DEVELOPMENT

PLANNED DEVELOPMENT DISTRICT: TRADITIONAL
NEIGHBORHOOD DEVELOPMENT

Proposed developments contemplated by an applicant to include design features described as "traditional neighborhood development" in Wisconsin Statutes sec. 66.1027(1)(c) (1999-2000 Statutes) may be considered for approval at locations determined appropriate by the City/Village under this section, including appropriate conditions.

A document identified as "A MODEL ORDINANCE FOR TRADITIONAL NEIGHBORHOOD DEVELOPMENT," dated December, 2000, published by the University of Wisconsin Extension pursuant to Wisconsin Statutes sec. 66.1027(2), shall serve as a non-exclusive guidebook to assist in further defining the various aspects of this form of urban design, along with such other sources of guidance the Plan Commission and local governing body may choose to consult.

California PUC Suspends Customer Choice

Last month the California Public Utility Commission, in a 3 to 2 vote, decided to suspend immediately the state's "direct access" system or the right of utility customers to enter into contracts with the energy provider or their choice. Direct access was once the cornerstone of the deregulation experiment in California. As reported in the *Los Angeles Times* (October 7, 2001), the suspension of new direct access contracts was opposed by coalitions of large energy users, including factories, farms and grocery chains and universities, who say they have saved millions through direct access contracts.

In suspending the direct access option, the California PUC was implementing a state law passed in response to California's recent energy crisis. That law requires the

California Department of Water Resources to procure electricity on behalf of the customers of the California utilities. To protect the Department, the California legislature also required the suspension of direct access until the Department ceases to be a power supplier. State officials were concerned that customers would leave utilities in the quest for lower rates, leaving behind fewer customers to pay for the Department's power purchases. According to the California PUC, "It is not in the public interest to permit such behavior. All ratepayers benefit from the State's actions to ensure reliable electricity service and, therefore, all ratepayers should contribute to the effort to pay down the unprecedented debt incurred by the state to help weather the energy crisis."

— Anita T. Gallucci

FERC To Pursue Aggressive Transmission Policy

In his first major policy address since taking over as chairman of the Federal Energy Regulatory Commission ("FERC"), Pat Wood III unveiled a list of major initiatives on a host of issues currently facing the electric industry. The September 26th address outlined proposals to ensure sufficient generation capacity; address transmission grid constraints and infrastructure problems; promote regional transmission organizations ("RTOs"); establish standards of conduct for transmission providers; monitor and enforce fair markets; and implement market-based rates.

Wood's aggressive agenda comes at a time when the agency's jurisdiction over transmission has been challenged at the United States Supreme Court and when the agency has come under fire for its handling of the California crisis and alleged ties to industry executives. The Commission's apparent Wood-inspired about-face with regard to all these issues has been greeted enthusiastically by industry observers and public power officials in particular.

Perhaps the most significant aspects of the Wood agenda concern transmission. Wood's proposals include a mandate to give all FERC jurisdictional entities until December 15, 2001, to elect either to join a FERC-approved RTO, or lose all Commission-granted privileges to charge market-based or otherwise innovative rates. In addition, Wood has recommended that no mergers be approved that include companies which have not joined an operational RTO.

To support the movement toward a seamless national power market, Wood has also announced a rulemaking to turn the Commission's Order 2000 RTO guidelines into market design standards. The rulemaking will produce a new transmission tariff to replace the Open Access Transmission Tariff established in Order 888 and is aimed at developing a coherent and informed Commission approach to emerging market design issues. In the past, FERC has approached these issues in piecemeal fashion in the context of contested cases.

Rulemakings are also expected to establish standards of conduct to govern the relation between regulated transmission providers and energy affiliates, as well as to assess and prohibit the exercise of market power in the context of market-based tariffs.

The new, no-holds-barred approach to these issues reflects FERC's renewed commitment to a new regime of competition. Yet Wood's strategic plan, which has been approved by the Commission, clearly accounts for the concerns of consumer and public power interests. Entitled "Making Markets Work," Wood's plan cites four core priorities, including promotion of reliable and environmentally sound infrastructure; fostering market competition over traditional regulation; monitoring and enforcing markets; and efficiently administering agency goals. It is this third goal—monitoring and enforcing markets, which most clearly distinguishes the Wood agenda from the past policies of the Commission. To protect consumers and market participants, the Commission has vowed "to improve its understanding of energy markets and to assure market structures that encourage competition."

— Richard A. Heinemann

New TRANSCO Applies For FERC Approval

Six Midwest utilities have applied to FERC to form an independent, for-profit transmission company called TRANSLink Transmission Co. LLC ("TRANSLink"). The six applicants are investor-owned, public and cooperative power utilities and include: Alliant Energy Corporation's subsidiaries IES Utilities, Inc. and Interstate Power Company; Corn Belt Power Cooperative; MidAmerican Energy Company; Nebraska Public Power District; Omaha Public Power District; and Xcel Energy.

The proposed TRANSLink system includes 26,000 miles of transmission lines, linking 35,000 megawatts of electric power to approximately 6.9 million customers in 14 states throughout the West and Midwest regions. TRANSLink becomes the second for-profit ITC to propose operating in the Upper Midwest region, after the American Transmission Company LLC.

According to company press releases, participating utilities will form TRANSLink through a combination of divestiture, leasing arrangements, and/or operating agreements, and hope to meet increasing local and regional energy needs while improving overall system efficiency and performance. Although the company will not seek Regional Transmission Operator status from FERC, the application states that TRANSLink's proposed corporate structure will meet the Commission's requirements for independence of transmission and generation functions. TRANSLink also has entered into a memorandum of understanding with the Midwest Independent Transmission Operator, Inc. for other required RTO functions and services.

The TRANSLink proposal includes provisions to consolidate the applicants' systems into a single electrical control area and to join operation of both publicly and privately owned transmission assets. TRANSLink's proposed transmission rates include contribution fees, rental fees, and operating fees that TRANSLink will pay to each participant. The participating public and cooperative utilities will participate in TRANSLink through operating agreements that accommodate private use and other restrictions in accordance with state laws and regulations.

The applicants have requested expedited consideration from FERC and expect action by early 2002. They plan initial commercial operation will begin in the fourth quarter of 2002. Access to the complete Commission filing is available on the TRANSLink web site, www.translinktc.com.

—Richard A. Heinemann

Group Home Not Protected By Fair Housing and ADA Laws

Tellurian UCAN, Inc. applied for a conditional use permit to open a community living arrangement (CLA) for adolescent boys who were under the jurisdiction of the state or county in the juvenile justice programs. Madison's General Ordinance §28.08 (2) (b) (11) requires a conditional use permit before a CLA serving not more than eight people may locate within 2,500 feet from another CLA. Tellurian's proposed CLA violated this rule.

The City of Madison Plan Commission (Commission) held a hearing. In the materials Tellurian submitted, Tellurian asserted that prior and present participants in the program had learning disabilities, developmental and psychological disorders, and past drug and alcohol addictions. Tellurian argued that this required the Commission to consider its application under the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA).

The Commission referred to the city attorney, who asserted: (1) information submitted to the Commission supported the conclusion that the proposed residents had problems that were handicaps within the meaning of the FHAA and ADA; (2) pursuant to the statutes, a "reasonable accommodation" had to be provided; (3) granting the permit would constitute a reasonable accommodation unless to do so would constitute a "direct threat" to public health or safety; and (4) no "direct threat" had been demonstrated at the public hearing.

After reconvening to hear additional speakers and receive additional written comments, the Commission denied Tellurian's application, finding the CLA detrimental to the public safety. The Commission also found that Tellurian had not demonstrated that a conditional use permit would not substantially impair or diminish the uses, value and enjoyment of neighborhood.

Tellurian appealed to the Common Council, which held a hearing, consulted the city attorney, and ultimately reversed the Commission's decision and granted the conditional use permit. A physician retained to determine whether the boys were handicapped within the meaning of the federal statutes concluded that three of eight boys fit the statute. The city attorney opined that, although no case law addressed whether a reasonable accommodation had to be made when some but not all of the proposed residents have disabilities, a reasonable accommodation would be required under these circumstances.

Bruskewitz, a neighbor to Tellurian's proposed CLA, sought judicial review. The circuit court affirmed the Council's decision, concluding that there was substantial evidence to support its decision that the standards for a conditional use permit were met. Bruskewitz appealed to the Wisconsin Court of Appeals.

The Court of Appeals first addressed Bruskewitz's contention that the Council acted arbitrarily because it based its decision on an erroneous interpretation of the FHAA and the ADA. The Court assumed, without deciding, that the record was sufficient to show that three out of eight proposed residents had a disability within the meaning of the FHAA and ADA. The Court agreed with Bruskewitz that both the FHAA and the ADA proscribe discrimination based on a disability. Therefore, even if some of the proposed residents have a disability within the

meaning of those statutes, only actions against them based on those disabilities are proscribed.

The Court found no evidence that the proposed CLA residents needed to live in the CLA because of their disabilities. The need for group housing was correctional ("to teach them the skills and the personal and social responsibility they need to live independently and successfully"). The mental health disabilities of some of the residents did not require group living and were not treated at the CLA.

The City found no case law in which a reasonable accommodation to a restriction on a CLA was required when the proposed residents were persons who were able to live independently despite their disabilities. In the cases the Court examined in which a reasonable accommodation was required, the proposed residents were persons who need to live in the CLA because of their disability.

The Wisconsin Court of Appeals concluded that because the proposed residents are not living in the CLA because of their disabilities, the City is not obligated to make a reasonable accommodation to Tellurian in the application of 2,500 foot requirement. The case was reversed and remanded to the circuit court, with directions that it reverse and remand to the Council and instruct the Council to determine whether Tellurian meets the standards for the conditional use permit without regard to a reasonable accommodation based on handicap or disability.

— Richard A. Lehmann

Agricultural Use Value Challenge Certified To Wisconsin Supreme Court

The Wisconsin Court of Appeals recently certified to the state Supreme Court a lawsuit challenging the Department of Revenue (DOR) rules which immediately implemented use value assessment for Wisconsin agricultural lands.

In 1995, the Wisconsin legislature adopted a law providing that agricultural lands in the state should be valued for property tax purposes based on their use as agricultural lands, not their potential use for development. The statute provided for a ten-year phase-in period, which was initially implemented by the DOR. However, in 1999, the DOR determined to end the phase-in and immediately moved to complete use value assessment of agricultural lands.

The DOR's decision was challenged by Ray and Wanda Mallo, farmers in Taylor County, Wisconsin. The Dane County Circuit Court rejected that challenge, and the case was appealed to the Court of Appeals.

In its certification, the Court of Appeals indicated that the question regarding the DOR's authority to immediately implement use value was one which had state-wide impact and should be determined by the state Supreme Court. The Supreme Court need not accept the certification. If the certification is accepted, the case will be argued to the Supreme Court. If it is not accepted, the case will be determined initially by the Court of Appeals.

— Michael P. May

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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.

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 charlene.beals@boardmanlawfirm.com

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