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Inclusionary Zoning Is Not Illegal Rent Control

The City of Madison's inclusionary zoning ordinance does not amount to illegal rent control. That was the Dane County Circuit Court's conclusion when it rejected the Apartment Association of South Central Wisconsin, Inc.'s challenge to the ordinance. See *Apartment Association of South Central Wisconsin v. City of Madison*, Case No. 05-CV-0423, decided September 29, 2005.

Wisconsin, like many other states, has adopted a legislative ban on local ordinances that regulate rents. Section 66.1015(1), Wis. Stats., provides that "No city, village, town or county may regulate the amount of rent or fees charged for the use of a residential rental dwelling unit." The Apartment Association argued that Madison's inclusionary zoning ordinance violated this statute by demanding that apartment developers rent 15% of their units at prices affordable to those earning 60% or less of the area median income.

A similar argument had prevailed elsewhere. The Colorado Supreme Court struck down an inclusionary zoning ordinance in *Town of Telluride v. Lot Thirty-Four Venture LLC*, 3 P.3d 30 (Colo. 2000), on the ground that it violated Colorado's ban on local regulation of rents. Accordingly, the Apartment Association had reason for optimism.

Nevertheless, the circuit court rejected the Association's challenge.

It noted that Wisconsin's rent control statute includes an important exception. The statute expressly provides that the ban does not prohibit a city from "entering into an agreement with a private person who regulates rent or fees charged for a residential rental dwelling unit." Wis. Stat. § 66.1015(2)(b).

The City argued that its inclusionary zoning ordinance fits within this exception, because it applies only to those projects that request zoning changes and land subdivisions. Thus, a developer—as a "person who regulates rent"—is agreeing to local rent regulation by seeking a zoning change or approval for a land subdivision. The circuit court agreed:

Although, Wis. Stat. § 66.1015(1) prohibits any city from "regulating the amount of rent or fees charged for the use of a residential rental dwelling unit," section (2)(b) of the same statute explicitly authorizes a city to enter into agreements with private persons who regulate rent or fees charged for a residential rental dwelling unit. On the statute's face there is no indication that the agreements a city is authorized to enter into cannot regulate the amount of rent or fees charged for

Attorneys Fees Not Available for Frivolous Prosecution of Municipal Ordinance Violation

Defendants cannot recover costs and attorney fees for having to defend against a frivolous lawsuit if the nature of the case is a municipal prosecution for an ordinance violation. That was the holding of an unpublished decision of the Court of Appeals in *Pell Lake Sanitary District No. 1 v. View*, Appeal No. 2005AP911-FT, issued August 24, 2005.

A local sanitary district sued a property owner for not complying with an ordinance on abandonment of sewer and water facilities that had been rendered obsolete.

For reasons not explained in the court of appeals decision, the prosecution was dismissed on a summary judgment motion. The now-dismissed defendants sought to recover their legal expenses on grounds that the prosecution was frivolous.

The court of appeals disagreed, applying case law saying that if the prosecution is made by the government, the decision to prosecute is an exercise of prosecutorial discretion and that discretion is immunized from penalties for frivolous prosecutorial decisions. To allow recovery of legal costs would “interfere with responsible and effective enforcement of the laws.”

—Richard A. Lehmann

Inclusionary Zoning Is Not Illegal Rent Control

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the use of residential rental dwelling units. To hold otherwise would prohibit any city from entering into any agreements in which a landowner wishes to regulate the fees it charges for residential dwelling units in exchange for funding or zoning incentives provided by the city and would also prohibit any city from entering into any agreement in which the city and an individual who regulates rents determine their relative rights and duties.

The court therefore concluded that Madison’s inclusionary zoning ordinance “does not constitute illegal rent control because it falls within the City’s authority to enter into agreements with individuals who regulate rents.”

The court’s ruling has no precedential value, as it was rendered by the circuit court rather than an appellate court. Nevertheless, it suggests that similar ordinances would survive a similar challenge. As of the writing of this article, the Apartment Association had not filed an appeal.

—Matthew D. Weber

Energy Policy Act of 2005 (Mostly) Good For Public Power

This past summer, Congress enacted comprehensive energy legislation that will have a significant impact on the power industry in general and municipal utilities in particular. Known as the “Energy Policy Act of 2005” (“EPA”), the new law was signed by President Bush in August and was widely supported by public power organizations and advocates nationwide. A wide-ranging package of compromises and incentives, EPA affects numerous areas of concern to municipal utilities, including industry structure, reliability, transmission, market manipulation, transparency and enforcement, and renewable energy.

With regard to industry structure, the new law includes a provision repealing the Public Utilities Holding Company Act (“PUHCA”), a New Deal-era law that has stabilized the energy industry for seventy years. Although EPA includes provisions designed to strengthen the Federal Energy Regulatory Commission’s (“FERC’s”) merger review authority, many public power advocates believe the repeal of PUHCA will lead to a new round of utility mergers, including “super-mergers” currently prohibited by PUHCA and encourage electric utilities and holding companies to invest in non-utility businesses, while permitting investment banks, foreign companies and oil companies to acquire electric utility core businesses.

However, if the repeal of PUHCA is a “bitter bill” for public power advocates to swallow, numerous other provisions of EPA have been welcomed. With regard to transmission, reliability and market behavior, EPA offers some significant protections which have been sought by industry stakeholders for several years. Chief among these are provisions that transform the North American Electric Reliability Council (“NERC”) into a self-regulatory reliability organization with authority to establish reliability standards. In addition, EPA provides the Department of Energy with siting authority over certain constrained electric transmission corridors; preserves existing law with regard to voluntary participant funding of new transmission projects; and protects the long term transmission rights of load serving entities. Finally, the new law prohibits market manipulation and the reporting of false information and directs FERC to facilitate price transparency in the new energy markets, while at the same time granting FERC increased enforcement powers in these areas.

With respect to renewable energy and demand-side management issues, EPA contains several significant provisions. Perhaps of most immediate interest to municipal utilities, the legislation creates a new financial instrument

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House Commerce Committee Releases Draft Telecom Bill

On September 15, the House Energy and Commerce Committee released draft legislation intended to reform the Telecommunications Act of 1996. The bill would weaken local authority over IP-based video services providers, ostensibly, so that Verizon, SBC, and CenturyTel, among other phone companies, can quickly launch new video services within their current telephone service areas.

The House draft would make radical changes to the local franchising process. The IP Video provider would simply register with the Federal Communications Commission ("FCC") to operate in local franchising areas. Once registered, the provider benefits from a streamlined local franchise process, under which the local franchise commences shortly after the local franchising authority (i.e., village or city) receives any bond payments it requires and a statement from the provider that certain Public, Educational and Governmental ("PEG") channel requirements will be met and will agree to PEG use of its system by the local franchising authority. The provider must also designate a local agent. The FCC would be responsible for setting a uniform duration for franchises and establishing procedures for renewal, termination and transfer of the franchise.

The local franchising authority, however, would still have a role in setting the franchise fee (up to 5% of the provider's gross revenues) and can require security funds

as well as establish penalties to ensure compliance with certain FCC-established rules.

With respect to PEG channels, the House draft would allow the local franchising authority to require the IP video provider to provide the same amount of PEG channel capacity as required of the incumbent cable operator. However, there is no ability to require the IP provider to provide financial support for PEG purposes (i.e., money to be used for a PEG studio or camera equipment). With regard to institutional networks (i.e., networks to be used by schools and public agencies for their ongoing operations), the bill would allow the use of existing I-Nets, but local franchising authorities could not require construction of a new I-Net.

The large phone companies, such as SBC and Verizon have been vigorously lobbying at both the state and federal levels for relaxed local franchise requirements. They prefer the more favorable franchising bill introduced in the Senate by Senator John Ensign (R-Nevada) in July. The Ensign bill would create national video franchises. Local authorities would have even less authority over the IP video provider than under the House draft. The Ensign proposal would all but eliminate the local franchise fee. Moreover, while a local government could require up to four PEG channels, it could not require financial support for PEG, and could not require an I-Net.

At the state level, the phone industry was successful in getting the Texas state legislature to pass a state-wide franchising law. Shortly after the bill passed, the Texas Cable & Telecommunications Association filed suit in federal district court seeking to invalidate the new law.

Similar measures are being considered in other states such as California and New Jersey.

National municipal organizations, such as the National Association of Telecommunications Officers and Advisors ("NATOA") and the National League of Cities, have been lobbying vigorously against such national franchising legislation, concerned that such measures will deprive local governments of the ability to manage and receive compensation for public rights-of-way.

Finally, unlike the Ensign Bill, the House draft would allow cities, counties and other local governments to own and operate their own broadband video, voice or data networks, as long as the municipalities met the same constraints and obligations as private operators and did not gain any preferential treatment from regulators. The legislation would prohibit states from barring local governments from providing wireline, wireless or other types of broadband services. The Ensign bill, however, has been criticized by the American Public Power Association for seeking to "impose a variety of burdensome and unnecessary requirements on cities and towns that want to invest in broadband infrastructure critical to their economic development," according to the organization's web site.

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—known as a taxable credit bond, or "Clean Energy" bond — that will enable public power entities to receive federal financial assistance for constructing renewable energy generation projects, thus putting public power on a more or less equal footing to private developers, who currently benefit from tax credits for renewable energy products. On the demand side, EPA initiates a formal process for the establishment of state rules on net metering, fuel diversity and efficiency or time-based metering requirements to facilitate demand response and distributed generation initiatives. EPA also modifies a number of requirements in the Public Utilities Regulatory Policy Act of 1978 ("PURPA") with respect to qualifying facility purchase requirements, including a loosening of the requirement where the qualifying facility has access to competitive energy and capacity markets.

More detailed information on EPA is available on the FERC web site at <http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act.asp>.

—Richard A. Heinemann

—Anita T. Gallucci

MUNICIPAL LAW NEWSLETTER

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