

IN THIS ISSUE

- *Circuit Court Upholds Town Subdivision Moratorium Ordinance*
- *Municipal Utility Service Contracts Questioned By the PSC*
- *State Steps Up Efforts to Promote Renewable Energy*
- *Previously Reported Case on ADA Applied To Zoning Advances To En Banc 7th Circuit Decision*

Circuit Court Upholds Town Subdivision Moratorium Ordinance

The Town of West Point, Columbia County enacted an 18 month moratorium on review and approval of land divisions and subdivisions. The Town was sued by the Wisconsin Realtors Association and the Wisconsin Builders Association, arguing that there was no legal authority for such a moratorium.

The Circuit Court of Columbia County issued a summary judgment decision on September 13, 2006, holding that broad authority of Wisconsin Statutes sec. 236.45 provided implied authority for a subdivision review moratorium.

The plaintiffs attempted to take that statute out of play by arguing that the moratorium was really an exercise of zoning powers. The court followed the lead of several recent appellate cases in holding that land subdivision review ordinances can overlap with zoning and be more restrictive than the applicable zoning provisions.

The case is *Wisconsin Realtors Association, Inc., and Wisconsin Builders Association v. Town of West Point*, Columbia County Case No. 06 CV 96.

— Richard A. Lehmann

Municipal Utility Service Contracts Questioned By the PSC

Whether a municipal utility can enter into an enforceable contract to provide utility services to a party it has no obligation to serve has recently been called into question by the Public Service Commission in *Complaint by St. Joseph Community Hospital of West Bend, Inc. Against The Village of Jackson Water and Sewer Utilities Regarding the Provision and Cost of Service in the Town of Polk*, PSC Docket No. 5-UI-109. In that proceeding, the PSC held that it had the authority to review the compensation provisions set forth in such a contract to determine whether the compensation was unlawful, unreasonable or unjustly discriminatory under PSC standards. The proceeding involves a situation where a party located outside the municipal utility's service area entered into a contract for service, but then later challenged the compensation provisions in the contract as being unreasonable.

Continued on page 2

Municipal Utility Service Contracts Questioned By the PSC

Continued from front page

The Village of Jackson entered into a contract with St. Joseph Community Hospital relating to the provision of water and sewer services to a new hospital and medical office building to be constructed in the neighboring Town of Polk. Since the Hospital was outside of the Village's service territory, the Village had no obligation to serve the Hospital, but it agreed to do so pursuant to the terms of a contract. The contract between the Village and Hospital required the Hospital to pay the Village a connection payment of approximately \$1 million. The amount of the connection payment was calculated to offset the capital costs anticipated to be needed to provide service to the Hospital now and in the future. However, regardless of the amount and how the connection payment was calculated, the Hospital signed the contract and agreed to make the payment.

After construction of the Hospital was completed and just days before occupancy, the Hospital refused to make the connection payment. The Village sued the Hospital in circuit court for payment, and the circuit court ordered the Hospital to pay the Village the amount agreed to by contract. The Hospital is appealing this ruling.

The Hospital brought a complaint before the PSC claiming the \$1 million charge was unreasonable under

PSC standards. The Village objected arguing the charge was established by a voluntary contract between the parties, and the contract was upheld by the court. The PSC, however, determined that despite the court order, it had the authority to consider the case and determine whether the connection fee is an illegal or unreasonable fee. In its memo on the issue, PSC staff questioned the connection fee, and how it was calculated. Staff seemed troubled by the calculation of the connection fee based upon an impact fee type methodology, when the Village had no statutory right to impose impact fees outside of its incorporated boundaries. In its memo, PSC staff also questioned whether all compensation established by the contract and related in any way to the water utility must be reflected in utility tariffs and approved by the PSC. PSC staff noted that water tariffs typically recognize special assessments, but there is no such similar recognition for impact fees at this time.

This case should raise a red flag to municipalities who have entered into utility service contracts with customers. While the provisions of a utility contract may be mutually agreeable to parties now, if a customer later complains to the PSC about costs or service provided, the terms of the contract may not be controlling. Instead, the PSC may ignore the contract terms and look to its own determination on what it considers reasonable or unreasonable.

— *Lawrie Kobza*

State Steps Up Efforts to Promote Renewable Energy

Last March, the legislature passed the Energy Efficiency and Renewables Act (Wisconsin Act 141). The law requires utility providers to dramatically increase their use of renewable energy, safeguards budgetary commitments and streamlines administrative oversight of energy efficiency and public benefits programs. At the time, Wisconsin Act 141 was widely hailed as promoting Wisconsin's leadership role in the development of renewable energy and energy conservation programs.

In July, Governor Doyle launched a "Declaration of Energy Independence," setting three main goals: generating 25 percent of the state's electricity and transportation fuel from renewable resources by 2025; capturing a 10 percent market share of renewable resource production by 2030; and becoming a

national leader in renewable resource research. That commitment was recently followed up with a proposal to invest \$450 million in public/private partnering to develop renewable energy through bonds, tax credits, loans and grants.

Wisconsin's public power community has been part of the surge in renewable energy initiatives. Municipal Electric Utilities of Wisconsin, in conjunction with other members of the Customers First! Coalition, was a staunch supporter of Wisconsin Act 141. Wisconsin Public Power Inc. (WPPI), the state's largest municipal joint action agency with 44 member communities, has publicly urged the Public Service Commission of Wisconsin (PSCW) to revise its strategic energy plan to step up the state's commitment to energy conservation, efficiency and renewable resources. WPPI also recently

Continued on next page

Previously Reported Case on ADA Applied To Zoning Advances To En Banc 7th Circuit Decision

An article in the July-August 2005 issue of this Newsletter reported on a July 2005 decision of a panel of the 7th Circuit Court of Appeals applying the Americans with Disabilities Act and the companion Federal Rehabilitation Act and the Federal Fair Housing Act to denial of a special use permit for a mental health clinic serving persons with disabilities. That decision held that a local zoning rule or decision that treats disabled persons differently than non-disabled persons, or a rule or decision that is driven by actual bias against the disabled occupants or clientele violates the ADA and cannot stand.

The same case then was reargued *en banc* before 10 of the 11 members of the Court of Appeals, Judge Sykes not participating, resulting in a new decision dated September 26, 2006.

The new decision focuses on the ADA, holding that zoning is a public program/service covered by Title II of the Act. (Although not mentioned in the decision, an article in the Summer 2006 issue of *The Urban Lawyer* (Vol. 38, No. 3 at page 613), an American Bar Association publication, argues that the ADA should not be seen as applying to zoning.)

Continued from page 2

announced plans to enter into a 50 MW purchase agreement in an Iowa wind project.

The PSCW, for its part, has recently set up two dockets to implement Wisconsin Act 141. Docket 1-AC-220 is designed to create rules regarding the state-wide administration of energy efficiency and renewable resource programs; Docket 1-AC-221 revises the PSC's rules regarding administration of the renewable resource credit program. The PSC's proposed rules establish procedures for selection of the statewide energy efficiency and renewable resource program administrator, clarify conservation program guidelines and set up mechanisms for tracking and trading renewable resource credits.

With broad support from a variety of stakeholders, the state's stepped up commitment to renewable resources and energy conservation initiatives is not likely to abate any time soon.

— Richard A. Heinemann

Administrative rules and court cases interpreting and applying Title II say that public entities shall make accommodations that are necessary to avoid discrimination due to disabilities provided that the accommodations are reasonable and do not fundamentally alter the nature of the public service or program. The hardship addressed by the requested accommodation cannot be one suffered equally by persons without disabilities.

The duty to accommodate is an independent basis for liability under the ADA. The plaintiff is not required to demonstrate actual intentional bias or that the rule or decision disproportionately burdens disabled persons. Proof of failure to afford reasonable accommodations is enough by itself.

In this case, the Court was not convinced that the Special Use Permit was denied because the clients of the clinic were disabled. There was evidence that the City wanted commercial land use at the site, not a social services use, whether or not the use served disabled persons.

The 7th Circuit Court of Appeals sent the case back to the District Court for a determination on that question.

The case is *Wisconsin Community Services, Inc. v. City of Milwaukee*, Case No. 04-1966 (7th Circuit Court of Appeals)

— Richard A. Lehmann

The Municipal Law Group
at Boardman Law Firm congratulates
Oshkosh City Attorney Warren Kraft
and
Eau Claire City Attorney Stephen Nicks
on their induction as Local Government
Fellows by IMLA, the International
Municipal Lawyers Association!

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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