

# MUNICIPAL LAW NEWSLETTER

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## Water Utilities Work on Proposed Groundwater Legislation

The Municipal Environmental Group-Water Division (MEG-Water), an organization of municipal water systems focused on legislation and administrative issues, has been working on draft changes to Wisconsin's groundwater law. The first draft of these proposed changes was unveiled at the Wisconsin Water Association Annual Conference and the Wisconsin Rural Water Association's Management Conference in September. The draft is still being worked on and it is expected that a final draft will be ready in October.

The purpose of the draft legislation is to provide a solid framework for Wisconsin groundwater law. Currently, Wisconsin's groundwater law as it has evolved in the statutes and through case law is unclear and provides little direction for decision-making. The draft legislation is intended to address those concerns. The draft legislation is also intended to address concerns that arose out of the Perrier proposal in Wisconsin.

Some of the main features of the draft legislation are described below.

### High Capacity Well's Impacts on Surface Water

Under the draft, the DNR is given the authority to deny or limit a permit for a high capacity well if the DNR determines the well will result in the unreasonable detriment of public rights in the surface waters of the state. A well will result in the unreasonable detriment of public rights only if the injury to public rights will exceed the public benefits generated by the well. In making this determination, the DNR is to consider a list of factors including factors related to the connection between the well and the potentially affected surface waters; the public benefits provided by the proposed withdrawal, including public health and safety benefits

and economic benefits related to employment, economic activity and tax revenues; any practical and feasible alternatives to the proposed withdrawal, including, without limitation, any available physical connection to a public water system; any measures that can be taken to mitigate any adverse environmental effects; and any other issues identified by the DNR as relevant to its determination.

### Every Well Needs a Permit

Under the proposal, every well in Wisconsin must be permitted. High capacity wells are already permitted, but this will create a new permitting requirement for non-high capacity wells. The primary purpose of this permit requirement is to create a database of all Wisconsin wells and their characteristics in order to allow for future groundwater management planning. In order to streamline the permitting process for these non-high capacity wells, a general permit is proposed which would allow the well owner to self-certify that the terms of the general permit will be met. Once the self-certification is submitted to the DNR, along with the appropriate fee, the well owner is entitled to proceed. An existing well must seek a permit by the end of 2006. The DNR must include the permit information on a computerized database which can be used for future groundwater planning.

### Groundwater Quantity Management in Areas with Quantity Problems

Under the proposal, the DNR can designate certain areas of the state as critical groundwater areas. If an area is designated as a critical groundwater area, the DNR or the regional planning commission in the area is to prepare a groundwater management plan for the area. The groundwater

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management plan is to look at information about: (1) the groundwater resources in the area and its characteristics; (2) past, present, and potential groundwater use within the critical groundwater area; (3) proposed water conservation and supply augmentation programs for the critical groundwater area; (4) the opportunity to integrate and coordinate the use of water from different sources of supply; (5) the relative economic value of different uses of groundwater proposed or existing within the critical groundwater area; (6) groundwater management objectives for the critical groundwater area; and (7) any corrective control provisions for the area. A groundwater management plan may include any corrective control provisions necessary to protect the public health, safety and welfare, to correct the problems that resulted in the designation of the critical groundwater area, or to achieve the management objectives of the critical groundwater area. Corrective control provisions might include provisions determining the permissible total withdrawal of groundwater in the critical area each day, month or year; a provision reducing or limiting the permissible withdrawal of groundwater by any one or more persons holding permits to withdraw groundwater in the critical area; a provision requiring and specifying a system of rotation of use of groundwater in the critical area; or a provision requiring the adoption of best management practices in the pumping of groundwater. The DNR is also to devise a system to collect the costs of preparing and implementing the groundwater management plan from all water users in the area.

The draft legislation is still being worked on by MEG-Water and other water utility organizations. Additional support for this legislation will be sought after October. The goal is to have the proposed legislation introduced during the 2003-2004 legislative session.

—Lawrie Kobza

## New Interest in Municipal Utility Ownership

Municipalities across the country are showing a renewed interest in owning utilities.

Perhaps the biggest change is in Iowa, where groups of municipalities are considering getting into the electric utility business, or creating telephone utilities. The city of Emmetsburg, Iowa recently conducted a referendum on taking over the electric utility serving the municipality. In a close vote, the residents approved the purchase, 686-639, according to Public Power Weekly. In a number of other municipalities in Iowa, the governing bodies are looking at the possibility of taking over the local electric utility at the end of the franchise. The largest city considering public power is Iowa City, Iowa. These municipalities are also looking at the possibility of creating competing telephone utilities.

In Oregon, the city of Portland is considering bidding for Portland General Electric (PGE). PGE is owned by Enron, the bankrupt power and gas trading company. As part of its bankruptcy, Enron is considering selling some of its assets, such as PGE. The city of Portland is conducting an analysis of whether such a purchase will benefit the city over the long term.

In Nevada, residents of Las Vegas will vote this fall on a referendum to take over electric service to the city. Las Vegas is now served by Nevada Power Company.

In Wisconsin, one of the few remaining private water utilities is considering whether to sell to local municipalities. Wisconsin Power & Light (WPL) owns the water utilities in Beloit and Ripon. WPL has indicated it may want to sell those water utilities to the local communities. WPL's consideration of these sales comes after the City of Beloit intervened at the Public Service Commission and challenged WPL's requests for electric and water rate increases.

—Michael P. May

## Irreparable Loss of Habitability Is A Taking In Inverse Condemnation Suit

While mere damage to property, short of a total taking, is not grounds for an inverse condemnation claim under the Wisconsin Constitution, property damage that leads to the irreparable loss of habitability may be. The Wisconsin Court of Appeals reaffirmed this determination in *Cops v. Kaukauna, et al.*, Appeal No. 01-2792, decided August 6, 2002, in which property owners alleged that construction of a bridge by the City of Kaukauna and the Department of Transportation had caused flooding in the basement of their building. The City sought dismissal of the suit for failure to state a claim upon which relief could be granted. Although the trial court granted the City's motion, the Court of Appeals reversed.

The Court of Appeals rejected the trial court's determination that the property owners had failed to sufficiently allege a taking of property. Although the basement was not permanently flooded, the owners alleged that intermittent flooding had caused mold and mildew to grow, rendering the building uninhabitable. They also alleged that it would cost \$145,582.13 "to clean up and attempt to restore the Property." These facts were sufficient to allow the court to infer that the building had no beneficial use.

Accordingly, the court concluded that the property owners had sufficiently alleged a taking of property in support of their inverse condemnation claim.

In reaching this conclusion, the court rejected the City's argument that the complaint merely alleged damage to the property because it stated a cost for restoring the property to its prior condition. The court noted that, according to the complaint, \$145,582.13 represents the cost to attempt to restore the property. The court stated, "If the attempt fails, the flooding may constitute a taking, and if it can be repaired, it may be mere damage. This issue is more appropriately resolved on summary judgment or at trial, not on a motion to dismiss."

Accordingly, while the City did not prevail in its motion to dismiss on this ground, the court's resolution points to a possible avenue of relief — in this case and others — at the summary judgment stage. Cities facing an inverse condemnation claim should determine whether the alleged "taking" is merely property damage that may be repaired. If so, a motion for summary judgment at the appropriate time may dispose of the claim.

This decision has not been recommended for publication.

—Matthew D. Weber

## Town's Power to Permit the Laying of Pipelines within Town Highways is Not a Bargaining Chip, Says Court of Appeals

In *Town of Barton v. Division of Hearings and Appeals*, 202 WI App 169, 628 N.W.2d 376 (Ct. App. 2002), the Court of Appeals dealt with the interpretation of sec. 86.16, Stats., which provides that “[a]ny person, firm or corporation . . . may . . . with the written consent of . . . local authorities with respect to highways under their jurisdiction, including connecting highways, construct and operate . . . pipes or pipelines for the purpose of transmitting messages, water heat, light or power along, across or within the limits of the highway.”

The City of West Bend had requested Town permission to construct a wastewater pipeline in the rights-of-way of two roads located in the Town of Barton. The Town refused to permit the construction unless all of the Town's residents abutting the pipeline were given immediate sewer system access. The City denied the Town's access request because it had a policy of not providing sewer access to properties located outside of the City. The City, however, agreed to construct laterals as part of the pipeline's initial installation, so that the abutting properties could be connected to the City's sewer system in the future if the property annexed without any further disruption of the highways. The Town refused permission to lay the wastewater pipeline.

The refusal was appealed to the Division of Hearings of Appeals, the circuit court, and then the Court of Appeals. Two issues were presented to the Court. The first issue was whether Wis. Stat. § 86.16(5) applied to wastewater pipelines. The second issue was whether the Town could condition its permission to lay pipelines in a highway on the provision of service to Town residents.

With regard to the first issue, the Court determined that sec. 86.16, Stats. applied to both water and wastewater pipelines. The Court stated that:

We can see no reason why we should interpret “water” in Wis. Stat. § 86.16(1) as being limited to “fresh water,” thereby permitting one utility that transports water for the benefit of the public to use the public ways for laying its pipelines and not include another utility, simply because that utility transports “waste water.” Additionally, any disruption in traffic on the highways would not be related to the type of water that the pipelines transport. Accordingly, we conclude that the “pipelines” to transport “water” referred to in § 86.16(1) unambiguously include wastewater as well as freshwater pipelines.

With regard to the second issue, the Court stated that the Town's authority under sec. 86.16 is to ensure that public highways are not unreasonably obstructed by construction and maintenance of utility facilities. According to the Court, however, this authority is limited by the fact that the State has granted public utilities the right to construct its facilities in the highways that are within the boundaries of a town. Because of this limitation, the Town's “power to permit or to deny permission that a town is given under Wis. Stat. § 86.16 is not a bargaining chip that a town can use to force a city to provide services to town residents that a city would not otherwise provide under its normal procedures and policies.” Accordingly, the Town had no authority to require the City to permit immediate hookup to the sewer, so long as the City's refusal to do so did not cause an unreasonable obstruction to traffic within the Town.

—Lawrie Kobza

## Check Your Forms

An unpublished opinion issued by the Wisconsin Court of Appeals in August reminds municipalities to “check your forms.” In *Milwaukee v. B. Davis Investment, LLC*, Appeal No. 02-1043, decided August 6, 2002, the court found that a property owner did not consent to a city inspection of its property, despite submitting an application form seeking a certificate of compliance with the city's building code. The court faulted the city for failing to expressly state in its application form that the property owner consents to an inspection of the property.

The case arose after the owner of B. Davis Investment, LLC, submitted an “Application for Certificate of Exterior Code Compliance.” The City of Milwaukee requires purchasers of certain properties to obtain such a certificate within 60 days of the sale or transfer of the properties. Following receipt of the application, the City inspected the property and cited several code violations. B. Davis Investment failed to correct the problems and the City secured a municipal court order imposing a fine. The company appealed.

B. Davis Investment argued on appeal that it had not consented to the City inspection. The City countered that the company had consented to the inspection by submitting an application for it. It cited the company's “Application for Certificate of Exterior Code Compliance” as evidence of that consent. The Court of Appeals rejected the City's argument.

The court noted that the City's ordinances refer separately to an “Application for Certificate of Exterior Code Compliance” and an “Application for Inspection.” Reviewing the City's “Application for Certificate of Exterior Code Compliance,” the court observed that it did not refer to an inspection in any way, other than to identify the “City of Milwaukee — Dept. of Inspection” as the issuer of the form. The form merely sought identifying information about the property, the buyer and the seller. Accordingly, the court concluded that the document was not an “Application for Inspection.” Because the municipal court had relied on the form to conclude that B. Davis Investment had consented to the inspection, the Court of Appeals remanded the case to the municipal court.

In doing so, the court acknowledged that, in practice, applicants may not read the “Application for Certificate of Exterior Code Compliance” as narrowly as the court:

This court is not naive. This court recognizes that, logically, an Application for Certificate of Exterior Code Compliance could trigger a process leading to an exterior inspection. And this court also recognizes that an experienced property purchaser might assume that, too. Still, this court must evaluate an appeal based on the record, not on speculation.

With nothing in the record expressly showing that B. Davis Investment had applied for an inspection, and with a code provision expressly requiring such an application, the court was compelled to find for the company.

This case reminds municipalities to check their forms. The forms should match the requirements of municipal ordinances. Moreover, where consent to an inspection is required, that consent should be expressly stated on the form, rather than implied from the act of submitting the form.

This case has not been recommended for publication.

—Matthew D. Weber

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