

# MUNICIPAL LAW NEWSLETTER

**BOARDMAN**<sup>LLP</sup>  
LAW • FIRM

Volume 9, Issue 4, April 2004

## IN THIS ISSUE

- *Legislature Throws Up Roadblocks for Municipal Telcos*
- *Equitable Defenses Available in Zoning Enforcement Cases*
- *Michael May to be New Madison City Attorney*
- *Groundwater Quantity Legislation Passes*
- *Reverse Age Discrimination not Protected Under the Age Discrimination in Employment Act*

### SPEAKERS' FORUM

April 6, 2004

#### **Employment Policies**

University of Wisconsin, Madison, WI

*Robert E. Gregg*

April 19-21, 2004

#### **Equal Opportunity Law Certification**

American Association For Affirmative Action, Washington, D.C.

*Robert E. Gregg*

April 22, 2004

#### **Fear Firing and the ADA**

American Association For Affirmative Action National Conference, Washington, D.C.

*Robert E. Gregg*

April 23, 2004

#### **Town Veto Powers**, 25th Annual Town Law

Institute, Madison, WI

*Richard A. Lehmann*

April 30, 2004

#### **Managers Duty Of Care and Basic Employment Law Issues**, Indianhead Technical

College, Spooner, WI

*Robert E. Gregg*

May 8, 2004

#### **Legal Liabilities and Responsibilities of Policymakers**, APPA Policymakers Workshop,

Colorado Springs, CO

*Michael P. May*

May 11, 2004

#### **Hot Topics In Employment Law**, Fond du Lac Society of Human Resource Managers,

Fond du Lac, WI

*Robert E. Gregg*

## Legislature Throws Up Roadblocks for Municipal Telcos

Senate Bill 272, a bill that sets up significant roadblocks for municipal telecom efforts, has now passed both houses of the Wisconsin legislature and awaits the Governor's signature. If signed by Governor Doyle, the bill will become effective this summer. In addition to the Municipal Electric Utilities of Wisconsin, the Wisconsin Alliance of Cities, the League of Wisconsin Municipalities, the Wisconsin Counties Association, the Wisconsin Association of School Boards and the Citizens Utility Board all joined together to ask that the Governor veto the bill.

The bill would impede a municipality's ability to provide cable television, broadband, and telecommunications services. First, the bill limits a municipality's access to capital in which to construct and operate a municipal cable television system. Among the sources of capital off limits to a municipal cable operator are general obligation bonds, bond anticipation notes and general fund money. This limitation will make the start up of a municipal cable system all but impossible.

The bill would also prohibit a municipality from adopting an ordinance authorizing the construction and operation of a facility to provide cable television, broadband or telecommunications services unless the municipality first releases a report that sets out the costs and expenses the municipality will incur in building such a facility and providing services and the revenues the municipality projects it will earn from the enterprise within the first three years of operation. The report is to be released 30 days before the public hearing is held on the proposed ordinance.

Moreover, with respect to municipally provided telecommunications services, the

bill would set a floor below which the price for such services could not fall, regardless of the price offered by a competitor. Under the new law, the rates for a municipal telecommunications service must not only reflect the provider's actual cost of providing service, but also must reflect costs that a private competitor has but which the municipality avoids by virtue of being a municipality. The bill does not indicate how a municipality is supposed to determine what these costs are.

Several amendments were added to the bill providing for certain exemptions. A municipality can be exempt from the public hearing and report requirements and from the restrictions on access to capital to construct and operate a cable system if two conditions are met: (1) the municipal must have obtained CLEC status by November 1, 2003 and (2) the municipality must hold a referendum election in which a majority of voters vote in favor of the municipality offering the proposed service. Another exemption would allow a municipality to provide broadband service to an underserved area without having to following the requirements of the bill if it first determines through written contact with local service providers that none has plans to serve the area within the next nine months.

Yet a third exemption applies to those municipalities that will use the facilities they build to offer broadband service on a wholesale basis in communities where there is only one broadband service provider.

Finally, any municipality that provides cable service as of March 1, 2004 is totally exempt from the provisions of the bill. Only Reedsburg and Oconto Falls can take advantage of this exemption.

— Anita T. Gallucci

---

# Equitable Defenses Available in Zoning Enforcement Cases

In zoning enforcement cases, municipalities may seek legal remedies, (e.g., forfeitures) and/or equitable remedies, (e.g., orders to remove or modify structures). When equitable remedies are sought, the issue arises as to whether and when property owners may raise traditional equitable defenses. Two recent cases shed some light on these questions. (See Feb. 2004 issue of Newsletter, p. 3, for additional discussion of equitable estoppel issues.)

In *Forest County v. Goode*, 219 Wis. 2d 654, 656, 579 N.W.2d 715 (1998), the supreme court held that a circuit court retains equitable power to deny injunctive relief after a zoning violation has been proven by a county in an enforcement action brought under section 59.69(11), Stats. Traditional equitable defenses include estoppel, laches, and unclean hands. The court noted that equitable defenses should be applied only in “those rare cases” when “the totality of the circumstances” show “compelling equitable reasons why the court should deny” the requested relief. *Id.* at 684. Recently, the court expressly applied the same holding with regard to enforcement actions brought by other municipalities under section 62.23(8), Stats. *Town of Delafield v. Winkleman*, 2003 WI 92, ¶ 28, 264 Wis. 2d 264, 663 N.W.2d 324.

In *Winkleman*, property owners sought a variance, which was granted subject to conditions that the owners thought were unreasonable (the facts are discussed in a report on oral argument in the case in the Jan. 2004 issue of this newsletter “Land Use Day in the Supreme Court”). They obtained certiorari review of the variance decision, but the circuit court affirmed. The town then brought an enforcement action due to the owners’ non-compliance with the terms. The Winklemans attempted to raise equitable defenses, but the circuit court concluded that it was obligated to order the removal of a structure in conformance with the certiorari decision. On appeal, the court of appeals reversed and ordered a remand to the circuit court with instructions that equitable defenses be considered, except for a defense the Winklemans had already made to the certiorari court and that had been rejected. On review, the supreme court agreed that remand was appropriate for consideration of equitable defenses, but reversed the portion of the court of appeals decision barring relitigation of the argument that had been presented to the certiorari court. Citing the limited scope of review in certiorari cases, and the absence of any case law to the contrary, the court of appeals and supreme court agreed that circuit courts do not have equitable powers in certiorari cases. *Id.* at ¶ 31. Then, applying the rules of issue and claim preclusion, the supreme court held that, since equitable defenses cannot be fully litigated in certiorari cases, the arguments presented in the certiorari action could not bar relitigation in the enforcement action.

The application of equitable defenses in an enforcement action was also at issue in *Village of Hobart v. Brown County*, Appeal No. 03-1907 (Ct. App. Feb. 24, 2004). In *Hobart*, Brown County was in discussions with the village about developing a landfill. The village initially told the county that the landfill was a permitted use and entered into an agreement in principle for the facility. In reliance on the village’s statements, the county incurred substantial engineering and planning expenses. After public outcry against the facility, the village discovered that the land was, in fact, zoned A-2, and withdrew from its agreement. The county corporation counsel then advised the county that it could proceed without permits from the village under section 13.48(13), Stats. The county acted on that advice and began construction. When the village sought a permanent injunction barring further construction or operation of the landfill, the county obtained a summary judgment on the grounds that it did not need a building permit under the statute and that the village was equitably estopped from enjoining the landfill because the county had reasonably relied on its initial representations. The court of appeals reversed and remanded for further action. The court assumed, without deciding, that section 13.48 would apply to the county, but found that a use must

still comply with applicable zoning, which the landfill did not. The court also found, as a matter of law, that after the village changed its mind, the county had relied on its corporation counsel’s opinion in proceeding to construct the facility, not on earlier statements from the Village. (In a footnote, however, the court commented that the issue of whether the county could recover its engineering and planning expenses was not before it.) Accordingly, the county did not meet the element of reasonable reliance required for equitable estoppel to apply. The court did allow the county to present other equitable defenses on remand.

It is now clear that property owners may raise equitable defenses against zoning enforcement actions seeking equitable remedies. However, the denial of equitable remedies should be limited to rare cases and property owners must still prove that they meet all elements of those defenses.

— Mark J. Steichen

---

## Michael May to be New Madison City Attorney

Michael P. May, a partner with the Boardman Law Firm and long-time counsel to municipalities, will be the new City Attorney for Madison, Wisconsin.

May, 49, was announced as the choice of Madison Mayor Dave Cieslewicz on March 12, 2004. May is expected to begin working as the new City Attorney in the middle of May. His appointment is subject to confirmation by the Madison City Council.

Describing May as “a top attorney at a prestigious firm known for its municipal legal work,” Cieslewicz praised Mike’s combination of legal expertise, management experience and ability to work with people. Mike has been with the Boardman Law Firm since 1979. He has long represented municipalities on complex matters, and in particular has worked for municipally-owned electric utilities and joint action agencies, in Wisconsin and the Midwest. Anita Gallucci, Richard Heinemann and Rhonda Hazen remain key parts of the municipal electric utility group at the Boardman Law Firm.

“This is a bittersweet decision for me,” May said. “I have long enjoyed working with municipalities and I think the people at the Boardman Law Firm are some of the best to work with. However, I could not decline the excellent opportunity to be City Attorney for Madison.”

Mike will be missed by all of us at Boardman. We wish him the best of luck.

— Læwrie J. Kobza

# Groundwater Quantity Legislation Passes

Groundwater quantity legislation, designated as (SB 524 or AB 926), passed the Legislature in the last week of the legislative session. The bill passed the Assembly by a 99-0 vote, and passed the Senate by a 32-1 vote. The bill will go on to the Governor who is expected to sign it.

The bill's focus is on certain high capacity wells. For most high capacity wells, DNR approval requirements will not change. However, for three categories of high capacity wells, DNR review may include more extensive environmental review. Those three types of wells are:

- A high capacity well within 1,200 feet of an outstanding resource water, an exceptional resource water, or a Class I, II, or III trout stream as designated by DNR under current regulations;
- A high capacity well which is located near a "spring" which discharges groundwater at or near land surface with flows of a minimum of one cubic foot per second at least 80% of the time.
- A high capacity well that has water loss that exceeds 95% of the amount withdrawn (intended to deal with bottled water plants).

Approval of these types of high capacity wells must include conditions which ensure that the wells will not cause significant environmental impact. The only exception is for a high capacity well that is a public utility water supply. Such a well may be approved even if there would be significant environmental impacts from the well if the environmental impact of the well is balanced by public benefit related to health and safety. These new requirements will first apply to any new high capacity well for which an approval request has not been submitted to the DNR on the effective date of the legislation.

All new high capacity wells would be required to pay DNR a \$500 fee, and all other new wells would be required to pay DNR a \$50 fee.

The bill also addresses regional drawdown areas. Under the bill, the DNR is to designate two "Groundwater Management Areas" by rule. These areas would encompass the areas in Brown County and Waukesha County where the groundwater potentiometric surface has been reduced 150 feet from historic pre-development levels. The "Groundwater Management Area" to be designated is to include the entire area of each city, village, and town which has part of its jurisdiction within the 150 foot drawdown area. For the near term, there is no repercussion from being designated as a Groundwater Management Area. DNR is to assist political subdivisions in Groundwater Management Areas by providing advice, incentives, and funding for research and for planning costs. However, it is unlikely that there will be funding for this.

A 14 person groundwater quantity committee is to be appointed to continue to work on groundwater quantity issues. Four appointees are to represent municipal interests. The committee is to recommend legislation to address issues regarding groundwater quantity that are not addressed in the bill. The committee is also to recommend final administrative rules to implement the legislation.

—Lawrie J. Kobza

## Reverse Age Discrimination not Protected Under the Age Discrimination in Employment Act

The Age Discrimination in Employment Act (the "ADEA") prohibits employment discrimination because of an individual's age and protects those employees age 40 and older. In a case that has important implications for employers, a sharply divided United States Supreme Court held that the ADEA does not forbid an employer favoring older employees over younger employees. *General Dynamics Land Systems, Inc. v. Cline* (February 24, 2004).

In *Cline*, a collective-bargaining agreement between General Dynamics and the United Auto Workers eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then-current employees who were at least 50 years old. A group of employees who were at least 40 years old but under 50 brought suit, claiming that the new policy discriminated against them on the basis of their age. In other words, they claimed that they were being treated less favorably than the 50 and older employees in terms of retiree health benefits.

The United States Equal Employment Opportunities Commission (the "EEOC") and a lower court ruled that the ADEA does prohibit favoring older employees over younger (but still 40 or older) employees because the language of the statute simply prohibits discrimination "because of [an] individual's age." The EEOC concluded that because the statute's reference to "age" does not expressly refer to discrimination against older employees, the ADEA prohibits favorable treatment of older or younger employees within the protected age class.

The Supreme Court ruled that the EEOC's interpretation of the statute was "clearly wrong" based on the legislative and social history that led to passage of the ADEA. The Court noted that the studies and Congressional hearings leading up to the law's passage revealed that the effects of discrimination against older workers intensify over time. Thus, the focus of the ADEA was to prohibit employers from making job-related decisions based on the notion that productivity and competence decline with old age. Based on this history, the Court ruled that the ADEA was intended only to prohibit discrimination against older workers in favor of younger workers, and not the reverse.

The *Cline* ruling is important in that it supports an employer's ability to favor older employees over younger employees in issues such as benefits. Employers should nevertheless consult with legal counsel in establishing such policies because Wisconsin local ordinances may affect the legality of such policies.

—Jennifer S. Mirus

# MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Municipal Drinking Water Division.

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 [cbeals@boardmanlawfirm.com](mailto:cbeals@boardmanlawfirm.com).

Richard L. Bolton	283-1789	<a href="mailto:rbolton@boardmanlawfirm.com">rbolton@boardmanlawfirm.com</a>
Christopher J. Dodge	283-1777	<a href="mailto:cdodge@boardmanlawfirm.com">cdodge@boardmanlawfirm.com</a>
Anita T. Gallucci	283-1770	<a href="mailto:agallucci@boardmanlawfirm.com">agallucci@boardmanlawfirm.com</a>
Robert E. Gregg	283-1751	<a href="mailto:rgregg@boardmanlawfirm.com">rgregg@boardmanlawfirm.com</a>
Rhonda R. Hazen	283-1724	<a href="mailto:rhazen@boardmanlawfirm.com">rhazen@boardmanlawfirm.com</a>
Richard A. Heinemann	283-1706	<a href="mailto:rheinemann@boardmanlawfirm.com">rheinemann@boardmanlawfirm.com</a>
Lawrie J. Kobza	283-1788	<a href="mailto:lkobza@boardmanlawfirm.com">lkobza@boardmanlawfirm.com</a>
Richard A. Lehmann	283-1719	<a href="mailto:rlehmann@boardmanlawfirm.com">rlehmann@boardmanlawfirm.com</a>
Michael P. May	283-1737	<a href="mailto:mmay@boardmanlawfirm.com">mmay@boardmanlawfirm.com</a>
Jennifer S. Mirus	283-1799	<a href="mailto:jmirus@boardmanlawfirm.com">jmirus@boardmanlawfirm.com</a>
Jon C. Nordenberg	283-1739	<a href="mailto:jnordenberg@boardmanlawfirm.com">jnordenberg@boardmanlawfirm.com</a>
Catherine M. Rottier	283-1749	<a href="mailto:crottier@boardmanlawfirm.com">crottier@boardmanlawfirm.com</a>
Mark J. Steichen	283-1767	<a href="mailto:msteichen@boardmanlawfirm.com">msteichen@boardmanlawfirm.com</a>
Cynthia A. Van Bogaert	283-7543	<a href="mailto:cvanbog@boardmanlawfirm.com">cvanbog@boardmanlawfirm.com</a>
Matthew D. Weber	283-1744	<a href="mailto:mweber@boardmanlawfirm.com">mweber@boardmanlawfirm.com</a>
Steven C. Zach	283-1736	<a href="mailto:szach@boardmanlawfirm.com">szach@boardmanlawfirm.com</a>

*This newsletter is published and distributed for informational purposes only. It does not offer legal advice with respect to particular situations, and does not purport to be a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions.*

**BOARDMAN**<sup>LLP</sup>  
LAW • FIRM

© Copyright 2004, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED

**BOARDMAN**<sup>LLP</sup>  
LAW • FIRM

Boardman, Suhr, Curry & Field LLP  
Fourth Floor  
1 South Pinckney Street  
P.O. Box 927  
Madison, WI 53701-0927

PRRSRT STD  
U.S. Postage  
**PAID**  
Madison, WI  
Permit #1400