

IN THIS ISSUE

WISCONSIN SUPREME COURT PREVIEW

- *Supreme Court To Decide Whether Citizens Can Force Their Governing Body To Submit Major Public Works Projects to Referendum*
- *Supreme Court To Review Two Police and Fire Commission Cases*
- *Wisconsin Supreme Court to Consider A Utility's Liability Exposure in The Face of the Utility's Compliance with PSC Regulatory Orders*
- *Court Struggles to Define the Scope and Extent of Due Process Requirements in Land Use Regulation*

Wisconsin Supreme Court Preview

Welcome to the Wisconsin Supreme Court Preview edition of the *Municipal Law Newsletter*. In the coming months, the Wisconsin Supreme Court will issue opinions on a wide range of topics of interest to municipalities, including the appropriate uses of direct legislation, utilities' liability for stray voltage, due process limits

on cities' extraterritorial powers, and the powers of police and fire commissions.

This edition summarizes the pending cases and key issues to prepare you for the court's ultimate decisions. Enjoy, and watch for the outcome of these cases in future issues of the *Municipal Law Newsletter*.

Supreme Court To Decide Whether Citizens Can Force Their Governing Body To Submit Major Public Works Projects to Referendum

Oral arguments were heard on November 6, 2002 in *Mt. Horeb Community Alert, et. al v. Village Board of Mt. Horeb*. The issue before the Wisconsin Supreme Court is whether an ordinance requiring that the specific purpose, location and cost of construction projects be submitted to referendum is a proper subject of direct legislation under Wis. Stat. § 9.20(1).

The facts underlying this case involve a petition for direct legislation filed with the Village Board of Mt. Horeb under Wis. Stat. § 9.20(1) by a group of Mt. Horeb residents calling themselves Community Alert. The residents were concerned over a million dollar library project that was being considered by the Board. Community Alert's petition would require adoption of an ordinance mandating that the Village Board

submit construction projects costing at least one million dollars to the Village electors prior to beginning construction of the project.

When the Village Board took no action on its petition, Community Alert brought a writ of mandamus against the Village Board. The trial court denied the writ, concluding that the proposed ordinance conflicted with a state statute, which is one of the common law exceptions to § 9.20(1). That decision was reversed by the Court of Appeals, which concluded that the common law exceptions asserted by the Village Board were inapplicable and that, therefore, the Board should have either passed the requested direct legislation or submitted it to the electors. *Mt. Horeb Community Alert v. Village*

Supreme Court To Decide Whether Citizens Can Force Their Governing Body To Submit Major Public Works Projects to Referendum

Continued from page 1

Board of Mt. Horeb, 252 Wis.2d 713, 643 N.W.2d 186 (Ct.App. 2002)

The Board argued that Community Alert's proposed legislation violated all four common law exceptions to the § 9.20 requirement that a village board either pass requested direct legislation or submit it to the electors. Those exceptions are: (1) when the proposed direct legislation involves executive or administrative matters, rather than legislative ones; (2) when it compels the repeal of an existing ordinance or resolution, or compels the passage of an ordinance which would be in clear conflict with existing ordinances or resolutions; (3) when it seeks to exercise legislative powers not conferred on a municipality; and (4) when it would modify statutorily prescribed directives that would bind a municipality if it were attempting to legislate in the same area.

Conflict with Statutes. First, the Board argued that the proposed ordinance conflicted with certain statutes. The Court of Appeals rejected the Board's argument that the proposed ordinance modified the statutory procedures for municipal borrowing found in Chapter 67, Wis. Stats. According to the Board, the proposed ordinance amounted to an initial resolution, thereby conflicting with § 67.05, which requires that a village adopt an initial resolution authorizing the borrowing. The Court disagreed, stating "though we agree that Wis. Stat. § 67.05(2) prohibits Village electors from passing initial resolutions, Community Alert's proposed ordinance does not affect the Village's initial resolutions, or the statutory authority for them. While the Village is correct that if it adopted Community Alert's proposed ordinance, a project could be terminated before it begins, we do not see that as conflicting with a statute outlining the procedures for municipal borrowing."

Next, the court considered the Board's assertion that the proposed ordinance conflicted with the public bidding statute. The Board argued that until bids are accepted, a village will not know whether the cost of a proposed project will reach or exceed one million dollars. The Court rejected this argument, stating that it was "unrealistic" to assume that a village could have no idea of the cost of a public works project before it was bid out.

The Board also argued that proposed ordinance conflicted with Wis. Stat. § 62.15(1b), which

permits villages to avoid the public bid procedure in case of emergencies. While the Court agreed that the proposed ordinance made no provision for emergencies, it failed to see any conflict.

Administrative or Legislative. The Village next argued that Community Alert's proposed ordinance was more administrative than legislative in nature. In addressing this argument, the Court sought to determine whether the proposed ordinance made new law (a legislative function) or executed law already in existence (an administrative function). Applying this test, the Court concluded that Community Alert's proposed ordinance was legislative since the ordinance would make new law.

Repeal of Existing Ordinances. The Board asserted that Community Alert's proposed ordinance repealed existing legislation relating to the library project. However, because the Board failed to quote or cite legislation related to the library project, the Court concluded that it could not determine whether any specific Village ordinance would be repealed by the proposed ordinance. The Court clearly stated, however, that Community Alert's proposed ordinance would not be appropriate for submission to the electors if it repealed a Village ordinance.

Excess of Powers. The Board also claimed that Community Alert's proposed ordinance exercised powers outside the authority of the Village Board. The Court disagreed with the one example the Board cited related to the library project and the statutory prohibition on a village board spending money from the library fund. The Court, however, was satisfied that the substance of Community Alert's proposal exercises powers that are within Village Board authority.

Ability to Comply. The Board's last claim was that it was impossible to comply with the proposed ordinance. The Board tried to show that the proposed ordinance might result in the Village having to commit itself to a debt obligation before it had any security that the project would proceed. The Court rejected this argument, because the Board failed to explain how compliance with the proposed ordinance would be "impossible."

On concluding that Community Alert's proposed ordinance does not modify statutory procedures, is legislative in nature, does not repeal existing legislation and does not exercise powers that are outside of the authority of the Village Board, the Court reversed and remanded the case for further proceedings.

— Anita T. Gallucci

Supreme Court To Review Two Police and Fire Commission Cases

The Wisconsin Supreme Court will hear oral argument on February 12, 2003 in two cases interpreting the powers of police and fire commissions under Sec. 62.13(5). In *City of Madison vs. Department of Workforce Development* the Court will review whether a police officer or a firefighter may file a discrimination complaint with the Department of Workforce Development Equal Rights Division (“ERD”) subsequent to a Sec. 62.13(5) hearing in which a police and fire commission ordered the termination of the police officer or firefighter. In *Conway vs. Board of Police and Fire Commissioners of the City of Madison* the Supreme Court will review whether a police and fire commission may appoint a hearing examiner to conduct initial and evidentiary hearings in Sec. 62.13(5) matters for submission of findings and a recommendation to a police and fire commission.

In *City of Madison vs. DWD*, the City of Madison fire chief filed charges against a firefighter on the basis of conduct which formed the basis for a criminal conviction. The City of Madison Board of Police and Fire Commissioners (“PFC”) held a lengthy hearing and ordered the firefighter’s discharge from employment with the City of Madison. The firefighter filed a Sec. 62.13(5) appeal to the circuit court. However, the service of that appeal was defective and the circuit court dismissed the appeal, thereby affirming the firefighter’s termination. The firefighter then filed a discrimination complaint under Chapter 111, Stats., with the ERD against the City of Madison, the fire chief and the PFC. These parties filed a circuit court action seeking a Writ of Prohibition to preclude the ERD from exercising jurisdiction over the complaint on the basis that Sec. 62.13(5) appeal process is the sole and exclusive manner to challenge a firefighter’s termination. The circuit court granted the Writ of Prohibition and the case was appealed by the firefighter to the Wisconsin Court of Appeals, which reversed the circuit court’s decision.

The issue in the case is whether Sec. 62.13(5) appeals process is the exclusive means by which a police officer or firefighter can challenge a PFC’s termination order or whether public protection officers who go through the Sec. 62.13(5) process can also, at a later date, seek reinstatement by the ERD under the anti-discrimination provisions in Chapter 111. The case will provide an interesting and significant analysis of the relationship of police and fire commission powers under Sec. 62.13(5) and the ERD powers to investigate discrimination claims.

In *Conway*, the PFC adopted a rule which permitted the appointment of a hearing examiner to conduct initial evidentiary hearings consistent with processes required of the PFC in Sec. 62.13(5) hearings. The rule required the hearing examiner to submit a comprehensive report to the PFC, including an evaluation of witness credibility and demeanor and recommendations for disposition of the charges. The PFC would review the findings and record created by the hearing examiner to determine whether just cause existed under Sec. 62.13(5) to discipline the police officer or firefighter.

The fire department union filed a declaratory judgment action in the circuit court seeking to void this rule. The circuit court agreed with the union and concluded that the PFC rule was void because Sec. 62.13(5) did not authorize the PFC to delegate its powers to a hearing examiner. The PFC appealed the decision to the Wisconsin Court of Appeals which reversed the circuit court, holding that Sec. 62.13(5) does not preclude the creation of a hearing examiner process to perform initial functions of the PFC so long as the PFC officially performs the functions outlined in Sec. 62.13(5) and makes the just cause determination. That decision was appealed to the Wisconsin Supreme Court and will be subject of oral argument immediately following the *Wagner* appeal.

— Steven C. Zach

Wisconsin Supreme Court to Consider A Utility's Liability Exposure in The Face of the Utility's Compliance with PSC Regulatory Orders

In *Hoffmann v. Wisconsin Electric Power Co.*, Appeal No. 00-2703, the Wisconsin Supreme Court is to consider the liability exposure that a utility may have for stray voltage damage despite the fact that the utility's actions complied with orders of the Wisconsin Public Service Commission (PSC). The case is of interest because the Supreme Court is to determine whether a utility that has complied with administrative regulations may still be found negligent by a jury, be ordered to pay damages and be ordered to correct those parts of its system that are determined to have caused the damage.

As background to the case, Allan and Beverly Hoffmann filed an action against WEPCO in June, 1997, claiming that WEPCO was negligent when it provided electrical service to their farm. The Hoffmanns claimed that WEPCO's negligence produced "excessively high voltage" which harmed their cows. WEPCO had been providing service to the farm via an underground, bare-concentric, multi-grounded distribution cable that was buried along a road adjacent to the farm. As the Hoffmanns increased their dairy herd, they began to notice what they characterized as "erratic" cow behavior and low milk production. The Hoffmanns believed this was caused by WEPCO's system and sought monetary compensation for their damages as well as a court order directing WEPCO to abate the problem.

The case was tried to a jury in the spring of 2000. The Hoffmanns' experts testified in principal part that while no stray voltage, as the PSC defined that term, had been found, electrical currents emitted from an underground cable, like WEPCO's cable, could be emitted into the earth and could adversely affect livestock. In defense, WEPCO relied on findings that the PSC had previously made in generic stray voltage proceedings that electrical currents cannot negatively affect livestock until (1) an electrical current actually passes through the cow, and (2) the current reaches a "level of concern" of at least two milliamperes. WEPCO's case hinged on its claim that under PSC testing protocol, none of the Hoffmanns' cows were being adversely affected by the system because no

current above the level of concern actually passed through the cows.

The jury found in favor of the Hoffmanns and determined that WEPCO had been negligent in providing service to their farm. The jury awarded them \$1,241,000 in damages. In addition, the Court entered an order requiring WEPCO to correct the problem by installing an ungrounded overhead delta system.

WEPCO subsequently filed an appeal with the Wisconsin Court of Appeals, which upheld both the jury's verdict for money damages and the trial court's abatement order. The appellate court specifically rejected WEPCO's position that compliance with the PSC's stray voltage orders precluded a jury finding that WEPCO was negligent. The appellate court further determined that even if the jury's implicit factual findings of damage to the cows were in conflict with factual findings that the PSC had made in its stray voltage proceedings, the agency's factual conclusions were not binding on the jury. That is, the jury was the fact finder in the negligence trial. Finally, the appellate court upheld the lower court's abatement order requiring WEPCO to install an overhead system as an appropriate exercise of the trial court's discretion.

In May, 2002, WEPCO filed a petition for review with the Wisconsin Supreme Court. The Court granted the petition and accepted the case in June, 2002. During the briefing stage of the case, numerous entities filed *amicus curiae* briefs. The PSC and the Wisconsin Utilities Association filed briefs in support of WEPCO, and the Wisconsin Farm Bureau Federation, the Wisconsin National Farmers Organization and the Dairy Business Association filed on behalf of the farm groups. On November 6, 2002, the Supreme Court held oral argument in the case. It has not yet rendered its decision.

The case is important because if the Supreme Court upholds the two lower courts' decisions, it could mean that a utility may still be liable for civil tort damages even if the utility complies with orders of its regulating agency.

— Rhonda R. Hazen

Court Struggles to Define the Scope and Extent of Due Process Requirements in Land Use Regulation

Do towns have a constitutional right to be involved in land-use decisions by cities exercising extraterritorial powers over lands within the towns' boundaries? Surprisingly to some, this may be the key question that is decided when the Wisconsin Supreme Court issues its opinion in *Wood v. Madison* (on appeal from the Court of Appeals, District IV, Appeal No. 01-1206).

The *Wood* case has its roots in the 1992 Court of Appeals decision in *Gordie Boucher Lincoln-Mercury of Madison, Inc. v. City of Madison Plan Comm'n*, 178 Wis. 2d 74 (Ct. App. 1993). Broadly stated, the *Boucher* court held that cities may not use extraterritorial subdivision regulations (ETSR) to govern land use, but rather must use their extra-territorial zoning (ETZ) powers. The rationale for this decision is open to debate. The court's opinion expressed some concern over the procedural differences between the ETZ and ETSR statutes, noting that the ETZ statute provides at least indirect representation of town property owners in the ETZ area by requiring town representation on the Joint ETZ Committee. The ETSR statutes have no similar provisions. Accordingly, the court favored the ETZ statutes, and *Boucher* can be read as a decision grounded on the constitutional right to due process.

However, *Boucher* can also be read as being decided purely as a matter of statutory interpretation. We have two statutes allowing for extra-territorial regulation of land use, ETZ and ETSR. The Court of Appeals merely determined which statute the legislature intended to be used when particular aspects of land use are regulated, and found in favor of the ETZ statute.

Wood raises similar issues to those raised in *Boucher*. It involves an ETSR situation, where the essence of the regulatory decision dealt with adequacy of public services, not purely land use. Property owners in the town challenged the city's authority to apply its ETSR powers in this way under *Boucher*.

On appeal, the Court of Appeals decided that it no longer agreed with its *Boucher* decision and asked the Supreme Court to overturn *Boucher*. (For a full discussion of the Court of Appeals decision, see "Wisconsin Court of Appeals 'Signals Disfavor' and Asks the Supreme Court to Reverse a Prior Appeals Court Land Use Ruling," *Municipal Law Newsletter*, Vol. 7, Issue 5, May 2002, p. 5.) It characterized

Boucher as being decided on statutory interpretation grounds, and self-critiqued its *Boucher* decision by finding and focusing on a statute saying that subdivision regulations are supposed to address land use.

Attorneys for Wood, the City and most of the amici approached the case in the same vein, as a matter of statutory interpretation.

However, the Wisconsin Realtors Association filed an *amicus* brief that characterized the issue as constitutional, arguing that the Town has a constitutional right to be involved in regulation by any entity of lands in the town and that such rights indirectly protect due process rights of citizens and property owners. Unilateral extra-territorial subdivision regulation fails to provide such involvement, the Realtors Association argued.

This contradicts case law nationally that says that individuals' procedural due process rights in the enactment of ordinances and application of ordinances are "minimal." See, e.g., *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (holding that a local government could, consistent with the due process clause, make zoning decisions through referendum without holding a hearing) and *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) (discussing *Eastlake* and concluding that "the procedures 'due' in zoning cases are minimal"). The concept of the town government, which is not a party to the case, having constitutional due process rights in how other governments regulate land use in the town is even more of a stretch. See, e.g., *New Rochelle v. Town of Mamoroneck*, 111 F.Supp.2d 353 (S.D. N.Y. 2000) (rejecting a town's challenge to a neighboring municipality's extraterritorial powers, where the town claimed a constitutional right to control land use within its jurisdiction).

The Justices of the Supreme Court were clearly interested in the Due Process issues at the October 8, 2002 oral argument in *Wood*, but frustrated by the limited treatment of the issue in the briefs, most of which treated the issue as a matter of statutory interpretation. It appears likely that the Court will address its Due Process concerns in the opinion it issues in *Wood*. We will learn then whether the Wisconsin Supreme Court will follow the case law nationally on this issue, or strike out on its own.

— Richard A. Lehmann and Matthew D. Weber

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 (MEUW) 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.

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

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^{LLP}
LAW • FIRM

© Copyright 2002, Boardman, Suhr, Curry & Field LLP

Printed on Recycled Paper

ADDRESS SERVICE REQUESTED

BOARDMAN^{LLP}
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