

MUNICIPAL LAW NEWSLETTER

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Dewatering For Construction Held To Constitute Inverse Condemnation

In *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2008AP921 (decided December 23, 2008), the Court of Appeals District 1 upheld a jury verdict which found the Milwaukee Metropolitan Sewerage District liable to E-L Enterprises for inverse condemnation because the District's dewatering during construction of a sewer project drained groundwater from around the pilings supporting E-L's building. Claims that the dewatering was negligent or a nuisance were dismissed by the trial court.

The District argued that it was not liable to E-L because it did not occupy E-L's property as required by Wisconsin's inverse condemnation statute, and its diversion of ground-water was not a taking of property under Wisconsin's Constitution.

The Court rejected the District's arguments. It cited with approval the circuit court's jury instruction which stated that the government commits a taking of property for which a court may order compensation if the following three elements are present: (1) the taking must be deliberate, not accidental; (2) the property must be taken for some use that benefits the public; and (3) the property must be taken permanently. According to the trial court, E-L persuaded the jury that the District took E-L's groundwater permanently, deliberately and for a public purpose and that E-L should be compensated for the lost groundwater and the accompanying loss in property value.

In response to the District's arguments, the Court stated that an entity with the power of condemnation may occupy land without physical entrance onto that land. It also stated that there may be a taking if an entity with condemnation powers does something outside of the affected property that adversely impacts the owner's use of that property. The Court then focused on the type of damage done to the property, and whether the damage was permanent and direct, or a "mere consequential damage" which does not result in a taking. The Court was persuaded that here the damage was permanent and direct, stating that the District was aware of the concerns during dewatering and had directed its contractor to be careful to avoid damage to the buildings. The Court also stated that the public benefited from the damage caused by the taking because draining the groundwater facilitated the District's construction by safeguarding the workers and the work from water flowing into the tunnel being dug.

The Court concluded its analysis by noting that under Wisconsin case law the removal of soil providing lateral support constitutes a compensable taking, and that there was "no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same function."

E-L was entitled to recover its damages to repair the property, along with its attorney fees for the inverse condemnation litigation.

— Lawrie Kobza

Immunity Exception For Public Employees Given Broad Application in *Pries v. McMillon*

The Wisconsin Court of Appeals recently considered the circumstances in which a government employee may be liable for injuries resulting from acts performed within the scope of the employee's official duties. In *Pries v. McMillon* (2008 WI APP 167), the Court considered the application of the "known danger exception" to the general rule that public employees are immune from personal liability for injuries resulting from acts performed within the scope of their official duties. The general rule, grounded in common law, is known as "discretionary act immunity." When a public employee asserts discretionary act immunity as a defense, a court assumes negligence and focuses on whether the action or inaction upon which liability is premised is entitled to immunity.

The known danger exception to immunity applies where particularly dangerous circumstances are deemed to give rise to a ministerial duty to act. This imputed duty to act arises by virtue of particularly hazardous circumstances that are known by public employees and that are sufficiently dangerous to require an explicit, non-discretionary governmental response.

The decision in *Pries v. McMillon* does not purport to create new law. The legal standards applied are derived from well-established precedent applying the known danger exception to discretionary act immunity. The significance of the decision lies in its application of well-settled legal principles to a particular factual setting.

The Court of Appeals affirmed the trial court in *Pries v. McMillon*, which had found a State employee liable due to an applicable exception to the general rule of immunity for public employees. The Court of Appeals concluded that a ministerial duty arose because the State employee knew of a dangerous situation, thereby giving rise to a ministerial duty to ameliorate the danger.

Judge Ralph Adam Fine dissented from the majority opinion. Judge Fine accused the majority of applying the known danger exception to "run-of-the-mill negligence." According to Judge Fine, the Court of Appeals is expanding the exceptions to the general rule of governmental immunity in tort actions so that the exceptions "smother the rule." Judge Fine reasoned that the majority essentially imposes a ministerial duty to act based on the foreseeability of injury, which is no more than negligence. If negligence is enough to give rise to the known danger exception to governmental immunity, according to the dissent, then no general rule of immunity really exists.

As a practical matter, the courts will continue to apply the known danger rule on a case-by-case basis. The Court of Appeals in *Pries v. McMillon* did not purport to adopt any new legal principles, but merely considered the particular factual circumstances of the case. Considering the outcome in *Pries v. McMillon*, and other cases applying the known danger exception to governmental immunity, the obviousness of the apparent risk seems to be determining outcomes in particular cases. The more obvious the risk, even if unintentional, the more likely that courts will apply the known danger exception to government immunity. This is not a bright line test, but it appears to be the basis for distinction in reported decisions. Applied over the broad spectrum of cases involving public employees, exceptions to immunity based on patently dangerous circumstances are still likely to constitute deviations from the general rule of immunity.

— Richard L. Bolton

Health Plan Changes Must Be in Writing

A recent Seventh Circuit case emphasized that benefit plan amendments must be in writing. *Orth v. Wisconsin State Employees Union*, 07-2778 (7th Cir. 10/22/08). Orth was a participant in a welfare benefits plan subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The plan was the result of a collective bargaining agreement between the employer (Council 24 of the Wisconsin State Employees Union) and the union that represented Mr. Orth.

When Orth retired, he received retiree health insurance. He was able to use the cash value of unused sick leave toward the premiums. The collective bargaining agreement effectively provided that the employer "will pay 90% of the total premium while the employee pays 10% of the total premium." However, in practice, the plan deducted not 10% but 100% of the retired employees' health insurance premiums from the sick leave account. The union apparently knew what the plan was doing, but did not object.

The court concluded that, after looking at all the extrinsic evidence, the contract terms were unambiguous. The court discussed the fact that ERISA plans must be "maintained pursuant to a written instrument," and that only modifications in writing are enforceable. Thus, according to the court, it would seem the principle that contracts can be modified by the subsequent conduct of the parties is inapplicable to ERISA plans without a written amendment. Although the ERISA plan was created by a collective bargaining contract and such contracts can be and often are modified by a subsequent nonwritten agreement—whether express (and therefore oral) or tacit (and therefore evidenced by subsequent dealings)—between the union and the employer, the court found that a written amendment would be required for the ERISA plan. Thus, Orth was entitled to premium reimbursement.

— Cynthia A. Van Bogaert

Board of Commissioners of Public Lands Approves Record 34 Million Dollars in Loans in December

The State of Wisconsin Board of Commissioners of Public Lands ("Board") announced in December that it approved \$34 million in loans to twenty-three Wisconsin municipalities. Together with an additional \$36 million approved in November, the amount represents an agency record and exceeds the total amount in loans distributed during the prior twelve months combined.

The Board is responsible for administering the State Trust Fund Loan Program. The loans are intended to provide financing for a variety of municipal projects, including (among other things) land acquisition, rescue vehicle purchasing, rebuilding sewage lift stations and promoting economic development within a Tax Incremental Finance district.

According to a Board spokesperson, the State Trust Fund Loan Program is currently experiencing all time highs in loan applications because of the worsening financial situation and, in particular, the credit crisis that has left many municipalities looking for alternative sources of funding.

The Board was established in 1848 by the Wisconsin Constitution and was intended to accept federal land grants and managed trust funds for the benefit of public education in Wisconsin. The majority of Trust Fund assets are held in the Common School Fund, from which most state trust fund loans are issued. Ninety-five percent of the interest collected on Trust Fund loans is distributed as aid to public school libraries in the State of Wisconsin.

State Trust Fund loans are relatively easy and cost effective alternatives to conventional revenue bond financing for public purpose projects. Trust Fund loan interest rates are generally competitive and the application process is relatively straightforward. Municipalities interested in applying for such funds can request formal applications through the Board of Commissioners of Public Lands' website: <http://www.bcpl.wi.gov>. After completing the appropriate loan worksheets with assistance from Board staff, loan applications are generally mailed out to potential loan applicants within two to three days. Applicants then complete the application, take necessary formal action through their governing bodies, mail the completed and signed application following the meeting where the necessary resolution is approved, and await review by Board staff and, ultimately, Board approval. The entire process generally takes 30 to 60 days.

State Trust Fund loan applications are reviewed on a rolling basis by the Board and are generally limited to no more than five million dollars. Scheduled loan payments are typically due on March 15 of each year. Eligible applicants include Wisconsin school districts and municipalities—specifically, counties, cities, villages, towns, technical college districts, metropolitan sewage districts, town sanity districts, public inland lake protection and rehabilitation districts and drainage districts. Loans are typically used for public works projects, local economic development and school repairs and improvements, although recently loans are also being used for refinancing purposes.

— Richard A. Heinemann

SPEAKERS FORUM

February 19, 2009

Property Taking Through Eminent Domain in Wisconsin
National Business Institute
Milwaukee, WI
Mark J. Steichen

March 5-7, 2009

Fundamentals of Employee Benefits Law
American Law Institute - American Bar Association
Orlando, FL
Cynthia A. Van Bogaert

May 6, 2009

Eminent Domain Update: Are Dotty Dumpling and 'Unit Rule' Passè?
State Bar of Wisconsin Annual Convention
Milwaukee, WI
Mark J. Steichen

May 6, 2009

Public Service Commission to Municipalities & Utilities: "Cooperate"
State Bar of Wisconsin Annual Convention
Milwaukee, WI
Anita T. Gallucci

League of Wisconsin Municipalities and Alliance of Cities to Consolidate Staff

The League of Wisconsin Municipalities and the Wisconsin Alliance of Cities have jointly announced they are taking initial steps towards merging their organizations. Beginning January 1, 2009, Alliance staff will become League employees. For now the Alliance of Cities will continue to exist as a separate organization with a separate Board of Directors, but it will contract with the League for the services of its two long-time employees, Ed Huck and Rich Eggleston.

— Lawrie Kobza

Smoking Ban Excluding Private, Non-Profit Clubs Survives Equal Protection Challenge

The City of Wausau enacted an ordinance in 2005 banning smoking in restaurants. The ordinance makes certain exceptions, including for private clubs. The definition of "private clubs" requires that the establishment be "operated solely for a recreational, fraternal, social, patriotic, political, benevolent or athletic purpose but not for pecuniary gain" and that the sale of alcohol be "incidental to its operation." Such clubs must be governed by a board of directors and must have by-laws or a constitution governing its activities. The club must also have tax exempt status under section 501 of the IRS code.

Zack Jusufi operated a restaurant called the Red Apple Social Club. To enter and be served, patrons must pay a one-time \$1 fee to become members. The membership fees are donated to charity. The Club also conducts other fund raising activities for charity. While the Club had a board of directors governing its charitable activities, the Club had no control over the operation of the restaurant itself. The restaurant apparently operated for profit and did not have tax exempt status.

On two occasions, Jusufi was cited under the ordinance for allowing patrons to smoke in the restaurant. In municipal court, Jusufi moved to dismiss the citations on grounds that the ordinance denied him equal protection of the law under the U.S. and Wisconsin constitutions by distinguishing between for profit and not for profit restaurants. The municipal court denied his motion and found him guilty. He sought a new trial in circuit court, which also rejected his defense and he was again found guilty.

In a decision issued on December 2, 2008 and recommended for publication, the court of appeals affirmed the conviction. *City of Wausau v. Jusufi*, 2008 AP 1107. The court began by noting that ordinances, like statutes, are accorded a presumption of validity and that their unconstitutionality must be established beyond a reasonable doubt. Where, as here, the equal protection challenge does not involve a suspect class or a fundamental interest, the classification will be upheld if there is any rational basis for the distinction between groups.

The court of appeals had little difficulty in finding a rational basis for the ordinance's distinction between for profit and not for profit establishments. The city has an interest in protecting the greatest number of people from the dangers of exposure to smoke. Limiting the

exception to members of truly private clubs is a means of limiting the public's exposure. In addition, the requirement that the clubs have tax exempt status and that they be governed by a board of directors subject to written bylaws or a constitution helps to prevent sham clubs with minimal membership criteria designed merely to circumvent the purposes of the smoking ban.

— Mark J. Steichen

Rep. Spencer Black to Chair Assembly Natural Resources Committee

Representative Spencer Black (Madison) has been selected to serve as the Chair of the Assembly Committee on Natural Resources for the next legislative session. Rep. Black previously served as Chair of the Committee for 8 years from 1986-1994. Rep. Black has indicated in a press release that his top priorities for the Committee will be global warming and improving water quality in lakes, rivers and streams.

— Lawrie Kobza

State and Municipalities May Not Prohibit Trains from Obstructing Roads, AG Opines

In response to an inquiry from the Douglas County District Attorney, the State Attorney General has opined in an October 14, 2008 letter that state and municipal efforts to prohibit trains from obstructing roads at train crossings would likely be prohibited by federal law.

Although Wis. Stat. §192.292 provides that it is unlawful to stop any train upon or across any highway or street crossings outside of cities for longer than 10 minutes, except in case of accident, the Attorney General has opined that this statute is likely preempted by federal law. In reaching this conclusion, the Attorney General notes that virtually all anti-blocking statutes and ordinances have been held to be preempted by the Federal Railroad Safety Authorization Act.

— Lawrie Kobza

Condemnation Power Cannot Be Waived or Estopped

The state court of appeals has affirmed that the power of condemnation is inalienable and cannot be contracted away by the government, nor can it be lost by waiver or estoppel. *Andrews v. Wisconsin Public Service Corp.*, 2007 AP 2541 (Ct. App. Dec. 2, 2008)(recommended for publication).

The *Andrews* case arose out of the controversial Arrowhead-Weston high voltage electric transmission line in the northwestern corner of the state. In 2001, the Wisconsin Public Service Commission approved the construction of the new transmission line, much of which would follow existing routes for transmission lines, pipelines, railway and highway corridors. The new line crossed Andrews' property, which was already subject to a high voltage transmission line easement dating from 1972.

Wisconsin Public Service Corporation ("WPSC") filed a declaratory judgment action to determine whether its 1972 easement allowed the construction of the new line or whether WPSC would need to acquire a new easement. The court declared that the existing easement did not grant the right to build the new transmission line and WPSC then started condemnation proceedings to acquire a new easement from Andrews.

Andrews brought an action under Wis. Stat. §32.06(5) challenging WPSC's right to condemn a new easement. She argued that WPSC had lost that right through waiver or estoppel. As the basis for these claims, Andrews asserted that WPSC's prosecution of the declaratory judgment action was contrary to its statements to landowners that it would acquire new easements, negotiate in good faith, and pay fair value for the easements. The circuit court granted summary judgment in WPSC's favor dismissing the challenge.

The court of appeals began its analysis with the observation that Wisconsin has long recognized that the power of eminent domain is inalienable and cannot be abrogated by contract nor can the state surrender this power by legislative grant. Addressing the waiver argument, the court noted Andrews had offered no authority for her argument that the power could be waived and that such a rule would be inconsistent with the basic principle that the power cannot be abrogated. Turning to the estoppel defense, the court explained that there is no inconsistency in asking a court for a declaratory ruling on whether a new easement was required before starting the condemnation process to obtain a new easement. The court also reiterated its rationale for rejecting the waiver argument. Finally, the court cited authority from other states in support of its conclusion that the power of condemnation cannot be lost through estoppel.

— Mark J. Steichen

Several Recent PSC Decisions Support Water Conservation

The Public Service Commission of Wisconsin ("PSC") has issued several recent decisions approving municipal utility efforts to implement water conservation.

Approval of Toilet Rebate Program for Madison Water Utility. For the first time, the PSC has approved funding a toilet rebate program through water rates. The PSC approved the Madison Water Utility's request to offer rebates of up to \$100 as an incentive for residential customers to replace their older toilets with EPA WaterSense-labeled high efficiency toilets. Participants must be residential customers of the utility, who live in single-family homes, condos, or apartments in buildings of no larger than four units. Rebates are for replacement of existing larger-capacity toilets, and are not for new construction. Rebates are limited to one per household, and are available on a first-come, first-served basis until funding is exhausted. The PSC is allowing \$250,000 for the rebate program to be recouped through rates. The program is part of the utility's water conservation and sustainability plan to reduce per capita water usage 20 percent by the year 2020.

Approval of Conservation Water Rates For Allouez. The PSC has approved new water rates that encourage water use efficiency for the Village of Allouez. Under the new rates, residential customers will pay \$4.00 per 1,000 gallons for the first 2,000 gallons of water used each month and as much as \$7.15 per 1,000 gallons for usage over 10,000 gallons per month. The increase on an individual customer's bill will depend on their water use. The utility requested the inclining block rates to manage residential demand and to reduce peak usage associated with summertime lawn watering. The new rates are intended to discourage wasteful water uses and to mitigate the water rate increase to customers who use water more efficiently. The village has also enacted an ordinance restricting lawn watering, and it is developing a water conservation education program within the community.

Approval of Conservation Water Rates for Fitchburg. The PSC also approved new water rates that encourage water use efficiency for the City of Fitchburg. The utility requested inclining block rates to manage residential demand and to reduce peak usage associated with summertime lawn watering. Under the new rates, residential customers will a higher per-volume rate as their usage increases. In addition, the utility requested that the PSC approval a special rate for those customers who have a second meter dedicated to outdoor water use. While these customers will continue to avoid sewer charges on water used for landscaping, they will be charged a rate that reflects the actual costs of providing water for this purpose during periods of peak demand in the summer.

— Lawrie Kobza

MUNICIPAL LAW NEWSLETTER

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