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## Court of Appeals Rejects Use of "Contingent" Legal Description in Incorporation Proceedings

The Court of Appeals (District IV) has concluded that an incorporation petition is legally insufficient if it contains a contingent narrative description which would allow the boundaries of a proposed incorporation to change depending upon whether prior annexations were held to be valid or invalid. The June 12, 2003 decision entitled, *In the Matter of the Incorporation as a Village of Certain Territory in the Town of Campbell*, Appeal No. 021150, was written by Judge Roggensack (newly elected to the Wisconsin Supreme Court), and is recommended for publication.

The case involved a lengthy struggle between the City of La Crosse and the Town of Campbell over competing annexation ordinances and incorporation petitions. As the case proceeded over the course of five years, several properties moved back and forth between the City and Town. These properties were first annexed to the City. They were then returned to the Town when the circuit court struck down the annexations, and then they were sent back to the City when the Court of Appeals reversed the circuit court and upheld the annexations. Certain residents in the Town were

seeking to incorporate the entire Town during this time period, and they wished to do so without the creation of a "town remainder." In an attempt to accomplish that, the petitioners prepared a description of the territory to be incorporated which purported to incorporate the entire town, with the provisions that (1) if any parcels currently within the description were held to be valid annexations, those parcels would be deleted from the incorporation, and (2) if any parcels not currently within the description were held to be invalid annexations, those parcels would be added to the incorporation. The City contended that this incorporation petition was invalid because it contained a contingent narrative description. The circuit court agreed and dismissed the incorporation petition. The Court of Appeals affirmed.

In reaching its decision, the Court of Appeals held that a contingent narrative description is legally insufficient because it does not satisfy the statutory requirement to "describe the territory to be incorporated with sufficient accuracy to determine its location." A contingent narrative description on its face presents more than one potential location

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of the territory to be incorporated, and in order to identify the actual location of the proposed incorporation, one would have to make reference to information not present in the narrative description (in this case the annexation petitions).

The Court concluded that other statutory requirements for incorporation show that a contingent description must be invalid. First, the circuit court's and the Department of Administration's review of the petition is to be based on the facts as they existed at the time of the filing of the petition. "A change in location is a change in facts material to the petition." Second, a person can sign a petition only if he or she is an elector and owner of property within the area proposed to be incorporated. If the location of the territory changes due to a contingency, a signature may be invalid and there is no method for correcting this problem. Finally, the Court noted that when the Department reviews a petition, if it determines that the territory sought to be incorporated is problematic for one reason or another and it dismisses the petition, it can do so with the recommendation that a "new petition be submitted to include more or less territory." Section 66.0203(9)(e)3. According to the Court: "That the statutory scheme directs the department to recommend the filing of a new petition, rather than amending the narrative description of the location of the territory in a pending petition, suggests to us that the narrative description on its face must be sufficient to identify the territory at the time the incorporation petition is filed." The Court therefore concluded that an accurate location of the territory proposed to be incorporated must be apparent from the face of the petition, and that the use of a contingent description is insufficient to satisfy the statutes.

Boardman attorneys Lawrie Kobza and Mark Steichen represent the City of La Crosse with regard to the Town's incorporation proceedings.

— Lawrie J. Kobza

## U.S. Supreme Court Declares Municipalities Subject to Treble Damages Under False Claim Act

In the April, 2002 issue of the Boardman Municipal Law Newsletter (available at [boardmanlawfirm.com](http://boardmanlawfirm.com)) we reported on the split among the circuits on municipal liability for treble damages under the Federal False Claims Act ("FCA"), 31 USC Section 3729 *et. seq.* The FCA provides for suits to be brought in the name of the government by private individuals in a *qui tam* action. The current version of the FCA imposes a civil penalty of between \$5,000 and \$10,000 per false claim, plus treble the damages sustained by the government.

In the past two years, several circuits had split on the applicability of the treble damage provisions to municipalities. The third and fifth circuits had ruled that municipalities enjoyed their traditional immunity from punitive damages. *See United States ex rel. Giribaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir., 2001); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir., 2001). The Seventh Circuit held that Congress had intended the FCA to abrogate the traditional immunity. *See United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir., 2002).

The Supreme Court agreed with the result reached by the Seventh Circuit. The debate centered around whether municipalities qualified as "persons" under the Act. The Court noted that there was no question that municipalities were considered persons under the Act when it was originally adopted in 1863. In 1986, Congress amended the Act to substantially increase the penalties and damages that were available for relief. The Court acknowledged that in the *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), it had described the increased remedies as being punitive. In *Cook County v. United States*, affirming the Chandler decision, the Court backpedaled its earlier characterization. It noted that damage multipliers are necessarily punitive in that the treble damage provisions had some aspects of compensatory damages. This weakened the argument for the traditional immunity from punitive damages. Ultimately, the Court relied on the rule of statutory construction that disfavors repeals by implication to conclude that Congress had not intended to exempt municipalities from the treble damage provisions. *Cook County v. United States*, 01-1572 (U.S., 2003)

— Mark J. Steichen

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# Department's Failure to Extinguish Fire Is Not Private Nuisance

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*Section 893.80(4), Stats., protects local governments from liability for discretionary governmental acts. However, while the statute affords broad immunity from claims, it does not shield local governments from suits for private nuisance.*

See *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 441, 400 N.W.2d 493 (Ct. App. 1986).

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In a quest to find a way around the immunity granted by section 893.80, creative plaintiffs sometimes attempt to recharacterize negligence or other claims into the language of a private nuisance claim. The court of appeals dealt a blow to such efforts in *Mellenthin v. Berger*, Appeal No. 02-2524 (May 20, 2003)(recommended for publication).

The Mellenthins are farmers in Pepin County. Ten Peppin towns, including the one in which the Mellenthins' property was located, had created the Durand Rural Fire Department (Department) under section 60.55(1). In August 1999, the Mellenthins contacted Rodney Berger, a coordinator and firefighter for the Department, about a fire on their property. Berger offered to dispatch a fire truck, but the Mellenthins asked that he come to inspect the property first. Berger went to the property and found that there was a fire inside of the Mellenthins' silos that contained two-year-old feed. Berger decided that the best course of action would be to allow the fire to burn itself out, because he concluded it would be dangerous for his crew to extinguish it and because the Mellenthins' insurer would cover the loss. Two days later, the fire spread to the Mellenthins' barn, which was totally destroyed. The Mellenthins subsequently brought suit and the Department asserted that it was immune under section 893.80(4). The circuit court denied the Department's motion for summary judgment on the grounds that the Department was not entitled to immunity due to the nature of its incorporation and because disputed issues of fact existed regarding the known and compelling danger and private nuisance exceptions to immunity.

As an initial matter, the Mellenthins' argued, and the circuit court agreed, that the Department was not entitled to immunity because it was organized under

section 60.55, rather than under chapter 213. Section 893.80(4) expressly states that its immunity extends to "any volunteer fire company organized under ch. 213" but makes no reference to section 60.55. The court of appeals reversed this holding citing *Selzer v. Dresser Fire Dept.*, 141 Wis. 2d 465, 415 N.W.2d 546 (Ct. App. 1987). *Selzer* rejected disparate treatment of ch. 60 and ch. 213 fire departments.

The court of appeals also rejected the known and compelling danger argument. The Mellenthins argued that fire is inherently dangerous and required the Department to at least monitor it. However, the court held that the Department had discretion in how to handle the fire and noted that the Mellenthins' conduct early on in declining to have a fire truck sent out immediately indicated their belief that the fire would burn itself out. The court observed that a party cannot use hindsight to create a duty to act based on what ultimately occurred.

With respect to the nuisance claim, the court of appeals explained that the private nuisance doctrine in Wisconsin is traditionally applied to balance conflicting rights of landowners. In cases where governmental bodies have been held liable in private nuisance, the government owned property and was using it in a way that interfered with the rights of neighboring landowners. In the case before it, the Department had not started the fire, the fire was not on governmental property or on any other property around the Mellenthins'. Accordingly, the court held that the private nuisance doctrine was inapplicable.

This case, if published, will clarify the scope of the private nuisance exception to governmental immunity and assist municipalities to ward off negligence claims masquerading as private nuisances.

— Mark J. Steichen

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## Wardens May Hold Keys to RLUIPA in 7th Circuit

Two prisoner cases currently pending before the United States Court of Appeals for the Seventh Circuit could have significant implications for land use officials. At issue in each of the cases is the constitutionality of the Religious Land Use and Institutionalized Persons Act (“RLUIPA,” codified at 42 U.S.C. §§2000cc-2000cc-5) under the Establishment Clause of the United States Constitution. The United States District Courts for the Eastern and Western Districts of Wisconsin split over this issue. Judge Crabb, in the Western District, upheld RLUIPA. See *Charles v. Verhaagen*, 220 F.Supp.2d 955 (W.D. Wis. 2002). Judge Adelman, in the Eastern District, struck it down. See *al Ghashiyah v. Wisconsin Dept. of Corrections*, Case No. 01-C-10, decided March 4, 2003. The Seventh Circuit heard oral argument in *Charles* on May 15, 2003, and stayed all briefing in *al Ghashiyah* until the Court of Appeals rules on RLUIPA’s constitutionality in the *Charles* case. If the Court of Appeals declares RLUIPA unconstitutional in the prison context, it may ultimately hold RLUIPA unconstitutional in the land use context as well.

Since Congress enacted RLUIPA in 2000, local governments across the country have been barraged by suits and threats of suits under the Act. RLUIPA prohibits local governments from enforcing land use regulations in a manner that imposes a substantial burden on the religious exercise of persons or institutions, unless the government can demonstrate that the regulations further a compelling governmental interest and are the least restrictive means of doing so. This standard applies even where the land use regulations at issue -- such as parking requirements or noise restrictions -- apply equally to religious and non-religious land uses. Consequently, routine permit decisions and zoning enforcement actions are frequently challenged on RLUIPA grounds when religious activities are involved. Local officials must decide whether to accommodate otherwise objectionable land uses or invest the time and resources necessary to defend a RLUIPA claim. The fact that successful RLUIPA plaintiffs may be entitled to attorneys fees raises the stakes even higher.

Prison officials face similar challenges. The “other half” of RLUIPA (the half not often discussed in land use circles) bars prison officials from enforcing regulations that impose a substantial burden on prisoners’ religious freedom, unless the officials can show that the regulations further a compelling governmental interest and are the least restrictive means of doing so. As in the land use context, RLUIPA has given rise to numerous challenges to regulations that prisoners find objectionable.

In both *Charles* and *al Ghashiyah*, the prisoners alleged that prison rules and practices interfered with the prisoners’ practice of the Islamic faith in violation of RLUIPA. They demanded access to Islamic prayer oils, candles, and religious talismans, sought certain religious dietary accommodations, and challenged a rule preventing prisoners from celebrating more than one annual religious feast. In response, prison officials challenged the constitutionality of RLUIPA under the Establishment Clause of the United States Constitution.

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” To survive an Establishment Clause challenge, a statute must satisfy three requirements: (1) it must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) it must not lead to excessive governmental entanglement in religion. Judge Crabb in *Charles* considered RLUIPA under the second prong of this test, and held that it passed. Judge Adelman in *al Ghashiyah* considered RLUIPA under the second and third prongs of this test, and held that it failed. The contrasting reasons for their decisions are instructive.

The defendants in *Charles* argued that RLUIPA had the effect of advancing religion because the accommodations RLUIPA requires amount to a subsidy for religion and a burden on the nonreligious. They observed that in the closed environment of a correctional institution, making accommodations for one prisoner almost necessarily means that other prisoners or prison officials will be burdened. However, Judge Crabb found that the burdens imposed to make the requested accommodations were not sufficiently significant to render the Act unconstitutional. She contrasted the incidental cost

on taxpayers of accommodating the prisoners with the significant and direct subsidy in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), in which the Supreme Court struck down a sales tax exemption for religious periodicals. Consequently, Judge Crabb concluded that RLUIPA did not violate the second prong of the test outlined above.

In reaching the opposite conclusion, Judge Adelman in *al Ghashiyah* focused more on the special benefits religious prisoners receive under RLUIPA, rather than the burdens the Act places on others. He noted that nonreligious prisoners will observe the benefits that their religious counterparts receive and “will know what they have to do so that they, too, can benefit from the softer rules: become religious.” *Slip Op.* at 23-24. Consequently, Judge Adelman found that RLUIPA has the effect of promoting religion in prisons.

Judge Adelman also found that RLUIPA leads to excessive governmental entanglement with religion. He observed that the Act requires prison officials to become familiar with all of the varied religious practices of their inmates, so that the officials can be in a position to accommodate them. Officials must also judge whether a prisoner holds a sincere belief in a religion. Prisoners with such beliefs must be accommodated, but not those without such beliefs. Judge Adelman observed that “this entanglement is not only excessive, it is unworkable.”

If the Seventh Circuit strikes down RLUIPA in *Charles* or *al Ghashiyah*, its ruling could carry over to the land use context. As in *al Ghashiyah*, nonreligious applicants for land use permits may be encouraged to “find religion” in order to receive the more lenient treatment often accorded to their religious counterparts under RLUIPA. Similarly, RLUIPA requires local officials to become familiar with the religious practices of their citizenry in order to know how and when to accommodate them. Consequently, RLUIPA could be struck down in a land use case on the same grounds that Judge Adelman struck it down in *al Ghashiyah*. Of course, it remains to be seen whether *al Ghashiyah* will survive appellate review.

— Dick Lehmann and Matt Weber

## Utility Holding Company Act Upheld

On May 29, 2003, the United States Court of Appeals for the Seventh Circuit largely upheld the Wisconsin Utility Holding Company Act (WUHCA) against a constitutional challenge from Alliant Energy and Wisconsin Power and Light Company (Alliant) (Case No. 02-2618).

The decision was immediately hailed by the Public Service Commission of Wisconsin (PSC), the Wisconsin Department of Justice (DOJ), consumer groups and municipal utilities as an important victory for consumers. Municipally-owned electric utilities had opposed Alliant’s attempt to have the Act declared unconstitutional.

Alliant had sought to overturn a number of provisions in the WUHCA and related Wisconsin public utility law. In particular, Alliant sought to overturn the provisions in state law that a utility operating within the state must be a Wisconsin corporation, that a public utility holding company must be incorporated in Wisconsin, the WUHCA asset cap restrictions on investing in non-utility property, and WUHCA provisions that would require PSC approval before any party may purchase 10% or more of the stock of a holding company and before the holding company may issue securities. Alliant challenged these provisions on the ground that they unreasonably restricted interstate commerce and thus violated the Commerce Clause of the federal Constitution. The DOJ defended the statute.

In a unanimous decision, the Seventh Circuit found that all of the restrictions were valid except for the provision requiring the utility holding company to incorporate in Wisconsin. The loss of that provision in the Act is not as critical, since the other consumer protections (asset cap restriction, approval of securities sales) and the provision on incorporation of actual utilities providing service within the state all remain.

The decision by the Seventh Circuit Court of Appeals follows annual meetings of shareholders for Alliant, during which there were public statements by some Alliant shareholders of dissatisfaction with the company’s financial performance over the last year.

— Michael P. May

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# No Municipal Liability for Overwhelmed Storm Sewers

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*On June 11, 2001, an extraordinary rainstorm hit the City of Appleton. At its peak intensity, two inches of rain fell in ten minutes. The City's stormwater system was overwhelmed.*

*The pressure in the system caused a 24-foot geyser to erupt from a vertical storm sewer drain pipe located up a hill from the Welches' house. The geyser lasted approximately 30 minutes. During that time, the water it discharged pooled against the foundation of the Welches' home, causing it to collapse. The damage was irreparable and the house was ultimately demolished.*

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Following the storm, the City evaluated the sewer system. It found no obstructions and all mechanical components were in working order. The City relocated the drain to an area of lower elevation than the home.

The Welches sued the City, alleging that the sewer constituted a private nuisance. See *Welch v. City of Appleton*, Appeal No. 02-3259-FT, decided May 28, 2003. They pursued this theory over other possible tort claims (such as negligence) because the sovereign immunity doctrine does not shield a municipality from liability for a nuisance claim, even where the claim of nuisance is based on a City's alleged negligence. Thus, a plaintiff may prevail on a nuisance claim by showing that a defendant's "negligent, reckless, or ultrahazardous conduct" caused an invasion of the plaintiff's property. *Slip Op.* at ¶ 9. The Welches attempted to meet this standard by showing that the City (1) negligently operated and failed to maintain an adequate sewer system or (2) by its actions unreasonably and substantially interfered with the Welches' comfortable life, health, or safety. *Id.* at ¶ 10. The trial court rejected both arguments, and the Court of Appeal affirmed.

## **Negligent Operation and Maintenance**

The Welches' negligent operation and maintenance theory failed due to a lack of proof. The Welches submitted the affidavit of an expert to show that flooding from the system was predictable because the system was designed for a ten-year event at best. The expert also opined that the pipe in the Welches' yard could have been capped or relocated, or a safety valve could have been added, in order to prevent the pooling of water at the foundation of the

Welches' home. The City's failure to address these issues, the Welches argued, constituted negligence.

That may be the case, the Court of Appeals effectively stated, but it constitutes the wrong kind of negligence. The evidence submitted by the Welches tended to show negligence in the *design* of the sewer system, but it did not show negligence in the *operation and maintenance* of the system. Design decisions are discretionary acts for which municipal governments are immune from suit -- even where the system is poorly designed. *Id.* at ¶ 13.

To demonstrate negligent operation and maintenance, a plaintiff must show that "the system itself failed due to negligence." *Id.* at ¶ 12. The Welches could make no such showing, as the sewer and its pumps functioned normally throughout the storm. As the Court explained, "The system's problem was not mechanical. Rather, it was simply unable to keep pace with the extraordinary rainfall." *Id.* Consequently, the Court found that the Welches could not prevail on their nuisance claim to the extent they attempted to show that the City negligently operated or maintained the sewer system. They simply lacked the evidentiary basis for making such a case.

## **Unreasonable or Substantial Interference**

The Welches also failed to show that the City was liable for causing an unreasonable or substantial interference with the comfortable enjoyment of the Welches' life, health, or safety. Prior case law had established that to prevail on such a claim, the Welches had to show that this was a "collected water" case rather than an "exceeding the capacity" case. Prior "collected water" cases generally involved

flood waters that were diverted from a sewer system onto private property, while “exceeding the capacity” cases involved sewers that were “simply incapable of draining all the water from the ground surface, leaving the surface water to cause damage.” *Id.* at ¶ 16. Thus, the Welches argued this was a “collected water” case because the City’s sewer system collected the surface water and then discharged it onto the Welches’ property. The Court of Appeals disagreed.

Its analysis of the “collected water” cases led it to conclude that *regular* discharge of water on to private property is one of the defining features of such cases. *Compare Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis.2d 431, 400 N.W.2d 493 (Ct. App. 1986) (city liable where storm system collected rain water and discharged it through a culvert onto private property, causing erosion), with *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996) (city not liable where unprecedented rainfall caused sewage to back-up into a residence on two occasions). Thus, it held that “for there to be a collected water case, there must be an element to the design of the sewer, either intentionally or negligently included, that regularly diverts the sewer’s water load to a resident’s private property.” Because that design element did not exist in *Welch*, the Court found in favor of the City.

### **Conclusion**

The *Welch* decision strongly favors municipalities. It is often impractical or fiscally impossible to build a storm water system to address truly extraordinary rainfall events -- the 100 year flood. *Welch* shields municipalities from liability for deciding to build a smaller-capacity storm water system, provided the system operates effectively for ordinary rainfall events, and does not regularly discharge water onto private property. The *Welch* decision has been recommended for publication.

— Dick Lehmann and Matt Weber

## **Court of Appeals Strikes Down Village’s Attempt to Repeal and Reannex Property Previously Annexed**

In *Town of Windsor v. Village of DeForest*, the Court of Appeals (District IV) held that a municipality may not “correct” an earlier annexation ordinance with a subsequent ordinance to repeal and reenact the earlier annexation. The Court’s May 22, 2003 decision in Appeal No. 02-0281 was written by Judge Roggensack and is recommended for publication.

De Forest enacted an annexation ordinance to annex approximately 2100 acres of land located partly in the Town of Windsor and partly in the Town of Burke. Windsor and Burke challenged the validity of the annexation. Two weeks later, the original parties who sought the annexation began another annexation process which included the same 2100 acres previously annexed plus an additional 100 acres of land. DeForest enacted a subsequent annexation that purported to repeal the prior ordinance and re-annex the 2100 acres earlier annexed, plus an additional one hundred acres. Windsor and Burke challenged this the second annexation arguing that De Forest could not annex property previously annexed. The circuit court agreed, and the Court of Appeals has affirmed.

In reaching its conclusion, the Court noted that according to the statutes, an “annexation is effective upon enactment of the annexation ordinance,” and, it is well settled that an annexation ordinance continues in effect until declared invalid by a court. Since the first annexation ordinance is presumed valid until declared invalid by a court, the 2100 acres was within the DeForest, and was not eligible for annexation under the direct annexation process of §66.0217. The Court held that under the unambiguous statutory scheme set out by §66.0217, DeForest may not repeal an annexing ordinance already in effect by enacting a correcting ordinance.

The Court also held that its decision is consistent with statutory provisions regarding the right to contest the validity of an annexation. The Court said that to permit DeForest to correct mistakes in its annexation ordinance by re-enacting correcting ordinances would impinge upon Windsor and Burke's right to contest the validity of the annexation ordinance in a timely fashion. If DeForest could enact correcting ordinances, it could annex the property with the ordinance first in place, while successfully preventing a challenge to the validity of the annexation due to the continuing passage of new ordinances affecting the same territory.

— Lawrie J. Kobza

# MUNICIPAL LAW NEWSLETTER

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