

## IN THIS ISSUE

- *Federal Court Upholds Local Regulation of AT&T's Video Programming Service*
- *New Notice Requirements for Some Zoning and Plan Enactments*
- *New Limitations on Impact Fees*
- *Tips for Serving Notice of Claim Denials*

## Federal Court Upholds Local Regulation of AT&T's Video Programming Service

A United States District Court in California recently dismissed a lawsuit filed by Pacific Bell Telephone Co. ("AT&T") against a municipality that imposed a franchise condition on the telephone company's plan to provide Internet-based video programming. *See Pacific Bell Telephone Co. v. The City of Walnut Creek*, No. C-05-4723 MMC (N.D. Cal. April 13, 2006). In doing so, the court made clear that federal law would not preclude local authorities from regulating AT&T's video programming service.

AT&T's suit against the City of Walnut Creek ("City") arose as the telephone company began its launch of Project Lightspeed, a plan through which AT&T intends to upgrade its telecommunications network to offer video service to customers through DSL phone connections and high speed broadband. The City was willing to grant AT&T a permit to perform the upgrades, but conditioned the grant on AT&T obtaining a cable TV franchise before providing the video programming service. As a result of the franchise condition, AT&T halted its upgrade activities and filed the federal action against the City claiming that the franchise requirement violated Section 253 of the federal Telecommunications Act of 1996 ("TCA"), that it was preempted by the federal Communications Act of 1934 ("Cable Act"), and that it violated the United States Constitution and California state law.

In an April 13 Order, the court granted the City's motion to dismiss each of AT&T's claims. In doing so, the court first rejected AT&T's allegation that the franchise requirement violated the TCA's prohibition of local regulations that "prohibit or have the effect of prohibiting the ability of any entity

to provide . . . telecommunications service." AT&T conceded that its planned video services are not "telecommunications service[s]," and since the company could not show how its provision of telecommunication services was affected by having to obtain a cable TV franchise, the court concluded there was no violation of the TCA.

The court also rejected AT&T's claim that the franchise condition was preempted by the federal Cable Act, which requires "cable operator[s]" to obtain a franchise before providing "cable service." AT&T argued that its video service is not a cable service, and that the City could therefore not impose a franchise requirement on it. The court was unable to determine whether the planned video service would meet the Cable Act's "cable service" definition, but determined that it did not need to decide that issue. Rather, the court accepted the City's argument, that even if AT&T's video programming is not a "cable service," the Cable Act would not preclude its local regulation. The court stated: "AT&T has not demonstrated that local governments are precluded under the Cable Act from imposing franchise conditions on AT&T. . . . If AT&T is a cable operator, the Cable Act itself requires it to obtain a cable franchise. . . . If AT&T is not a cable operator, nothing in the Cable Act bars local authorities from imposing franchise requirements on AT&T's provision of non-cable video programming."

The court ultimately dismissed each of AT&T's claims against the City, concluding that the company's remaining allegations were either novel state law claims better left to a state court or were not cognizable claims for relief.

The *City of Walnut Creek* case is one of five lawsuits that AT&T has recently filed against municipalities seeking to

---

# New Notice Requirements for Some Zoning and Plan Enactments

Zoning jurisdictions now must sort out which new zoning ordinances or amendments to existing zoning ordinances “have the effect of changing the allowable use” of any property within the boundaries of the municipality or county. See 2005 Wisconsin Act 208, effective April 11, 2006.

Such enactments/amendments must have a public hearing preceeded by a class two hearing notice. What is added to the notice requirement by Act 208 is the need for the notices to include a map showing all properties whose allowable uses will be changed or a description of the properties whose uses will be changed and a statement that a map may be obtained from the governing body that will consider the enactment or amendment. (We use the word “notices” in this article, since all notices covered are class two notices under Chapter 985 of the Statutes.)

There are a number of questions raised by the new Act, including the following:

1. Does an amendment has to be parcel specific to be covered? The answer is, probably not. Thus, a text amendment that adds or deletes a particular use in a zoning district arguably changes the allowable uses for all lands within that zoning district. But, will a text amendment that changes one or more uses listed for that district from permitted uses to conditional uses, or vice versa, fall under the Act? This amendment changes the circumstances under which the uses will or may be allowed, rather than whether the uses are potentially allowable.
2. As the amendment affects town, village and city zoning, the Act says the map must be available from the Town Board, the Village Board or the City Council.

---

## Federal Court Upholds Local Regulation of AT&T's Video Programming Service

*Continued from front page*

impose franchise requirements on the company's upgrade plans for its Project Lightspeed. The court's decision is important because it leaves to state and local authorities the decision of whether to require franchises from entities seeking to provide video services. However, regardless of how the issue is resolved in the court system, pending federal legislation may ultimately further AT&T's efforts. That is, at the same time that AT&T is battling franchise requirements in the courts, the Senate and the House are considering passing legislation that could either provide for national franchises or streamlined local franchises.

— Rhonda R. Hazen & Anita Gallucci

To be safe, municipalities and towns should consider a resolution designating the municipal clerk as agent for the governing body for purposes of distributing the maps.

3. The new Act calls for a “description of the property” in lieu of the map for notices. It does not say a “legal description,” suggesting that a mailing address or tax parcel number may be sufficient.
4. The new Act does not address the consequences of an amendment that affects allowable uses of a property or properties when no property description appears in the hearing notice. Does this deficiency invalidate the amendment?

Quite possibly it does, under the implications of cases such as *Glouderman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864 (Ct. App. 1988), which said: “...notice and hearing provisions ... (are) intertwined with due process considerations and thus... (are) matters primarily of state concern... (and cannot be waived even by a municipal charter ordinance), and *Oliveria v. City of Milwaukee*, 242 Wis.2d 1, 624 N.W.2d 117 (2001), which said: “The statutory notice and hearing requirements regarding proposed zoning amendments implicate due process concerns because property rights are affected....” After making that statement in the *Olveria* case, the Court noted that the amendments that were not properly noticed were “not substantial” and, therefore, the deficiency in notice did not warrant invalidation of the amendment.

Arguably, the 2005 Wisconsin Legislature has taken a stand that any amendment that affects in any way the permissible uses of a property requires that the property be identified in the hearing notices.

Another question is what happens if the notices do not include the map or the property descriptions, the hearing proceeds, and all or most of the affected property owners attend and are allowed to speak. Does this “cure” the defect under a “no harm, no foul” philosophy? Case law suggests that that philosophy can determine the outcome of a failure to comply with an ordinance imposed notice requirement, but not a statutory notice requirement. *Step Now Citizens Group v. Town of Utica*, 264 Wis.2d 662, 663 N.W.2d 833 (Ct. App. 2003).

Act 208 also provides that every zoning jurisdiction shall maintain a list of all persons who request in writing to be receive individual notice of all zoning changes affecting lands owned by the requester. The notice must include the ordinance or amendment. The same thing is true for adoptions or amendments to comprehensive plans. The municipality can charge the costs of sending the notices to persons on the list. The notices can be mailed or sent by some other method agreed to by the requester and the municipality. Here, however, failure to send a notice to a requester does not invalidate the zoning ordinance or amendment. Unless it can be shown that the failure to provide the notice was “intentional.”

— Richard A. Lehmann

## New Limitations on Impact Fees

The Impact Fee statute was amended to require impact fee revenues to be spent within 7 years of collection. The 7-year period can be extended to 10 years for extenuating circumstances or hardship. A municipality that does not spend the impact fees collected within this seven-year period must refund the unspent fee revenues to the then-current owner of the property for which the fee was paid. This new requirement applies to fees under ordinances in place on April 11, 2006. The new law is 2005 Wisconsin Act 203.

The basic provisions of the new law were reported in the May 2006 issue of this newsletter. This article focuses on those public improvements with cycles of planning and project development exceeding 7-10 years in length and examines how the new law applies to those improvements.

The answer to this question depends upon whether a municipality can charge impact fees to pay for growth capacity built into facilities existing at the time the impact fee is collected, or whether a municipality is limited to charging impact fees to just new facilities.

If a municipality is limited to charging impact fees to just new facilities, that would mean that only the homes, businesses, and other new developments that receive permits and pay impact fees within 7-10 years before a project is built would pay impact fees toward the project. Once the new facilities were built, new users would be able to immediately use the growth capacity built into the now existing facilities and not be required to pay impact fees. This would result in differential treatment between users, and even more unfairly, would result in the users who were able to use the growth capacity built into existing municipal facilities immediately paying less than the users who had to wait to have facilities built to serve them.

If the impact fee law is interpreted to allow a municipality to charge impact fees to pay for growth capacity built into facilities existing at the time the impact fee is collected, the problems arising from the 7-10 year limitation period are lessened. If impact fees were collected in 2010 for a project built in 1998 that included capacity for growth over, say a 20-year period, there would likely still be unpaid bills, in the form of debt service, for the growth capacity built into the project. Impact fees collected in 2010 would be immediately invested in the capital cost of the growth component of the project by payment toward the principal portion of the debt service. In this way, a municipality could ensure that impact fees collected would be spent within the 7-10 year period.

Whether a municipality may use impact fees to pay for growth capacity built into facilities existing at the time the impact fee is collected is not a question that has been addressed in any court case. There are arguments supporting both interpretations of the impact fee law. However, if a court would interpret the impact fee law as allowing a municipality to pay for growth capacity built into existing facilities, this would be a way to retain the ability to do impact fees fairly for municipal projects with capacity increments greater than 7-10 years.

— Richard Lehmann & Lawrie Kobza

## Tips for Serving Notice of Claim Denials

Section 893.80, Stats, requires that a person file a notice of claim with a municipality as a precondition to filing suit. If the municipality takes no action, the claim is deemed denied after 120 days. The claimant may then bring suit and is subject to whatever statute of limitations would apply to the underlying claim. However, if the municipality serves a written denial of the claim in the manner required by statute, section 893.80 imposes a 6-month limitation on filing a lawsuit based on the claim.

Because of the short time limit established by a written disallowance of the claim, the courts enforce strict compliance with the statutory requirements for serving notice. The statute itself provides that: "Notice of disallowance . . . shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service." Wis. Stat. § 893.80(1g).

In *Cary v. City of Madison*, 203 Wis. 2d 261, 264, 551 N.W.2d 596 (Ct. App. 1996), the court held that service of the notice of disallowance on the claimant's attorney, rather than the claimant, did not trigger the running of the 6-month limitation. In *Humphrey v. Elk Creek Lake Protection and Rehabilitation District*, 172 Wis. 2d 397, 403, 493 N.W.2d 241 (Ct. App. 1992), five couples served notices of claim on the district. The notice of disallowance was served on all five couples, but only stated that one couple's claim had been denied. The notice was held insufficient to bind the other four couples. In a recent decision, the court of appeals lays out the exact procedures that should be used in mailing the notice of disallowance to ensure that the 6-month limitation applies.

In *Pool v. City of Sheboygan*, 2005AP2028 (Dist. II, May 3, 2006) (recommended for publication), the city served its notice of disallowance by certified mail at the claimant's address. However, the claimant's adult daughter received the notice and signed the certified mail receipt. The claimant then sued more than 6 months later. The circuit court granted the city's motion to dismiss, holding that the claimant's actual knowledge of the disallowance was sufficient. The court of appeals reversed. One judge concurred in part and dissented in part. The majority held that service was made on the claimant's daughter, not on the claimant himself. Therefore, the city did not strictly comply with the statute. Judge Snyder concurred in the result, but disagreed as to the rationale. He concluded that service was defective, but only because the receipt was not signed by the claimant, as expressly required by statute. The majority disagreed, stating that return of the receipt signed by the claimant was only conclusive "proof of service" in the words of the statute, but not a prerequisite for effective service.

Regardless of whether the majority or minor rationale is more convincing, the simple lesson to be drawn from both is that a notice of disallowance should be served preferably by registered mail, which requires the signature of the addressee. If the claimant does not sign a receipt for the letter, the return of the letter is sufficient proof of service. As the decision explains in detail, if certified mail is used, the municipality should pay the small additional fees and fill out the paperwork to request a "return receipt" and "restricted delivery", which means that only the addressee is allowed to sign. This procedure will provide conclusive proof of proper service on the claimant. The small difference in cost is more than made up by the savings in litigation expenses to fight over service issues.

— Mark J. Steichen

# 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>
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>
William R. Peck	283-1732	<a href="mailto:wpeck@boardmanlawfirm.com">wpeck@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>
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 2006, 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