

MUNICIPAL LAW NEWSLETTER

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Governor's Budget Reform Bill Targets Municipalities

To address a \$1.1 billion deficit in the state budget, Governor McCallum's Budget Reform Bill takes aim at municipal spending. Under the Governor's proposal, shared revenue payments to local governments would be phased out over three years. Such payments would be reduced by \$350 million in 2002 and by \$360 million in 2003. Shared revenue payments would be reduced to zero in 2004.

Under the bill's aid reduction formula, each municipality can expect to receive \$39.21 per person less in shared revenue payments in each of the next two years. If a municipality currently receives less than this amount, its share revenue payments will be reduced to zero in 2002. In 2002 and 2003, a portion of the shared revenue payments will come from the permanent endowment fund, which consists of all the proceeds for the sale of the state's right to receive payments under the Tobacco Settlement Agreement of 1998 and all investment earnings on those proceeds.

The proposal has angered municipalities throughout the state because of the tremendous negative fiscal impact the proposal will have on municipalities and because of the Governor's characterization of municipalities as "big spenders." Green Bay Mayor Paul Jadin reportedly called the proposal "the most significant issue that has ever faced local government." *Legislators Hear Cutback Woes, Green Bay News Chronicle* (February 12, 2002). He estimated that Green Bay would have to cut \$22 million from its annual budget by 2004 under the

Governor's proposal. "You cannot mathematically eliminate that amount of money without eliminating police, fire and public works," he said. "And to hear we have to do this without cutting those suggests that we don't know our own budget. It seems like [the Governor] picked on the easiest prey. But we are coming together and we will show that we aren't."

The Governor's proposal would also restrict the ability of municipalities to make up for the reduction in shared revenue payments by raising taxes. The bill provides that no municipality whose total levy rate is at least one mill (\$1 per \$1,000 of value) may annually increase its operating levy by a percentage that exceeds the rate of inflation and population growth in the municipality. The levy limit may be exceeded only if the governing body of the municipality adopts a resolution to do so, and the resolution is approved in a referendum election. However, it appears that a municipality's ability to issue general obligation or revenue bonds will be unaffected.

The Governor's proposal would also eliminate the incentive for municipalities to host new power plants. Included in the shared revenue payments are payments municipalities receive for having qualified utility property (e.g., privately owned power plants) located within their boundaries. In 2001, municipalities received \$13.9 million in such shared revenue payments. As with the other shared revenue payments, these payments will also be reduced over the next two years and eliminated in 2004. — Anita T. Gallucci

New Bankruptcy Decision Denies Retroactive Application of Tax Roll Lien on Utility Arrearages

A recent Wisconsin federal bankruptcy proceeding has clarified the issue of when the statutory lien for delinquent utility charges arises. The case, *United States Leather, Inc. v. City of Milwaukee*, 271 B.R. 306 (Bankr. E.D. Wisconsin, 2001), involved a chapter 11 reorganization petition filed on February 22, 2000. The debtor-business had incurred over two hundred thousand dollars in unpaid charges for water and sewer use from the City of Milwaukee prior to the petition date. Pursuant to section 66.069(1)(b), the City placed the charges on its combined property tax bill for calendar year 2000 on November 1, 2000. The debtor then commenced a proceeding for declaratory judgment that the unpaid utility charges were unsecured claims that could be avoided under the applicable bankruptcy laws. The City objected on the grounds that the charges were perfected as of the petition date and should thus be treated as secured claims. The bankruptcy judge agreed with the debtor.

According to the judge, the statutory lien on unpaid utility charges does not arise until after the service is provided, the charges remain unpaid, notice is given, and the comptroller places the charges on the tax roll. The judge found that the statutes do not provide for retroactive application of the lien, thereby rejecting the City's argument that the statutory language indicates that utility charges are a lien when they are incurred (*i.e.* when the service is provided), but become a tax when they are entered on the tax roll, entitled to the same retroactive perfection as other property taxes.

In so finding, the judge distinguished treatment of utility arrearages from that of real estate taxes more generally. Section 70.01, Wis. Stats., explicitly states that real estate taxes are a lien upon the property to which they are charged when they are levied and further provides that the lien is generally superior to all other liens and that it is retroactively effective to January 1 in the year they are levied. In contrast, section 66.069(1)(b) (since renumbered as section 66.0809) provides for notice and penalty of unpaid water charges and states that "thereafter, the same will be levied as a tax against the lot or parcel of real estate to which utility service was furnished . . . [and] shall thereupon become a lien . . ." (emphasis added by the judge). The judge then reasoned that such a plain language construction was not inconsistent with other relevant statutory provisions.

The decision is limited to treatment of prepetition charges. Utilities are still entitled under the bankruptcy laws to assurance of postpetition payment, as well as to offset rights. Thus utilities may wish to review their policies regarding customer deposits and guarantees for new customer accounts.

—Richard A. Heinemann

WPL Water Rates at Issue in Beloit

The City of Beloit is contesting a proposed water rate increase by Wisconsin Power and Light Company at the Public Service Commission of Wisconsin (PSC). Beloit is one of the few municipalities in the state that is served by a private water utility, as opposed to a municipally-owned utility.

WPL has proposed a 44% rate increase for Beloit, which translates into an annual increase of \$1,589,000. The Company has proposed that the new rates take effect on April 14, 2002. The hearing date at the Public Service Commission for the rate increase is April 2, 2002. A hearing on the Company's request for interim rate relief (*i.e.*, an increase, subject to refund, pending the PSC's final order on the rate request) was held on February 22, 2002.

The WPL increase is part of a case involving requested increases in electric, natural gas and water rates, and is being contested by a number of customer groups, including the Citizens Utility Board.

— Michael P. May

Wisconsin Municipals Fight Alliant Electric Rate Increase

Municipal electric utilities in Wisconsin are opposing a proposed electric rate increase by Alliant-Wisconsin Power and Light Company (WPL). The opposition has already met with some success, reducing the proposed increase by over 50%.

WPL's rates to municipalities owning their electric utilities are regulated by the Federal Energy Regulatory Commission (FERC) in Washington, D.C. Wisconsin Public Power Inc. (WPPI) purchases from WPL for a number of its members in the WPL territory. Other individual municipalities purchasing from WPL comprise the Municipal Wholesale Power Group (MWPG).

On December 4, 2001, WPL proposed increasing the rates to the MWPG by approximately 20%, nearly \$12 million annually. The proposed increase for WPPI was about 15%, over \$2 million annually. WPPI and the MWPG intervened at the FERC and argued that the rate increase was excessive and contrary to power supply agreements in place with WPL.

In January, 2002, WPL took the rare step of actually withdrawing its proposed increase. Alliant then re-filed in February, seeking an increase of about 10% or \$5.5 million annually from the MWPG, and 5%, or \$700,000 annually from WPPI. Thus, the interventions by the municipals have already saved their customers over \$8 million annually.

The Wisconsin municipals intend to intervene and continue to contest the Alliant rate increase.

— Michael P. May

SPEAKERS FORUM

March 7, 2002

2002 Common Employment Law Mistakes - Wisconsin Independent Insurance Agencies Conference - Middleton, WI

Robert E. Gregg

April 5, 2002

PEG Access Management - Wisconsin Association of PEG Access Channels Wisconsin Dells, WI - Anita T. Gallucci

April 9, 2002

Day on FMLA - Society of Human Resource Managers - Madison, WI

Robert E. Gregg and Jennifer S. Mirus

Federal Court of Appeals Rejects Takings Case for Failure To Exhaust State Remedy

In a case illustrating a national trend of federal courts not wanting to decide routine takings cases against local governments, the United States Court of Appeals for the Seventh Circuit upheld rejection by the United States District Court for Eastern Wisconsin of a takings case involving a special assessment.

The developer of a condominium project in the Village of Nashota (Waukesha County) entered into a developer's agreement with the Village in 1997. One point in the agreement was a promise to pay the Village \$137,000 in reserve capacity assessments for a 1980 wastewater collection project. However, the Village had collected enough assessment revenue by 1996 to pay off all debt on that project. The developer paid the assessment and then filed suit in State court to recover the payment. The suit was filed 19 months after the developer's agreement gave the developer notice of the assessment.

The suit was framed as a takings claim under the United States and Wisconsin Constitutions, likely in order to come under more liberal statutes of limitation than apply to state law certiorari appeals, as well as perhaps to take advantage of attorneys fee-shifting provisions. The Village removed the case to the District Court.

That court classified the payment demand as a special assessment under Wisconsin Statutes sec. 66.0703, formerly sec. 66.60. The court then said that the developer had not pursued the adequate remedy it was provided under state law, namely sec. 66.0703(12), Wis. Stats. That statute provides that an appeal of a special assessment must be filed within 90 days in the circuit court of the county in which the property is situated.

The Federal Court of Appeals held that, although the developer did not acquire the property until 1997, after the special assessment was first levied, it had notice of the assessment when it entered into the developer's agreement with the Village. Because the Court found section 66.0703(12) to be an adequate remedy, the Court of Appeals dismissed the case, leaving the developer without any remedy.

An underlying issue in the case, but not discussed by the court, is whether a required payment of money to a government can be a form of regulatory taking. A case raising that issue is thought to be headed toward the United States Supreme Court: *Commonwealth Edison v. United States*, 271 F.3d 1327 (rejecting utility's claim that allegedly excessive payments to the federal government to cover the cost of enrichment decontamination under the Energy Policy Act of 1992 constitute an unconstitutional taking of property).

— Richard A. Lehmann

Fact-Finding Delegation To Germany Glimpses Possible Solutions To Current Energy Challenges

Sometimes the only way to think outside the box is to leave the box altogether.

Such was the premise at least behind last month's energy-environmental fact-finding tour to Germany. Organized by the Department of Natural Resources, the tour brought a delegation of regulators, environmentalists, engineers, and utility executives across the Atlantic to learn more about how to link investment in new energy generating capacity with environmental goals. Germany is widely reputed to have perhaps the best regulatory system in Europe for promoting reductions in plant emissions, technological efficiency, and development of renewable resources. And while Germany is not without its share of monumental challenges (*i.e.*, achieving further reductions in carbon dioxide emissions while at the same time decommissioning its remaining nuclear facilities by the year 2020), almost everyone who participated in the tour agreed that the German example has much to offer.

Tour participants visited four power plants throughout Germany. Three of these facilities utilize the latest technology to produce electric energy and steam heating from lignite, generally considered to be one of the dirtiest coal varieties. The plants produce electric energy at efficiency levels up to 10 percent higher than equivalent generating facilities in Wisconsin, with markedly reduced NOx and carbon dioxide emissions. Byproducts from the production are utilized as well as by the German construction industry.

In Berlin, tour participants visited a municipal gas-steam cogeneration power plant and toured an exhibition of the latest fuel cell and solar energy technology.

Along the way, tour participants also met with renewable energy entrepreneurs and representatives from German industry, state regulators, and utility executives to discuss how Germany's impressive achievements with regard to clean energy generation have come about through a combination of stringent regulation and voluntary agreements. One new law, for example, provides government support and guaranteed pricing for the production of renewable energy.

Many of the laws and regulations that have enabled Germany to produce clean energy are not easily translatable to Wisconsin. German consumers, for example, are used to paying twice and even three times as much for their energy as Wisconsin consumers, and conditions of over capacity and other geographical considerations provide opportunities for efficient utilization of resources that don't exist here. Nonetheless, tour participants were hopeful that many ideas with regard to regulatory reform, technological innovation, and customer/community relations could indeed prove beneficial both in the short and long term.

— Richard A. Heineman

Richard Heinemann participated in the Germany fact-finding tour on behalf of the Municipal Electric Utilities of Wisconsin with support from the Boardman Law Firm and the Humboldt Foundation.

MUNICIPAL LAW NEWSLETTER

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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.

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