

MUNICIPAL LAW NEWSLETTER

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IN THIS ISSUE

- *Wisconsin Attorney General Issues Informal Opinion Criticizing Use Of E-Mail Voting*
- *Joint Town Boards Act As One For Highway Decisions*
- *Trial Needed To Determine Reasonableness Of Municipal Fee*
- *Towns Must Follow Procedure to Object to Zoning Changes*
- *Zoning Variance by Stipulation Not Enforceable*

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Wisconsin Attorney General Issues Informal Opinion Criticizing Use Of E-Mail Voting

The City of Racine created a Loan Review Board to review loan applications submitted by city residents for improvements to properties. The committee from time to time took action on specific loan projects through the use of e-mail voting, and then later confirmed the results of the e-mail vote at a subsequent committee meeting. A newspaper reporter questioned the legality of the process.

In an informal opinion dated January 25, 2010, the Attorney General concluded that the process likely violated the public notice and open session requirements of Wisconsin's open meeting law. The open meetings law requires that a governmental body must give advance public notice of each of its meetings and must conduct all of its business in open session unless a specific exemption applies. A meeting occurs when enough members convene for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The convening of members of a governmental body is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which

members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together.

The Attorney General concluded that the e-mail votes of the Board members amounted to the exercise of the Board's authority. The Board's reaffirmation of its voting at subsequent meetings further reflected the members' understanding the Board's course of action would be determined by the Board's e-mail votes.

The Attorney General reasoned that, because the e-mail votes fit the definition of a meeting, and because the open meetings law requires all meetings to be preceded by public notice, the Board's failure to provide the public with advance notice of its e-mail votes and an opportunity to observe the voting process almost certainly violated the public notice requirements of the open meetings law. The informal opinion declined to speculate on whether a governmental body could create some type of e-mail voting protocol and public record notice that would satisfy the public accessibility requirements of the open meetings law.

—Lawrie Kobza

Joint Town Boards Act As One For Highway Decisions

Section 82.21, Stats., governs the layout, alteration or discontinuance of town highways located on the boundary between two towns. It sets out a procedure whereby both town boards hold a joint meeting, hear comments, and then vote on the proposal. In a recent case, the Court of Appeals had occasion to clarify that the decision to lay out, alter or discontinue the highway is reached by a majority vote of all of the Town Board members from both Towns acting together. *Dawson v. Town of Jackson, et al.*, 2009 AP 120 (Ct. App. Dist. II, Jan. 6, 2010) (recommended for publication).

In *Dawson*, landowners applied for the abandonment of part of a town road running between the Towns of Jackson and Cedarburg. At the meeting to decide the application, all five members of the Jackson Town Board attended while the Town of Cedarburg sent only three of its five members. The vote in favor of abandonment was 5-3, with the Jackson members all voting in favor and the Cedarburg members all against abandonment. After the vote, the Town of Jackson recorded a highway order abandoning the portion of the road at issue.

The Town of Cedarburg took the position that the abandonment was not effective on the grounds that a majority vote of each town board was required under the statute. The Dawsons then brought a declaratory judgment action to establish the validity of the order.

As an initial matter, Cedarburg argued that the Dawsons' sole remedy was a *certiorari* action under § 82.15, Wis. Stats. Accordingly, Cedarburg argued, the failure to pursue a *certiorari* action precluded the declaratory judgment action. The circuit court and Court of Appeals both agreed with the Dawsons that the issue could not have been raised in a *certiorari* action. *Certiorari* actions are limited to review of: (1) whether a board kept within its jurisdiction, (2) whether it acted according to law, (3) whether it acted arbitrarily or unreasonably, and (4) whether there was sufficient evidence to support the board's decision. The Dawsons did not contest any of those factors. Each board had jurisdiction to act on the application. Each acted in accordance with the law in performing the actions required by statute for abandoning a road and each acted reasonably and had sufficient evidence to reach their decisions. The Dawsons' declaratory judgment action sought clarification about the legal effect of the board members' votes. *Certiorari* review would not have addressed that issue or offered a remedy.

The circuit court and Court of Appeals also agreed with the Dawsons that the votes of all members of both boards are counted together in determining a majority. The Wisconsin Towns Association filed an amicus brief in support of Cedarburg. The Court of Appeals reasoned that, if the legislature had not meant the votes to be counted together, it would not have established a distinct procedure calling for the boards to act together. If each town were intended to have a veto, there would be no reason to require a joint meeting. It found Cedarburg's argument contrary to the plain language of the statute as well as against the public policy set out in Chapter 82, Wis. Stats., generally. The court noted that

Trial Needed To Determine Reasonableness Of Municipal Fee

The Milwaukee Metropolitan Sewerage District solicited bids for a public works contract to construct earthworks, including a large detention basin, on County-owned grounds in the City of Wauwatosa. Edgerton Contractors was awarded the bid. As part of the bid, Edgerton was required to obtain the necessary permits, including an erosion control permit. The fee for the erosion control permit was established by a City fee schedule. Under the fee schedule, erosion control permits required an application fee of \$45 and an inspection fee of \$7.00 per 1,000 square feet of disturbed area. Based upon the size of the project, the City charged Edgerton an inspection fee of \$43,908. Edgerton paid the fee under protest, and brought an action against the City claiming the fee was unreasonable. Both Edgerton and the City moved for summary judgment. The trial court held the fee was unreasonable and reduced the fee to \$5,000. The City appealed.

The Court of Appeals for District 1 considered the appeal in *Edgerton Contractors, Inc. v. City of Wauwatosa*, Appeal No. 2009AP1042 (decided Feb. 17, 2010). Both Wisconsin statute (§ 66.0628(2), Wis. Stats.) and Wisconsin case law provide that when municipalities elect to impose fees for regulation purposes, the fees must be designed to cover the cost of regulation and be reasonable. The Court of Appeals held that evidence submitted by the parties in support of their summary judgment motion was insufficient to be able to make a determination concerning the reasonableness of the inspection fee. The Court noted that the submitted testimony claimed that the City's fee schedule was based on the City's indirect and direct costs related to erosion control permits, but that no dollar figures or percentages of the costs recovered were provided. The Court stated that the record contains conflicting assertions and opinions and lacks the factual development needed to analyze whether the inspection fee bears a reasonable relationship to the service for which the fee is imposed. Given this lack of information, the Court of Appeals held that there was insufficient evidence to support granting summary judgment on the reasonableness of the fee, and that a trial would be needed to further develop the record.

The lesson to be learned from this case is that not only should a municipality make sure that its fees are reasonable in relation to the cost of the regulation, but it should also document the basis for its fees in the event the amount of fee is challenged in the future.

—Lawrie Kobza

Wisconsin precedent was sparse but found controlling authority in *State ex rel. Madison v. Walsh*, 247 Wis. 317, 19 N.W.2d 299 (1945). *State ex rel. Madison* dealt with apportionment boards comprised of members of boards or councils from multiple municipalities in the transfer of territory from one to another. In addition, the court found persuasive authority in support of its position in a Minnesota case, *Skrove v. Town Board of Towns of Belmont and Christiana*, 191 N.W. 584 (Minn. 1922) and in the *McQuillin Treatise* on the law of municipal corporations.

—Mark J. Steichen

Towns Must Follow Procedure to Object to Zoning Changes

Towns have the right to object to proposed changes in county zoning ordinances. Wis. Stat. §59.69(5)(e). If a property owner petitions the county for a change in zoning, the county must hold a public hearing. A town in which the property is located can notify the county of its approval or disapproval of the proposed change. In that event, the county zoning committee cannot recommend approval of the petition to the county board.

In order to register its objection with the county, a town must submit a certified copy of a resolution approved by the town board stating the objection. The town must file the certified copy within ten days after the county's public hearing, unless the town, by resolution, extends the deadline by another twenty days. As with any resolution, the town must consider and adopt the resolution objecting to the zoning change at a public meeting.

A recent court of appeals decision is a good reminder of the need to follow the statutory procedure completely. See *Johnson v. Washburn County et al.*, 2009 AP 371 (February 17, 2010) (not recommended for publication). The Johnsons petitioned Washburn County to rezone their property. The county zoning agency sent the Town of Spooner a copy of a two-page form it had developed for input from towns. The form was addressed to the members of the town board and asked the board for its reasons or comments on why the rezoning request should be approved or denied. The form included blank lines for the town's recommendation and reasoning and contained signature lines for the town chairman, supervisors and clerk.

The town clerk sent the form to the county signed by the town chairman and supervisors and countersigned by the town clerk. The county approved the zoning petition on September 18, 2009. The town responded on October 9, 2007 by passing a resolution purporting to disapprove and invalidate the county's amended ordinance. The county zoning administrator then informed the Johnsons that the county's approval of their rezoning petition was invalidated by the town ordinance.

The Johnsons sued and the circuit court granted summary judgment for the town. The Court of Appeals reversed. The appeals court noted that the county's form as completed by the town did not indicate that a resolution on the objection had been introduced or passed within the deadline. Nor was the form certified by the clerk. The Court of Appeals explained that the town board functions as a political check on the county's zoning authority. However, a resolution could only be passed at a properly noticed public meeting on which the resolution appears as an agenda item. There was no indication that any meeting had occurred much less that a resolution was passed.

One message from the *Johnson* case is that forms or documents supplied by a county to towns do not necessarily and may not be intended to set out all statutory requirements or inform towns of what the statutory requirements are for objecting to a zoning petition or other matters. Towns should verify the legal requirements for objections before acting.

—Mark J. Steichen

Zoning Variance by Stipulation Not Enforceable

The New Hampshire Supreme Court issued a decision with persuasive value in Wisconsin variance applications. See *Huard v. Town of Pelham*, 2009 WL 5150346 (N.H. 12/31 2009).

Huard purchased property in a residential district he intended to use for both a residence and operating his transmission repair business. The prior owner obtained a use variance in 1985 permitting the repair of "carburetor, fuel pump, alternators, etc." Two years after Huard moved in, he received a letter from the town informing him that the transmission repair business was prohibited in a residential zone. The town also informed him that the 1985 use variance had expired because it had been abandoned for over a year before Huard moved in. Huard did not take an administrative appeal from the town's letter decision. Instead he applied for a new use variance, which was denied. He then filed a court action for injunctive relief and declaratory judgment.

A few months before Huard filed his lawsuit, the town had voted to repeal the ordinance under which the 1985 variance had expired. With this change, Huard and the town agreed to a stipulation staying the lawsuit pending further proceedings with the town. The stipulation allowed Huard to resume the use of his premises for his transmission repair business. Under the terms of the stipulation, the town's zoning administrator declared that the 1985 variance remained in effect and applied to Huard's business.

Adjoining property owners appealed the administrator's decision to the zoning board of appeals challenging the continuing business use of the property. The board reversed the administrator's decision and held that the 1985 variance had expired many years ago and could not be reinstated because the ordinance setting the time limitation had recently changed.

On appeal, the New Hampshire Supreme Court affirmed the summary judgment dismissing Huard's lawsuit. The court based its decision on Huard's failure to exhaust administrative remedies. The court found Huard's failure to exhaust administrative remedies came within the zoning board's area of expertise and implied that the court would give deference to the board's decision.

The *Huard* case indicates that if a municipality enters into a stipulation for a zoning change, such a stipulation may be subject to objections and administrative appeals. The property owner would not necessarily be entitled to enforce a stipulation merely because the local government had entered into it.

—Mark J. Steichen

SPEAKERS FORUM

Seminars Presented by *Cynthia A. Van Bogaert*

April 22, 2010 - HIPAA
EBIA, Baltimore, MD

May 6, 2010 - HIPAA Privacy Heats Up
Midwest Claims Conference, Lake Geneva, WI

May 27, 2010 - Fiduciary Responsibility
Wisconsin Retirement Plan Professionals, Ltd., Milwaukee, WI

MUNICIPAL LAW NEWSLETTER

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