

MUNICIPAL LAW NEWSLETTER

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U.S. Supreme Court Decides That States May Ban Municipal Telcos

The United States Supreme Court has released its opinion in the Missouri Municipal League cases, holding that Section 253 of the Telecommunications Act of 1996 does not preempt state laws that prohibit or have the effect of prohibiting local governments from providing telecommunications services. Justice Souter wrote the opinion, with Justices Scalia and Thomas filing a separate opinion concurring in the judgment. The lone dissenter was Justice Stevens. The Court ruled that Congress did not intend to interfere with the power of a state to restrict its political subdivisions from providing telecommunications services.

The decision in *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555 (March 24, 2004), overturns the decision of the United States Court of Appeals for the 8th Circuit. The 8th Circuit had held that Section 253's preemption of laws that limit the provision of telecommunications services by "any entity" plainly included municipalities, so that a Missouri law that restricted the ability of Missouri cities to provide telecommunications service was preempted under Section 253.

The Supreme Court rejected the 8th Circuit's view and instead found that "the strange and indeterminate results of using federal preemption

to free public entities from state or local limitations is the key to understanding that Congress used 'any entity' with a limited reference to any private entity when it cast the preemption net." In the Court's view, when a state regulates its subdivisions, "there is no clear distinction between the regulator and the entity regulated," and, thus, preemption of a state's efforts to regulate its subdivisions simply would not operate like the preemption of laws that restrict private behavior. The Court concluded that, absent a "clear statement" of Congress' intent to interfere with a state's relationship with its subdivisions, the Court would read the law to preserve "a State's chosen disposition of its own power."

As many as eight states (Missouri, Arkansas, Iowa, Minnesota, Nebraska, Nevada, Tennessee, Texas and Virginia) currently have laws precluding or limiting the ability of municipalities to provide telecommunications services. These laws are now no longer subject to attack under Section 253 and nothing in the federal law would prevent other states from adopting similar laws. Unfortunately, the Court's decision may spur such legislative activity. Currently pending in Wisconsin is a bill that may have a profound inhibitory effect on new municipal telecom activities.

— Anita T. Gallucci

Lack of Evidence Dooms Exotic Dancing Ordinance

Evidence of the adverse secondary effects of nude dancing establishments is abundant. Numerous studies and court decisions cite problems of crime, unsanitary conditions, and diminished property values associated with such establishments. However, evidence that there are similar adverse secondary effects associated with exotic dancing nightclubs — establishments that feature clothed dancers who convey an erotic message through their movements rather than exposed bodies — is apparently hard to come by. The City of Rockford, Illinois lost a constitutional challenge to a zoning ordinance that regulated the location of exotic dancing nightclubs because it could not demonstrate a significant governmental interest in regulating them.

The City adopted the ordinance a day before the planned Moulin Rouge nightclub applied for a liquor license. Moulin Rouge described itself as an “upscale” facility serving food along with “theme dancing” and “artistic performances.” Its selected location was fewer than 1000 feet from a church, which violated the separation requirements in the City’s new exotic dancing nightclub ordinance. Consequently, the City notified Moulin Rouge that it would not be permitted to operate at the site. Moulin Rouge sued, claiming that the ordinance violates the club’s First Amendment rights.

The main issue in the suit was whether the City had a substantial interest in regulating the location of exotic dancing nightclubs. Such an interest is required to justify a government regulation that restricts the time, place and manner of expression. For ordinances that regulate nude or semi-

nude entertainment establishments, the case for a substantial interest is usually made by citing the city’s past experience with such establishments, or the experience of other municipalities, if the city reasonably believes those other experiences are relevant.

In this case, however, Rockford adopted its Exotic Dancing Nightclubs Ordinance without citing any evidence of adverse secondary effects of such nightclubs. The record only contained a statement from the City Attorney indicating that such clubs “have similar secondary effects in the neighborhood as sexually oriented businesses.”

The City attempted to introduce the requisite evidence at trial. A police officer testified to problems of prostitution in an area of the city known as 7th Street and Broadway. The area includes several adult establishments, including massage parlors, lingerie modeling shops, and cabarets. A City Alderperson also testified that based on her own personal observations, strip clubs have negative secondary effects on adjoining residential properties.

The United States Court of Appeals for the Seventh Circuit held this evidence insufficient to establish the requisite substantial government interest in regulating the location of such clubs. It noted that none of the businesses that operate in the 7th Street and Broadway area meet the ordinance’s definition of an exotic dancing nightclub. Rather, they are more traditional sexually oriented businesses. The Court explained:

“While it may have been reasonable for Rockford to believe that the evidence presented at trial was relevant to demonstrate a connection between adverse

secondary effects and nude or topless dancing, we conclude that it falls short of being relevant to establishing a meaningful connection between negative secondary effects and the type of entertainment to which the Ordinance applies.”

In short, evidence of secondary effects from nude dancing is not evidence of secondary effects from erotic but clothed dancing.

As for the Alderperson’s personal observations, they were simply not enough, by themselves, to support a finding that the City had a substantial interest in regulating exotic dancing nightclubs. As the Court concluded, “If Rockford had presented more convincing evidence to show that some businesses featuring clothed entertainers produce adverse secondary effects, a different result might ensue.”

The case is *R.V.S., L.L.C. v. City of Rockford*, Appeal No. 03-2772 (7th Cir., March 17, 2004).

—Matthew D. Weber

Dave Penn To Retire From APPA

American Public Power Association (APPA) Executive Vice President David W. Penn will retire July 23, 2004. Penn spent more than a dozen years as the first General Manager of Wisconsin Public Power Inc. (WPPI) before going to APPA in December 1991. Penn was also a former chief economist of the U.S. Department of Energy’s Office of Competition.

Penn was instrumental in the formation and early years of WPPI, and has been a strong voice for public power. He is a native of Wisconsin. We wish Dave the best in his retirement.

—Michael P. May

Legislature Grants Tax Exemption for Nonprofit Housing

Last November, the Wisconsin Supreme Court held that benevolent organizations that rent affordable housing to the poor are not entitled to a property tax exemption for that housing. See *Columbus Park Housing Assoc. v. City of Kenosha*, 2003 WI 143. Just six months later, the Legislature amended the law to grant the exemption that the Supreme Court held did not exist. See 2003 Act 195.

The *Columbus Park* decision addressed the “lessee identity” requirement in sec. 70.11, Wis. Stats. That statute grants a property tax exemption to property owned and used by religious, educational or benevolent associations. The “lessee identity” requirement extends this property tax exemption to leased property if the persons or entities leasing the property would themselves be exempt from taxation under the statute.

In *Columbus Park*, the Supreme Court applied this lessee identity requirement to find that housing owned by a benevolent (charitable) organization and rented to low-income families is not exempt from property taxes. It reasoned that, because the low-income families would not be entitled to the exemption if they owned the property, the benevolent organization loses the exemption by leasing the property to the families.

The court’s ruling was a fairly straight-forward application of the lessee-identity requirement. Consequently, many municipalities had long refused to grant property tax exemptions to charitable housing providers. Nevertheless, in those communities that previously granted an exemption, the ruling had the ironic and politically-unpalatable effect of causing charitable housing organizations to lose their property tax exemptions by carrying out the very charitable missions (provision of affordable housing) for which they were granted exemptions in the first place. It also left many such organizations scrambling to meet property tax burdens for which they had not budgeted.

Responding to these issues, the Legislature adopted Act 195 to grant the property tax exemption that the Supreme Court held did not exist. Specifically, the Act provides that leasing a part of any property that would otherwise be exempt from property taxes does not render the property taxable if both of the following apply:

- The leased property is residential housing; and
- The owner uses all of the rental income for maintenance of the property or to retire construction debt (or both).

This rule applies regardless of whether the lessee would be exempt from property taxes if the lessee owned the property.

The original draft of the legislation (SB 512) included a sunset provision that was intended to make the Act a temporary response to *Columbus Park* while the Legislative Council studied the issue. An amendment eliminated the sunset provision. However, the requirement of a Legislative Council study survived. The study is due by December 15, 2004.

Act 195 was published April 22, 2004, and takes effect retroactively to January 1, 2002.

— Matthew D. Weber

9th Circuit Stays Brand X Cable Modem Ruling

The U.S. Court of Appeals for the Ninth Circuit has stayed the Brand X decision until June 30, 2004 while the Federal Communications Commission and the National Cable & Telecommunications Association seek U.S. Supreme Court review of the 9th Circuit's cable modem ruling. If the Supreme Court decides to hear the case, the stay will remain in effect while the case is pending.

In October 2003, a three-judge panel of the Ninth Circuit ruled that high-speed Internet service provided over a cable system (“cable modem service”) should be not be classified as a cable service, but rather contained both information service and telecommunications service components. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir 2003). One result of this classification is that local governments may no longer charge a franchise fee on cable modem revenues since the service is not classified as a cable service.

Another potential result of the 9th Circuit ruling is that, if the decision stands, and cable modem service is, in part, a telecommunications service, then cable companies may have to allow consumers to choose which Internet service provider they would like to use. However, the FCC has already indicated that, should the 9th Circuit stand, it will not require open access. The FCC believes that cable modem service should be classified as purely an information service that is not subject to the regulations applicable to a telecommunications service.

— Anita T. Gallucci

MISO Files New Energy Market Tariff

The Midwest Independent Transmission System Operator (MISO) filed a revised Energy Markets tariff with the Federal Energy Regulatory Commission (FERC) on March 31, 2004. The proposed tariff seeks to implement FERC's favored standard market design (SMD) for transmission service throughout the MISO territory by December 1, 2004.

The filing is likely to be opposed by Wisconsin stakeholders. They have already put together an unprecedented coalition of regulators, government officials, industry leaders, customer groups and public power interests asking FERC to delay the SMD plan until Wisconsin's constrained transmission infrastructure can be substantially improved. Most stakeholders fear that imposing the proposed tariff before such system enhancements are in place will result in significant cost spikes.

Whereas MISO is projecting a cost savings of \$51 million with the new tariff, a study commissioned by the United States Department of Energy indicates that the projected costs to Wisconsin customers may be as high as \$200 million. Such disparity in the projected costs and benefits of the SMD tariff is itself a major source of the concern among Wisconsin stakeholders.

Under the proposed tariff, MISO would institute day ahead and real-time markets to dispatch generation throughout the region, thereby replacing current procedures for physical management of system congestion with an elaborate structure of pricing signals designed to regulate the flow of energy. According to MISO, the new energy market will function to reveal the real value of power at key points

along the grid, thus expanding trading opportunities and helping utilities optimize purchases and sales. Wisconsin stakeholders have expressed skepticism, arguing that such benefits cannot be achieved as long as the existence of a real market is impeded by the lack of an adequate and reliable infrastructure. Moreover, although locational marginal pricing has been successfully instituted in other, smaller regions of the country, it has never been implemented in a region as large or complex as that of MISO. The MISO region has never had centralized dispatch or regional planning and includes 23 control areas.

The proposed tariff represents MISO's second attempt to seek FERC approval and stakeholder buy-in. MISO submitted its original proposal for the SMD tariff in August of 2003, but withdrew it in response to stakeholder protests that MISO's application left a number of key issues unresolved, including, most importantly, the allocation of financial transmission rights (FTRs) and treatment of existing bundled contracts. The new application includes more detailed treatment of these issues. However, FTRs in particular are likely to be a continued item of contention for smaller, transmission-dependent utilities since they are the only means by which market participants can hedge against congestion costs in the new market.

Protests and Interventions in the MISO market tariff docket are due in early May. Stakeholder groups have already asked for a filing extension because of the complexity of the application. A link to the new tariff filing can be found at the MISO website at www.midwestiso.org.

—Richard A. Heinemann

New Take on Zoning Variance Standards Announced by Wisconsin Supreme Court

The January issue of this newsletter reported on the Wisconsin Supreme Court holding oral arguments on three zoning cases on December 4, 2003.

One of the cases, *State v. Ziervogel*, involved a proposed vertical expansion of a lakeshore home, the entire footprint of which was within the 75 foot shoreland setback. The county zoning code had codified the law of *State v. Kenosha County*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998), which held that variances may be granted only if the variance board finds that the property would have no reasonable use if the variance were denied. The *Kenosha County* court applied this rule to overturn a grant of a variance that would have allowed a homeowner to build a deck on the lake side of a lakeshore lot. The court found that the owner had a reasonable use of the property without the variance.

Following this example, the county in *Ziervogel* denied the owners a variance to expand their home vertically, finding that they had a reasonable use of the property without the expansion. The owners appealed.

In a decision joined by five justices on the Supreme Court (Chief Justice Abrahamson and Justice Bradley declined to participate in the case), the Court ruled on March 19, 2004, that the "no reasonable use" test should apply only to "use variances" and not to "area variances."

Use variances or area variances are not defined or discussed in state zoning statutes. The distinction

Continued on next page

is entirely court-made. The court tells us that use variances deal with “fundamentally how property may be used.” They permit “wholesale deviation from the way land in the zone is used.” They do so in order to protect against unconstitutional takings of private property. By contrast, area variances deal with lot dimensions, setbacks, densities, frontage, height, and other dimensional attributes. Their effects on the neighborhood and community are normally small and incremental. They are a regulatory “escape valve...allowing the rendering of justice” by variance boards that need to have “real flexibility” in their powers.

The standard for area variances henceforth will be whether enforcement of the strict letter of the ordinance will unreasonably prevent use of the property for a permitted purpose or result in unnecessary burden. The board applying the standard is to consider the purpose of the zoning restriction and the effect of granting the variance on the neighborhood and the larger public interest. The hardship must be unique to the property and not self-created, and the applicant has the burden of proof.

The court goes on to say that the court-developed variance standards are matters of statewide concern and cannot be modified under local ordinances exercising home rule powers. Thus, the county ordinance that applies the no reasonable use test to all variances is invalid. The implication of this ruling is that an ordinance forbidding use variances will also be invalid.

The Court remanded the case for further proceedings. Presumably, it will wind its way back to the County Board of Adjustment to apply the area variance standard, unless, of course, the Board decides that the case involves a use variance to allow an airspace that is now not used for residential occupancy to be put to residential use, whereupon the use variance test will be applied.

State v. Ziervogel, 2004 WI 23, decided March 19, 2004.

— Richard A. Lehmann

Court Orders Issuance of Zoning Permit Directly Under Federal ADA and Rehabilitation Acts

The United States District Court for the Eastern District of Wisconsin issued a decision on March 16, 2004, directing Milwaukee to issue a zoning permit that had originally been requested by a mental health clinic nearly three and one-half years earlier. The clinic sought to move to a bigger office on the same street in Milwaukee as its current location, in order to better serve its growing clientele.

The use required a special use permit from the City Zoning Appeals Board. The Appeals Board initially denied the permit in 2001, after refusing, on advice of the City Attorney’s office, to consider the Federal Americans with Disabilities Act or the Federal Rehabilitation Act, both of which require entities regulating property to make reasonable accommodations to entities serving persons with disabilities.

The refusal of the Zoning Board to consider the federal statutes was largely based on a 1999 decision of the Wisconsin Court of Appeals that held that a zoning appeals board can only apply the standards in the zoning statute (in that case a variance was requested to allow a building expansion to accommodate a disability of the owner), and cannot look to State statutes on disability accommodations as authority for granting a variance. *County of Sawyer v. Department of Workforce Development*, 231 Wis.2d 534, 605 N.W.2d 627 (Ct. App. 1999).

The clinic sued in federal court, the same court which held in 2001 that federal disability statutes supersede state zoning laws and municipal zoning ordinances and require the zoning board to apply the reasonable accommodation rules of the federal statutes. The federal court sent the matter back to the City Zoning Board. *Wisconsin Correctional Service v. City of Milwaukee*, 173 F.Supp. 2d 842 (E.D. Wis, September 25, 2001).

Following a hearing, the Zoning Board again denied the special use permit and the case went back to federal court. The Court once again held for the clinic, saying that it met the federal standards by showing that the permit was reasonable and necessary, that the larger quarters will benefit the clients, and that the issuance of the permit will not be outweighed by costs to the City. The Court ordered the City to issue the permit.

The 1999 Sawyer County case included a footnote attempting to distinguish State laws on disability accommodation from federal laws. The 2001 federal case from Milwaukee attempts the same differentiation, although this may be open for debate in future cases.

The City of Milwaukee has appealed the latest decision to the Seventh Circuit Court of Appeals.

Wisconsin Correctional Service v. City of Milwaukee, 2004 WL 556720 (E.D. Wis., March 16, 2004).

— Richard A. Lehmann

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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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