

Volume 10, Issue 5, May 2005

## IN THIS ISSUE

- *50% Limit Applies to Nonconforming Properties Defined by Use Not Structure*
- *MISO Day 2 Market Launched*
- *U.S. Supreme Court Rejects Municipal Liability Under Section 1983 in Cell Tower Cases*
- *PSC Reverses Course on Kewaunee Sale*
- *U.S. Supreme Court Confirms Narrow Scope of Age Discrimination Based on Disparate Impact*
- *Speakers' Forum*

## 50% Limit Applies to Nonconforming Properties Defined by Use Not Structure

In a case recommended for publication, the court of appeals has clarified that the 50 percent rule on additions or remodeling of nonconforming properties is governed by the use made of the property. *Hillis v. Village of Fox Point*, Appeal No. 04-1787 (Ct. App. March 15, 2005).

The Hillises lived next door to the McGees, whose house was built in 1927. The Hillises purchased their home in 1979 and the McGees purchased theirs in 1995. Both houses are in a residential district. There was no evidence that the McGee house had ever been used as anything other than a residence in conformity with the use classification for the area.

Later, the McGees applied for a permit to construct an addition on the south side of their home—the sidenearest the Hillises. The Hillises objected, but did not allege that the proposed addition violated any ordinances as to use (residential), setbacks, or area. Instead, they objected that the McGee residence was a nonconforming property, because it extended over a bluff line in violation of a village ordinance adopted in 1989 restricting construction of buildings on or over the slope of a lake bluff. Accordingly, they argued, any addition must be limited in value

to 50 percent of the assessed value of the property in accordance with section 66.23(7)(h), Stats., and a substantially similar village ordinance.

After asking the parties to brief the issue, the board of adjustment agreed with the McGee's argument that the limitation on changes to nonconforming properties applies to uses of property that are inconsistent with the zoning classification. Since the McGee house had always been used as a residence and since this use had always been consistent with the zoning district in which it was located, it was not a nonconforming use. Therefore, it was not subject to the 50 percent limitation on the cost of structural repairs or alterations.

On certiorari review from the board's decision, the circuit court and the court of appeals affirmed the decision. No petition for reviewed was filed within the deadline. The court of appeals noted that the state statute and the ordinance balance the interests of property owners in the free use of their property and the government's interest in controlling land uses to promote public health, safety, and welfare. The 50 percent rule is designed to gradually phase-out uses that do not conform with the zoning district, e.g., a commercial enterprise in a

*Continued on page 2*

---

## MISO Day 2 Market Launched

**A**fter several years of preparation, more than a year's worth of delays and amidst continuing concerns over potential impacts on the cost and reliability of transmission service, the Midwest ISO launched its new "Day 2" energy markets on April 1, 2005.

The new markets are the nation's largest centrally dispatched markets to employ locational marginal pricing ("LMP") as a means of managing congestion on the grid. Although proponents of the new markets, including the Federal Energy Regulatory Commission ("FERC"), continue to tout increased efficiency as a major benefit, many stakeholders, including industrial customers, rural cooperatives and municipal utilities, have raised doubts about the degree to which organized LMP markets actually produce competition and consumer benefits.

With an LMP-based market, prices at different points on the transmission system vary as a consequence of congestion. Market participants submit day-ahead bids and offers, as well as self-schedules, to a day-ahead

---

### 50% Limit Applies to Nonconforming Properties Defined by Use Not Structure

*Continued from front page*

residential district. As long as the use of a building conforms to the intended uses for the district, it can be altered or expanded without being subject to this standard. Of course, there may be building or other codes that may apply to require changes in structures even if they are conforming uses.

It should be noted that the village ordinance in this case was substantially the same as the state enabling statute for city/village zoning. It is also commonly used as the statutory basis for town zoning under village powers. The county zoning enabling statute, section 59.69, Stats., has sufficiently similar language that the same interpretation probably applies to that statute also. Municipalities may opt out of the state standards by adopting a charter ordinance expressly rejecting specific statutory provisions pursuant to section 66.0101(a)(b), Stats. The DNR administrative rule for flood plain zoning, NR 116.15, specifically applies the 50% rule to pure dimensional situations. The legality of this rule is now in question, since the DNR does not have the same ability to override the statute.

— Richard A. Lehmann

market, and all sellers get a market clearing price determined by central economic dispatch, meaning that the price is established by the last generating unit bid in by a supplier needed to meet demand. The market is then corrected in real-time. Participants that fail to forecast accurately are assessed penalties, which are used to compensate generators for the cost of operating their units to meet real-time demands. Customers whose loads are served in congested areas may be assessed congestion charges, which may or may not be adequately hedged.

Prior to market launch, stakeholders expressed concerns about the Midwest ISO's ability to manage the markets accurately and efficiently. Wisconsin stakeholders in particular expressed concern that the inadequacy of the state's transmission infrastructure would lock consumers into having to pay high congestion costs. Although FERC responded by instituting transitional measures, including a requirement that the Midwest ISO implement a cost-based bidding requirement for the first two months of the market, many market participants remained wary of the short-to-medium term impacts of the new markets.

With that background, stakeholders both inside and outside of the Midwest ISO looked to April 1 with a mix of anxiety and curiosity. According to most reports, launch of the markets did not bring any major surprises. But many industry insiders and market participants have reported a number of market implementation issues that remain to be resolved, including the sufficiency of the compensation being paid to generators for operating their units to meet real-time demand; the efficiency of the dispatching decisions being made by the Midwest ISO; and the still-erratic nature of the prices being set at various hours of the day. Over the long haul, many stakeholders have also raised questions about whether the Midwest ISO has developed an adequate method of allocating congestion hedges that will properly incent market participants to build badly needed generation and transmission infrastructure.

Less than a month into "Day 2," market participants and transmission policymakers are still carefully monitoring the impact of market implementation. While the lights remain on, most stakeholders agree it will take some time before the true impact of the

---

## U.S. Supreme Court Rejects Municipal Liability Under Section 1983 in Cell Tower Cases

**T**he U.S. Supreme Court ended a split among the federal circuits by deciding unanimously that violations of section 332 of the Telecommunications Act of 1996 (the "Act") do not give rise to separate claims for relief under 42 U.S.C. § 1983.

*City of Rancho Palos Verdes v. Abrams*, Appeal No. 03-1601, 544 U.S. \_\_\_\_ (March 22, 2005).

The decision significantly strengthens the ability of local governments to exercise their traditional zoning powers in reviewing applications for the placement of telecommunications towers. If the court had reached the opposite conclusion, municipalities would have been subject to claims for damages and attorney's fees if they acted in good faith in denying permits for telecommunications towers, but their decision was later overturned by a reviewing court. Threats or even the fear of judgments for substantial damages and attorney's fees could have intimidated many local governments from exercising their full zoning review authority.

Congress passed the Act to encourage competition in the roll-out of wireless communication networks throughout the nation without unreasonable interference by local governments. The Act represents a compromise between federalism -- maintaining traditional state and local control over zoning decisions -- and achieving national policy objectives. The Act imposes both substantive and procedural limitations on local authority over placement and conditions for siting communications towers. Substantively, the Act bars discrimination among functionally equivalent providers of service and prohibits local governments from basing a denial of a tower application on grounds of the environmental or health effects of radio frequency transmissions. Procedurally, the Act requires a zoning authority to act on a permit application within a "reasonable time" and any denial of an application must be based on substantial evidence in a written record. If a permit is denied, the applicant may seek certiorari review within 30 days and is entitled to expedited judicial review.

The laws at issue, 42 U.S.C. §§ 1983 and 1988, provide remedies of damages and actual attorney's fees for the violation of federal constitutional and statutory rights. There is a rebuttable presumption that the remedies of sections 1983 and 1988 apply to

the violation of any private right of action arising under a federal statute. However, Congress may expressly or impliedly exclude the application of section 1983. Where there is no express exclusion, the court will generally find an implied exclusion only where the statute at issue includes such a comprehensive remedial scheme that it appears Congress did not intend to include other remedies.

Finding that the Act included a comprehensive remedial scheme that carefully balanced the interests of federalism while also implementing a national communications policy, the U.S. Court of Appeal for the Third and Seventh Circuits had concluded that section 1983 does not apply to violations of the Act. The Tenth Circuit had concurred in a case not directly on point. The Sixth Circuit (in a decision issued just a month before the Supreme Court's decision) and the Ninth Circuit reached the opposite conclusion. A three-judge panel of the Eleventh Circuit had reached the same result as the Ninth and Sixth Circuits, but its decision was later vacated after en banc review.

The *Abrams* case was not a typical telecommunications fact pattern. The applicant in *Abrams* was an individual homeowner who had obtained a permit for a 52-foot antenna on his property for amateur use and then began providing commercial service for two-way radios. When he applied for a permit for a second tower, the city discovered the commercial use and sought an injunction against the commercial use and also denied the application for a second tower. The district court found that the homeowner's rights had been violated, but concluded that he had no remedy for damages or attorney's fees under section 1983. The Ninth Circuit reversed.

The Supreme Court agreed with the Third and Seventh Circuits that the remedies provided by the Act are comprehensive and inconsistent with the provisions of section 1983. The court stated that the provision of "an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at \*7. However, the court rejected the city's argument that the provision of such a remedy within a statute conclusively establishes a Congressional intent to exclude section 1983 remedies.

The Supreme Court left open the possibility that the Act itself allows for damages, but not attorney's

*Continued on page 4*

---

## PSC Reverses Course on Kewaunee Sale

At its March 17th open meeting, the Public Service Commission of Wisconsin (the "Commission"), reversing its prior decision, voted to approve the sale of the Kewaunee Nuclear Power Plant ("KNPP") to Dominion Energy Kewaunee ("DEK"), a special purpose entity formed by Dominion Resources, Inc., which will own and operate KNPP as a merchant plant. This was the first time the Commission had been asked to allow a rate-based generating unit to be sold to an entity that is not a public utility, subject to the Commission's regulatory authority.

Previously, in its December 11, 2004 decision, the Commission rejected the application to sell the plant to DEK, concluding that the proposed transaction was not in the public interest. The Commission's decision outlined a number of its concerns about the transaction, such as the Commission's loss of authority to prevent DEK or a subsequent owner from storing foreign nuclear waste at the KNPP site. More generally, the Commission expressed concerns over its loss of jurisdiction over the plant and its lack of regulatory authority over DEK or a subsequent non-public utility owner.

After the decision was issued, the current owners of the plant, Wisconsin Public Service Corporation and Wisconsin Power and Light Company, requested that the Commission reopen the docket to consider several new conditions that DEK would agree to follow if the Commission approved the sale. The conditions were to address the concerns stated in the Commission's December decision and were intended to apply to subsequent owners as well.

At the open meeting, Chairperson Bridge focused her comments on the economics of the proposed sale in terms of the benefits the transaction would afford to Wisconsin ratepayers. She stated that she believed that the benefits to ratepayers were significant and were such that the transaction was in the public interest and, therefore, should be approved. She referenced the recent unplanned outages at KNPP (as of mid-April the plant is still not in operation) and the significant costs associated with those outages would be passed on to ratepayers, costs that DEK would be obligated to assume once it owned the plant.

Bridge addressed the proposed conditions, stating that the new conditions adequately addressed all of her prior concerns. She went on to state her belief that the conditions are enforceable by the Commission

as to DEK and to any subsequent purchasers. The enforceability of the proposed conditions was a hotly contested issue among those participating in the proceeding. Bridge also dismissed the arguments made by certain municipal utility groups that converting KNPP to merchant status would sever the regulatory compact and amount to backdoor deregulation.

Commissioner Garvin, the lone dissenter on the November 2004 decision, stated that he believed the transaction was a good deal before and thought that it was even better now that there were additional conditions. Commissioner Meyer also voted to approved the transaction, explaining that the newly proposed conditions adequately addressed the concerns he had previously expressed about the transaction, including concerns about future owners.

Once the Commission issues its written decision, opponents of the sale will have 30 days in which to seek circuit court review of the decision.

— Anita T. Gallucci

---

## U.S. Supreme Rejects Municipal Liability Under Section 1983 in Cell Tower Cases

*Continued from page 3*

fees to successful plaintiffs. The court stated that "the remedies available [under the Act], moreover, perhaps do not include compensatory damages," comparing a Seventh Circuit case noting in *dictum* holding that damages are "presumptively" available under the Act with a district court holding that a mandatory injunction is the appropriate remedy for violations. See *Primeco Personal Communications, Ltd. Partnership v. Mequon*, 352 F.3d 1147, 1152-53 (7<sup>th</sup> Cir. 2003). Telecommunications companies may latch onto this language to argue for a damages remedy directly under the Act. However, Justice Stevens, in a concurring opinion, emphasized that "nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available." Given the court's unanimous agreement in *Abrams* that the statute's express remedies to evince a comprehensive remedial scheme, the court's recognition that the Act represents a balancing of local and federal interests, and the strong majority of lower courts holding that only injunctive relief is available, it seems unlikely that the Act itself will be found to provide a damage remedy.

— Mark J. Steichen

---

# U.S. Supreme Court Confirms Narrow Scope of Age Discrimination Based on Disparate Impact

**T**he United States Supreme Court recently decided that the Age Discrimination in Employment Act (the "ADEA") authorizes recovery under the disparate-impact theory of age discrimination.

In other words, employers may be liable for discrimination if their facially neutral employment policies fall more harshly on older employees than others. However, the court also ruled that the scope of disparate-impact cases under the ADEA is narrower than for other types of discrimination (such as race, gender, national origin) under Title VII of the Civil Rights Act of 1964.

The case, *Smith, et al. v. City of Jackson*, (No. 03-1160, March 30, 2005), involved the city of Jackson, Mississippi's pay plan that was intended to bring city employees' salaries up to the regional average. Under the pay plan's terms, police officers with less than 5 years service received proportionately greater raises than those with more service, and most officers over 40 had more than 5 years of service. Thus, a group of older officers who received less generous pay increases brought suit, alleging that the city's pay policy, which was neutral on its face, had a less generous effect on their pay than on the younger officers' pay.

Surprisingly, the U.S. Supreme Court had never addressed whether disparate-impact claims could be brought under the ADEA. The court's ruling was clear. Noting that disparate-impact claims are recognized under Title VII, and that the relevant statutory language in the ADEA is identical to the language of Title VII, the court ruled that disparate-impact claims are allowed under the ADEA. The court stressed that even when an employer does not intend to discriminate, if its policies operate as a "built-in headwind" that affect protected groups of individuals and are unrelated to measuring job capability, then discrimination exists.

Nevertheless, the court ruled that the police officers' claim that the city's pay plan had a discriminatory effect on them was invalid for two reasons. First, the court explained that in order to succeed on a disparate-impact claim in an ADEA case, employees must do more than simply allege

that there is a disparate impact on a group of workers. They must instead identify a specific test, requirement or practice that has a disparate impact on older workers. The court found that the officers' generalized claim of discrepancy in pay raises did not meet this requirement.

More importantly, the court explained that the scope of the disparate-impact theory is narrower under the ADEA than under Title VII because of what is known as the ADEA's "ROFA provision." This provision states that under the ADEA, it is not unlawful for employers to take otherwise prohibited actions "where the differentiation is based on reasonable factors other than age." Here, where the city argued that larger salary increases were granted to lower echelon employees in order to bring all salaries in line with surrounding police forces, the decision was based on a legitimate factor other than age.

The *Smith* decision clarifies that employers must be aware of the potential impact of facially neutral policies. Employers need not intend to discriminate to be held liable. However, the case also reinforces that the scope of successful disparate-impact claims under the ADEA is very narrow. Thus, whether the court's ruling will have any significant impact remains to be seen.

— Jennifer S. Mirus

## SPEAKERS' FORUM

---

June 16, 2005

Stormwater Utilities: Overview and Update  
League of WI Municipalities' Clerks,  
Treasurers & Finance Officers Institute  
La Crosse, WI  
*Lawrie J. Kobza*

---

June 24, 2005

Municipal Authority to Charge Fees  
League of WI Municipalities'  
Municipal Attorneys Institute  
Elkhart Lake, WI  
*Lawrie J. Kobza*

# 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>
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>
Matthew D. Weber	283-1744	<a href="mailto:mweber@boardmanlawfirm.com">mweber@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 2005, 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