

MUNICIPAL LAW NEWSLETTER

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Regional Planning Commission Wins First Round Against Governor

The Dane County Regional Planning Commission recently delivered a setback to Governor McCallum's bid to dissolve the Commission. Judge David Flanagan of the Dane County Circuit Court issued a temporary injunction on September 30, 2002 suspending the effect of an executive order issued by the Governor calling for the dissolution of the Commission as of October 1, 2002.

Regional planning commissions may be created under the authority of section 66.0309, Stats. Section 66.0309(15) provides a procedure for dissolution of regional planning commissions by a vote of a majority of the local units within the region. The statute is ambiguous as to whether the county board must approve any dissolution.

The Dane County Regional Planning Commission (DCRPC) is the only single-county commission in the State. For a number of years, there has been rancor between many towns and other municipal bodies over the existence of the DCRPC. In 1998, 34 towns within Dane County (a majority) filed resolutions calling for its dissolution. Dane County did not vote to dissolve the commission. No action was taken by then Governor Tommy Thompson to dissolve the DCRPC based on those petitions.

In 2000, the state budget included a provision stating that "notwithstanding the procedures for dissolution" under

section 66.0309(15) [f/k/a 66.945(15)], the DCRPC "shall be dissolved on October 1, 2002." In August, 2002, the legislature included in the Budget Repair Bill a provision amending the session law to state that the DCRPC "shall be dissolved on October 1, 2004." Governor McCallum signed the bill without vetoing that provision. Several weeks later, the Governor issued an executive order purporting to dissolve the DCRPC as of October 1, 2002, based on the 1998 resolutions.

The DCRPC, Kathleen Falk, as Dane County Executive, and a number of other municipal and private parties, joined as plaintiffs in a declaratory judgment action against the Governor to declare the executive order invalid. The Governor retained independent counsel and the Dane County Towns Association intervened as a defendant on the side of the Governor. At a hearing on September 30, 2002, Judge Flanagan found that the plaintiffs had established each of the elements for a temporary injunction. With respect to likelihood of success on the merits, Judge Flanagan ruled, based on a careful review of the session law language and its legislative history, that the legislature intended the DCRPC to continue in existence until October 1, 2004. The injunction is in effect pending the conclusion of the litigation.

The DCRPC is represented by The Boardman Law Firm.

—Mark J. Steichen

Court of Appeals Discusses Special Assessment Issues

A recent court of appeals decision, *Bender v. Town of Kronenwetter*, Appeal No. 02-0403 (Ct. App. Dist. 3, decided October 1, 2002), discusses several issues regarding the application of special assessments for water and sewer extensions. This case involves the extension of sewer and water lines along a highway beside the plaintiffs' properties. From the beginning, the plaintiff property owners indicated to the town board that they were not interested in the extension if the town would impose a special assessment against their properties.

The town board authorized the town engineer to engage in discussions with the property owners regarding an easement on their property. The board, however, determined not to offer any compensation in exchange for easements. Later, the town engineer told the town board that the property owners would voluntarily convey the easement. The town engineer did not inform the town board of any plan to defer the special assessments in exchange for the easements. The property owners maintained that the town engineer promised one of the property owners an exemption from the special assessment. Another property owner claims that the town engineer told him that the property owners would not be charged for sewer and water until they tapped into it.

The property owners' concerns about the special assessment were raised at a public hearing. Several months after the hearing, the town board adopted a resolution to go ahead with the project and it approved the engineer's report, finding the special assessments to be reasonable. The town board never approved any agreement between the town engineer and the property owners regarding an exemption or deferral of the special assessment.

The property owners challenged the special assessment on several grounds. The trial court, and court of appeals, addressed numerous issues about the challenge. Four issues are of particular note.

First, the court addressed the issue of whether there was an oral agreement between the town engineer and the property owners to defer or exempt their properties from the special assessment. With regard to the alleged exemption, the court found that the property owners cited no authority allowing for exemptions at all. With regard to the deferral, the court noted that while deferrals are allowed by Wis. Stat. §66.0715(2), the property owners failed to show that the town authorized the town engineer to defer these assessments.

The property owners argued that the town should be estopped from denying an oral contract between the town engineer and the property owners. The property owners claim that the court should have balanced the injustice to the property owners by not applying the estoppel doctrine, and the harm to the public interest by applying the doctrine. However, the court reaffirmed the well-established rule that a municipality may not be estopped from denying the validity of a contract

which is not within the power of the municipality to make. Furthermore, "estoppel cannot make enforceable a municipal contract which is not executed in compliance with the mandatory or prohibitive conditions expressly prescribed by statute." The court held that a special assessment can only be levied by a resolution of the town board, and can only be deferred by the governing body. A town engineer is not authorized to defer the special assessment merely because of his or her position. Thus, any claimed contract was either not within the town's power or was not executed as required by statute.

Second, the property owners contended that the town's entire special assessment was unreasonable in its methodology, allocation and result because it made a distinction between properties with direct access to the water and sewer extensions, and properties with indirect access. The property owners argued that some property owners with "direct access" will incur more expense and more difficulty connecting to the sewer than those who have "indirect access." Therefore, they argued that the distinction between "direct" and "indirect" access is illusory, arbitrary and capricious and therefore unreasonable.

The court, however, upheld the reasonableness of the special assessment. Under the statutes, special assessments made under a municipality's police power must be made upon a "reasonable" basis. If a special assessment is uniformly applied, it is deemed to be reasonable. Here, the record demonstrated that the assessment was done according to a consistent, accepted method (the acreage methodology), and that this method was used in prior sewer and water projects in the town. Additionally, the town applied the assessment according to the location of each property and whether it would be directly benefitted. The property owners can, if they wish, directly and immediately connect to sewer and water, while those with "indirect" access cannot. Based on these factors, the court concluded the assessment was imposed on a reasonable basis.

Third, one property owner contended that his property, a tree farm, should be exempt from the special assessment because it is "eligible farmland" under Wis. Stat. §66.60(6m). Under Wisconsin Stat. 66.60(6m)(a)2, eligible farmland "means a parcel of 35 or more acres of contiguous land which is devoted exclusively to agricultural use . . ." In this case, the property owner owned 62.6 acres. The circuit court treated this property as two parcels (one of 38.7 acres and another of 23.9 acres) because the property was treated as two parcels for tax purposes. Since the statute only exempts parcels of thirty-five acres or more, the trial court held that only the 38.7 acre parcel was exempt from the special assessment.

The court of appeals, however, disagreed, and found that the statute's requirement that land be greater than thirty-five acres is not dependent on how land is allocated for property tax purposes. The court of appeals therefore concluded that the tree farm property was eligible farmland exempt from the special assessment.

The fourth issue the court addressed was whether the town was entitled to add its legal expenses associated with this

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Ninth Circuit Upholds Municipal Right to Review Cable TV Transfers

The U.S. Court of Appeals for the Ninth Circuit recently reversed the trial court's decision in *Charter Communications, Inc. v. County of Santa Cruz*, 2002 WL 31095813 (9th Cir. September 20, 2002) and concluded that a local franchising authority's (LFA's) denial of consent to transfer a cable television franchise must be upheld "as long as there is substantial evidence for any one sufficient reason for denial." The case is important because of the high deference it affords to an LFA's decision.

This case arose when the County of Santa Cruz denied a request to approve Paul Allen's acquisition of the controlling equity interest in Charter Communications. The lower court found that the denial was unreasonable and unlawful, the standard set forth in the local cable franchise. Specifically, the court found the denial unreasonable because it was based on Charter's refusal to comply with the county's untimely information requests, some of which related Mr. Allen's net worth, the county's demand for an independent financial study to be financed by Charter, the county's demand for a cash payment of \$500,000, and the county's demand for a post-transaction rate freeze.

The Ninth Circuit, however, ruled that the "unreasonable and unlawful" standard set out in the cable franchise did not apply because the denial of consent to the transfer request was a "legislative action." Rather, the court stated that "under this deferential standard, the county's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial."

The court of appeals found that two of the reasons the county cited as the basis for its denial were sufficient and based on substantial evidence. First, the court found that the county had not acted unreasonably

in denying the transfer based on its stated concerns about "Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." Second, the court found that the lower court had failed to give proper deference to the "County's articulated concern for keeping stable the subscriber rates in the future" . . . given that "Allen's offer, based on a per subscriber basis, was incontrovertibly and substantially higher than the market price." In so ruling the higher court recognized that the very high price Allen had paid to acquire the cable system "might imperil the possibility of achieving a reasonable return on equity and thereby jeopardize the company's financial health, the stability of rates, and the quality of service."

The Ninth Circuit also rejected Charter's claim that the denial violated Charter's First Amendment rights, concluding that Charter had voluntarily entered into the franchise agreement with the county, under which the county had the right to approve a transfer of ownership, and thereby effectively waiving its right to raise a First Amendment claim.

Charter is seeking a rehearing of the Ninth Circuit's decision. No action has been taken on the rehearing request.

—Anita T. Gallucci

Second Circuit Rules White Plains' ROW Ordinance Violated 1996 Telco Act

In September, the United States Court of Appeals for the Second Circuit ruled that the city of White Plains, New York violated section 253 of the Telecommunications Act of 1996 (Act) by, among other things, requiring TCG, a competitive local exchange carrier (CLEC), to pay franchise fees and other forms of compensation as part of a telecommunications franchise while excusing the incumbent local exchange carrier (ILEC), Verizon, from any comparable requirements. *TCG New York, Inc., v. City of White Plains*, 2002 WL 31045144 (2d Cir. Sept. 12, 2002).

Under section 253(a) of the Act, a local government may not adopt regulatory ordinances "that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(c) of the Act, however, preserves a local government's authority to adopt right-of-way management regulations and to require compensation from telecommunications providers for use of the right-of-way, as long as that compensation is "fair and reasonable" and imposed on a "competitively neutral and nondiscriminatory basis." There have been conflicting rulings from the federal courts on the meaning of both provisions.

The court ruled that the certain provisions of White Plain's telecommunications franchise and regulatory ordinance violated section 253(a) of the Act. Specifically, the court ruled that the ordinance "provision that gives the Common Council

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litigation to the special assessment levy. The town argued that Wis. Stat. §66.60(5), which allows a municipality to add to the special assessment "the cost of any architectural, engineering and legal services, and any other item of direct or indirect cost which may reasonably be attributed to the proposed work or improvement" authorized the inclusion of litigation expenses in the special assessment levy. The court, however, rejected this argument, stating "[t]he legal expenses the town is seeking to add to the assessment are not reasonably attributed to the work or improvement. They do not aid in its creation or development, but arise after completion of the engineering report and after the municipality has published its final resolution. They are instead attributed to an appeal from the special assessment. While the town would be entitled to legal costs for establishing the project, the statute does not allow for the addition of legal expenses that are speculative and uncertain, and merely the result of a legal challenge."

—Lawrie J. Kobza

Task Force Seeks Changes to Promote Intergovernmental Cooperation

Reforms designed to promote intergovernmental cooperation dominate the set of draft recommendations recently issued by the Governor's Task Force on State and Local Government. Gov. McCallum created the Task Force by executive order in March and charged it with making recommendations to "strengthen the partnership between the state and local governments." Tim Sheehy, president of the Metropolitan Milwaukee Association of Commerce, chairs the Task Force, which is composed of town, village, city, county and state officials and private sector leaders.

In October, the Task Force issued 85 draft recommendations organized around seven themes. The recommendations range widely, reflecting both the diversity of the Task Force's membership and the difficulty the group has had in reaching consensus. Nevertheless, a recurring theme throughout the Task Force's report is the need to use state resources to encourage, rather than hinder, intergovernmental cooperation. The Task Force recommends that the State:

- Use shared revenues to promote cooperation between communities on services, boundaries and economic growth. Task Force members are concerned that disparities in fiscal capacity and competition for shared revenue lead to jurisdictional disagreements between communities. The Task Force recommends that the state use shared revenue as an incentive to promote cooperative efforts among local jurisdictions in relation to a state strategy. It also recommends that shared revenue be revised to better equalize each community's ability to afford municipal services.
- Adopt tax-base growth-sharing laws to promote regional economic development. Related to the above recommendation, the Task Force urges the State to facilitate regional agreements to distribute a portion of tax-base increases in any community to the other communities in the region. Such a measure is intended to eliminate competition and promote cooperation among communities in courting new businesses.
- Eliminate state review of municipal boundary changes and annexations. This recommendation is based on the idea that if local governments agree to a boundary change or annexation, and the public is accorded notice and due process, no administrative review of these actions should be necessary.
- Authorize the creation of metropolitan governments. The Task Force seeks authorizing legislation that would allow communities to form a metropolitan government if they choose to do so.
- Promote regional cost sharing and regional decision-making for regional assets. Task Force members

recognize that amenities such as zoos or museums are often supported by city tax dollars alone, despite their broader benefit to all communities in a region. They recommend that, "by local decision," communities should share the costs of such amenities in exchange for a role in decision-making over those amenities. They urge the state to create a mechanism that would allow local governments to easily make decisions on supporting regional assets.

The Task Force issued its draft recommendations in October in the hope that its ideas would be discussed by the gubernatorial candidates. After receiving feedback from their various constituencies, Task Force members have agreed to reconvene this Fall in order to review and refine their recommendations. A final report is due in February, 2003.

—Matthew D. Weber

Second Circuit Rules White Plains' ROW Ordinance Violated 1996 Telco Act

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the right to reject any application based on any 'public interest factors . . . that are deemed pertinent by the City' amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City." In addition, the court concluded that "the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays." According to the court, these regulatory "obstacles" impinged on TCG's ability to compete in White Plains on a fair basis and, therefore, violated the Act.

The Second Circuit affirmed the district court's ruling that several provisions of the city's ordinance were invalid because they were not designed to "manage the public rights-of-way," as permitted by section 253(c) of the Act, but rather went well beyond what that section allows. Invalidated were provisions that required disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise.

The Second Circuit also considered the validity of the 5% gross revenues fee the city's ordinance imposed on CLECs, such as TCG, but not on Verizon, the incumbent provider. The court ruled that the city's imposition of fees on TCG but not on Verizon was not "competitively neutral and nondiscriminatory," as required by section 253(c) of the Act. The court stated, "[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goal" of the Act. Another provision that required TCG, but not Verizon, to provide the city with free conduit was also invalidated.

The parties have not yet decided whether to appeal the decision to the U.S. Supreme Court.

—Anita T. Gallucci

New FCC Decision Limits Pole Attachment Fee

In an October 9, 2002 order affirming an earlier decision of its Cable Services Bureau, the Federal Communications Commission ("FCC") rejected a \$53.35 per pole annual attachment rate. The rate had been sought by Georgia Power Company ("GPC") from Teleport Communications of Atlanta ("Teleport"), an Atlanta-based competitive local telecommunications affiliate of AT&T. The decision, "In the Matter of Teleport Communications Atlanta, Inc." (FCC 02-270), is notable for clarifying the FCC's stance on certain aspects of its formulas for maximum allowable pole attachment rates for cable systems and telecommunications carriers. See 47 C.F.R. § 1.1409(e)(1) and (2) ("FCC formulas").

Specifically, the FCC decision invalidated GPC's use of an alternative methodology for calculating pole attachment rates. Among other things, GPC's formula improperly used replacement costs rather than historical costs, as mandated by the FCC, and included in its calculations Federal Energy Regulatory Commission accounts not approved by the FCC for inclusion in the pole attachment formulas because the costs recorded in those accounts are not sufficiently attributable to poles.

In addition, the FCC rebuked GPC for failing to count itself as an attaching entity in its formula. The FCC pole attachment formulas include a "Space Factor" used to calculate the capital and operating costs attributable to an attaching party. A key element in this factor is the number of attaching entities. The FCC has established presumptions on what this number should be. In rural areas, the FCC presumes 3 attachers, including the electric utility. In urban areas, the FCC presumes

5. The minimum possible number is 2, the electric utility and one other attaching entity. In contrast to the FCC presumptions, GPC used 1.5922 as the average number of attachers. With the FCC formulas, the lower the presumptive average number of attachers per pole, the higher the pole attachment rate. In GPC's case, use of the FCC presumptions would have resulted in annual attachment rates of \$8.24 for rural areas and \$7.23 for urban areas.

In addition to omitting itself as an attacher, GPC erred, according to the decision, by failing to adequately justify its presumptive average. According to the decision, GPC not only neglected to provide the required documentation at the time Teleport filed its initial complaint, but the information subsequently provided suggested that GPC had included in its sample poles located in areas where Teleport was not even attached. The FCC found that this was contrary to the rule that an attacher be responsible for paying its formula share of the costs of unusable space only for those poles to which it is actually attached. See 47 U.S.C. 224(e)(2). Accordingly, the FCC decision exhorts GPC to "develop a presumptive average that accurately reflects the Teleport service area and that can be used in future negotiations with Teleport."

Although FCC rulings do not explicitly apply to municipal utilities, they provide such utilities with a useful touchstone for deriving reasonable pole attachment rates.

GPC has already appealed the FCC's initial decision in the matter at the Eleventh Circuit of Appeals. Oral arguments in that proceeding are scheduled to take place next month.

—Richard A. Heinemann

Raze Order Held Valid Despite Lack of Personal Service

Thaddeus Derynda sued the city of Milwaukee for razing a building on his property. He claimed that he had been denied due process of law because he had not been personally served with the raze order, that the provisions of the raze order statute were unconstitutionally applied to him and that he was denied a right to a remedy under Article I, Section 9, of the Wisconsin Constitution. The circuit court dismissed his claims. The court of appeals, in an unpublished decision, affirmed and declared his arguments to be frivolous. *Milwaukee v. Derynda*, Appeal No. 01-3186 (Ct. App. Sept. 24, 2002).

Milwaukee issued a raze order in September, 1999 pursuant to section 66.0413(1)(b)1, Stats. The order gave Derynda 20 days to raze and remove a building on his property. The city posted the order at his property, published the order, recorded it with the Milwaukee County Register of Deeds, and attempted personal service at Derynda's residence on five separate occasions. Each time personal service was attempted, cards were left instructing Derynda to contact the city. When the city received no response, it razed and removed Derynda's

building. When the city brought an action to recover its costs, Derynda filed a counterclaim asserting his claims.

Derynda claimed that the city knew his address and, therefore, was required to serve him by mail under section 66.0413(1)(d), Stats. The court disagreed and stated that the issue was whether the city was reasonably diligent in serving him. The court held that a rule requiring service on a property owner by mail, by publication, by posting on the property, by recording with the Register of Deeds, and by personal service would place an undue burden on municipalities and would encourage unscrupulous property owners to evade service.

The decision demonstrates the advantages of using multiple means of service to establish reasonable diligence in serving recalcitrant property owners. It also demonstrates that the courts will not permit game-playing by property owners in an effort to avoid the effect of raze orders.

—Mark J. Steichen

SPEAKER'S FORUM

December 10, 2002

Creating Stormwater Utilities

UW-Extension Local Government Center

ETN Sites throughout Wisconsin

Lawrie J. Kobza

MUNICIPAL LAW NEWSLETTER

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