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Twelve Communities Added to Governor's Energy Independence Partnership Program

On October 8th, 2008, the Governor's Office of Energy Independence ("OEI") announced that twelve new municipalities have signed Wisconsin Energy Independent Community ("WEIC") Partnership agreements with OEI. The new members include Columbus, Evansville, Kaukauna, Lodi, Muscoda, New Richmond, Plymouth, River Falls, Stoughton, Waunakee, Waupun, and Westby. There are now thirty WEIC partners in all.

The WEIC partnership program is the first of its kind in the nation and a central part of Governor Doyle's Plan for Energy Independence. WEIC partners are local governments, including counties, cities, villages, and towns. Partnership communities make a three-tiered commitment to participate in programs designed to foster innovation in the use of renewable energy resources and promotion of energy efficiency efforts.

First, WEIC partners must pass a resolution committing the municipality to meeting the so-called "25 by 25" goal of generating 25 percent of electricity and 25 percent of transportation fuel from renewable resources by 2025. Partners must post their efforts on the web and create a link to the Office of Energy Independence website.

Second, WEIC partners also pledge to reduce fossil fuel consumption and encourage building efficiency in their communities by passing resolutions

that track the Governor's executive orders requiring purchase of energy efficient equipment for municipal facilities, use of renewable fuels in municipally-owned vehicles, and promotion of high performance green building standards for newly constructed municipal buildings.

Finally, WEIC partners must perform comprehensive energy audits. The evaluations are designed to define community boundaries, describe emerging energy uses attuned to community needs and resources, design a strategy for achieving energy efficiency and savings, evaluate potential renewable energy technologies, and match energy needs to capacity. In addition, WEIC partners must prepare a comprehensive energy independence plan, participate in the shaping of ongoing state energy policies, and designate an official energy independence coordinator.

According to OEI, WEIC partners receive the benefit of access to state and federal funds, technical assistance from state and federal agencies as well as the private sector and foundations, and cost savings for local operating budgets through increased energy efficiency.

To further OEI's efforts, Governor Doyle recently announced a special \$500,000 grant for municipalities toward the development of a 25 x 25 plan. Grant applications are due on December 15, 2008. Additional information can be found on the OEI website at <http://power.wisconsin.gov>.

Supreme Court Asked To Rule on Responsibility for Stormwater Runoff

The Court of Appeals, District IV, has certified the following question to the Supreme Court:

Can an uphill landowner who has done nothing to affect surface water flow be held liable to the owner's downhill neighbor for damages and injuries sustained as a result of the water flow?

This question arises in *Hocking v. City of Dodgeville*, Appeal No. 2007 AP1754. In that case, the Hockings brought an action alleging damages and injuries for excessive surface water runoff from the property of their neighbors, who had done nothing to alter the surface water flow on their land. The Hockings' problems with the water flow began when the neighboring home was built thirteen years earlier as the City of Dodgeville developed the surrounding area and altered the landscaping.

The neighbors contend that the standard of care they owed the Hockings is defined by the "reasonable use" doctrine articulated in *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), and that they are not liable for any damages the Hockings have sustained because they did nothing to alter the surface water flow from their property. They contend that in *Deetz* and other cases finding liability for surface water runoff, there was some conduct by the defendant that increased the runoff onto the plaintiff's property.

The Hockings argue that the neighbors are liable for negligently failing to abate a nuisance, relying on *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658. In *Milwaukee Metropolitan*, the sewerage district brought a claim for maintaining a nuisance against the City of Milwaukee for damage to a sewer allegedly caused by a collapse of the city's water main. The Supreme Court cited with favor Restatement (Second) of Torts, section 839, which imposes liability on a party who negligently fails to abate a nuisance condition. The Hockings argue that the neighbors have not appropriately managed the surface water flow from their property and are thus subject to liability for negligently failing to abate this nuisance under *Milwaukee Metropolitan*.

The Court of Appeals has certified this case to the Supreme Court to address the issue of whether the reasonable use doctrine articulated in *Deetz* remains the law with respect to surface water or whether a party may be held liable for damages caused by surface water flow for negligently failing to abate a nuisance based on *Milwaukee Metropolitan* and Restatement (Second) of Torts, section 839. The Supreme Court has not yet decided whether to accept the case.

— Lawrie Kobza

Congress Approves Great Lakes Compact

The Great Lakes Compact was signed by President Bush on October 3, 2008, substantially sooner than many people expected. When Wisconsin approved the Compact in May, 2008 (2007 Act 227), many assumed that it would be at least three years before all eight Great Lakes States and Congress approved the Compact. The process, however, moved much faster than expected, and the Compact provisions will become effective on December 8, 2008. What this means is that the implementation schedule anticipated when Act 227 was passed will be greatly accelerated.

Effective December 8, 2008, withdrawals of over 100,000 gallons per day from the Great Lakes Basin will be prohibited without a permit or approval. In order to address this requirement, the Department of Natural Resources will be issuing an "interim approval" letter to all current users with the capacity to withdraw more than 100,000 gallons per day in any 30-day period. The interim approval letter will contain a withdrawal baseline amount based upon the user's current capacity. A user's water use will be grandfathered under the Compact up to this baseline amount. Grandfathered water users who seek to increase their water use above their withdrawal baseline will be required to apply to the DNR for a permit increase.

The DNR will soon begin writing administrative rules to implement the Great Lakes Compact. The administrative rules are to address general and individual permit requirements, public notice and public hearing procedures, water supply area planning requirements, water conservation and efficiency, and more. It is expected that although statutory requirements will apply beginning December 8, 2008, the administrative rules will not be final until December 2010 at the earliest.

— Lawrie Kobza

Condo Associations Fail to Convince Federal Court to Find A Constitutional Violation In Refusal of City to Maintain Private Streets

Most municipalities decline to maintain private roads or streets, ranging from “ring roads” around the perimeter of shopping centers to what function as streets within apartment complexes and condominium projects.

Several residential condominium associations in the City of Brookfield filed a federal court case challenging the City of Brookfield’s policy declining to maintain private condominium streets, arguing that the policy resulted in the associations having to charge unit owners for private street maintenance while the unit owners were also paying city property taxes.

The Eastern District of Wisconsin federal court issued its decision on September 30, holding that the applicable test is whether the City had a rational basis for declining to maintain the private streets. The Court held that minimizing City expenses where there is neither a statutory or common law duty to maintain such streets and where the presence of condo associations with the ability to assess costs of private maintenance against the condo unit owners is a rational basis supporting the policy. Owners of apartment complexes and shopping centers have a similar ability to fund private street maintenance through the rents they charge or service charges on top of rents.

The parties to the case disagreed about why the streets were not dedicated to the City. The City told the court that the developers of the condo projects chose to make the streets private to avoid applicability of zoning setback standards that apply only to lands abutting public streets; the ability to skirt setback standards allows higher density levels. The current condo unit owners whose associations brought the suit said they did not participate in those decisions. The court responded that the unit purchasers can be assumed to have known that the streets were private and bought into the projects with that assumed awareness.

The associations asked the court to apply a state statute, section 703.27, that provides that no municipality can enact an ordinance or regulation providing a lower level of services to a condominium project than are provided to similar projects not set up as condominiums. The court rejected the idea that this statute establishes condominiums as a suspect classification under federal equal protection doctrines, which the court believes state law cannot do. Furthermore, the City’s policy applies to all private streets or roads, not just those in condominium projects.

Pheasant Run Condominium Homes Association v. City of Brookfield, 2008 U.S. Dist. LEXIS 75897.

— Richard A. Lebmann

SPEAKERS FORUM

November 4, 2008

401(k) Plans

Employee Benefits Institute of America
Baltimore, MD

Cynthia A. Van Bogaert

November 7, 2008

Employment Law Update:

Protecting Yourself in Times of Change

Bagels with Boardman Law Firm
Madison, WI

Steven C. Zach, Jennifer S. Mirus,

Robert E. Gregg & Cynthia A. Van Bogaert

November 11, 2008

401(k) Plans

Employee Benefits Institute of America
Kansas City, MO

Cynthia A. Van Bogaert

December 3, 2008

Small Retirement Plans: Plan Design Considerations and Impact of Special Rules

Worldwide Employee Benefits Network
Madison, WI

Cynthia A. Van Bogaert

Moody’s to Recalibrate Municipal Bond Ratings

Moody’s Investors Service has announced that, beginning in October, it will recalibrate its ratings of U.S. municipal bonds by phasing out its municipal scale and moving all ratings to its global scale. Among other things, the action is expected to help municipal utilities by lifting ratings, making it easier to attract credit. The move was prompted, at least in part, by the credit freeze in the current market and the resulting need for rating comparability between municipal and non-municipal securities. The transition is expected to begin with state government general obligations and be completed in January. The transition for public power credits is scheduled for December. The increase for utilities is anticipated to be about one ratings notch. According to Moody’s, the ability to set rates and exercise local control will continue to make public power utilities attractive despite the current economic downturn.

— Richard A. Heinemann

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.

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