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Closed Session Proceedings May be Subject to Discovery in Litigation

In *Sands v. Whitnall School District*, 2008 WI 89, the Wisconsin Supreme Court recently held that closed session proceedings may be subject to discovery in litigation. The case involved litigation over the nonrenewal of a school district employee. During discovery, the employee submitted interrogatories to the school district asking the district to identify each person at the closed session who spoke during the deliberations that resulted in the nonrenewal decision and to state the substance of what each person identified had said about the nonrenewal. The district refused to answer, claiming that the information was privileged under Wis. Stat. §19.85 (the open meeting law exemptions) and under a "deliberative process privilege."

The circuit court ordered the district to provide the requested information, but the court of appeals reversed holding that the language of Wis. Stat. §19.85 indicated that the legislature intended to protect the substance of closed sessions from public disclosure. On July 11, 2008, the Supreme Court reversed the court of appeals and held that the closed session proceedings were discoverable.

The Supreme Court held that there is no privilege implicit in Wis. Stat. §19.85 which would automatically shield the contents of a governmental body's closed session from a discovery request. Under the discovery statute, Wis. Stat. §804.01, a litigant's right to discover relevant information is broad, as long as the information isn't privileged. The court noted that this broad right to discovery is necessary to effectively ensure litigants are able to uncover the

truth and seek and be accorded justice. The court reasoned that if all communications in a closed session were privileged, litigants would be left without the ability to discover whether a governmental body has acted outside of its authority. According to the court, this would in effect, immunize a public body from any challenge relating to the propriety of its closed session.

The court also noted that Wis. Stat. ch. 905 does not include a closed session privilege. While the school district argued there was an implicit privilege granted by Wis. Stat. §19.85, which authorizes certain matters to be handled in closed session, the court rejected this argument. The court noted that to do otherwise would provide governmental bodies with a privilege against litigation discovery which was not also available to nongovernmental bodies.

The Supreme Court also held that Wisconsin does not have a "deliberative process privilege." The court stated that Wisconsin law has not recognized a "deliberative process" privilege and that it would not judicially create one.

The conclusion to be drawn from *Sands* is that closed session proceedings will not **automatically** be exempt from discovery if a litigant later challenges the governmental body's actions. However, to the extent that the closed session involves communications with legal counsel, such communications would still be privileged under the attorney-client privilege which is explicitly recognized by Wis. Stat. ch. 905, and such communications would be exempt from discovery.

— Laurie Kobza

County May Prohibit Construction Manager from Bidding on Construction Contract

Rock County's Corporation Counsel requested an informal opinion from the Wisconsin Attorney General as to whether Rock County could prohibit its contract construction manager from bidding on the construction contract for a new jail. In an informal opinion dated July 30, 2008, the Attorney General opined that it could.

Rock County put out a Request for Qualification (RFQ) for those interested in the role of construction manager for the jail project. One of the provisions placed in the RFQ was that the selected construction manager would not be allowed to bid as a contractor on the project. A construction firm questioned the limitation and asked that it be removed. It even hired a law firm that opined that the County could potentially be in violation of the bidding statutes if it did not allow the construction manager to bid on the construction contract.

In his request, the Rock County Corporation Counsel indicated that he has found nothing that would prevent the construction contractor and construction manager positions from being held by the same person, however, he believed the two roles to be incompatible. In describing his concerns he said, "One of the construction manager's duties is to protect the County's interest in determining that the construction contractors are performing their duties as required by their respective construction contracts. To allow both a construction contractor and construction manager to be the same person or entity would essentially require the construction manager to watch themselves and it is questionable whether there could be compatibility to protect the County's interest. Also, the construction manager would be involved in helping the County evaluate bids from the construction contractors. To have the construction manager and contractor both be the same gives the appearance of impropriety and defeats one of the purposes of having a construction manager."

The Attorney General, in his response, first stated that construction management services are professional services which are not covered by the constraints of the public bid law. Next, he stated that the legislature has not restricted a county's discretion to hire a construction manager and impose reasonable conditions on the contract. While the statute does not explicitly authorize the county from prohibiting its construction manager from bidding on the construction contract, nothing in the statutes precludes the county from doing so. Finally, the Attorney General concluded that the incompatibility doctrine did not apply to independent contractors. The Attorney General did not address whether it would be a conflict of interest for the same firm to serve as both the construction manager and construction contractor.

— Lawrie Kobza

Governor's Task Force Issues Final Report on Global Warming Strategy

Governor Doyle's task force on global warming has finalized its report addressing Wisconsin's strategy for confronting the problem of global warming. The report recommends a group of interim targets to reduce greenhouse gas (GHG) emissions in Wisconsin to 2005 levels by 2014 and 1990 levels by 2022. Long term goals include reaching 75 percent reduction from 2005 levels by 2050.

The 29-member task force was convened by executive order in April 2007 and was comprised of a wide array of environmental, agricultural, industry, citizen, tribal and utility leaders. Using local research and current national research, the task force analyzed potential solutions to global warming and was charged with devising a state-wide plan of action to reduce GHG emissions. An interim report was issued in February of this year that included numerous recommendations that were incorporated into the final report.

The recommendations represent an aggressive, multi-sector strategy to address the problem of GHG emissions. Specifically, the report enumerates 63 detailed policies to be implemented by utilities, government entities, consumers and businesses and includes support for a proposed mandatory federal cap and trade program, as well as an interim recommendation that Wisconsin participate actively in the Midwestern Governors Association effort to develop a regional cap and trade program. A cap and trade program sets an economy- or industry sector-wide cap on GHG emissions and then auctions or allocates tradable allowances to GHG sources or fuel distributors.

For the utility sector, the report recommends greater funding for Wisconsin's existing Focus on Energy program, which supports efforts by consumers, business and local governments to reduce energy consumption. The report also encourages

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Owners May Not Reserve Riparian Rights When Conveying Property

In a recent case recommended for publication, the court of appeals further defined the limitations on property owners' ability to convey riparian rights. Persons who own title to land abutting a body of water are known as riparian owners. These rights are subject to the public's right to use navigable waters under Wisconsin's public trust doctrine. Over a decade ago, in *Stoesser v. Shore Drive Partnership*, 172 Wis. 2d 660, 665, 494 N.W.2d 204 (1993), the supreme court held that riparian owners had the right to sell interests in their riparian rights to third parties. Within a year, the legislature enacted section Wis. Stat. §30.133, which prohibits "the conveyance" of riparian rights by easement or similar means to anyone else who does not hold title to the shoreline property.

Within a few years of its enactment, the meaning of Wis. Stat. §30.133, was challenged where a limited partnership attempted to create a "dockominium." Under its plan, the partnership would convert its marina with 407 rental boat slips into 407 individual condominium units, each with riparian rights to one slip. *ABKA Ltd., Partnership v. DNR*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448. The supreme court affirmed the decision of the court of appeals, which had reversed the circuit court, and held that the structure of the transaction amounted to conveyance of riparian rights by easement in violation of the statute.

Governor's Task Force

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development of innovative utility rate designs and demand-side response programs to facilitate conservation, and urges adoption of state-of-the-art residential and commercial building codes, including the possibility of mandatory efficiency upgrades for existing buildings at the time of sale. Finally, the report includes numerous policy recommendations designed to promote cleaner and renewable electric generation technologies, as well as water conservation programs.

Other sectors targeted by the final report include transportation, agriculture and forestry, industry and waste. Many of the recommendations also identify ways that GHG reduction practices can create new jobs and improve the state's economy. The report specifically attempts to mitigate the potential costs of the recommended policies on Wisconsin consumers and businesses.

The report is now under consideration by Governor Doyle. Copies are available online at <http://dnr.wi.gov/environmentalprotect/gtfgw>.

— Richard A. Heinemann

More recently, in *Berkos v. Shipwreck Bay Condominium Association*, 2006 AP 2747 (Ct. App. July 17, 2008)(recommended for publication), a riparian owner/developer executed a Declaration of Condominium and developed five condominium units on its property. The developer also owned an adjacent parcel of riparian property where it operated a restaurant and bar. The condominium declaration included a provision that gave the developer the right to control the placement of piers, docks and water craft along the shoreline owned in common by the condominium owners. After the last condominium unit was sold, the developer applied to the DNR for a permit to build piers off the restaurant and bar parcel, with the piers to extend in front of the condominium property's shoreline. The DNR denied the application, finding that the developer was no longer the riparian owner, but said the DNR would grant a permit if the developer obtained the authorization of the condominium association or a judgment declaring it the riparian owner. The association refused to give its authorization.

The developer brought suit against the association and condominium owners seeking a declaratory judgment that it was the riparian owner. The circuit court found against the developer, and the court of appeals affirmed. The developer's principal argument was that the relevant provisions of the condominium declaration constituted an easement that reserved to it the right to control the placement of piers in the waters abutting and extending out from the condominium property. The developer reasoned that, since 30.133, Stats., expressly proscribed only the "conveyance" of riparian rights by easement, the statute did not bar a reservation of riparian rights while conveying other property interests.

The court of appeals looked to the issues at stake in *Stoesser* case and the legislature's reaction to the court's holding by enacting section 30.133, Stats. The court explained adherence to legislative intent as evidenced by legislative history as further explained in *ABKA* compelled it to view the holding in *Stoesser* to be abrogated. The "majority rule" as adopted in *Stoesser* allowed riparian rights to be granted or reserved. The court in *Berkos* found that the legislature intended to reverse the entire holding in *Stoesser* and to establish a policy that riparian rights are not severable from riparian property. This result establishes a bright-line rule and avoids significant litigation that would otherwise be engendered in future transactions by artful drafting of conveyances attempting to qualify as reservations rather than grants of riparian rights.

— Mark J. Steichen

Public Access to Navigable Waters Not Easily Abandoned

Public access to navigable waterways in Wisconsin is often a point of contention between riparian landowners and the public. A recent court of appeals case gives support and guidance to towns seeking to defend public access.

Vande Zande v. Town of Marquette, Appeal No. 07-2354 (Ct. App. Aug. 13, 2008) (recommended for publication).

Since 1923, developers of riparian lands in Wisconsin must provide access from a public road to navigable waterways at least every 1/2 mile. In *Vande Zande*, a developer filed a certified survey map in 1971 that showed a 66-foot wide strip described as “Public Access” extending from Marine Drive in the Town of Marquette to Lake Puckaway. The next year, the developer sold a parcel of land near the strip, with the warranty deed purporting to give access rights in the 66-foot wide strip “as will be shown” in a plat yet to be recorded. In 1974, the developer created a plat of 14 parcels, showing the same access strip in the same location, again describing it as “Public Access.” The town approved the plat. From 1993 onward, the developer sold 13 of the parcels in the plat by deeds purporting to convey a 1/13th share in the access strip. An agreement between the purchasers of the parcels required them to make certain improvements to the strip. The town never improved or maintained the strip.

The decision does not explain how the issue arose, but in 2006, the town board informed the owners of the parcels that their claim of ownership to the access strip was not valid. The owners then brought a declaratory judgment action for a determination of their rights. The owners alleged that: (a) the strip had never been dedicated to the public for access, (b) the town had never accepted the dedication, and (c) if there was a proper dedication, the town was estopped to assert the public’s rights, because of inaction on its part.

The landowners’ argued that the strip had never been dedicated to the public because the plat said “Public Access,” rather than the statutory wording “Dedicated to the Public” specified in section 236.20

(4)(b)(1973). They relied on *Hunt v. Oakwood Hills, Civic Ass’n*, 19 Wis. 2d 113, 119 N.W.2d 466 (1963), in which the court found a parcel in a plat of a new subdivision described as “Community Beach” to be private, rather than public. The court distinguished *Hunt* on two grounds. First, the term “Community” was ambiguous under the circumstances in *Hunt* where a new subdivision was being created and the plat might intend the beach to serve only the residents of the new subdivision. In *Vande Zande*, there was no such confusion that the word “public” signified a dedication to the public at large. Second, by 1974, the statutes concerning dedication of public streets had changed. When *Hunt* was decided, the statutes on land division required that land be marked as dedicated to the public on plats and there was a presumption that anything not clearly marked as public was retained for private use. Chapter 236, Stats., has since been amended to create the opposite presumption, i.e., that streets, roads and other lands appearing for common use on plats are presumed public unless marked otherwise. Accordingly, the court found that the strip had been properly offered for dedication.

Next, the landowners argued that the town had never properly accepted the dedication of the strip for public access, citing *Gogolewski v. Gust*, 16 Wis. 2d 510, 114 N.W.2d 776 (1962). *Gogolewski* held that, under the statutes in existence at the time, a municipality’s approval of a plat did not constitute an acceptance of the dedication of all streets within the plat offered for dedication. The municipality had to do more to declare its acceptance. The court in *Vande Zande* began by noting that the *Gogolewski* case involved a road and its reasoning included the interplay between the land division statutes in Chapter 236, Stats., and a town highway statute, Wis. Stat. §80.38. The court posed the question, without deciding it, of whether a public access to a waterway constitutes a “highway.” The court then went on to explain that the statutes governing land divisions had changed since *Gogolewski* to provide that the approval of a plat does constitute the acceptance of the offer of dedication of all lands shown on the plat for the purposes for which they are offered (streets, parks, etc.). Therefore, the town had accepted the offer of dedication of the access strip by statutory means. The court noted that land can be dedicated to the public by informal common law methods, as well as formal statutory means, but did not have the

need to analyze whether the facts would have demonstrated a common law dedication.

The landowners' next argument was that the town had discontinued the access strip, citing Wis. Stat. §80.32. Under that section, a highway may be discontinued if it is not "opened, traveled or worked" within 4 years of being laid out, or, alternately, if it has been "entirely abandoned as a route of travel" and no highway funds have been spent on it for five years. The landowners argued that the town had never opened the highway and that it had been abandoned as a route of travel with no funds having been spent on it for at least five years. The court rejected this argument on the grounds that amendments to Chapter 236, Stats., in 1997 made section 236.43, Stats., the exclusive means by which public access could be abandoned. That section requires the consent of the municipality. Section 236.16, Stats., was amended to clarify that public access to navigable waterways need not be opened or improved. The section made the amendments retroactive, thereby protecting the public's access to lakes, rivers, and streams.

... the court reiterated that estoppel requires far greater proof when applied against the government representing the public than against private parties.

Finally, the landowners argued that the town was equitably estopped from asserting the public's right of access, citing *Klinkert v. Racine*, 177 Wis. 200, 188 N.W. 72 (1922), for the proposition that estoppel may at times be used to bar the public's property rights. In response, the court reiterated that estoppel requires far greater proof when applied against the government representing the public than against private parties. A claim for equitable estoppel against the government must establish inequitable conduct on the part of the government and irreparable injury to parties relying in good faith on the government's conduct. "Mere laches" will rarely be sufficient to estop the public.

— Mark J. Steichen

Plan Administration Tip: Take Care When Using "IRS Publications" in Administering Employee Benefits

IRS Publications and other items often deal with employee benefit plan issues. They can be found on the IRS website: <http://www.irs.gov/formspubs/index.html?portlet=3>. However, municipalities with employee benefit plans should exercise caution before relying upon "IRS Publications" for administering plans. Be aware that if you try to rely upon an IRS Publication for support for a position you have taken, the IRS and courts may take the view that an IRS Publication will not provide that support. In general, better sources will be found in certain other legal references, such as statutes, certain regulations, and, in some cases, court opinions.

In addition to the reliance concern, be sure to pay attention to the publication date on the IRS Publication and keep in mind that subsequent changes in the law might not be reflected in the guidance.

In attorney Cynthia Van Bogaert's BenefitsLink 401(k) Q&A column, she recently addressed a question which provides more information about the potential pitfalls of relying upon "IRS Publications." Here is the link to the Q&A: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=76

Cindy also has an electronic employee benefits newsletter. If you would like to be on the email list, you can email her at cvanbog@boardmanlawfirm.com.

— Cynthia A. Van Bogaert

SPEAKERS FORUM

401(k) Plans

Employee Benefits Institute of America

Denver, CO	October 7, 2008
Phoenix, AZ	October 14, 2008
Minneapolis, MN	October 21, 2008
Baltimore, MD	November 4, 2008
Kansas City, MO	November 11, 2008

Cynthia A. Van Bogaert

October 23, 2008

Automatic Enrollments

Worldwide Employee Benefits Network, Lisle, IL

Cynthia A. Van Bogaert

October 23, 2008

Promoting Sustainable Cities Through Energy & Water Initiatives

League of Wisconsin Municipalities

Lawrie J. Kobza, Richard A. Heinemann & Anita T. Gallucci

December 3, 2008

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

Worldwide Employee Benefits Network, Madison, WI

Cynthia A. Van Bogaert

MUNICIPAL LAW NEWSLETTER

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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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