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Municipal Law Newsletter

VOLUME 27, ISSUE 4 JULY/AUGUST 2021

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Wisconsin Supreme Court Holds DNR's Broad Statutes Provide "Explicit" Authority to Take Challenged Actions; Dissent Decries "Calamitous Decision"

On July 8, 2021, the Wisconsin Supreme Court issued two decisions important to administrative agency authority. Both cases were decided by a 4-2 decision with Justices R.G. Bradley and Roggensack dissenting and Justice Hagedorn not participating.

The two cases addressed the authority of the Department of Natural Resources (DNR) to take certain actions on permit applications. The *Kinnard Farms* case (*Clean Wisconsin v. DNR*, 2021 WI 71) addressed the DNR's authority to impose an animal unit maximum condition and an off-site groundwater monitoring condition upon a Wisconsin Pollutant Discharge Elimination System (WPDES) permit issued to Kinnard Farms. The *Pleasant Lake Management District* case (*Clean Wisconsin v. DNR, 2021 WI 72*) addressed the DNR's authority to review a high capacity groundwater well application for environmental impacts before approving the application.

Both cases focused on how the Legislature's passage of the REINS Act (2011 Wis. Act 21) and specifically Wis. Stat. § 227.10(2m) impacted the DNR's authority. The Legislature adopted 2011 Wis. Act 21 to place limits on administrative agency authority. Section 227.10(2m) now provides that "[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is ***explicitly required or explicitly permitted*** by statute or by a rule that has been promulgated in accordance with this subchapter" (emphasis added).

At issue in both cases was the meaning of the phrase "explicitly required or explicitly permitted" in § 227.10(2m). In the *Kinnard Farms* case, the Court's majority determined that the word "explicit" is not synonymous with the word "specific," that an agency may rely upon a grant of authority that is explicit but broad when undertaking agency action, and that such an explicit but broad grant of authority complies with § 227.10(2m). This conclusion about the meaning of the word "explicit" was key to the result reached in both cases.

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In the *Kinnard Farms* case, the Court found that Wis. Stat. § 283.31(3) and (4) provided the DNR with the necessary statutory authority to impose the challenged conditions in the WPDES permit issued to Kinnard. The Court focused on the authority granted to the DNR to prescribe conditions to assure compliance with effluent limitations and groundwater protection standards. The Court found that (i) the Legislature gave the DNR broad authority to establish, monitor, and enforce health-based groundwater standards in Wis. Stat. ch. 160; (ii) this resulted in the promulgation of Wis. Admin. Code ch. NR 140; (iii) § NR 140.02(4) provides that the DNR "may take any action within the context of regulatory programs established in statutes or rules outside of this chapter, if those actions are necessary to protect public health and welfare or prevent a significant damaging effect on groundwater or surface water quality"; and (iv) NR 140 applies to all facilities regulated under Wis. Stat. ch. 283, including Kinnard Farms.

The Court concluded that the challenged conditions placed on the Kinnard WPDES permit were necessary to assure compliance with effluent limitations and groundwater protection standards. The Court noted that these conditions were imposed after examining the specific facts surrounding a particular permit application: "This case-by-case analysis allows the DNR to use its expertise to make fact-specific determinations and gives it the flexibility to prescribe conditions that are specifically tailored to a particular applicant." With respect to the condition that required Kinnard to install offsite monitoring wells, the Court noted that "if the DNR did not have the ability to impose a groundwater monitoring requirement, then the groundwater protection standards would be essentially unenforceable." 2021 WI 71 ¶39.

The *Kinnard Farms* dissent took issue with the Court's decision claiming its interpretation of § 227.10(2m) was inconsistent with the Court's interpretation of that provision in *Wisconsin Legislature v. Palm*, 2020 WI 42. In *Palm,* the Court struck down Emergency Order 28 (the "Stay at Home" Order) based in part upon its conclusion that the Secretary of the Wisconsin Department of Health Services did not have explicit authority to issue such an Order. According to the *Palm* majority, the "explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies." The *Kinnard Farms* dissent argued that an administrative agency must have "explicit textual authority before it may act." 2021 WI 71 ¶70 (citing *Palm*). It accused the majority opinion of ignoring the clear directive of the Legislature in Act 21.

In the *Pleasant Lake* case, the question before the Court was whether the DNR had explicit authority to consider the environmental impacts of eight proposed high capacity wells when deciding whether to permit those wells. In 2011, the Court unanimously decided in *Lake Beulah Management District v. DNR*, 2011 WI 54, that the DNR did have the authority and discretion to consider the environmental impacts of a proposed high capacity well. However once § 227.10(2m) was adopted (which was after *Lake Beulah* was argued), former Attorney General Schimel opined that the DNR no longer had that authority.

The Court majority in *Pleasant Lake* concluded that Wis. Stat. § 227.10(2m) did not alter the Court's prior *Lake Beulah* decision and that the DNR still had the authority, primarily from Wis. Stat. § 281.12, to consider the environmental impacts of a high capacity well. According to the majority, "[t]he DNR's authority to consider the environmental effects of proposed high capacity wells, while broad, is nevertheless explicitly permitted by statute." 2021 WI 72 ¶21. The passage of § 227.10(2m) did not change the conclusion it previously reached in *Lake Beulah*: "Section 227.10(2m) does not . . . strip an agency of the legislatively granted explicit authority it already has. Nor does it negate a more targeted 'directive from the legislature' to 'liberally construe' the specific statutes that expressly confer an agency's authority." 2021 WI 72 ¶24.

The *Pleasant Lake* dissent strongly condemned the majority's decision. The dissent warned that "[t]he majority's move has injurious impact far beyond a handful of wells. . . . Although the legislature created our current administrative system, the majority transforms it into Frankenstein's monster,

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Supreme Court Signals that Government Agencies Should Be Very Wary of Denying Exceptions to Regulatory, Licensing and Contracting Requirements that Burden the Free Exercise of Religion

The United States Supreme Court has made clear in two recent decisions that government agencies that regulate, license, or contract may not readily deny exceptions to their requirements that burden the free exercise of religion. Such requirements are subject to strict scrutiny. Under this standard of review, government agencies bear the burden of proving both that their regulations serve a compelling governmental interest and that their regulations are narrowly tailored. This is a very demanding standard.

In *Fulton, et al v. City of Philadelphia, et al (*June 17, 2021) (*Fulton*), the Supreme Court held that the City's refusal to contract with a catholic foster care provider unless the provider certified same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment to the United States Constitution. The Court rendered its decision on June 17, 2021, followed two weeks later by its decision in *Amos Mast, et al v. Fillmore County, Minnesota, et al* (July 2, 2021) (*Mast*). In *Mast*, the Court reversed a decision of the Court of Appeals of Minnesota that had upheld Fillmore County's right to require an Amish community to install modern septic systems for the disposal of water used in dishwashing, laundry, and the like. The Supreme Court did not substantively rule on the merits in *Mast*, but remanded to the Minnesota Court of Appeals for reconsideration of its earlier decision in light of the Supreme Court's decision in *Fulton*. The clear implication of the Court's remand, made clear in Justice Gorsuch's concurrence, is that the Minnesota Court did not appropriately consider the free exercise issue involved.

The Free Exercise Clause of the First Amendment prohibits government action that substantially burdens the free exercise of religion. The foster care provider in *Fulton* argued that its religious exercise was burdened by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The Supreme Court agreed with this analysis and proceeded to determine whether Philadelphia's same-sex regulation violated the Constitution. In the final analysis, the Court unanimously concluded that Philadelphia's requirement did not serve a compelling governmental interest and that its certification requirement was not narrowly tailored, *i.e.*, the least restrictive means of furthering a compelling governmental interest.

The Supreme Court's subsequent decision in *Mast* remanded with direction to the Minnesota Court of Appeals to reconsider its decision requiring religious objectors to install modern septic systems. The Supreme Court did not expressly direct the Minnesota Court of Appeals to change its earlier opinion, but the concurrence by Justice Gorsuch outlines a path of analysis strongly suggesting that the Amish group should not be required to install septic systems contrary to their religious views regarding modern technologies.

In the first place, according to Justice Gorsuch, the County's general interest in sanitation regulations should not be deemed compelling without reference to the specific application of those rules to the specific religious community. As deduced from *Fulton*, courts should not rely on broadly formulated governmental interests, but must scrutinize the asserted harm of granting specific exceptions to particular religious claimants. Accordingly, the relevant question is deemed not to be whether the County has a compelling interest in enforcing its septic system requirement generally, but whether it has such an interest in denying an exception to the specific Amish community at issue.

Justice Gorsuch's concurrence in *Mast* also emphasizes that courts should carefully consider exemptions available to others. As the Court stated in *Fulton*, the government must offer a compelling reason why it has a particular interest in denying an exception to a religious claimant while making exceptions available to others.

Justice Gorsuch also advises that government bodies must give consideration and weight to rules of other jurisdictions that militate against the government's claimed compelling interest in a prescribed regulation. Justice Gorsuch states that it is the government's burden to show that alternatives won't

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Government Agencies Should Be Very Wary of Denying Exceptions

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work; it is not the religious claimant's burden to show that an alternative will work. If the government can achieve its interest in a manner that does not burden religion, it must do so, according to the Supreme Court. This means, according to Justice Gorsuch, that government agencies must prove with evidence, rather than supposition, that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate. In *Mast*, the Amish community proposed to use mulch basins, which the County now has the burden to prove will not work on the particular farms of the particular Amish families involved.

Several cautionary generalizations can be derived from the Supreme Court's recent decisions. First, government regulatory, licensing, and contracting requirements that impact the free exercise of religion, including by requiring implicit endorsements contrary to religious belief, will be reviewed with disfavor by courts. Second, if exceptions to government requirements are allowed in the discretion of an agency decision-maker, the government's requirements will be deemed to not be neutral and of general applicability. Third, the denial of exceptions to religious claimants will be rigorously reviewed in comparison to other exemptions when addressing the question of compelling governmental interest and narrowly tailored fit. Finally, when considering alternatives proposed by religious claimants, the government has the burden to disprove the effectiveness of alternatives to accomplish the government's interest.

The provision for exceptions to agency regulatory, licensing or contractual requirements is emphasized by the Supreme Court as a door opener to religious claimants, but may not be practically avoidable. In such cases, the refusal to accommodate specific religious exceptions will be strictly scrutinized with disfavor. Such situations should be considered by government bodies with reference to the specific circumstances of the religious claimant. A generalized concern, moreover, about opening the flood gates to exceptions will not support the government body's position.

— Richard L. Bolton

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a behemoth beyond legislative control unless the legislature kills it." 2021 WI 72 ¶57. The dissent claims that "the majority affords administrative agencies carte blanche to regulate the people and entities they govern, based solely on broad grants of authority, denying the legislature the ability to check the actions of the bureaucracy it created." *Id.*

The Pleasant Lake dissent argues that a faithful reading of Wis. Stat. § 227.10(2m) would have inevitably led to the abrogation of *Lake Beulah* and a curtailment of the broad grants of authority previously delegated to agencies. The dissent accuses the majority of having "nullified" the Legislature's chosen mechanism for taking back some control from administrative agencies [i.e. the REINS Act] and leaving the legislature with no alternative but to repeal the statutes by which it has delegated its authority to make law.

A few thoughts about these decisions and the REINS Acts. First, if the Legislature wants to limit administrative agency authority or abrogate *Lake Beulah*, it may need to adopt direct and specific legislation, instead of relying on broad legislation like the REINS Act. As the *Pleasant Lake* majority states, the REINS Act does not strip an agency of the legislatively granted authority it already has. The Court will look to existing statutes and rules to determine the extent of an administrative agency's authority. If the Legislature granted an administrative agency broad authority, the Court will not limit that authority based on the REINS Act. Second, these cases both involved an administrative agency's permitting decision under a legislatively established permitting program. In these permitting decisions, the consideration of individual facts was important. These cases did not involve the establishment of new rules or policy decisions with more general application. New rules or policy decisions would likely be subject to more scrutiny. Third, these decisions reaffirm the DNR's broad authority over water issues and may encourage the DNR as it seeks to deal with other challenging water issues such as nitrates, lead, and PFAS.

— Lawrie Kobza

PSC Dismisses Complaint Challenging Extraterritorial Sewer Service "License Fee"

The City of Oconomowoc (City) provides wastewater treatment service to three extraterritorial customers -- Mary Lane Area Sanitary District, the Village of Lac La Belle, and Ixonia Utility District No. 2. In 2020, these three customers filed a complaint with the Public Service Commission (PSC or Commission) challenging the "license fees" charged by the City. (PSC Docket 9300-SI-125.) The license fees were included in the agreements between the City and the customers, but the customers contended that that the license fees were illegal sewerage service charges and were unjust and unreasonable. The complainants asked the PSC to invalidate the license fees. The City, represented by Boardman Clark, denied the claims and responded that the license fees constituted valid consideration for the City's agreement to provide service outside its boundaries, and that the PSC lacked jurisdiction over the complaint.

On June 17, 2021, the PSC issued its written decision dismissing the complaint. (PSC Ref#: 413873.) The Commission concluded that it lacked jurisdiction over the agreed upon license fees. In reaching this conclusion, the Commission relied upon the following important points that other communities with intermunicipal wastewater agreements should keep in mind:

- A municipality retains discretion over whether, and under what conditions, it provides extraterritorial sewer service.
- Municipalities entering into an intermunicipal agreement are able to freely negotiate for services and over the consideration provided.
- The PSC found nothing under Wisconsin law that would prohibit a municipality from negotiating a fee as consideration for providing a service.
- The intermunicipal agreements here were negotiated so that the complainants could obtain wastewater treatment service which was otherwise unavailable.
- Intermunicipal agreements in their entirety do not fall under the PSC's complaint jurisdiction. The PSC only has jurisdiction over the specific provisions of an intermunicipal agreement that qualify as a "rate, rule, or practice" within the PSC complaint jurisdiction under Wis. Stat. § 66.0821(5)(a).
- The fact that the agreements in this case contained a separate section for service rates (that fall under the PSC's complaint jurisdiction) and another section for license fees indicated that the license fees at issue in this case were different than service rates and were not a rate, rule or practice subject to PSC jurisdiction.
- It was also relevant that the contracting municipality was required to pay the license fee. A payment negotiated between two municipalities is not a service charge that affect rates unless or until a utility is involved in the payment itself.
- The PSC concluded that the license fees imposed in these agreements were consideration for the agreement to provide extraterritorial wastewater treatment service as opposed to the actual wastewater treatment service itself.
- The fact that these agreements dealt with wastewater service did not place any additional burdens or requirements on the parties. The relationship between parties acting pursuant to an intergovernmental agreement is solely that of contracting parties.
- The PSC Decision also noted that intergovernmental agreements under Wis. Stat. § 66.0301 should be "interpreted liberally in favor of cooperative action between municipalities," and, that if the legislative policy behind the statute is to encourage cooperation, eliminating incentives for municipalities to provide services outside their territorial boundaries would only discourage such behavior.

— Lawrie Kobza

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

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Municipal Law Newsletter

The Municipal Law Newsletter is published by Boardman & Clark 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—Water Division.

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Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	286-7255	ehagen@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Storm B. Larson	286-7207	slarson@boardmanclark.com
Michael P. May	286-7161	mmay@boardmanclark.com
Kathryn A. Pfefferle	286-7209	kpfefferle@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@boardmanclark.com
Catherine E. Wiese	286-7181	cwiese@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com