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The FCC's Small Cell Order: The Down and Dirty

The express goal of the Federal Communications Commission's recent Small Cell Order[1] is to remove purported barriers to the deployment of wireless broadband services by ensuring that wireless carriers have low-cost and easy access to local right-of-way ("ROW") and to municipal property located in local ROW. The FCC believes it can accelerate deployment by limiting municipal authority to regulate the placement of so-called small wireless facilities ("SWF") in local ROW and on municipally owned structures in the ROW, including street light poles, traffic light poles, and utility poles. Here are a few things every Wisconsin municipality should know about the Order:

What can a municipality reasonably do? It is NOT true that the wireless carrier may put its SWF, including support structures, anywhere it wants to in the ROW. While the FCC's Order places additional limits on municipal authority to regulate the ROW, municipalities have not been stripped of all of their authority. Municipalities may still adopt and apply "reasonable regulations" to the use of local ROW, including when the user is a wireless carrier.

The FCC Order, however, does redefine what is "reasonable" with respect to municipal ROW regulation as applied to wireless and other telecommunications carriers. Under the FCC's new formulation, a municipal regulation is preempted if it: "materially limits or inhibits any competitor's or potential competitor's ability to compete in a fair and balanced legal and regulatory environment." It is not immediately obvious what this new standard means, and it will likely only be through litigation that we will have a better understanding of it. For now, we understand that, under this standard, a municipal regulation would be preempted if it, for example, created a moratorium on the processing of permit applications by wireless carriers until a comprehensive ROW ordinance was adopted or mandated that wireless carriers place their antenna facilities only on existing structures.

What can a municipality do about aesthetics? The FCC adopted a new "reasonableness" standard to be applied to regulations that deal with aesthetics. Aesthetic and other similar requirements (e.g., undergrounding and spacing) are preempted unless they are: reasonable, no more burdensome than those applied to other types of infrastructure deployments, objective, and published in advance. The key criterion here is the second one -- that is, an aesthetic regulation cannot apply only to wireless facilities. This means that if the municipality's ROW is already cluttered with aesthetically unappealing electric utility poles and wires or pedestals and other street furniture, then it will have a difficult time adopting permissible aesthetic requirements if those requirements are not also applied to the equipment of existing ROW users.

1 *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order*, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133, 2018 WL 4678555 (released Sept. 27, 2018).

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Each Concert at a Public Park was a Separate Event for Purposes of Providing Notice of a Private Nuisance Claim Against a City

The Wisconsin Supreme Court has held that, in the context of a private nuisance claim, each concert held at a public park was a separate event for purposes of providing timely notice of a claim to a municipality. *The Yacht Club at Sister Bay Condominium Association v. Village of Sister Bay, 2019 WI 4 (*Jan. 18, 2019) (*"Yacht Club"*).

The village completed construction of a performance pavilion in a public park by August 1, 2014. It immediately began hosting performances, which typically involved live music and often continued past official park hours. The condominium association owned a condominium complex within several hundred feet of the pavilion and due to the layout, the sound of performances was amplified and directed straight toward the complex. On March 6, 2016, the association served a notice of claim on the village asserting that the noise from the concerts substantially interfered with the residents' quiet enjoyment of their property and constituted a private nuisance. The complaint alleged that the last concert took place on or about September 1, 2015.

The issue reviewed by the Supreme Court was whether the concerts taken together were a single ongoing event, or if each concert was a separate event for purposes of the notice of claim statute, section 893.80(1d). The village argued, and the circuit court held, that the claim arose in August 2014 when the residents started noticing problems with noise. The association argued that the last concert in September 2015 was a separate event. In either case, the association did not meet the formal statutory requirement to provide notice of the claim within 120 days of the event. However, the case was to be remanded for a determination of whether the village had actual notice and was not prejudiced—an alternative to timely formal notice. Therefore, the issue was still relevant.

The Court concluded that nature of the claim asserted—private nuisance—was determinative. It cited the well settled common law of nuisance that every continuance of a nuisance is, as a matter of law, a new nuisance. The Court distinguished the case from *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421 (*"E-Z Roll Off"*), which involved Wisconsin antitrust law. In that case, Oneida County had entered into a waste hauling contract under which a hauling company would pay a $5.25 per ton tipping fee whereas every other hauler would pay $54 per ton. Another hauler served a notice of claim and filed suit alleging violations of section 113.18, Wis. Stats. The Supreme Court rejected E-Z Roll Off's argument that each time it delivered a load of waste was a separate violation and affirmed the dismissal of the case for failure to comply with the notice of claim statute.

The Court noted several distinctions between the two cases. First, the plaintiff in *E-Z Roll Off* had not cited any authority for applying the continuing violation rule to

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What fees can a municipality charge? Fees fall into three categories: ROW access fees, permit application fees, and rental or license fees for the use of municipally owned property (e.g., street light poles). The FCC adopted yet another standard to determine whether such fees are reasonable. ROW fees are prohibited unless three conditions are met: the fees are a reasonable approximation of the municipality's costs, only objectively reasonable costs are factored into those fees, and the fees are no higher than the fees charged to similarly situated competitors in similar situations.

In an effort to avoid litigation regarding fees, the FCC set out fees that it believes are presumptively reasonable:

Application Fees: $500 for a single up-front application that includes up to five small wireless facilities, with an additional $100 for each SWF beyond five, or $1,000 for a new pole to support SWF.

Recurring Fees: $270 per SWF, per year, for all recurring fees (including any possible ROW access fee or fee for attachment to municipally owned structures in the ROW).

In Wisconsin, unlike some other states, state law prohibits a municipality from charging an annual ROW access fee, unless the ROW user is a video service provider (Wis. Stat. § 66.0420(7) specifically allows such a fee). To charge a permit application fee or license fee greater than the ones set out by the FCC, the municipality should undertake a cost study to determine the full costs incurred in reviewing wireless siting applications for completeness and granting permits. The municipality should consider such things as the cost of municipal staff time, outside legal counsel and engineers for tasks such as reviewing applications for completeness, conducting any necessary pre- or post-construction inspections, or administering a public notification process. Such cost studies will be crucial in defending the municipality's application and permit fees if those fees are challenged by the wireless carrier.

For more information on the FCC's Order and municipal regulation of the ROW, we refer you to materials Boardman & Clark developed for the League of Wisconsin Municipalities, which are available at: http://www.lwm-info.org/1538/Telecommunications-Including-Small-Cell.

— Anita T. Gallucci and Julie K. Potter

What Constitutes a Quasi-Governmental Corporation Subject to Wisconsin Public Records Law?

A recent Wisconsin Court of Appeals case held that the Kemper Center was not a quasi-governmental corporation subject to Wisconsin public records law. *State ex rel. Flynn v. Kemper Center* (Wis. Ct. App. 2019). In 1977, Kenosha County (the County) acquired Kemper Hall and the surrounding property (Kemper Park) through grants and charitable contributions. The County entered into a lease with the Kemper Center (a private non-profit corporation) whereby the Kemper Center would pay one dollar annually to the County in rent. The Kemper Center would be entitled to keep all revenue generated by Kemper Park, but would also be responsible for all the operational and maintenance costs relating to Kemper Park.

In late 2016, Annette Flynn, a caterer, submitted a public records request to the Kemper Center for, among other things, all documents pertaining to the status of Victoria's Catering as the Kemper Center's preferred caterer. The Kemper Center denied her request asserting that it was not a quasi-governmental corporation subject to Wisconsin public records law. Flynn sued.

The Court of Appeals reasoned that the Kemper Center was not a quasi-governmental corporation subject to the public records law after applying five factors: (1) whether the Kemper Center's funding comes from predominately public or private sources; (2) whether the Kemper Center serves a public function; (3) whether the Kemper Center appears to the public to be a government entity; (4) the degree to which the Kemper Center is subject to government control; and (5) the amount of access governmental bodies have to the Kemper Center's records.

The court's reasoning was based primarily on its determination that the Kemper Center's funding does not come primarily from public sources. The revenue that the Kemper Center generated through its lease with the County should not be imputed to the County. The County was merely serving as the Kemper Center's landlord, and a landlord generally has no claim to revenue generated by a tenant. Additionally, while the County provided a substantial sum of money over the years to improve Kemper Park, this money is not paid directly to the Kemper Center. Instead, this money is spent to improve the County's property. The County-provided funding is minor compared to the money the Kemper Center raises by renting out Kemper Park for private events.

The court also analyzed the four other factors. The court determined that the Kemper Center provides a function that is provided by both public and private actors, and thus this factor was inconclusive. The court also determined that the Kemper Center does not appear to the public to be a government entity because the relationship between the County and the Kemper Center is similar to a landlord-tenant relationship, meaning that the Kemper Center does not appear to be a government entity and the County does not have sufficient control over the Kemper Center to transform the Kemper Center into a quasi-governmental entity. Additionally, the fact that a County Board of Supervisors member served on the Kemper Center's board of directors did not indicate governmental control because that member served on the Kemper Center's board as a private citizen. Finally, the lease obligates the Kemper Center to make all documents pertaining to Kemper Park available to the County. This was the only factor that weighed in favor of the Kemper Center being a quasi-governmental corporation.

After weighing all the factors, the court concluded that the Kemper Center was not a quasi-governmental corporation and was not subject to the Wisconsin public records law. The court also explained that Ms. Flynn could make a public records request to the County in order to obtain records regarding the relationship between the County and the Kemper Center. In this way, the public interest in government transparency is still satisfied.

This case outlines the factors a court will apply when determining whether a private entity is a quasi-governmental corporation subject to the Wisconsin Public Records Law. A key takeaway is that a traditional landlord-tenant relationship with a public entity is not likely sufficient to subject a private entity to the public records law, even if the rent paid to the public entity is nominal.

— Brian P. Goodman

Notice of a Private Nuisance Claim

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the notice of claim statute. Second, the court in that case had explicitly limited its holding to the antitrust context. Finally, whereas in *E-Z Roll Off* every incident of dumping had the same alleged violation, i.e., the differential tipping fee, in *Yacht Club* each concert was different. The Court gave a hypothetical comparison of an unamplified string quartet performance that ends at 8 p.m. and a concert with amplified heavy metal music that goes on past midnight. The association was not asserting that every concert was a nuisance. The village's theory could deprive the association of its ability to assert a nuisance claim for some later concerts by not objecting to all of them from the start.

The takeaway from *E-Z Roll Off* and *Yacht Club* is that there is not a bright line rule on whether a continuation of conduct will be treated as a single event or a series of separate events for purposes of providing notice of claims under section 893.80(1d). It will depend on the legal theory and the nature of the claim.

— Mark J. Steichen

BoardmanClark

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

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Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@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
Kathryn A. Pfefferle	286-7209	kpfefferle@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Douglas E. Witte	283-1729	dwitte@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com