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# Municipal Law Newsletter

VOLUME 25, ISSUE 3 MAY/JUNE 2019

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## *Municipalities Lose the Right to Raise the Notice of Claim Statute as a Defense if Not Plead as an Affirmative Defense*

Before persons may sue a municipality, they must serve the municipal clerk with a notice of claim under Wis. Stat. § 893.80(1d). The purpose of the notice is to make the municipality aware of the claim in order to allow the municipality to investigate and possibly settle it before a lawsuit is filed. If a person does not give proper notice, then a subsequent lawsuit can be dismissed. However, a municipality must raise the issue at the start of the lawsuit by pleading it as an affirmative defense in its answer to the complaint.

In *Maple Grove Country Club v. Maple Grove Estates Sanitary District*, 2019 WI 43 (April 23, 2019), the Wisconsin Supreme Court held that a municipality waives its right to raise the notice defense if it does not plead it as an affirmative defense. In that case, the country club alleged in its complaint that its actions had met the requirements of the notice of claim statute. The district denied those allegations, but did not plead as a separate affirmative defense that the case must be dismissed on the grounds that the club had failed to comply with the statute. The court held that a person does not have to allege in the lawsuit that he complied with the statute and, even if he does, it is not enough for the municipality to simply deny those allegations. Although the parties in the case had submitted evidence and argument about whether the club had, in fact, met the notice requirements, the court explained that it did not have to decide that issue, because the district had lost its right to use the defense.

The statutes give municipalities other defenses to lawsuits, some of which must be plead as affirmative defenses. For example, municipalities have immunity from liability for many discretionary actions and decisions. However, immunity must be plead as an affirmative defense. The statutes also put a limit of $50,000 on damages in certain types of cases. The cap on damages does not have to be plead as an affirmative defense. The lesson is that it is important for attorneys who represent municipalities in lawsuits to be aware of special defenses that may be raised and to determine at the start of the lawsuit whether any of those defenses are applicable and, if so, whether they must be specifically plead as defenses.

*— Mark J. Steichen*

## *A Comparison of the First Three Approved Financial Assistance Programs for Private Lead Service Line Replacements*

The Public Service Commission of Wisconsin (PSC) has now received four applications from municipal water utilities to provide for ratepayer assisted private lead service line replacements pursuant to 2017 Wisconsin Act 137 (the Act). The PSC has approved three of the four applications, with the fourth having just been filed by Kaukana Utilities on April 24, 2019. This article provides a partial analysis of the approval process and different approaches taken by the cities of Kenosha (docket 2820-LS-100), Manitowoc (docket 3320-LS-100), and Menasha (docket 3560-LS-100), as approved by the PSC.

### Timing for Approval

Where no hearing is held on the application, Wis. Stat. § 196.372(3)(d) requires the PSC to take final action within 90 days from the notice of opening a docket on an application.

For the first applicant, Kenosha, it took 135 days from the date Kenosha filed its application on April 3, 2018, to the date that the PSC approved the application on August 16, 2018. For the second applicant, Manitowoc, the duration was 177 days from filing the application on September 11, 2018, to approval on March 7, 2019. For the third applicant, Menasha, the duration was 205 days from filing the application on October 22, 2018, to approval on May 15, 2019.

The difference in timing is a result of how long it took the PSC to issue a notice of opening a docket after the application was filed. For all three applications, the PSC approved the applications within, but close to, 90 days from the date of notice.

### Mandatory Replacement of Lead Service Lines

Wisconsin Stat. § 196.372(2)(a) allows the provision of financial assistance only if a municipality has an ordinance requiring the replacement of each customer-side service line containing lead. As submitted, Manitowoc's program did not require replacement of lead service lines unless the lead service line serving a property has failed or the property is a home and the water main was also being replaced. As a condition to approval, the PSC required a change to Manitowoc's ordinance to make it clear that all lead service lines must be replaced, regardless of the presence of the other preconditions. However, the PSC did not require Manitowoc to require replacement of all galvanized steel pipes.

### Galvanized Steel Pipes

The PSC does not require replacement of galvanized steel pipes; thus, each community has the ability to decide whether it wants to, or can, extend the utility's financial assistance program to cover the replacement. Based on community priorities, Kenosha's program only covers the replacement of lead service lines. Manitowoc provides financial assistance for the replacement of customer-side galvanized steel pipes, but only mandates replacement when a pipe fails. Menasha provides financial assistance for the replacement of customer-side galvanized steel pipes and requires their replacement in the same manner as the replacement of lead service lines.

### Financial Assistance

Wisconsin Stat. § 196.372(3) provides numerous conditions on how a water utility may provide financial assistance (see Municipal Law Newsletter Volume 24, Issue 1). Two conditions relevant to this comparison are Wis. Stat. § 196.372(3)(e)2.a., providing that grants may not exceed 50% of the replacement cost, and Wis. Stat. § 196.372(3)(e)3.a., providing that the percentage of the cost of replacing the property owner's portion of the service line must be the same for each owner in a customer class. While the approaches are divergent, the PSC has approved each of the three financial assistance programs proposed.

Kenosha provides financial assistance equal to 100% of the replacement cost. The financial assistance offered is a grant for 50% of the cost of replacement up to a maximum of $2,000, and a low interest rate loan for the remainder of the cost.

Manitowoc provides "100% financial assistance" in the form of a 10-year, 2.5% loan, up to a maximum of $6,000. Grants are not being provided at this time. Consequently, where replacement costs exceed $6,000, the total financial assistance may not equal 100% of the project cost for every owner. Without noting this issue, the PSC found that Manitowoc does offer the same financial assistance ("loan") amount to every owner in a customer class and Manitowoc's application is consistent with Wis. Stat. § 196.372(3)(e)3.a.

The Menasha program also provides financial assistance to residential property owners equal to 100% of the replacement cost as follows: 1/3 of the cost as a grant from the City of Menasha (up to $1,000 per residential property owner); 1/3 of the cost as a grant from Menasha Utilities (up to $1,000 per residential property owner); and a 5-year low interest loan from Menasha Utilities available for the remaining cost. Menasha's ordinance provides that the grants provided by the utility may not exceed 50% of the total replacement cost. In finding that Menasha's program appears to comply with Wis. Stat. § 196.372(3)(e)2., the PSC looks as if it will not consider city grants as "financial assistance" for purposes of compliance. This is consistent with the Act regulating only the provision of financial assistance by utilities, and opens up options for communities to have combined city and utility funded lead service line replacement programs.

### Recoupment of Loans

There have been two principal approaches for recoupment of loans: 1) annual repayment included on the

*Continued on next page*

## *Supreme Court Allows Town to Proceed with Broad Challenge to Annexation Ordinance*

In April of 2018, the Wisconsin Court of Appeals ruled against the Town of Lincoln in its challenge to the City of Whitehall's annexation of a sand mine located within the Town. (For a detailed discussion of the Court of Appeals' decision, see July/August 2018 Issue of the Municipal Law Newsletter.) In a recent decision, *Town of Lincoln v. City of Whitehall*, 2019 WI 37, 382 Wis. 2d 112, 912 N.W.2d 403, the Wisconsin Supreme Court reversed the Court of Appeals.

The Court of Appeals' decision was based on the assumption that, in accordance with the title that appeared on the petition, the annexation petition qualified as a petition for "direct annexation by unanimous approval" under Wis. Stat. § 66.0217(2). This procedurally streamlined form of annexation requires that an annexation petition be signed by all of the electors residing in the territory to be annexed, along with all owners of the property located within that territory. The annexation petition is then presented to the annexing municipality on a "take it or leave it" basis. Subject to certain filing requirements and the requirement that the property be "contiguous" to the annexing municipality, the municipality may then adopt an annexation ordinance by a 2/3 vote of its governing body.

Because a direct annexation by unanimous approval is initiated by electors and landowners, rather than the annexing municipality, Wis. Stat. § 66.0217(11)(c) provides that the town from which the territory was annexed may only bring a legal challenge to the annexation on the narrow grounds of contiguity or county parallelism. Thus, the Court of Appeals concluded that the Town could not raise any other theories in its lawsuit challenging the annexation (e.g., failure to obtain necessary signatures on the petition, or lack of reasonable present or demonstrable future need for the annexed property).

The Town appealed that decision to the Wisconsin Supreme Court. Rather than relying on the title of the annexation petition, the Wisconsin Supreme Court began by examining its substance. In order to qualify as a petition for direct annexation by unanimous approval under Wis. Stat. § 66.0217(2), the court observed that the annexation petition must be signed by *all* of the electors residing in the territory and the owners of *all* of the real property in the territory. The court examined the petition and noted that the owner of a very narrow strip of railroad land in the proposed annexation area had not signed it. The City argued that this omission was minor and should not affect the classification of the petition because the railroad, whose operations are governed almost exclusively by federal law, had no reason to care whether its track was located in the Town or the City. The court rejected this argument and, relying on the plain language of the statute, held that a petition that lacks the signature of an owner of real property in the territory proposed for annexation does not qualify as a petition for direct annexation by unanimous approval under Wis. Stat. § 66.0217(2). Instead, such a petition should be treated as a petition for annexation by one-half approval or by referendum under Wis. Stat. § 66.0217(3), and may be challenged in court on grounds beyond simply contiguity and county parallelism.

This case should serve as a reminder to municipalities that details matter, particularly in the context of annexation petitions. Instead of relying on the titles petitioners place on annexation petitions, a municipality should carefully examine the petition to ensure that it meets the relevant statutory requirements and includes all required landowner signatures, including signatures from railroad landowners.

*— Julia K. Potter*

## First Three Approved Fincancial Assistance Programs

*Continued from page 2*

property owner's tax bill as a special charge (Kenosha); and 2) monthly repayment included on the property owner's monthly water bill, with the tax roll used in the event of nonpayment (Manitowoc and Menasha).

In addition, Menasha and Manitowoc provide for acceleration of repayment. Menasha requires full loan repayment when a property is sold. Manitowoc requires full loan repayment when a "home" is sold or no longer becomes the homeowner's primary residence. It is unclear if Manitowoc's ordinance also applies to the sale of non-residential properties—a question not addressed by the PSC. In the event of a default, Manitowoc places the balance of the loan amount on the tax roll.

### Short-Term Impact on Rates

Kenosha and Manitowoc did not predict that their programs will have any short-term impact on rates. Menasha predicted that its grant program, but not its loan program, would result in a 2% increase in rates for residential and multifamily customers. However, the PSC required all three utilities to file full rate cases that include private lead service line replacement costs within two years of approval. In response, Menasha requested that the PSC consider providing an extension on that deadline, if necessary to allow the filing of one rate case combining both the financial assistance program and a large capital project. The PSC has not publicly addressed this request.

### Conclusion

With the three approved utilities taking divergent approaches for providing and recovering financial assistance, it appears that the PSC is allowing utilities a degree of flexibility to meet the specific preferences and limitations of each community.

*— Jared W. Smith*

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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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