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MUNICIPAL LAW NEWSLETTER

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Supreme Court Affirms that Evidence of Contamination and Remediation Costs May Be Admitted in Condemnation Cases

The September/October 2010 edition of the Municipal Newsletter reported on the court of appeals decision in *260 North 12th Street, LLC v. Wisconsin DOT,* 2011 WI App 138, 329 Wis. 2d 748, 792 N.W.2d 572, holding that evidence of environmental contamination and the costs of remediation may be admissible in eminent domain cases on the issue of just compensation. The supreme court affirmed the decision on December 22, 2011. 2011 WI 103. The decision was unanimous, with Justice Abrahamson filing a concurring opinion.

The DOT acquired the property in question as part of the massive Marquette Interchange project in Milwaukee. The site was largely an abandoned industrial property contaminated with various chemicals and the DOT presented evidence on the cost of remediating the contamination. The landowner's appraiser valued the property at $3,497,000. Based on its own appraisal, which deducted remediation costs, the DOT paid a basic award of $1,348,000. The case went to trial and the jury returned a verdict finding a value of $2,001,725. Judgment was entered for the landowner for the difference between the verdict and the basic award paid by the DOT, plus litigation expenses. The judgment was affirmed by the court of appeals.

The landowner raised two issues of general interest on appeal: (1) whether evidence of environmental contamina-

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New Boardman & Clark Provides More Services to Municipalities

The law firms of Boardman, Suhr, Curry & Field LLP and Lathrop & Clark LLP joined together on January 1, 2012 to create a new firm: Boardman & Clark LLP. Together the new firm will have nearly 70 lawyers. By combining the strengths of both firms, Boardman & Clark will enhance the breadth and depth of the legal services provided to municipal clients. Look for articles from Attorneys Paul Johnson, Jeff Clark, and Joann Hart from the former Lathrop & Clark firm in future Newsletters.

Court Discusses How to Handle Property Tax Assessment Challenges Affected by Invalidation of Act 86 Process

The court of appeals has recently addressed how to handle ongoing property tax assessment challenges in light of the Wisconsin Supreme Court's decision finding the Act 86 process for "enhanced certiorari" review unconstitutional. *CNL Income GWWI-DEL, LP. v. Village of Lake Delton Board of Review*, Appeal No. 2011AP116, Ct. App., Dist. 4, decided December 22, 2011.

The case involved Great Wolf Resort's challenge to the Village of Lake Delton's property tax assessment of its property. The Village had enacted an ordinance adopting a statutory scheme created by 2007 Wis. Act 86 for challenges to property tax assessments. Under

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Supreme Court Affirms that Evidence May Be Admitted

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tion and remediation costs are admissible in condemnation proceedings, and (2) assuming it is, whether the DOT's appraiser's testimony should have been excluded as speculative. The ultimate holding is that "[s]ubject to the circuit court's discretion, evidence of environmental contamination and of remediation costs are admissible in condemnation proceedings so long as they are relevant to the fair market value of the property." *Id.* at ¶48.

The court's rationale is straight forward. The federal and state constitutions guarantee a property owner's right to "just compensation" when his property is taken. The well established rule is that, in a total taking case, just compensation is determined as the fair market value of the property. Anything that influences the price a prudent buyer would pay in the market is relevant to the fair market value. Environmental contamination and remediation costs obviously impact the price a buyer would be willing to pay. Therefore, such evidence was admissible in the pending case. The majority emphasized the broad discretion of circuit courts in deciding the admissibility and scope of evidence in any given case. It noted that it could envision circumstances in which such evidence may be inadmissible.

Justice Abrahamson concurred in the result, but would have either dismissed the case on the grounds that review was improvidently granted or would have adopted the decision of the court of appeals without further comment. She based her opinion on the fact that the landowner conceded in oral argument that evidence of contamination and remediation costs is relevant to the fair market value and is not categorically inadmissible. Accordingly, she reasoned, the issues were not fully argued and the court should not have weighed in.

The concurring opinion explains that only twelve states seem to have addressed the issue. Only a slim majority excludes evidence of both contamination and remediation costs and some only exclude the latter. The concern in those cases is that the government may be double dipping, i.e., the landowner loses the amount attributable to remediation costs or reduced value of the property in the condemnation proceeding but remains potentially liable to the government for the costs of remediation after the property is taken. At least two states have a rule whereby evidence of both is excluded, but the compensation award is held in escrow, allowing the condemnor to initiate a subsequent action to recover actual costs of remediation. The cases which depart from the fair market value approach do so by resorting to the constitutional bedrock principal that compensation must be "just" and that using fair market value in contamination cases is fundamentally unjust to the landowner. Justice Abrahamson notes that the issues other courts have struggled with include "the difference between evidence of contamination and evidence of remediation costs, liability for remediation, availability of public remediation funds, indemnification from other parties, stigma of contamination even after remediation, fairness of the valuation to the condemnor and condemnee, and other contamination-related effects on the market value of condemned property." *Id.* at ¶80. In her opinion, the court should have waited until more of these issues were developed before weighing in.

The issue of the admissibility of the allegedly speculative nature of the DOT appraiser's testimony is noteworthy because the standard for admissibility of expert testimony has changed since this case was tried. The supreme court affirmed the admission of the testimony because the objection went to the method applied by the appraiser. Since the appraiser was qualified to render appraisal opinions, under the old Wisconsin standard on expert testimony, the court held that the objections to the substance of the testimony went to its weight and credibility not its admissibility. Effective February 1, 2011, Wisconsin amended Wis. Stat. § 907.02 to adopt the federal test of reliability of expert opinion testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). The analysis of the objection under the new standard would require an inquiry into the validity of the method employed by the appraiser.

— Mark J. Steichen

Case Addresses What Constitutes a Boundary Agreement Under § 66.0301(2)

Under current law, a city or village may not annex territory under § 66.0217, Stats., (annexation initiated by electors and property owners) unless the city or village agrees to pay the town for its lost property taxes for the next 5 years. This payment obligation does not apply, however, if the city or village, and the town, have entered into a boundary agreement under §§ 66.0225, 66.0301, or 66.0307.

At issue in *Town of Buchanan v. Village of Kimberly*, Appeal No. 2011AP93, Ct. App., Dist. III, decided December 6, 2011, was whether an agreement entered into by the Village and Town was a boundary agreement under § 66.0301. The Village and Town first negotiated an agreement in 2000 that designated certain areas located within the Town as a Village growth area. The Town agreed not to oppose the Village's attempts to annex land within the Village growth area, and in return the Village agreed not to accept any petition for annexation of land outside the growth area. In 2006, however, the Village annexed property outside the Village growth area, and the Town filed a notice of claim. To settle their dispute, the Village and Town executed another agreement in March 2007. That agreement stated that its purpose was to "provide for the orderly development of the entire area encompassed by [the Village and the Town]." However, with regard to future boundaries, the agreement provided only that:

> It is agreed by the parties that Village shall not encourage nor entice property owners to annex property within Town. However, it is also acknowledged by the parties that Village cannot abrogate its statutory obligations, in the event that a unanimous petition for annexation is presented. Under such circumstances, it is agreed that Town shall not oppose nor challenge any such annexation based upon its size, shape or configuration.

In 2009, the Village annexed property within the Town. The Town did not object to the annexation, but claimed the Village was required to pay the Town for its lost taxes for 5 years. The Village argued that it was exempt from this requirement because the agreement signed in March 2007 constituted a "boundary agreement" for purposes of the exemption from § 66.0217(14).

The circuit court granted summary judgment in favor of the Town, concluding as a matter of law that the 2007 agreement was a settlement agreement to resolve litigation, and not a boundary agreement. The court of appeals went farther and decided the 2007 agreement between the Village and Town was not a boundary agreement, or even an intergovernmental agreement under § 66.0301. The court of appeals opined that the 2007 agreement did not constitute a boundary agreement under § 66.0301(6) because it did not meet the requirements of that subsection, which requires the agreement to establish specified future boundaries. The court also opined that the 2007 agreement did not constitute an intergovernmental agreement under § 66.0301(2) because the agreement did not contain any provision regarding shared services or a joint exercise of power. According to the court, an agreement only falls under § 66.0301(2) if it contains an arrangement between municipalities to share services or jointly exercise power.

Given the court's determination, the Village is required to pay the Town the payments required by § 66.0217(14). This case has not been recommended for publication. However, given the court's conclusion, municipalities with boundary agreements promulgated under § 66.0301(2) -- as opposed to § 66.0301(6) -- may be well advised to review those agreements to confirm that the agreements provide for the sharing of services or the joint exercise power, in addition to the establishment of boundaries.

— Lawrie Kobza

Municipal Subdivision Ordinance Granting Council Discretion to Make Decision Upheld

The City of New Berlin rejected a property owner's application to divide property into two lots based on a municipal ordinance which allowed the council to prohibit new lots that were smaller than lots in the existing subdivision, not as wide as lots in the existing subdivision, or when the existing subdivision was more than twenty-five years old. The parties agreed that the proposed lots could have been prohibited under these criteria. The property owner, however, argued that the ordinance was unconstitutionally vague and that the city council's denial of his application was arbitrary, unreasonable, and discriminatory. The trial court agreed with the property owner and held the ordinance unconstitutional. In *Guse v. City of New Berlin*, Appeal No. 2011AP663, Ct. App., Dist. 3, decided January 18, 2012, the court of appeals reversed, holding that the ordinance was not vague, and that the council's actions were neither arbitrary nor unreasonable.

The ordinance at issue provided that:

> New lots within existing residential subdivisions may be prohibited under any of the following criteria:
>
> (1) When the new lot area is less than the average of the existing lots within the subdivision excluding unbuildable lots; or
>
> (2) When the new lot width is less than the average width of the existing lots within the subdivision excluding unbuildable lots; or
>
> (3) The subdivision was platted over 25 years ago.

The property owner argued that this ordinance did not set adequate standards for the council to consider when deciding applications. In making its arguments, the property owner relied upon *Humble Oil v. Wahner,* 25 Wis. 2d 1, 130 N.W.2d 304 (1954), which stated that when an ordinance vests discretionary power in administrative officials, "it must prescribe standards to guide their action." The *Humble Oil* court held that the "promotion of the public health, safety, convenience, prosperity or general welfare" was not enough of a standard.

In weighing the property owner's arguments in this case, the court also considered three other cases that upheld city ordinances that gave discretionary power to administrative officials. Considering all the cases together, the court concluded that "ordinances may vest boards with some (and even significant) discretion without being unconstitutionally vague. What an ordinance may not do is blanket the board with unfettered discretion." According to the court, the ordinance in *Humble Oil* contained no criteria to consider when deciding whether to grant or deny a permit. In contrast, the court held that New Berlin's ordinance provided much more specific standards -- lot size, width, and age of subdivision -- for the council to consider when making a determination. The court also held that these standards were all reasonably related to the city's objective of promoting the "prosperity, aesthetics and general welfare of the City."

In addition, the court referred to New Berlin's other land use ordinances that outlined the general welfare issues to be considered when making land use decisions. The court noted the very specific and exhaustive list of general welfare criteria the council is to consider in making decisions. According to the court, it recited the list of these criteria in its decision in order to emphasize how much more specific the criteria for the council's consideration in this case was than what was present in *Humble Oil*.

The property owner also argued that the city's denial of his proposed lots was arbitrary, unreasonable, and discriminatory, because the city had approved other lots which failed the size, width, and age standards. The court rejected this argument. Regarding the property owner's arbitrariness argument, the court stated that inconsistencies in determinations arising by comparison are not proof of arbitrariness or capriciousness. In this case, the facts demonstrated that there was a rational basis for the council's decision. Regarding the discrimination argument, the court found that the property owner's argument was not supported by facts in the record. The property owner had argued that he was treated differently from others because of political pressure put on the alders by other residents of his subdivision. The court responded with the observation that "neighbors weigh-in on zoning applications all the time—sometimes objecting at the zoning hearing, sometimes objecting to their elected officials and sometimes both. Nothing out of the ordinary occurred here."

— Lawrie Kobza

Municipal Authority to Limit Actions of Residential Landlords Restricted

Effective December 20, 2011, a city, village, town, or county may not enact or enforce an ordinance that does any of the following:

- Prohibits or limits a landlord from obtaining and using information with respect to a tenant's or prospective tenant's: (1) monthly household income; (2) occupation; (3) rental history; (4) credit information; (5) court records, including arrest and conviction records, to which there is public access; and (6) Social Security number or other proof of identity.
- Limits how far back in time a prospective tenant's credit information, conviction record, or previous housing may be taken into account by a landlord.
- Prohibits or limits a landlord from entering into a rental agreement (oral or written) for a premises with a prospective tenant during the tenancy of the current tenant of the premises.
- Places additional requirements on a residential landlord with respect to security deposits or earnest money or pretenancy or posttenancy inspections that go beyond those requirements contained in administrative rules related to residential rental practices.

This new law was adopted by 2011 Wisconsin Act 108.

— Lawrie Kobza

Court Discusses How to Handle Property Tax

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the process authorized by Act 86, the Village's Board of Review was required to provide certain procedures for objecting taxpayers who were seeking review of their assessments before the Board. In exchange, the Act 86 process limited the type of judicial review available to taxpayers.

The Village followed the Act 86 process and provided the property owner with a hearing before the Village's Board of Review. After the hearing, the Board lowered the assessment, but not as much as the property owner had proposed. The property owner then sought judicial review, and the circuit court affirmed the Board's decision by applying "enhanced certiorari" review. The property owner appealed. During briefing, the Wisconsin Supreme Court issued *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, which held the Act 86 review process used by the Village unconstitutional.

The court of appeals held that the *Metropolitan Associates* ruling applied retroactively to the property owner's challenge in this case. The court noted that case law presumes retroactive application, and nothing overcomes that presumption here. Furthermore, the court opined that retroactive application would further the view of *Metropolitan Associates* that all taxpayers should have the option of *de novo* review.

According to the court, prior to Act 86, a property owner who was unhappy with a property tax assessment decision had two judicial review options. One option was regular, or "common law," certiorari review, which was "limited" in that the circuit court was bound by the record before the board and the legal inquiries on review were narrow. The second option was *de novo* judicial review, which was "more substantial" in that the circuit court could receive additional evidence, the court was to give no deference to the board's decision, and the court was entitled to calculate the proper assessment without remanding to the board. In 2007 Wis. Act 86, the legislature gave taxing authorities the ability to opt out of the existing review procedures and, instead, provide a new "enhanced certiorari" review option. Because some taxing authorities adopted the new review procedure under Act 86, taxpayers in different taxing districts were treated differently. The Wisconsin Supreme Court decided in *Metropolitan Associates,* in a 4-3 decision, that this amounted to "significantly different" treatment which violated equal protection principles. The court held that Act 86's modifications were unconstitutional and invalid.

The court of appeals opined that the invalidation of Act 86 returned CNL, the owners of the Great Wolf Resort, to the position of having two options for judicial review of its assessment — *de novo* review and certiorari review. The court rejected the Village Board's argument that CNL was limited to seeking certiorari review. According to the court, the relevant statutory language allowed a taxpayer to seek either *de novo* review or regular certiorari review, but not both. Since CNL has not previously sought either of these types of review, both remained available to it. Based upon CNL's requested review, the court of appeals concluded that the course of action most in keeping with *Metropolitan Associates* was to remand the case to the circuit court for *de novo* review.

— Lawrie Kobza

Land Under Highway Owned by Property Owner; May Impact Whether Minimum Lot Size Requirement is Met

In *Berger v. Town of New Denmark*, Appeal No. 2011AP1807-FT (Ct. App. District III, January 10, 2012), the Court of Appeals concluded that land under a highway was owned by the property owner. Given that conclusion, the land may be included when determining whether two parcels meet the minimum lot size for development, unless the applicable Town ordinance provides that right of way land is to be excluded from this determination.

The case involved a property owner's challenge to the Town of New Denmark's determination that two parcels were of insufficient acreage for development. The applicable zoning regulations required a minimum area of 35 acres and zoning lot frontage of at least 500 feet. The property owner asserted that the parcels were of sufficient size when property underlying a county highway abutting their land was included in the acreage calculation. The Town Board, however, concluded that the zoning ordinance required exclusion of roads when calculating the total amount of acreage. Excluding land occupied by a county highway, the parcels each contained approximately 34.5 acres.

The issue considered by the court was who owned the land on which the county highway was located. The propertyowners contended that they owned the land, and the county only had an easement over the land. The Town argued that Brown County owned the land.

The court looked to the 1951 and 1956 conveyance documents for the land. Each instrument was entitled, "Conveyance of Land for Highway Purposes." Those documents provided that:

> It having been deemed necessary for the proper improvement or maintenance of a county aid highway, and so ordered, to change or relate a portion thereof through lands owned by … in the Town of New Denmark, Brown County, and a plat showing the existing location, the proposed change and the right of way to be acquired, having been filed with the County Clerk of said County by the County Highway Commission as required by Section 83.08, Wisconsin Statutes;….
>
> KNOW ALL MEN BY THESE PRESENTS, That the said owner … for … valuable consideration, … the receipt of which is hereby acknowledged, do … hereby grant and convey to Brown County, Wisconsin, for highway purposes as long as so used, the lands of said owner necessary for said relocation shown on the plat and described as follows
>
> …
>
> A covenant is hereby made with the said Brown County that the said grantor holds the above described premises by good and perfect title; having good right and lawful authority to sell and convey the same; that said premises are free and clear from all liens and encumbrances whatsoever except as hereinafter set forth[.]

The circuit court held that this language transferred fee simple ownership to the County. The court of appeals, however, disagreed. The court stated that under Wisconsin case law, courts are to presume that the grantor of land to be used for roadways intended to convey only an easement, unless there is express language to the contrary. In this case, the court of appeals opined that using the term "right of way" in the conveyance documents strongly suggested that the County received easements, with the property owner retaining all the rights and benefits of ownership consistent with the easement. Furthermore, the court opined that the statement in the conveyances that the land shall be used "for highway purposes" generally suggested that an easement, not fee title, was granted.

Based upon its reading of the conveyance documents -- which focused primarily on the inclusion of the term "right of way" in those documents -- the court of appeals concluded the property owner conveyed only an easement, and not fee title, to the County. The court of appeals reversed the circuit court's decision, and remanded the case for further proceedings. The circuit court will be asked to determine whether the Town's ordinance on minimum lot size allows for the inclusion of public right-of-ways when calculating acreage.

— Lawrie Kobza

Electric Utility Municipalization Efforts Move Forward

The City of South Daytona (City) has won a declaratory judgment from the Federal Energy Regulatory Commission (FERC) that its supplier's claim for $8 million in stranded cost recovery under the supplier's open access tariff was premature. *City of South Daytona, Florida*, 137 FERC ¶ 61,183.

The controversy resulted after the City voted to purchase the distribution system of its supplier, Florida Power & Light (FPL), in an effort to municipalize the City's electric service. The City argued that the stranded cost obligation provisions of FPL's tariff were inapplicable because the City intended to continue purchasing wholesale power from FPL following municipalization.

FERC agreed, on the grounds that the stranded cost provisions of its open access mandate were intended as a transition mechanism to allow utilities to recover costs incurred to serve a customer that, as a result of deregulation, received power from an entity other than its historic supplier. Because South Daytona did not obtain a new supplier of power, it could not be considered a "departing customer" and had no stranded cost obligation. The fact that an agreement for wholesale power had yet to be reached and that the City had yet to municipalize was irrelevant, FERC reasoned, assuming the City were able to fulfill its intention of becoming a municipal utility and continuing to receive power supply from FPL.

South Daytona, a community of just over 12,000 residents, anticipates providing commercial and residential service to electric customers in June, 2012, with a peak load of approximately 30 MW. The City already owns and operates water, sewer and wastewater utility systems. Although the FERC decision clears away a significant hurdle in the path toward municipalization, the City's effort to form and operate its own electric utility must still withstand FPL's likely appeal of the April, 2011 circuit court decision which set the purchase price of the City's acquisition of FPL's distribution facilities.

South Daytona is not the only recent municipalization effort that has attracted national attention. In November, 2011, the City of Boulder, Colorado city council voted to authorize efforts to purchase the distribution system of its wholesale supplier, Xcel Energy. Boulder's efforts, too, face significant hurdles, including a potentially costly regulatory battle at FERC over stranded costs, as well as a potentially contentious condemnation battle in court. Boulder is also in the process of reviewing alternatives for the development of a comprehensive energy strategy that would include energy efficiency measures, renewable project development and wholesale energy procurement.

Although most existing municipal utilities were formed in the early twentieth century, there have been numerous municipalization efforts nationwide in recent years. Many have been defeated -- in Iowa, California and elsewhere. However, according to the American Public Power Association, thirteen communities have switched from investor-owned to municipal utilities since 2000, most in small communities of 10,000 or less.

— Richard A. Heinemann

Attorney Dick Lehmann Retires

Attorney Dick Lehmann -- an expert on land use planning and regulation -- retired from the Boardman Law Firm at the end of 2011. Dick is well known throughout Wisconsin for his vast knowledge of land use matters, and his sense of humor.

Dick is unique, being both a professional land use planner and an attorney. He received both his urban and regional planning degree and his law degree from UW-Madison. Prior to engaging in private legal practice, Dick was on the faculty of the University of Wisconsin where he advised land use planners throughout the state. He was a supervisor on the Dane County Board from 1968-70 and a member of the City of Madison Common Council from 1972-73,

Dick joined the Boardman Law Firm in early 1990, and concentrated his practice on land use and planning law representing local governments and planning agencies as well as private landowners throughout Wisconsin. He continued to teach land use law at the University of Wisconsin Law School, and was a frequent speaker at land use seminars. He has represented the Wisconsin Chapter of the American Planning Association. He is a founding member, and past chair of the Wisconsin Environmental Initiative, Inc., a non-profit, non-partisan organization finding collaborative approaches to harmonizing environmental and economic advancement. He is also a former member of plan commissions at the city, county and regional levels.

Dick plans to enjoy his retirement with his wife, Richelle, by travelling and visiting friends. We wish Dick all the best on his well deserved retirement.

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