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Public Records: Who Pays For Redaction Costs?

The Wisconsin Supreme Court recently answered the question that many governmental authorities have had for several years; namely, can a governmental authority charge a requester for the cost of redacting protected information before releasing the non-confidential portions of the public record. *Milwaukee Journal Sentinel, et al. v. City of Milwaukee, et al*., 2012 WI 65 (decided June 27, 2012). The answer is a clear and decisive "no." Clarity was needed after two prior supreme court decisions, *Osborn v. Board of Regents and WIREdata, Inc. v. Village of Sussex*, muddied the waters on this issue, leaving many governmental authorities uncertain whether "all" costs of preparation could be charged to the requester, including redaction costs, or whether only certain types of costs could be charged.

This case arose out of a dispute between *Milwaukee Journal Sentinel* reporters and the City of Milwaukee Police Department. The reporters requested several hundred records from the police department. In response, the police department stated it would only disclose the records if the reporters prepaid a several thousand dollar fee for the "actual cost of complying with [the request]." The police department wanted the reporters to pay the costs associated with redacting nondisclosable information from the records.

In its unanimous decision, the Wisconsin Supreme Court reiterated that the purpose of Wisconsin Public's Records Law is to ensure that "all persons are entitled to the greatest possible information regarding the affairs of government … [and that the public records law should] be construed in every instance with a presumption of complete public access." The Court also confirmed that when records are disclosed, governmental authorities can pass some of their costs associated with producing the records on to the requester. However, recovery of costs is limited. Specifically, the court relied on WIS. STAT. § 19.35 (3), which outlines the instances when a governmental authority can impose a fee for the production of public records. Those instances are: (1) "reproduction and transcription of the record; (2) photographing and photographic processing; (3) locating a record; and (4) mailing or shipping of any copy or photograph of the record." The Court read the statute narrowly and found that since "redaction" is not among the enumerated items for which a governmental authority can charge a fee, the police department's attempt to recover fees for the time it took to redact the requested records was impermissible.

This decision clarifies for governmental authorities that costs associated with redaction of public records cannot be passed onto the requester of public records.

— Anita T. Gallucci

Livestock Facility Siting Law Preempts Town Conditions in Conditional Use Permit

On July 11, 2012, the Wisconsin Supreme Court decided *Adams v. State of Wisconsin Livestock Facilities Siting Review Board*, 2012 WI 85, a case of first impression dealing with the application of Wisconsin's livestock facility siting law to a town's conditional use permit for a livestock facility.

The livestock facility siting law, Wis. Stat. § 93.90, was adopted in 2004 "for the purpose of providing uniform regulation of livestock facilities." The statute authorizes the Department of Agriculture, Trade, and Consumer Protection ("DATCP") to adopt rules setting standards for siting and expanding livestock facilities. The statute provides that a political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless one of the statutory criteria set forth in § 93.90(3) applies. If a political subdivision's ordinances require a special exception or conditional use permit (CUP) for the siting, § 93.90(3)(ae) provides that compliance with applicable DATCP standards is to be a condition of issuance of the CUP. Section 93.90(3)(ar) allows a political subdivision to apply requirements that are more stringent than state standards as a condition of CUP issuance if the requirements are established by an ordinance adopted before the application is filed, and are based on reasonable and scientifically defensible findings of fact adopted by the political subdivision that show that the requirements are necessary to protect public health and safety.

Adams involved an application to the Town of Magnolia for a conditional use permit for a livestock facility to house 1,500 "animal units." The town held a public hearing on the CUP and testimony was offered on potential environmental damage from the farm, and the risk posed to surface water and drinking water. After the hearing, the town board granted the CUP with seven conditions, "imposed for the purpose of protecting the town's ground and surface water."

The property owner appealed the town's decision to the Livestock Facility Siting Review Board ("Siting Board"), and challenged five of the town's conditions. The Siting Board affirmed the grant of the permit but revised the town's conditions after determining that each challenged condition exceeded the town's legal authority. The town appealed the Board's action.

The primary issue in the case was the extent to which the Siting Law preempted town action. The Wisconsin Supreme Court concluded that a political subdivision was preempted from regulating livestock facility siting in any manner inconsistent with the Siting Law. The Court held that a town may not disapprove a livestock facility siting permit unless one of the limited exceptions in § 93.90(3)(a) applies. The Court also held that a town must grant a CUP for a livestock facility and that the CUP may only contain certain limited conditions. The CUP must require compliance with applicable state standards as required by § 93.90(3)(ae), but beyond that, may only contain conditions that meet the narrow exception contained in § 93.90(3)(ar). Section 93.90(3)(ar) provides that if a town wishes to condition a CUP on a requirement that is more stringent than state standards, the town must adopt the requirement by ordinance before the applicant files the application for approval, and it must base the requirement on reasonable and scientifically defensible findings of fact.

The Court concluded that the town conditions placed on the CUP in this case did not meet the requirements of § 93.90(3)(ar) because they were not imposed based on fact-finding adopted by the town. Accordingly, the Court held that all of the challenged conditions in the CUP were invalid.

Chief Justice Abrahamson dissented from the Court's opinion. The dissent argued that the town's CUP conditions were not prohibited by the Siting Law because they dealt with water quality issues that were not addressed by DATCP rules. According to the dissent, the imposition of a condition relating to water quality in granting a permit would not impose a more stringent condition than the state standards under the Siting Law. Nothing in the text of the Siting Law or DATCP's rules would explicitly prohibit the town from imposing conditions relating to subjects that DATCP has not addressed, according to the dissent.

After upholding the property owner's challenge to the CUP issued by the town, the Supreme Court addressed whether the Siting Board had the authority to modify the conditions imposed by the town. The Siting Law provides that the Siting Board is to "reverse the decision of the political subdivision" if it determines a challenge is justified. The town argued that this compels the Siting Board to reverse improper permits rather than modify them. The Court disagreed and concluded that the Siting Board has the implied power to modify the town's CUP. The Court concluded that the town committed the initial error that the Siting Board was required to rectify, and it would make little sense to prohibit the Siting Board from correcting the problem in as efficient a manner as possible.

— Lawrie Kobza

Court of Appeals Extends Governmental Immunity to Construction Contractor

In *Showers Appraisals, LLC v. Musson Bros., Inc*., Appeal No. 2011AP1158 (decided June 27, 2012), the Wisconsin Court of Appeals, in a 2-1 decision, extended governmental immunity to a construction contractor working on a project to replace city storm sewers.

The private construction contractor contracted with the Wisconsin Department of Transportation ("WDOT") to replace sanitary and storm sewers in an area in the City of Oshkosh. The construction contract included plans and specifications for the project, but also provided that the contractor was "solely responsible for the means, methods, techniques, sequences, and procedures of construction." The contract required that the contractor "be responsible for any damages to property or injury to persons occurring through their own negligence."

During the project, large storms occurred and many city streets were flooded. The plaintiff suffered flood damage which he alleged was caused by the negligence of the contractor. The contractor claimed it was entitled to governmental immunity under *Estate of Lyons*, 207 Wis. 2d 446, 457-58, 558 N.W.2d 658 (Ct. App. 1996) and moved for summary judgment. The trial court agreed, and this appeal followed.

Wisconsin Statute § 893.80(4) provides governmental immunity to a governmental subdivision and "its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." In *Lyons*, the court held that an independent contractor who follows official directives is an agent entitled to governmental immunity when: (1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

The Court of Appeals held that pursuant to the principles set forth in *Lyons*, the contractor in this case was entitled to governmental immunity. The Court held that the plans and specifications in the construction contract constituted reasonably precise specifications for purposes of the Lyons analysis even though the contract provided that the contractor was solely responsible for means and methods. According to the Court, it is enough for the project owner to outline certain bottom line expectations that the contractor must adhere to. While a "means and methods" clause gives the contractor the discretion to operate within those expectations as it pleases, the Court held that this discretion does not necessarily result in

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Madison Smart Meter Project Challenged at PSC

On Friday, July 6, 2012, thirty-three Madison residents filed a petition with the Wisconsin Public Service Commission (Commission) to investigate the City of Madison's plan to implement a new wireless water meter system in City businesses and homes over the next two years.

Known as "Project H2O," the $13 million project was approved last December to enable customers to monitor their own daily water usage, detect leaks and promote conservation, while reducing the utility's costs for meter reading. The petition raises privacy and First Amendment concerns and seeks additional study on the possible harmful effects associated with the system's use of radio frequencies. The petition requests that the Commission require the City to allow residents to opt out of the program prior to installation.

Recent decisions in other states have begun to draw national attention to public concerns over the use of smart meters. In June, 2012, the Michigan Public Service Commission (MPSC) concluded a formal investigation in response to citizen concerns over a plan by Consumers Energy to deploy between 50,000 and 60,000 smart meters in two Michigan counties. The study concluded that smart meters pose "insignificant" health risks and surpass current metering systems, but recommended that utilities provide "opt out" programs based on cost of service principles. The report came on the heels of a Michigan Court of Appeals decision rejecting as unreasonable an MPSC order approving a nearly $37 million rate increase to fund a Detroit Edison smart metering program on the grounds that the order was not supported by "competent, material

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Lessons for Condemning Property Subject to Leases

A dispute between private parties over the partition of proceeds of a condemnation award provides a useful reminder for condemnors when taking property subject to leasehold interests, especially billboards. *The Lamar Company v. Country Side Restaurant, Inc.,* 2012 WI 46 (decided May 4, 2012).

In this case, the Wisconsin Department of Transportation ("WDOT") acquired roughly two acres of land owned by Country Side as part of a highway project. Lamar Company had a 10-year lease with Country Side to part of this property on which it built a billboard. The WDOT's appraiser valued the lease site at $65,100. Following the unit rule, the WDOT valued the entire two acre parcel as a whole, including the lease site, at $2 million and deposited that sum as just compensation under Wis. Stat. § 32.05, with the clerk of court to be divided between Country Side and Lamar according to their respective interests. Lamar and Country Side agreed that the award should be distributed to Country Side, except for $120,000 to remain on deposit until the amount of Lamar's interest was determined. Country Side appealed the $2 million award under Wis. Stat. § 32.05(11), but Lamar did not join in the appeal.

Lamar then applied to the WDOT for compensation for relocating its sign under Wis. Stat. § 32.19, and was awarded $83,525. This award was aggregate of $5,850 to take down the existing sign, $75,175 to rebuild the sign, and $2,500 in relocation costs. As part of the relocation claim settlement, Lamar signed a WDOT form stating that it "waive[d] any right to future claims for damage or loss involving this sign."

Lamar filed a partition action contending that it was entitled to the full $120,000 deposit, plus interest, as the fair market value of its billboard. Country Side responded that the $65,100 allocated to the sign in the jurisdictional offer was the value of the sign site, which it owned and in which Lamar had no interest. It argued further that Lamar had already been compensated by the $83,525 relocation award. The circuit court found for Country Side, holding that Lamar had waived any right to a share of the proceeds on deposit when it failed to join in Country Side's appeal. The court of appeals affirmed, but on the grounds that Lamar was fully compensated by the relocation award. The Wisconsin Supreme Court reversed and remanded for further proceedings.

Substantively, the Court explained that a tenant with a leasehold of more than one year has an interest in real property and is considered an "owner" for purposes of condemnation. In the case of billboards, the billboard owner's property interest may be composed of three elements: the value of the leasehold site, the value of the permit allowing the operation of a billboard at that site, and the value of the billboard structure itself. The billboard owner is entitled to just compensation for the fair market value of its interest in the real property. In addition to just compensation, which is constitutionally required, the legislature has provided for statutory benefits to owners who relocate as a result of a taking. These benefits are listed in Wis. Stats. §§ 32.19 and 32.195.

Procedurally, the Court noted that section 32.05(9)(a) expressly provides that the result of an appeal of an award of just compensation does not affect parties who have not appealed. Therefore, the circuit court erred in holding that Lamar's failure to join in Country Side's appeal had the effect of waiving its interest in the award on deposit. In reversing the court of appeals, the Court pointed out that the procedure for relocation expense claims is separate from the just compensation procedure under section 32.05 and provides compensation for different elements of damages incurred as a result of a taking.

Although this case involves the partition of a condemnation award among private parties, it serves as a useful reminder to municipalities undertaking condemnation projects. First, leases and other interests such as mortgages constitute interests in real property and must be included as interested parties in any award. Payments must be made jointly to all parties in interest or deposited in court to protect the municipality when multiple interests in real estate are involved. Second, just compensation and relocation benefits are distinct components of cost: payment or settlement of one of them does not necessarily affect a party's right to the other.

— Mark J. Steichen

Court of Appeals Extends Governmental Immunity to Construction Contractor

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a governmental contractor losing immunity. The Court found that contract language that provided the project owner with the ability to oversee the project curtailed the contractor's discretion.

The Court also found that the contractor was following the reasonably precise specifications of the WDOT when the alleged negligence occurred. Many of the specifications (such as conducting operations and maintaining the work so that adequate drainage is provided at all times, and taking the necessary precautions to provide for normal drainage) were not specific to the type of large storm event that occurred during the project. Other more concrete standard specifications, such as the provision of notice, either were met or were inapplicable, according to the Court. The Court found the fact that the contractor was not acting in disregard of the WDOT's instructions, or without WDOT oversight, demonstrated that the contractor was following the WDOT's specifications when the alleged negligence occurred.

The Court rejected plaintiff's arguments that the contractor was not entitled to governmental immunity because it was exercising ministerial duties which are not entitled to immunity. According to the Court, the contractor was not merely exercising ministerial duties. Both building a new drainage system and deciding how to respond to damage posed by heavy rains involves the exercise of discretion, and this exercise of discretion is entitled to immunity.

The dissent argued that the Court's decision will inappropriately expand governmental immunity to all government contractors for their discretionary acts (the "means and methods" of performance). The dissent argued that while expanding immunity to the discretionary acts of government contractors may result in lower bids from contractors for public works projects, private citizens who are harmed by the negligence of these contractors will have to bear the cost. According to the dissent, "[g]ranting blanket immunity to government agents for their discretionary acts will encourage private contractors to base their bids upon minimal conditions, as the contractor will know that if a rainy day comes, or if a mistake is made in the means and methods of performing the contract, or if the contractor simply decides to cut corners on quality, someone else will pay for the contractor's gambles and mistakes." The dissent concluded with a statement that "the public policy of granting immunity to government contractors for their discretionary acts is counterproductive and will have severe and adverse consequences."

-- Lawrie Kobza

Madison Smart Meter Project Challenged at PSC

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and substantial evidence" of ratepayer benefits.

Similarly, a July 12, 2012 decision issued by the Maine Judicial Supreme Court sided with smart metering opponents in holding that the Maine Public Utilities Commission ("PUC") had not adequately resolved health and safety concerns related to a Central Maine Power Company project to install 600,000 smart meters. The Maine program permitted customers to opt out for a $12 monthly fee, but the Court ruled that the Maine PUC was in no position to determine whether payment of such a fee was unreasonable or unduly discriminatory without having expressly determined whether or not concerns about the effects of radio frequency radiation raised by complainants had merit.

Although the issue of "smart metering" has been the subject of Commission informational meetings, the City of Madison resident petition represents the first time that the issue will be the subject of a formal hearing. It is not yet clear whether the Commission will use the petition as an opportunity to set broader policy in the area, but the proceeding is likely to be closely watched by electric and water utilities throughout Wisconsin.

— Richard A. Heinemann

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Lawrie J. Kobza

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