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Supreme Court Holds MMSD Must Abate Private Nuisance Caused by Sewer System Infiltration

A new Wisconsin Supreme Court case appears to substantially narrow the scope of governmental immunity and raises serious concerns about the ability of courts to order municipalities to repair, replace, or modify a municipality's existing infrastructure. The case, *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, 2007AP221 & 2007AP1440, involves MMSD's Deep Tunnel system.

The Deep Tunnel system was constructed in the early 1990s to collect and store stormwater runoff and sewage until it could be transported to Milwaukee's sewage treatment plant. Bostco alleged that MMSD's maintenance of the Deep Tunnel damaged its downtown Milwaukee department store (Boston Store). The Boston Store buildings rested on wood pile foundations which, at the time of the Deep Tunnel construction, were below the water table and were saturated so as to prevent their deterioration. Over time, the water table declined, the wood pilings were exposed to air, and the buildings began to suffer structural damage.

Bostco alleged that MMSD's operation and maintenance of the Deep Tunnel caused the drawdown of the water that led to the deterioration of the wood pilings underlying its buildings. Bostco sought damages and equitable relief to abate the nuisance. Bostco's claims of negligence and private nuisance were tried to a jury. The jury found that MMSD was negligent in its maintenance of the Deep Tunnel near Bostco's buildings, and that MMSD's negligence was a cause of Bostco's injury. The jury awarded Bostco $3 million for past damages and $6 million for future damages. The jury also found that Bostco was at fault for 30 percent of the damages, thereby reducing the $9 million award to $6.3 million.

MMSD sought judgment notwithstanding the verdict, on the ground that it was protected by governmental immunity. The circuit court held that MMSD was not immune, but that the $50,000 damages cap in Wis. Stat. § 893.80(3) applied. The $6.3 million award was reduced to $100,000 ($50,000 for each of the two plaintiffs). Bostco renewed its request for equitable relief, and the circuit court ordered MMSD to fix the nuisance caused by MMSD's maintenance of the Deep Tunnel. The court of appeals reversed the abatement order because it concluded that the damages cap precluded equitable relief.

On July 18, 2013, the Wisconsin Supreme Court issued a decision in which it concluded that MMSD was not immune from liability and that injunctive relief could be ordered. Regarding the issue of immunity, the Court stated that Wis. Stat. § 893.80(4) provides immunity for governmental entities exercising their legislative, quasi-legislative, judicial or quasi-judicial functions. The Court concluded MMSD was not exercising such functions in operating and maintaining its sewer system. "Although a municipal entity escapes liability for its legislative or quasi-legislative decision regarding whether to install a particular system or structure, once the municipal entity makes the decision to install, the entity is under a subsequent ministerial duty to maintain the system or structure in a safe and working order." In support of this statement, the Court

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cited *MMSD v. City of Milwaukee*, 2005 WI 8, in which the Court held that if the City of Milwaukee had a duty to repair a water pipe so that it did not rupture and damage MMSD's tunnel (which duty in turn was dependent upon the City having notice that the pipe was leaking), such duty was ministerial and there would be no immunity under § 893.80(4) for the City's failure to abate the nuisance its leaking pipe had created. In this case, since MMSD knew that "excessive siphoning of water into the Deep Tunnel was a cause of significant harm to Bostco's building," the Court said that MMSD's failure to address the harm caused by the maintenance of its system would not be entitled to immunity.

Potentially more important for municipal utility systems than the immunity discussion was the Court's discussion about the basis of MMSD's liability. In this case, the jury had already found that MMSD was negligent in its maintenance of the Deep Tunnel near Bostco's buildings, and that MMSD's negligence was a cause of Bostco's injury. Given the jury's finding, MMSD's negligence was a given in the Court's discussion. Nevertheless, statements made by the Court raise questions about whether MMSD was liable because its negligent actions in designing the Deep Tunnel resulted in a private nuisance or whether MMSD was liable because a private nuisance existed (regardless of whether the cause was negligence) and MMSD did not take action on its own to abate the private nuisance.

Bostco claimed that MMSD's actions constituted a private nuisance. A private nuisance is a condition that harms or interferes with a private interest which has been characterized in Restatement (Second) of Torts § 821D as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) [I]ntentional and unreasonable, or
>
> (b) [U]nintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Restatement (Second) of Torts, § 822.

In the decision, it is unclear whether the Court considered MMSD to be liable because of negligent action in designing the Deep Tunnel system that caused a private nuisance (in which case Supreme Court precedent would preclude MMSD from being held liable), was liable for negligent action in its operation and maintenance of the Deep Tunnel system, or whether it considered MMSD to be liable because it did not abate the private nuisance (regardless of its cause). Some provisions of the Court's decision appeared to suggest the second scenario. For example, the Court states that "[i]n the case of negligence, as here, liability may be predicated on a party's failure to act when he has a duty to do so." The duty to act to abate a nuisance arises when one has notice that he is maintaining a nuisance that is a cause of significant harm." Referring back to the 2005 City of Milwaukee case, the Court states that, "if the City had notice that its water main was leaking before it broke, it had a duty to abate the nuisance by fixing the pipe. The duty to fix the pipe, if the City knew it was leaking, was "absolute, certain and imperative." These comments suggest that the Court believes that a municipality has a "duty" to maintain its infrastructure and that it may face liability for the manner in which it chooses to operate and maintain this infrastructure. The remainder of the Court's decision, as discussed more below, raises the further possibility that a Court can order a municipality to repair, replace, or modify its existing infrastructure in certain cases, regardless of the cost and despite the $50,000 limitation on tort damages under Wis. Stat. § 893.80(4). If so, the decision could be construed, in effect, as linking liability for the operation of municipal infrastructure to results, not actions.

On the issue of the type of relief that could be ordered, the Supreme Court held that since MMSD was not immune from liability, equitable relief could be ordered. While the court of appeals concluded that Wis. Stat. § 893.80(3) does not allow parties to obtain equitable relief against governmental entities because doing so would "render the damage cap set forth in Wis. Stat. § 893.80(3) superfluous," the Supreme Court disagreed. It concluded that the plain meaning of § 893.80(3) was to limit the dollar amount of recovery to be paid for damages, injuries or death to $50,000 per claimant and that the statute did not prohibit a court from also ordering equitable relief, such as abatement.

The Court upheld the circuit court's order that MMSD abate the private nuisance caused by MMSD's negligent maintenance of its Deep Tunnel, but held that the circuit court should not have ordered the method for abating the nuisance (i.e., lining the tunnel) without hearing testimony. The Supreme Court ordered that the case be remanded to the circuit court for a hearing on whether another method would abate the nuisance, or whether lining the tunnel with concrete was required.

Justice Gableman wrote a concurring opinion advocating for a change in how governmental immunity cases are analyzed. He recommended that the Court adopt a "planning-operational distinction" to determine whether governmental action is "legislative, quasi-legislative, judicial, or quasi-judicial." Under this test, immunity would be granted to "only to upper-level legislative, judicial, executive and administrative policy and planning decisions rather than to any decision that might be made." According to Justice Gableman, the operation and maintenance of a sewerage system would always be "operational," and would never be entitled to governmental immunity.

If applied to this case, MMSD's decision to build — or not build — the Deep Tunnel system would be a planning level decision entitled to immunity. A plaintiff could not successfully allege that he or she was damaged by the failure to build the project. However, once built, the day-to-day operation and maintenance of the project would be operational, and standard negligence principles would apply "in the same fashion as if the tunnel were built by a private organization." According to Justice Gableman, "[t]he conclusion that MMSD is liable for damages under this test would also be in harmony with more than a century of Wisconsin case law, which has reaffirmed that while the decision to build a public works project is entitled to immunity, a governmental entity is liable if its negligent operation and maintenance of the project causes damages or injury."

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Supreme Court Complicates Condemnation Rules

A seemingly simple procedure for determining whether a condemnor has to acquire an uneconomic remnant has been complicated in a recent decision. *Waller v. American Transmission Company, LLC*, 2013 WI 77 (July 16, 2013). An uneconomic remnant ("UER") is a piece of land left over after a partial taking that by its size, shape or condition is "of little value or of substantially impaired economic viability." Wis. Stat. §32.05(3m). Classic examples of UER include small slivers of land that have no practical use, landlocked parcels where the cost of building an access road would exceed the parcel's value and lots that are below the minimum size under local zoning or subdivision rules and become nonconforming. Routinely, the parties agree on whether an UER is left after a partial taking.

When a partial taking leaves a UER, the condemnor must offer to acquire it as part of the condemnation, but the landowner does not have to accept the offer. In eminent domain, there are separate procedures to handle appeals of compensation awards versus challenges to a condemnor's right to take property. In the latter, the landowner must bring an action to challenge the right to take within 40 days of the issuance of the jurisdictional offer or be barred. Generally, appeals from compensation awards can be brought within anywhere from 60 days to two years of the date of taking depending on the circumstances. Since the acquisition of an UER affects the amount of compensation the condemnor must pay, conventional wisdom was that disputes over the existence of an UER would be decided within the compensation appeals.

The right to take procedure must be used "for any reason other than that the amount of compensation offered is inadequate." Wis. Stat. §32.05(5). The supreme court held in the Waller decision that disputes over the existence of UER must be handled in a right-to-take case. There is an inherent internal contradiction in the statutes in deciding UER issues within a right-to-take action. In a compensation appeal, both parties are entitled to a jury trial to determine the amount of compensation, which includes a determination of the fair market value of the remainder in partial takings cases. Wis. Stats. §32.09(6) and (6g). Right-to-take cases are decided by the court. Whether a remnant constitutes an UER depends on the value of the remnant, which is intertwined with whether it has substantially impaired economic viability because of the taking. When a court decides the UER issue in a right-to-take case, it seemingly deprives the parties of the right to a jury trial on the same issue in the evaluation case. In *Waller*, the court noted tellingly, that the same witnesses were called in both cases.

The supreme court's decision raises a number of points. First, condemnors should note in negotiations if the landowner believes that a partial taking leaves an UER. The jurisdictional offer should offer to acquire such parcels at the landowner's option unless the condemnor feels the claim is obviously without merit. Second, in a compensation appeal, condemnors may now move to strike any claims for compensation for UER not included within the jurisdictional offer unless the landowner brought a right-to-take case. Third, if an UER dispute is an issue other than the amount of compensation, there might be many other issues that used to be handled in compensation appeals and now must be brought as right-to-take challenges. This cuts both ways. Landowners may find themselves shut out from raising issues if they did not file a right-to-take challenge shortly after the jurisdictional offer. Condemnors, however, may face many more right-to-take challenges before compensation appeals are brought. A landowner is entitled to recover litigation expenses, including attorney's fees, if they win a right-to-take case on the particular issue. In a compensation appeal, they would be entitled to litigation expenses only if they recover additional compensation that exceeds the thresholds in section 32.28. Finally, the case raises questions about what constitutes an UER. In the past, UER usually had almost no value. In *Waller*, the condemnation changed the highest and best use from residential to commercial. It caused the removal of some trees which had provided a partial noise visual barrier from the adjoining 4-lane interstate highway However, the residential property, a 1.5 acre farmette, could continue to be used just as it had been for decades. The taking, according to the jury's verdict in the compensation appeal, caused a 70% decline in the value of the property. Nevertheless, the remnant was still worth $40,000. Will a percentage decline in the value be sufficient to declare a property an UER? Is there a minimum dollar amount exceeding $40,000 that constitutes "little value" or "substantially impaired economic viability? These issues are likely to arise in future litigation.

— Mark J. Steichen

Supreme Court Holds MMSD Must Abate Private Nuisance

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Chief Justice Abrahamson wrote a strong dissent to the decision. She, along with Justice Bradley, would have concluded that MMSD was immune from suit for any monetary damages or injunctive relief because there was no evidence that the Deep Tunnel project was being operated and maintained other than as designed. She argued that the known existence of a nuisance alone was insufficient to impose liability on a municipal entity. Once a property owner proves the existence of a nuisance and notice to the entity, the owner must also prove that the underlying conduct giving rise to the nuisance constitutes actionable negligence. According to Justice Abrahmson, MMSD's conduct was not negligent because the tunnel was being operated and maintained as it was designed, and therefore there was no ministerial duty to repair it. She also stated that if the District were not immune, she would have concluded on a plain reading of the statute that any monetary damages or injunctive relief would be limited by the statutory cap.

According to Justice Abrahmson: "By means of this majority opinion, the court imposes an unfunded mandate. Government entities will now be subject to unlimited liability in the form of injunctive relief in cases founded on tort, and may not have the concurrent ability to raise additional taxes or request additional funds from the legislature to pay for the liability the court imposes."

— Lawrie Kobza

Court Affirms Denial of Application for Special Exception Permit

The Wisconsin Court of Appeals recently upheld a decision by the Polk County Land Information Committee denying an application for a special exception permit, concluding the applicants failed to demonstrate the Committee acted arbitrarily or upon insufficient evidence in denying the application.

The case, *Kraemer Mining & Materials, Inc., v. Polk County Land Information Committee*, et al., Appeal No. 2012AP2048 (June 28, 2013), arose from Kraemer's October, 2008 application for a special exception permit to operate a non-metallic quarry in an area zoned A-1 Agricultural in the Town of Osceola, Polk County. The application was subsequently amended and a revised application submitted in August, 2009. Thereafter, the Committee held three public hearings on the matter before denying the application in January, 2010.

The Committee denied Kraemer's application after determining that the proposed quarry was "close to homes with wells" and "close to the Lotus Lake area and its residents," which did not align with the purpose of the County's Comprehensive Land Use Ordinance to "promote the public health, safety, morals and general welfare" of the County. The Committee gave five reasons in support of its conclusion that "operating the proposed quarry at the proposed site would have a negative impact on the health, safety and welfare of those who live, work and play in Polk County." First, it recognized there could be increased traffic in the area disrupting the flow of emergency services. Second, the Committee concluded the quarry would cause noise issues due to blasting and operation of heavy equipment. Third, it expressed skepticism that noise reduction efforts would be successful. Fourth, it credited the testimony of an expert in noise vibration and shock controls, concluding that vibrations could cause structural damage within the area. Finally, the Committee concluded that water quality could be negatively impacted for residents.

Kraemer requested the circuit court review the Committee's decision and, in doing so, substitute its judgment for that of the Committee by weighing the credibility of the testimony given at the public hearings. The circuit court refused to do so, noting that review upon appeal is limited to: (1) whether the Committee kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the determination in question. Applying the appropriate standard, the court determined the Committee's decision was reasonable and adequately supported. The court reviewed the record (containing over 380 pages of testimony from the public hearings) and remarked there were "clearly differing expert opinions presented to the Committee" as to noise, water contamination, and consequences of blasting and crushing operations, but the Committee had not acted arbitrarily in deeming the quarry inconsistent with the purpose and intent of the Ordinance. Kraemer subsequently appealed.

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Residency Requirements Banned for All but Emergency Personnel

As part of the Budget Bill, 2013 Wisconsin Act 20, the legislature adopted a ban on municipal residency requirements. Under the new law, no city, village, town, county or school district may require any employee or prospective employee to "reside within any jurisdictional limit" as a condition of employment. That law also prohibits local governments from enforcing any existing residency requirements. An exception to the ban was carved out for "law enforcement, fire, or emergency personnel," all of whom may be required to "reside within 15 miles of the jurisdictional boundaries" of the relevant jurisdiction. Unlike an earlier legislative attempt to ban residency requirements, the term "emergency personnel" is not defined. Whether that term would include, for example, electric utility line workers, is unclear. Likely, a court will have to determine the scope of the term.

The law was opposed by many municipal groups, including the Urban Alliance of the League of Wisconsin Municipalities. In its April 5, 2013 letter to the Joint Committee on Finance, the organization explained that communities adopt residency restrictions to address a number of concerns, including concerns about public safety response times. They noted that a ban on municipal residency restrictions would needlessly interfere with local policy decisions.

The controversial measure is already before a Milwaukee County circuit court. In July, Judge Daniel Noonan signed a temporary restraining order prohibiting the City of Milwaukee from enforcing its residency requirement. After Milwaukee Mayor, Tom Barrett, and the Common Council determined to continue to enforce the City's residency requirements, the Milwaukee Police Association initiated a circuit court action, seeking an order requiring the City to cease enforcing its residency requirements. The City maintains that its residency requirements are unaffected by the new state law because residency issues are matters of local concern and, therefore, within the scope of the City's home rule authority.

— Anita Gallucci

Regulatory Watch

FERC Issues 2012 State of the Markets Report

The Federal Energy Regulatory Commission released its annual assessment of the energy markets in June. The report provides data on broad trends in both the natural gas and electricity markets, as well as on the impact of significant regulatory developments.

Among notable findings, the report indicates that natural gas production grew to record levels in 2012, contributing to the lowest nominal natural gas prices since 2002, with spot prices at Louisiana's Henry Hub averaging $2.74/MMBtu (down 31 % from 2011). The report does cite a strengthening of natural gas prices in late October and November of 2012 as a result of high demand from power generators and the onset of winter heating season. Forward contracts also showed continued strength into 2013.

Closely following the drop in natural gas prices, average on-peak energy prices for electricity continued a downward trend in 2012. The 2012 annual average locational marginal price at MISO's NI-Hub, for example, dropped 13.7% to $34.79. The report cites a continued drop in electricity demand due to the lagging economy, as well as increased efforts at energy efficiency. The report also confirms that competitive fuel pressures between natural gas and coal has led to a substantial shift in electricity generation resource utilization away from coal. Although coal-fired generation was still the largest source of energy supply in 2012, its share of net generation declined to 39 percent from 43 percent in 2011. The report anticipates continued increases in investment in natural gas-fired facilities.

According to FERC's findings, wind generation has continued to grow, surpassing 50 GW of capacity in August of 2012, more than twice the amount of capacity available at the end of 2008. MISO continues to be one of the largest wind-generating regions in the country, with 10,600 MW of reported capacity. The report cites MISO's successful use of spinning reserves to handle sudden drops of wind generation to remain within reliability limits.

On the regulatory side, the report cites several market reforms enacted by either FERC or the regional transmission organizations since 2011 as having improved wholesale electricity market performance, including improved market mitigation, resource compensation, transaction scheduling and transparency.

Legislature Further Relaxes Ex Parte Rules

In adopting 2013 Wis. Act 28, the Wisconsin legislature has added a new exception to the ex parte rules as they apply in contested case proceedings before the Public Service Commission of Wisconsin ("PSC"). Generally, parties to a contested case proceeding may not communicate about the merits of the case while the case is ongoing "to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process." Wis. Stat. § 227.50 (1)(a). This included the three Commissioners, their executive assistants, and the hearing examiner. Act 28 has narrowed the prohibition even further to prohibit ex parte contact with just the Commissioners and hearing examiner. The new law took effect July 7, 2013.

Legislature Adopts Municipal Utility Customer Privacy Law

The Municipal Utility Customer Privacy Law, 2013 Wisconsin Act 25, went into effect on July 7, 2013. The new law provides an exemption to Wisconsin's Open Records Law for "customer information," which is defined as "any information received from [municipal utility] customers which serves to identify customers individually by usage or account status." Wis. Stat. § 196.137.

Under the new law, municipal utilities generally may not release customer information to any person without the customer's consent. There is no requirement that the consent be in writing. The law goes on to provide, however, that consent is not required when disclosing the information to:

- Agents, vendors, partners, or affiliates of the municipal utility that are engaged to perform any services or functions for or on behalf of the municipal utility.
- Transmission and distribution utilities and operators within whose geographic service territory the customer is located.
- The Public Service Commission of Wisconsin ("PSC") or any person whom the commission authorizes by order or rule to receive the customer information.
- An owner of a rental dwelling unit to whom the municipal utility provides notice of past-due charges pursuant to s. 66.0809(5).
- Any person who is otherwise authorized by law to receive the customer information.

The bill was sought by the Municipal Electric Utilities of Wisconsin ("MEUW"), the state association representing Wisconsin's 82 municipal electric utilities, and WPPI Energy, a nonprofit, municipally owned power supplier serving 41 municipally owned Wisconsin utilities.

The law is intended to clarify the prior existing law relating to the release of customer information by municipal electric utilities. While municipal utilities are subject to Wisconsin's Open Records Law, PSC rules require that electric and gas utilities, including municipally owned electric utilities, not release "any information received from individual customers which serves to identify them individually, by usage or status." Arguably the PSC's rule prohibiting disclosure of customer information may have been overridden by the Open Records Law. The issue, however, had not been addressed by the courts.

No penalty is provided for violations of the new law. However, the general forfeiture statute applicable to public utilities would apply. Wisconsin Stat. § 196.66 sets a forfeiture of no less than $25 nor more than $5,000 for a violation of applicable law. The forfeiture law is enforced by either the Wisconsin Attorney General's Office or the District Attorney for the County in which the utility is located.

— Anita Gallucci

Appellate Court Upholds Act 32 Prohibition on Bargaining Health Costs

In the wake of 2011 Wisconsin Act 10, the legislature followed up with the restriction on general municipal worker bargaining rights by adopting prohibitions on bargaining for protective service units with respect to health insurance plans, designs and costs. That prohibition was recently upheld in *Milwaukee Police Association Local 21, et al v. City of Milwaukee*, (Appeal No. 2012AP1928).

The specific provision in question, Wis. Stat. § 111.70(4)(mc)6, states:

> The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a public safety employee with respect to any of the following:
>
> …
>
> 6. The design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.

The City of Milwaukee contended that by statute it was prohibited from bargaining the design and selection and the economic impact of those choices with its protective service bargaining units. Therefore, it proposed the elimination of significant portions of the collective bargaining agreement which set forth the plan design, selection and cost allocations.

The union sued the City and sought judgment seeking a determination that the statute does not allow the City to unilaterally make wholesale changes to the specifics of health care coverage plans and that the City must bargain any specific changes that create a "financial exposure" to health care. The circuit court agreed with the union and enjoined the City from making any such changes without bargaining. The City appealed the decision.

On appeal, the union conceded that the City had the unilateral right to design and select the health-care-coverage plans, to its structure (e.g., deductibles, maximum-out-of-pockets, co-pays, premiums, etc.) and to the specific funding mechanism associated with the plan (e.g., a high deductible Health Savings Account, Health Reimbursement Account, Flexible Savings Account, etc.). However, the union contended that once the plan is designed and selected, bargaining must occur would occur with respect to the "direct results" of that design and selection.

The court of appeals rejected this argument, finding that the direct result of a municipality's design and selection decision includes such things as 1) the deductible amount; 2) maximum-out-of-pocket expense; 3) co-pays, and; 4) prescription costs, etc. The court of appeals held that:

> (I)t would make no sense for the legislature to have granted to the City and other municipal employers the unilateral right to design and select health-care-coverage plans irrespective of the "impact" the "design and selection" has "on the wages, hours, and conditions of employment of the public safety employee," but require bargaining on what the Association calls the "direct result" on the public-safety employee's finances.

As a result, the impact of the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee is a prohibited subject of bargaining.

In bargaining with protective service units since Act 10, there has been much confusion as to the scope of a municipality's duty to bargain deductibles and co-pays even though the design and selection of a health plan is solely within the municipality's discretion. There have been different decisions handed down at the circuit court and by the Wisconsin Employment Relations Commission on this issue. The court of appeals decision clarifies that with respect to health insurance issues, a municipality may unilaterally implement the design and selection of plans without having to bargain the financial impact of those decisions.

— Steven C. Zach

Court Affirms Denial of Application

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In its decision affirming the Committee's denial of the application, the court of appeals was quick to point out that akin to Kraemer's appeal at the lower court level, Kraemer ignored the proper standard of review to be applied by the court. Instead, Kraemer rehashed the evidence before the Committee, alleging flaws in testimony or reports of opposition experts, and discounting lay testimony presented at public hearings. Kraemer also argued that the standards against which its application was judged were vague and violated minimal due process. The court quickly dismissed the due process claim, as the Committee produced a thorough written decision that recited not only the criteria for granting a special exception permit, but also the Committee's reasons for denying the permit. As to the evidentiary challenges, the court emphasized, "It is the Committee, not this court, that determines the weight to be given to the evidence of record." In addition, the court "must uphold the Committee's decision so long as it is supported by substantial evidence, even if there is also substantial evidence supporting the opposite conclusion." Finding this to be true, the court held that the Committee was entitled to reach the conclusion it did and affirmed the decision denying Kraemer's application.

— Anne M. H. Brindley and Jeffrey P. Clark

Governmental Construction Contractor Not Entitled to Immunity from Property Owner Suit for Stormwater Damage

The City of Oshkosh and the Wisconsin Department of Transportation ("DOT") undertook a sewer improvement project along a stretch of State Highway 44 in the City. The construction contract was awarded to Musson. The contract with Musson included a "means and methods" provision which stated that the contractor "is solely responsible for the means, methods, techniques, sequences, and procedures of construction." In undertaking the project, Musson decided to remove the storm sewer along the project's entire span, rather than removing it block-by-block. The DOT concluded that this was a "means and methods" decision that could be made by Musson.

Heavy storms hit the Oshkosh area and the basement of plaintiff's property flooded with water. Plaintiff's sump pump, which had been connected to the City's storm sewer, ran continuously but Musson had disconnected the storm sewers as part of the project. Because of the flooding, plaintiff incurred substantial damages.

Plaintiff sued both Musson and the City for negligence. Both moved for summary judgment arguing they were entitled to immunity under Wis. Stat. § 893.80(4) for their acts relating to the sewer project, and the circuit court granted their motions. Plaintiff appealed the court's decision as to Musson, but not the City. The court of appeals affirmed. In *Showers Appraisals, LLC v. Musson Bros., Inc*., 2011AP1158, decided July 18, 2013, the Wisconsin Supreme Court reversed the grant of summary judgment for Musson.

The circuit court and court of appeals had concluded that Musson was a governmental contractor entitled to immunity under Wis. Stat. § 893.80(4). The Wisconsin Supreme Court, however, disagreed and held that Musson had not proved that it met the definition of an agent of a governmental entity under Wis. Stat. § 893.80(4) or that the contractor's act was one for which immunity was available under § 893.80(4).

With regard to whether Musson met the definition of an agent of a governmental entity entitled to immunity, the court looked to the three-part test adopted in *Lyons v. CNA Insurance Cos*., 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996). One part of that test looks at whether the contractor is subject to "reasonably precise specifications" established by the governmental entity. The court held that Musson was not subject to reasonably precise specifications from the City or DOT because the "means and methods" language in the contract demonstrated that Musson was responsible for the actions at issue. According to the court, "being 'responsible' for the 'means, methods, [etc.]' involves both powers and duties. That is, Musson was not only empowered to take actions involving how the construction process was to proceed, Musson also had the responsibility for the actions it took, including incurring liability if its actions caused injury." The court held that under the Lyons test, Musson was not an agent of a governmental entity entitled to immunity under Wis. Stat. § 893.80(4).

The more interesting portion of the decision looked at whether the contractor's act was one for which immunity was available under § 893.80(4). According to the court, "an equally dispositive question in the § 893.80(4) immunity analysis is whether the relevant decision of the governmental entity that the governmental contractor implements is, itself, entitled to immunity under § 893.80(4). . . ." Only certain types of acts fall within the immunity shield of § 893.80(4), and the court must determine that the action at issue falls under that shield.

Citing Wis. Stat. § 893.80(4), the court stated that immunity is available to a governmental entity only for those governmental decisions that are made as an exercise of "legislative, quasi-legislative, judicial or quasi-judicial functions," and advised that care must be taken when examining a claim for governmental immunity in order to ensure that the grant of immunity is proper. As an example, the court referred to *Bronfeld v. Pember Cos*., 2010 WI App 150, in which the court of appeals indicated that a city would be immune from suit if it failed to place barricades at a construction site. The Supreme Court stated that "[t]his cursory determination of whether the governmental entity would have been entitled to immunity under the language of § 893.80(4) highlights the need for a more thorough immunity analysis for claims of governmental immunity."

In this case, plaintiff alleged that Musson's performance of its construction duties, such as the maintenance of drainage at the worksite, did not meet the standard of due for construction work. According to the court, this type of action is not done in furtherance of a government's legislative, quasi-legislative, judicial or quasi-judicial functions. Since this type of action is not the type of action for which Wis. Stat. § 893.80(4) would afford immunity to a governmental entity, no immunity could be available to a contractor acting for the governmental entity.

The case was sent back to the circuit court for a determination on Musson's liability under standard negligence law. Musson may be liable to plaintiff if plaintiff is able to show that in performing its work under the government contract, Musson had a duty of care to plaintiff, that Musson breached that duty, and that the breach was a cause of plaintiff's damages.

— Lawrie Kobza

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MUNICIPAL LAW NEWSLETTER

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