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An Update on Acts 10 and 32's Status Through the Courts

In the continuing legal saga of 2011 Wisconsin Acts 10 and 32 ("the Acts"), the Wisconsin Court of Appeals denied the State of Wisconsin's petition to have the decision of Dane County Circuit Court Judge Juan Colas, which found certain provisions of the Acts unconstitutional, stayed pending a decision on the merits.

The decision on whether to stay Judge Colas' ruling has importance to municipalities across the state because of the uncertainty as to whether the Acts apply to municipalities as signed into law or whether municipalities must follow the Acts as modified by Judge Colas' ruling. His decision held, among other things, that the Acts' prohibition on bargaining subjects other than "base wage rates" was unconstitutional. This has the effect of making those prohibited subjects of bargaining now permissive subjects and has led unions to request bargaining on those subjects.

Judge Colas' decision also has the effect of expanding mandatory subjects of bargaining beyond "base wage rates" to "wages." The latter have been widely believed to include health insurance and retirement premiums and other economic items as mandatory subjects of bargaining. Thus, if the Colas decision applies to municipalities, those municipalities contemplating changing premiums, co-pays or deductibles would have to bargain those changes as opposed to unilaterally implementing them through personnel policy as was contemplated under Act 10 as adopted.

The Colas decision has led to uncertainty across the state as to which set of bargaining rules must be followed. It was because of this uncertainty that the State petitioned the court of appeals for a stay of Judge Colas' decision until the appeal process was completed. Had the petition for a stay been granted, municipalities would be able to bargain under the Acts as adopted by the Legislature as if the Colas decision had not been issued; they would be required to bargain only "base wage rates."

With the court of appeals' denial of the petition for a stay, municipalities continue to face the uncertainty as to what bargaining rules apply to them. One of the legal issues involved in answering this question is whether the Colas decision has any applicability outside of the parties to the case. The better legal argument is that the decision does not affect municipalities who were not parties to the lawsuit, although labor unions take a different stance on this issue. The court of appeals addressed this issue in its decision on the petition for stay and rejected the unions' contention that the Colas decision applied statewide. Instead, the court of appeals stated that circuit court decisions, such as the Colas decision, do not have the same binding effect as a decision of the court of appeals or supreme court.

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Update on Acts 10 and 32

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However, the unions also contend that the Colas decision has statewide impact because the Wisconsin Employment Relations Commissioners were parties in their official capacity in the Colas case and, thus, in carrying out their duties in administering the Acts they were compelled to enforce the Acts under the Colas interpretation. The parties in the Colas decision briefed this issue with respect to the petition for stay, but the Court of Appeals' decision is silent as to the binding effect of the Colas decision on the WERC Commissioners. It is clear from recent WERC actions, however, that the Commissioners do not consider themselves bound to Judge Colas' decision outside of the context of the parties to that case.

In March 2012, the WERC was in the process of certifying certain results from the annual certification elections mandated by the Acts. Prior to doing so, however, the United States District Court for the Western District of Wisconsin issued a decision finding the annual certification provisions of Act 10 unconstitutional, and it issued an injunction prohibiting the WERC from processing those elections. The elections which were in the middle of the WERC certification process have been in limbo since that time. The Western District Court decision was overturned by the United States Seventh Circuit Court of Appeal recently, and the injunction prohibiting the WERC from processing the Acts annual certification elections was lifted.

While the WERC was cleared to proceed with the annual certification elections from a federal standpoint, the question still remained whether it would proceed in light of the fact that Judge Colas also held that the certification election requirement in the Acts was unconstitutional. That question has been answered. The WERC is now contacting parties involved in the suspended election process advising them that the WERC is proceeding to finalize its processing of those elections. The WERC has also indicated that it is beginning to work on starting up the annual certification process under the Acts. It is clear from this activity that the WERC Commissioners do not feel themselves bound by the Colas decision statewide and is working under the Acts' mandates in its enacted form.

What does this mean to municipalities? We now have a federal court of appeals ruling upholding the Acts in their entirety. While the Dane County Circuit Court decision found parts of the Acts unconstitutional, the Wisconsin Court of Appeals has held that that decision is not binding on parties outside of that lawsuit, and the WERC is proceeding to enforce the Acts as adopted statewide. This should allow municipalities to proceed without regard to the Colas decision.

A word of caution is warranted, however. First, while the Colas decision is not binding statewide, this does not prevent a union from filing a lawsuit against a municipality in another circuit court in the state seeking the same ruling. Second, legal counsel for the unions in the Colas case has publically threatened the WERC Commissioners with contempt of court proceedings should the WERC seek to enforce the Acts contrary to the Colas ruling. Third, the court of appeals still has to rule on the merits of the case and, if it agrees with Judge Colas, the court of appeals' decision will be binding on municipalities statewide. The Colas decision will likely make its way to the Wisconsin Supreme Court. Given the composition of the court, particularly given Justice Roggensack's recent re-election, it is assumed that the Acts will eventually be found constitutional.

Stay tuned.

— Steven C. Zach

Just Compensation for Easements Taken by Eminent Domain Must Take into Account the Value of the Whole Property Before and After the Taking

In *Savage v. American Transmission Co. LLC* (2013 WI App 20), the Wisconsin Court of Appeals addressed how to determine just compensation when an easement is taken by eminent domain. The Court of Appeals held that just compensation is determined by the difference in the fair market value of the landowner's whole property before the taking of the easement compared to the fair market value of the landowner's whole property after the taking. The Court of Appeals overturned the trial court's decision because it had restricted evidence regarding the value of John Savage's property to only "aerial rights" and precluded Savage's experts from testifying because their appraisals were not limited to the loss of "aerial rights."

An easement is a right to enter and use another person's property. In this case, American Transmission Company, LLC ("ATC") had taken an easement on Savage's property. The easement did not allow ATC to place structures within the easement area without Savage's express written consent, and it also prohibited Savage from placing any structures in the easement area. ATC initially attempted to acquire the easement through negotiations, but after they failed, ATC took the easement through it power of eminent domain. Savage had been awarded compensation, but he appealed the amount to the circuit court and requested that a jury determine the amount of just compensation. A jury never heard the case because

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Just Compensation for Easements

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the trial court dismissed Savage's appeal. The trial court held that only "aerial rights" were acquired through the easement and, therefore, precluded Savage's experts from testifying because it found that the experts' testimony was not relevant because the experts did not limit their opinions to the loss of "aerial rights." The court's ruling left Savage with no evidence regarding the value of his property and dismissed the case.

In overturning the trial court on whether only "aerial rights" were at issue, the Court of Appeals noted that the easement did not address or reference the taking of only "aerial rights" and that ATC's appraisal experts did not define or address "aerial rights" within their reports. The Court of Appeals found no support for ATC's argument that only "aerial rights" were at issue and noted that the easement could be enforced against Savage both on and below the ground level of his property. ATC also tried to argue that restrictions other than ATC's easement already precluded Savage from the full use of the easement area. The Court of Appeals rejected this argument and stated that ATC's easement imposed an additional loss on Savage's property. It held that the "degree of imposition and the degree of the effect of this loss is for a jury to determine based upon all the evidence presented (by both Savage and ATC) as to the fair market value of the whole property immediately after the taking." The jury's determination requires an examination from the viewpoint of the landowner, not the condemnor.

The Court of Appeals further held that the trial erroneously precluded Savage and his appraisal experts from testifying regarding the property value. It stated that evidence is admissible if it is relevant and does not fit within a small category of exclusions. Any evidence affecting the property value due to an easement condemnation should be considered. In deciding just compensation, the jury must consider the most injurious use of the property reasonably possible. The compensation should be based on a comprehensive view of all the elements of the property.

The Court of Appeals also specifically noted the public policy concerns that support admitting evidence in determining just compensation in eminent domain cases. Just compensation proceedings are "intended to benefit an owner whose property is taken against his or her will." Since the government allows eminent domain and writes the rules on just compensation, the Court of Appeals noted that "it is proper public policy that a private citizen whose property is taken has the statutory right to have just compensation determined by a jury of his or her peers rather than by an arm of the same government that authorized the taking of the citizen's property in the first place."

The Court of Appeals remanded the case for a new trial to allow Savage to present evidence on the value of his whole property.

— Jami L. Crespo

Court Holds Insurance Defense Legal Bills Subject to Open Records Law

A recent decision by the Wisconsin Supreme Court holds that when a law firm defends an insurance company under a municipal liability insurance policy, itemized invoices to the company for legal services rendered are subject to Wisconsin's open records law. The case, *Juneau County Star-Times and George Altoff v. Juneau County and Kathleen Kobylski* (2013 WI 4) ("Juneau County"), stemmed from a public records request issued to Juneau County by the *Juneau County Star-Times* for records relating to litigation against the County relating to a former county employee. The County's defense was handled by an outside law firm in accordance with the County's public entity liability insurance policy with Wisconsin County Mutual Insurance Corporation. The circuit court concluded that the law firm's invoices were not subject to the "contractors' records" provision of the open records law, Wis. Stat. § 19.36(3), on the grounds that the invoices were produced pursuant to its contract for legal services with the insurance company, not the County. The judgment was reversed by the court of appeals and remanded to the circuit court, while the County was ordered to produce unredacted copies of the invoices to the newspaper.

Affirming the court of appeals, the Wisconsin Supreme Court reasoned that the liability insurance policy itself constitutes a tripartite contractual relationship between (i) the County and the insurance county; (ii) the insurance company and the law firm; and (iii) the law firm and the County. Therefore, invoices produced during the course of the law firm's representation of the County and the insurance company pursuant to the County's insurance policy meet the requirements of Wis. Stat. § 19.36(3), under which records are subject to disclosure even when they are not created by or kept by a public body, as long as they are produced or collected under a contract entered into by the authority with a third party. The provision is expressly designed to prevent a public body from evading its disclosure responsibilities under the open records law by shifting creation or custody of a record to an agent.

In this case, the County (and the circuit court) took the position that the invoices in question had not been produced under a contract between the County and the law firm since the law firm has been engaged by the insurance company. A nonparty brief submitted by the Wisconsin Department of Justice applied similar reasoning to argue that the invoices had not been produced "under" the insurance policy. However, the supreme court majority rejected such reasoning as unduly narrow, concluding that an insurance company's retention of a law firm to defend an insured under an insurance policy creates an attorney-client relationship between the law firm and the insured (in this case, the County) and thus exactly the sort of agency relationship contemplated by the statute. Citing precedent, the

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The Sky's the Limit: Seventh Circuit Dismisses Challenge to Wind Farm Regulations

Although arising outside of Wisconsin, *Muscarello v. Winnebago County* Bd., 11-2332, 11-3258, 2012 U.S. App. LEXIS 25077 (7th Cir. Dec. 7, 2012) is interesting if for no other reason than to illustrate the depth of opinion for and against wind farms. At issue in Muscarello was a 2009 amendment to the Winnebago County, Illinois zoning ordinance, which made wind farms a permitted, rather than special use. Prior to the 2009 amendment, a property owner was required to "run an elaborate procedural gauntlet" to obtain a special use permit for a wind farm. The amendment made wind farms a permitted use, which required only a zoning clearance and building permit be obtained, allegedly encouraging wind farms to locate in the county. While no one had yet applied for a wind farm permit in the county, the plaintiff, who owned several parcels of farm land, feared that construction of one next to her farm land would subject her property to rather numerous prospective dangers, including severe noise, ice throw, shadow flicker, death of birds, blade throw, interference with electronic communication and stray voltage. The plaintiff alleged that such dangers diminished the value of her properties.

The plaintiff brought suit against the Winnebago County Board, County Zoning Board of Appeals, various county officials, and several companies that operate wind farms, claiming the amended ordinance violated the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment. The district court dismissed the action for failure to state a claim, and the plaintiff appealed to the Court of Appeals for the Seventh Circuit.

In a very entertaining and colorful opinion, Judge Posner, writing for the court, remarked that "a pall of prematurity hangs over the case," since no wind farm had even been proposed in the county. Nevertheless, it is interesting to note that Judge Posner specifically acknowledged that some of the plaintiff's claimed dangers such as noise, ice throw, shadow flicker and death of birds "are indeed" potential concerns. Therefore, even though the plaintiff's allegations regarding potential dangers were not certain, the injuries alleged were not so speculative as to deny her standing to sue. Although it allowed the plaintiff standing to proceed, the court held the ordinance did not violate either the federal or state takings clauses, as the ordinance did not transfer possession of any of the plaintiff's land or limit her use of the property. A "taking" within the meaning of the takings clause of the U.S. Constitution has to be an actual transfer of ownership or possession of property or the enforcement of a regulation that renders the property essentially worthless to its owner. According to Judge Posner, "no property of the plaintiff's has yet been taken, or will be until and unless a wind farm is built near her property - and probably not even then."

The plaintiff also argued that the amended ordinance deprived her of property without due process and, thus, violated the Fourteenth Amendment. However, the Court was quick to point out that the plaintiff was merely challenging a change in the procedure by which one obtained permission to build a wind farm. Such change did not impose any restriction on the use of the plaintiff's land and therefore "is too remote to count as a deprivation of property." Moreover, according to Judge Posner, the plaintiff's attack of the ordinance failed because the ordinance constituted legislation impacting every property owner in the county owning different properties with different interests. Using adjudicative procedures to allow all property owners to air their concerns before making a change to the ordinance was not required. According to Judge Posner, "[f]or a court to allow a hypothetical harm to a person's property from a yet to be built (or even permitted to be built) wind farm to upend a county-wide ordinance would be an absurd judicial intrusion into the public regulation of land uses."

In the end, the court recharacterized the plaintiff's contention as simply that a wind farm next to her property would constitute a nuisance. There was no merit to the plaintiff's claim that the ordinance amended in 2009 violated her constitutional rights. Rather, "it is a modest legislative encouragement of wind farming and is within the constitutional authority, state as well as federal, of a local government." According to Judge Posner, should any of the defendants create a nuisance when a wind farm is built (or at least a permit to do so drawn) the plaintiff can at that time, but not now, seek to abate it.

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

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court further reasoned that disclosure of the invoices in question is consistent with the policy behind the open records law of making documents available whose contents are "related to the affairs of government, to the official acts of officers and employees, and to the conduct of governmental business" (Juneau County at ¶ 65) .

A strong dissenting opinion underscores a concern that the court's decision potentially undermines attorney-client privilege by broadening the extent to which attorney records are subject to disclosure under the open records law. However, both the majority opinion, authored by Justice Abrahamson and a concurring opinion written by Justice Roggensack, emphasize that the decision does nothing to alter the rules governing attorney-client privilege or work product, or any other duties inherent to attorney confidentiality. Those issues had not been briefed or argued in the case. As a practical matter, however, in the wake of the decision, municipalities concerned about protecting confidential attorney-client communications from open records disclosure can expect legal battles to the extent their legal invoices are withheld on privilege grounds. For that reason, municipal attorneys and special counsel for public bodies are well advised to include unnecessary detail in their descriptions of legal services that appear on client invoices.

— *Richard A. Heinemann*

Court of Appeals Rejects Municipal Liability Limitation Claim Stacking

A recent decision by the Wisconsin Court of Appeals, *Anderson v. Hebert* (2012AP1313) rejects the application of the $50,000 statutory limit under Wis. Stat. § 893.80 to multiple claims against a municipal entity stemming from a single legal action. The case involved a defamation claim brought by a former county employee against the county administrator for public statements made at two county board meetings and to the local media. The trial court jury found that all three sets of statements damaged the employee's reputation, were essentially untrue and had been made in reckless disregard of their truth or falsity, awarding damages of $50,000 each on two separate verdicts and $75,000 on another. The court then applied the $50,000 damages cap under section 893.80(3) to each verdict, resulting in a total adjusted award of $150,000.

After rejecting the appellant's claim that he was protected by neither executive, nor legislative absolute privilege for the defamatory statements, the court of appeals then examined the circuit court's application of the statutory limit on tort liability and concluded that the statute's use of the term "action" means a single legal proceeding, not every discrete claim that might be made in such a proceeding. Although two other subsections of Wis. Stat. section 893.80 use the term "suit" instead of "action," the court of appeals reasoned that the sections are unrelated to subsection (3), which states that "[T]he amount recoverable by any person for damages, injuries or death in any action founded on tort against any . . . governmental subdivision or . . . their officers . . . or employees . . . shall not exceed $50,000." The court of appeals indicated further that if the legislature had intended the damages cap to be stackable based on a plaintiff's separate claims or causes of action within a single proceeding, it would have said as much. Accordingly, the circuit court was directed to reduce the judgment to $50,000.

— Richard A. Heinemann

REGULATORY WATCH

"Regulatory Watch" highlights federal and state agency actions of interest to municipalities and their utilities. It is presented as a regular feature of the Municipal Law Newsletter by Anita Gallucci, Rhonda Hazen, Richard Heinemann and Lawrie Kobza.

FERC Partially Approves MISO and PJM Order 1000 Compliance Filings

At its March 21, 2013 meeting, the Federal Energy Regulatory Commission ("FERC") conditionally approved the transmission planning and cost allocation proposals submitted by the Midwest Independent Transmission System Operator ("MISO") and PJM Interconnection ("PJM") in compliance with FERC Order No. 1000. Order No. 1000 requires transmission providers to improve transmission planning processes, allocate costs for new transmission facilities to the users who benefit from such facilities and align transmission planning and cost allocation. The Commission found that the two regional transmission operators had largely complied with FERC's requirements, but directed them to provide additional planning procedures designed to link transmission needs to state and local public policy requirements, and to clarify certain aspects of their elimination of a federal right of first refusal for incumbent transmission providers. Commissioners Moeller and Clark dissented on the grounds that the PJM and MISO proposals would impede construction of needed transmission. MISO and PJM will have 120 days to submit compliance filings.

FERC Urged to Approve Streamlined Reliability Standards

The North American Electric Reliability Corporation ("NERC") has submitted a proposal to FERC for revising the Standard Process Manual, which governs the development of mandatory reliability standards ("Reliability Standards") for the planning and operation of the North American bulk electric power system. Along with regional reliability organizations, NERC has legal authority to enforce compliance with the Reliability Standards, which it achieves through a rigorous program of monitoring, audits and investigations, as well as through imposition of financial penalties and other enforcement actions. The proposed revisions are intended to enhance the development of Reliability Standards by providing additional clarity and streamlining the drafting, commenting and implementation process. NERC's proposals have been supported by the American Public Power Association, the National Rural Electric Cooperative Association and the Transmission Access Policy Support Group, which promotes the interest of transmission dependent utilities, including municipal electric utilities.

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Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Jami L. Crespo	283-1740	jcrespo@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Rhonda R. Hazen	283-1724	rhazen@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com

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Boardman & Clark LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701 -0927

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