

Municipal Law Newsletter

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The End of Deference to Agency Interpretations of Law in Wisconsin

The underlying question the Wisconsin Supreme Court faced in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, was certainly not earth-shattering: whether separating river sediment as part of environmental remediation efforts constituted “processing” as that term was used in Wisconsin Statutes, such that the Department of Revenue properly imposed a sales tax for those activities. But the Court seized the opportunity in that case to transform principles of agency review in a way that will dramatically affect municipalities and everyone involved in agency decisionmaking.

Before *Tetra Tech*, Wisconsin courts applied varying levels of deference -- “great weight,” “due weight,” or no deference at all -- depending on the “the comparative institutional qualifications and capabilities of the court and the administrative agency.” *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶ 13. That approach largely comported with federal principles of agency deference that the Supreme Court endorsed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But five Justices in *Tetra Tech* broke new ground by ending that practice, requiring instead that courts review *de novo* every conclusion of law. *Tetra Tech*, 2018 WI 75, ¶ 3.

Two Justices (Daniel Kelly and Rebecca Bradley) embedded their decision in the separation-of-powers principle inherent in the Wisconsin Constitution, reasoning that deference to agency interpretations violated the maxim first announced in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. 137, 177 (1803). See *Tetra Tech*, 2018 WI 75, ¶ 50. Those two Justices also concluded that agency deference “deprives the non-governmental party of an independent and impartial tribunal.” *Id.*, ¶ 67. Three other Justices (Annette Ziegler, Patience Roggensack, and Michael Gableman) avoided the constitutional question and instead arrived at the same result based on the Court’s power to overrule court-created doctrine. See *id.*, ¶¶ 135, 159.

Although it is clear from the *Tetra Tech* decision that Wisconsin courts may no longer defer to agency conclusions of law, it is difficult to predict what the practical implications of the decision will be in administrative review cases, and the guidance is particularly muddled by the fractured nature of the ruling. For example, the Court stated that courts must continue to give “due weight” to the experience, technical competence, and specialized knowledge of an administrative agency, as required by Wis. Stat. § 227.57(10). See *id.*, ¶ 3. But the lead opinion stripped from that concept “the patina of ‘deference’ with which our cases have covered it,” *id.*, ¶ 71, reducing the concept of ‘due weight’ to a “matter

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Court of Appeals Rules for City in Town's Challenge to Annexation Ordinance

In a recent case, *Town of Lincoln v. City of Whitehall*, Case No. 2017AP684 (April 17, 2018), the Wisconsin Court of Appeals clarified the standards and limitations that apply to a town's legal challenge of a grassroots annexation procedure known as "direct annexation by unanimous approval." This procedurally streamlined form of annexation requires that an annexation petition be signed by all of the electors residing in the territory to be annexed, along with all owners of the property located within that territory. The annexation petition is then presented to the annexing municipality on a "take it or leave it" basis. Subject to certain filing requirements and the requirement that the property be "contiguous" to the annexing municipality, the municipality may then adopt an annexation ordinance by a 2/3 vote of its governing body. Because the annexation is initiated by electors and landowners, rather than the annexing municipality, the statutes provide that the town from which the territory was annexed may only bring a legal challenge to the annexation on very narrow grounds.

Town of Lincoln v. City of Whitehall concerns the Town of Lincoln's legal challenge to annexation ordinances enacted by the City of Whitehall. Whitehall Sand and Rail, LLC was interested in locating a sand mine near the City, and wanted it to ultimately be located within City boundaries. The LLC selected the land it would like to purchase, and then made offers to purchase the land from the current landowners, contingent on annexation. The Town exercised its right under Wis. Stat. § 66.0217(6)(d) to seek review of the annexation from the Department of Administration, which concluded that the annexation violated the statutory requirement that the property annexed be "contiguous" to the annexing municipality. The Town then brought a declaratory judgment action, asking the court to declare the annexation ordinances invalid and unenforceable on a variety of theories, including lack of contiguity.

The Court of Appeals concluded that, because the challenge was to a direct annexation by unanimous consent, Wis. Stat. § 66.0217(11)(c) limited the Town to challenging the annexation ordinances on the basis of contiguity or county parallelism (the requirement that some part of the annexing municipality be located in the same county as the territory to be annexed—a requirement that was not at issue in this case). The Town could not raise any other theories in its lawsuit challenging the annexation (e.g., failure to obtain necessary signatures on the petition, or lack of reasonable present or demonstrable future need for the annexed property).

With respect to its contiguity claim, the Town argued that, although the annexed territory was physically

touching the City's boundaries, it was not truly "contiguous," because it was an arbitrary and odd shape. In its opinion, the Court of Appeals explained that the word "contiguous" generally means "some significant degree of physical contact between the properties in question." That requirement was met in this case, because the annexed territory shared an approximately ¾ mile border with the City. However, the court acknowledged that there were certain limited circumstances where an arbitrarily shaped boundary could give rise to a finding that annexed territory in a direct annexation by unanimous consent, although physically contiguous to the annexing municipality, does not meet the statutory contiguity requirement.

The first circumstance is when the annexing municipality is one of the petitioning landowners or the "real controlling influence" in the proceedings. In order to be considered the "real controlling influence," a municipality must do more than provide technical assistance or recommendation to the petition signers. Instead, the municipality must engage in conduct by which it "dominates" the petitioners so as to have effectively selected the boundaries of the annexed territories itself. That standard was not met in this case because the City did not solicit or encourage property owners to file an annexation petition, but instead the LLC selected the parcels and entered into agreements with the landowners requiring annexation. Although the City did advise the LLC (after the petitions had been submitted) that excluding certain property was likely to create an illegal town "island," the court concluded that that was not enough for the City to be considered a real controlling influence.

Second, physically contiguous territory may be found to violate the statutory contiguity requirement when the territory is of an "exceptional shape." In the context of

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Agency Interpretations of Law in Wisconsin

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of persuasion, not deference." It is also murky what effect that the Court's decision will have on the decades of court rulings that relied on the deference doctrine. *See id.*, ¶ 139 (Ziegler, J., concurring). Nevertheless, municipalities along with all other participants in agency decisionmaking should expect that after the *Tetra Tech* decision, courts will now approach cases of agency review in a dramatically different fashion than they have done so before.

— Barry J. Blonien

U.S. Supreme Court Decision Impacts Public Safety Union's Dues Deductions

As part of the sweeping changes to municipal labor law enacted in Wisconsin in 2011 (known as "Act 10"), municipal employers are prohibited from deducting union dues from the earnings of a public safety or a transit employee, unless the municipal employer was provided with an individual authorization signed by the employee. The authorization is required to be terminable by at least the end of any year of its life or earlier, provided the employee gave at least 30 days' written notice to the municipal employer and to the union. Wis. Stat. § 111.70(3)(a)(6). This provision did not apply to public safety or municipal transit employees who were part of a collective bargaining unit with a collective bargaining agreement that contained a fair share provision requiring bargaining unit employees to be part of the union and also authorized the deduction of their dues without individual consent. In those bargaining units, municipal employers have been deducting union dues from all bargaining unit members pursuant to the contract language.

However, the United States Supreme Court recently held that such fair share and mandatory dues deduction provisions in collective bargaining agreements violate public employees' First Amendment rights. *Janus v. AFSCME*, 585 U.S. ___ (2018). In particular, the Court held that public employees cannot be required to pay union dues or fees because doing so violates the free speech rights of employees by compelling them to subsidize the union's "private speech on matters of substantial public concern."

The effect of this decision is to invalidate immediately the fair share and mandatory dues deduction provisions in existing collective bargaining agreements covering public safety employees and municipal transit workers. Accordingly, employees in those bargaining units are no longer required to be union members and pay union initiation fees, dues, or other fees. Employees in those bargaining units who desire to be union members, and have union fees and dues deducted from their paychecks and forwarded to the union by the municipality, must file an authorization signed by the employee with the municipality and the union.

One question that has arisen in implementing practices to comply with *Janus* is whether a municipality can recognize authorizations signed prior to the *Janus* decision or whether a municipality is required to receive post-*Janus* authorizations from employees who want to have union dues deducted from their paycheck. The decision is not clear on this issue, and municipalities are split on the path they are choosing. There is also some question as to when an employee can revoke an authorization. The relevant Wisconsin statute requires the authorization to be

"terminable by at least the end of any year of its life or earlier," but requires at least 30 days' notice. Accordingly, while unions have expressed a desire for an authorization that allows revocation annually, the statute allows revocation upon at least 30 days' notice.

While *Janus* does not impact most municipal workers, if the Act 10 provisions are ever amended to permit other public sector unions to operate on a broader scope than currently allowed, *Janus* would still prohibit a municipality and those unions from agreeing to a fair share provision requiring the payment of union dues.

— Steven C. Zach

Court of Appeals Rules for City in Town's Challenge to Annexation Ordinance

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owner-initiated annexations, the court explained that this analysis protects against only the "most egregious" configurations. Shapes that are merely irregular, or that are arm-like extensions from a municipal boundary, do not necessarily demonstrate that the territory is exceptionally shaped. In this case, the Town argued that the City's annexation was a so-called "balloon-on a string" or "shoestring" configuration, in which the annexed territory includes isolated areas connected by means of a narrow strip of land. The court disagreed, noting that the so-called "string" territory was over 1,000 feet wide at its narrowest point and was not included in the annexation merely as a means to reach the alleged "balloon" territory, but instead would be an integral part of the mining operation. Thus, the court held that the territory was not such an egregiously exceptional shape as to invalidate the annexation.

Ultimately, the Court of Appeals ruled in favor of the City on all claims. This case should serve as a reminder to municipalities that all annexations are not created equal. When it comes to direct annexations by unanimous consent, a Town's ability to challenge the annexation is severely constrained by statute. Towns may only challenge such an annexation on the basis of contiguity or county parallelism. If the property is physically contiguous to the annexing municipality (i.e., there some significant degree of physical contact between the properties), then the statutory contiguity requirement will be satisfied unless the annexing municipality signed the petition (or is the "real controlling influence" behind it) or the annexed territory is of a "most egregious" "exceptional shape."

— Julia K. Potter

Wisconsin Supreme Court Extends Building Permit Rule to Land

In *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, 381 Wis.2d 704, 913 N.W.2d 118, the Wisconsin Supreme Court extended the bright-line “Building Permit Rule” to all land identified in a building permit application. This rule, upheld by the Supreme Court last year in *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, provides that a property owner has a vested right to build a structure upon the filing of a building permit application that strictly conforms to all applicable zoning regulations in effect at the time of application. The Building Permit Rule’s effect is to remove the power of a municipality to prevent a planned use of property by changing its zoning code. The rule is an exception to the general policy that property owners “obtain no vested rights in a particular type of zoning solely through reliance on the zoning.” Wisconsin is in the minority of jurisdictions that vest rights prior to substantial construction and/or substantial expenditures by the applicant.

In *Golden Sands*, a dairy owned or was under contract to purchase 6,388 acres of land in and around the Town of Saratoga. The dairy filed a building permit application for seven farm structures on a building site of 92 acres to be used for dairy cows. The application also identified by map and state permit submissions the entire 6,388 acres as used to support the operation. After the application was filed the Town of Saratoga enacted a zoning ordinance that prohibited the dairy's proposed use. However, the Town issued a building permit after the dairy succeeded in a mandamus action.

The dairy next brought a declaratory judgment action, asking the circuit court to declare that it may use all the land specifically identified in its building permit application for its operation. Neither party argued against the bright-line Building Permit Rule as affirmed in *McKee*. The circuit court held that by filing an application that specifically identified the parcels, the dairy had a vested right to use the land for agricultural purposes. The court of appeals reversed, holding that while the right to build a structure vests with a building permit application, the right to use the land only vests with open and obvious use under the nonconforming use doctrine.

In this matter of first impression, the Wisconsin Supreme Court reversed the court of appeals. The majority held that the Building Permit Rule applies not only to structures but also to all land specifically identified in the building permit application. The majority went on to find that the dairy had sufficiently identified all 6,388 acres in its application to gain a vested right to use the land for its dairy operation.

Quoting *McKee*, Justice Gableman, writing for the majority, emphasized that the bright-line Building Permit Rule “creates predictability for land owners, purchasers, developers, municipalities[,] and the courts” by identifying the exact date upon which rights vest—the date that the building permit application is filed. The Court rejected the court of appeals’ concern that an applicant may identify far more land than is necessary under a building permit application by noting that any unused land at the time the building permit expires may be subject to the zoning regulations that exist at the time of permit expiration. According to the Court, any other interpretation would render a building permit “nearly worthless” if the rights vested only to structures and not to the land “necessary to put the structures to their proper use.”

In a dissent joined by Justice Ann Walsh Bradley, Justice Abrahamson concluded that the majority’s expansion “sacrifices” predictability and uniformity by requiring a case-by-case analysis of the applicant’s specificity regarding both a description of the property and the property’s proposed use. Specifically, the dissent was concerned that municipalities lack satisfactory guidance as to what materials or information will be sufficient to vest rights in an applicant. Without this guidance, the dissent worried that the majority opinion may actually serve to encourage developers to provide less, rather than more, information.

Absent further clarification, the result of *Golden Sands* is that municipalities are left to determine whether a building permit application contains sufficiently specific information to vest a right in the applicant to use all land identified in the permit application. Each municipality will need to determine whether it will require applicants to submit additional detailed information with building permits, including maps, legal descriptions, state permits, or detailed descriptions of proposed uses and locations.

— Jared Walker Smith

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Richard A. Heinemann

Court of Appeals Clears the Way for Badger Coulee Project

The Wisconsin Court of Appeals has upheld a 2015 decision by the Public Service Commission (PSC or Commission) to grant a Certificate of Public Convenience and Necessity (CPCN) for the so-called “Badger Coulee Project” (Project), a 345 kilovolt high voltage line co-developed by a group of public utilities comprised of the American Transmission Company LLC (ATC), WPPI Energy, Dairyland Power Cooperative, and several others (the “Companies”). The transmission project is intended to improve electric reliability for the City of LaCrosse and its environs, extending to Winona, Minnesota. A substantial portion of the line is located in the Town of Holland (Town), which opposed the project on several grounds, including a lack of need due to the recent construction of another high voltage line in the area (the CapX line).

After the Commission rejected the Town’s request for rehearing, the Town sought judicial review, arguing that the Commission’s Environmental Impact Statement (EIS) was legally insufficient; that the line was unnecessary in view of slow growth trends in the area; and that the line would unreasonably interfere with the Town’s land use and development plans.

Limiting its review on jurisdictional grounds to the Town’s petition for review of the PSC’s initial decision (rather than on the PSC’s subsequent denial of the Town’s petition for rehearing of that decision), the circuit court affirmed the PSC’s determination of need. However, the circuit court refrained from addressing whether the EIS was legally sufficient because the EIS had not been formally included in the record. Instead, the court remanded the matter to the PSC so that it could complete the record, as well as reevaluate the feasibility of co-locating an eight mile stretch of the Project on the existing CapX line, which the Town had sought in accordance with statutory guidelines requiring that new transmission facilities be sited in existing transmission corridors “to the extent feasible”.

After first determining that the PSC’s decision should be accorded great weight deference under the standards enunciated by the Wisconsin Supreme Court in *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin*, 2005 WI 93, 282 Wis. 2d 250, 700 N.W. 2d 768, the court of appeals found a reasonable basis for the Commission’s determination that the Project had met the “reasonable needs of the public” under Chapter 196. Citing the Commission’s review of testimony and evidence on a range of relevant factors, including economic benefits and public policy considerations such as the development of alternative power sources, the court of appeals found that the Commission was justified in applying a broader definition of “reasonable needs” than the narrower, reliability-based definition advocated by the Town.

The court of appeals then applied great weight deference again in upholding the Commission’s determination that the EIS was legally sufficient. Noting that the EIS prepared by the PSC was over six hundred pages long, with detailed analysis of all the factors enumerated in Wis. Stat. sec. 1.11(2)(c), the court found the EIS to be a thorough and detailed report, and rejected the Town’s argument that the Commission had merely parroted the positions of the Companies, rather than doing its own independent analysis.

On the siting issue, the court of appeals disagreed with the circuit court’s finding that the PSC had failed to establish a rational basis for determining that only one mile of the project could be located with the CapX line. The court of appeals found that the Commission had reasonably relied on the Companies’ own analysis, which showed that co-locating the lines had to be limited to a one mile stretch in order to avoid incurring unacceptable service disruption risks. In so holding, the court of appeals invalidated the circuit court’s injunction against further construction on the seven mile portion of the Project at issue.

Finally, the court of appeals reviewed *de novo* the issue of whether the circuit court had properly determined that it lacked jurisdiction to review the PSC’s order denying the Town’s request for rehearing. Citing *Schwartz v. Wisconsin Department of Revenue*, 2002 WI App 255, 258 Wis. 2d 112, the Town argued that the PSC had improperly denied the petition for rehearing because it failed to take into account new evidence regarding growth trends in the area that had not been available prior to the PSC’s decision. The circuit court found that it did not have jurisdiction over the PSC’s denial of the rehearing request because the order denying the request was discretionary, and not based on any factual findings on the record.

The court of appeals disagreed, concluding that circuit court review was permissible because Wis. Stat. §. 196.41 expressly permits judicial review of PSC orders, as well as decisions, and because the Commission’s stated reasons for denying the petition show that it used the same analysis in reviewing the new information that had been used in reviewing the original record. Rather than remand to the circuit court to determine the rehearing question, the court of appeals applied the “substantial evidence” standard under Wis. Stat. § 227.49(3) and concluded that rehearing is not warranted because the PSC had a rational basis for determining that the new evidence was not sufficiently strong to reverse or modify its decision.

With the appellate court decision, construction on the line can now proceed. According to ATC, the line is expected to be in service by the end of the year.

— Richard A. Heinemann



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