BoardmanClark

Municipal Law Newsletter

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COVID-19 Pandemic

The COVID-19 pandemic has fostered legislative and regulatory activity unprecedented in recent times. Coupled with Wisconsin's "Safer at Home" directive, municipalities have significantly changed the way they provide services to the public. During the last month, our municipal attorneys have worked with you to understand the legal options required and/or available to you.

The Boardman Municipal Practice Group has also worked with our other practice groups to generate summaries of the laws and regulations dealing with the COVID-19 pandemic, a number of which you have received directly. We have catalogued all those documents on our website for your continued review and reference. They can be located at: https://www.boardmanclark.com/covid.

Municipalities Have New Flexibility to Provide Notice of Open Meetings

On March 3, 2020, Governor Evers signed 2019 Wisconsin Act 140 ("Act 140"), which amended Wisconsin's Open Meetings Law to clarify the methods by which a governmental body may provide an Open Meetings notice to the public.

Previously, Wis. Stat. § 19.84(1)(b) provided that either the chief presiding officer of a governmental body or the officer's designee must provide notice of the governmental body's meeting to the public, any news media who had filed a written request for such notice, and to the official newspaper designated under Wisconsin law on publication of legal notice located in Wis. Stat. ch. 985, or if none exists, to a news medium likely to give notice in the area.

While the previous law provided that notice must be given to the public, it did not specify the method that a governmental body must use to provide notice to the public. Attorney General guidance had indicated that in most situations, governmental bodies should provide notice of meetings to the public by posting notices in at least three public places likely to give notice to the persons affected, in addition to the applicable news media.

Act 140 amended Wis. Stat. § 19.84(1)(b) and provides additional flexibility to governmental bodies. Now, a governmental body may choose one of the following three methods for giving notice to the public:

(1) Posting a notice in at least three public places likely to give notice to persons affected;

(2) Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body's internet site; or

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No Private Cause of Action to Compel Towns to Construct Roads to Meet Wis. Stat. § 82.50 Standards

The Wisconsin Supreme Court has ruled that individuals have no private right of action for mandamus or damages to compel a town to construct roads to the standards for "town roads" under Wis. Stat. § 82.50. *DSG Evergreen Family Limited Partnership v. Town of Perry*, 2020 WI 23 (2/27/2020).

The Town of Perry acquired by eminent domain approximately 12 of 92 acres of farmland owned by DSG for purposes of creating a park preserving the oldest surviving Norwegian log church in the state. Before the taking, DSG's access from a county highway to its farmland was via a field road. However, DSG had planned to construct a home and accessory buildings in the location of the 12 acres that were acquired. Accordingly, DSG had constructed the road to the higher standards for a driveway. As part of the taking, Perry committed to constructing a replacement "field road, to the same construction standards as the existing field road." The new road would serve as the access to both the park and to DSG's remaining land.

The town constructed the new road to the driveway standards. Under the town's driveway ordinance, the term "field road" is defined as a private road used only for agricultural purposes. A "driveway" is a private road used for residential purposes. The ordinance sets design specifications applicable to field roads and driveways.

The town laid out the road as a "parkway" pursuant to Chapter 27, Stats., not a town road under Chapter 82, Stats. DSG filed a declaratory judgment action seeking by mandamus to compel the town to reconstruct the new road to the standards of a town road set out in Wis. Stat. § 82.50. In the alternative, DSG alleged a private right of action seeking damages for the cost of reconstructing the road. DSG argued that, by opening any type of road to the general public, the town was obligated to meet the statutory standards independent of any obligations arising out of the condemnation. The Supreme Court rejected both claims.

With respect to the first claim, the court found that § 82.50 includes an element of discretion in that the Department of Transportation may approve deviations from the standards. The remedy of mandamus applies only when there is a clear duty imposed by law and nothing is left to the discretion of the governmental body. The court also found that the claim was not ripe for adjudication, because there had been no determination by the department whether to approve any deviation from the standards and the town has discretion in how to apply for such relief.

Regarding the second claim, the court explained that a private right of action for failure to comply with statutory obligations exists only when the legislature intends to create such a right and the statute provides for private civil liability rather than merely providing for the protection of the general public. The court held that § 82.50(1) does meet either criteria.

The court seems to have assumed, without deciding, that parkways laid out under Chapter 27 must meet the standards of § 82.50. The town also briefed the question of whether all town "highways" laid out under Chapter 82 (which is entitled "Town Highways") must necessarily meet the standards for "town roads" under § 82.50, since there is a statutory definition of "highway" and treating them as interchangeable with "town roads" leads to inconsistencies or redundancies with other provisions of Chapter 82. State transportation aids statutes also distinguish between general aids for "highways" and local roads improvement funding, which applies to town roads, but not to all thoroughfares that meet the definition of a town "highway." The court did not address this question.

On an independent basis, DSG also sought to have the new road reconstructed to higher standards on the grounds that the road does not meet DSG's interpretation of the applicable "construction standards" promised in the condemnation petition. The town contends that DSG's alleged interpretation is incorrect. The lower courts did not decide the correct interpretation and, instead, dismissed this portion of the case on claim preclusion grounds. The supreme court held that claim preclusion did not apply and remanded the matter back for a decision on the merits.

—Mark J. Steichen

Notice of Open Meetings

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(3) By paid publication in a news medium likely to give notice to persons affected.

This is in addition to providing notice of the governmental body's meeting to any news media who had filed a written request for such notice, and to the official newspaper designated under Wisconsin law, or if none exists, to a news medium likely to give notice in the area.

The Act became effective on March 5, 2020. Municipalities should review any ordinances, resolutions, or policies relating to public notice and consider revising them to take advantage of the greater flexibility provided by this law change. In the absence of an ordinance, resolution, or policy, the municipality can likely take advantage of this flexibility immediately.

— Catherine Wiese

Wisconsin Supreme Court Upholds City of Sheboygan Annexation

In a recent case, *Town of Wilson v. City of Sheboygan,* 2020 WI 16, the Wisconsin Supreme Court upheld the City of Sheboygan's annexation of land owned by Kohler Company for development as a world championship golf course. The property was located in the Town of Wilson, but many Town residents and five members of the Town Board had expressed opposition to the proposed development based on environmental concerns, deforestation, and perceived impacts to residential wells. Kohler approached the City of Sheboygan about annexation and independently designed the boundaries of the territory proposed to be annexed, including a large amount of state- and city-owned land, parcels owned by third parties, as well as additional parcels that Kohler had purchased. The annexation was consistent with the City's comprehensive plan, the Department of Administration ("DOA") found the annexation to be in the public interest, and City ultimately adopted an ordinance annexing the territory.

The Town of Wilson challenged the annexation on a variety of grounds. First, it argued that the territory was not contiguous with the City, as required by Wis. Stat. § 66.0217(3). The border between the City and the annexed territory was approximately 650 feet wide. The territory then continued in a southeasterly direction, varying between 1,450 feet wide and 190 feet wide before expanding into the large golf course development. The Town argued that the configuration of the territory was virtually identical to an annexation that was struck down in *Town of Mt. Pleasant v. City of Racine*, 24 Wis. 2d 41 (1964). The court disagreed, explaining that this was not a "corridor" or "strip" annexation in which the connection between the City and the annexed territory is only "a technical strip a few feet wide." Rather, there was a "significant degree of physical contact" between the City and the annexed territory, and the border between the City and the territory in this case was more than four times as wide as the border at issue in the *Town of Mount Pleasant.* Therefore, the court found that the annexation satisfied the statutory contiguity requirement.

Next, the Town argued that the annexation violated the rule of reason, a long-standing judicial doctrine used to assess whether a city or village has abused its powers of annexation under the facts and circumstances of a given case. In order to satisfy the rule of reason, an annexation must meet three requirements: (1) exclusions and irregularities in boundary lines may not be the result of arbitrariness; (2) some reasonable present or demonstrable future need for the annexed property must be shown; (3) no other factors must exist which would constitute an abuse of discretion on the part of the municipality. The court found that all three requirements were met in this case. However, Justices Rebecca Bradley, Daniel Kelly, and Brian Hagedorn each expressed an interest in abolishing the rule of reason in annexation cases, as they believe that the doctrine has no basis in the statutory text and therefore represents judicial overreach.

Moreover, the Town argued that the annexation petition did not meet statutory signature requirements. Wis. Stat. § 66.0217(3)(a)1 requires a petitioner to obtain signatures from either the owners of half of the land area within the annexed territory or the owners of half of the real property in assessed value within the annexed territory. The Town argued that, because there was so much tax-exempt land within the territory, the petitioners should be forced to calculate the number of signatures needed based on land area, rather than assessed value. The court disagreed, finding no support for that argument in statute itself, which allows petitioners to choose freely between the two methods of calculation.

Finally, the Town argued that the petition did not contain a certified population count for the territory, as required by Wis. Stat. §66.0217(5)(a), which provides: "The petition shall also specify the population of the territory . . . as shown by the last federal census, by any subsequent population estimate certified as acceptable by the [D]epartment of Administration or by an actual population count certified as acceptable by the [D] epartment of Administration." The court rejected this argument, noting that the statute does not require the DOA to engage in any particular process to certify a population count and ultimately concluding, based on an affidavit from a DOA employee, that the DOA had certified the petition's population count as part of its public interest review.

Because the court found that none of the Town's challenges to the annexation ordinance were justified, it affirmed the decision of lower court and upheld the annexation as valid.

— Julia K. Potter

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Municipal Law Newsletter

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