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Legislature Approves Options for Providing Financial Assistance for Private Lead Service Line Replacements

The Wisconsin Legislature has approved legislation (2017 Senate Bill 48) which creates two new options for assisting private property owners with the replacement of their privately-owned lead service lines. These two new options are in addition to existing municipal programs which may be funded with DNR grant proceeds or other municipal monies. The Governor is expected to sign the bill.

One option is for the municipality to establish a loan program that is paid back by special charges placed on a property owner's tax bill. A municipality may provide a loan to a property owner to replace that property owner's private lead service line, or it may facilitate owner-arranged financing from a third party for that purpose. Loan repayments would be collected in installments over time through special charges included on the property owner's tax bill. An unpaid installment payment would become a lien on the property. This option, which will be included in Wis. Stat. § 66.0627, is similar to loan programs allowed for energy and water efficiency improvements. If a municipality establishes this type of program, the legislation provides that it must require every property owner with a private lead service line within its borders to replace that line.

Another option is for the public water utility to establish a program that would allow revenue from water utility rates to be used to provide property owners with financial assistance in replacing their private lead service lines. This option has previously been unavailable in Wisconsin.

In order to establish this type of program, the city, town, or village in which the water public utility provides service must first enact an ordinance that permits the water public utility to provide financial assistance. It must also enact an ordinance that requires every property owner with a private lead service line within its borders to replace that line. Finally, the Public Service Commission of Wisconsin ("PSC") must approve the water utility's program.

In order to obtain PSC approval, a water public utility must submit an application to the PSC. The application must include a description of the proposed financial assistance to be provided to property owners and a description of the method for funding the financial assistance. Financial assistance may be provided in the form of a grant, a loan, or both. The application must also include a description of the customers served by the public utility that would be eligible for financial assistance, and any other information that the PSC requests.

Once the PSC has received a complete application, the PSC is required to

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Financial Assistance for Private Lead Service Line Replacements

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investigate the application. The PSC may, but is not required to, hold a public hearing on the application. If there is no public hearing, the PSC must complete its investigation within 90 days. If there is a public hearing, the PSC must complete its investigation within 180 days, unless the PSC chairperson extends the review period for good cause. The PSC must grant its approval if it finds that a public utility's proposal is not unjust, unreasonable, or unfairly discriminatory, and if the program satisfies the conditions set out in the legislation.

The legislation establishes numerous conditions on financial assistance programs funding with water utility revenue:

- The amount of any grant provided by a water utility may not exceed one-half of the total cost of replacing the owner's portion of the water service line.
- Any loan provided may not be forgiven by the water public utility or the municipality. A delinquent loan replacement may be placed on the property owner's tax bill, just like delinquent utility charges.
- If a water public utility proposes to provide financial assistance as a percentage of the cost of replacing the property owner's portion of a water service line, the percentage must be the same for each owner in the customer class.
- If a water public utility proposes to provide financial assistance as a specified dollar amount, the dollar amount must be the same for each owner in a customer class.
- If a water public utility provides retail water service in multiple political subdivisions (cities, villages, or towns), the utility may only fund financial assistance in an individual political subdivision with utility revenue collected from retail water customers located in that individual political subdivision.
- The amount of utility revenue collected from a class of customers to fund financial assistance under the program may not exceed the amount of financial assistance received by that class.

A water utility with an approved program will only be allowed to provide financial assistance for private lead service line replacement if the utility-side water service line and the water main pipe that are connected to the customer-side water service line are lead-free or are replaced at the same time as the customer-side water service line.

The intent behind this legislation has had broad support, but there have been challenges in developing a consensus on whether and how to provide financial assistance for private lead service line replacement with utility revenues. The legislation is the result of this consensus building process. With this legislation, Wisconsin continues to be at the forefront of efforts to replace lead service lines.

— Lawrie Kobza

Court of Appeals Addresses the Disciplinary Process for Police and Fire Commissions

In a recent unpublished decision, *Ryan T. Trapp v. Board of Fire and Police Commissioners of the City of Milwaukee*, 2016AP1970 (Nov. 7, 2017), the Wisconsin Court of Appeals discussed the evidentiary standards that the City of Milwaukee's Board of Fire and Police Commissioners (Board) must apply in upholding a chief's discharge of an officer, and when it is appropriate for the Board to give deference to the chief's decision.

Under Wis. Stat. § 62.50, in order for the City of Milwaukee (City) to suspend for greater than five days, reduce in rank, or terminate a non-probationary member of the police or fire department, the City is required to file charges and hold a trial before the Board. In rendering a decision under Wis. Stat. § 62.50(17)(a)&(b), the Board must perform a two-step analysis. In Phase 1, the Board must determine whether "just cause" supports sustaining the charges through consideration of seven factors. If the Board sustains those charges, the Board must determine in Phase II whether the "good of the service" requires discharge or suspension. While this case involves the application of §62.50, the court interpreted language which is identical to that found in Wis. Stat. §62.13(5)(em) and, therefore, the decision is instructive to all municipalities who are governed by either statute.

In 2015, the Milwaukee Fire Chief issued an order discharging Trapp for various violations of department rules. On appeal, the Board concluded that the Department satisfied the "just cause" standards, and that the "good of the service" required discharge. In making its "good of the service" determination, the Board concluded that "deference may appropriately be given to a chief's decision to discharge, assuming that the decision is substantively reasonable, procedurally fair, and not motivated by any improper bias or personal animus." Trapp appealed the decision to the circuit court, which upheld the Board's decision, and then filed an appeal with the court of appeals

Trapp argued that the Phase 1 analysis under Wis. Stat. § 62.50(17)(a) of the "just cause" factors precluded the Board in Phase 2 from giving deference to the Chief's decision, based upon the board's "good of the service" requirement. The court concluded that it "would not be reasonable for a board to ignore the impact of a discharge on the chief and the department as part of that determination." Determining what is in the "good of the service" necessarily requires an analysis of the chief's recommendations and giving the chief's decision deference when appropriate.

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New Law Exempts Religious Organizations from Paying Property Taxes when a Church Burns Down

On September 21, 2017, the Wisconsin Legislature enacted 2017 Act 59, which modified the necessary-for-building requirement for religious organizations under Wis. Stat. § 70.11(4)(a) to allow religious institutions to claim the property tax emption when the religious building has been destroyed due to arson or natural disaster.

Property Tax Exemption for Religious Organizations

Wisconsin law generally provides property tax exemptions for qualified religious organizations. To be exempt from property taxes, a religious organization's property must meet several requirements. First, the property must be "used exclusively" by a religious association. Second, the property must be "necessary for location and convenience of buildings." Wis. Stat. § 70.11(4)(a).

Under old Wisconsin law, churches that owned vacant land devoid of any buildings did not qualify for the property tax exemption. *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 591 N.W. 583 (1999) (analyzing Wis. Stat. § 70.11(4) (1995-96)). Therefore, if a church owned land but failed to construct any buildings on its property, it was liable for property taxes. *Id.*

Under the new Wisconsin law, religious associations can meet the "necessary-for-building" requirement for property tax exemption if they plan to construct or replace a building that was destroyed by fire, natural disaster, or criminal act, regardless of whether preconstruction planning or construction has begun. 2017 Wis. Act 59; Wis. Stat. § 70.11(4)(a). In other words, if a religious organization owns property with a building on it and that building is subsequently destroyed due to arson or a natural disaster, the religious organization may still obtain the property tax exemption if it plans to reconstruct or replace the building. This applies even if the construction has not yet begun in the relevant tax year, so long as the building was destroyed within the last 25 years.

St. Raphael's Congregation v. City of Madison

This legislative change was recently analyzed by the Wisconsin Court of Appeals in *St. Raphael's Congregation v. City of Madison*, 2017 WI App 85, 2017 WL 5953075. St. Raphael's Congregation, a Roman Catholic church located in the City of Madison, owned 1.31 acres of land in downtown Madison, which includes the site of the former St. Raphael's Cathedral that was destroyed by an arson fire in 2005. The Church planned to rebuild the cathedral, but as of the 2014 tax year, was unable to raise the necessary funds to begin construction. Thus, the lot did not have any building structures on it that would exempt it from property taxes in 2014.

The Church placed a "Way of the Cross" station on the vacant land and sought a property tax exemption from the City of Madison for the 2014 tax year. The City denied the Church's request. The Church then sued the City, claiming it met the exclusive use and necessary-for-building requirements to obtain a property tax exemption. The Church argued that a "totality of the circumstances" test applied. Therefore, the fact that the property was necessary for the *planned* cathedral should satisfy the test. The Church also argued that the Way of the Cross station constituted a building. The Wisconsin Court of Appeals disagreed and held that there must be an actual building on the property in the tax year at issue. Because the dispute concerned the 2014 tax year, Wisconsin's old statute applied and the Church was required to pay the property taxes.

Takeaways

This legislative change means other religious organizations are no longer on the hook for property taxes if their buildings are destroyed. However, this exemption may be subject to future legal challenges. The U.S. Supreme Court has held that, under the Establishment Clause, a state law cannot treat churches more favorably than other charitable organizations. *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989). The legislative carve-out here exists only for religious associations, while the broader tax emption applies to religious, educational and nonprofit organizations.

— Kathryn A. Pfefferle

Court of Appeals Addresses the Disciplinary Process for Police and Fire Commissions

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In this case, the court concluded that the Board gave deference to the chief's decision to discharge only after finding that that chief's decision was "reasonable, fair, and not improperly motivated." By making an independent determination that these conditions were present, the Board exercised the independent judgment required in the Phase 2 analysis.

The case is significant in that it outlines the responsibilities of Commissions or committees hearing cases under §62.13(5). In such cases, the Commission or committee must make an independent assessment of whether "just cause" exists under the seven factor test. If so, then the Commission or committee can give deference to the Chief's decision as to what discipline to impose, provided it makes an independent judgment that the chief acted reasonably, fairly and without improper motivation in determining the disciplinary level. As a practical matter, Commissions and committees typically look to the chief's recommendation of discipline and rationale behind it, and *Trapp* suggests that such complies with the statutory disciplinary scheme.

— Jared Walker Smith

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