MUNICIPAL LAW NEWSLETTER

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New Law Modifies Act 10

On November 10, 2011, Governor Walker signed legislation which permits a municipality to enter into a memorandum of understanding with its collective bargaining units to reduce compensation and fringe benefits without that memorandum being considered a modification to an existing collective bargaining agreement. Under 2011 Wisconsin Act 10, a municipality is required to terminate a collective bargaining agreement upon its termination, extension, modification or renewal, whichever comes first. A memorandum of understanding has been considered to be a "modification" of the collective bargaining agreement which would trigger automatic termination of the agreement by operation of Act 10. Because of this, bargaining units had no incentive to enter into cost savings agreements in mid-term of a collective bargaining agreement even if they wanted to do so to avoid lay-offs. This new provision eliminates that disincentive by permitting modifications of an existing collective bargaining agreement, but only if that modification results in reductions of compensation or fringe benefits.

– Steve Zach

Boardman Combining with Lathrop & Clark LLP on January 1

The law firms of Boardman, Suhr, Curry & Field LLP and Lathrop & Clark LLP will be joining together on January 1, 2012 to create a new firm: Boardman & Clark LLP. Together the new firm will have over 70 lawyers. By combining the strengths of both firms, Boardman & Clark will enhance the breadth and depth of the legal services provided to clients.

Boardman & Clark will be located at the expanded offices of the current Boardman location at One South Pinckney Street, Fourth Floor, on the Capitol Square in downtown Madison.

County's Insurance Defense Counsel's Bills Ruled Subject to Open Records Law

In an opinion issued October 27, 2011 by the Wisconsin Court of Appeals (Dist. IV), the court ruled that the attorney invoices submitted for payment to Juneau County's insurer were subject to disclosure under Wisconsin's Open Records Law. See *Juneau County Star-Times v. Juneau County*, Appeal No. 2010AP2313 (Oct. 27, 2011). The County's insurer, the Wisconsin County Mutual Insurance Corporation, hired a private law firm to defend the County Sheriff in a disciplinary matter. The defense was conducted pursuant to the County's insurance contract with its insurer.

The Juneau County Star-Times (Star-Times) made a written request to the County under the open records law for the attorney invoices. The insurance defense attorneys responded to the request by providing the Star-Times with redacted versions of its bills. The defense attorneys explained that the redactions were to protect information subject to the attorney-client privilege or attorney work product doctrine. The County itself later provided an additional response to the newspaper, essentially adopting the attorneys' response as its own.

The issue whether the defense attorneys' bills to the insurance company were subject to the open records law was addressed under the "contractor's records" provision set out in Wis. Stat. § 19.36(3). That provisions states that an authority, such as the County, "shall make available for inspection and copying . . . any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority."

The court concluded that the legal bills were "collected under" the insurance contract by the insurer and, therefore, were subject to disclosure under the open records law. Finding the statutory provision lacking in specificity, the court concluded that "at a minimum" the phrase "collect under a contract" must include both any representative of authority and any representative of the contracting party (e.g., the insurance company). The court explained that under the terms of the insurance defense contract, it was unreasonable to argue that "the parties to that contract [i.e., the insurer and the County], did not anticipate the insurer's collection of invoices from a law firm in the event that a defense was necessary."

Having concluded that the legal bills were subject to the open records law, the court went on to consider whether the material redacted from the bills was protected from disclosure either by the attorney-client privilege or the work product doctrine. The court noted that attorney billing records are communications from the attorney to the client and, therefore, disclosure of such billing records could violated the attorney-client privilege if those records "would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." Moreover, to meet this standard, the records must "contain detailed descriptions of the nature of the legal services rendered." The court ruled that the County had failed to meet its burden of showing the billing records were sufficiently "detailed" to be protected from disclosure under the attorney-client privilege.

Finally, the court declined to consider whether the billing records were protected under the work product doctrine. The court explained that the County had failed to adequately develop the argument on appeal and that therefore the court had no duty to take up the issue.

– Anita T. Gallucci

Timely Mandamus Action Is the Exclusive Remedy for Open Records Violations

Open records requesters may be quicker to file suit demanding disclosure of records in light of the decision in *The Capital Times Co., et al. v. Doyle*, 2011 WI App 137 (published). In *Capital Times*, the newspaper requested that the governor's office produce copies of letters regarding nine judicial candidates. The request was made on June 4, 2009. The governor released the records on July 8, 2009 -- ninety minutes before he announced his appointments. The newspaper filed a civil action on July 30, 2009 seeking punitive damages. The trial court dismissed the action on the grounds that the newspaper had failed to file a timely writ of mandamus under section 19.37, Wis. Stats. The court of appeals affirmed.

The newspaper alleged that the governor's office arbitrarily and capriciously delayed releasing the records and argued that it should not be penalized for its reliance on the governor's office's claim that there was a legal justification for the delay. It argued that section 19.37, Wis. Stats., sets out four alternative methods for enforcing the open records law: (a) a mandamus action asking the court to require the release of records, (b) a request that either the district attorney or attorney general bring a mandamus action, (c) an action for punitive damages under subsection 19.37(3), and (d) an action by the state for forfeitures under subsection 19.37(4).

The court of appeals adhered strictly to a plain language analysis of the statutory language, which it found to be unambiguous. It held that the statute provides only the first two forms of relief. Within the context of a mandamus action under subsection (1), the potential remedies include not only the release of records, but also recovery of costs, attorney fees, actual damages and punitive damages. If the district attorney or attorney general's office pursues a mandamus action, the remedies may include forfeitures. The court refused to consider policy arguments as grounds for interpreting the statute, finding that such policy factors are the domain of the legislature.

The court also rejected the newspaper's argument that a requester does not have to prove actual compensatory damages

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Taxpayers Bypass Board of Review at Their Peril

A taxpayer may not circumvent the board of review process by proceeding directly to a declaratory judgment action. *Clear Channel Outdoor, Inc., et al., v. City of Milwaukee*, 2011 WI App 117.

According to allegations in the complaint, before 2009 the City of Milwaukee taxed billboards as personal property. In 2009, the city created real property tax key numbers for each billboard and began taxing them as real property. The change in method resulted in a different amount of tax being levied. Without first bringing its case to the board of review, Clear Channel sued the city asking for a declaratory ruling that the city's method was unlawful and for an injunction prohibiting the city from enforcing its ordinance. The circuit court granted the city's motion to dismiss on the grounds that Clear Channel had failed to exhaust its administrative remedies. The court of appeals affirmed.

A different procedural section, 70.47(16) (a), Wis. Stats., applies to Milwaukee, versus other cities, which are governed by section 70.47(7) (a). Nevertheless, for purposes of the exhaustion issue, the relevant wording is so similar that the parties and the court treated them as the same. Both sections provide that no action can be brought challenging "the amount or valuation of property" unless objections are filed with the board of review. The court of appeals distinguished between the "amount" and the "valuation" factors. Clear Channel treated the terms interchangeably, which the court found would render one of them superfluous.

The amount of property subject to taxation includes such issues as whether part of the property is exempt. In the case of billboards, there are three components that must be valued: (a) the structure, (b) the land on which the structure sits (typically a leasehold interest), and (c) the permit authorizing the structure to be located on the particular parcel. *Id*., ¶ 6 (citing *Vivid, Inc. v. Fiedler,* 219 Wis. 2d 764, 781, 580 N.W.2d 644 (1998)). Billboard structures are taxed as personal property, but the leasehold interest and permits are taxed as real property. *Id*., ¶ 6 (citing *Adams Outdoor Advertising Ltd. v. City of Madison,* 2006 WI 104, ¶¶ 3 and 31). Clear Channel asserted that it was not challenging the valuation of the various components, but rather the city's authority to assign tax key numbers to billboard property and to tax it as real property. The court found that the challenge to the city's method inherently involved both the amount and value of the property.

Clear Channel argued that the city's assessments "were without legal authority and were therefore void." *Id*., ¶ 12. However, the court pointed out that a taxing authority's assessments are merely voidable and are not void ab initio unless the taxes are levied on property that is either: (a) outside the authority's jurisdiction, or (b) statutorily exempt. *Id*., ¶ 10 (citing *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 390-91, 572 N.W.2d 855 (1998)). A board of review has the power to hear challenges to assessments and to determine "whether the assessor's assessment is correct." Wis. Stats., § 70.47(9)(a). If it concludes that the value is too high or too low, the board "shall raise or lower the assessment accordingly . . . ." *Id* The court of appeals held that the word "correct" is broad enough to include all alleged errors in an assessment, even if the contention is that the assessment should be zero. *Clear Channel,* 2011 WI 117, ¶ 14.

In support of its conclusion, the court of appeals discussed *Hermann*, in which the claim was made that an assessment violated the Wisconsin Constitution's Uniformity Clause. The plaintiffs filed a declaratory judgment action without having pursued a challenge before the board of review. The supreme court held that the failure to exhaust the administrative remedy doomed their circuit court action. If a constitutional challenge has to be brought before a board of review before going to court, then certainly objections based on statutory interpretation must also be pursued first administratively as well.

Although its decision rests on statutory interpretation, the court of appeals also touched on the public policy considerations that favor exhaustion of administrative remedies in the taxation realm. The timetable for tax assessments, challenges, and levies is essential to effective governmental planning. The statutory deadlines in chapters 70 and 74, Wis. Stats., protect municipalities against having to conduct comprehensive reassessments for a given tax year long after the books have been closed. Bypassing the board of review remedy for the much longer deadlines in civil litigation would thwart the legislature's deliberate process.

– Mark J. Steichen

Timely Mandamus Action Is the Exclusive Remedy for Open Records Violations

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in order to recover punitive damages in open records actions. In the absence of anything to the contrary in the statutory language, the court found that the legislature implicitly incorporated the common law on punitive damages. Wisconsin has continually and recently held to the view that the recovery of compensatory damages is an essential prerequisite to an award of punitive damages.

The newspaper noted that the supreme court had warned requesters not to prematurely invoke the open records law's remedies. See *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736, and complained that it unfair to hold that its action was untimely. The court of appeals responded that the records request in *WIREdata* was far more complex than this one. In *WIREdata*, the supreme court emphasized that complexity is an important factor in determining the reasonable diligence of the records custodian, which is determined upon the totality of the circumstances surrounding the request. *Id*.

– Mark J. Steichen

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