MUNICIPAL LAW NEWSLETTER

BOARDMAN LLP LAW • FIRM

Volume 16, Issue 5, September/October 2011

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Wisconsin's Concealed Carry Law: What it Means for Wisconsin Municipalities

On July 8, 2011, Governor Walker signed The Personal Protection Act making Wisconsin the 49th state to allowed concealed weapons. Generally, the Act allows qualified licensed individuals 21 years and older to carry concealed weapons in Wisconsin, including in government buildings, except in police stations, correctional facilities, secure mental health facilities, courthouses, on or in school grounds and beyond airport security check points. The law will take effect November 1, 2011.

The Act's definition of "weapon" includes handguns, tasers or other electric weapons, knives that are not switchblades and billy clubs. The Act does not define the term "concealed." However, Wisconsin courts have held that a firearm is "concealed" if it is hidden from ordinary view and that a firearm in a vehicle is "concealed" if it is indiscernible from the ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

Prohibiting Weapons in Municipal Buildings

Municipalities and other governmental units are not generally exempt from the concealed carry law. However, municipalities and other governmental units may prohibit licensed individuals from carrying weapons[1] in any part of a building that is owned, occupied, or controlled by the municipality or other governmental unit (other than in parking lots, as discussed below) by providing proper notice. Municipalities that wish to prohibit weapons in their buildings must post at least a 5 inch by 7 inch conspicuous sign near all entrances and probable access points to the building notifying individuals that they are prohibited from carrying weapons inside. Individuals who carry weapons inside a municipal building that has posted signs indicating that weapons are prohibited may be found to have engaged in statutory trespass and are subject to a $1,000 forfeiture.

Municipalities may not prohibit licensed individuals from carrying firearms if such individuals lease residential or business space in a government owned building. In addition, municipalities and other governmental units may not prohibit licensed individuals from keeping firearms in a vehicle being driven or parked in a parking lot or to any part of a municipal building used as a parking lot, or from carrying firearms on ground or lands occupied by a municipality or other governmental unit.

Municipalities and other governmental units do have the right to prohibit licensed individuals from

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carrying weapons at "special events" if the organizers of the event have notified individuals that firearms are prohibited, but may not prohibit firearms in vehicles being driven or parked in a parking facility or to any part of the special event grounds being used as a parking facility. The law defines "special event" as an event that is open to the public, is for a duration of not more than three weeks, and either has designated entrances to and from the event that are locked when the event is closed, or requires admission.

Prohibiting Weapons in the Workplace

Under the Act, properly licensed employees are permitted to carry concealed weapons at work unless they are prohibited from doing so by their employer. Thus, if an employer elects to prohibit concealed weapons in its workplace, it must take affirmative steps to establish and communicate its policy to do so. However, the Act does not require employers to post signs in order to prohibit concealed weapons in the workplace.

Municipalities wishing to prohibit employees from carrying concealed weapons at work should establish policies prohibiting weapons in the workplace. Many public employers may already have such a policy, and such policies should also be reviewed for legal compliance in light of the new law. Note that under the Act, if they so choose, municipalities may prohibit employees from carrying weapons while at work and still permit the public at large to carry concealed weapons in municipal buildings. However, if an employer does not intend to ban weapons, it should nevertheless review its policies to determine whether to set restrictions on the storage and use of the weapon at work.

Significantly, even if a municipality bans weapons in the workplace, it cannot prohibit employees from keeping weapons in their own vehicles. This is true even if the employees park in the municipal parking lot or use their own vehicles for work purposes. Employers may want to consider adopting policies that address employee storage of concealed weapons in vehicles.

Immunity and Liability

One significant aspect of the Act is the issue of immunity from liability. Under the Act, municipalities or other governmental units that do not prohibit individuals or employees from carrying concealed weapons in their buildings are "immune from any liability arising from its decision." The extent of that immunity is ambiguous in some respects, and it is unclear whether Wisconsin courts will interpret the Act's immunity language broadly or narrowly. Without further judicial guidance, municipalities should not necessarily assume that electing to allow concealed weapons would protect it from all legal claims related to concealed weapons in all circumstances.

Importantly, municipalities and other governmental units that do prohibit individuals or employees from carrying concealed weapons are not provided immunity under the Act. However, this does not mean that a municipality would necessarily be liable for harm that occurs on its premises. The Act does not explicitly override the common law and statutory immunities and liability caps and other such protections that municipalities currently enjoy. In general, a municipality's risk of liability for harm under the concealed carry law will be the same as a municipality's current risk of liability. The risk of incurring liability for injuries caused by individuals carrying concealed weapons would typically depend on issues including whether the risk of harm was foreseeable and whether the municipality took reasonable steps to prevent the harm.

Between now and November 1, 2011, municipalities and other governmental units will have to decide the risks and benefits of permitting or prohibiting concealed weapons in the workplace and on the premises. Municipalities are encouraged to review their relevant employee policies, procedures, and applicable insurance policies and to consult with legal counsel to help them make this important decision.

— Patrick P. Neuman

1 The specific statutory provisions regarding posting requirements only reference prohibiting the possession of "firearms." However, according to the Wisconsin Department of Justice, property owners may prohibit or restrict the possession of firearms and other weapons on their property and while the statute's provisions regarding posting only specifically refer to firearms, they apply with equal force to other weapons.

SPEAKERS FORUM

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November 10, 2011
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Cynthia A. Van Bogaert

City Not Liable for Failing to Discover Improper Private Plumbing During Inspection

A city is immune from a lawsuit claiming its inspector failed to discover a property owner's private plumbing was not connected to the city's sanitary sewer main, the Court of Appeals held in *Scott Neuendorf v. City of West Bend*, Appeal No. 2010AP2570 (Ct. App., decided October 6, 2011).

The case arose after the City of West Bend discovered that sanitary waste from private property was discharging into the city's storm water main, instead of its sanitary main. An investigation revealed that a private plumber had connected a property owner's sanitary pipe to the wrong main when the plumbing was first installed in 1999. The city informed the property owner that he was responsible for correcting the error at his own expense. The property owner sued the city for negligence claiming that the city plumbing inspector improperly inspected the sewer lateral in 1999 and failed to discover the improper connection. The property owner sought damages related to making the correction to the connection. The property owner did not sue the plumber, who apparently was judgment proof.

The circuit court granted the city's motion for summary judgment, finding that the city was immune from suit. The property owner appealed arguing that the city was not immune from suit because governmental immunity does not apply to ministerial duties, or to duties to address a "known danger." The property owner argued that the city's inspection duty was a "ministerial duty" because he claimed the inspector had an absolute, certain and imperative duty to determine if the property owner's sanitary lateral was connected to the city's sanitary main.

The property owner argued that an inspector is required to inspect for compliance with all code provisions. The city disputed the contention that its inspectors must verify that there is complete code compliance in every respect. After reviewing the applicable administrative regulations, the court found no language in those regulations specifically requiring an inspector to inspect the lateral's connection, or to require an inspector to inspect all parts of the plumbing for compliance with every code provision. Therefore, the court

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Police Statutory Due Process Procedures Do Not Apply to FMLA Leave

The Wisconsin Court of Appeals recently ruled that a police department's placement of an officer on a leave of absence under federal and state medical leave provisions did not require a due process hearing under statutory provisions applicable to law enforcement officers. *Milwaukee Police Association v. Flynn,* et al, Appeal 2010AP2254 (Ct App. 2011).

Grykowski was a City of Milwaukee police officer who suffered a work-related spinal injury that required medication. He was placed on limited, primarily clerical, duties. On several occasions his supervisors found him sleeping on the job. The City sent Grykowski to a fitness-for-duty examination which yielded a medical finding that Grykowski was not fit for duties that required alertness and focus. The City placed Grykowski on family medical leave for purposes of addressing his physical and medication issues. He was advised that if he was permitted by his treating physician to return to work, he could do so consistent with any limitations placed on his return to employment.

Grykowski and his union filed a written notice with the City's Board of Fire and Police Commissioners seeking a due process hearing under Wis. Stat. §62.50, which pertains to police departments of first class cities. The Board declined to hold a hearing stating that the statute did not apply to FMLA leaves. Grykowski filed a circuit court action seeking a determination that §62.50 required a hearing in these circumstances. The circuit court rejecting this claim and Grykowski filed an appeal with the court of appeals.

Under §62.50, discharged or suspended police officers are afforded a due process hearing to determine whether certain employment actions are justified. Grykowski argued that since he was placed on unpaid leave without his consent, he was entitled to such a hearing. The court of appeals rejected this argument, holding that the provisions of

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Trees and Ancient Fences Sufficient to Rebut Presumption of 4-Rod Wide Highway

The Wisconsin Supreme Court in *Affeldt v. Green Lake County*, 2011 WI 56 (July 6, 2011), examined the sufficiency of evidence needed to create a genuine issue of fact concerning the presumptive width of a highway. In the course of maintaining County Highway B in the town of Green Lake, the county planned to remove trees and fences within what it deemed to be the 4-rod (66') highway right-of-way. The Affeldts objected and sued for a judgment declaring that the highway was only 3 rods wide and enjoining the county from clearing them.

County Highway B has existed in the same location since the mid-1800s. The Affeldts own two farms along the highway. Alan Affeldt lives on the north side of the highway in a house built by his grandparents in the 1920s and he lived in the house all of his life. He was born in December 1946. Their son purchased a house on the north side of the highway in 2005.

The county sought summary judgment on the basis of two affidavits. One was from the county highway superintendent averring that the highway has existed and been maintained by the county as a four-rod right-of-way for over 20 years. The other was from a registered land surveyor and showed that the obstacles were within a 4-rod width. He acknowledged that he could not find any record of the highway's location or width in the county's files, the records of the towns in which the road is located, or with the register of deeds. He also noted that "ancient fences" varied in width from zero to six feet within what would be the southern boundary of a 4-rod right-of-way.

The Affeldts filed affidavits in opposition to the motion for summary judgment. Alan testified that the fences and trees existed in their present location throughout the time he lived there. His family had always mowed the lawn up to the gravel shoulder of the highway and he had never seen the county maintain the trees or the fence nor plow the snow or mow the lawn to the full 4-rod width. Alan stated that a machine shed has been built as early as 1954 26 feet from the centerline of the highway and that he replaced the shed in 1992 with one that lies 32 from the centerline. The Affelds also submitted an aerial photo from the late 1940s and a photograph of Alan as a baby in 1962 showing a fence line and mature trees within the 4-rod width.

The circuit court granted summary judgment in the county's favor and the court of appeals affirmed. The court of appeals held that it was undisputed that the highway is a recorded, laid out highway and, therefore has a four-rod right-of-way as a matter of law. It found the highway to be recorded based on a resolution of the Green Lake County Board in minutes dated November 21, 1939. The supreme court reversed, holding that the Affeldts had offered sufficient evidence to raise a genuine issue of fact whether the highway had been recorded, and if so, whether the highway had been worked to a four-rod width.

The supreme court began by distinguishing between the presumptions applicable to recorded and unrecorded highways. In 1939, the statutes provided that highways were to be laid out to a minimum of 3 rods. However, in a rule dating back to the 1880s, highways that are laid out are presumed to be four rods wide where no width is specified in the layout order, where the order is unrecorded or where records of the order are lost. *See* Wis. Stat. § 82.31(1). Since 1951, a second 4-rod presumption also applies to unrecorded highways that have been worked for at least 10 years. Wis. Stat. § 82.31(2).

The court found that there was a genuine dispute about whether the highway had been laid out. In 1939, a layout order had to be signed by the town or county board supervisors (depending on which entity adopted the order) and the order or a certified copy had to be filed in the office of the clerk of the town or towns in which the highway was located. In *Affeldt*, the records were not entirely lost. The county board minutes reflected the adoption of a resolution ordering the construction of the highway. The minutes did not specify the width of the highway. Nevertheless, the minutes were not signed by town or county supervisors and were only attested to by the county board chairman. Moreover, there was no record of a layout order having been filed with any town clerk.

Even if the highway had been laid out but not recorded of it was created by user, the court held that the photographs and affidavit testimony regarding the historical location of trees, fences and buildings were sufficient to rebut the presumption of a 4-rod width for purposes of summary judgment.

— Mark J. Steichen

Municipal Boards Act Separately When "Acting Together" on Town Line Roads

In *Dawson v. Town of Jackson and Town of Cedarburg*, 2011 WI 77 (July 19, 2011), the Wisconsin Supreme Court addressed how municipal boards "act[] together" to lay out, alter or discontinue a joint public highway under section Wis. Stat. § 82.21(2). The issue arises when an existing or proposed highway straddles two jurisdictions in what are often called town line roads. Decisions to take any of the specified actions must be made by the governing bodies of both municipalities "acting together." The question in *Dawson* was whether the two bodies vote separately or as one consolidated entity in which a majority of the entire combined boards decides the outcome.

Dawson applied separately to the town boards of Jackson and Cedarburg to discontinue a town line road. Cedarburg is located in Ozaukee County and Jackson is located in Washington County. The Jackson town board voted unanimously to vacate the road, but the Cedarburg board rejected the application on a split vote. Dawson subsequently filed a joint application with both towns. The town boards met together. Five members of the Jackson board and three members of the Cedarburg board attended with two Cedarburg members being excused. The boards voted separately with the Jackson board voting unanimously to approve the application and the three Cedarburg members voting to deny it. Following the meeting, the Town of Jackson recorded a highway order in Washington County, but the Town of Cedarburg refused to do so in Ozaukee County. The Dawsons subsequently filed a declaratory judgment action; the circuit court granted summary judgment in their favor and the court of appeals affirmed, both finding the statutory language to be unambiguous.

A 6-1 majority of the supreme court held that the two boards, although required to cooperate with one another, must vote separately. A majority vote of each board is required to approve an action.

The majority found the statutory language to be ambiguous. It began its lengthy statutory interpretation by noting that a literal interpretation could not be applied to all requirements under the statute. All parties agreed that, upon receiving an application, each municipality must send out separate notices of the combined meeting. As in this case, the municipalities might have designated different official newspapers and had different publication requirements. In addition, the statute requires that the town supervisors personally examine the highway in question. Neither party suggested that the supervisors of both towns must conduct the inspection at the same time. Moreover, if a highway order is adopted, it must be filed with both town clerks, who act separately and it must be recorded with the register of deeds in each county. The majority rejected the incorporation of Wis. Stat. § 990.001(8) into its analysis. That section provides that "words purporting to give joint authority to 3 or more public officers . . . shall be construed as giving such authority to a majority of such officers." According to the majority, that statute has been given limited application to mean only that where a member of a board is absent or disqualified from voting, a majority of the remaining members may still act. Cedarburg pointed out that the legislature has contemplated separate approval of highway decisions in another context. Section 83.42(5), Wis. Stats., provides that rustic road status cannot be conferred or withdrawn except by the approval of "all affected municipalities." The majority distinguished this language as being more explicit than § 82.21(2).

After completing its statutory construction analysis, the court considered the public policy ramifications. It explained that requiring the members of two governing bodies to vote as one combined entity would give an unfair advantage to larger municipalities, like cities and villages, to impose their will on smaller municipalities. By statute, town boards are limited to five supervisors. Villages may have up to six trustees and cites have the discretion to set the number of council members -- usually between six and twenty. Accordingly, municipalities with larger numbers of members on their governing boards would have a disproportionate say in the outcome.

The court addressed a second issue, namely whether a decision of a town board under § 82.21(2) can be challenged in a declaratory judgment action or whether certiorari review under Wis. Stat. § 68.13 is the exclusive remedy. Based on the express statutory language in Wis. Stat. § 82.15, the supreme court concluded that certiorari is the exclusive procedure. This substantially limits the time in which to seek relief to 30 days from the receipt of the "final determination." The court noted, but did not decide, the question of whether "final determination" means the date on which municipalities vote or the date on which the applicant receives notice of the determination. In either case, Dawson's lawsuit was untimely.

— Mark J. Steichen

Damages for Breach of a Development Agreement Cannot Be Designated as a Tax; City's Interest in Project Subordinate to Bank's

A city does not nave the authority to designate liquidated damages for breach of a development agreement as a tax, the Wisconsin Court of Appeals recently held in *Baylake Bank v. Fairway Properties of Wisconsin, LLC*, Appeal No. 2010AP2632 (Ct. App., Decided September 15, 2011). As a result, the city's claim for damages resulting from the developer's breach of its development agreement was not entitled to priority in a foreclosure action over the claim of the developer's bank.

The case involved property located in a tax incremental district in the City of Waupaca. The property owner/developer entered into a mortgage agreement with a bank, and subsequently entered into a development agreement with the city. According to the development agreement, the developer was to develop the property into single-family housing, with a minimum value of $4,500,000, and the city was to provide improvements, such as sidewalks, wells, and driveway approaches. The developer agreed to meet a graduated development goal each year for eleven years, the last of which was the $4,500,000 ending goal. For each year, if the developer did not meet the agreed development goal, it was contractually required to pay the city "a liquidated damages penalty." The damage amount was based on a formula in the contract designed to compensate the city for the difference between the actual property tax levied for a given year and the property tax that would have been levied had the development goal been reached for that year. The development agreement further stated that "[t]he payment due is a special charge, which may be entered in the tax roll as a charge against the real property … and collected in the same manner as real estate taxes" and that this was "a lien upon the property superior to all other liens."

The developer defaulted on its mortgage, and its obligations to the city. The bank initiated foreclosure proceedings, and named the city as an interested party. The city claimed the developer owed delinquent property taxes, and liquidated damages under the development agreement for the prior three years. The bank agreed that the delinquent property taxes had priority over the bank's interests, but contended that the liquidated damages under the development agreement did not. The city disagreed, arguing that the damages were a tax and, therefore entitled to priority under statute.

The city argued that the purpose of the development agreement, and the liquidated damages provision in the agreement, was to assure that the city would recoup its financing of improvements benefiting the proposed development in the tax incremental district, either (a) through increased property taxes via the tax increment law, or (b) in the event of a default, through enforcement of the liquidated damages clause which was intended to make up the difference between the actual taxes levied and the anticipated taxes. The court acknowledged that the intent of the liquidated damages provision in the agreement was to create a back-up mechanism for the city should its hope for increased taxation fall through, and that the city clearly had the authority to enter into such an agreement. However that contractual agreement cannot turn the back-up mechanism into a tax unless the city otherwise has the authority to impose such a tax. The court found that the city had no such authority here. Therefore, the liquidated damages from the developer's breach of the development agreement could not be designated as a tax with priority over the bank's mortgage interest. In the foreclosure proceeding, the bank's interest had priority over the city's interest in the liquidated damages.

— Lawrie Kobza

City Not Liable for Failing to Discover Improper Private Plumbing During Inspection

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rejected the property owner's claim that the city had a ministerial duty to verify the sanitary laterals connection to the city's sewer main.

The property owner also argued that the "known danger" immunity exception applies because "the health and safety threat resulting from an improper hookup of a sanitary sewer lateral to a City storm sewer main is a known danger." The court rejected this argument also. According to the court, the property owner did not demonstrate that an incorrect sewer connection constitutes a "compelling," "severe," and "immediate" danger.

— Lawrie Kobza

Police Statutory Due Process Procedures Do Not Apply to FMLA Leave

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§62.50 apply only to actions relating to the discipline of police officers for wrongdoing and not to decisions made that find a police officer unfit for duty. The court held that the language of the statute requires this conclusion. Therefore, placement of an officer on FMLA leave does not invoke the procedural protections established by § 62.50.

While this decision involves statutory procedures pertaining to first class cities, the court of appeals' decision makes it clear that this holding also has applicability to other cities and villages under the provisions of Wis. Stat. §62.13, which requires due process hearings for those municipalities and their sworn officers. First, the operative language in §§62.13 and 62.50 is nearly identical. Second, the court of appeals cited as justification for its decision *Kraus v. City of Waukesha Police and Fire Comm'n*, 2003 WI 51, which held that §62.13(5) disciplinary proceedings apply only to disciplinary actions.

When faced with a sworn officer with medical issues that impact work performance, one tool municipalities can use is a fitness for duty examination. Under this case, employment decisions based on that examination, including placement of the employee on family and medical leave, are not subject to the due process requirements of §§62.13 and 62.50. Care should be taken, however, when documenting such actions. In this case, the court of appeals noted that all of the employment records regarding Grykowski's leave did not reference discipline or rules violations when addressing how to handle the employment situation. This reinforced the city's position that its actions were based upon fitness for duty considerations and not issues of misconduct or discipline.

— Steven C. Zach

DNR Loses Land by Adverse Possession

In *Wisconsin Department of Natural Resources v. Building and All Related Structures, et al*., 2011 WI App 119 (published), the DNR held land on the tip of a peninsula. In 1965, the Wieds purchased a lower portion of the peninsula with the only land access to the DNR property being across the Wied's property. The Wieds quickly began mowing the DNR land and installed a lockable gate across the road in 1970. They built a vacation house on the DNR land in 1986. In 12007 the DNR sued for possession of its land and for removal of the physical improvements. The Wieds asserted affirmative defenses and filed a counterclaim for adverse possession.

In 1965, the applicable statute of limitations required 40 years of adverse possession. The statute was repealed and recreated in 1980 shortening the minimum time to 20 years. It was repealed and recreated again in 1980 keeping the 20-year minimum, but now requiring that the existence of a fence for 20 years. The primary issue on appeal was which version of the statute governed.

The DNR argued that the circuit court erroneously applied the 1980 statute, because it was in existence for only 18 years. Looking to *Petropoulos v. City of West Allis*, 148 Wis. 2d 762, 436 N.W.2d 880 (Ct. App. 1989) for guidance, the court held that adverse possession under a statute continues to run prospectively despite repeal and recreation of the statute unless the new legislation expressly terminates it. Since the 1998 version did not require retroactive application, the Wieds obtained ownership by adverse possession in 2000.

The court of appeals noted that the DNR's brief did not dispute the circuit court's conclusion that the Wieds had also satisfied the requirements of the 1998 statute and, therefore, waived that issue. Nonetheless, the court went on to consider whether the Wieds' house met the requirements of a fence. The court reasoned that the purpose of a fence -- to enclose property -- is served at least as well by the four walls of a house as it is by a traditional fence.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Municipal Drinking Water Division.

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