boardman & clark llp
LAW FIRM

# MUNICIPAL LAW NEWSLETTER

Volume 23, Issue 1, January/February 2017

## IN THIS ISSUE


- *Department of Labor FLSA Overtime Rules Update*
- *Prosecutor Trainings Recordings Not Subject to Disclosure Under Public Records Law*
- *Lawsuit Challenging Annexation of Frac Sand Mine Dismissed*
- *Seventh Circuit Dismisses Challenge to Shoreland Zoning*
- *Voluntary Payment Doctrine Does Not Bar Recovery of Unlawful Special Assessments for a Business Improvement District under Section 66.1109*


**Read us online at:**
**boardmanclark.com/publications**

## Department of Labor FLSA Overtime Rules Update

As we previously reported in the May/June 2016 Municipal Law Newsletter, the Department of Labor (DOL) issued rules which significantly increased the salary level for exempt employees. This caused many employers to implement payroll changes, restructure positions, or modify jobs in order to comply with the new rules. The rule was scheduled to take effect December 1, 2016. On November 22, 2016, a federal district court judge in Texas granted an emergency nationwide injunction to prevent the new rule from taking effect. For some employers this was a welcome reprieve because they had done nothing to prepare for the new rule or had not yet rolled out their changes to employees. For others, this last minute injunction was a source of frustration after they had worked through and communicated or implemented pay changes in order to comply with the new rule. Many employers are wondering, "What should we do now?"

First, the litigation over these rules continues on at least two fronts. The DOL has appealed the district court ruling to the 5th Circuit Court of Appeals, which has put the case on an expedited appeal process. Second, the district court judge is continuing to process the remainder of the case to determine if his injunction should be permanent and the rule declared invalid. It is unknown when any further decisions may be issued in this case. Also, the Trump administration may decide to abandon, reverse, or modify the rules which were issued. Thus, from a legal standpoint, employers are in a holding pattern.

From a practical standpoint, employers who have already taken time to examine their payroll practices, evaluate their exempt employees, and make changes are a step ahead. The new rule was only going to change the "salary level" an employee must be paid in order to be considered exempt. It did not change any of the "duties tests" an employee must meet in order to be considered exempt and it did not change the "salary basis" test. Of the three components, the "salary level" test is by far the easiest to comply with. The other two components are more complicated and have led to significant litigation over the years. Employers must continue to comply with the "duties tests" and the "salary basis" test.

If employers have not already done so, they should audit their exempt/non-exempt classifications, including a review of the "duties tests" and the

*Continued on page 2*

## Prosecutor Trainings Recordings Not Subject to Disclosure Under Public Records Law

The Democratic Party of Wisconsin requested recordings of two prosecutor trainings given by Waukesha District Attorney Brad Schimel. At the time of the request, Schimel was running for Wisconsin Attorney General, a position in which he now serves. The records custodian denied the request, resulting in the Democratic Party of Wisconsin seeking a court order to release the recordings. The Wisconsin Supreme Court ruled in *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100 (Dec. 28, 2016) that these recordings were not subject to disclosure. The case has implications for public record custodians as the case explains that the risks of revealing prosecutorial strategies and law enforcement tactics weigh strongly against disclosure of public records.

Both recordings were made at Wisconsin State Prosecutors Education and Training conferences and were attended by prosecutors and victim's rights advocates. On the first recording, Schimel discussed the prosecution of and common defenses in child exploitation cases. On the second recording, Schimel discussed victim confidentiality through the lens of a high-profile case that Schimel prosecuted. The records custodian denied the request for both recordings, concluding that the public interest in nondisclosure outweighed the presumption favoring release of the records. The Wisconsin Supreme Court ultimately held that the record custodian's reasons for nondisclosure were legally sufficient.

The court analyzed each recording separately. For the first recording, the court determined that the recording contained specific techniques and procedures for law enforcement investigations and prosecutions. Releasing this information would be so harmful to the public interest as to justify nondisclosure. The court noted that sexual predators could use the information in these recordings to circumvent the law. Furthermore, permitting this disclosure would require the records custodian to disclose these records to every other future requestor. The court explained that the recordings would not help parents protect their children from sexual predators. In applying the balancing test, Schimel's status as a public official was not sufficient to outweigh the factors favoring nondisclosure, particularly when the parties agreed that the recordings did not reveal any misconduct by Schimel. Therefore, the recording was not subject to disclosure.

For the second recording, the court held that a common law exception protecting prosecutorial case files from disclosure applied. The court described the recorded training as an oral accounting of the district attorney's discretionary processes—the same processes that would otherwise be protected in written form under the common law exception. Because a common law exception to disclosure applied, the court did not have to apply the balancing test. However, the court explained that even if the balancing test applied, the record would still not be subject to disclosure. The court acknowledged that this recording, like the first recording, implicated the public interest in protecting from disclosure specific techniques and procedures for law enforcement investigations and prosecutions. Furthermore, this recording implicated the Wisconsin Constitution's mandate that the State treat crime victims with "fairness, dignity and respect for their privacy." Disclosing the recording risked re-traumatizing the

*Continued on page 3*

### Department of Labor FLSA Overtime Rules Update

*Continued from front page*

"salary basis" test, and correct any misclassifications or update classifications of jobs that may have changed over the years. It is also a good time to audit payroll practices to ensure that all working time is recorded and paid, all compensation is properly included in overtime calculations, and exempt employees are truly paid on a "salary basis." Enforcement of wage and hour violations has been increasing at the state and federal level and private attorneys are becoming more aggressive in seeking out employees who may not be paid properly. Just because the court has enjoined implementation of the higher salary requirement does not mean other enforcement activity will slow down. Taking a proactive approach may save you time and money down the road. For assistance with a payroll audit or other FLSA issues, please contact a Boardman & Clark attorney.

*— Douglas E. Witte & JoAnn M. Hart*

**Prosecutor Trainings Recordings Not Subject to Disclosure Under Public Records Law**

*Continued from page 2*

victims, even though the victims were not mentioned by name in the recording, because the high profile nature of the case made the victims' identities easily discoverable. The court also expressed concern that continually traumatizing victims would deter future victims from reporting crimes. For these reasons, the court held that the recording was not subject to disclosure.

Interestingly, the court also concluded that the records custodian did not have to release a redacted version of the recordings because a redacted version "would be meaningless to the viewer." This conclusion drew criticism from the dissenting justices because generally records custodians have to produce redacted versions of records under the law. This decision provides some support for the proposition that records custodians do not have to disclose redacted versions of records that would be "meaningless to the viewer." However, records custodians should consult with legal counsel on this issue before deciding not to disclose redacted records.

This case is a reminder that records custodians must carefully consider all the relevant factors when applying the balancing test under the Wisconsin Public Records Law. Wisconsin law creates a presumption that public records are subject to disclosure absent an exception. However, that presumption can be overcome if the public interest in nondisclosure outweighs the public interest in disclosure. The Wisconsin Supreme Court emphasized in this case that the risk of revealing specific techniques and procedures for law enforcement investigations and prosecutions weighs strongly against disclosure. While the recordings in this case discussed high profile serious criminal cases, the rationale of the case is applicable to prosecutors more generally, including municipal prosecutors. While the risk of disclosing these techniques and procedures may be somewhat diminished in less significant cases, records custodians should recognize Wisconsin's public policy against disclosure of these techniques and procedures. Records custodians need to examine each public record on a case-by-case basis to determine whether the record is subject to disclosure.

*— Brian P. Goodman*

## Lawsuit Challenging Annexation of Frac Sand Mine Dismissed

In a recent decision, *Town of Burnside v. City of Independence*, 2016AP34-AC (Nov. 29, 2016), the Wisconsin Court of Appeals dismissed a claim by the Town of Arcadia contesting the annexation of town land for a frac sand mine by City of Independence, bringing to a close a multi-party lawsuit that had been ongoing for more than two years. The lawsuit arose out of the City of Independence's annexation of land in the Towns of Lincoln, Burnside, and Arcadia. A mining company wanted to expand and operate an existing sand mine located in Arcadia, but wished to remove the mine from the reach of Trempeleau County regulations by having the land annexed by the City. The company entered into a pre-annexation agreement with the City, and the City adopted ordinances annexing a thin strip of land extending across Lincoln and Burnside townships and a larger portion of land in the Town of Arcadia, encompassing the existing sand mine. This type of annexation is commonly referred to as "balloon-on-a-string," "strip," or "corridor" annexation, and is designed to satisfy the requirement in Wis. Stat. § 66.0217(2) that the annexed property be "contiguous" to the annexing city. There were three separate ordinances, one for each town encompassing only the land within that town.

The Towns of Lincoln and Burnside asked the Wisconsin Department of Administration to review the annexation, and the Department determined that the annexation was improper because some of the territory was not contiguous. Lincoln and Burnside then filed suit, asking the circuit court to invalidate the annexation both because it failed to meet the statutory requirement that the land be contiguous and because there were procedural irregularities regarding a signature on the annexation petition. Instead of allowing the case to proceed to a final ruling, the parties signed a settlement agreement whereby Burnside and Lincoln agreed to dismiss their lawsuit against the City and the parties entered into an agreement that gave Lincoln and Burnside some control over annexations by the City for the next 20 years.

After this settlement agreement was signed, but before it was approved by the court, the Town

*Continued on page 4*

## Seventh Circuit Dismisses Challenge to Shoreland Zoning

A brief decision from the Seventh Circuit Court of Appeals serves as a reminder of the limited involvement of federal courts in local zoning decisions. *Donohoo v. Hanson*, Appeal No. 16-2405 (7th Cir. Oct. 28, 2016)(non-precedential decision). Donohoo owned property in Douglas County that is subject to shoreland zoning. He filed an application for permission to build an addition to his home. He later learned of the passage of 2011 Wisconsin Act 170, which prohibits local governments from enforcing shoreland zoning standards that are stricter than state regulations. He then withdrew his application and filed a new application to add a second story to his home as permitted by state law. The zoning administrator mistakenly believed that the new law did not change county zoning and denied the permit. Donohoo appealed to the board of adjustment, which affirmed the zoning administrator's decision. He then filed a certiorari action asking the circuit court to reverse the board's decision. For reasons that are not explained, it took the county clerk more than six months to file the record from the board of adjustment hearing with the circuit court. Before the circuit court addressed the merits, the county revised its shoreland zoning ordinance, approved Donohoo's application and granted him a permit subject to county approval of a mitigation plan. The circuit court then dismissed the certiorari action.

Donohoo then filed a lawsuit in federal court. He alleged that county officials had taken his property rights and had violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments. He based his allegations on the zoning administrator's initial denial of the zoning permit, the board of adjustment's affirmance of that decision, the county clerk's delay in forwarding the record from the board proceedings to the circuit court and the county's placement of conditions on his permit that were allegedly stricter than for other landowners and contrary to Act 170. The federal district court granted summary judgment to the county. The circuit court affirmed the dismissal.

With respect to the Takings claim, the court explained that Donohoo had not produced any evidence that the county had deprived him of property or of all practical uses of his property. Moreover, Donohoo had not exhausted his available state remedies (including an inverse condemnation action under Wis. Stat. § 32.10) and hence could not pursue relief in federal court. The court rejected the equal protection claim because Donohoo did not demonstrate that the county acted irrationally or that it had treated him differently than other equally situated property owners. Finally, the court concluded that Donohoo had not been denied due process because there is an entitlement to only limited process in zoning decisions.

*— Mark J. Steichen*

### Lawsuit Challenging Annexation of Frac Sand Mine Dismissed

*Continued from page 3*

of Arcadia asked the court's permission to join the lawsuit, challenging the legality of the annexation on the same grounds as Lincoln and Burnside. The City objected, arguing that Arcadia's request to participate in the lawsuit came too late because it was made after the 90-day statutory deadline to file an action challenging the validity of an annexation. See Wis. Stats. §§ 66.0217(11) and 893.73(2)(b). Arcadia responded with a variety of arguments about why the 90-day deadline should not be applied to parties in its position. In essence, Arcadia argued that because Lincoln and Burnside had filed their action prior to the 90-day deadline, and because Arcadia intended to make essentially the same arguments, Arcadia should be allowed to "piggy back" on the other towns' timely filing. The circuit court rejected this argument, and the Court of Appeals agreed. Although it may have raised the same legal arguments, Arcadia's claim related to different land and a different ordinance than the two ordinances at issue in Burnside's and Lincoln's claims. In order to preserve its claim against the City, Arcadia was required to bring an action challenging the annexation within 90 days of the date the City adopted the annexation ordinance. Because Arcadia missed this statutory deadline, the Court dismissed its claim.

Although the Court did not resolve the underlying claim—whether the type of "balloon-on-a-string" annexation used by the City of Independence is legal—this case emphasizes the importance of careful attention to the deadlines and procedures set out in the statutes related to annexation.

*— Julia K. Potter*

## Voluntary Payment Doctrine Does Not Bar Recovery of Unlawful Special Assessments for a Business Improvement District under Section 66.1109

The Wisconsin Court of Appeals has concluded that the voluntary payment doctrine does not apply to the recovery of unlawful special assessments for business improvement districts under Wis. Stat. § 66.1109. Such claims are subject to the six-year statute of limitations under Wis. Stat. § 893.93(1)(a) rather than the one-year statute of limitations for recovery of special assessments under Wis. Stat. § 893.72. *DJK 59 LLC v. City of Milwaukee*, 2015AP2046 (Nov. 22, 2016) (recommended for publication).

Section 66.1109 authorizes a municipality to create a business improvement district and to levy special assessments to pay for improvements within the district. However, properties that are used exclusively for residential purposes are exempt from assessment. Over an eight-year period 2005-2012, the City of Milwaukee ("City") issued special assessments against two parcels of property that were purely residential in character. On January 31, 2014, the owners of the two parcels filed suit seeking the recovery of the assessments. During the course of the litigation, the city conceded that it had no authority to levy the assessments and that collection of the assessments violated section 66.1109. The action was stayed while the court of appeals considered a similar matter in *Yankee Hill Housing Partners v. City of Milwaukee*, 2014AP183 (unpublished slip op. Sept. 3, 2014). The court in *Yankee Hill* concluded that section 66.1109 creates an implied right of action to recover payments wrongfully collected from assessments against residential property.

In *DJK*, the City raised two affirmative defenses of note: the voluntary payments doctrine and the statute of limitations under section 893.93(1)(a). The voluntary payments doctrine is a common law defense. It requires a person, in order to preserve a challenge to the validity or legality of a bill, to raise an objection before or at the time of making a voluntary payment. The City argued that, because the property owners did not object before paying the assessments, their suit was barred. The Court of Appeals disagreed. A common law defense or doctrine does not apply when it would undermine the manifest purpose of a statute. The inquiry is statute specific. Section 66.1109 allows for collection of special assessments in business improvement districts. The funds must be segregated and used only for improvements within the district. The legislature expressly exempts residential-only properties from such assessments. The exemption would be meaningless if there were no statutory enforcement mechanism, hence the implied right of recovery. The implied right would be undermined if property owners had to object before or at the time of paying the assessments. Therefore, the voluntary payments doctrine does not apply to special assessments against residential property under section 66.1109.

The City also asserted a statute of limitations defense. Section 893.72 applies a one-year statute of limitations to actions challenging "any special assessment . . . except in cases where the lands are not liable to the assessment, or the city, village or town has no power to make any such assessment . . ." The City conceded that section 893.72 did not apply because the city lacked the power to assess the residential properties. Instead, the City argued that section 893.93(1)(a) imposed a six-year limitation that barred a portion of the plaintiffs' claims. The six-year limitation would bar a portion of the plaintiffs' claims. Section 893.93(1)(a) is a catchall provision that applies to liabilities created by statute "when a different limitation is not prescribed by law." The circuit court reasoned that section 893.93(1)(a) does not apply because section 893.72 prescribes a limitation with respect to special assessments; accordingly, the court awarded the plaintiffs their full recovery. The Court of Appeals reversed on this issue. It held that, since section 893.72 expressly excludes from its scope situations where the property is not subject to assessment and where the assessments are not authorized by law, it does not prescribe a limitation in those circumstances. Therefore, the default limitation under section 893.93(1)(a) applied and the plaintiffs' recovery was limited to assessments collected within six years of the filing of the lawsuit.

*— Mark J. Steichen*

boardman & clark llp
LAW FIRM

Boardman & Clark LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701 -0927



Certified ABA-EPA Law Office
Climate Challenge Partner

# MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published by Boardman & Clark 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 - Water Division.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.


| | | |
|---|---|---|
| Eileen A. Brownlee | 822-3251 | ebrownlee@boardmanclark.com |
| Jeffrey P. Clark | 286-7237 | jclark@boardmanclark.com |
| Anita T. Gallucci | 283-1770 | agallucci@boardmanclark.com |
| Kathryn A. Harrell | 283-1744 | kharrell@boardmanclark.com |
| JoAnn M. Hart | 286-7162 | jhart@boardmanclark.com |
| Richard A. Heinemann | 283-1706 | rheinemann@boardmanclark.com |
| Paul A. Johnson | 286-7210 | pjohnson@boardmanclark.com |
| Michael J. Julka | 286-7238 | mjulka@boardmanclark.com |
| Lawrie J. Kobza | 283-1788 | lkobza@boardmanclark.com |
| Julia K. Potter | 283-1720 | jpotter@boardmanclark.com |
| Mark J. Steichen | 283-1767 | msteichen@boardmanclark.com |
| Douglas E. Witte | 283-1729 | dwitte@boardmanclark.com |
| Steven C. Zach | 283-1736 | szach@boardmanclark.com |