BoardmanClark

Municipal Law Newsletter

VOLUME 24, ISSUE 2, MARCH/APRIL 2018

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

Seventh Circuit Rules against City in Zoning-Related Disability Discrimination Case

In a recent disability discrimination case, *Valencia v. City of Springfield,* 883 F.3d 959 (7th Cir. 2018), brought under the Fair Housing Act ("FHA"), Americans with Disabilities Act ("ADA"), and Rehabilitation Act, the Seventh Circuit ruled against the City of Springfield, Illinois and in favor of a non-profit that provides residential services to adults with disabilities. Individual Advocacy Group, Inc. ("IAG") challenged a decision of the Springfield City Council that would have required it to relocate its home for adults with disabilities (a "Community Integrated Living Arrangement") because it was too close to a similar facility operated by a different company. Both facilities were located in a residential district in Springfield, and the City's zoning code imposed a 600-foot separation requirement between facilities. IAG submitted an application for a Conditional Permitted Use, which would have allowed the facility to remain in place, but the City Council denied its request.

IAG alleged that the City discriminated against its disabled residents on the basis of their disabilities, in violation of the FHA, ADA, and § 504 of the Rehabilitation Act. The FHA provides that "it shall be unlawful … to otherwise make unavailable or deny ... a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" 42 U.S.C. § 12132. The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Claims under all three statutes apply to municipal zoning decisions, and the same analysis generally applies under each of the statutes.

Plaintiffs may prove a violation of the FHA, ADA, or Rehabilitation Act by showing disparate treatment, disparate impact, or a refusal to make a reasonable accommodation. Although IAG proposed several different theories of liability, the Seventh Circuit focused on IAG's reasonable accommodation claim. The law requires public entities to reasonably accommodate disabled persons by making changes in rules, policies, practices, or services as necessary to provide such persons with access to housing that is equal to the access of persons who

Continued on page 2

Zoning-Related Disability Discrimination Case

Continued from front page

are not disabled. An accommodation is required if that accommodation is reasonable and necessary to afford a disabled person the equal opportunity to use and enjoy a dwelling.

The Seventh Circuit found that IAG was likely to prevail on its reasonable accommodation claim. The court found that the requested accommodation (granting the Conditional Permitted Use application) was reasonable. The accommodation would advance the integration of disabled individuals into the community, and the benefits were likely to outweigh the costs of implementation. Evidence presented to the lower court showed that the financial and administrative burden on the City would be negligible, and there did not appear to be substantial intangible costs to the neighborhood or to residents of the other nearby facility for adults with disabilities. Similarly, the court found that the accommodation was necessary to fulfill IAG's mission to provide residential services to disabled adults in a community-based setting, especially because the evidence showed that group homes were in short supply in the area. Finally, the court determined that the Conditional Permitted Use sought by IAG would afford IAG's disabled residents an equal opportunity to establish a residential home, because facilities such as IAG's are often the only means by which disabled persons can live in a residential neighborhood, either because they need more supportive services, for financial reasons, or both. Ultimately, the court ruled in favor of IAG and granted a preliminary injunction that prohibits the City from evicting IAG's residents while the case is pending before the district court.

This case should serve as a reminder to municipalities that special attention should be paid to how provisions of a zoning code affect individuals with disabilities. While many municipalities may be familiar with the specific state law provisions governing the zoning of community living arrangements, community-based residential facilities, and the like, it is important to also keep in mind the requirements of the Fair Housing Act, Americans with Disabilities Act, and the Rehabilitation Act when drafting zoning codes or making decisions to grant or deny conditional use permits for individuals with disabilities or the organizations that serve them.

— Julia K. Potter

PSCW Considers Making Energy Innovation Grant Funds Available to Local Governments

Since 2015, a $55 million dollar grant program funded through the Obama-era American Recovery and Reinvestment Act has been administered by the Wisconsin Office of Energy Innovation (OEI). Known as the Energy Innovation Grant Program, the funds have been used primarily to promote a wide array of energy efficiency and clean energy programs benefitting Wisconsin citizens and businesses, including the $38.66 million Clean Energy Manufacturing Revolving Loan Fund (CEMRLF). The OEI programs, including CEMRLF, as well as the FOCUS on Energy program, are overseen by the Public Service Commission of Wisconsin (PSCW).

In 2017, PSCW staff evaluated these programs and developed a set of recommendations to make them more effective. Among the recommendations was conversion of the CEMRLF into a grant program, along with a proposal to expand existing eligibility criteria to include municipalities, universities, schools, hospitals, and other public sector entities. The PSCW approved the recommendations, and directed staff to make the necessary filings with the federal government to implement them. Approval by the United States Department of Energy was granted in February, 2018.

The Commission is now considering changes to further refine the Energy Innovation Grant program. The proposal, which was submitted in March for public comment, is intended to enable successful energy efficiency and renewable energy projects for both private and public sector stakeholders. Specifically, eligible applicants would now include, among others, cities, villages, towns, counties, tribes, K-12 school districts, municipal water and wastewater utilities, municipal electric utilities, municipal natural gas utilities, UW System campuses, the Wisconsin Technical College System, and hospitals.

Eligible activities for the Program would be divided into two categories: planning and implementation for energy efficiency and renewable energy projects. Planning activities generally would fall within two areas: facility and fleet audits, and the development of comprehensive energy plans (CEPs). CEPs would need to meet the criteria of an "investment grade audit," which means a comprehensive energy audit that identifies all cost-effective investment opportunities based on both economic and engineering analysis of energy saving measures.

Implementation activities would encompass four broad categories: building efficiency projects to reduce electric and thermal use; renewable energy projects, including biogas, biomass, geothermal, solar photovoltaic, solar thermal, wind and alternative fuels; transportation projects, including

Continued on next page

Update on Options for Providing Financial Assistance for Private Lead Service Line Replacements

On February 21, 2018, the Governor signed 2017 Wisconsin Act 137 into law, creating two new options for assisting private property owners with the replacement of their privately-owned lead service lines. Attorney Kobza wrote about the legislation in the January/February issue of the Municipal Law Newsletter, available at boardmanclark.com. Since then, the Public Service Commission of Wisconsin ("PSCW") has provided additional guidance, available on its website at psc.wi.gov, on how municipal utilities can apply for PSCW approval of utility customer-owned lead service line replacement programs.

Prior to applying, the PSCW recommends that utilities hold a pre-application web conference with PSCW and Wisconsin Department of Natural Resources ("DNR") staff to review application requirements and sound industry practices for minimizing lead and copper in drinking water. The utility should prepare a power point-based presentation that describes the utility's proposed program and additional items required by the PSCW Application Checklist.

The Checklist includes the following key items:

1. Copies of the municipal ordinance permitting the utility to provide financial assistance and requiring owners to replace their customer-side lead service lines.
2. How the utility will ensure that either the utility-owned main or service line connected to the customer-owned service line does not contain lead or is replaced at the time the customer-owned service line is replaced.
3. How the utility will ensure that (i) grants do not exceed half of the total cost to the owner; (ii) loans provided to customers are not forgiven; and (iii) financial assistance as a percentage of cost or as a specific dollar amount is the same percentage or dollar amount, respectively, for each owner in a customer class.
4. Information about the utility's proposed lead service line replacement program, including:
    a. A current inventory of utility-owned lead service lines as reported on Page W-22 of the Utility's most recent annual report, and a description of how that inventory was developed;
    b. A current inventory of customer-owned lead service lines as reported on Page W-29 of the utility's most recent annual report, and a description of how the inventory was developed;

        Note: The DNR views Page W-29 as a way to encourage utilities to improve their inventory of customer-side service lines, especially lead service lines. Utilities are waiting on further guidance from the PSC on how to develop an inventory of data that utilities have not historically tracked.
    c. A map showing the location of lead service lines by Public Land Survey System quarter-quarter section or other PSC acceptable method;
    d. A description of program components, phases, schedule, and anticipated duration;
    e. A description of how the utility will prioritize service line replacements;
    f. A year-by-year estimate of program costs; and
    g. Assumptions used to develop estimates of program costs.
5. A proposed tariff that describes the program and is consistent with the municipality's ordinance.
6. Information describing how the utility plans to communicate with its customers about the proposed program.
7. Identification and estimated amount of funding sources.
8. Identification of permits and approvals required by other state agencies or local governmental units, with an indication of whether the permits or approvals have been applied for or obtained.
9. Information to allow the PSC to document the environmental impacts of the program consistent with s. PSC 4.10, Wis. Admin. Code, and coordinate with the DNR pursuant to s. 30.025, Wis. Stats.
10. Estimated water rate impact.

Utilities may be required to include additional information in their applications as identified in the pre-application conferences.

— Jared Walker Smith

PSCW Considers Making Energy Innovation Grant Funds Available to Local Governments

Continued from page 2

conversion of existing vehicles or new purchases of alternative fuel vehicles and 50% of associated refueling infrastructure; and training and operations programs.

For 2018, the PSCW staff recommends an overall program budget of $5 million, to be allocated to eligible applicants. The allocations may be targeted to special areas of interest, and award maximums may be established.

The Commission is expected to act on the proposed program refinements in April or May.

— Richard A. Heinemann

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO 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
Brian P. Goodman	283-1722	bgoodman@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
Kathryn A. Pfefferle	286-7209	kpfefferle@boardmanclkar.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Jared W. Smith	286-7171	jsmith@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