

# *Municipal Law Newsletter*

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## **Wisconsin Supreme Court Affirms There is No Compensable Property Right to Visibility in Billboard Case**

On June 19, 2018, the Wisconsin Supreme Court affirmed in *Adams Outdoor Advertising Limited Partnership v. City of Madison* that the right to visibility from a public road is not a recognized property right for the purpose of an unconstitutional takings claim. In a 4-3 decision, the Court held that a billboard company was not entitled to compensation from the City after the City constructed a bridge blocking visibility of a billboard from a major highway.

### **Adams' Claims**

Adams owns a billboard on a small, unusually-shaped parcel of land adjacent to a major highway known locally as "the Beltline." One panel of the billboard faces east and the other west allowing for separate advertising signs. Adams bought the land in 2007 for \$200,000. In 2013, the City built the Cannonball Bridge, a pedestrian and bicycle bridge adjacent to, but not on, Adams' property. The bridge now obstructs the view of the west-facing billboard panel from Beltline traffic, and Adams contends it can no longer sell advertising space on that panel.

According to an appraiser hired by Adams, before the bridge was built the land was worth \$1,460,000 and after it decreased to \$720,000. Adams sued the City for depriving them of all economically beneficial use of the west-facing side of its billboard, entitling them to just compensation for private property taken for public use under the "takings clause" - the Fifth Amendment of the U.S. Constitution and Art. 1 § 3 of the Wisconsin Constitution.

At the Supreme Court, Adams argued that its right was not one relying on the right to be seen, but a right to continuing "a preexisting use of its property." To put Adams' argument into perspective, a homeowner whose ability to see across the street, blocked by a bus stop is not deprived of the essential function of their home, but as a billboard company, Adams' sole purpose for the property is to be seen and visibility is essential to achieving that purpose. The Court rejected this argument, holding that the essence of Adams' asserted property interest is based on a right to visibility and that the right to visibility of private property from a public road does not give rise to a protected property interest.

### **The Court's Reasoning**

The Court agreed with the City that "[a]lthough [a property owner] may sustain consequential damages in so far as [a] street improvement will somewhat

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obstruct or interfere with ingress and egress, and the view to and from their land to the vehicular traveled portion of the street, that is not a taking of private property for public use.” The Court relied heavily on its previous decision in *Randall et al., v. City of Milwaukee*, which reasoned that public thoroughfares, including highways, are dynamic spaces that must change and adapt over time. *Randall* concluded that the public rights in streets are paramount to those of private landowners.

The Court also considered similar decisions in other jurisdictions. In particular, in *Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006), the California Supreme Court rejected a billboard owner’s takings claim which asserted that when the City planted palm trees, it reduced visibility of its billboards, constituting a taking. The *Regency* court explained that courts generally rely on three justifications for the “virtually unanimous” rule that there is no right to be seen from a public road: (1) road improvements limiting visibility are foreseeable; (2) the government has the authority to maintain and improve the road system; and (3) the abridgment of the right to reasonable access and an outlet is an owner’s only right meriting compensation when the government acts to improve a road.

### The Dissent

Justice Rebecca Bradley, writing for the dissent, argued that the majority erred when it defined the property interest at issue as a right to visibility. The dissent argued an alternative frame for the property interest: Adam’s interest in the advertising permit for the west side of the billboard. An unconstitutional taking occurs when government denies all economically viable use of a person’s property. A permit is considered real property for takings purposes. The dissent further reasoned that the real value of the property was in the advertising permits. The bridge construction eliminated the entire value of the advertising permit for the west side of the billboard, and thereby, constituted an unconstitutional taking. In a footnote, the majority discounted this argument, noting it was not raised or argued by Adams or the City.

### Impact

This is an important decision for municipalities. As the League of Municipalities argued in its *amicus* brief in this case, a decision in favor of Adams would have handed owners of the vast numbers of billboards that exist alongside public highways across the state a constitutionally protected demand on state and local government bank accounts. Moreover, a new visibility property right would not logically stop at billboard advertising but would extend to the much larger pool of all commercial activities that line public highways and can claim some economic value from public highway visibility.

— Kathryn Pfefferle

## Court of Appeals Upholds Constitutionality of Municipal Smart Meter Program

The City of Naperville (Naperville) can constitutionally spy on its municipal utility customers - at least in a limited sense. Such is the inference to be reached from the holding by the United States Court of Appeals for the Seventh Circuit in *Naperville Smart Meter Awareness v. City of Naperville* (Case No. 16-3766, August 16, 2018).

The case was prompted by a local citizens’ group challenge to a mandatory smart meter initiative implemented by the city’s municipal utility. Using American Recovery and Reinvestment Act grant money to fund an \$11 million grid upgrade program, the city’s electric utility installed digital “smart meters” throughout its system. The meters allow the utility to collect residential electric consumption data at 15 minute intervals, yielding far more robust profiles of residential “load signatures” than the traditional analogue meters they replaced. A citizens group sued on the grounds that collection of the data constituted an unreasonable search and seizure, in violation of the Fourth Amendment and the equivalent provisions of the Illinois Constitution. A federal district court rejected the complaint and the Court of Appeals upheld.

Citing 2001 Supreme Court precedent involving the government’s use of thermal imaging, the Court of Appeals held first that Naperville’s collection of customer use data at 15 minute intervals constitutes a “search” under the Fourth Amendment. The court reasoned that the data yielded by such meters reveals details about activity within the home—such as sleep, eating and appliance use patterns—that would be unavailable to the government without a physical search.

Next, the Court examined whether Naperville’s search was reasonable and concluded that it is. Although a warrantless search is presumptively unreasonable, the Court found that, in this case, the privacy interest is diminished because the city does not collect the data with prosecutorial intent and does not provide it to third parties, such as law enforcement, without a warrant and a court order. At the same time, the Court found that the government’s interest in the data is considerable because

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## Public Service Commission Approves First Financial Assistance Program for Private Lead Service Line Replacements

On August 16, 2018, the Public Service Commission (PSC) approved the City of Kenosha's private lead service line financial assistance program. Created pursuant to 2017 Wisconsin Act 137, the program allows revenue from water utility rates to be used to provide property owners with financial assistance to replace their private lead service lines. Kenosha was the first utility to apply for PSC approval of a program under the new law and, therefore, the three PSC Commissioners' determination regarding Kenosha's application addressed several outstanding questions.

Under Kenosha's program, a private property owner served by a private lead service line may receive financial assistance equal to 100% of the replacement cost. The financial assistance offered is a grant for 50% of the cost of replacement up to a maximum of \$2,000, and a low interest rate loan for the remainder of the cost. Loan repayments will be included on the property owner's tax bill. The Commissioners determined that Kenosha's program satisfied the Act's requirement that all property owners in a class be offered the same percentage of "financial assistance," even though the component grant and loan percentages may differ between property owners.

The Commissioners discussed whether to require Kenosha to extend its program to cover the replacement of galvanized steel pipes that are or were attached to Kenosha's lead pipes because of the potential for deposits on the inside of the galvanized steel pipes to trap lead. PSC Staff recommended that PSC approval of Kenosha's program be conditioned on extending the financial assistance program to the replacement of galvanized steel pipes. While the Commissioners encouraged Kenosha to look at the galvanized steel pipe issue, they did not condition approval of Kenosha's program on their replacement. The Commissioners' decision left open the option for each community to make its own decision on whether it wants to, or can, extend the community's financial assistance program to cover replacement of galvanized steel pipes.

The Act requires that replacement of a private-side lead service line and utility-side lead service line happen at the "same time." PSC Staff suggested that the Commissioners define at the "same time" to mean that the replacements had to occur on the same day. The Commissioners did not find that any further definition of the statutory requirement that the service lines be replaced at the "same time" was necessary. The Commissioners recognized that

communities needed flexibility to coordinate their public replacements with private contractors performing private replacements.

PSC Staff also suggested that PSC approval of Kenosha's program be limited to five years, and that Kenosha be required to seek re-approval of its program at that time. The Commissioners did not support placing a time limit on its approval of Kenosha's program, but it did require Kenosha to apply for a full rate case that includes private lead service line replacement costs within two years.

Kenosha expects its financial assistance program to be in full swing for the 2019 construction season, but it has already provided financial assistance for the removal of several leaking private lead service lines in the City. With the first program approved, the PSC expects to begin to receive additional applications from interested communities. Manitowoc Public Utilities became the second applicant on September 11, 2018.

—Jared Walker Smith & Lawrie J. Kobza

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## Court of Appeals Upholds Constitutionality of Municipal Smart Meter Program

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the data it collects reduces cost, enhances grid resiliency, and encourages energy efficiency. Hence, the Court held that Naperville's smart meter program passes constitutional muster as currently constituted. Under different circumstances, however, such as collection of data at more frequent intervals, the Court cautioned that it could reach a different result.

The case underscores the fact that rapidly-evolving energy technology carries considerable privacy implications. Municipal utilities implementing smart meter programs should therefore consider allowing some degree of customer choice—the ability to opt out, for example—in order to minimize legal exposure to privacy-related law suits. Such programs should also contain procedural safeguards to ensure that collected data is not readily available to third parties.

—Richard A. Heinemann



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