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MUNICIPAL LAW NEWSLETTER

Volume 21, Issue 5, September/October 2015

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Wisconsin Joins Fourteen States in Clean Power Plan Law Suit

Wisconsin Attorney General Brad Schimel has signed on to an Emergency Petition for Extraordinary Writ ("Petition") in a multi-state effort to stay the final greenhouse gas emission rules recently issued by the Environmental Protection Agency ("EPA") under Section 111(d) of the Clean Air Act, popularly known as the "Clean Power Plan" ("Rule"). Citing the EPA's accelerated timetable for submittal of state compliance plans required by the Rule, the Petition invokes the All Writs Act to take the unusual step of seeking to stay all deadlines in the Rule prior to its actual publication in the Federal Register. The Petition was filed in the DC Circuit Court of Appeals.

Under the Clean Power Plan, existing coal-fired power plants are subject to emissions performance standards on a state-by-state basis in an effort to drive an aggressive, industry-transforming transition to zero-carbon renewable energy sources by 2030. The Rule provides states with a number of options to achieve an overall carbon reduction target of 32 percent from 2005 standards, beginning by 2022. In addition to improving heat rates at existing coal generation facilities, compliance options available to states include promoting demand-side energy efficiency efforts and expanding nuclear and other non-carbon, renewable generation resources.

According to the Petition, three features of the Rule stand out as especially problematic. First, the petitioners question EPA's claim that it has the authority to regulate carbon dioxide under Section 111(d) because it has not chosen to regulate it as a hazardous air pollutant under other sections of the Clean Air Act. Second, the petitioners challenge the EPA's authority to impose across-the-board energy policy changes "outside the fence," rather than limiting the scope of the Rule to the ways in which existing facilities operate.

Finally, the petitioners object to EPA's "aggressive" timetable, in accordance with which states must submit initial State Plans by September 6, 2016. Although the rule allows for two-year extensions, the Petition alleges that work must begin immediately, at considerable cost of administrative resources, for there to be any hope of meeting either the 2016 initial deadline or the 2018 final deadline. The Petition includes affidavits from Ellen Nowick, chairperson of the Public Service Commission of Wisconsin, and Patrick Stevens, the Division Administrator of the Environmental Management Division of the Wisconsin Department of Resources, to support its claims of regulatory duress.

EPA's expansive reading of its own authority is viewed by most observers as legally vulnerable, particularly with respect to its potential impact on electric consumer behavior and long-term integrated resource planning. However, because the Rule has yet to be published or implemented, the Petition is generally given only limited chances of success. Three previous petitions were already rejected by the DC Circuit in June. Moreover, the petitioners are likely to have difficulty showing irreparable harm given that another opportunity to petition for a stay will arise once the rules are finally published. Even if the stay is ultimately granted, the prospect of protracted litigation is certain to pose substantial challenges for utilities and regulators alike.

— Richard A. Heinemann

Court of Appeals Upholds Boundary Agreement Greatly Expanding Newly Incorporated Village

In 2013, the Village of Harrison was incorporated pursuant to the statutory incorporation procedure set out in Wis. Stat. §§66.0201 to 66.0211. This procedure establishes numerous requirements for the territory proposed for incorporation and requires that a state review board only approve for referendum those proposed incorporations that meet these statutory standards. One standard requires the petitioned territory to be sufficiently compact and uniform to function as a city or village. Another standard requires that the territory beyond the most densely populated square mile have the potential for residential or other land use development on a substantial scale within the next three years. The state review board reviewed the incorporation petition for the Village of Harrison and found that the statutory standards for incorporation were all met. The Executive Summary of the incorporation commented that "Petitioners desire to incorporate this portion of the Town because the area is distinct and essentially unrelated to the rural character of the remaining Town of Harrison. The proposed village is densely populated, urban in character, and distinct socially from the rural areas of the Town, and has much higher service needs and demands." Voters approved the incorporation in February 2013.

In June 2013, the new Village and the remaining Town of Harrison published a joint public hearing notice to discuss a proposed intergovernmental cooperation agreement affecting the provision of municipal services and boundary line adjustments between the Village and Town. A joint public hearing took place on July 2, 2013, and following a closed session, both the Village board and Town board approved the agreement. The agreement authorized a major boundary line change that transferred all properties in the Town not subject to a prior boundary agreement with the cities of Appleton or Menasha from the Town to the Village.

Kaukauna, Menasha and Sherwood challenged the major boundary changes undertaken through the intergovernmental agreement. They argued that allowing municipalities to achieve major boundary changes via intergovernmental agreements would render the more specific statutory processes for other jurisdiction alterations meaningless.

The Court of Appeals in *Cities of Kaukauna and Menasha, and Village of Sherwood, v. Village and Town of Harrison*, (Ct. App., Dist. 2, decided August 26, 2015) disagreed. First, the Court noted that Wis. Stat. § 66.0301(6) is silent on the scope of the boundary changes permitted by intergovernmental agreement. Second, the Court noted that Wisconsin statutes provide multiple methods of altering municipal boundary lines as well as multiple methods of incorporation, annexation and consolidation, and that there would be nothing absurd about the legislature creating an additional way to change boundaries. Furthermore, the Court commented that it would not be "absurd that the legislature would create different procedural requirements from those already in existence in other statutes; in fact, that would appear to be precisely the point."

Plaintiffs also challenged the sufficiency of the notices provided to property owners by the Village and Town pursuant

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IRS Ruling Could Allow Tax Credit for Residential Owners in Community Solar Projects

In a September 4, 2015 private letter ruling, the Internal Revenue Service concluded that an individual owner of solar panels in an offsite, community solar garden was eligible to claim a tax credit to cover part of the installation costs. This one-time credit, known as the Section 25D residential income tax credit, allows owners of renewable energy equipment used for residential purposes to take a tax credit equal to 30% of qualified installation costs. Under current law, this tax credit will sunset at the end of 2016.

This ruling is the first time the IRS has weighed in on the applicability of the residential income tax credit to individual owners of solar panels in an offsite community solar array. As community solar projects proliferate, providing the benefits of solar energy to renters and owners of property unable to accommodate solar panels, the availability of this tax credit may spur further growth in the community solar market.

Private letter rulings apply only to the taxpayer to whom they were issued and are not binding precedent, but may be consulted by IRS employees when issuing letter rulings to similarly situated taxpayers. Thus, this letter ruling indicates that the IRS may be receptive to similar claims for this tax credit by taxpayers who own solar panels in an offsite, community shared solar array whose structure mirrors the structure of the project in the ruling.

— Julia Potter

Boardman & Clark LLP Welcomes Kathryn Harrell and Julia Potter

Boardman & Clark is pleased to announce the addition of Kathryn (Kate) Harrell and Julia Potter.

Kate, an experienced trial and litigation attorney, will work primarily with the firm's municipal and litigation practice groups. Kate has nine years of experience as a trial lawyer. Her trial and appellate practice focuses on the representation of municipalities, insurance companies, individuals, and businesses in litigation and insurance coverage disputes. She is also the Municipal Prosecutor for the Village of Waunakee. Kate received her J.D. from Marquette University. She was named an "Up and Coming Lawyer" by the Wisconsin Law Journal in 2014 and a "Rising Star" by Super Lawyers.

Julia graduated summa cum laude in May, 2015 from the University of Michigan Law School. She graduated Phi Beta Kappa, magna cum laude in 2012 from Brown University in Providence, RI with a degree in International Relations. During law school, Julia clerked for Boardman & Clark and served as a judicial intern to Justice N. Patrick Crooks of the Wisconsin Supreme Court and Judge Richard G. Neiss of the Dane County Circuit Court. Julia will be working in the municipal law practice group, as well as a number of other areas in the firm, including labor and employment law.

Seemingly Insignificant US Supreme Court Decision Expands Free Speech Protections

In a decision dated June 18, 2015, the Supreme Court held that the Town of Gilbert, Arizona's ("Town") code regulations governing outdoor signs ("Sign Code") were unconstitutional because they were content-based regulations of speech that did not survive strict scrutiny. *Clyde Reed, et al. v. Town of Gilbert, Arizona, et al.*, 576 U.S. __ (2015). The Sign Code prohibited the display of outdoor signs without a permit, but exempted 23 types of signs from that prohibition. Three of those exempted categories of signs were at issue: ideological signs, political signs and temporary directional signs (defined as signs directing the public to a church or other qualifying event). The Sign Code designated different size, duration and location restrictions for each of these sign categories.

Good News Community Church and its pastor, Clyde Reed, posted signs on Saturday mornings that included the church name, time and location of the Sunday morning service. The signs were removed mid-day on Sunday. The church received a citation for exceeding the time limit for temporary directional signs and for failing to include an event date on the sign.

The Supreme Court struck down the Sign Code finding that it unlawfully restricted free speech by imposing different restrictions on signs addressing different subject matters. By doing so, the Court found the Sign Code regulations to be content-based speech regulations. A regulation is content-based if it applies to a particular speech because of the topic, idea or message expressed. The Sign Code was content-based because it defined categories of ideological, political and temporary directional signs on the basis of their messages and then subjected each category to different restrictions. The Town argued that the regulations were not content-based because the Town wasn't motivated by hostility to any message. Rejecting this argument, the Supreme Court reasoned that a regulation can be content-based if it "singles out a subject matter for differential treatment, even if it does not target viewpoints within that subject matter."

When a law is content-based, it is subject to the highest level of judicial scrutiny, called strict scrutiny. To survive strict scrutiny, the Town had to demonstrate that the Sign Code's differentiation between temporary directional signs and other types of signs "furthered a compelling governmental interest and was narrowly tailored to that end." The Town was unable to make that extremely difficult showing, so the Supreme Court struck down the Sign Code.

Constitutional scholars have called this seemingly insignificant decision "bold," "sweeping" and one that threatens many types of laws. In the past, typically only laws that attempted to suppress speech that was unpopular were deemed content-based. Now, any law that singles out a topic for regulation may be unlawfully discriminating based on content.

Several courts have already struck down regulations based on the *Reed* decision. A court struck down a law that made it illegal to take a picture of a completed election ballot and show it to others. A different court struck down a law that made it illegal to panhandle in parts of Springfield, Illinois. Another court struck down a law that barred robocalls on political and commercial topics but not others. The far-reaching implications of the *Reed* decision are likely to lead to variety of challenges to municipal, state and federal regulations that single out particular subject matters.

— Kathryn A. Harrell

Wisconsin Court of Appeals Upholds Municipal Agency's Rule Governing Travel with a Weapon

In a decision dated August 6, 2015, the Wisconsin Court of Appeals upheld a rule adopted by the City of Madison's ("City") Transit and Parking Commission ("Commission") that prohibits a person from traveling on a city bus with a weapon. *Wisconsin Carry, Inc. et al. v. City of Madison*, 2015AP146. The City operates a municipal bus system that is governed by the Commission. The City's General Ordinances include an ordinance that authorizes the Commission to establish "rules and procedures" related to transit. Pursuant to this authority, the Commission enacted a rule that prohibits a person from traveling in a city bus with any weapon, including a gun (the "bus rule").

The bus rule was challenged by Wisconsin Carry, Inc., a gun rights organization, and one of its members. They argued that the bus rule is preempted by Wis. Stat. § 66.0409, the law that, among other things, prohibits a political subdivision from enacting an ordinance or adopting a resolution that regulates the keeping, possession, bearing, or transporting of a firearm.

The City argued that the bus rule is not an "ordinance" or "resolution" as those terms are used in § 66.0409. The court of appeals agreed that the bus rule was not an "ordinance" or "resolution" and thereby upheld the bus rule. Wisconsin Carry tried to get around the plain language of § 66.0409 by arguing that the legislature must have intended the statute to have a broader application to local agency regulations. The court of appeals rejected this argument reasoning that the legislature could have included additional or more expansive language in the statute if it had intended the broad meaning advanced by Wisconsin Carry. The legislature "could have reasonably distinguished between a municipality's broad legislative powers and a municipal agency's more limited powers," but the legislature did not do this. The court surmised that one of the reasons the legislature did not make this distinction was to permit targeted agency regulation or firearms for limited purposes, such as the bus rule.

— Kathryn A. Harrell

Court of Appeals Upholds Boundary Agreement

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to Wis. Stat. § 66.0301(6). They argued that the notices provided did not inform property owners that approval of the intergovernmental agreement would result in relocating many of them or their neighbors into the new village. This challenge was also rejected, with the Court stating that the notice provided "complied with the minimal notice requirement of Wis. Stat. § 66.0301(6)(c)1."

— Lawrie Kobza

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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.

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