boardman & clark llp
LAW FIRM

MUNICIPAL LAW NEWSLETTER

Volume 21, Issue 2, March/April 2015

IN THIS ISSUE

Read us online at:
boardmanclark.com/publications

Wisconsin Courts Issue Three Decisions Addressing Employer Modification of Retirement Benefits

Wisconsin courts have issued several decisions over the years providing guidance to public sector employers regarding benefits for retirees and how the status of a benefit as "vested" or not affects an employer's ability to modify the benefit. In general terms, these decisions provide that if a retirement benefit is vested, the employer cannot reduce or modify it; in contrast, if a retirement benefit is not vested, the employer may be able to reduce or modify it. Whether a benefit is vested or not depends on the particular benefit at issue, whether there is a contract, ordinance or statute that affects vesting, and whether the employee has met the applicable conditions for vesting.

Since December 2014, Wisconsin courts have issued three new decisions regarding vesting of benefits: *Stoker v. Milwaukee County*, 2014 WI 130 (Dec. 19, 2014); *Monreal v. City of New Berlin*, 2014 WI App 458 (Feb. 4, 2015); and *Schwegel et al. v. Milwaukee County*, 2015 WI 12 (Feb. 12, 2015).

In *Stoker v. Milwaukee County*, the Wisconsin Supreme Court considered a challenge brought by Milwaukee County employees after the County reduced the formula multiplier used to calculate pension benefits. Milwaukee County calculates pension amounts for retired workers by multiplying the highest average salary by a multiplier and the number of service years. The multipliers were set by ordinance and had increased over the years. In 2012, the County passed an ordinance that reduced the multiplier with respect to future service earned after 2012, but did not reduce the multiplier that applied to benefits already earned through 2011.

Several employees sued for breach of contract, arguing that the County could not amend the ordinance because they had a vested interest in the multiplier increases. The circuit court and Court of Appeals found in favor of the employees, but the Supreme Court reversed.

The Supreme Court concluded that the County could amend the ordinance because, although the pension benefits at issue became vested as they were earned, the employees did not have vested rights in the pension benefits that had not yet been earned. Thus, the County could reduce future benefits that had not yet been earned or vested.

Justice Ann Walsh Bradley and Chief Justice Shirley Abrahamson dissented, arguing that the employees' benefits were protected by a state statute and that the employees' pension benefits should be found to have vested on the date the employees commenced their employment with the County.

Continued on page 2

Wisconsin Courts Issue Three Decisions

Continued from front page

In *Monreal v. City of New Berlin*, the Court of Appeals reviewed a claim filed by a retired New Berlin police officer and member of the police union who contended that he had a right to deductible-free health insurance for the rest of his life pursuant to the collective bargaining agreement in place when he retired. After serving as a police officer for 30 years, the officer had retired in 2010 because of a service-related injury. The collective bargaining agreement in place from 2009-2011 required that officers who retired receive the same health benefits as active duty officers. The agreement also required the City to reimburse employees for all in-network deductibles. However, after that collective bargaining agreement expired, the City implemented a new "high deductible" plan for all of its officers.

The plaintiff officer argued that he was entitled to reimbursement of all his deductibles as provided under the previous agreement. The circuit court agreed with the officer, but the Court of Appeals reversed. The Court of Appeals concluded that although the officer's future health insurance benefits were vested at the time of his retirement, the collective bargaining agreement limited the scope of those benefits. In particular, one section of the collective bargaining agreement granted vested rights to deductible reimbursements, while another section applying specifically to duty-related disability retirees allowed the plan to change. The Court of Appeals concluded that the City was obligated to provide health insurance coverage to the officer in the future, but that the City was not required to reimburse deductibles.

A few days after the Court of Appeals' decision in *Monreal*, the Supreme Court issued a decision in *Schwegel, et al. v. Milwaukee County*. As in *Stoker* and *Monreal*, the Court applied a fact-specific approach to evaluate whether benefits had been vested or could be changed prospectively. In that case, Milwaukee County had amended an ordinance that had required the County to reimburse Medicare Part B premiums for retirees of the County retirement system who had worked for the County for at least 15 years. The County amended the ordinance so that it would no longer pay Medicare Part B premiums for certain employees who retired after a certain date.

Two employees sued, arguing that their right to Medicare Part B premium reimbursement could not be eliminated before they retired because their benefits had become vested upon commencing their employment with the County.

The Court of Appeals concluded that the modification was permissible because the employees' benefits did not accrue until actual retirement. Because the employees had not yet retired at the time the ordinance was modified and the benefit eliminated, they had no vested right to have the County provide reimbursement for the Medicaid Part B premiums.

The Wisconsin Supreme Court affirmed. The Court undertook an analysis of the applicable ordinance history and discussed the difference between health benefits and pension benefits. The Court relied on its decision in *Loth v. City of Milwaukee*, 2008 WI 129, 315 Wis.2d 35, 758 N.W.2d 766, which had held that that the City of Milwaukee could eliminate no-cost retirement health benefits for employees who had not yet retired.

Justices Bradley and Abrahamson dissented. As in *Stoker*, these two justices concluded that the employees' benefits vested at the time of their initial employment.

— Sarah B. Painter

Zoning Variance or Conditional Use Permit Request Does Not Trigger Prohibition on Private Interest in a Public Contract

Under Wis. Stat. § 946.13(1)(a), a public officer or employee is prohibited from negotiating, bidding or entering into a public contract in which he or she has a private pecuniary interest if at the same time he or she is authorized to take official action regarding such contract. A violation of this prohibition constitutes a Class I felony. The Waukesha District Attorney asked the Wisconsin Attorney General whether an alderman would violate this prohibition with respect to properties he owned and for which he was seeking a zoning variance and conditional use permit, if he abstains from voting on the zoning decisions related to the properties.

In OAG-09-14, the Attorney General opined that Wis. Stat. § 946.13(1)(a) would not apply in the scenario presented because the statute applies to private interests in public "contracts" and a request for a zoning variance or conditional use permit does not constitute a contract. According to the Opinion, a municipality's zoning decision is not a contract under Wisconsin law. The municipality does not make an agreement with the zoned property owner in exchange for consideration. Rather, the municipality's zoning power constitutes the exercise of the municipality's police power to be exercised for the health and welfare of the community.

— Lawrie Kobza

Summary Judgment on Governmental Immunity Grounds Reversed in Case Involving Natural Gas Explosion

The Court of Appeals reversed a summary judgment granted to the City of Milwaukee on the grounds of governmental immunity where the response of the city fire department was alleged to be negligent. *Oden v. City of Milwaukee*, 2014AP130 (Mar. 3, 2015) (recommended for publication).

Two 911 callers reported smelling natural gas in their homes. The city police and fire departments were dispatched to the scene where they discovered natural gas bubbling up from the street. The responders reported the discovery and said that people were staying in their houses and that the responders would advise if evacuation was necessary. Six minutes later the fire fighters were sent back to their stations and left the police to wait for personnel from We Energies, the utility provider, to arrive. An explosion occurred in the basement of Oden's home and she and her 8-year old son were seriously injured. An independent inspection concluded that the source of ignition was the water heater pilot light. The pilot light could have been extinguished if the gas supply to the home had been cut off at the outside meter. Oden sued the City, which successfully moved for summary judgment on governmental immunity grounds. The Court of Appeals reversed.

The Court of Appeals found that two exceptions to governmental immunity were relevant: (1) ministerial duty and (2) known and compelling danger. A ministerial duty is one imposed by law and that is so specific that it removes any element of discretion. The known and compelling danger rule arises where a situation presents such a clear and immediate danger that it gives rise to a ministerial duty to take specific action. The Court held that both exceptions precluded the entry of summary judgment.

City ordinances adopted by reference the National Fire Prevention Association code. The code requires that gas and electric utilities cooperate with localities to provide specialized training in how to respond to inadvertent gas leaks. The City mandated that all fire department personnel attend training presented by We Energies. This was the only specialized training they received. As part of the training, We Energies provided a First Responder Handbook. The handbook contained numerous statements that the area should be evacuated and that people should not be allowed to stay in their homes. Specific instructions included removing or eliminating all ignition sources. The Court found these instructions sufficiently detailed and specific to create a ministerial duty and that the situation clearly presented such an immediate and high risk of severe injury that the responders were required to take specific action. The Court remanded the case to the trial court for further proceedings to determine whether the responders had acted negligently in their performance of these ministerial duties.

— Mark J. Steichen

Restrictions on the Duration of Rentals in Residential Districts Must Be Clearly Stated

In a decision recommended for publication, the Court of Appeals upheld home owners' rights to rent their homes in a single-family residential district on a short term basis. *Heef Realty and Investments LLP v City of Cedarburg Board of Appeals*, 2014AP62 (Feb. 4, 2015).

Two couples purchased second homes in single-family residential districts in the City of Cedarburg. When they began renting them out on a short term basis, the city zoning administrator sent them notices stating that their use violated the zoning code. The couples appealed to the city's board of zoning appeals (BZA). In the appeal, the city zoning administrator testified that the City allows long term but not short term rentals.

The zoning code lists "single-family dwellings" as a permitted use in its RS-5 residential district. The code has a standard definition of "dwelling," namely "any building or portion thereof designed or used exclusively as a residence and having cooking facilities, but not including boarding or lodging houses, motels, hotels, tents, cabins, or mobile homes." It does not include any definitions of short term or long term and there is no express language on the duration of rentals. Ultimately the BZA upheld the zoning administrator's interpretation.

On certiorari review, the circuit court reversed the BZA and held that the couples were entitled to rent their properties without any time limitation. The Court of Appeals affirmed. The appellate court began its analysis with the rule that the law favors the free use of land. Since zoning is in derogation of common law, restrictions on use must be clear and unambiguous. The single family residence requirement is fulfilled as long as only one family is occupying the dwelling at any one time. The court cited as dispositive an earlier case upholding a time share arrangement in which 13 families each had 4 weeks' use of a single home. *State ex rel. Harding v. Door County Bd. of Adj*., 125 Wis. 2d 269, 371 N.W.2d 403 (Ct. App. 1985).

The *Heef Realty* case probably affects most municipalities in the state since, at least in the

Continued on page 5

FCC Chairman Responds to the Myths Surrounding Recent "Open Internet Order"

In defense of the Federal Communications Commission's Open Internet Order, which was released March 12th, Commission Chair Tom Wheeler issued a statement intended to debunk the "myths" regarding the impact of the Order. According to Commissioner Wheeler, the Order promotes net neutrality by putting in place "bright line rules to ban blocking, throttling and paid prioritization (or 'fast lanes')."

The Order is controversial even among net neutrality supporters primarily because the rules applying to common carriers found in Title II of the Federal Communications Act will now apply to broadband providers. Also controversial is the Commission's position that Section 706 of the Telecommunications Act of 1996, called "Advanced Telecommunications Incentives," gives the FCC authority to impose its new net neutrality rules on Internet service providers. Generally, Section 706 authorizes the FCC to encourage the nation-wide deployment of advanced telecommunications services, including high-speed broadband, by using price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

In response to the charge that the Internet will be regulated just like a public utility, Commissioner Wheeler firmly stated that there is no "utility-style" regulation. Rather, he states, that the Order avoids the "kinds of tariffing, rate regulation, unbundling requirements and administrative burdens that are the hallmarks of traditional utility regulation." He made clear that "[n]o broadband provider will need to get the FCC's approval before offering any price, product or plan." He assured that "[b]roadband providers will be able to adjust retail rates without Commission approval and without having to wait even a minute."

In response to the claim that the rules will result in increased consumer bills for Internet service, Commissioner Wheeler explained that the Order does not impose any new taxes or fees, nor does it "impose mandatory contribution assessments, but simply allows a current, separate proceeding on how to reform universal service contributions to proceed."

The Chair also addressed concerns that the new rules "will embolden authoritarian states to tighten their grip on the Internet," stating that, to the contrary, the Order is a strong statement that no one – government or corporation – should interfere with the user's right of free and open access to the Internet."

Finally, Commissioner Wheeler also made clear that the Order is not part of a larger plan to allow the federal government to take over the Internet. He clarified that the Order does not "regulate the Internet," but rather applies to broadband providers to "protect[] consumers' and innovators' 'last-mile' access to what's on the Internet—the applications, content or services that ride on it and the devices that attach to it. It means consumers can go where they want, when they want and it means innovators can develop products and services without asking for permission."

The full text of Commissioner Wheeler's statement can be found at http://www.fcc.gov/document/fcc-open-internet-order-separating-fact-fiction.

— Anita T. Gallucci

SPEAKERS FORUM

ED: Economic Development and Eminent Domain
State Bar Association Administrative & Local Government Law Section
Milwaukee, WI
April 15, 2015
Mark J. Steichen

CAFOs, What Towns Need to Know
Town Lawyers Conference
Madison, WI
April 24, 2015
Mark J. Steichen

Recent Public Service Commission Activities and Possible Implications for Your Municipality
League of Wisconsin Municipalities, Municipal Attorney's Institute
Delavan, WI
June 18, 2015
Anita T. Gallucci

FCC Preempts State Laws Restricting Municipal Broadband in North Carolina and Tennessee

On the same day the Federal Communications Commission issued it Open Internet Order (see article on page four), the Commission also exercised its authority to preempt state laws in Tennessee and North Carolina that prevented the petitioning municipalities from expanding their broadband service territories in order to meet local demand for broadband service. While the Commission's order only applies to these two cities, FCC Chair Tom Wheeler has conceded that the decision provides guidance on what the FCC would do with similarly situated municipal providers.

The Commission's order finds that the challenged North Carolina and Tennessee laws operate as barriers to broadband deployment, investment and competition, and conflict with the FCC's mandate pursuant to Section 706 of the Telecommunications Act to promote these goals. The state laws had effectively prevented the cities from expanding broadband service outside their current footprints despite numerous requests for service from neighboring unserved and underserved communities.

The petitions were filed by the Electric Power Board, a municipal broadband provider in Chattanooga, Tennessee, and the City of Wilson, North Carolina. In addition to providing electric service, both operate broadband networks providing Gigabit-per-second broadband, voice, and video service. The networks in both areas have attracted major employers to both communities. Wilson's system also provides free Wi-Fi in its downtown area.

The Tennessee law prohibits municipal electric utilities from providing Internet and cable services outside of the municipality's electric service territory. The North Carolina law imposed conditions on municipalities that effectively precluded the City of Wilson from expanding its broadband service into neighboring counties. One such condition prevented municipal providers from expanding into areas in which the private sector delivers service at speeds of up to 768 kbps, which is a fraction of the FCC's current benchmark of 25 Mbps downstream and 3 Mbps upstream.

In support of its Order, the Commission found that there was a "clean conflict" between Section 706, which authorizes the FCC to take steps to remove barriers to broadband investment and competition, and the Tennessee and North Carolina laws that erect barriers to expansion of service into surrounding communities, including unserved and underserved areas.

The FCC recognized that its preemption of such laws will likely speed broadband investment, increase competition, and serve the public interest.

The full text of the Order can be found at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf.

— Anita T. Gallucci

Restrictions on the Duration of Rentals

Continued from page 3

author's experience, few zoning codes include an express minimum duration of rentals. There is a difference in character between short term rentals--in the range of daily, weekly or even monthly stays--and long term rentals on the order of annual leases. In general, the shorter the term of the rental, the less of a stake the tenants have in the character of the neighborhood, which may result in less constraint on their behavior. With shorter rental periods, there is more activity as renters move in and out of the residence on a frequent basis. Plus, neighbors know less about who is authorized to use the residence, making it harder for them to discern strangers who might pose a threat of criminal activity.

Municipalities who wish to set time limits on rental of homes within single-family or even two-family residential districts will need to include express limitations in their zoning codes. The details of the restrictions involve policy choices and pitfalls; there is no simple one-size-fits-all language. Banning all rentals would place significant hardships on owners. Requiring that the home be the person's primary place of residence would affect vacation homes and potentially snow birds if a person changes their official residence or spends more time out of state than at their Wisconsin residence. One option is to place an across the board minimum duration for rentals. Another option would be to require, if the home is not owner-occupied, that it be the primary residence of the occupant.

In the end, municipalities who wish to regulate the duration of rentals must have express language in their zoning codes. Those municipalities should start by identifying their goals and reasons for restricting the duration. Once identified, careful drafting will be necessary to achieve those goals without unwanted, unintended consequences.

— 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.

Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@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
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Sarah B. Painter	283-1744	spainter@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com