BoardmanClark

# Municipal Law Newsletter

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## Updated DNR Rules Relax Attorney Letter Requirement for Safe Drinking Water and Clean Water Fund Loans

Municipalities seeking funding from Wisconsin's Clean Water Fund Program (CWFP) or Safe Drinking Water Loan Program (SDWLP) must comply with administrative rules governing those programs. The Clean Water Fund Program is governed by NR 162 of the Wisconsin Administrative Code and the Safe Drinking Water Loan Program is governed by NR 166. These rules have just been updated by the Department of Natural Resources (DNR) effective November 1, 2023.

Before the update, both programs required an applicant submit to the DNR a legal opinion on land ownership and acquisition of easements and rights-of-way before financial assistance could be awarded.

In the rule updates, however, this legal opinion requirement for the SDWLP and CWFP has been relaxed. Sections NR 162.055 and NR 166.09 now provide that an applicant requesting CWFP and SDWLP financial assistance must sign and submit a certification regarding ownership of the land or required easements and permits for access to the land on which the project takes place. An attorney opinion is not automatically required. The DNR retains the ability to require the applicant to submit a legal opinion establishing land ownership or easement rights to the project site if the DNR determines a legal opinion is necessary. In that case, the legal opinion may be in addition to or in lieu of an applicant's certification. Examples of when the DNR may require a legal opinion include projects for which new land is being purchased by the applicant or the applicant is extending its facilities to land on which no municipally owned infrastructure was previously located.

This change to the legal opinion requirement will apply to SDWLP applications filed with the DNR after November 1, 2023. Any utility which submitted a financial assistance application to the DNR prior to November 1 must still comply with prior DNR rules and guidance related to legal opinions for SDWLP financed projects.

The updated NR 166 rule also clarifies that an applicant is not required to submit a land ownership certification or legal opinion for portions of a project that include removal of lead service lines or galvanized pipe on private property. Accordingly, the DNR does not expect an applicant to provide any type of real property opinion or certification related to a private lead service line replacement project that takes place on private property.

These changes to NR 166 and NR 162 were made in response to comments to the proposed NR 166 rule submitted by Boardman Clark on behalf of the Municipal Environmental Group — Water Division (MEG — Water).

*— Jared W. Smith & Lawrie J. Kobza*

## *Lease, License, or Easement?*

Clients need to use or let others use real property in ways that occasionally defy easy characterization. Most everyone understands that if you want to occupy a suite in an office building for five years, you sign a "lease." That you give an "easement" to a neighbor who needs to cut across your property to get to theirs. That you occupy a hotel room, parking ramp, or your seat at a college football game under a "license." But what if a company needs its employees to park in its next-door neighbor's parking lot? Or if a church wants to permit another group to regularly hold meetings in its space? What if a municipality wants to let cell phone providers put antennas on its water towers? And what about billboards? Indeed, any time real property is being used or occupied by someone other than the owner, it is useful to consider whether to use a lease, a license, or an easement.

We consider three basic questions to choose the appropriate alternative. First, is the interest *possessory* or *nonpossessory*? Second, is the interest *permanent* or *temporary*? Third, should the owner's remedy be a simple termination or the onerous process of eviction after a default? (Other relevant questions include whether a particular use or occupancy of real property is exclusive or non-exclusive, and transferable or personal.)

Possessory interests generally permit permanent occupancy to the exclusion of others, whereas nonpossessory interests permit only temporary use. Leases are possessory estates, giving the tenant exclusive occupancy of the leased premises against the rest of the world, including even the owner. Easements, in contrast, are generally intended to be nonpossessory interests, granting the use of property for a specific purpose but not occupancy. A driveway easement, for example, merely gives your neighbors the temporary right to use your driveway to get to their garage; but not to build an addition, have a garage sale, or camp out on your driveway. Note, however, that the lines blur. Most leases do not confer strict, exclusive, possession, since landlords usually reserve the right to enter the leased property to inspect, repair, and show it to prospective tenants. And a billboard easement confers a possessory interest since the sign physically occupies the land.

Easements are generally intended to be permanent interests in real property, whereas leases must end and are therefore temporary. For example, it would be impossible to run an electric utility if leases with each homeowner served had to be regularly renegotiated. (It's important to note that under Wis. Stat. § 893.33, even easements are not technically permanent. But the distinction remains useful.) These lines can be blurred as well, with leases that "automatically" renew and become potentially permanent, and "temporary" easements for construction or grading.

Licenses must be temporary but can be either possessory or nonpossessory. A license is not technically an interest in real property, but rather a mere contract right that confers permission to use or occupy real property. Without a license, you'd be trespassing. Licenses are typically revocable. The biggest distinction between leases and licenses is the remedy upon default. Defaulting tenants under leases are entitled to an eviction remedy, which technically allows them to continue in exclusive occupancy despite having defaulted in payment of rent or other lease terms. Eviction is a lengthy and potentially expensive process. Defaulting licensees, on the other hand, can be dispossessed without having to go through eviction: imagine having to evict someone from a hotel, football game, or parking garage.

Parking is a good example of how we work through the three questions. A grocery store client had a next-door neighbor that wanted to build a restaurant but didn't have enough parking spaces on its own lot to satisfy the requirements of the applicable zoning ordinance. Without additional parking, the local municipality wouldn't approve the construction of the restaurant. The restaurant asked the grocer for a permanent easement. But the grocer wanted the restaurant to pay monthly charges rather than a one-time fee, which raised the possibility of default. Default would terminate the easement, making the interest impermanent. The municipality would have accepted a long-term lease, yet it seemed inapt to have to go through the process of evicting the restaurant for failure to pay for parking. The grocer would have preferred to give a license, but the municipality would not accept that because a license is not an interest in property sufficient to give it comfort about granting the variance. (The parties ultimately settled on an easement subject to termination for non-payment of rent.) Cell phone antennas and billboards can all be done as licenses, leases, and easements, as well as combinations of those, depending on the interests of the parties.

We tend to use easements for interests that are more "permanent" and "nonpossessory;" leases for interests that are more "temporary," "possessory," and "eviction-appropriate;" and licenses when eviction is inapt. But these are not bright-line tests. The characterization of an interest as a lease, license, or easement is not entirely up to the contracting parties to decide. For example, one cannot side-step the onerous requirements of residential leasing laws by having tenants sign license agreements. However, working through the three questions will generally guide you in choosing the correct interest for your situation.

*— John Starkweather*

## *Energy Grant Awards: Congratulations to Kaukauna Utilities*

The U.S. Department of Energy (DOE) has begun awarding energy grants under the Bipartisan Infrastructure Law (BIL). On October 18th, it was announced that Kaukauna Utilities (KU) received approximately $3 million in funding from the Grid Resilience and Innovation Partnerships (GRIP) Program. The GRIP program is designed to strengthen the electric grid and provide more reliability in the face of extreme weather events and increased demand. Nationwide, 58 projects were chosen to receive funds among 300 applicants in this first round of GRIP funding. KU was the only Wisconsin-based utility to receive funding.

With this grant, KU plans to upgrade its electric infrastructure to enhance the reliability and resiliency of the grid while maintaining cost effective customer rates. It is anticipated that the project will result in an impressive 20% increase in reliability for customers. As part of the infrastructure upgrade, KU will deploy advanced technologies like Distributed Fault Location Isolation Service Restoration (D-FLISR), a battery energy storage system, and microgrid. The program will also provide internship and apprenticeship opportunities for students in order to strengthen Wisconsin's future energy workforce. The technologies deployed as part of this project will serve as a model for the Midwest in its endeavors to increase grid resiliency and reliability going forward.

The DOE recently kicked off the second round of GRIP grant funding, with up to $3.9 billion available. The DOE is prioritizing projects presented by utility consortia which span across multiple utility service territories. The DOE is also looking for programs that can have the greatest impact on disadvantaged communities. Concept papers for the second round of funding are due on January 12, 2024, utilizing a somewhat simplified process as compared to the first round.

This is not the only program offering energy grants. The Wisconsin Public Service Commission (PSC) has released instructions for the first round of its state-administered grid resilience funding. Phase One proposals for that funding opportunity are due February 16, 2024. The PSC also administers the Energy Innovation Grant Program, which begins taking applications for its next round of funding at the end of the month.

Programs are highly competitive, and many have a rolling window of availability. If you are interested in applying for funding, it is important to give yourselves plenty of runway to prepare the application and to seek technical assistance when needed.

*— Liz A. Leonard*

## *Wisconsin Court Of Appeals Clarifies Appropriate Use of Vacancy Rate in Tax Assessment Matters*

A recent decision from the Wisconsin Court of Appeals held that a projected vacancy rate was a better metric for an assessor to use in valuing a luxury apartment in downtown Madison. In *Veritas Village, LLC v. City of Madison*, the court of appeals affirmed a circuit court judgment which upheld the City of Madison's ("City") 2018 tax assessment of the property.

This case centered on the City's 2018 assessment of Veritas Village. Construction on the apartment complex was completed in 2017. By January 1, 2018, it was 28%occupied, which meant there was an actual vacancy rate of 72%. There was, however, no dispute that Veritas Village was in the process of signing new leases to bring that figure closer to the market vacancy rate in the City. Thus, the *projected* vacancy rate was lower than the *actual* rate of 72%. As of January 1, 2018, the City assessed the property at $17,780,000 using a projected vacancy rate whereas Veritas Village assessed the property at $6,800,000.

The stark difference in the appraisal figures was due mainly to the differing vacancy rates that the respective appraisers used. On appeal, Veritas Village argued that the City's 2018 assessment failed to comply with the *Wisconsin Property Assessment Manual* when it used the *projected* vacancy rate in assessing the property rather than the *actual* vacancy rate.

Ultimately, the court of appeals agreed with the City's use of a projected vacancy rate concluding that the method was more consistent with the *Wisconsin Property Assessment Manual* that there was no support for Veritas Village's assertion that the actual vacancy rate should have been used.

In sum, *Veritas Village, LLC v. City of Madison* serves as a good reminder to assessors and municipalities as to the proper data and methodologies to use in conducting proper property assessments.

*— Storm B. Larson*

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# *Municipal Law Newsletter*

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