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# Municipal Law Newsletter

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## *Supreme Court Narrowly Affirms Discretionary Governmental Immunity*

In a recent case, the Wisconsin Supreme Court continued to allow governmental immunity under Wis. Stat. § 893.80(4) for discretionary acts of a municipality, but the narrow majority and subsequent retirement of Justice Abrahamson leaves the future of governmental immunity unclear.

According to the facts in *Pinter v. Village of Stetsonville*, 2019 WI 74, the Village of Stetsonville operates a wastewater disposal system that includes two lift stations that pump sewage to a treatment plant. During rainstorms these lift stations may fill up faster than the sewage can be pumped. Village employees had a "rule of thumb" that the department would bypass the water treatment facility—pump untreated wastewater into a nearby ditch—when the sewage levels inside the lift stations reached a certain height, as measured on the rungs of a ladder. During a heavy rain event in 2014, both lift stations reached high levels. Rather than immediately bypass, the director of public works decided to have a septic hauling company manually pump and transport waste from the lift stations to the treatment plant. This solution proved insufficient and wastewater backed up into Pinter's basement.

Subsequently, Pinter brought claims of negligence and private nuisance against the Village, alleging that the Village's "rule of thumb" created a ministerial duty to bypass. The Village contended that the "rule of thumb" required the exercise of discretion, thereby affording the Village immunity from liability.

In granting summary judgment to the Village and dismissing Pinter's negligence cause of action, the circuit court agreed that the "rule of thumb" did not create a ministerial duty requiring the Village to bypass. While not further analyzed in this article, the circuit court also dismissed Pinter's cause of action for private nuisance, finding that Pinter had not met his burden of proof. The court of appeals affirmed the circuit court. In a narrow four to three ruling, the Wisconsin Supreme Court affirmed the court of appeals and the longstanding interpretation of Wisconsin's governmental immunity statute, Wis. Stat. § 893.80(4).

The governmental immunity statute provides local governments immunity from liability for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," which the Wisconsin Supreme Court interprets to include any acts that involve the exercise of discretion by a public official or employee. One of the exceptions to

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## *Court Of Appeals Upholds Denial of Cell Tower Permit*

In a recent case, *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, the Wisconsin Court of Appeals upheld a municipality's decision to deny a permit to Eco-Site, LLC, a wireless infrastructure provider seeking permission to construct a cell tower on private, rural land. In doing so, the court clarified the scope of the limits placed on municipal regulatory authority by Wis. Stat. § 66.0404, which prohibits a municipality from denying a cell tower permit "based solely on aesthetic concerns."

Eco-Site sought a permit from the Town of Cedarburg to construct a 120-foot metal monopole cell tower, along with a supporting 5600 square foot structure, on a horse farm located in the Town's A-1 agricultural zoning district (but surrounded by residential uses). Under the Town's ordinances, the permit could not be granted unless certain conditions were met, including that the tower be "[c]ompatible with adjacent land"—i.e., that "[t]he uses, values and enjoyment of other Town property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation" of the cell tower. After much discussion, the Town Board denied Eco-Site's permit application on a number of grounds, including failure to meet the ordinance's compatibility requirement.

Eco-Site sued the Town, making two primary arguments: (1) that the Town's determination that the tower was incompatible with adjacent land was a misapplication of its own ordinances; and (2) that the Town's decision was based solely on aesthetic concerns in violation of Wis. Stat. § 66.0404(4)(g). Both arguments failed.

The court held that the Town's conclusion that the proposed tower would be incompatible with neighboring land uses was reasonable, noting that the Town had placed the property and adjacent land in agricultural and residential districts in an effort to keep the area rustic, rural, and populated and that "[t]his intended use and lifestyle are clearly at odds with, and would be thwarted by, the introduction of a 120-foot tall telecommunications

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## Supreme Court Narrowly Affirms Discretionary Governmental Immunity

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governmental immunity is where a duty is "ministerial." A duty is ministerial when the duty is absolute, certain and imperative, involving merely the performance of a specific task and the law specifies the mode of performance with such certainty that nothing remains for judgment or discretion.

Outside of defending existing jurisprudence, the majority opinion finding that the Village was immune from liability for a discretionary act is not particularly notable. The majority noted that the "rule of thumb" was an oral policy, subject to mixed interpretations, and, at best, indicated a signal to "do something." The majority cited DNR regulations that prohibited a bypass unless a municipality can demonstrate that (1) the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; (2) there were no feasible alternatives; and (3) the bypass was reported to the DNR by the municipality. The majority opined that both the first and second conditions require an exercise of discretion, inferring that the "rule of thumb" could not abrogate the municipality's obligation to consider multiple situational factors in a decision to bypass.

The dissenting opinion, written by Justice Dallet and joined by justices R.G. Bradley and Kelly, advocated abrogating the Court's jurisprudence and "return[ing] to the plain text of § 893.80(4)." Under the dissent's interpretation, governmental immunity would only apply for agents or employees of a governmental entity "who are engaged in an act that, in some sense or degree, resembles making laws or exercising judgments related to government business." Applying this interpretation to the facts, the dissent argued that the Village is not entitled to governmental immunity because the Village employees "were not making any laws or exercising any judgments related to government business" nor were they "making balanced policy decisions for wastewater management on behalf of the Village for which the protection of immunity was intended." (Emphasis added.)

In response, the majority warned that "adopting the dissent's reasoning would effectively pull the rug out from under municipalities … that have managed their affairs relying upon our decades-old interpretation of the governmental immunity statute." (Internal quotations omitted.) Consequently, while the law of local governmental immunity remains unchanged, this case serves as the canary in the coal mine for the existing interpretation of governmental immunity.

*— Jared W. Smith*

## *Local Governments Buy in to Large Scale Solar Projects*

The City of Middleton and Middleton-Cross Plains Area School District are the first two local governmental units to purchase solar energy under a new large scale renewable energy tariff developed by Madison Gas & Electric (MGE). Known as the "Renewable Energy Rider" (RER), the MGE tariff allows large customers with multiple facilities to purchase renewable energy under separate power purchase agreements (PPAs) from dedicated facilities located nearby.

The Middleton PPAs were approved by the Public Service Commission of Wisconsin (PSCW) on July 25, 2019. Other local governments, including Dane County and the City of Madison, are expected to follow suit by seeking PSCW approval of similar PPAs with MGE under the RER in the coming months.

In contrast to existing roof top and community or shared solar programs, which have become wide spread in utility territory throughout Wisconsin largely to serve residential customers, the RER tariff allows utilities to design lower cost, large scale renewable energy projects without creating cross-subsidies that potentially increase energy costs for other non-tariff customers.

The Middleton project, for example, will generate 1.5 megawatts of solar power for the city and school district on property owned by the City of Middleton located near the Middleton airport. The Dane County project, which was formally approved by the county in early September, will generate 9 megawatts of solar power on land leased by MGE at the Dane County Regional Airport. The facility is expected to produce about 40% of the county's energy needs.

The RER tariff enables local governments otherwise unable to take advantage of federal tax credits to directly finance dedicated renewable energy generation. Rather than issuing bonds or working with third party developers, local governments enter into long term PPAs with their utilities at a fixed price and offset their energy purchases under standard tariff rates. Excess energy generated by the resource, as well as associated capacity, are compensated by the utility at market rates. Because the RER allows multiple meters to be aggregated under the PPA, eligible customers are not restricted by the size of individual buildings, meaning that the projects can be scaled up.

The PSCW first approved MGE's program in 2017 for up to 25 megawatts. Since then, the PSCW has approved 150 MW RER programs for both We Energies and Alliant Energy. Hence it is likely that an increasing number of local governments will be able to develop cost-effective renewable energy resources and meet clean energy goals in partnership with their incumbent utilities.

*— Richard A. Heinemann*

### Court Of Appeals Upholds Denial of Cell Tower Permit

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tower with its substantial related structure and fencing." In addition, the court concluded that the neighboring homeowners' concerns about the negative effect the cell tower would have on their property values fairly related to the residents' "uses, values and enjoyment" of their property and therefore to the compatibility factor set out in the ordinance.

Eco-Site also argued that that the Town's denial of its permit application on the basis of incompatibility, lost property values, and the effect on the public health, safety, and general welfare amounted to a denial based solely on aesthetics in contravention of Wis. Stat. § 66.0404. Eco-Site pointed to numerous comments during the discussion of each ordinance factor that related to the visual impact of the tower. The court acknowledged that the Town Board made comments regarding aesthetics, but concluded that Wis. Stat. § 66.0404(4)(g) only prohibits a denial of a cell tower siting permit if that denial is based "solely" on aesthetic concerns. Because the Board's decision that the tower did not meet the ordinance's incompatibility standard was also based on the impact of the tower on the uses and lifestyle for which the neighborhood was zoned and the economic impact on neighboring property values, it was not a denial based "solely" on aesthetic concerns.

This decision is an important one for municipalities looking to exercise their right to regulate the siting of cell towers within municipal limits. Municipalities should carefully consider the standards set out in local ordinances for the granting of cell tower permits to ensure that they incorporate factors that are not purely aesthetic (e.g., effect on property values and impact on the uses and enjoyment of nearby property), and should be sure to carefully document that the basis for denial of a permit includes non-aesthetic factors.

*— Julia K. Potter*

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# *Municipal Law Newsletter*

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