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Final ARPA Rule May Facilitate Infrastructure Projects to Provide Government Services

In early January, the US Treasury Department released its final rule pertaining to the American Rescue Plan Act ("ARPA"), adopting Treasury's interim final rule published on May 17, 2021, but with certain amendments. Perhaps the most significant amendment to the interim final rule for many smaller municipalities considering various infrastructure projects is the new provision allowing municipalities to use up to $10,000,000 of ARPA funds for "government services." *See* 31 C.F.R. § 35.6(d). This provision may provide greater flexibility for the use of ARPA funds for, among other things, infrastructure projects that would not otherwise qualify as eligible uses under the rule.

Subsection 35.6(d) of the rule now allows a municipality to use a "standard allowance" of $10,000,000 when determining how much of its ARPA funds may be used to replace "lost revenue" for government services. Thus, under the final rule, a municipality may either calculate its lost revenue under the formula set out in the rule or claim the standard allowance and use up to $10,000,000 for government services projects. As used in the rule, "government services" is understood to refer to any service that a municipality would typically provide. Treasury has given the following examples of eligible uses within this category: "construction of roads and other infrastructure, provision of public safety and other services, and health and educational services."

There are some restrictions; however, they should not pose a problem for most municipalities:

- ARPA funds may not be used for debt service, replenishing financial reserves, or deposits into a pension fund.
- ARPA funds may not be used for a program, service, or capital expenditure that conflicts with or contravenes the statutory purpose of ARPA, including a program, service, or capital expenditure that includes a term or condition that undermines efforts to stop the spread of COVID-19.

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Court Upholds Milwaukee's Decision to Terminate Licenses for Gas Station Found to Be a Nuisance

The Milwaukee Police Department (MPD) and the neighbors near the Citgo gas station on North 35th Street were getting fed up. An extensive MPD report detailed several shootings, armed robberies, illegal drug transactions and panhandling complaints at and around the gas station. After a hearing, Milwaukee terminated all of the licenses held by the station, and the termination of those licenses was upheld by the Circuit Court in Milwaukee and the District I Court of Appeals. *VK Citgo v. City of Milwaukee*, 2020 AP 1458 (Dec. 28, 2021, not recommended for publication).

Citgo held licenses for Extended Hours Establishments (allowing 24-hour operation), Filling Station, Weights and Measures, and Food Dealer (the Licenses) under Milwaukee's ordinances. When Citgo applied to renew those Licenses in 2019, the City sent a formal notice that the Licenses might be terminated for a number of reasons, including that the gas station "tends to facilitate a public or private nuisance," that it "has been the source of congregations of persons," and that these led to complaints of "illegal drug activity, disturbing the peace, thefts, assaults, and batteries." Attached to the notice was the extensive MPD police report, and a nuisance letter from an MPD Captain, finding the station was a nuisance for the incidents in the letter. A hearing was set for December 3, 2019, before the City's Licensing Committee.

The MPD Captain testified at the hearing, detailing the problems in the MPD Report, and that Citgo's attempt to come up with an approved nuisance abatement plan had been unsuccessful. He recommended terminating only the Extended Hours license. Neighbors also testified as to the problems at the station, as did the Milwaukee Alder from the district.

Citgo argued it had done all that it could, including employing security guards and security cameras, and the problems often started elsewhere.

At the end of the hearing, the Licensing Committee voted to recommend that ALL of the Licenses for Citgo not be renewed. The Milwaukee Common Council adopted the Committee's recommendations. Citgo appealed to Circuit Court by a *certiorari* action.

The only issue raised by Citgo was a due process argument. Citgo claimed the original notice from Milwaukee was inadequate, arguing that it failed

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Final ARPA Rule Provides a "Catch-All" Use Category, Dramatically Expanding the Types of Eligible Projects

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- Use of ARPA funds must comply with applicable state and federal laws and may not be used in violation of the conflict-of-interest requirements contained in the Award Terms and Conditions, including any self-dealing or violation of ethics rules.

Although it may seem counterintuitive, 31 C.F.R. § 35.6(d) ("Providing government services") would presumably allow a water, sewer, or broadband infrastructure project that might not be an eligible use under 31 C.F.R. § 35.6(e) ("Making necessary investments in water, sewer, and broadband infrastructure"). For example, a municipality wishing to build new broadband infrastructure may not be sure whether the project meets all the requirements of Subsection (e), the broadband specific category. However, the project (up to a maximum of $10,000,000) should nevertheless fall within the scope of Subsection (d), the broad government services category of eligible uses, because providing utility-type services is a typical government service.

Thus, a municipality would be wise to evaluate the projects it may be considering under the "government services" category of eligible uses.

— Anita Gallucci and Julia Potter

Wisconsin Supreme Court: Municipalities Not Entitled to Certiorari Review of Tax Assessments

A recent decision from the Wisconsin Supreme Court restricts a municipality's ability to challenge tax determinations rendered by a local board of review. In *State of Wisconsin ex rel. City of Waukesha v. City of Waukesha Board of Review*, 2021 WI 89, the Wisconsin Supreme Court unanimously held that the City of Waukesha ("the City") was not entitled to seek certiorari review of a tax assessment determination of the City's Board of Review ("the Board").

This case stemmed from a property valuation disagreement between the City and the Salem Methodist Church over a piece of church-owned property ("the Property"). In 2017, the City assessed the Property at $51,900. The City reassessed it in 2018 at $642,200 because the church decided to list it for sale. Given the assessment jump, the church filed an objection with the Board and claimed that the Property was actually worth $108,655. The Board agreed with the church's valuation and concluded it was worth $108,700. Thus, the Board rejected the City's reassessment figure.

What came next is the critical juncture in the litigation: the City filed an appeal with the Waukesha County Circuit Court and invoked Wis. Stat. § 70.47(13) which governs certiorari review of Board determinations. Wis. Stat. § 70.47(13) provides that appeals from board decisions must be "commenced within 90 days after the *taxpayer* receives notice [of the board's determination]." (emphasis added). Notably, it makes no mention of whether a city or municipality may commence certiorari review.

The church moved to dismiss the appeal, arguing that the statute only granted *taxpayers* a right to seek certiorari review—not *municipalities*. The circuit court rejected that argument and granted certiorari review. The circuit court then found that the City's 2018 reassessment was reasonable and reinstated it. The church appealed this decision to the Wisconsin Court of Appeals which reversed the circuit court's decision and held that Wis. Stat. § 70.47(13) did not grant the City a right to appeal. The City then appealed to the Wisconsin Supreme Court which ultimately affirmed the decision of the court of appeals.

Writing for a unanimous Supreme Court, Justice Ann Walsh Bradley concluded that certiorari review was unavailable to the City under the statute's plain wording. According to the Supreme Court, the statute's reference to "taxpayer" and lack of reference to "municipality" conclusively resolved the issue. The Supreme Court reasoned that when the legislature intends to grant municipalities an avenue for relief, it does so unambiguously as it has in other contexts such as zoning determinations under Wis. Stat. § 62.23(7)(e)10. *State of Wisconsin ex rel. City of Waukesha v. City of Waukesha Board of Review* thus provides important clarification to municipalities which seek to challenge tax assessment determinations.

— Storm B. Larson

Court Upholds Milwaukee's Decision to Terminate Licenses for Gas Station Found to Be a Nuisance

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to advise them of the specific incidents that were behind the non-renewal proceeding.

The Circuit Court and the Court of Appeals quickly rejected that argument and upheld the non-renewal of the Licenses. The courts noted that the notice itself was relatively brief, but that Milwaukee had attached the extensive MPD report and the nuisance letter, both of which detailed the incidents leading to the non-renewal proceeding. The courts concluded Citgo had sufficient notice to meet both due process and the Milwaukee ordinances.

The case indicates the importance of municipalities maintaining adequate records on problem properties and using those records to give adequate notice of the basis of any proceeding to revoke or non-renew a license.

— Michael P. May

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