

Municipal Law Newsletter

VOLUME 29, ISSUE 1 JANUARY/FEBRUARY 2023

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Seventh Circuit Dismisses Challenge to Madison's Digital Sign Ordinance

On January 4, 2023, the Seventh Circuit Court of Appeals in *Adams Outdoor Advert. Ltd. P'ship v. City of Madison, Wisconsin*, 56 F.4th 1111 (7th Cir. 2023) dismissed a challenge to the City of Madison's digital sign control ordinance.

In 2009, the City of Madison amended its sign ordinance to, among other things, prohibit most digital sign technology, including off-premises digital billboards, citing motorist safety and aesthetic concerns. Adams Outdoor Advertising, a company that owns billboards across the country including in Madison, brought a federal suit in 2017 challenging the constitutionality of the City's entire sign ordinance, including the 2009 digital ban. The City was represented by a team of Boardman Clark attorneys. In 2020, the district court granted the City's motion for summary judgment, finding that all of Adams's claims failed on the merits, and nearly all of its claims were precluded by a 1993 consent decree entered into between Adams and the City that resolved a prior lawsuit.

Adams appealed the 2020 ruling to the Seventh Circuit. The Seventh Circuit agreed with the district court on appeal and found that all of Adams's claims were precluded by the 1993 consent decree except its challenge to the digital ban, which was part of the 2009 amendment to the sign ordinance.

In its challenge to the digital ban, Adams argued that the City's regulation of digital signs applied differently to off-premise signs (billboards) than on-premise signs, and thus violated the First Amendment because treating off-premise signs differently was an impermissible content-based regulation of speech subject to strict scrutiny under *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). However, the Seventh Circuit agreed with the City and ruled that the ordinance actually contained a place-based restriction unrelated to content and subject to intermediate scrutiny. The application of intermediate scrutiny rather than strict scrutiny was key to this case and supported by the recent U.S. Supreme Court decision of *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022). *City of Austin* clarified *Reed's* impact on the on-premise, off-premise distinction that many municipalities rely on in their regulation of signs. Applying intermediate

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Wisconsin Appellate Court Rules City of Milwaukee Violated Family Dollar's Due Process Rights When it Denied the Renewal of Food Dealer and Weights & Measures Licenses

In *Family Dollar Stores of Wisconsin LLC et.al. v. City of Milwaukee et.al.*, 2021AP1432, decided October 11, 2022, the Court of Appeals ruled the City of Milwaukee violated Family Dollar's due process rights when it denied an application to renew Family Dollar's Food Dealer and Weights & Measures licenses.

In 2019, a Family Dollar store located in the City of Milwaukee was designated as a nuisance property by the City due to increased police activity, loitering, lack of maintenance, and other related issues. The City and Family Dollar entered into an abatement plan in 2019. In 2020, Family Dollar applied to renew its Food Dealer and Weights & Measures licenses with the City.

The City provided Family Dollar with a notice, which included a copy of an email from a community group to an Alderman detailing sanitary and maintenance issues with Family Dollar. The application was then heard in front of the Licenses Committee. A member of the community group, the Milwaukee Police District Captain, and the Alderman all testified at the committee hearing against renewing the application. Of note, the Alderman noted that a different store nearby offered the same products as Family Dollar. Family Dollar representatives were not permitted to cross examine witnesses that testified against the application and the questioning was led by the Alderman, who was not on the committee. Family Dollar representatives then testified in support of the application. After the hearing, the Licenses Committee voted against renewing the application.

The application then went to the Common Council. A hearing was held at the Common Council where Family Dollar raised due process concerns based on being denied the right to cross-examine witnesses. After the hearing, the Common Council denied the application in a 9-6 vote and the Alderman who testified at the committee hearing voted against renewal.

Family Dollar filed a petition for writ of certiorari with the circuit court based on the due process argument. The City and Family Dollar then agreed to

remand the case back to the Licenses Committee to allow Family Dollar to cross-examine witnesses.

The City provided notice of the remand hearing to Family Dollar, including a letter from the Milwaukee Police Department designating the store as a nuisance, a copy of the letter notifying Family Dollar of acceptance of the abatement plan, and a copy of the email from the community group to the Alderman. At the second hearing in front of the Licenses Committee, representatives from the Milwaukee Police Department, the community group, and the Alderman testified again. The testimony was generally the same as the first hearing, except Family Dollar was able to cross-examine witnesses. The Licenses Committee voted against approving the application. The Common Council unanimously followed the Committee's recommendation and denied the application, with the Alderman voting again.

The circuit court affirmed the City's denial of the application and Family Dollar appealed arguing its due process rights were violated. The appellate court agreed with Family Dollar for two reasons: (1) the notices provided to Family Dollar were insufficient, and (2) the Licenses Committee hearing was not fair and impartial.

The City was required to provide written notice to Family Dollar of the possibility of non-renewal of their license and the notice was required to include a statement of specific reasons for non-renewal. The appellate court found the City's notices were insufficient. It first notes that the notices provided to Family Dollar "were essentially form letters" that contained a statement of the possibility of non-renewal and various types of evidence the Committee might consider in making the determination. Beyond that statement, the other information provided in the notices was an email from the community group, a letter from the Milwaukee Police Department detailing four incidents supporting the designation of the property as a nuisance, and a letter approving the abatement plan.

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Welcome Joseph Hasler and Maximillian Buckner

Boardman Clark and the Municipal Practice Group are excited that attorneys Joe Hasler and Max Buchner have joined the firm. They formerly practiced at the LaRowe Gerlach firm in Reedsburg. Both have worked extensively with municipalities in south and west central Wisconsin. Joe and Max will continue working with their former municipal clients and will allow Boardman Clark to provide our municipal clients with additional, expanded, and comprehensive expertise and coverage. Joe and Max will work out of Boardman's Baraboo office.

Joe began his legal career working with a Madison law firm and later moved to Reedsburg where he became a partner and long-time member of the LaRowe firm. In that capacity he has represented many municipalities in south central Wisconsin, including being the long-time city attorney for Wisconsin Dells. Joe has advised local governments, boards, and commissions on a variety of general municipal matters, including negotiation, and drafting of development agreements with financial, annexation and land use components; crafting ordinances and policies; preparing access and utility easements, real estate contracts, and covenants, and navigating conditional uses, special exceptions, and variances. Joe has served on the Wisconsin Elections Board and the City of Reedsburg Planning Commission and was a trustee of the Madison Area Technical College Board of Trustees.

Max is a 2014 graduate of the University of Wisconsin Law School. At LaRowe, his practice included a focus on general municipal law, municipal prosecutions, litigation, and real estate. Max assists municipal clients with real estate, land use and development, zoning, ordinances, open records, traffic and ordinance enforcement, and general municipal advisement. Max is the city attorney for the City of Reedsburg. Max is on the boards of the West Central Wisconsin and Reedsburg Boys and Girls Clubs.

Joe becomes one of the Municipal Practice Group's "senior" lawyers, along with Eileen Brownlee, Paul Johnson and Steve Zach, who provide general

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WI Appellate Court Rules City of Milwaukee Violated Family Dollar's Due Process Rights

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The appellate court found that the information in the notices was not enough, because the information in the notices had already been addressed by Family Dollar, and no further citations had been issued after the abatement plan was implemented. The City failed to provide Family Dollar with "sufficient pertinent information, such that it could prepare and offer responses" at the hearing. Thus, Family Dollar's due process rights were violated.

In addition, the appellate court found the City violated Family Dollar's due process rights due to the Alderman's bias. The Alderman, who was not on the Licenses Committee, testified and then questioned witnesses at the committee hearings. He made his position clear that he was against renewing the license. He made comments at the committee hearings that he may be biased against Family Dollar because it is a chain store. Based on this information, the appellate court found that the Alderman "prejudged" the matter and that his actions overcame the presumption of honesty and integrity creating a situation where the risk of bias was impermissibly high. Therefore, again, Family Dollar's due process rights were violated.

This case is a warning to municipalities on two separate issues. First, municipalities must be aware of notice requirements and provide sufficient, detailed notices. In this instance, the City was required to provide detailed information and facts sufficient to support a reason for non-renewal in their notice. Despite an attempt to use a form letter and attach letters and emails, the City failed to provide sufficient notice.

Second, municipalities must provide an unbiased hearing process. Individuals running the hearings must provide a fair hearing process and the local board must be made up of impartial decision makers. Municipalities and board members should be informed of the risk of bias and be prepared to take steps to prevent bias and conflicts of interest in decision making.

-- Maximillian Buckner

Wisconsin Supreme Court Clarifies How Tax Assessment Claims Must Proceed

A recent decision from the Wisconsin Supreme Court clarifies how taxpayers must initiate tax claims against municipalities under Wis. Stat. § 74.35. The Wisconsin Supreme Court ruled that taxpayers must first pay the disputed tax prior to filing their claims. The case is captioned *St. John's Communities v. City of Milwaukee*, 2022 WI 69, and a brief recitation of the facts will be helpful for context.

At issue in *Saint John's Communities, Inc.* was a 501(c)(3) nonprofit which owned a parcel of property in the City of Milwaukee. This lot had previously been declared as tax exempt between the years 2010-2018. However, in 2018, the nonprofit chose to begin developing the lot into a luxury apartment complex for retired individuals.

When the City learned of this development, it asked the nonprofit to reapply for tax-exempt status. It asked the nonprofit to reapply because it was changing the use of the property, and the change in use made the property presumptively taxable under the relevant statutes. The nonprofit complied and submitted its new application in September 2019, but the deadline for applying for an exemption had already passed on March 1, 2019. Therefore, because the nonprofit missed the deadline and had begun developing the property in a taxable manner, the City determined that the property would be taxable for the year 2019.

On November 8, 2019, the nonprofit filed a claim with the City for recovery of unlawful taxes pursuant to Wis. Stat. § 74.35. However, the City advised the nonprofit that the claim was premature because the tax bill had not been levied or collected (paid) yet. The tax was due to be levied on November 27, 2019. The nonprofit then filed a second claim on December 5, 2019 after the tax was levied, but the City again advised that the claim was still premature because the nonprofit had not yet paid its bill. The City also advised that the nonprofit's claim was defective for another reason: the March 1, 2019 tax exemption application deadline had long passed.

In response, the nonprofit filed suit in Milwaukee County Circuit Court and sought recovery of unlawful

taxes against the City pursuant to Wis. Stat. § 74.35. The City filed a motion to dismiss that claim because, under Wis. Stat. § 74.35(2)(a), it had not paid its tax bill prior to filing its claim with the City.

The circuit court denied the City's motion to dismiss, but the court of appeals reversed that decision and adopted the City of Milwaukee's reading of the statute, namely, that a tax bill must be paid before a claim against the tax authority can lie. The court of appeals held that the unambiguous meaning of Wis. Stat. § 74.35(2)(a) meant that the tax must be paid prior to the claim being filed and that failing to do so constituted procedural default. As the court of appeals explained: "The language of the statute clearly anticipates a claim being filed with the taxation district *after* the taxpayer has paid the challenged tax." (emphasis in original). Therefore, the nonprofit's claim was procedurally defective and was time-barred since the March 1 deadline had long passed.

The supreme court affirmed the court of appeals' decision and largely adopted its analysis. Notably, the opinion was 7-0 with Chief Justice Ziegler writing for the court. Moving forward, the court made clear that taxpayers will procedurally default on claims if they fail to pay the challenged tax prior to filing their claims.

Tax assessment claims involve intricate procedural rules which can lead to default for noncompliant litigants. We encourage municipalities to reach out to a member of the Boardman Clark Municipal Practice Group with questions.

-- Storm B. Larson

Seventh Circuit Court Dismisses Challenge to Madison's Digital Sign Ordinance

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scrutiny, the court found that the City of Madison had a significant interest in promoting motorist safety and preventing aesthetic harm. Because the ordinance regulating digital signs was designed to further those interests, it passed intermediate scrutiny and the case was dismissed.

-- Tanner G. Jean-Louis

Court Dismisses RLUIPA Challenge to City's Stadium Lighting Decision

Edgewood High School of the Sacred Heart, a Catholic high school based in Madison, Wisconsin, sought to renovate its athletic field to add stadium lighting and eventually amplified sound. Edgewood was bordered on three sides by two residential neighborhoods, members of whom vocally opposed the plans for stadium lighting. Edgewood sued the City of Madison in federal court after City officials denied Edgewood's permit applications to install the lights. The City was represented by a team of Boardman Clark attorneys.

Edgewood's primary argument was that the City violated RLUIPA – the Religious Land Use and Institutionalized Persons Act. Among the goals of RLUIPA are to ensure that municipalities do not unduly restrict religious land uses, and to prevent municipalities from treating religious land users worse than other land users. Edgewood argued that preventing the school from obtaining stadium lights would burden its religious exercise because it would hamper the school's religious mission to educate the 'whole student.' Edgewood also argued that it was being treated less favorably than other institutions because Memorial High School and the University of Wisconsin-Madison both had athletic fields with outdoor lighting.

The district court in *Edgewood High Sch. of the Sacred Heart, Inc. v. City of Madison*, No. 21-CV-118-WMC, 2022 WL 18024626 (W.D. Wis. Dec. 30, 2022) granted the City's motion for summary judgment and dismissed Edgewood's lawsuit. The court found that Edgewood was unable to support its argument that its religious mission required that its students be able to play athletic games on their home field at night, as opposed to using another stadium for night games as Edgewood had done in the past.

The court also found that Edgewood was not treated less favorably than Memorial High School or UW-Madison because Edgewood's permit applications were filed at different times than the other institutions and were therefore subject to different rules. Additionally, at the time of its first application, Edgewood had entered into a binding master plan with the City and that master plan made no mention of stadium lights but instead contained language limiting the allowed uses

of the field. Memorial High School did not enter into a master plan, and UW-Madison's lighting applications were approved before its own, substantially different master plan went into effect.

Edgewood had also brought additional claims under the First and Fifth Amendments and state law, all of which were also dismissed.

-- Tanner G. Jean-Louis

Welcome Joe Hasler and Max Buckner

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municipal legal advice to our clients. Eileen, Paul, and Steve have long-standing municipal general and employment practices around the state and welcome Joe in providing counsel to our clients and mentorship to our younger municipal attorneys.

Max joins Eric Hagen and Jared Walker Smith in providing general municipal services to our clients. Eric is a 2017 Marquette Law School graduate and works out of the firm's Fennimore office with Eileen Brownlee. He is the city attorney for the City of Dodgeville and works with our southwest Wisconsin municipal clients. Jared is a 2012 graduate of the University of Wisconsin Law school and works out of Boardman's Madison office. He not only provides general municipal, real estate, and land use and development services to several municipalities, but also works extensively with the firm's municipal utility and special purpose district clients, with a focus on water and wastewater utilities and lake districts. He currently serves as chair of the State Bar of Wisconsin's Public Utilities Section. Jared is actively engaged in community services, including membership on the Rivers Art's Inc. board in Sauk Prairie.

The Boardman Clark Municipal Practice Group provides a full range of legal services to municipal boards, councils, committees, commissions, and joint action agencies. The addition of Joe and Max brings depth and expertise to the group and expands our ability to provide full-scale municipal services to our clients now and in the future.

For a complete description of the full range of our municipal services and the attorneys who practice in this group, visit our website at [boardmanclark.com/](https://www.boardmanclark.com/).



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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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