

MUNICIPAL LAW NEWSLETTER

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Legislative Push for Clean Energy Jobs Act Begins

Wisconsin legislative hearings are scheduled to begin on January 27, 2010, on the Clean Energy Jobs Bill. The proposed legislation is designed to implement many of the recommendations made by Governor Doyle's Climate Change Task Force, which issued its final report in July, 2008. According to Governor Doyle, the bill would create 15,000 "green" manufacturing and construction jobs by 2025.

The bill declares statewide goals for greenhouse gas (GHG) emission reductions, energy conservation, generation of energy from renewable energy resources, and new building energy use.

Key provisions of the bill include: (i) enhanced energy efficiency and renewable resource programs; (ii) an enhanced renewable portfolio standard (i.e., by 2025, 25% of all electric energy consumed in the state would be mandated to come from renewable resources); (iii) renewable or "feed-in" tariffs, designed to require electric providers that sell electric energy at retail to purchase small-scale renewable energy at set prices; (iv) modifications in the existing nuclear moratorium to allow for new nuclear plants; (v) implementation of vehicle emission limitations identical to the California greenhouse gas emission standards; (vi) strengthening energy conservation provisions in the commercial building code; (vii) industrial efficiency incentives; and (viii) programs to subsidize landowners for production of biomass feedstock and otherwise encourage production of biomass

feedstock.

The bill also contains provisions aimed at state and local governments, including directing state agencies to reduce greenhouse gas emissions; authorizing the Office of Energy Independence to work with school districts to do the same; and excluding monies levied by municipalities for energy efficiency measures or renewable energy products from applicable levy limits.

Although the Governor's Task Force, which produced the recommendations at the core of the bill, was made up of numerous industry stakeholders, the bill is expected to be opposed by key business and industry groups, including Wisconsin Manufacturers & Commerce (WMC), the state's largest business lobby. According to WMC spokespersons, the bill would result in a net loss of jobs, a cut in annual wages, and a substantial increase in energy bills.

If it passes, the bill could become the most significant piece of energy-related legislation since the 1999-2000 Wisconsin Act 9, which imposed renewable portfolio standards, mandated energy efficiency programs, and required utility divestiture of transmission assets and creation of an independent transmission company.

It is anticipated that the overall timeframe for introduction of the bill, movement through legislative committee and both legislative houses, and review by the Governor will be relatively short.

— Richard A. Heinemann

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Governmental Immunity Applies to Design of Storm Water Inlets

Assessed Value Change Upheld Where Based on Factor Other Than Fair Market Value

Governmental immunity applies to design of public utilities unless there is a ministerial duty to act. A duty is ministerial only when a particular task is absolutely required to be performed and where the task is spelled out in such detail that there is no discretion as to how or when to perform it.

Property owners, the Glaums, sued the City of Hayward in tort seeking damages due to increased storm water runoff resulting in flooding on their property. They claimed that the city caused the additional runoff onto their property by redesigning the road adjoining their property. The city had widened the road, repaved the blacktop, lowered the storm sewer, and placed a curb and gutter opposite their property. Before the work, the Glaums had experienced pooling of water along the southern edge of the driveway. Afterward, they suffered water drainage and flooding in their driveway. The circuit court granted summary judgment in the city's favor, dismissing the case.

The Glaums argued that the city had a ministerial duty to prevent flooding on their property. They cited Wisconsin Administrative Code § Comm. 82.36(9), which states: “[a]ll exterior storm water inlets shall be designed for the anticipated flow.” They reasoned that the code section required the city to ensure that the storm water drains could handle the amount of flow created by the road changes. They alleged that, since the city installed a curb and gutter on the curve in the road opposite their property, and given that storm water will follow the curve, if the storm gutter is filled by water or debris, the only reasonable conclusion is that the storm water inlet was inadequate and that the excess water would flow directly to the Glaums' property.

On appeal, the court of appeals found that the administrative code section did not set out a ministerial duty. The section does not specify how anticipated flow is to be determined or what specific engineering is to be used to accommodate anticipated flow. In affirming the circuit court, the court of appeals relied on *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, ¶ 61, 277 Wis. 2d 635, 691 N.W.2d 658. *MMSD* held that, even if a system is poorly designed, a municipal government is immune from liability for its discretionary act of design. It distinguished the case from *DeFever v. City of Waukesha*, 2007 WI App 266, 306 Wis. 2d 766, 743 N.W.2d 848, upon which the Glaums relied. In *DeFever*, the administrative code specifically

In this somewhat unusual case, the court of appeals held that a change in assessed value unrelated to any change in the property's fair market value need not be applied retroactively. *State ex. rel. Stupar River, LLC v. Town of Linwood Board of Review*, 2009 AP 191 (Ct. App. Jan. 6, 2010) (not recommended for publication). The town assessor valued the subject commercial property for the years 2003-2006 at \$1,893,400. The town stipulated that the fair market value of the property remained constant from 2003 through 2006. In 2006, the assessor lowered the assessed value by 25 percent. Stupar had appealed the assessments for the earlier years. Based on the change for 2006, Stupar argued that the assessments for 2003-2005 must be lowered by the same amount. The board of review denied Stupar's appeal.

The assessor explained that the change resulted from a 2005 major class comparison report from the Department of Revenue. The department found that the commercial class of property was out of line with the other classes of property and had to be equalized. Because the change was greater than 10 percent, the assessor decided that the assessments for commercial properties in the town had to be equalized in accordance with the department's report. Rather than increase the assessments for other classes of property, he decided to lower the assessments of commercial properties in the town.

The board of review denied Stupar's appeal. On certiorari from the board's decision, the court of appeals held that the board's decision provided a substantial basis for refusing to order a change in the earlier year's assessment. The court rejected Stupar's argument that the assessment was changed in 2006 to reflect the property's true fair market value. To the contrary, the court found that the change was made in response to the department's report. Changes resulting from equalizing values between classes of properties did not mean that the fair market value of commercial properties had changed. Because the town's change in the assessed value of Stupar's property was done for reasons other than a change in fair market value, the board's decision refusing to require changes to the earlier years' assessments was consistent with the statutory requirements.

— Mark J. Steichen

required pipe to be buried at least five to seven feet underground. In that case, the code specified the minimum depth of the pipe at the time it was installed and, therefore, precluded any discretion to lay the pipe higher than specified.

The *Glaum* case does not break new ground and is not recommended for publication. However, it provides yet another example of the level of specificity required in the law before the performance of an act is considered ministerial. *Glaum v. City of Hayward*, Appeal No. 2009AP21 (Ct. App., Dist. III, decided January 20, 2010, unpublished decision).

— Mark J. Steichen

Employee's Resignation Extinguishes Claim for Wrongful Termination

In a case involving the resignation of a city human resources director, the court of appeals revisited the issue of under what circumstances an employee's voluntary resignation constitutes a constructive discharge. Consistent with past precedent, the court found that when an employee chooses to resign to avoid the possibility of being discharged for misconduct, the resignation is not a constructive discharge unless the employee presents evidence of harassment at work.

The case, *Mercer v. City of Fond du Lac*, 2009 AP 505 (Dec. 16, 2009), concerned the resignation of Benjamin W. Mercer, who was the City of Fond du Lac's human resources director. In June of 2004, Mr. Mercer was the subject of an investigation by the city and local police, who suspected that Mr. Mercer was viewing pornography on his work computer. The investigation concluded that Mr. Mercer had been using his work computer to view pornography, but the police did not press charges because they did not find that Mr. Mercer had been viewing child pornography.

Although no charges were pressed, the city manager, Tom Ahrens, issued a letter reprimanding Mr. Mercer for violation of the city's employment policies. The letter revoked Mr. Mercer's Internet privileges and directed him to obtain counseling. The letter was added to Mr. Mercer's personnel file, but Mr. Ahrens informed Mr. Mercer that if he complied with the terms of the discipline, the letter would be removed from his personnel file in six months.

In March of 2005, the city revisited the issue of Mr. Mercer's behavior in a closed city council meeting. The purpose of this meeting was to discuss Mr. Ahrens' performance, including his handling of Mr. Mercer. At the meeting, the council asked Mr. Ahrens whether he intended to take additional disciplinary action against Mr. Mercer because "some of the images viewed by Mr. Mercer possibly contained child pornography." In addition, the city requested an independent investigation of Mr. Mercer by the Wisconsin Department of Justice.

After the council meeting, Mr. Ahrens went to Mr. Mercer's home and told him that the city council "wanted [Mercer] gone." Mr. Mercer interpreted this to mean that he was being given a choice: he could either resign or be terminated. In order to "try to maintain some sort of employability," Mr. Mercer choose to resign, and he submitted a letter of resignation several days later.

Months later, in December of 2005, Mr. Mercer filed suit against the city, the council members, and Mr. Ahrens. Mr. Mercer's complaint raised several claims, all of which were premised on a theory that his resignation constituted a wrongful discharge by the city. Mr. Mercer argued that

his resignation was the result of an "indirect mandate" from the city council to terminate him. Mr. Mercer claimed that the city's employment policies constituted a contractual agreement regarding how he would be disciplined. He argued that under these policies, which called for progressive discipline, he could not be disciplined twice for the same conduct. Therefore, he argued that because he had received a letter of discipline for his conduct, it was a contractual violation for the city to later "rediscipline" him for the same conduct by issuing an "indirect mandate" for his termination. In response, the city argued that by voluntarily resigning, Mr. Mercer extinguished any claims of wrongdoing. The trial court agreed with the city, and granted summary judgment against Mr. Mercer. The court of appeals affirmed.

In its decision, the court of appeals discussed the flaws in Mr. Mercer's claim that his resignation constituted a wrongful discharge. The court acknowledged that under the theory of constructive discharge, if an employee is forced to resign, the resignation may be "tantamount to a termination." But the court explained that for this to be the case, there must be evidence that the employee faced "harassing behavior sufficiently severe or pervasive to alter the conditions of [his or her] employment" and that "the abusive working environment became so intolerable that [his or her] resignation qualified as a fitting response." The court found that Mr. Mercer presented no such evidence. The court emphasized the fact that Mr. Mercer resigned to avoid the impact that an involuntary termination would have on his employability. The court also noted that as the city's human resources director, Mr. Mercer should have understood the consequences of his resignation. Citing past precedent, the court explained that under Wisconsin law, "[a] resignation resulting from a choice between resigning or facing proceedings for dismissal is not tantamount to discharge by coercion." Thus, the court found that Mr. Mercer's resignation was not a constructive discharge.

— *Andy N. DeClercq*

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March 10, 2010

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Cynthia A. Van Bogaert

April 22, 2010

HIPAA

EBIA, Baltimore, MD

Cynthia A. Van Bogaert

MUNICIPAL LAW NEWSLETTER

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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 Boardman attorneys listed below who are contributing to this newsletter.

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