Municipal Case Law Update (Part 1)

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This is Part 1 of a 2-part case law update summarizing Wisconsin appellate and 7th circuit decisions affecting Wisconsin municipalities. Part 2 will be printed next month.

This case law update summarizes cases decided within the last year that affect municipalities. Cases decided by the United States Supreme Court will be covered in a separate case law update. Cases are organized by subject matter which is organized alphabetically. These case summaries are general overviews and are not a substitute for reading the actual decision.

Constitutional Law

Takings Clause – Equal Protection Clause

Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613 (7th Cir. 2016).

DECISION: The City of Milwaukee could dramatically increase the number of taxicab permits it issued without running afoul of the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.

SUMMARY: From 1992 to 2013, a Milwaukee ordinance capped the number of taxicab permits at the number issued as of January 1, 1992, and that were renewed. The City refused to issue new permits, although existing permits could be sold on the open market. This restricted market increased the value of taxicab permits substantially (as high as $150,000).

A 2013 lawsuit successfully challenged the City's permit-cap ordinance as a violation of the equal protection and substantive due process clauses of the Wisconsin Constitution. In response, Milwaukee began issuing a new permit to every qualified applicant. This diminished the profitability of existing taxi companies and the value of their existing permits.

The existing taxicab companies sued, claiming the lost profits and lost permit value were invalid takings without compensation. The Seventh Circuit upheld Milwaukee's new permitting ordinance.

The court observed that, while property can sometimes take an intangible form (e.g., patents), a taxicab permit merely grants the right to operate a taxi, not to exclude others from doing so. As such, the existing companies were not deprived of any property right when the city decided to begin issuing new permits. The city did not enter into any contract with the taxi companies to freeze permits for a certain period of time, and the companies were on notice that there was no guarantee that the ordinance would remain in force indefinitely. The court acknowledged that the city's decision to free up entry into the taxi business would reduce the revenues of individual taxicab companies, but it observed that that is simply the normal consequence of replacing a cartelized market with a competitive one.

Illinois Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594 (7th Cir. 2016).

DECISION: Municipal ordinance authorizing ride-sharing services to operate in City under different set of rules than those applicable to taxicab services did not violate the takings or equal protection clauses of the U.S. Constitution.

SUMMARY: Taxicab companies sued the city of Chicago, claiming that city ordinance allowing ride-sharing companies such as Uber and Lyft to operate in the City violated their rights under the federal takings and equal protection clauses.

The taxi companies first argued that the negative economic impact of the decision on taxi companies constituted a taking of property without compensation. The court observed that "[p]roperty" does not include a right to be free from competition. Accordingly, since the city did not take existing taxi permits from any company but merely granted other similar companies the right to compete in the same market, no property had been taken and the City had not violated the takings clause.

The taxi companies also argued that the City impermissibly discriminated against them by allowing Uber and other ride-sharing services to operate in the City without requiring them to comply with the same rules about licensing and fares as taxicabs. The court rejected this argument as well, pointing out that different products or services do not, as a matter of constitutional law, always require identical regulatory rules, so long as the differences in the regulatory schemes are not arbitrary and that the City had provided sufficient reasons for the differential treatment to justify the different regulatory schemes for taxis and ride-sharing services.

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Vagueness Doctrine

City of Oshkosh v. Kubiak, 2017 WI App 20, 374 Wis.2d 337893 N.W.2d 271.

DECISION: Use of the term "organizer" in a municipal ordinance is not unconstitutionally vague.

SUMMARY: The city of Oshkosh special-events ordinance requires an "organizer" of an event to apply for a permit and pay the city for any extraordinary services associated with that event.

Specifically, the ordinance provides that "[n]o person or entity acting as an event organizer shall set up for, hold, or conduct a Special Event … without first obtaining a … permit."

For several years defendant Kubiak applied for a permit and paid the required costs as the purported organizer of semi-annual gatherings called the Oshkosh Pub Crawl. In 2014, he did not comply and the city sued. Kubiak claimed the term "organizer" as used in the ordinance was unconstitutionally vague.

The circuit court agreed with Kubiak and dismissed the City's suit. The court of appeals reversed. The court explained that procedural due process requires that an ordinance provide fair notice and proper standards for adjudication and an ordinance is vague when it fails to do so. It noted though that civil penalty ordinances, like the City's, are reviewed more deferentially than criminal statutes because any lack of clarity would yield far less severe consequences.

The court concluded that "people of ordinary intelligence can read and sufficiently understand the requirements of the Ordinance. To 'organize' means to 'arrange by systematic planning and coordination of individual effort.' Organize, Webster's Third New International Dictionary 1590 (1993). Other standard definitions incorporate the same concept of planning, structure, and coordination…. The Ordinance confirms this definition. It provides that only those who 'set up for, hold, or conduct a Special Event' are required to apply for a permit and pay for 'Extraordinary Services.' By describing the conduct of an 'organizer,' the Ordinance restricts its applicability to those who take an active role in the Special Event, not merely those who encourage others to attend." Accordingly, the court concluded that the term "organizer" as used in the ordinance was not unconstitutionally vague and reversed the circuit court decision dismissing the City's suit.

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Contracts

Benson v. City of Madison, 2017 WI 65.

DECISION: City's contracts with golf professionals who ran City-owned golf courses were "dealerships" under Wisconsin's Fair Dealership Law and could only be terminated for cause.

SUMMARY: In a 5-2 decision, the Wisconsin Supreme Court concluded that four golf professionals can maintain their lawsuit against the city of Madison for $1.8 million in damages over claims their contracts with the city were terminated in 2012 without good cause. The Court's majority concluded that the golf pros' contracts were "dealerships" under Wisconsin's Fair Dealership Law which, like similar laws across the country, protects the economic interests of "dealers" against unfair treatment or practices by "grantors," those who grant dealerships and who might have superior economic or bargaining powers. The law applies to arrangements in which there is a "community of interest" between the two parties, such as a shared financial interest or coordination of activities. This is the first decision to extend the law to relationships between private contractors and municipalities.

The golf pros claimed that their contracts with the city, sale of goods associated with the city, and shared financial interests in operating the courses created a dealership under the law. The City argued that it was not a "grantor" under the law and immune from liability under Wisconsin law.

Two lower courts agreed with the City and ruled that a municipality is not subject to the Fair Dealership Law because a municipality does not fall within the law's definition of a grantor as "a person." The Supreme Court's majority disagreed and stated that the law's definition of a "person" included a corporation, and the city is a "municipal corporation." The majority opinion also disagreed with the court of appeals decision that the pros weren't selling or distributing city goods or services. The majority reasoned that the golfers made reservations to play one of the city golf courses through the golf pros or their attendants and paid their greens fees through them. The city also provided the equipment necessary to process payments, and the golf pros remitted those revenues to the city.

"In this way, the golf pros sold access to city courses," Justice Ziegler wrote in the majority opinion. She also wrote that the agreement between the pros and the city constituted "a community of interest" because there was a shared financial interest in the operation of the dealership. "It is more than fair to say that the city's power to terminate, cancel, or not renew the relationship(s) (was) a substantial threat to the economic health of the (golf pros)," Ziegler wrote.

Justice Shirley Abrahamson dissented and wrote that the decision establishes "a far-reaching precedent" that fundamentally changes the relationship between municipalities and contractors. "Municipalities will be limited with regard to managing their finances and their contracts," Abrahamson wrote. Justice Abrahamson observed that the state Legislature's instructions for determining whether a statute governs a municipality make clear that the Fair Dealership Law should not be interpreted as applying to a city. She noted that included among the specific powers conferred on a city by the Legislature is the management and control of city property.

The majority opinion "ought to interpret the Dealership Law as not limiting the powers of the city of Madison because nothing in the Fair Dealership Law expressly limits the city of Madison in exercising management over its golf courses or expressly limits the city's power to act for the good order of the city, its commercial benefit, or for the health, safety, and welfare of the public with regard to its golf courses," Abrahamson stated. Justice Ann Walsh Bradley also disagreed with the majority opinion and dissented.

Employment

Vidmar v. Milwaukee City Bd. of Fire Police Comm'rs., 2016 WI App 93, 372 Wis.2d 701, 889 N.W.2d 443.

DECISION: The Milwaukee City Board of Fire and Police Commissioners proceeded on a correct theory of law in upholding the discharge of a Milwaukee police officer on grounds that he lacked capacity to enforce laws following the officer filing a false report and notice from prosecutors that they would not call the officer as a prosecution witness.

SUMMARY: The Milwaukee Police Chief discharged Officer Vidmar from employment for violating three Milwaukee Police Department (MPD) rules and procedures. The chief found that Vidmar failed to obey the laws in effect in Wisconsin, failed to be forthright and candid on an official department report, and lacked the capacity to enforce federal and state laws and city ordinances. The charges related to Vidmar allegedly filing an official MPD report under false pretenses to obtain personal possession of a dirt bike that had been held by the MPD as unclaimed property. Before Vidmar was discharged, the MPD had received notices from the Milwaukee County District Attorney's Office, the local U.S. Attorney's Office, and the Milwaukee City Attorney's Office that indicated that these offices would no longer be able to use Vidmar as a witness in their cases because of his misconduct.

Vidmar appealed his discharge to the Milwaukee City Board of Fire and Police

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Commissioners. The board dismissed the charge of failing to obey state laws, reduced the penalty for filing a false police report to a 60-day suspension, and sustained the discharge for lacking the capacity to enforce federal, state, and municipal laws because of Vidmar's inability to testify as a prosecution witness.

Vidmar pursued both a statutory appeal and *certiorari* review in the circuit court, which affirmed the board's decision to discharge him. Among the issues at the court of appeals was whether, as it relates to *certiorari* review, the board proceeded on a correct theory of law in concluding that Vidmar violated the MPD rule dealing with his capacity to enforce the law. The court of appeals ruled it had. The court rejected Vidmar's argument that he can still function as a police officer by working on administrative duties. The board concluded that "'enforcing the law' really implies working in the field – patrol, investigation, arrests, and the like" and that Vidmar's inability to testify rendered him unable, as a practical matter, to enforce the law."

The court agreed with the board that the capacity to enforce the laws means the capacity to engage in the full spectrum of responsibilities that an officer may be called on to undertake. The court said,

> One of the most crucial of those responsibilities is giving testimony in court that is worthy of belief. If an officer's capacity to work in the field, which includes giving credible testimony in court, has been permanently compromised – as is the case here with Vidmar – then his ability to engage in the full spectrum of the responsibilities of a police officer has also been compromised. In such a scenario, the officer does not have the capacity to enforce the laws. Accordingly, we conclude that the Board proceeded on a correct theory of law in concluding that Vidmar violated [the] charge [alleging that he lacked the capacity to enforce the law].

Sexual Discrimination

Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. en banc), *rev'g* 830 F.3d 698.

DECISION: A public employee may bring sexual orientation discrimination claims under Title VII.

SUMMARY: Kimberly Hively is openly lesbian and taught part time at Ivy Tech Community College. She applied for at least six full-time positions between 2009 and 2014 and was not offered any of them. In July 2014, her part-time teaching contract was not renewed. She believed her sexual orientation was the reason for her denials and non-renewal and sued.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of a person's "race, color, religion, sex, or national origin." However, the Seventh Circuit had long held that sexual orientation discrimination claims weren't cognizable under Title VII. The court decided to revisit this conclusion "in light of developments at the Supreme Court extending over two decades," including *Obergefell v. Hodges* (2015), which granted same-sex couples a constitutional right to marry.

Hively offered two theories for why "sex discrimination" includes discrimination on the basis of sexual orientation. The court's en banc panel found both of them persuasive.

First, the court considered the "comparative method" in which it asked if everything else in the situation was constant except Hively's sex would she have been treated the same way. Hively alleged that if she had been a man romantically involved with a woman she would have been promoted and not fired and thus, she was disadvantaged *because she is a woman*. The court noted that the U.S. Supreme Court has long recognized that sex stereotyping is a form of sex discrimination. "Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."

Second, in *Loving v. Virginia* (1967) the Supreme Court held that bans on interracial marriage are unconstitutional. According to the Seventh Circuit per *Loving*, "[i]t is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."

This case has immediate significance in Wisconsin which, along with Indiana and Illinois, is within the Seventh Circuit Court of Appeals' jurisdiction and has significance nationwide because it creates a split in the law between circuits which means the U.S. Supreme Court will likely review the case.

Home Rule

Black v. City of Milwaukee, 2016 WI 47, 369 Wis.2d 272, 882 N.W.2d 333.

DECISION: Wisconsin Stat. § 66.0502 prohibiting municipal employee residency requirements is uniform on its face and satisfies the home rule uniformity requirement under Article XI, section 3(1) of the Wisconsin Constitution. Therefore, the statute trumps the City of Milwaukee's 1938 charter ordinance requiring that employees reside in the City.

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SUMMARY: In 1938, the City of Milwaukee adopted a charter ordinance that required city employees to live in the City. In 2013, the Legislature enacted Wis. Stat. sec. 66.0502, which prohibits cities, villages, towns, counties, and school districts from requiring their employees to reside within their jurisdictional limits. A City union challenged the City's continued enforcement of its 1938 residency ordinance.

The City argued that the residency ordinance was valid under Article XI, section 3(1) of the Wisconsin Constitution, the "home rule amendment," which gives cities and villages the power to determine local affairs and government subject only to the constitution and to legislative enactments of statewide concern that uniformly affect every city or village. But, the Wisconsin Supreme Court has held that "a legislative enactment can trump a city charter ordinance *either* (1) when the enactment addresses a matter of statewide concern, *or* (2) when the enactment with uniformity affects every city or village." The City asserted that 66.0502 did not satisfy the uniformity requirement because not all cities and villages in Wisconsin had a residency requirement.

The Court rejected the City's uniformity argument. The Court focused on whether Wis. Stat. sec. 66.0502 uniformly affects every city and village. It reasoned that a statute satisfies the home rule amendment's uniformity requirement "if it is, on its face, uniformly applicable to every city or village."

The Court explained that "the Legislature banned residency requirements throughout Wisconsin by enacting Wis. Stat. sec. 66.0502. We conclude that Wis. Stat. sec. 66.0502 (consistent with the home rule amendment) uniformly affects every city or village. We so conclude because the plain language of Wis. Stat. sec. 66.0502 demonstrates its uniform effect: Wis. Stat. sec. 66.0502 says that 'no local governmental unit' may have a residency requirement, and it goes on to define 'local governmental unit' to mean '*any* city, village, town, county, or school district' in the State. Wis. Stat. sec. 66.0502(2)-(3) (emphasis added). Consequently, Wis. Stat. sec. 66.0502 uniformly bans residency requirements, and in so doing, it satisfies the home rule amendment's uniformity requirement." The Court concluded that 66.0502 barred the City from enforcing its residency requirement.

Liability/Immunity

Governmental Immunity – Private Contractors

Melchert v. Pro Electric Contractors, 2017 WI 30, 374 Wis.2d 439, 892 N.W.2d 710.

DECISION: A private contractor was entitled to governmental immunity for damage done while carrying out the government's specifications.

SUMMARY: Pro Electric severed a sewer lateral while working on a governmental contract, causing flooding damage in the neighborhood. Several property owners sued Pro Electric, which admitted causing the damage but also asserted that it was carrying out the Wisconsin Department of Transportation's (DOT's) construction design.

The circuit court granted summary judgment in favor of Pro Electric on grounds of governmental immunity. The court of appeals affirmed. The Wisconsin Supreme Court also affirmed.

The Court concluded that "Pro Electric is immune from liability for severing the sewer lateral, because the DOT Project Plan provided reasonably precise specifications for Pro Electric's augering, Pro Electric severed the sewer lateral by adhering to those specifications, and DOT adopted the specifications in the exercise of its legislative, quasi-legislative, judicial, or quasi-judicial functions."

The Court explained that "DOT – not Pro Electric – made the decision to auger that particular hole in that particular place, and all of the evidence suggests that Pro Electric severed the sewer lateral not because of the manner in which Pro Electric chose to do the augering, but simply because the Project Plan directed Pro Electric as to exactly where and how to auger."

A second allegation accused Pro Electric of backfilling its excavation without inspecting the sewer lateral for damages so that repairs could be made. The Court acknowledged that Pro Electric was not acting as the DOT's agent and thus could not assert governmental immunity for this conduct. But, it noted that the trial court properly awarded summary judgment to Pro Electric because there was no material issue of fact showing that the contractor had violated its statutory duties.

Justice Abrahamson concurred. She concluded that the court of appeals had correctly decided the case and the supreme court should have dismissed the petition as improvidently granted. She explained that two of the issues involved well-settled law on governmental immunity and a third issue, relating to "Digger's Hotline" statutes, was resolved on summary judgment. She cautioned that any wholesale reconsideration of the governmental immunity cases was not before the court in this case.

Justice Rebecca G. Bradley, joined by Justice Kelly, dissented strongly. They asserted that the majority opinion

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"perpetuates a non-textual interpretation of sec. 893.80(4)" that requires reconsideration of the entire line of cases. The current cases, they alleged, work a manifestly improper "judicial distortion" of a much more limited governmental immunity they see in the plain language of 893.80(4).

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