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Municipal Law

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management has been sharply debated. Critics maintain that the state should stay out of the garbage business. Local governments lack sufficient funds and technical expertise to deal with this ever-increasing problem. Establishment of the Solid Waste Authority will facilitate cooperation with and aid to municipalities by recognizing solid waste management as a unique and serious problem.

DONALD J. WALL

MUNICIPAL LAW

I. CLAIMS AGAINST MUNICIPALITIES

A. Notice of Counterclaim

The Wisconsin court ruled in *City of Milwaukee v. Milwaukee Civic Developments, Inc.*[1] that section 62.25(1)[2] of the Wisconsin Statutes applies to counterclaims filed against a city when the city has instituted the original action. Section 62.25(1) generally requires filing a notice of claim with the city council as a condition precedent to recovery on the claim. Subsection (a) states:

> (a) No action shall be maintained against a city upon a claim of any kind until the claimant shall first present his claim to the council and it is disallowed in whole or in part. Failure of the council to pass upon the claim within 90 days after presentation is a disallowance.

The City of Milwaukee had commenced an action against defendant Milwaukee Civic Developments, Inc. The defendant interposed several counterclaims, but did not present the counterclaims to the city council. The city asserted as a defense that the condition of compliance with section 62.25(1) had not been met. The circuit court upheld the city's position and dismissed the counterclaim.

The supreme court affirmed. The defendant-appellant argued that applying section 62.25(1) to counterclaims was not in accord with the purpose of the statute, citing *Patterman v. City of Whitewater*,[3] which had stated that the claim presenta-

1. 71 Wis. 2d 647, 239 N.W.2d 44 (1976).
2. WIS. STAT. § 62.25(1) (1973).
3. 32 Wis. 2d 350, 145 N.W.2d 705 (1966).

tion requirement was intended to allow the city a chance to settle claims. Once the action had been commenced, appellant contended, this purpose was no longer served. The court's response was that filing a claim also served to alert the city to upcoming expenses, whether of settlement or litigation, so a notice of counterclaim requirement served the purpose of facilitating city budget planning.

The court also rejected the appellant's argument that there was case law precedent for not requiring notice of claim filing for counterclaims. The appellant had cited two related cases, both entitled *State v. City of Milwaukee,*[4] in which the state had failed to present the claim to the city council. The court in the first *State v. City of Milwaukee* case held the claim statute inapplicable to the state. The second case allocated the proportionate shares of the city and county in the judgment obtained by the state in the first case. As to any filing requirement, the court in the second case said that once an action was begun the notice of claim requirement did not apply. The court in *Milwaukee Civic Developments* held that this language was restricted to the unique facts in the *State v. City of Milwaukee* cases, and that it would not be applied as precedent in the case of a conventional counterclaim.

B. Tort Claims

The plaintiff in *Binder v. City of Madison*[5] brought a tort action against the Area Vocational, Technical and Adult Education District No. 4 (VTAE District), but failed to notify the district of his claim. There is no statute expressly requiring filing of a notice of claim against a VTAE district. The district moved for summary judgment on the grounds that section 118.26,[6] which requires notice of a claim against a "school district," applied to VTAE districts. The court agreed.

In holding section 118.26 applicable to VTAE districts, the court found no indication of a legislative intent to exclude the districts from the notice requirement that had applied under section 118.26 when the now independent VTAE districts[7] were under local school district control.

4. 158 Wis. 564, 149 N.W. 579 (1914); 145 Wis. 131, 129 N.W. 1101 (1911).
5. 72 Wis. 2d 613, 241 N.W.2d 613 (1976).
6. WIS. STAT. § 118.26 (1973).
7. WIS. STAT. § 41.155 (1965).

II. ANNEXATION OF TOWN TERRITORY

In a series of recent decisions the Wisconsin Supreme Court has developed the concept that in cases of municipal annexation of town territory under section 66.021 the "rule of reason" is satisfied if a reasonable need for the annexed territory is shown on the part of the city.[9] In *Town of Lafayette v. City of Chippewa Falls,*[10] the court seems to have expanded even this rule to provide that the "rule of reason" may be met if a need for annexation on the part of the annexed territory is proven, even absent any showing of need by the city.

All the territory involved in *Town of Lafayette* was state-owned and used as the site of a mental institution. Although the state and a majority of the electors of the area petitioned for annexation, it was undisputed that the original suggestion for annexation had come from the city which could provide necessary services that the town could not provide. However, despite its interest in annexing the area, the city could show none of the factors which the court has held to show need for annexation by the city.[11]

The issue, therefore, was whether a need for annexation by the territory to be annexed was sufficient in itself to satisfy the "rule of reason." The court held that, at least under the circumstances of *Town of Lafayette,* it was sufficient. The opinion, however, emphasized that the present situation was unique in that the nature of the mental institution property involved did not and never would lend itself to the types of benefits traditionally held to meet the city need requirement, whereas the benefits to the state would be substantial. In future decisions, the court will have the option of expanding the *Town of Lafayette* rule to include conventional annexation sit-

8. WIS. STAT. § 66.021 (1973).

9. *See* Town of Waukesha v. City of Waukesha, 58 Wis. 2d 525, 206 N.W.2d 585 (1973); Town of Waukechon v. City of Shawano, 53 Wis. 2d 593, 193 N.W.2d 661 (1972); City of Beloit v. Town of Beloit, 47 Wis. 2d 377, 177 N.W.2d 361 (1970); Village of Elmwood Park v. City of Racine, 29 Wis. 2d 400, 139 N.W.2d 66 (1966).

10. 70 Wis. 2d 610, 235 N.W.2d 435 (1975).

11. These were first set out in Village of Elmwood Park v. City of Racine, 29 Wis. 2d at 411, 139 N.W.2d at 71, quoting the trial court's memorandum decision. The factors included: a substantial increase in population; a need for additional area for construction of homes, mercantile, manufacturing or industrial establishments; a need for additional land area to accommodate the present or reasonably anticipated future growth of the municipality; the extension of police, fire, sanitary protection or other municipal services to substantial numbers of residents or adjacent areas.

uations or of restricting it either to cases involving state-owned property or to situations where the circumstances are such that the likelihood of present or future need by the city is negligible but the benefits to the territory proposed for annexation are great.

Nonetheless, it is clear that the court has liberalized the "rule of reason" requirement by recognizing at least one instance in which it is unnecessary to find need by the city for the proposed annexation. The court pointed out,[12] that although previous determinations of whether the "rule of reason" was satisfied had considered the needs and wishes of the residents of the territory to be annexed, this had only been in addition to a showing of need by the city, and not as the determinative factor.[13]

III. Municipal Contracts

Section 66.29(5) of the statutes deals with the circumstances under which a bidder on a municipal public works contract may recover his deposit after refusal to perform the contract because of errors in his bid. In *Nelson, Inc. v. Sewerage Commission*[14] the court clarified this section respecting when a bidder must give notice of error and the need for a bidder's reasonable diligence in checking for errors.

Over a period of approximately two weeks after the plaintiff construction company in *Nelson* had submitted its bid on a sewerage construction project to the defendant commission, it discovered five errors in its bid. It was only upon discovery of the fifth error that the plaintiff decided that the cumulative effect of the errors was so great that it could not perform the contract, and thus immediately notified the commissions of these errors. Section 66.29(5) specifically requires that:

> In case any [bidder] shall make an error or omission or mistake and shall discover the same after the bids are opened, he shall immediately and without delay give written notice and make known the fact of such mistake, omission or error which has been committed [to the municipal body] . . . .[16]

12. 70 Wis. 2d at 629, 235 N.W.2d at 445.
13. Town of Waukesha v. City of Waukesha, 58 Wis. 2d 525, 206 N.W.2d 585 (1973).
14. 72 Wis. 2d 400, 241 N.W.2d 390 (1976).
15. Wis. Stat. § 66.29(5) (1973).
16. *Id.*

The Commission argued that the company had failed to give proper notice because it waited until the fifth error had been discovered, rather than notifying the commission on discovery of each separate error. The plaintiff countered that the statute should be interpreted to require notice only if the bidder discovers an error which will prevent him from performing the contract. The court agreed, stating, "The obligation to report errors and omissions 'immediately and without delay' arises upon the discovery of a mistake which, in the judgment of the bidder, would preclude the performance of the contract as bid."[17]

The basis of the decision was that it was consistent with the common law equitable rule permitting withdrawal of a bid because of a material mistake not due to the bidder's own failure to exercise ordinary care. The court held that section 66.29(5) was intended to be a codification of the common law rule, with some limitations.

The commission also argued that although the statute expressly requires immediate notice only on discovery of an error, there is an implied requirement of reasonable diligence in checking for errors. The court found that although the plaintiff had exercised such diligence, there was an implied standard of diligence, premised on the intent of the notice requirement, to minimize prejudice to the public body as well as to permit the bidder to recover his deposit. This, the court noted, could be effectuated only if the bidder was obliged to make an effort to find errors in his bid as soon as possible.

IV. Capacity of Public Agency to Sue and be Sued

As numerous governmental functions have been delegated to legislatively created agencies, boards, and commissions, the supreme court has increasingly been called upon to determine whether these bodies have the capacity to sue or be sued.[18] Although the general rule has been that such capacity does not exist absent express statutory authority,[19] necessity has forced

17. 72 Wis. 2d at 409-10, 241 N.W.2d at 396.

18. *See* Joint School Dist. No. 1 v. Wisconsin Rapids Education Ass'n, 70 Wis. 2d 292, 234 N.W.2d 289 (1975); Flood v. Board of Education, 69 Wis. 2d 184, 230 N.W.2d 711 (1975).

19. State *ex rel.* Board of Education v. City of Racine, 205 Wis. 389, 236 N.W. 553 (1931).

the court to find exceptions to the rule.[20] In the past, the court has looked to the specific facts of each case to find grounds for capacity to sue or be sued. In *Racine Fire and Police Commission v. Stanfield,*[21] the court attempted to formulate a general rule defining the circumstances under which a legislatively created body could sue or be sued in the absence of express statutory authority.

The case arose when the commission terminated four City of Racine police officers. Over the objections of the commission, the terminated employees attempted to set up an arbitration panel. The commission, which contended that it had exclusive authority over employment of police officers, sought an injunction restraining the arbitration. The defendants, the four police officers and one of the named arbitrators, demurred on the grounds that the commission lacked standing to sue. Generalizing from earlier cases, the court said:

> The basis for the rule . . . appears to be that a particular power or duty conferred by statute may, of necessity, require the additional power to maintain or defend an action arising out of that power or duty. This is not to say that a body which is given the power to sue in one instance possesses that power for all purposes and all cases. It is only where the capacity to sue or be sued is necessary to carry out an express power or to perform an express duty, or where the action arises out of the performance of statutory powers or obligations that the authority to sue or be sued exists.[22]

Applying this rule to the facts of the case, the court noted that police and fire commissions have broad statutory powers in regard to the employment of police officers.[23] Because the question of whether these powers preempt arbitration was specifically raised by the commission's injunction for suit, the court held that the action was one arising "out of the performance of statutory powers or obligations" and thus that the commission had the capacity to sue in this situation.

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20. Joint School Dist. No. 1 v. Wisconsin Rapids Education Ass'n, 70 Wis. 2d 292, 234 N.W.2d 289 (1975); Flood v. Board of Education, 69 Wis. 2d 184, 230 N.W.2d 711 (1975).

21. 70 Wis. 2d 395, 234 N.W.2d 307 (1975).

22. *Id.* at 401-02, 234 N.W.2d at 311.

23. WIS. STAT. §§ 62.13(5), (5m) (1973).

V. Due Process in Removal Proceedings

In *State ex rel. DeLuca v. Common Council,*[24] the court held that a city officer subject to removal for cause is entitled to fourteenth amendment due process rights.[25] The court based its opinion on United States Supreme Court decisions holding that a state employee entitled to continued employment has a property interest in his employment sufficient to invoke due process rights.[26] Since the decision was based on the fact that the officer, a city clerk, was an employee entitled to retain his job unless there was cause for removal, the question remains whether a public official who is not also a public employee enjoys a similar property right to his office.

Having decided that due process was required, the court then considered whether the officer had been denied due process since the same members of the common council had been involved in both the investigatory and the adjudicative portions of the removal proceedings. Under section 17.12(1)(a),[27] the common council is empowered to remove elected city officers for cause. Several of the common council members had been involved in preliminary investigations leading to the institution of removal proceedings, as well as having participated in the removal hearing itself. The court found controlling the rule of the recent United States Supreme Court case, *Withrow v. Larkin,*[28] which arose in Wisconsin. *Larkin* held that the mere fact that the same body has participated in both phases of judicial or quasi-judicial proceedings does not violate due process.

The Wisconsin court did find, however, that the officer's due process rights had been violated in one respect. At the opening of the hearing before the common council, the officer by his attorney had requested from the council copies of any statements in its possession of witnesses who would be called in support of the charges. The request was denied. The court held that due process in this case required production of the statements for use in cross-examination. This is an extension of the rule in criminal cases laid down in *Jencks v. United*

24. 72 Wis. 2d 672, 242 N.W.2d 689 (1976).

25. U.S. Const. amend. XIV.

26. Perry v. Sinderman, 408 U.S. 593 (1972); Wieman v. Updegraff, 344 U.S. 183 (1952).

27. Wis. Stat. § 17.12(1)(a) (1973).

28. 421 U.S. 35 (1975).

States,[29] and adopted by Wisconsin in *State v. Richards*.[30] Since the court did not state a general rule as to when this rule applies outside of criminal cases, it is impossible to predict how widely it might be applied. The court went on to hold, however, that the officer had the burden of proving that he was prejudiced by the failure to produce the statements in order to establish a denial of due process and that no prejudice was shown on the record.

MARY F. WYANT

PROPERTY

I. LANDLORD - TENANT

The legal rights of tenants were expanded this term in *College Mobile Home Park and Sales, Inc. v. Hoffman*,[1] in which the court held that exculpatory clauses in leases may under some circumstances be invalid. The court refused to set any absolute rule stating that certain categories of exculpatory clauses are void, preferring to develop the rule by case-by-case application.

College Mobile Home began as an eviction action commenced by the landlord for nonpayment of rent. The tenant counterclaimed for personal injury and other damage allegedly caused by the landlord's failure to maintain adequate heating. The landlord moved for summary judgment on the counterclaim based on an exculpatory agreement in the lease releasing the landlord from liability for property damage and personal injury. The trial court dismissed the motion on the grounds that the clause should not be enforced and the supreme court affirmed.

The court first stated that although exculpatory clauses are generally valid on the principle of freedom of contract, they are usually strictly construed in favor of the tenant. It then noted that several states have either legislatively prohibited such clauses or judicially held them unenforceable as against public

29. 353 U.S. 657 (1957).

30. 21 Wis. 2d 622, 124 N.W.2d 684 (1963).

1. 72 Wis. 2d 514, 241 N.W.2d 174 (1976).