The court next considered the amount of the fine that may be imposed on an unincorporated association. Looking to the civil contempt statutes, it held that section 295.14[72] required the fine in this case to be limited to two hundred fifty dollars plus costs and expenses, since there was no showing of actual damages. The court, however, opened the door to the possibility that in an appropriate case, the dollar limit set by section 295.14 could be found to be an invalid restriction on the inherent power of a court to punish for contempt. It was stated that the legislature may regulate the power to punish for contempt but "may not diminish it so as to render it ineffectual."[73] The court ruled that to exceed the statutory maximum, there must be a specific trial court finding that the contempt power would be rendered ineffectual. Since there was no such finding in *Kenosha Unified,* the statutory limit precluded imposition of a greater fine.

MARY F. WYANT

MISCELLANEOUS

1. OPEN MEETING LAW

In *State ex rel. Lynch v. Conta,*[1] the Wisconsin Supreme Court upheld the applicability of Wisconsin's open meeting law[2] to closed sessions of a state legislative committee where it was questionable whether those members in attendance, all of whom were from a single political party, acted in the capacity of a political caucus or a legislative body. This case was an original action for declaratory relief[3] challenging the legality of

72. WIS. STAT. § 295.14 (1973):
If an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss. Where no such actual loss or injury has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings.
73. 70 Wis. 2d at 335, 234 N.W.2d at 316.

1. 71 Wis. 2d 662, 239 N.W.2d 313 (1976).
2. WIS. STAT. § 66.77 (1973).
3. The court discussed at some length the propriety of rendering a declaratory

two secret meetings conducted by members of the Wisconsin Legislature's Joint Committee on Finance.

This committee was composed of fourteen senators and representatives—eleven of whom were Democrats, the remainder being Republicans. The purpose of the committee was to recommend a budget bill to the legislature governing the appropriation of funds to state departments. To gather information to accomplish this responsibility, the committee held numerous public hearings receiving public testimony on funding and department allocation. Except for the two meetings in question here, all executive sessions had been preceded by full notice to the public, committee members, and other interested departmental agencies and groups.

The bill underwent several changes resulting in an amended version (ultimately being passed by both houses). While the bill was still before the committee the eleven Democrats held a private meeting, no notice being given to the minority Republican members, nor to the public. Members of the legislative fiscal bureau attended and reported on the finances of certain state agencies. The recollection of those committee members in attendance raised a question as to what actually transpired — some recalled that just questioning of the reporting bureau occurred while others recalled partisan views also being exchanged. At a second meeting the only persons in attendance were seven Democrats, members of the legislative finance bureau and an administrative department employee. It was stipulated by those in attendance at this meeting that their intent was to discuss and review party policy and strategy relevant to the items under discussion.

The general mandate of Wisconsin's open meeting law states that "[n]o discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in a

judgment. The opinion noted that those in the position of the district attorney-petitioner have an adequate forum in the normal enforcement action for the proposed construction of a law, while it is those without such recourse who must rely upon the declaratory judgment. The court, however, held that because the parties were, in fact, adversaries and since the respondents could have brought this suit as petitioners and did not protest the converse form, the suit was not dismissed. This was done although the court was cognizant of the generally accepted rule that a proper case for a declaratory judgment concerning a penal law is presented only by the request of the party threatened by application of the sanctions of the law involved.

closed session"[4] except under certain specified circumstances.[5] The question asked of the court was under what circumstances do members of the state legislature and its various committees fall within the scope of the open meeting law. The court answered that the law applied at the point of bringing the governmental body to its collective existence such that "the body is vested with authority, power, duties or responsibilities not vested in the individual members."[6]

The court sought some method to reach those members of a governmental body who would fail to follow the formalities of convening a competent body. This problem was addressed by the legislature in the preamble to the law: "The intent of this section is that the term 'meeting' or 'session' as used in this section shall not apply to any social or chance gathering or conference *not designed to avoid this section.*"[7] The court recognized the intent of the legislature to extend the ban on secrecy to more than formal metings convened for the transaction of official business. Otherwise, formal meetings could become merely a ceremonial acceptance of secret decisions. At the same time, the court warned that the imposition of the open session requirements on all government business discussions between at least two members of the same body would seriously impede the preliminary effort involved in government action and thus be incompatible with the necessary conduct of governmental affairs and the transaction of governmental business.[8]

The court took a liberal view in determining what circumstances required compliance with the open meeting mandate. The open meeting law was held applicable to members of a governmental body in three situations: (1) when the full mem-

4. WIS. STAT. § 66.77(3) (1973).

5. Eight exceptions have been enumerated in § 66.77(4).

6. WIS. STAT. § 66.77(2)(b) (1973). *See also* WIS. STAT. § 66.77(3) (1973).

7. WIS. STAT. § 66.77(1) (1973) (emphasis added).

8. 71 Wis. 2d at 689, 239 N.W.2d at 332. A full reading of § 66.77 (1) suggests such an admonition:

> **66.77 Open meetings of governmental bodies.** (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government affairs and the transaction of governmental business. The intent of this section is that the term "meeting" or "session" as used in this section shall not apply to any social or chance gathering or conference not designed to avoid this section.

bership is present; (2) when a quorum exists; and (3) when one-half the membership, a so-called "negative quorum", is present. A failure to meet the open session requirements would result in the presumption that such gatherings were intended or designed to avoid the law, though participants at these conferences might rebut the presumption by demonstrating that no evasion of the open meeting law was intended.[9]

While Justice Hansen agreed in his dissent with the court's conclusions, he felt the court did not go far enough. Given an "intent to avoid" and the ability to influence or control decisionmaking, Justice Hansen would have also proscribed meetings of less than one-half of the members of a legislative committee or governmental body.[10]

Although the court found the open meeting law applicable to the joint finance committee, the court also determined that the two meetings under consideration herein did not evade the law. The law itself provides for certain exceptions to its general open session requirement.[11] Reliance was placed upon subsection (4)(g) which provides an exemption for "partisan caucuses" of members of the state legislature. As for legislative committees, where those persons participating in a closed committee meeting belong to a single political party, their secret gathering becomes a "partisan caucus," exempted from the anti-secrecy requirements.[12] Since the two meetings challenged were attended solely by members of one political party, and no restrictions were placed on the matters that could be addressed at such caucuses, the court found the two closed sessions exempt from the purview of the open meeting law.

The conclusion that can be drawn from the court's decision is that partisan state legislative committee members may hold secret meetings in advance of the public session of such legislative committee so long as no one from another party is invited to or in attendance at the closed session.

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9. 71 Wis. 2d at 685-86, 239 N.W.2d at 330-31.

10. *Id.* at 703, 239 N.W.2d at 339. The majority itself conceded that:

> It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum.

Id. at 687, 239 N.W.2d at 331.

11. WIS. STAT. § 66.77(4) (1973).

12. 71 Wis. 2d at 692-94, 239 N.W.2d at 334.

The dissent found this possibility startling in view of Wisconsin's constitutional mandate against secrecy at any stage of the law-making process of the state legislature "except when the public welfare shall require secrecy."[13] Exceptions from such constitutional insistence upon openness may not be legislatively created or judicially upheld except where required for public welfare.

A key to the possible constitutional infirmity of a blanket exemption of "partisan caucuses" from the requirement of openness rests upon the interpretation given to the word "caucus".[14] Justice Robert Hansen, in his dissent, would not accept the court's liberal construction of the partisan caucus exemption. The gathering of members of a single party on a committee could not be for the purpose of determining the party policy for their party colleagues in the senate or assembly. Such a gathering could only discuss what a particular committee would do. The action here was confined to the committee itself, rather than broad party policy.[15] Justice Hansen would interpret the partisan caucus exemption to refer solely to the "traditional and institutionalized party caucuses composed of all members of a political party in the assembly, in the state senate, or, on occasion, in the two houses."[16] The basis for his construction lay in the fact that such a construction furthered the purpose of the open meeting law yet stayed within the bounds of the state constitution. Justice Hansen reasoned:

> If three members of a five person legislative committee can, assuming they belong to the same party, meet in secret to determine what the committee is to do when it meets in public, the exemption as to a "partisan caucus" is broadened to where public business can be transacted in secrecy. This

13. WIS. CONST. art. IV § 10:

Journals; open doors; adjournments. SECTION 10. Each house shall keep a journal of ts proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open except when the public welfare shall require secrecy. Neither house shall, without consent of the other, adjourn for more than three days.

14. An accepted and widely used dictionary defines the word thusly: "[A] closed meeting of a group of persons belonging to the same political party or faction [usually] to select candidates or to decide on policy." WEBSTER'S, SEVENTH NEW COLLEGIATE DICTIONARY, BASED ON WEBSTER'S, THIRD NEW INTERNATIONAL DICTIONARY (1967).

15. 71 Wis. 2d at 706, 239 N.W.2d at 340.

16. *Id.* at 707, 239 N.W.2d at 341.

is contrary to the constitutional mandate and purpose of the statute.[17]

One important provision of the open meeting law which the court found unnecessary to the determination of this action was the broad phraseology contained in section 66.77(3)[18] deeming "voidable" any action taken at a meeting held in violation of the open meeting requirements. The court regarded this provision of the statute as unclear, though it did state that the legislature meant only "tangible actions can be . . . voided while intangible thought processes from discussion cannot be reached . . . ."[19] The failure to construe this provision within the context of the case before it left open the questions whether the forfeiture provision of section 66.77 could be applied without attempting to rule upon whether or not "actions" taken at meetings in violation of this section were voidable and to what extent a court would interpret the term "any action."

The Wisconsin Supreme Court also considered the open meeting law in *State ex rel. Lynch v. Dancey*[20] and determined that section 66.77 did not apply to proceedings of the Wisconsin Judicial Commission. The Judicial Commission was created by the Wisconsin Supreme Court as an agency of the judicial branch[21] to handle disciplinary matters involving the state's judiciary. Confidential complaints alleging judicial misconduct or disability are received and investigated by the Commission. After formal charges are brought by the Commission against a judge, the proceedings, according to the Commission's rules, become public.

On April 18, 1975, a meeting of the Commission was convened to discuss both the complaints in a disciplinary matter and the results of the investigation as to the charges against Judge Richard Harvey, Jr. With seven of the nine Commission members present the question of the issuance of a formal com-

17. *Id.*

18. Except as provided in sub. (4), all meetings of governmental bodies shall be open sessions. No discussion of any matter shall be held and no action of any kind, formal or informal, shall be introduced, deliberated upon, or adopted by a governmental body in closed session, except as provided in sub. (4). *Any action taken at a meeting held in violation of this section shall be voidable.* (Emphasis added.)

19. 71 Wis. 2d at 680, 239 N.W.2d at 328.

20. 71 Wis. 2d 287, 238 N.W.2d 81 (1976).

21. Code of Judicial Ethics, 52 Wis. 2d vii (1972).

plaint against Judge Harvey resulted in a four-to-three affirmative vote. A public meeting was scheduled for July 25, 1975. However, on the morning of the meeting the Commission discovered a violation of rule 2(5) of the Judicial Committee Rules of Procedure which required concurrence by five members of the Commission to take valid action.[23] Prior to convening the public meeting, a secret executive session of eight members of the Judicial Commission was held to reconsider the investigation results and other disciplinary data in light of the previously issued invalid complaint. The result of this closed meeting was a valid complaint affirmed by a six-to-two vote.

The adoption of the Judicial Committee Rules of Procedure[24] was found by the court to preempt any attempt to apply the open meeting law. The rules[25] provide that following an investigation and a determination of probable cause for the filing of a formal charge or hearing, all proceedings shall be public. The court found these rules to be at least as expansive as those contained in section 66.77 and thus determined that the rules of the Commission did no violence to the public policy expressed in section 66.77(1).

Though the Wisconsin Supreme Court reached a different result as to the application of the open meeting law in *Dancey* than in *Conta,* the court did not consider its rationale contradictory. In *Dancey* the open meeting law was found inapplicable because of its conflict with the superintending power of the supreme court as expressed in the Wisconsin Constitution.[26] The Wisconsin Judicial Commission was a governmental body,[27] created by the supreme court itself under its unequivocal grant of power and superintending control over the state's judiciary. In matters of ethical supervision and maintenance of

22. In the Matter of the Promulgation of the Code of Judicial Ethics, 52 Wis. 2d vii, viii-xi (1972). *See especially,* Rules 8, 18 and 20.

23. 57 Wis. 2d vii, ix (1973).

24. 57 Wis. 2d vii (1973).

25. Rules 2 and 3, Judicial Committee Rules of Procedure, 57 Wis. 2d at viii-x.

26. 71 Wis. 2d at 294-96, 238 N.W.2d at 84. WIS. CONST. art. VII, § 3 provides:

> The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

27. For the definition of a "governmental body" *see* WIS. STAT. § 66.77(2)(c) (1973).

standards for the judiciary the power of the state supreme court is exclusive.[28] "Although duly enacted legislation is ordinarily effective as a constraint or guide on all branches of government, it cannot overpower the express or implied applications of that more fundamental law, the state constitution."[29]

Assuming, arguendo, that section 66.77 was intended to apply to proceedings of the Judicial Commission, the Wisconsin court concluded, without serious question, the conduct of the Commission's secret meeting came directly within the scope of two exceptions to the open meeting law.[30] Those exceptions deal with a governmental body's right to convene in closed session for the purpose of disciplinary matters. The matters which those exceptions exempt were the very matters considered by the Commission in its secret meeting.

II. FINANCIAL DISCLOSURE

Recently in *In re Hon. Charles Kading*[31] the Wisconsin Supreme Court was faced with the nature and scope of its supervisory control over the state judiciary. At issue was whether the supreme court had the power to adopt and enforce the Code of Judicial Ethics.[32] Special attention was directed to Rule 17,[33] which requires an annual financial report, listing the assets and liabilities of each state judge, and property owned by the judge, by his spouse or by his legal dependents. Judge Kading filed

28. 71 Wis. 2d at 295, 238 N.W.2d at 85.

29. 71 Wis. 2d at 699, 239 N.W.2d at 337.

30. WIS. STAT. § 66.77(4) (1973):

(4) A governmental body may convene in closed session for purposes of:

. . .

(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

. . .

(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

. . .

31. 70 Wis. 2d 508, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975).

32. The Code of Judicial Ethics was adopted on November 14, 1967. *In re* Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 153 N.W.2d 873, 155 N.W.2d 565 (1967).

33. The code was amended by order of the Wisconsin Supreme Court on June 28, 1974, in order to add Rule 17. In the Matter of the Amendment of Code of Judicial Ethics, 63 Wis. 2d vii (1974).

his financial report and completed all items with the exception of a disclosure of assets. In its place Judge Kading indicated that he declined to furnish this information, but if he was assigned a case in which he might be prejudiced because of assets owned by himself or his family, his situation would be fully disclosed. The supreme court directed the Judicial Commission to investigate. A formal determination by the Commission found that Judge Kading had not filed a completed financial report and this constituted a violation of Rule 17. The commission further recommended that the supreme court take appropriate measures to insure compliance. The court sought compliance from Judge Kading but he still refused based on a belief that Rule 17 was unconstitutional. The supreme court subsequently ordered a hearing in which the court found it had authority to adopt and enforce the Code of Judicial Ethics and that Rule 17 was valid against all constitutional challenges.

Following a review of prior judicial statements concerning inherent judicial power, the supreme court declared, "The function of the judiciary is the administration of justice, and this court, as the supreme court within a statewide system of courts, has an inherent power to adopt those statewide measures which are absolutely essential to the due administration of justice in the state."[34] The court concluded that the promulgations of the Code of Judicial Ethics with Rule 17 was such a measure.

An additional source of authority for the court's power was implied from the constitutional grant of supervisory control contained in Article VII, section 3 of the Wisconsin Constitution.[35] The court stated:

> This power of superintending control is "unlimited in extent . . . undefined in character . . . [and] unsupplied with means and instrumentalities." That this is "a clear, unequivocal grant of power" has been recognized from the earliest days of Wisconsin law. Mr. Justice ROUJET MARSHALL, after a painstaking survey of this power concluded in 1908 that it is "not limited other than by the necessities of justice" and that it necessarily includes "all. . .means applicable thereto and all power necessary to make such. . .means fully acceptable for the purpose." The superintending power is as broad

34. 70 Wis. 2d at 518, 235 N.W.2d at 413.

35. See note 26 *supra*.

> and as flexible as necessary to insure the due administration of justice in the courts of this state.[36]

The power to regulate judges in their judicial role was a small logistic step from the constitutional grant of power over all inferior courts and the power to regulate attorneys in the practice of law.[37] The court held that it possessed this additional power as part of an ongoing, continuing supervision in response to changing needs and circumstances.

Erosion of confidence and respect for public officials were factors cited to support the adoption of Rule 17 as a reasonable response by the court to the maintenance and enhancement of public confidence in the integrity of the courts of this state.[38] Though the dissent had agreed to the desirability of Rule 17, it criticized the extent to which the majority went beyond " 'the ambit of the power of [the supreme court] to promulgate.' "[39] Charging the court with legislating in promulgating Rule 17, the dissent stated the majority's purpose was to accomplish indirectly what the constitution says it may not do directly through the use of the sanctions of censure, reprimand and contempt.

No explicit constitutional barrier exists for the imposition of the lesser sanctions of censure, contempt and suspension, though constitutional provisions for the removal[40] of a sitting judge require that he be removed by the constitutional method. In *Kading,* the Wisconsin court cited other jurisdictions which had held that the state supreme court could impose sanctions short of removal though there was a constitutional provision vesting in the legislature the power to remove judges.[41] The Wisconsin Supreme Court noted that in each case the court involved based the decision upon "its responsibility as a constitutionally charged superintendent and upon the proposition that it was unsound jurisprudence to refuse to exercise judicial

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36. 70 Wis. 2d at 519-20, 235 N.W.2d at 414 (footnotes omitted).

37. *In re* Integration of Bar, 273 Wis. 281, 77 N.W.2d 602, 79 N.W.2d 441; *In re* Integration of Bar, 249 Wis. 523, 25 N.W.2d 500 (1946).

38. 70 Wis. 2d at 523-24, 235 N.W.2d at 416.

39. *Id.* 2d at 543, 235 N.W.2d at 426.

40. The constitutional means of removal are impeachment (WIS. CONST. art. VII, § 1), address (WIS. CONST. art. VII, § 13), and recall (WIS. CONST. art. XIII, § 12).

41. The court noted especially *In re* Mussman, 112 N.H. 99, ____, 289 A. 403, 405-06 (1972) and Ransford v. Graham, 374 Mich. 104, ____, 131 N.W.2d 201, 202 (1964).

power where there was an established need for it and no explicit constitutional barrier to its exercise."[42]

Rule 17 was further challenged by Judge Kading as an unconstitutionally overbroad intrusion into his private economic affairs. The court concluded that "it is extremely doubtful that a public official has a fundamental constitutional right to economic privacy," because the protected zone of privacy had been limited to intimate personal and familial matters.[43] Also cited was the higher degree of scrutiny and exposure expected of a public official as compared to a purely private individual.[44] Nor was Rule 17 found overbroad in requiring the disclosure of all assets. An objective scheme of relevant and nonrelevant judicial assets was deemed impossible.[45] The limiting provisions of Rule 17 also precluded the court from finding the rule suffered from overbreath.[46] The weight of authority[47] forced the court's conclusion that full financial disclosure laws for public officials were not unconstitutionally overbroad.[48]

III. ENVIRONMENTAL LAW

The 1973 State legislature created the Wisconsin Solid Waste Recycling Authority[49] as a public body corporate and politic with the authority to develop and coordinate all solid waste recycling activities within specified recycling regions in

42. 70 Wis. 2d at 523, 235 N.W.2d at 416.

43. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

44. 70 Wis. 2d at 526, 235 N.W.2d at 417.

45. *Id.* at 527, 235 N.W.2d at 418.

46. In the Matter of the Amendment of Code of Judicial Ethics, 63 Wis. 2d vii (1974):

17.

. . .

(b) The report shall be in a prescribed form and shall list; without dollar value or quantity, all assets (for each asset having a total market value of $100 or more) except for household and personal effects, automobile, and recreational equipment, and all liabilities together with the names of creditors, but without dollar amount, provided however that liabilities need not include ordinary consumer debts incurred in the normal course of an individual's personal affairs.

. . .

47. The Wisconsin court cited Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied*, 419 U.S. 1058 (1974); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902 (1974); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973).

48. 70 Wis. 2d at 530, 235 N.W.2d at 419.

49. 1973 Wis. Laws ch. 305, *creating* WIS. STAT. ch. 499 (1973).

the state.[50] The Authority was also empowered to incur debts and issue notes and bonds to implement those activities.[51] Its members were to be appointed by the governor with the advice and consent of the senate.[52] The operation of the Authority was to serve the well-settled public purpose of promoting the health, safety and welfare of state residents through the conservation of energy and the protection and improvement of the environment.

The Solid Waste Recycling Authority was created subsequent to the court's decision in *State ex rel. Warren v. Nusbaum*[53] sustaining the constitutionality of the Wisconsin Housing Finance Authority (HFA). The organization, powers and limited discretion of the Authority are virtually the same as the organization, powers and limited discretion of the HFA. Like the HFA, it is a nonprofit, "public body corporate and politic" created by the legislature to carry out public purposes, which, by virtue of express language of the Act, cannot incur state debt.

This controversy arose when the Authority requested the Department of Administration to issue to it the $500,000 appropriation made by the legislature for initial operating expenses. Secretary Anthony Earl refused based on his belief that the Act was unconstitutional because it failed to serve a public and state-wide purpose, illegally delegated legislative power, unlawfully attempted to control future legislative action, provided for unlawful state involvement in works of internal improvement, created a prohibited state debt, unlawfully exempted Authority property from taxation, invaded municipal rights of home rule, and vested overly-broad condemnation powers in the Authority. In *Wisconsin Solid Waste Recycling Authority v. Earl*[54] the Wisconsin Supreme Court adjudged the provisions of chapter 499, creating the Wisconsin Solid Waste Recycling Authority, constitutional.

It is well established that the expenditure of public funds

50. WIS. STAT. §§ 499.02, 499.07, 499.10 (1973).

51. WIS. STAT. §§ 499.07(12), (13), (14), 499.25 (1973).

52. WIS. STAT. § 499.02 (1973)

53. 59 Wis. 2d 391, 208 N.W.2d 780 (1973). This case held that the legislation creating the Housing Finance Authority, intended to assist in the financing of needed housing facilities through existing channels of commerce, was a valid enactment.

54. 70 Wis. 2d 464, 235 N.W.2d 648 (1975).

must be for public purposes only.[55] In view of the nature and provisions of the Act as spelled out in detail in section 1 of chapter 305 of the Laws of 1973,[56] the court found that the Act's implementation would be for the public health, welfare, safety and comfort of the people of the entire state.[57]

The court concluded that the issuance of bonds in accordance with the directives of the Act would not constitute a state debt or pledge of the state's credit in violation of the state constitution.[58] The Act prohibited the Authority from incurring such obligations on behalf of the state.[59] In reliance upon language contained in *Nusbaum*[60] an additional provision was included in the Act placing a moral obligation upon the state legislature to make up deficits with an "expectation and aspiration" that the legislature would appropriate funds to meet such deficits.[61]

The court found that the tax exempt status granted to the Authority encouraged the favorable sale of its bonds and further aided in the accomplishment of the Act's public purpose by reducing the Authority's capital needs,[62] quoting *Nusbaum* for the proposition that such an exemption is constitutional where "(a)ny classification of taxation . . . has a reasonable relation to a legitimate end of governmental action."[63]

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55. State *ex rel.* Hammerhill Paper Co. v. LaPlante, 58 Wis. 2d 32, 47-48, 205 N.W.2d 784, 793-94 (1973).

56. [I]n establishing a Wisconsin solid waste recycling authority, the legislature is acting in all respects for the benefit of the people of this state to serve a public purpose in improving and otherwise promoting their health, welfare and prosperity and that the . . . authority . . . is empowered to act on behalf of the people of this state in serving this public purpose for the benefit of the general public; and that it is a valid public purpose to assist local units of government and the private solid waste management industry in providing the necessary systems, facilities, technology and services for solid waste management and resources recovery and to provide the necessary powers needed to accomplish these public purposes.

See also WIS. STAT. § 499.03 (1973).

57. 70 Wis. 2d at 480, 235 N.W.2d at 658-59 (1975).

58. WIS. CONST. art. VIII §§ 3, 4, 7. 70 Wis. 2d at 482, 235 N.W.2d at 660 (1975).

59. WIS. STAT. § 499.31 (1973).

60. 59 Wis. 2d at 429-32, 208 N.W.2d at 803-05 (1973). In *Nusbaum* the court construed the provisions of the Housing Finance Authority Act as constituting an "expression of future intention or aspiration" and the subsequent amendment of the act to include a "moral obligation" clause.

61. WIS. STAT. § 499.32(4) (1973).

62. 70 Wis. 2d at 483, 235 N.W.2d at 660, *quoting* State *ex rel.* Warren v. Nusbaum, 59 Wis. 2d 391, 438, 208 N.W.2d 780, 808 (1973).

63. *Id.*

Since section 499.32(4) does not restrict the final deliberations or actions of future legislatures, there is no unconstitutional limitation of the powers of the legislature.[64] An analogous provision in the Housing Finance Act, as noted by the court, was declared a nullity because it required the joint finance committee to introduce in bill form without change in either house the capital reserve fund appropriation recommended by the governor.[65] In the Solid Waste Authority Act there is no limitation on changes in budget proposals nor upon the actions of the executive. The secretary of administration, a legislatively-created rather than constitutionally-mandated office, was merely required to bring to the legislature's attention the operation of the Authority by including it in his budget compilation.[66]

The dissent vigorously stressed that the creation of the Authority constituted an act of internal improvement in violation of Article VIII, section 10 of the Wisconsin Constitution.[67] It posed the question whether the state could delegate the power to a body such as the Authority to enable it to require municipalities, private corporations and even individuals to use its manufacturing facilities and still disavow the Authority's existence as an agency or arm of the state.

No violation of the internal improvements clause was found to exist. The court found that the Authority was an entity independent from the state[68] and that the Act's one-time appropriation of $500,000 was for initial operating, planning and administration expenses, and not for building facilities.[69] The rule recognized in *Appeal of Van Dyke*[70] provided the court with an additional basis for its conclusion. *Van Dyke* held that if a law is predominantly public in its aim it will not be held to violate the internal improvements provision in spite of the fact that the state carries on internal improvements incident

64. 70 Wis. 2d at 487, 235 N.W.2d at 662 (1975).

65. *Id.*

66. 70 Wis. 2d at 486-87, 235 N.W.2d at 662 (1975).

67. This section provides in part: "The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works . . . ."

68. 70 Wis. 2d at 491, 235 N.W.2d at 664 (1975). The court supported its conclusion by citing two Alabama decisions to the same effect: Knight v. West Ala. Environmental Improvement Auth., 287 Ala. 15, 246 So. 2d 903 (1971); Edmonson v. State Indus. Dev. Auth., 279 Ala. 206, 184 So. 2d 903 (1966).

69. 70 Wis. 2d at 491-92, 235 N.W.2d at 664 (1975).

70. 217 Wis. 528, 259 N.W. 700 (1935).

to the main public purpose of the law.[71] The more recent decisions of *State ex rel. LaFollette v. Reuter*[72] and *Nusbaum*[73] followed the same approach. In light of the internal improvements prohibition of the Wisconsin Constitution, the court had no trouble in determining that the dominant purpose of the Act was the preservation of the health, safety and welfare of the people of the state and any incidental internal improvements were merely the physical means for achieving that purpose.[74]

In responding to the challenge that the power delegated under the act was excessive, the court pointed out that sections 499.16[75] and 499.10(5)[76] placed the Authority's power within the confines of the test set forth in *Nusbaum:* "The Authority is not delegated the power to make law but to make factual determinations in execution of the law as declared by the legislature."[77]

Finally, the court found that the section of the Act providing that the Authority should not be terminated while it had obligations outstanding[78] did not place an invalid restriction on the reserved power of the legislature to repeal enactments in violation of the Wisconsin Constitution.[79] The court explained that the reserved power clause was inapplicable to the Solid Waste Act since section 1 of article XI is directed only to laws enacted under its provisions. Since the Authority is not a corporation in the normal sense, it was not created pursuant to the reserved power clause.[80] The state's involvement in solid waste

71. *Id.* at 544, 259 N.W. at 707 (1935).

72. 33 Wis. 2d 384, 147 N.W.2d 304 (1967). In this case the court held that since water pollution was a matter of public health, a law which appropriated money for use by other governmental entities in constructing water pollution abatement facilities did not run afoul of the internal improvements prohibition.

73. Here, the construction of public housing was found not to be the ultimate purpose. This case gave a broad interpretation to *Van Dyke* and used it to uphold the Housing Finance Authority.

74. 70 Wis. 2d at 493-94, 235 N.W.2d at 665-66 (1975).

75. This section sets out the standards against which the Authority is to measure the facts found at a hearing on required use.

76. This section gives criteria for the establishment of regional boundaries. The regional system set up by the Act was further found not to be an unreasonable classification of governmental subdivisions. 70 Wis. 2d at 497-98, 235 N.W.2d at 667 (1975). *See also* WIS. STAT. §§ 499.11, 499.16 (1973).

77. 70 Wis. 2d at 496, 235 N.W.2d at 666 (1975), *quoting* State *ex rel.* Warren v. Nusbaum, 59 Wis. 2d 391, 443, 208 N.W.2d 780, 810 (1973).

78. WIS. STAT. § 499.02(4) (1973).

79. 70 Wis. 2d at 498-99, 235 N.W.2d at 667-68 (1975). *See also* WIS. CONST. art. XI, § 1.

80. *Id.* at 498, 235 N.W.2d at 667 (1975).

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).