Municipal Law

Cornelia Griffin Farmer

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol61/iss2/8

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
claim settlement practices fully reflect the impact of the Garrity decision.

Both Garrity and Karl have clarified selected areas of the law of subrogation. While these decisions have raised additional questions, on the whole they should provide a basis for greater harmony and consistency in future decisions of the court regarding subrogation. The lack of such consistency in previous decisions has been the major cause of problems in this area.

Patrick R. Griffin

MUNICIPAL LAW

In the 1976 term the Wisconsin Supreme Court addressed a broad spectrum of municipal law issues. This article focuses on five cases dealing with three of these issues: (1) the application of the Wisconsin Constitution's home rule amendment to both a state statute and a municipal ordinance, (2) interpretation of the Wisconsin Environmental Protection Act, and (3) the local governmental body's role in implementing the direct legislation statute. Each of the cases discussed below represents the court's first determination of the issue involved.

I. APPLICATION OF THE HOME RULE AMENDMENT

This term the court dealt with the distinction between matters of statewide concern and matters of local concern in two very different contexts. City of Beloit v. Kallas involved a state statute aimed at pollution control, while State ex rel. Michalek v. Le Grand involved a municipal ordinance aimed at improving housing conditions. In each case, the challengers unsuccessfully argued that statewide concerns were being subjugated to local interests in contravention of Article XI, section 3 of the Wisconsin Constitution. This section, known as the home rule amendment, provides in pertinent part:

Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of

1. 76 Wis. 2d 61, 250 N.W.2d 342 (1977).
2. 77 Wis. 2d 520, 253 N.W.2d 505 (1977).
the legislature of state-wide concern as shall with uniformity
affect every city or every village.

Under this amendment, municipalities receive a direct grant of
legislative power, the exercise of which is subject only to legis-

lative enactments of statewide concern.

In *City of Beloit v. Kallas* eleven electors\(^3\) of the unincorpor-
ated area of the Town of Beloit challenged the constitutionality
of section 144.07(1m)\(^4\) of the statutes. That section provides
that when the Department of Natural Resources (DNR) orders
connection of an unincorporated area to a city or village sewer
system, the city or village may commence annexation proceed-
ings. If the voters of the area to be annexed reject the annexa-
tion, the connection order will be voided. Plaintiffs were pro-
nonents of a sewer connection order voided after annexation rejec-
tion.\(^5\) The annexation issue was never actually submitted to a
referendum but, in accordance with section 66.024(2) of the
Wisconsin Statutes, was rejected by a petition of a majority of
the voters of the area to be annexed.\(^6\)

The plaintiffs contended, first, that the provision voiding
the sewer connection order upon annexation rejection violated

---

\(^{3}\) The circuit court for Dane County, pursuant to Wis. Stat. § 227.16(1) (1971)
named eleven electors of the unincorporated area of the Town of Beloit as proper
parties to challenge the constitutionality of § 144.07 (1m). In 1973 the issue of the
constitutionality of this same statute had been raised by the Department of Natural
Resources but the court refused to consider the issue because neither the agency nor
the other party, a municipality, had standing to raise the issue. City of Eau Claire v.
DNR, 60 Wis. 2d 751, 751-52, 210 N.W.2d 771, 771-72 (1973).

\(^{4}\) An order by the department for the connection of unincorporated territory
to a city or village system or plant under this section shall not become effective
for 30 days following issuance. Within 30 days following issuance of the order,
the governing body of a city or village subject to an order under this section may
commence an annexation proceeding under s. 66.024 to annex the unincorpor-
ated territory subject to the order. If the result of the referendum under s.
66.024(4) is in favor of annexation, the territory shall be annexed to the city or
village for all purposes, and sewerage service shall be extended to the territory
subject to the order. If an application for an annexation referendum is denied
under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexa-
tion, the order shall be void. If an annexation proceeding is not commenced
within the 30-day period, the order shall become effective.
Wis. Stat. § 144.07(1m) (1975).

\(^{5}\) Following a pollution complaint, the Department of Natural Resources ordered
connection of the Town of Beloit to the City of Beloit sewerage transport and treatment
system. The city petitioned the circuit court for an annexation referendum which was
denied because of a petition by 62% of the town's voters opposing annexation. The city
then petitioned the court to declare the DNR connection order void. 76 Wis. 2d at 63,
250 N.W.2d at 343.

\(^{6}\) *Id.*
the home rule amendment by making the state interest in pollution control subject to a local concern. The court, however, did not accept this categorization of state and local interests, but rather found that both pollution control and annexation were matters of statewide concern.\(^7\) By determining that both pollution control and urban development were statewide concerns and proper subjects for legislation, the court eliminated the possibility that the legislation would be found violative of the home rule amendment.\(^8\)

Secondly, plaintiffs challenged the provision permitting annexation rejection by petition on the basis that there was no guarantee that voters would be "apprised of the consequences of their decision."\(^9\) A referendum vote, and presumably the petition procedure, could be found arbitrary and capricious if based on insufficient or inaccurate information.\(^10\) However, the *Kallas* court found no lack of information but rather accepted a presumption that the appropriate publicity was given and that the reasons for the annexation proposal were known by the voters who signed the petition rejecting annexation.\(^11\)

Whatever the actual notice in this case, the legislature

---

7. The court's broad statement that annexation is a vehicle for urban development or expansion does not clarify what the state interest in urban development is. One reason for state interest in annexation and urban development is that the fiscal and political integrity of divisions of the state could be undermined if they were forced to provide needed services to outlying areas without the concomitant benefits of incorporating those areas into their fiscal and political structures when desirable. *See In re City of Fond du Lac, 42 Wis. 2d 323, 333, 166 N.W.2d 225, 229 (1969).*

8. Even accepting the plaintiffs' categorization of interests, the court could have reached the same result. The inquiry, then, would have been whether the effect of the annexation rejection contravened the home rule amendment by "assigning a right to block advancement of paramount interests, [or whether it was a permissible] delegation of a limited authority or responsibility to further proper public interests." *Minzer v. Elkhart Lake, 51 Wis. 2d 70, 78, 186 N.W.2d 290, 294 (1971).*

9. Brief for Appellant at 23, *City of Beloit v. Kallas, 76 Wis. 2d 61, 250 N.W.2d 342 (1977).*

10. In Wisconsin, notice of referenda "shall contain the entire text of the referendum questions and an explanatory statement of the effect of either a yes or no vote." *Wis. Stat. § 10.01(2)(c) (1975).*

11. According to appellant's brief, a substantial number of people attempted to withdraw their names from the petition against annexation when they realized that their signatures had the effect of voiding the sewerage connection order. Brief for Appellant at 23, 24. The respondents, on the other hand, argued that the issue had not been raised at the circuit court level and therefore should not be considered. Brief for Petitioner-Respondent at 30. Amicus Curiae argued that notice is ordinarily presumed and that a public hearing and notices coupled with the juxtaposition of issues was presumptively sufficient. It was this argument of presumption and of implied knowledge upon which the court relied in its opinion.
should recognize that the use of section 66.024(2), whereby annexation can be rejected by petition without a formal vote of the electorate, could thwart the legislative accommodation of competing public interests reflected in section 144.07(1m). If the end result of the statutory procedures is to effectively reflect the legislature's concerns, it is critical that the voters have adequate notice of the implications of their annexation decision. This notice could be achieved by removal of section 66.024(2) as an option for rejection of annexation in this situation or by a requirement that any petition contain a statement fully explaining the reasons for the referenda and the effect of signing the petition.

State ex rel. Michalek v. Le Grand\(^\text{12}\) arose when the building inspector of the City of Milwaukee refused to implement a Milwaukee ordinance\(^\text{13}\) permitting rent withholding in an escrow account pending removal of city building and zoning code violations. Inspector Le Grand's refusal was based on the premise that the rent withholding ordinance might violate the Wisconsin Constitution's home rule amendment.\(^\text{14}\) The petitioner-tenant brought a mandamus action to compel the rent withholding but the court refused to issue the writ on the basis that the ordinance was unconstitutional.\(^\text{15}\) On appeal, the supreme court reversed.

In situations where legislation does not fall neatly into the statewide concern or local concern classifications, such a determination must be made by the courts.\(^\text{16}\) In Michalek the court found that the subject of the ordinance was "primarily and paramountly . . . a matter of the 'local affairs and government' of [the] city and, as such, authorized by the home rule amendment to the state constitution."\(^\text{17}\) Once it had made this determination, the court easily dismissed the three arguments against the ordinance. It found no conflict between the local rent withholding ordinance and a state statute\(^\text{18}\) providing that residential buildings not complying with local building codes

\(^{12}\) 77 Wis. 2d 520, 253 N.W.2d 505 (1977).
\(^{13}\) MILWAUKEE, WIS., CODE OF ORDINANCES § 51-4(1) (1976).
\(^{14}\) 77 Wis. 2d at 525, 253 N.W.2d at 506. The home rule amendment is found in Wis. Const. art. XI, § 3.
\(^{15}\) 77 Wis. 2d at 525, 253 N.W.2d at 506.
\(^{16}\) Id. at 527-28, 253 N.W.2d at 507.
\(^{17}\) Id. at 528-29, 253 N.W.2d at 508.
\(^{18}\) Wis. Stat. § 280.22 (1975).
may be declared a public nuisance and providing for the appointment of a receiver to collect rents and apply those monies to necessary building repairs. Rather, the court found, these were parallel and complementary pieces of legislation reflecting both "a valid exercise of municipal lawmaking authority under the home rule amendment and . . . a valid enactment of the state legislature in a field of statewide concern." Similarly, the court found no conflict between the ordinance and the landlord tenant statutes dealing with termination of tenancies for failure to pay rent. Finally, the court found that the rent withholding ordinance did not violate the notice and hearing requirements of the due process clause of the fourteenth amendment. "[T]he ordinance as drafted ensures that no landlord or lessor will be deprived of his property interests without a full opportunity to challenge the proposed rent withholding action before it is undertaken."

Neither Kallas nor Michalek dealt with matters of exclusively statewide or exclusively local concern. In these cases the court's attempt to classify the concerns was a pragmatic response to the language of the home rule amendment, but the court clearly recognized the overlap of state and local interests.

---

19. 77 Wis. 2d at 530, 253 N.W.2d at 508-09.
20. Wis. Stat. § 704.17 (1975). The possibility of conflict with § 704.07, which allows rent abatement for the untenantable portion of the premises, was not addressed. If the interest were of statewide concern, such a conflict would have been pertinent. However, because of the determination that the ordinance dealt with an issue of local affairs, state legislation could neither pre-empt the field nor be considered paramount. 77 Wis. 2d at 536, 253 N.W.2d at 508.
21. U.S. Const. amend. XIV.
22. 77 Wis. 2d at 511. The landlord has 20 days to request a hearing after notice of the existence of code violations. Such a request automatically postpones rent withholding until after the hearing at which the lessor may appear personally and present evidence and witnesses. At the hearing the burden of establishing violations is on the building inspector.
23. The exact boundary lines of the field of the "local affairs" of cities or villages we shall not now undertake to delimit. Solution of the possible difficulties in determining when the narrower and particular term "local affairs" is or is not within the more general and wider term of "state-wide concern," and the possible query whether such terms involve conflict or contradiction, must also all be left to the future.

The words "local affairs and government" are perhaps, and in one view of the matter, a rather unfortunate choice of language.

State ex rel. Ekern v. Milwaukee, 190 Wis. 633, 638, 209 N.W. 860, 861 (1926).
24. The significance of the problems addressed by the legislation is recognized in court discussion of the proper exercise of the police power, and of judicial deference to
II. INTERPRETATION OF THE WISCONSIN ENVIRONMENTAL PROTECTION ACT

Two cases this term construed that portion of the Wisconsin Environmental Protection Act (WEPA) which sets forth the environmental impact statement (EIS) requirements with which agencies of the state must comply prior to legislative enactments or "other major actions significantly affecting the quality of the human environment." In *Robinson v. Kunach* the court pointed out a major gap in the application of the Act. The case arose when Oneida County initiated condemnation proceedings for the proposed relocation of a county road onto land owned by the plaintiff. The crucial issue, addressed by both the briefs and the court, was whether the term "agency of the state" as used in section 1.11(2)(c) of WEPA included local governmental units such as counties. After determining that the clause was ambiguous as used, the court turned to legislative history for guidance.

Three factors led the court to conclude that the statute was not intended to apply to counties: no fiscal note, as required legislative determinations of what laws "are reasonably required to protect the public safety." *76 Wis. 2d* at 67-68, 250 N.W.2d at 345-46.

25. *Wis. Stat.* § 1.11(2)(c) (1975) provides:

(2) All agencies of the state shall:

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment, a detailed statement, substantially following the guidelines issued by the United States council on environmental quality under P.L. 91-190, 42 U.S.C. 4331, by the responsible official on:

1. The environmental impact of the proposed action;

2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;

3. Alternatives to the proposed action;

4. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short term and long term, and the economic advantages of the proposal.


27. Federal revenue sharing funds were allocated for the relocation. This use of federal funds, channelled through a federal agency, is not sufficient to be considered federal action which could trigger the application of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1970). See, e.g., *No. E.—W. Highway Comm'n, Inc. v. Whitaker*, 403 F. Supp. 260 (D. N.H. 1975); *Nodell Inv. Corp. v. Colman*, 396 F. Supp. 1341, 1343 (E.D. Wis. 1975).
by section 13.10, was included;\(^{28}\) there was no specific definition of the term "agency of the state," as found in the soil and water conservation statutes;\(^{29}\) nor was there any history of application of the statute to counties by administrative agencies.\(^{30}\) Thus, county highway projects and other county public works are not subject to the Act, regardless of the potential impacts.\(^{31}\)

In *Wisconsin Environmental Decade v. Public Service Commission*,\(^ {32}\) the court determined the breadth of the application of the same statute when an agency of the state is involved. The conflict between Wisconsin Environmental Decade (WED) and the Public Service Commission (PSC) arose over whether it is necessary to prepare an environmental impact statement prior to authorizing an increase in electric power rates.\(^ {33}\) Contending that the impact of the order was economic, and that any environmental effects would be "remote and indirect,"\(^ {34}\) the PSC issued the rate increase order involved without an environmental impact statement. The commission also contended that the statement was not warranted because there was no evidence that conclusions reached would be "based on anything other than pure speculation."\(^ {35}\) The trial court found that the PSC had not sufficiently considered environmental factors prior to making its no-impact determination and remanded the matter for further investigation to determine whether an impact statement should be prepared. Both the PSC and the power company appealed the decision and questioned the appropriate standard for judicial review of the PSC's decision not to prepare an environmental impact statement.\(^ {36}\)

The Wisconsin Supreme Court construed the purpose of WEPA in light of the National Environmental Policy Act (NEPA), upon which the Wisconsin Act is patterned. The court said,

\(^{28}\) 76 Wis. 2d at 444-45, 251 N.W.2d at 452.
\(^{29}\) Id. at 445-46, 436 N.W.2d at 452-53.
\(^{30}\) Id. at 446-48, 436 N.W.2d at 453-54.
\(^{31}\) Id. at 448, 436 N.W.2d at 454.
\(^{32}\) 79 Wis. 2d 409, 256 N.W.2d 149 (1977).
\(^{33}\) The Wisconsin Electric Power Company requested the increase "so as to be 'made whole' for increases in taxes, depreciation, the cost of money and other operating costs occurring subsequent to a [previous] rate order of the Commission." Id. at 412, 256 N.W.2d at 152.
\(^{34}\) Id. at 413, 256 N.W.2d at 152.
\(^{35}\) Id.
\(^{36}\) Id. at 414, 256 N.W.2d at 153.
The threshold decision whether to prepare an EIS occupies a critical position within the context of WEPA's operation. A negative determination at the initial stage may eliminate to a significant degree environmental consideration by the agency. . . . It is obvious that achievement of WEPA's goals will be significantly compromised if ill-advised determinations not to prepare an EIS are permitted by the courts to stand. Thus a consideration of the manner in which WEPA was intended to function dictates a liberal approach to the threshold decision of whether the impact statement should be prepared.37

The court also recognized that the administrative and technical costs of preparation, as well as lack of familiarity with environmental analysis, might prompt an agency subjectively and "in complete good faith" to be biased toward a negative conclusion as to the necessity of an environmental impact statement.38

The court adopted the standard of reasonableness found in federal cases interpreting NEPA and held that "[w]here issues of arguably significant environmental import are raised . . . the agency must show justification for its negative-EIS decision."39 Significantly, the court accepted WED's contention that, in order to comply with the statutory mandate to determine whether or not an impact statement is warranted, a state agency must look to both the direct and the indirect effects of a proposed action. "Any construction limiting the Act to direct environmental effects would be contrary to its manifest intent."40

Thus, although the court's construction of the Wisconsin Environmental Protection Act in Robinson v. Kunach41 has severely limited the entities subject to the law, once an entity is found subject to the law, as in Wisconsin Environmental Decade,42 the court has broadly defined the duty to consider the

37. Id. at 419, 256 N.W.2d at 155.  
38. Id. at 420, 256 N.W.2d at 155.  
39. Id. at 424, 256 N.W.2d at 157.  
40. Id. at 430, 256 N.W.2d at 160.  
41. 76 Wis. 2d 436, 251 N.W.2d 449 (1977).  
42. 79 Wis. 2d 409, 256 N.W.2d 149 (1977). The court's decision in this case is far more detailed in its analysis than this discussion indicates. However, since it is not, in the strictest sense, a municipal law case, the discussion herein has been limited. The case has been included in the municipal law term because of the aspects in which it complements the discussion of Wis. Stat. § 1.11(2)(c) (1975) in Robinson v. Kunach.
environmental impact of proposed governmental activities and to prepare environmental impact statements where appropriate.

III. IMPLEMENTATION OF THE DIRECT LEGISLATION STATUTE

In another area of municipal law, the court dealt with the obligation of a municipal legislative body to submit legislation proposed under the direct legislation statute to a referendum, despite legislative doubts as to the constitutionality of the legislation. In *State ex rel. Althouse v. Madison* the voters of the City of Madison had presented a petition for enactment of a Fair Rent Ordinance to the council. According to the direct legislation statute, the municipal legislative body could have voted on the proposal and enacted it into law, but failing enactment, the law required that the proposal be submitted to a referendum. Based on the advice of the city attorney, the city council concluded that the proposed Fair Rent Ordinance was "in violation of state statutes and... unconstitutional," and thus had not submitted it to a vote of the electorate.

The Wisconsin Supreme Court examined conflicting precedent in Wisconsin and other jurisdictions. It held that the city council had gone beyond its powers by improperly making

---

43. 79 Wis. 2d 97, 255 N.W.2d 449 (1977). As a result of this decision the proposed ordinance was submitted to referendum on Sept. 7, 1977. It was resoundingly defeated by a vote of 46,916 to 7,893. Information supplied by City Clerk, City of Madison, Wisconsin.

44. Wis. Stat. § 9.20 (1975) provides in pertinent part:

**Direct legislation.** (1) A number of electors equal to at least 15% of the votes cast for governor at the last general election in their city may sign and file a petition with the city clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or referred to a vote of the electors. The person filing the petition shall designate in writing a person or organization to be notified of any insufficiency or improper form under sub. (3).

(4) The common council shall, without alteration, either pass the ordinance or resolution with 30 days following the date of the clerk's final certificate, or submit it to the electors at the next spring or general election, if the election is more than 6 weeks after the date the order is given. If 6 weeks or less before election the ordinance or resolution shall be voted on at the next election thereafter. The council by a three-fourths vote of the members-elect may order a special election for the purpose at any time prior to the next election, but not more than one special election for direct legislation shall be called in any 6-month period.

45. 79 Wis. 2d at 102, 225 N.W.2d at 451.

46. Id. at 103, 255 N.W.2d at 451.
a judicial determination of unconstitutionality, and concluded that,

where there has been no specific prior adjudication of unconstitutionality, the electorate under the direct legislation statutes, may compel placement on the ballot regardless of grave doubts in respect to constitutionality and statutory validity. Only after the measure has passed and a controversy arises may a court of this state pass upon the question of constitutionality.

Section 9.20 is based upon the reserved legislative powers of the electorate and has priority over the legislative discretion of the city council. The city council may take into account the possibility of conflict with state statutes or of unconstitutionality of the proposal when it initiates legislation. However, the council is statutorily obligated to either enact the measure itself or to submit it to a public vote when, as in this case, the reserved powers of the electorate are involved. Thus, under the direct legislation statute, no determination of constitutionality is appropriate before the electorate has voted. Issues of statutory conflict and constitutionality are to be dealt with by the judiciary if the measure is enacted and later challenged.

CORNELIA GRIFFIN FARMER

PROPERTY

I. EMINENT DOMAIN

In Falkner v. Northern States Power Co., the court affirmed the controversial taking of farm land by a Wisconsin public corporation for the future construction of a large nu-

47. Id. at 110, 255 N.W.2d at 455.
48. Id. at 117-18, 255 N.W.2d at 458.
49. Id. at 118-19, 255 N.W.2d at 459.
50. Id. at 110, 255 N.W.2d at 455.
51. Id. at 119, 255 N.W.2d at 459.
52. Id.

1. 75 Wis. 2d 116, 248 N.W.2d 885 (1977).
2. Power of eminent domain is an attribute of sovereignty which may be delegated to a corporation by the legislature. Wisconsin Water Co. v. Winans, 85 Wis. 26, 39, 54 N.W. 1003 (1893); Wis. Stat. § 32.02(6) (1975).
3. At trial the estimated completion dates of the units were April 1982, and October