

## WAPA LEGAL UPDATE

By: Michael R. Christopher<sup>1</sup>  
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### **Can the Prevailing Party in an Open Records Case be Compensated for Attorneys' Fees?**

#### *Summary*

The open records law provides that a party who prevails in whole or in substantial party who seeks general public records is entitled to attorneys' fees. However, if a party seeks "personally identifiable information," that person is entitled to actual damages if the authority willfully or intentionally withholds the documents but the applicable section of the open records law does not provide that the damages include The payment of attorneys' fees.

#### *Analysis*

On September 21, 2006, the Court of Appeals for District IV decided the case of *Kang v. Board of Regions of the University of Wisconsin System*. Kang was denied admission to a University PHD program after he failed the qualifying examination on three separate occasions. He made numerous open records requests for information relating to his examinations. The University released some documents but delayed or withheld other documents to which Kang was entitled. Kang then filed an action for mandamus, asking the Court to order the University to produce the documents they continued to withhold. The Circuit Court found that while the University had intentionally and willfully withheld documents to which Kang was entitled to they were not continuing to withhold any such documents once the litigation was commenced. The trial court awarded Kang damages and attorneys' fees. The University appealed the attorney fee award and the Court of Appeals reversed that portion of the trial court decision.

Under the open records law, if an authority denies or delays access to records, the requester may bring an action for mandamus asking a court to order release of the record. *See* sec. 19.37(1)(a). In another section of the open records law, the statute lists the type of damages that are recoverable in a mandamus action, depending on the type of documents sought. If a party is seeking general public records and that person prevails in whole or in substantial part in the action, then attorneys' fees are included in the recoverable damages. However, if a party is seeking "personally identifiable information," the party is not entitled to reimbursement for attorneys' fees even if they prevail in the action.

Judge Dykman who wrote the Court of Appeals decision recognized that denying Kang attorneys' fees for his mandamus action to obtain records from the University could be

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<sup>1</sup> Michael R. Christopher is a shareholder in the Madison office of DeWitt Ross & Stevens S.C., 2 East Mifflin, Suite 600, Madison, Wisconsin 53703; Phone: (608) 255-8891; E-mail: [mrc@dewittross.net](mailto:mrc@dewittross.net). He is legal counsel to WAPA. He received his law degree from the University of Wisconsin in 1972.

considered contrary to the legislative intent in enacting the open records law. However, the Court states that to award Kang attorneys' fees in a case where he is requesting personally identifiable information would be contrary to the intent of the legislature. In fact, the Court recognizes that the state of the law as to whether attorneys' fees should be included in the actual damages incurred by a requestor of records who prevails in the litigation, may be illogical but it is a problem that the legislature should deal with and not the courts.

## **Do Special Assessments Have to be Levied Uniformly?**

### *Summary*

The Wisconsin Supreme Court invalidated a portion of a special assessment levied against 18 condominium owners by a town sanitary district to finance a sanitary sewer system. The court concluded that the assessment was unreasonable because it was not levied uniformly and that the effect of the methodology imposed an inequitable cost burden on the condominium owners as compared with the benefit accruing to them.

### *Analysis*

The Green Lake Sanitary District ("District") operates a waste water treatment plant and a sanitary sewer collection system. The District adopted a resolution to extend sanitary sewer service to additional properties within the District by using its special assessment powers. The special assessment included two components: an "availability assessment" to cover the costs of making the sewer available to each lot and a "connection assessment" to cover the costs of the infrastructure needed to transport sewage to the treatment plant. The availability assessment of \$4,730 was levied against each lot or parcel of record receiving sewer service. The connection charge of \$5,930 was individually levied against every habitable unit on a lot and every structure connected to the sewer system on any lot that did not include a habitable building.

The Wisconsin Supreme Court invalidated the "availability charge" component finding that there was no nexus between the availability charge assessed against the condominium owners and the district's recovery of the capital cost to provide sanitary sewer service to individual lots. In addition, the Court found that the availability charge was not reasonable in that other lots with multiple, habitable units that were provided the same sewer service were assessed only one availability charge. Finally the Court held that the District did not show that the condominium owners received a greater benefit than what was provided to other lots that were affected by the service extension.

The lesson in *Steinbach v. Greenlake Sanitary District* is that although municipalities have wide discretion in determining a special assessment methodology, it still must be reasonably related to the benefit accruing to the condominium owner as compared with the benefit derived by other assessed property owners.

## **Are Municipal Zoning Codes Designed to Encourage Redevelopment?**

Many municipal planners would answer the above question with a resounding “no.” Many present zoning codes reflect a planning philosophy that contained a strict separation among residential, commercial, industrial and recreational uses. In addition, zoning code provisions relating to parking availability and set back requirements among many other provisions can impose serious hurdles to achieve smart growth redevelopment.

There are a number of different approaches that either have been implemented or are being considered to bring municipal zoning codes into the 21<sup>st</sup> Century. One approach is being considered by the City of Greenfield whereby niche sectors in particular zones would be created to attract similar businesses. The assumption supporting this approach is that to have specialized clusters of similar or complementary businesses would draw people from greater distances more than if a municipality had a hodgepodge of various developments. For example, the Greenfield planners have recommended that a particular zone be created to permit only furniture or design stores. Another zone in the City is recommended to permit medical-related uses. It is possible that this “niche sector” approach to land use planning could result in sustainable municipal redevelopment.