BoardmanClark

Municipal Law Newsletter

VOLUME 30, ISSUE 5 SEPTEMBER/OCTOBER 2024

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

What's All This About Chevron?

The Shift in Judicial Review of Federal Administrative Agency Decisions After the Supreme Court's Last Term

If you often deal with federal regulations, for example, if you are subject to air quality permitting requirements or you apply for federal grant money, you may have heard some chatter in the last few months about the end of "*Chevron* deference" or the "*Chevron* doctrine." At the end of June, the Supreme Court issued a decision in *Loper Bright v. Raimondo*, 144 S.Ct. 2244 (2024), which overturned the 1984 decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Loper Bright* decision continues the recent trend of reducing agency power and influence and shifting that influence to the courts.

But what exactly was *Chevron* deference and how will things change? *Chevron* deference meant that when an administrative agency was responsible for administering a statute, such as how the EPA is responsible for administering the Clean Air Act, a court would defer to the agency's interpretation if (1) the statute was unclear or ambiguous and (2) the agency's interpretation was reasonable. This meant that courts were more likely to affirm an agency's action when challenged, giving agencies breathing room to act based on their understanding of the law and their policy priorities.

Since at least the year 2000, *Chevron* deference has been narrowed or contained in various ways. In recent years, the Supreme Court has essentially ignored it, last relying on *Chevron* to defer to an agency interpretation back in 2016. *Loper Bright* finally overturned this practice of deference altogether, holding that the Administrative Procedure Act (APA) gave courts, not agencies, the power and responsibility to make determinations on issues of law. Therefore, courts will no longer defer to an agency's interpretation of ambiguous statutory provisions that the agency administers. However, the court may still consider the agency's interpretation to be particularly persuasive based on the agency's unique experience and expertise.

Essentially, this means that agency actions are more vulnerable to challenges in court. And *Loper Bright* was not the only Supreme Court decision last term that opened agencies up to an increase in lawsuits. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S.Ct. 2440 (2024) held that the default six-year statute of limitations for APA claims begins to run when the entity challenging the agency action is injured, not when the agency action took place. This means that when new entities are created, those entities may be able to challenge agency actions that imposed that regulation, even if those agency actions were taken decades ago. This disrupts the stability and finality of long-standing agency actions which are now subject to legal challenges from newly created private companies or groups.

It is too early to know the extent to which these recent Supreme Court decisions will affect run-of-the-mill agency business. It is possible that more challenges will be brought against agency actions. These challenges can have wide-ranging effects,

Continued on page 3

Public Dedications: When Municipal Property Rights Are Less Than Total

A municipality may acquire real property in many different ways, including by purchase, eminent domain, gift, or dedication. But not all of these ways are always equal in how a municipality may use or dispose of its land once acquired. This article discusses the implications of acquiring property through each method before focusing on the restrictions that a municipality may find itself under when owning land acquired through dedication or conditional gift.

The cleanest way for a municipality to acquire land is usually by purchase or unconditional gift. So long as there are no other recorded restrictions (such as restrictive covenants) or competing rights (such as easements), the municipality should be able to use the land for any public purpose otherwise allowed under applicable local, state, and federal law, including local zoning and land use regulations.

The ability to initially use land acquired through a municipality's eminent domain power is constitutionally restricted to direct public use and occupation and may be otherwise limited by statute. *See* Wis. Const. art. I, § 13; *see e.g.* Wis. Stat. § 32.03(6)(b) (prohibiting the acquisition of property through eminent domain if the municipality intends to transfer it to a private entity). In many instances only an easement interest is acquired through condemnation. (In Wisconsin, a municipality always acquires only an easement in land condemned for public streets.) When an easement, including for highway purposes, is abandoned, the interest typically reverts back to the person—or their successor in interest—from whom the easement right was acquired. When fee simple title is acquired through condemnation, a municipality typically has more rights. When the public purpose for the condemnation is lawfully discontinued or abandoned, the municipality generally may use or dispose of the land for any other lawful purposes.

Acquisitions of land or rights in land by way of dedication or conditional gift always come with strings attached. The dedication of any land for a public purpose on a plat or certified survey map are statutorily limited to "the purposes therein expressed and no other." Wis. Stat. § 236.29; see also Wis. Stat. § 236.34(1m)(e). Under a typical conditional gift, the deed by which the municipality acquired the land will indicate both the limitations under which a municipality may use the land (e.g., for a public park) and, should that use be abandoned, the consequences (oftentimes reversion of interest back to the grantor).

Whether or not a deed states a consequence, however, for either a conditional gift or dedication a municipality is constitutionally required to offer to return the land to the donor. Wisconsin Const. art. XI, § 3a provides that where a municipality accepts "a gift or dedication of land made on condition that the land be devoted to a special purpose and the condition subsequently becomes impossible or impractical, such governing body may be resolution or ordinance enacted by a two-thirds vote of its members elect either to grant the land back to the donor or dedicator or his heirs or accept from the donor or dedicator or his heirs a grant relieving" the municipality of the condition. (*See also* Wis. Stat. § 66.1025, allowing a municipality to seek court relief from such a condition when the donor or their heirs cannot be found.)

A municipality cannot get around this constitutionally imposed procedure by using its eminent domain powers, as was affirmed in a recent Wisconsin Court of Appeals case, *Greenwald Family Limited Partnership v. Village of Mukwonago*, 2022AP284 (unpublished *per curiam* decision).

In *Greenwald*, the Greenwald Family Limited Partnership ("GFLP") dedicated a parcel of land on a plat to the Village of Mukwonago for the specific purpose of serving as a regional pond. Roughly 17 years after accepting the dedication and constructing the pond, the Village began condemnation proceedings to acquire property rights to build a road across the pond parcel for future commercial development. GFLP objected and sued. The Court of Appeals affirmed the circuit court's judgment that, through the section 236.29 dedication, the Village acquired the property in fee simple and the Village has no eminent domain power to condemn property that it owns. The only procedure for a municipality to relieve itself of conditions imposed by way of dedication or gift are the procedures outlined in Wis. Const. art. XI, § 3a and Wis. Stat. § 66.1025.

The bottom line is that before a municipality disposes or looks to change the use on any public property, the municipality should understand (1) the manner in which the municipality acquired the property and (2) whether any restrictions were placed on the acquisition or retention of the property. Doing this at the beginning of the sale or redevelopment process—and resolving any issues discovered—could save the municipality significant time and money down the road.

— Jared W. Smith

Welcome Aiyanah Simms

Aiyanah Simms graduated from Marquette University Law School in May of 2024. Before entering her final year of law school, Aiyanah clerked at Boardman for the summer. Prior to law school, Aiyanah spent time in Brazil, doing community service work. In her free time, she enjoys trying new restaurants and reading mystery novels.

Aiyanah will be primarily working in the municipal law and intellectual property practice group, as well as a number of other areas in the firm.

City of Eau Claire's New Children's Museum Shows How Public-Private Partnerships Bring About Innovation

In a bid to replace its original location, the Eau Claire Children's Museum kicked off a fundraising campaign in 2019 with the slogan of ***Bolder. Better. Bigger.*** Five years of hard work and community support for the campaign culminated in the opening of a one-of-a-kind, award-winning facility located in the heart of revitalized downtown Eau Claire. The effort is a great example of how public-private partnerships can lead to innovation.

A longtime supporter of the Museum, the City helped to develop the project in several key ways. The museum is in one of the City's tax increment finance districts. Because of this, the City was able to provide funding to support infrastructure needs for the museum. Additional support came from the City's Redevelopment Authority's (RDA) via its Phoenix Park redevelopment project. The RDA sold a premium site to the museum on a pad ready basis at a very gracious price.

The Museum also was the beneficiary of a generous investment from Wisconsin Economic Development Corporation (WEDC) through its Community Development Investment Grant. This program supports community development and redevelopment efforts, primarily in downtown areas based on the ability of applicants to demonstrate the economic impact of the proposed project and, including public and private partnership development, financial need, and use of sustainable downtown development practices. The Museum has proven to a strong community partner over many years, so it was a great fit for the grant profile.

Indeed, the museum benefited from a strong network of supporters who raised substantial private donations. The museum also worked with a variety of partners to raise additional funds in several different ways, including the sale of its former building; value engineering and financial support through its partnership with the general contractor; Xcel Energy's Focus On Energy grant program; the Eau Claire Community Fund and various corporate funds; and utilization of New Market Tax Credit financing.

The Museum also sought and received an Energy Innovation Grant through the Public Service Commission (PSC). These PSC grants are awarded to organizations, including local governments, with projects that reduce energy consumption, increase the use of renewable energy and transportation technologies, bolster preparedness and resiliency in the energy system and create comprehensive energy plans. The museum's carbon neutral building design made it an ideal candidate for the grant.

Specifically, the new facility is a 24,000 square foot two-story building, supported by a unique support structure of whole tree columns. It also features 16 geothermal wells, 308 solar panels, a specialized lighting system, high efficiency plumbing fixtures, large glass window walls intended to maximize natural light and heat, and no dedicated parking thanks to the museum's proximity to the City's parking ramp.

These features have garnered the attention of publications throughout the US and globally. In addition, the museum is the winner of the AIA Wisconsin's *2024 Special Recognition Award* and two awards from the National Council of Structural Engineers Association with one for *Outstanding Structure Award for New Buildings < $30M and 2023 Structure of the Year Award.*

The Eau Claire Children's Museum is a one-of-a-kind treasure benefitting the entire Chippewa Valley region. Since the museum reopened last year it has hosted 160,000 visitors, from 47 states and six countries. Its success is a testament to the hard work and generous support of its many sponsors and public and private stakeholders. Although capital fundraising will be an ongoing effort, the museum's strong foundation means it will be a big part of the Eau Claire community for generations to come.

— Jamie D. Radabaugh

What's All This About *Chevron*?

Continued from page 1

including nationwide injunctions on agency activity. As a result, we may see more frequent and sudden changes in agency policy or authority.

In addition to the immediate changes to federal administrative law that may unfold, the *Loper Bright* decision will likely have a broad and long-lasting effect on the relationship between the legislature, administrative agencies, and the courts. This may eventually result in less pronounced shifts in agency policy with each new administration that enters the White House.

These recent changes only affect the review of federal agency decisions and federal statutes. The Wisconsin Supreme Court abolished our version of deference to agency interpretation of law back in 2018 with the *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, decision. Under *Loper Bright*, federal court review of federal agency decisions will now look very similar to what Wisconsin has been doing for the last six years.

Given the uncertainty stemming from these recent changes, it will be particularly important to stay informed on recent activity when interacting with federal regulations and agencies.

— Elizabeth A. Leonard

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

Certified ABA-EPA Law Office
Climate Challenge Partner

Municipal Law Newsletter

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group—Water Division.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

Maximillian J. Buckner	608-283-1787	mbuckner@boardmanclark.com
Anita T. Gallucci	608-283-1770	agallucci@boardmanclark.com
Brian P. Goodman	608-283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	608-286-7255	ehagen@boardmanclark.com
Joseph J. Hasler	608-283-1726	jhasler@boardmanclark.com
Richard A. Heinemann	608-283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	608-286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	608-283-1788	lkobza@boardmanclark.com
Storm B. Larson	608-286-7207	slarson@boardmanclark.com
Elizabeth A. Leonard	608-283-7224	lleonard@boardmanclark.com
Julia K. Potter	608-283-1720	jpotter@boardmanclark.com
Aiyanah A. Simms	608-283-1733	asimms@boardmanclark.com
Jared W. Smith	608-286-7171	jsmith@boardmanclark.com
Steven C. Zach	608-283-1736	szach@boardmanclark.com