American Planning Association
Wisconsin Chapter
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April Case Law Update
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A summary of Wisconsin court opinions decided during the month of April related to planning

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Court Upholds Conditional Use Permit for Frac Sand Mine

The Wisconsin Court of Appeals case *O'Connor v. Buffalo County Board of Adjustment* involved a citizen's challenge to the granting of a conditional use permit (CUP) for a frac sand mine operation in Buffalo County. On January 13, 2012, R&J Rolling Acres, LLP, applied to Buffalo County for a CUP to establish a frac sand mining operation on property that was zoned agricultural. Rolling Acres estimated that 80 trucks would leave the property every weekday. At a public hearing on the CUP Rolling Acres clarified that it expected 126 trucks to leave the site each day. The Buffalo County Board of Adjustment voted to deny the CUP based on the Board's concern that the large number of trucks leaving the property each day would decrease traffic safety. He Board observed that there would be 252 total trucks on a given day (126 traveling to the site and 126 trucks leaving the site) which equated to one truck every 3.33 minutes over a 14 hour hauling period.

On March 27, 2012, Rolling Acres submitted a second CUP application. The application changed the proposed number of trucks from 80 to 126, as stated at the meeting, and proposed to have trucks hauling six days per week instead of five. At the hearing on the second application, the Board tabled the matter for 60 days while the Wisconsin Department of Transportation conducted a Traffic Safety Impact Assessment. The Assessment found that the road could handle the increased traffic volumes and that the truck traffic would not move the roads into a different statistical range for crashes or safety. The board then granted the CUP, subject to 43 conditions including limiting the number of trucks leaving the site to 105 per day and prohibiting hauling on weekends and certain holidays.

The granting of the CUP was then challenged in court on two issues: (1) the Buffalo County zoning ordinance does not allow frac sand mining as a conditional use in the agricultural district; and (2) after the Board denied Rolling Acres first CUP application, it was prohibited from considering the merits of the second application. The citizen challenging the CUP also argued the Board "acted arbitrarily, unreasonably, and outside its jurisdiction by granting a CUP with no information ... about the identity of [Rolling Acres'] partners." In reviewing the case, the Wisconsin Court of Appeals rejected the challenge.

In examining the County's zoning ordinance, the Court deferred to the Board's interpretation of the ordinance. The ordinance listed the following as conditional uses in the agricultural district: "Manufacturing and processing of natural mineral resources indigenous to Buffalo County incidental to the extraction of sand and gravel and the quarrying of limestone and other rock for aggregate purposes...." The Board argued that "for aggregate purposes" only modified the terms "the quarrying of limestone and rock." The citizen challenging the permit argued that "for aggregate purposes" modified the entire sentence meaning that the extraction of sand could only be for aggregate purposes (for use in cement, asphalt, or similar materials). While the Court of appeals acknowledged the sentence was ambiguous, the Court determined the Board's interpretation was reasonable and deferred to that interpretation.

With regard to the second application, the Court of Appeals found nothing in Wisconsin statutes or case law that prevented Rolling Acres from submitting a second CUP application. The Court acknowledged that a local government *may* enact a rule prohibiting a party whose application has been denied from filing a new application absent a substantial change in circumstances. In this case, Buffalo County did not have such a limitation.

As for the argument that the argument that the Board acted arbitrarily because it did not ask for information about Rolling Acres partners, the Court could not find any legal authority that required the disclosure of this information before granting a CUP.

The case is recommended for publication in the official reports.

Destruction of Property Due to Failure of Lake Delton Dam Was Not a Taking

Fromm v. Village of Lake Delton involved a lawsuit resulting from the 2008 failure of the 1927 dam on Dell Creek that created Lake Delton. The Village took over ownership of the dam in 1994 and made no changes to the structural design of the dam. As a result of the failure of the dam in 2008 due to unusually heavy rainstorms, Fromm's residence and the land on which it was built were swept into the river destroying all structures and taking away a substantial quantity of the land.

Fromm sued the Village for a taking of private property in violation of the Wisconsin and United States Constitutions. The circuit court dismissed the case due to Fromm's failure to identify a specific action by the Village that caused the flooding event. The Wisconsin Court of Appeals affirmed the judgment of the circuit court in favor of the Village.

The decision is recommended for publication.

Newly Incorporated Village Annexing Remainder of Town Does Not Violate Rule of Reason

Ries v. Village of Bristol involved a challenge in the Wisconsin Court of Appeals to an annexation by referendum of the Town of Bristol in Kenosha County into the Village of Bristol. In 2008 the Town of Bristol petitioned to incorporate 18 square mile (over half the Town) as the Village of Bristol. The Wisconsin Department of Administration dismissed the petition but recommended the Town file a new petion including less territory. The Town subsequently filed a new petition for incorporation for 9.2 square miles. This incorporation was approved. Soon after the incorporation, the Village petitioned the circuit court for a referendum on whether to annex the remainder of the Town to the Village. The referendum passed and the Village enacted an ordinance annexing the reminder of the Town to the Village.

A resident initiated a lawsuit challenging the annexation on the grounds that it violated the rule of reason for annexations. The rule of reason is a court-made doctrine for review of annexations. An annexation satisfies the rule of reason when three requirements are met: (1) exclusions and irregularities in boundary lines are not the result of arbitrariness; (2) there is a reasonable present or demonstrable future need for the annexed territory; and (3) no other factors exist that constitute an abuse of discretion on the part of the annexing municipality. Failure to satisfy any of these requirements renders the annexation invalid.

The citizen challenging the annexation argued that the annexation violated the rule of reason because the Village abused its discretion "by using the annexation process as a manipulative technique to circumvent the requirements" for incorporation. The Wisconsin Court of Appeals, however, could not find any provision in either the annexation of incorporation statutes that prohibits a village from annexing territory that did not meet the requirements for incorporation. According to the Court, "it is permissible for a village to annex territory by referendum that the village was precluded from incorporating because of failure to meet the statutory requirements for incorporation."

The citizen also argued that the annexation was prohibited because it did not meet the essential characteristics of a village test under Wisconsin law. The Court of Appeals, however, noted that this test is used to determine whether a village may be incorporated and has no application to the annexation process.

Finally, the challenger argued that there was no reasonable need for the annexation. The Court, however, found a reasonable need for services in the Town provided by the Village. The Court therefore dismissed the challenge to the annexation.

The case is not recommended for publication.

Classification Proper But Reassessment Needed

In *West Capitol, Inc. v. Village of Sister Bay*, West Capitol appealed a circuit court judgment to the Wisconsin Court of Appeals that reduced the 2009 assessment of the value of real property it owns in the Village of Sister Bay from $4,487,500 to $3,935,000. West Capitol claims the circuit court erred in two respects. First, West Capitol argued it is entitled to a fifty-percent reduction in the 2009 assessment because its property meets the statutory definition of "undeveloped land." See Wis. Stat. §§ 70.32(2)(c)4., (4). Second, West Capitol argued the circuit court erred by concluding the property's assessed value in 2009 should have been the same as in 2010.

West Capitol's property is a 16.86-acre parcel in Sister Bay with about 610 feet of Green Bay shoreline. The parties stipulated that the property: (1) is heavily wooded and "preserved in its natural state;" (2) does not contain any buildings or dwellings; (3) is not used for agricultural or manufacturing purposes; (4) is not primarily devoted to buying and reselling goods for a profit; (5) is not used for the production of commercial forest products; and (6) was zoned "B-1 general business district" as of January 1, 2009. It is also undisputed that the property does not generate any income.

For property tax assessment purposes, the Village classified the property as "residential." West Capitol argued that the property should have been classified as "undeveloped." Undeveloped land is assessed at fifty-percent of its full value. The statutory definition for 'undeveloped" land requires, in part, that the land is unproductive. The Village contended the property was not unproductive because it was

"perfectly developable shorefront acres." The Wisconsin Court of Appeals agreed that the property should not be classified as undeveloped. However, the Court of Appeals found that the circuit court erred when it decided the 2010 Assessment should be the same as the 2009 assessment. The Court of Appeals therefore ordered that the property should be reassessed to determine the 2010 assessment.

The case is recommended for publication.

Is Notice of Objection to Assessments Necessary?

The decision of the Wisconsin Court of Appeals in *Walgreen Co., v. City of Oshkosh* is another in a series of property tax assessment cases where the property owner did not file an objection to its assessments as required by statute, but argued that notice of objection was not necessary to proceed with its claim for a tax refund. Wisconsin case law provides a narrow exception to strict compliance with Wis. Stat. § 70.47(7) where two factors are present: (1) the previous year's assessment is under challenge at the time of the first meeting of the board of review (BOR) for the current assessment year and (2) the current year's assessment is the same as the previous year's. The linchpin to the exception is the knowledge on the part of the taxing district that the assessment amount is still disputed, which excuses the need for another objection.

According to the Court of Appeals, the record in this case is silent as to whether Walgreen's challenges to the prior year's assessments were pending as of the first meeting of the BOR for the assessment year relevant to this appeal. The Court therefore reversed the circuit court's dismissal of Walgreen's challenge to the assessment and remanded the case to the circuit court for findings of fact on the timing of Walgreen's challenges to the prior year assessments.

The case is recommended for publication.

City Restrained From Enforcing Raze Order

In *Nabham v. City of Beloit*, the Wisconsin Court of Appeals upheld an injunction imposing a restraining order prohibiting the City of Beloit from enforcing a raze order for a building dating from the 1900s with commercial space on the first floor and five apartments upstairs. The City issued an order declaring the property dilapidated and unfit for human habitation. The order required the property owner to raze the building because the cost of the necessary repairs exceeded fifty percent of the assessed value of the building. The property owner brought an action in circuit court contesting the reasonableness of the raze order.

The circuit court found that the City acted in bad faith. The City had no explanation for why alleged code violations which had been in existence for many years suddenly required immediate remediation. The circuit court also found that the City dramatically reduced the assessed value of the property at a rate many times the adjustments made for property in the city in general to get the assessment down to a level at which the City could claim repairs would exceed fifty percent of the assessed value. The circuit court also referred to details suggesting that the City's building inspector had an interest in removing the building because of suspicions related to the ethnic background of the people occupying the building. Upon review, the court of Appeals agreed that the City's actions were unreasonable and the Court affirmed the restraining order granted by the circuit court prohibiting enforcement of the raze order.

The case is not recommended for publication.