



December Case Law Update December 31, 2012

**[A summary of published Wisconsin court opinions decided during the month of
December related to planning]**

Wisconsin Supreme Court Opinions

Update on the Impact of the Wisconsin Supreme Court Rule on the Unauthorized Practice of Law on Planners

As reported in the September 2010 Case Law Update, the Wisconsin Supreme Court adopted a new rule (Supreme Court Rule 23) directed at prohibiting the unauthorized practice of law in Wisconsin. The new rule took effect on January 1, 2011. The new rule broadly defines the practice of law to include many activities that planners engage in as part of their day-to-day jobs, such as drafting ordinances. The rule includes an exclusion for non-lawyers who are employees of governmental agencies. The rule also excludes non-lawyer professionals who are licensed by the state such as engineers and landscape architects. Omitted from the exclusion are planners who are employed as private consultants and are not a licensed attorney, engineer, or landscape architect.

In December 2010, then Chapter President Gary Peterson sent a letter to the Wisconsin Supreme Court asking for certain clarifications about the potential impact of the rule on planners in the private sector. The Chapter failed to receive a response from the Court. In November 2012, current Chapter President Larry Ward sent a letter to the Court reminding the Court that the Chapter was waiting for a response to Gary's letter. In December, the Chapter finally received a letter from the Court. The letter, written by Supreme Court Commissioner Julie Anne Rich, states that responding to the questions raised in Gary Peterson's letter "would require an impermissible discussion of hypothetical situations." In other words, the Court will only provide an opinion about an issue until confronted with an actual court case. Despite the Chapter's efforts to have the Court clarify the rule, we are still left with many ambiguities surrounding the impact of the rule on planners in the private sector.

The impetus for the Supreme Court rule was driven by efforts to protect consumers from unscrupulous activities primarily unrelated to community planning (internet scams, consumer debt, estate planning, etc.). However, one of the reasons for the Rule cited by the State Bar of Wisconsin was community planning related. The State Bar cited the non-lawyer private consultants hired by dozens of towns in Wisconsin to prepare "coordination resolutions." Each town paid over \$1500 to the consultants to prepare the resolutions which require that all other forms of government (county, state, federal) coordinate their land use programs with the town's plan. The Wisconsin Attorney General has confirmed that these resolutions have no basis in Wisconsin law.

The Chapter is interested in monitoring the impact of the Supreme Court's Rule on planners. Please email me with any stories you have about the impact of the Rule on what you do.

Wisconsin Court of Appeals Opinions

Must Sue State Agency, Not the State

[*Hoops Enterprises, LLC v. Super Western, Inc.*](#) involved a lawsuit against the State of Wisconsin seeking relief due to damage (flooding) caused by roadwork overseen by the Wisconsin Department of Transportation (DOT). Under the doctrine of sovereign immunity, however, the State cannot be sued without its consent. In section 88.87 of the Wisconsin Statutes, the legislature has established procedures under which property owners aggrieved by water problems created by the DOT's improper construction or maintenance of highway grades may bring an action in inverse condemnation or sue for other equitable relief. The statute names the DOT as the source for relief. The State is not named in the statute.

The plaintiff in this case named the State of Wisconsin as a defendant, not the DOT. The State is a separate legal entity from its agencies and the State has not given the consent to be sued in this matter. Since the plaintiff failed to bring the suit against the DOT, the Court of Appeals held that the claim is barred by the doctrine of sovereign immunity.

The case is recommended for publication in the official reports.