American Planning Association
Wisconsin Chapter
Making Great Communities Happen

For more questions or comments about these cases, please contact:
Brian W. Ohm, JD, VP of Chapter Affairs
c/o Dept. of Urban & Regional Planning, UW-Madison
925 Bascom Mall
Madison, WI 53706
bwohm@wisc.edu

May Case Law Update
May 31, 2015

A summary of Wisconsin court opinions decided during the month of May related to planning

For previous Case Law Updates, please go to: www.wisconsinplanners.org/learn/law-and-legislation

Wisconsin Supreme Court Opinions

Decision to Rescind Conditional Use Permit Not Based on Substantial Evidence

Oneida Seven Generations Corp. v. City of Green Bay, 2015 WI 50, involved a challenge to the City of Green Bay Common Council's decision to rescind a conditional use permit (CUP) issued to Oneida Seven Generations for a proposed waste to energy facility. The Common Council initially voted to grant the permit but citizens concerned about the environmental impact of the facility subsequently convinced the Common Council to rescind the CUP on the grounds that Oneida Seven Generations misrepresented the environmental impact of the facility. Following a review of the record, the Wisconsin Supreme Court concluded that the City's decision to rescind the CUP was not based on substantial evidence. The Court's decision affirmed a similar conclusion by the Wisconsin Court of Appeals reversing the City's decision to rescind the CUP.

The City's planning staff report to the Plan Commission recommended approving the conditional use permit. The Plan Commission voted unanimously to recommend approval of the CUP. The Common Council then voted ten to one to approve the CUP. In accordance with the conditions of the permit, Seven Generations applied for various city, state, and federal permits needed for the project. The City's Division of Safety and Buildings found the project in conformance with applicable regulations and issued a building permit. The Wisconsin Department of Natural Resources (DNR) reviewed the project for compliance with air quality regulations and approved Seven Generations' application for an air permit. The U.S. Department of Energy also reviewed the project and determined it would not significantly affect the quality of the human environment.

Members of the public then raised several concerns with the Common Council. The concerns focused on stack and emissions referenced in the building permit. The citizens argued that the CUP had been obtained by misrepresentation since in the earlier presentations to the City, Seven Generations had said there would be no smokestacks nor emissions from the project. The citizens also took issue with statements made by Seven Generations that the technology of the facility was not new. The Common Council voted to direct the Plan Commission to hold a hearing to determine whether the CUP had been obtained by misrepresentation. At the hearing the plan Commission reviewed the testimony made by Seven Generations during the earlier proceeding and heard from individuals speaking in favor and against the project. Following the hearing, the Plan Commission unanimously agreed that they had adequate information to reach a decision on the CUP, that they had not been misled, and that Seven

Generations had not made misrepresentations. The Plan Commission relayed its findings to the Common Council. The Common Council, however, found that Seven Generations had made false statements and voted seven to five to rescind the CUP.

Following a review of the record (which involved listening to hours of audio tapes of the various proceedings before the City), the Wisconsin Supreme Court held that the City's decision to rescind the CUP was not based on substantial evidence. The Court could not find any statement made by Seven Generations that the facility would have no emissions. Rather, the record revealed that Seven Generations made statements that there would be emissions. The Court also found that the statement that there would be "no smokestacks" was taken out of context. Seven Generations stated the facility would not have the tall, massive smokestacks "associated with coal power plants." The use of the term "stacks" was a technical term used by DNR to refer to devices like the exhaust pipes for the proposed facility that would rise only three feet above the roofline. The Plan Commission acknowledged it was aware the facility would have these vents. Finally, the Court found that the statement that the technology is not new or experimental was also not misleading. While the facility would be the first for Wisconsin, the technology is used elsewhere in the U.S. and the world.

Wisconsin Court of Appeals Opinions

Court Had Discretionary Authority to Modify Easement

The Muellenbergs live north of Hudson and have an easement over adjacent parcels that provides access to the St. Croix River. They accessed the easement from Highway 35 by using a neighboring driveway. The owners of the neighboring property had given them permission to use the driveway. As part of the new Stillwater Bridge project, the Wisconsin Department of Transportation (DOT) planned to remove the driveway and create a new trail to allow access to the easement. The Muellenbergs brought this lawsuit to stop the DOT from changing the access to the easement. The circuit court found that the new trail was comparable to the original access to the easement. The circuit court then determined it had discretionary authority to modify the original easement to include the new trail. The Muellenbergs then filed this appeal arguing the circuit court did not have the authority to modify the original easement. After reviewing applicable law, the Court of Appeals agreed that the circuit court had the authority to modify the easement on the ground that the fulfillment of its original purpose was no longer possible. The Court of Appeals also concluded that the circuit court had not erroneously exercised its discretion in modifying the easement.

The case is *Muellenberg v. State of Wisconsin Department of Transportation*, and it is recommended for publication.

Court Finds Zoning Ordinance Prohibited Short-term Rental in Single-Family Residential District

The February 2015 APA-WI case law update discussed the Wisconsin Court of Appeals decision *Heef Realty and Investments, LLP v. City of Cedarburg Board of Appeals*, 2015 WI APP 23, in which the Court disagreed with the interpretation taken by the City of Cedarburg's Board of Appeals that the City's zoning ordinance did not permit short-term rentals in the single-family residential district at issue. The City's zoning ordinance allowed long-term rentals and that there was no definition of the minimum time period allowed. According to the Court, if a city is going to regulate the short-term rental of single family homes it must enact a "clear and unambiguous law."

Now, just a few months later, the Court of Appeals provided an interesting(?) example of what it means by "clear and unambiguous law" in the *case* *Vilas County v. Accola.* The Accola's purchased a single-family detached home on a lake in the Town of Presque Isle. Shortly after they purchased the property, the Accolas began advertising it for rent on the internet for stays as short as two nights. The Town has adopted County Zoning and the home is on a parcel zoned R-1 under the Vilas County Zoning Ordinance.

The Zoning Ordinance lists the following as permitted uses in the R-1 district:

(1) Single-family detached dwelling units, including individual mobile homes, which meet the yard requirements of the district.
(2) One non-rental guesthouse, which may be occupied on a temporary basis.
(3) Parks, playgrounds, golf courses and other recreation facilities.
(4) Home occupations as defined in Article XI of this Ordinance.
(5) Essential services.
(6) Hobby farms.

The County later notified the Accolas that single-family residences in the R-1 district could not be rented for periods of less than one month. The County argued that rental of single-family residences for a period of less than a month could only occur in the R-L district and began an enforcement action to prevent the rental of the property.

The County Zoning Ordinance has a Residential/Lodging (RL) district. The purpose statement from the district state that the RL district "is to provide for areas with primarily low-density residential use, but with some mixing of low-density Transient Lodging. (Transient Lodging is defined as: A commercial lodging establishment, which allows rental of sleeping quarters or dwelling units for periods of less than one month.) Transient Lodging uses are a permitted use."

The ordinance also lists the following permitted uses in the RL district:

(1) All uses permitted in the R-1 District.
(2) Bed and breakfast establishments.
(3) Resort establishments with no contiguous multiple-family dwelling units.
(4) Rental of residential dwelling unit.

The Accolas argued that the County's ordinance did not unambiguously prohibit rental of single-family detached units in the R-1 district for periods of less than one month. Citing the *Heef* case, the Wisconsin Court of Appeals agreed that if the Court only looked at the R-1 district, the ordinance did not unambiguously prohibit the short-term rental of single-family dwelling units. The Court, however, said that the R-1 district must be read in context with the RL district. The Court notes that although the RL district does not distinguish between short-term and long-term rentals, the Court agreed with the County's interpretation that the phrase "rental of residential dwelling unit" must be read in context with the definition of transient lodging in the purpose statement of the RL district which contains a one-month time limitation.

In holding that the Zoning Ordinance "unambiguously prohibits short-term rentals of single-family detached units in the R-1 district" of the County's general zoning ordinance, the Court notes that all permitted uses in the R-1 district are also permitted uses in the RL district. The Court then concludes

that when the ordinance "states that rental of residential dwelling units is permitted in the RL district, it actually means that rental of single-family detached dwelling units is permitted in the RL district." Considering the language of the R-1 district with the RL district "leads to the inescapable conclusion that the rental of single-family detached dwelling units for periods of less than one month is not a permitted use in the R-1 district."

Clearly, drafting zoning ordinances is more art than science.

The case is not recommended for publication in the official reports.

United States Court of Appeals for the Seventh Circuit

Court Affirms Dismissal of Class of One Equal Protection Claim in Failed Development Project

The Seventh Circuit Court of Appeals once again expressed its reluctance to review local land use matters in *Miller v. City of Monona*.

In September 2004, Stephanie Miller applied to the City of Monona for permission to build a four-unit condominium project on a lot she owned in Monona. At the prompting of the City, Miller purchased a neighboring lot and resubmitted her application as a request to build a 10-unit project. The plan commission subsequently suggested changes to Miller's plan and Miller's architect again revised the plans and resubmitted them in September 2005.

In January 2006, an inspection uncovered asbestos on both of her lots. In March 2006, Miller's architect informed the City that the project had stalled because Miller was in negotiations with neighboring property owners about their involvement in a still larger development project. Later that month, Miller's negotiations with the neighbors broke down.

In June 2006, Miller obtained permission from the State of Wisconsin to demolish the buildings and remove the asbestos. The exterior asbestos removal was completed in July but then the City's building inspector issued citations to Miller for creating a public nuisance and working without a proper permit from the City. The City also informed Miller that she needed a local razing permit to demolish the houses. She then obtained a permit allowing demolition through July 30, but the Wisconsin Department of Natural Resources (DNR) issued a "stop work" order because of asbestos debris and interior asbestos on Miller's property. On July 20, a professional contractor removed the interior asbestos in compliance with DNR requirements.

The City then ordered Miller to erect a fence around her property and warned her that a fine of $2,000 per day was being imposed for the code violations on her property. The City provided Miller with a letter from the Building Inspector stating that the property was a public nuisance because of the partial demolition.

In August, Miller erected the fence and completed the asbestos abatement. In September, Miller tried to contact DNR to confirm compliance with the DNR orders, but the appropriate staff person at DNR was unavailable. She sought to move forward on her project without this final approval, but was told by City officials that she had to wait until the DNR approved the asbestos removal and until she paid outstanding fines.

On October 3, 2006, before approval of the asbestos removal, the City's building inspector informed Miller that she needed to remove a garage, pier, boat hoist, and driveway from her property. Six days later, the building inspector issued Miller citations for not razing these structures and for not filling the lots to the proper grade. Miller obtained a razing permit for the garage within two days and razed the garage within two weeks. In November, the building inspector reported to the plan commission that the final inspection of Miller's property had been satisfactory.

Despite the satisfactory inspection, the City would not allow Miller to continue construction until her outstanding citations were resolved. In April 2007, the City ordered Miller to take down the fence, which she did.

Miller went to trial in municipal court on her citations for code violations. In February 2009, the municipal court issued a decision rejecting three of the four citations against Miller. The court upheld the citation for starting demolition without a proper permit, and ordered Miller to pay $671 to the City.

After the trial, the City refused to adjust the taxes on Miller's property to reflect the demolitions. Miller contacted the Dane County Treasurer, who had the assessment corrected.

In April 2010, Miller filed this lawsuit, alleging that the City of Monona had intentionally treated her differently than others similarly situated without a rational basis. For a comparator, she pointed to Kevin Metcalfe—the son of another former Monona mayor—and alleged that he had applied and gained approval for a 45-unit condominium development on the same street as her project without opposition.

Miller alleged that the City's actions violated the Equal Protection Clause of the 14th Amendment to the United States Constitution. The U.S. Supreme Court has held that the Equal Protection Clause can protect a class of one.

The Seventh Circuit Court of Appeals acknowledged that state and local land use decisions are entitled to great deference when constitutional claims are raised in federal court: "Thus even if we disagree with a land-use decision made by local officials, there is no class-of-one claim unless the plaintiff is able to show that there was no rational basis for the officials' actions." Citing the asbestos and building code problems, the Court concluded there was a rational basis for the City's actions and agreed that Miller's Equal Protection claim failed.