American Planning Association
Wisconsin Chapter

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August Case Law Update
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A summary of Wisconsin court opinions decided during the month of August related to planning

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Raze Order for Home Damaged by Fire Upheld

Auto-Owners Insurance Co. v. City of Appleton involved a challenge by an insurance company to an order issued by the City of Appleton to raze a home following a fire. The insurance company argued that Wisconsin's raze order statute, Wis. Stat. § 66.0413, did not authorize the razing of a building damaged as a result of the fire. The company also argued the raze order was unreasonable because the home could be repaired at a reasonable cost. Finally, the company argued that smoke and water damage remediation should be excluded when calculating a building's cost of repair.

City records showed the assessed value of the home was $124,000 and the estimate for restoration was $130,600 or $112,850 if cleaning costs were excluded. Based on this information, the City issued a raze order. The insurance company objected to the order because razing the home would result in a total loss requiring payment of the homeowner policy limits of $287,500.

The Court of Appeals upheld the City's raze order. The Court interpreted the language in the raze order statute authorizing local governments to raze buildings that are "out of repair" applied to homes damaged by fire. The Court also determined that the City's raze order was reasonable and that "cost of repairs" under the raze order statute includes all repairs necessitated by the condition justifying the razing, including costs to remediate smoke and water damage.

The case is recommended for publication in the official reports.

Burial Sites Preservation

Two unpublished Court of Appeals cases provide a good review of Wisconsin's Burial Sites Preservation law found at Wis. Stat. § 157.70. The cases are Wingra Redi-Mix, Inc. v. Burial Sites Preservation Board (*Wingra I*) and Wingra Redi-Mix, Inc. v. State Historical Society of Wisconsin (*Wingra II*). Both cases involve two Native American effigy mounds near Madison called the Ward Mound Group on three acres surrounded by a large quarry owned and operated by Wingra Stone Company, formerly known as Wingra Redi-Mix, Inc.

The Burial Sites Preservation law requires that the Director of the State Historical Society identify and catalog human burial sites in the State including "sufficient contiguous land necessary to protect the burial site from disturbance." Under the law, no one may disturb a human burial site without authorization from the Director of the State Historical Society. The law authorizes the imposition of fines or imprisonment for unauthorized disturbance of burial sites. Burial sites are recorded with county Register of Deeds and the site may be exempt from property taxes under Wis. Stat. § 70.11(13m) if subject to a restrictive covenant/conservation easement.

Wis. Admin Code § HS 2.03(6)(a) allows the Historical Society to remove sites from the burial sites catalog if there is "sufficient evidence to indicate that a cataloged site does not contain any burials." Wingra Stone petitioned the Director of the State Historical Society to remove the mounds from the catalog on the basis of some evidence that the site does not contain human remains. The Director denied the petition. Wingra Stone then appealed the Director's decision to the Burial Sites Preservation Board, which affirmed the Director's decision. Wingra Stone next appealed to the circuit court and the circuit court affirmed the Board's decision. Wingra Stone appealed that decision to the Court of Appeals (the *Wingra I* case).

In Wingra I, the Court of Appeals found that Wingra Stone failed to provide sufficient evidence that Indian mounds did not contain human remains. Wingra Stone had presented an expert witness report from a UW-Madison geology professor and some historical literature indicating human remains may not be present. The State Historical Society countered with a report prepared by an archaeologist for the Society indicating that most effigy mounds are burial sites. The Society also pointed out flaws in the expert witness report prepared for Wingra Stone and inconsistencies in the literature provided by Wingra Stone.

In *Wingra II*, Wingra Stone petitioned the Director of the State Historical Society for permission to disturb the mounds as allowed under the Burial Sites Preservation law. The Director referred the petition to the Division of Hearing and Appeals (DHA) in the State Department of Administration, which conducted a contested case hearing and denied the petition. Upon review, the circuit court reversed the DHA's decision. The State historical Society and the Ho-Chunk Nation appealed the circuit court's decision to the Court of Appeals.

Under Wis. Stat. § 157.70(5)(c)2, the DHA's review of requests to disturb burial sites must:

> "determine whether the benefits to the permit applicant in disturbing the burial site or the land outweigh the benefits to all other persons shown … to have an interest in not disturbing the burial site or the land. [The DHA] shall weight the interest in the following order of priority: a. Direct kinship. b. A cultural, tribal or religious affiliation. c. A scientific, environmental or educational purpose. cm, Historical and aesthetic significance of the burial site. d. Land use. e. A commercial purpose not related to land use which is consistent with the purposes of this section. f. Any other interest which the board deems to be in the public interest."

After a review of the proceedings before the DHA, the Court of Appeals determined the DHA's decision was based on substantial evidence that the interest in a cultural, tribal, or religious affiliation and the historical significance of the site outweighed Wingra Stone's interests in use of its land. The Court of Appeals reversed the circuit court's decision and affirmed the DHA's decision denying Wingra Stone's petition for a permit to disturb the Ward Mound Group.

City's Denial of CUP for Shooting Range Invalid

Hartland Sportsmen's Club, Inc. v. City of Delafield involved a challenge to the City's denial of a conditional use permit (CUP) for a shooting range located in the City. Among other things, the City's criteria for considering CUPs included the effect on the health, safety, and welfare of the community. The City planner suggested that the shooting range follow National Rifle Association (NRA) guidelines and implement "no blue sky" technology (the shooter cannot see any sky). The shooting range hired an engineer to design a range using the NRA Range Sourcebook, measures used at gun clubs around the country, and a Minnesota best practices manual. According to the shooting range, the designs would make it impossible for a bullet to leave the range.

At the hearing on the CUP, residents spoke in favor of and in opposition to the CUP. The Plan Commission voted to deny the CUP because it did not adequately meet safety and health standards. The Common Council upheld the Plan Commission's recommendation. The shooting range sued, arguing the denial of the CUP was arbitrary. The circuit court invalidated the City's denial of the CUP. The Court of Appeals upheld the circuit court's decision finding that the City failed to make any findings of fact to support the denial other than stating the city "did not *feel* the plan was adequate to protect the safety of its citizens." (Emphasis added by the Court.) According to the Court, "Feelings are no substitute for reason, and reason is what we seek. Since the City gives us no rational basis upon which to conclude that its decision was not arbitrary, we can only conclude that its decision was so."

The case is not recommended for publication.

What is an "unpublished" decision?

Under Wisconsin law, an unpublished opinion may not be cited in any Wisconsin state court as precedent or authority. However, an unpublished opinion issued on or after July 1, 2009, may be cited

for its persuasive value with certain exceptions. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]