American Planning Association
Wisconsin Chapter
Making Great Communities Happen

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

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

City Sign Regulation Preempted by State Law

City of Eagle River v. Slusarczyk involved the appeal of a finding that Slusarczyk violated a provision of the City of Eagle River's sign ordinance. Slusarczyk owns and operates Traveler's Inn in Eagle River. The inn adjoins Synergy Salon and Spa. Customers of the salon regularly park in the inn's parking lot. To prevent salon customers from parking in his lot, Slusarczyk posted a sign on his parking lot that read:

PRIVATE PROPERTY NO TRESPASSING!
TRAVELERS INN GUESTS
PARKING ONLY
DO NOT BLOCK DRIVEWAY ANY TIME
NO! SYNERGY OR THEIR RUDE GUESTS
PROHIBITED THANK YOU

The City cited Slusarczyk for violating a provision in the City's zoning ordinance for off-premise signs. The City's ordinance states that off-premise signs are only allowed by a "conditional grant" which Slusarczyk did not have. The City's ordinance defined "off-premise signs" as "a sign which directs attention to a business, product, service, or entertainment not conducted, sold or offered upon the property where such sign is located." Slusarczyk argued the ordinance did not apply to him because his sign did not meet the definition of an off-premise sign. The circuit court found that the sign was an off-premises sign because the reference to Synergy on the sign directed attention to a business that was not located on the property where the sign was located.

On appeal, the Wisconsin Court of Appeals declined to decide whether the ordinance applied to Slusarczyk and focused on a different argument made by Slusarczyk alleging that the ordinance was preempted by state law. Section 346.55(4) of the Wisconsin Statutes provides, in part: "Owners or lessees of public or private property may permit parking by certain persons and limit, restrict or prohibit parking as to other persons if the owner or lessee posts a sign on the property indicating for whom parking is permitted, limited, restricted or prohibited." The City argued that its ordinance did not

prohibit the sign, only that Slusarczyk needed a conditional use permit for the sign. The Court of Appeals, however, did not agree. According to the Court, "[b]ecause a preemptive state statute grants Slusarczyk the right to indicate for whom parking is restricted or prohibited on his property, the City of Eagle River cannot restrict that right by requiring Slusarczyk to first obtain a conditional grant."

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

State Law Preempts City Ordinance Requiring Landlords Notify Tenants of City Inspection Program

Olson v. City of La Crosse involved a challenge by a group of landlords to a City of La Crosse ordinance requiring that landlords notify tenants of City inspections under the City's inspection and registration program. The landlords argued that section 66.0104(2)(d)1.a of the Wisconsin Statutes preempts this notice provision. Section 66.0104(2)(d)1.a provides that "[n]o city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law." The Wisconsin Court of Appeals agreed with the landlords that section 66.0104(2)(d)1.a preempts the City's notification requirement.

The City argued the notification requirement was not preempted because Wis. Stat. § 704.07(2) requires landlords to "comply with any local housing code applicable to the premises." In an effort to reconcile the possibly conflicting statutes, the Court of Appeals, held that "nothing in our interpretation stops local governments from implementing rental housing inspection and registration programs as part of a housing code . . . . We simply conclude that the responsibility for communicating to tenants about housing code programs like the City's program must, under WIS. STAT § 66.0104(2)(d)1.a., fall on the government instead of on landlords."

The case is recommended for publication in the official reports.

State Law Does Not Preempt City's Residency Requirement Ordinance

Black v. City of Milwaukee involved a challenge brought by the Milwaukee Police Association against the City of Milwaukee ordinance that requires all city employees to live in the City of Milwaukee. The Association argued that the ordinance was prohibited by 2013 Wis. Act 20, § 1270, which abolished local residency requirements. The law is codified at Wis. Stat. § 66.0502. The City, however, argued that the state law did not trump the City's ordinance because the City enacted the ordinance over 75 years ago under its constitutionally protected Home Rule authority. In this interesting case, the Wisconsin Court of Appeals agreed with the City of Milwaukee and concluded that § 66.0502 does not apply to the City of Milwaukee and that the City's residency requirement ordinance is still good law.

The Article XI, section 3(1) of the Wisconsin Constitution provides that "[c]ities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." According to the Court of Appeals, "[t]his means . . . that where a city has created law under its 'home rule' authority, any state law in conflict must yield to the local law unless it involves a matter of 'statewide concern' and affects every city or village with uniformity." After reviewing the facts of the case, the Court of Appeals found that § 66.0502 does not involve a matter of statewide concern and does not affect all local governments uniformly.

The Court of Appeals' decision cites a two-part test for reviewing whether state legislation violates the home rule protections. First, a court determines whether the statute concerns a matter of primarily statewide or primarily local concern. If it is primarily a statewide concern, home rule is not implicated. If the statute relates to a matter of primarily local affairs, the court must determine whether the statute satisfies the uniformity requirement. If it does not, it violates the home rule protections.

The Court of Appeals notes that it is for the courts to determine whether a particular statute is a matter of statewide concern. The Court notes that this determination is made on a case-by-case basis and that there is no fixed standard for determining matters of statewide or local concern. As for the uniformity requirement, the Court notes that the language used in the state constitution is "affects, not "applies," which requires a more substantive analysis of the statutes. As a result, the Court states that "the uniformity requirement does not simply mean that a legislative enactment 'applying' to all municipalities passes the test."

In analyzing the case, the Court of Appeals found that there is "no convincing reason to conclude that Wis. Stat. § 66.0502 concerns a matter of statewide concern." The Court reviewed the legislative history of the state statute and found that the goal of the statute was to target the City of Milwaukee: "the sole reason we can delineate for the statute's existence is the gutting of Milwaukee's long-standing residency requirement." The Court agreed with the City's arguments that § 66.0502 concerns a local matter. First, the Court agreed that doing away with the City's residency requirement directly affects the City's economy and tax base. Second, the Court agreed that § 66.0502 interferes with the ability of municipalities to promptly respond to emergencies. Third, the Court agreed that § 66.0502 directly affects the City's strong interest in having employees who are genuinely interested in the City's welfare and progress.

Having concluded that § 66.0502 does not involve a matter of statewide concern, the Court turned to the uniformity requirement. The Court found that the statute does not meet this requirement. The Court's analysis relies on a report prepared by the Legislative Fiscal Bureau shortly before the passage of § 66.0502. The Legislative Fiscal Bureau report indicated that the City of Milwaukee was one of only thirteen municipalities and three counties that require all of their employees to live within the municipal limits. The report states that the City employs nearly 7,200 individuals and that several neighborhoods contain high concentrations of City employees. The report noted that city employees had higher salary levels and home values than the city average. The report also cited the experience of the Cities of Detroit and Minneapolis that saw significant out-migration following the lifting of residency requirements. The report concluded that the City could be negatively impacted if large numbers of employees leave Milwaukee. In light of these impacts, which could be huge for the City of Milwaukee, the Court concluded that § 66.0502 does not uniformly affect every city and village.

The case is recommended for publication in the official reports.

United States Court of Appeals for the Seventh Circuit

Nude Dancing and the First Amendment

Green Valley Investments, LLC v. Winnebago County involved an on-going challenge to an adult entertainment ordinance. Stars Cabaret (owned by Green Valley Investment) is a nude dancing establishment in The Town of Neenah in Winnebago County. In 2006, when Stars opened for business,

Winnebago County's zoning ordinance required adult entertainment establishments to locate within "adult entertainment overlay [AEO] district[s]." An AEO district could be established only if the County issued a conditional-use permit to the would-be adult entertainment operator. The U.S. Court of Appeals for the Seventh Circuit (which includes Wisconsin) concluded that the County's ordinance "unquestionably imposes a prior restraint" on freedom of expression protected by the first Amendment to the U.S. Constitution. According to the Court, the ordinance "requires applicants such as Green Valley to apply to the County for permission to undertake their selected mode of expression—nude dancing. The County's committee decides whether applicants receive permission to make their proposed communication based on the content of that communication. This requires the committee to review such amorphous points as whether the proposed use is 'a detriment to the public welfare,' or 'will in no way contribute to the deterioration of the surrounding neighborhood,' or 'will not have a harmful influence on children' in the area. The ordinance leaves it to the County's discretion to decide yes or no on each of these criteria. Finally, the County must affirmatively grant permission for the use to occur. This is a quintessential prior restraint."

Despite being unconstitutional, a focus of the case was whether the cabaret was a valid nonconforming use under state law. The district (trial) court determined that it was not a valid nonconforming use. The Court of Appeals, however, held that since nonconforming use status is a matter of state law, after deciding the federal Constitutional question, the district court should have relinquished its jurisdiction over the state claims and dismissed them without prejudice so the nonconforming use issue could be decided by state court. The Seventh Circuit Court of Appeals therefore reversed and remanded the case for such an order.