American Planning Association
Wisconsin Chapter
Making Great Communities Happen

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

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Unites States Supreme Court Opinions

Freedom of Speech Under the First Amendment: Government Speech v. Sign Ordinances

On June 18th, the United States Supreme Court announced two decisions related to government's ability to regulate speech under the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. The cases reinforce the public law/private law distinctions that have long been a central component of American jurisprudence.

The first case, Walker v. Texas Division, Sons of Confederate Veterans, involved a design for a specialty automobile and truck license plate proposed by the Sons of Confederate Veterans that featured the Confederate battle flag. The State of Texas refused to issue the specialty plates and the Sons of Confederate Veterans sued alleging a violation of their freedom of speech protections under the First Amendment. In a five to four decision, a majority of the Court's members ruled that the messages on those plates are "government speech" as opposed to "private speech." Writing for the majority, Justice Breyer stated: "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." Equating state issued automobile license plates with government IDs, Breyer cited the practice of states to include slogans on license plates, such as the "America's Dairyland" slogan that appears on Wisconsin license plates. People associate this type of speech with the state. As government speech, the Court found that Texas was entitled to refuse to issue the plates featuring the Confederate flag.

In a strongly worded dissent, Justice Alito argued that people seeing cars and trucks passing by on the roads do not read license plate slogans as the government speaking, given the immense variety of what Texas has allowed to be said on vanity license plates. He was joined by Chief Justice Roberts, and Justices Kennedy and Scalia.

In the second case, Reed v. Town of Gilbert, the Court, in a rare unanimous decision, struck down a local government's sign code as a violation of the freedom of speech guaranteed by the First Amendment.

The sign code for the Town of Gilbert, Arizona, prohibited the display of outdoor signs without a permit, but then exempted 23 categories of signs from that requirement. Three categories of exempt signs based on the content of the sign were relevant to the case: Ideological Signs, Political Signs, and Temporary Directional Signs Related to a Qualifying Event. The code defined a "qualifying event" as an event sponsored by a religious, charitable, or other non-profit organization. Temporary Directional

Signs are limited in size (6 square feet), the number which may be placed on property (4), and time (12 hours before and one hour after the event). The signs are treated less favorably than ideological signs (which may be 20 square feet, allowed in any zone and unlimited in time) and political signs (which may be 16 to 32 square feet, depending on the status of the property, and allowed 60 days before and 15 days following an election).

Clyde Reed, the pastor of Good News Community Church, wanted to advertise the time and location of Sunday church services. The church owned no building and held services in elementary schools or other locations in or near the Town. The Church began placing 15 to 20 signs around the Town early in the day on Saturday to announce the time and location of the upcoming service. The signs were removed around midday on Sunday. The Town cited the Church for violating the Town's sign code. Efforts by the Church to reach an accommodation with the Town proved unsuccessful. The Church initiated this lawsuit arguing that the Sign Code abridged their freedom of speech in violation of the United States Constitution.

Justice Thomas, writing for the Court, found the regulations content -based because they focused on the message (the "qualifying event," an ideological matter, an election) which triggered different regulations for each category. As content-based regulations of speech, Thomas said that the regulations were subject to strict scrutiny by the Court. "Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."

As a result of the decision, sign codes similar to the Town of Reed that distinguish between political signs, ideological signs, or temporary directional signs to certain events will be considered to be content-based. These laws, wrote Thomas, likely will be struck down "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."

The main opinion was supported by Chief Justice Roberts and by Justices Alito, Kennedy, Roberts, Scalia, and Sotomayor. A concurring opinion written by Justice Alito, and joined by Justices Kennedy and Sotomayor, includes a non-comprehensive list of rules that would not be content based as guidance for communities trying to determine what signage they can regulate following the Reed case:

Rules regulating the size of signs;
Rules regulating the locations in which signs may be placed;
Rules distinguishing between free-standing signs and those attached to buildings;
Rules distinguishing between lighted and unlighted signs;
Rules distinguishing between signs with fixed messages and electronic signs with messages that change;
Rules that distinguish between the placement of signs on private and public property;
Rules distinguishing between the placement of signs on commercial and residential property;
Rules distinguishing between on-premises and off-premises signs;
Rules restricting the total number of signs allowed per mile of roadway;
Rules imposing time restrictions on signs advertising a one-time event.
Government entities may also erect their own signs consistent with the principles that allow governmental speech.

Alito also concluded that: "Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."

Justices Kagan and Breyer also wrote separate opinions. Justice Kagan expressed her concern that there was no reason to apply strict scrutiny in this case and warned that the Court risks becoming the "Supreme Board of Sign Review."

Takings -- "I heard it through the grapevine"

The United States Supreme Court also decided an important "takings" case, **Horne v. Department of Agriculture**. The case involved a challenge to the United States Department of Agriculture's (USDA) California Raisin Marketing Order that required a percentage of a grower's crop be physically set aside in certain years for the account of the federal government, free of charge. The Agricultural Marketing Agreement Act of 1937, a hallmark of the New Deal, authorizes USDA to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. (This is the same legislation that enables the milk marketing orders familiar to many farmers in Wisconsin.)

The requirement that raisin growers give part of their crop to the government was meant to keep those raisins off the market temporarily to increase prices for the annual crop as a whole. The Hornes refused to turn over some of their raisins to the government under the order and were fined $680,000 (an amount equal to the market value of the missing raisins plus a civil penalty for noncompliance). They then sued the federal government alleging that the set-aside requirement resulted in the taking of private property without the payment of just compensation as required by the Fifth Amendment to the United States Constitution. An eight member majority of the United States Supreme Court agreed with the Hornes that the set-aside requirement was an unconstitutional "taking."

Chief Justice Roberts, writing for the majority, focused on three questions. The first question was whether the duty to pay just compensation under the Fifth Amendment applies to the personal property at issue in the case or does it only apply to real property. The court answered this question in the affirmative citing the protections of private personal property from uncompensated takings included in the Magna Carta which this year is celebrating its 800th anniversary. (For many years the Wisconsin Supreme Court has applied the "takings" provision of the Wisconsin Constitution to personal and intellectual property so the U.S. Supreme Court's answer to this question has little impact in Wisconsin.)

The second question addressed by Chief Justice Roberts was whether the government may avoid paying just compensation for the physical taking of property by "reserving to the property owner a contingent interest" in the value of the property set-aside by the government. (The government eventually sells the raisins set aside and after deducting expenses returns any net proceeds to the growers.) Justice Roberts notes that since the case involved the physical appropriation of property, any net proceeds returned to the farmer goes to the question of the amount of just compensation and not whether or not the appropriation constituted a "taking." (This ruling could be important in future cases that answer the question whether payments received under a transfer of development rights program constitute "just compensation.")

The final question addressed by the Chief Justice was the government's argument that the reserve requirement was not a taking because raisin growers voluntarily choose to participate in the raisin market. Chief Justice Roberts disagreed as he was unwilling to find the program was a voluntary exchange.

Chief Justice Roberts then determined the Hornes should be relieved of the obligation to pay the fine as the "just compensation" due to the Hornes for the taking. Although eight of the nine Justices agreed that the raisin set aside program was a "taking," three of those eight wanted the case sent back to the lower courts to determine whether the Hornes were entitled to any compensation, because they may have benefited financially from the better prices that raisins supposedly got because of the market effects of the government set-aside regime. Three votes was not enough to change the outcome of this issue.

Justice Sotomayor dissented arguing that the raisin growers were not deprived of all of their ownership interests in the raisins that they had to turn over, and thus there was no "taking."

Court Upholds "Disparate-Impact" Analysis Under the Federal Fair Housing Act

In **Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,** the United States Supreme Court held that the Federal Fair Housing Act (FHA) permits disparate impact claims. In a disparate-impact claim, a plaintiff may establish liability, without proof of intentional discrimination. Disparate-impact analysis originated in Griggs v. Duke Power Co., 401 U.S. 424 (1971), involving a provision of the Civil Rights Act of 1964 prohibiting employment discrimination. The Court held that plaintiffs can make employment discrimination claims without proving intent to discriminate.

The FHA prohibits *intentional* discrimination ("disparate-treatment") by making it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). However, whether or not the FHA encompasses disparate-impact liability had never been addressed by the U.S. Supreme Court until the present case.

The Inclusive Communities Project (ICP) sued the Texas Department of Housing and Community Affairs over how the Department distributes tax credits for low-income housing under the Low-Income Housing Tax Credit Program (LIHTC), 26 U.S.C. § 42(g)(1). ICP claimed that the Department's policy unintentionally resulted in granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department needed to modify is selection criteria in order to encourage the construction of low-income housing in suburban communities.

A five to four majority of the Court agreed with ICP finding that disparate impact claims are cognizable under the FHA. Writing for the majority, Justice Kennedy began his opinion with the statement that: "[t]he underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas, that is, whether the housing should be built in the inner city or in the suburbs." Kennedy summarizes the history of the various Civil Rights laws of the 1960s and finds the disparate-impact claims consistent with the central purpose of the FHA: "The FHA . . . was enacted to eradicate discriminatory practices within a sector of our nation's economy. . . . These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. . . . The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units."

Kennedy, however, recognizes limits to disparate-impact liability and highlights the need for a "robust causality requirement": "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." Housing authorities have "leeway to state and explain the valid interest served by their policies." According to Kennedy, [d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." He concludes that "even when courts do find liability under a disparate-impact theory," remedial orders must "concentrate on the elimination of the offending practice" through "race-neutral means."

Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas. Justice Thomas wrote a separate dissent.

The case points out the need for state agencies and local communities to seriously consider the impact of their policies and programs on the availability of low-income housing as they conduct their planning processes.

Same-Sex Marriage and Fair Housing

Obergefell v. Hodges, the U.S. Supreme Court's recent decision upholding same sex marriage, was not a housing case. Nonetheless, the controversy surrounding the topic might prompt some to ask if it is possible to define "family" in their local zoning code in such a way to exclude same-sex couples from living in "single-family" zoning districts. Currently, the Federal Fair Housing Act does not specifically include sexual orientation and gender identity as prohibited bases. However, the State of Wisconsin has banned discrimination in housing based on sexual orientation since 1982. Any attempt to discriminate against same-sex couples through zoning could be challenged in court.

U.S.E.P.A. Must Consider Cost Impacts of Emission Rules

In Michigan v. Environmental Protection Agency, the United States Supreme Court ruled by a five-to-four vote that the United States Environmental Protection Agency (EPA) must take costs into account when regulating emissions of hazardous air pollutants from stationary sources. The decision, written by Justice Antonin Scalia, temporarily blocks an EPA ruling to regulate power plants until EPA considers cost (such as the cost of compliance) in deciding if the regulation is appropriate and necessary. EPA had intended to consider costs later, when calculating just what controls to impose on a specific power plant.

Wisconsin Supreme Court Opinions

Housing Impact Report Not Required For State Wind Energy Rules

In Wisconsin Realtors Assoc. v. Public Service Commission of Wisconsin, 2015 WI 63, the Wisconsin Supreme Court held that housing impact report was not required as a matter of law when the Public Service Commission (PSC) developed the wind facility siting rules in 2012.

The Wisconsin Administrative Procedures Act requires that if any rule proposed by a state agency (including the PSC) "directly or substantially affects the development, construction, cost, or availability of housing in this state," then the Department of Commerce [now the Department of Administration]

shall prepare a "housing impact report" before that rule is submitted to the Legislative Council staff. Wis. Stat. § 227.115(2).

The Wisconsin Realtors Association initiated this lawsuit arguing that the wind energy rules, Wis. Admin. Code ch. PSC 128, titled "Wind Energy Systems," were invalid because the PSC failed to prepare a housing impact report during the promulgation of the rules.

In a decision written by Justice Abrahamson, the Wisconsin Supreme Court concluded that the texts of the governing statutes and the wind energy rules did not demonstrate as a matter of law that the rules directly or substantially affect the development, construction, cost, or availability of housing in Wisconsin. Chief Justice Roggensack and Justice Ziegler dissented in the case.

Attorney Fees Not Allowed in Public Records Case

The Journal Times v. City of Racine Board of Police and Fire Commissioners , 2015 WI 56, involved an action by the Journal Times to recover reasonable attorney fees related to the newspaper's efforts to collect information related to a meeting held in closed session by the Commission.

The Commission initially denied the records requests but later provided the requested information. At the time of the request and at the time that the information was provided, no record existed that could have been responsive to the request. The Wisconsin Supreme Court concluded the newspaper had not prevailed in "substantial part" and was therefore not entitled to attorney fees.

Wisconsin Court of Appeals Opinions

Notes Are Not "Records" Under State's Public Records Law

The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District, involved a request by the newspaper for access to records involving the school district's investigation into allegations of impropriety surrounding a school athletic program. As part of the investigation, district employees conducted interviews of people related to the program. The newspaper sought disclosure of the notes but the district refused to release the notes. The newspaper then sued the district.

The Wisconsin Court of Appeals held that the district did not need to produce the documents because they fell within the exemption under the public records law for notes prepared for the originator's personal use.

The case is recommended for publication in the official reports.

United States Court of Appeals for the Seventh Circuit

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For an interesting reading on a protracted and messy case out of Chicago on the issue of substantial burden on religion under the Religious Land Use and Institutionalized Persons Act of 2000 see: http://www.rluipa-defense.com/2015/06/seventh-circuit-remands-again-world-outreach-conference-center-v-city-of-chicago/