

September Case Law Update

A summary of court opinions decided during the month of June
related to planning in Wisconsin
September 30, 2013

Wisconsin Supreme Court Opinions

[No decisions to report for the Month of September.]

Wisconsin Court of Appeals Opinions

Town Zoning Of Shorelands Limited

In *Hegwood v. Town of Eagle Zoning Board of Appeals*, the Wisconsin Court of Appeals addressed the relationship of town general zoning to county shoreland zoning. The Court of Appeals held that, except for towns that adopted general zoning prior to the adoption of the county shoreland zoning ordinance, towns do not have authority to regulate shorelands. The Court of Appeals decision raises some significant issues and leave many questions unanswered regarding the distinction between *general* zoning used to establish the use of property and special *overlay* zoning used to establish standards to protect water resources.

The dispute involved land located near the shoreline in the Town of Eagle in Waukesha County. Hegwood built an outdoor fireplace and pergola on the shoreline and applied for an after-the-fact variance from the 20 foot setback requirement in the County's Shoreland and Floodland Ordinance. The County approved the pergola on the condition that Hegwood remove the roof and allowed the fireplace to remain. Hegwood then applied to the Town for a variance from the Town's *general* zoning ordinance that also included a 20 foot setback. The Town Board of Appeals denied the application.

Hegwood then sued the Town by filing a certiorari action seeking reversal of the BOA decision on the basis that only the County has the authority to regulate shoreland under Wisconsin law. The Town made two basic arguments in defense of the lawsuit. First, the Town argued that the lawsuit should not have been brought as a certiorari action (appropriate for challenging variance decisions). Rather, the Town argued that the suit should have been brought as a declaratory judgment action since the dispute was about town authority to regulate shorelands. The Court of Appeals disagreed.

Second, the Town argued that it has concurrent zoning with the county over shoreland areas. Hegwood, however, argued that Wis. Stat. § 59.692 (the mandatory shoreland zoning provisions for counties) vests counties with exclusive authority to zone shorelands in all incorporated areas and thus the Town lacked the authority to enforce its general zoning ordinance on Hegwood's property along the shoreland.

Wis. Stat. § 59.692 requires that counties adopt shoreland zoning ordinances consistent with the standards developed by the Wisconsin Department of Natural Resources (DNR). The county

ordinance applies unilaterally to all shoreland property located in the unincorporated (towns) areas of the county. County shoreland zoning follows different procedures than county *general* zoning. County general zoning does not apply unilaterally to all unincorporated areas of the county. Towns have the ability to approve the application of county zoning within the town. Those towns that decide not to have county zoning apply in the town can either be unzoned, or adopt their own zoning ordinance.

The shoreland zoning standards developed by the DNR primarily focus on standards for setbacks, vegetative buffers, etc. The standards do not fully address the various uses that may occur along the shoreline (e.g., different types of residential uses, commercial uses, etc.) As a result, many counties treat their shoreland zoning ordinance as an *overlay* ordinance. The county then relies on general zoning (either the county general zoning ordinance or the town general zoning ordinance) to regulate the uses along the shoreline. This was the situation presented in this case -- the county shoreland zoning ordinance overlaying the town general zoning ordinance.

Since the town's ordinance was adopted after the county shoreland zoning ordinance, the court of appeals held that the town **did not** have concurrent jurisdiction with the county over the shoreland area. To support its decision, the Court of Appeals cited Wis. Stat. § 59.692(2)(b) that provides: "If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise." The Court of Appeals interpreted this provision to mean that the legislature gave the authority for adopting shoreland zoning exclusively to the county and only **preexisting** town ordinances that were more restrictive than the county's shoreland zoning ordinance could remain in effect.

In footnote number 8, the Court of Appeals notes that nothing in its opinion affects the authority of towns to zone areas "in or along natural watercourses, channels, streams or creeks . . . related to non-navigable waters." This statement is confusing given that virtually all natural watercourses, channels, streams or creeks will be navigable waters. It is also not clear how the Court's analysis applies to situations where counties have recently adopted new shoreland zoning ordinances in response to DNR's revised shoreland zoning rules in NR 115.

The decision is recommended for publication. It is expected that the Town of Eagle will petition the Wisconsin Supreme Court to review the Court of Appeals decision.

Court Upholds State Requirement to Restore Wetland

In *State of Wisconsin v. CGIP Lake Partners, LLP*, the Wisconsin Court of Appeals reversed the Circuit Court decision denying the State's request for an injunction requiring the property owner remove a road and restore a wetland.

The case involved the illegal fill for a driveway to a home. The driveway bisected a wetland. The State determined that the driveway was not necessary because there was an alternative route to the home thereby providing a practicable alternative to filling the wetland for the driveway. The State brought this enforcement action requesting both penalties and injunctive relief to

remove the fill. The Circuit Court ordered \$30,135.85 in penalties but denied the injunctive relief based on equitable reasons due to the Department of Natural Resources not following the proper procedure in the permit process.

The Court of Appeals reversed the Circuit Court's denial of injunctive relief. In its decision, the Court of Appeals follows the standard set forth in Forest County v. Goode, 219 Wis. 2d 654, 579 N.W.2d 175 (1998). Forest County v. Goode sets forth a rebuttable presumption that the court should grant an injunction. The burden is on the defendant to convince the court that there are compelling equitable reasons to deny injunctive relief. In this case the Court of Appeals found that the Circuit Court had improperly shifted the burden to the State to show specific instances of environmental harm caused by the road.

The decision is recommended for publication.