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Planners and Lead in Drinking Water

By Cassandra Leopold and Nancy Frank
University of Wisconsin - Milwaukee

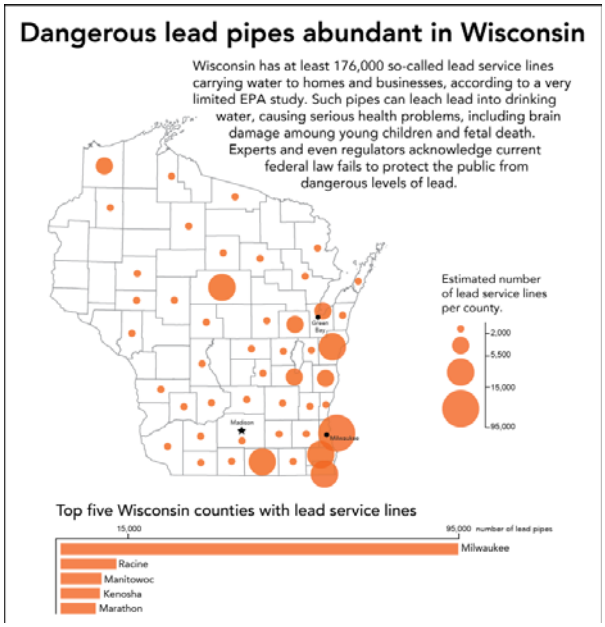
In October 2015, the New York Times reported, “Flint Officials are No Longer Saying the Water is Fine.” Since then Flint has become a symbol of government incompetence and venality, with 15 people criminally charged, 5 with involuntary manslaughter. We know the basic facts of the Flint water crisis: Flint began drawing their drinking water from a local river in April of 2014, after switching from Detroit’s public water, but water managers and state officials failed to add anti-corrosives to protect residents from lead leaching from their pipes, principally private service lines connecting homes to the public water main.

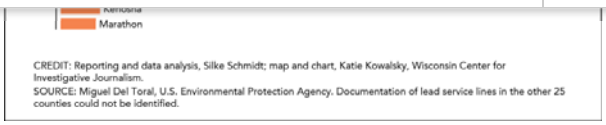
This article considers examines how Wisconsin communities across the state, in cities large and small and in rural areas, are becoming increasingly award of the public health risks from lead water pipes and how communities can benefit by including their planning staff in developing strategies for reducing the risk.

Visit the APA - Wisconsin website Planning and Health page for a summary of basic information about the lead in drinking water issue.

Lead Pipes in Wisconsin

A USA Today investigation analyzed data from the EPA’s Safe Drinking Water Information System. They found 81 Wisconsin water systems tested by the EPA from 2012 to 2105 had lead levels above the EPA’s action level in at least one testing period, amounting to 10 percent of the water systems throughout the state. Twelve systems topped the action level in two or more testing periods. When the investigators controlled for population size in the states, Wisconsin had the 12th-highest number of systems failing at least once in the four years included in the report (Litke 2016). The EPA estimates that over 176,000 homes in Wisconsin have lead service lines. Due to inconsistent sampling methods, however, the EPA cautions that this is probably an underestimate.





CREDIT: Reporting and data analysis, Silke Schmidt; map and chart, Katie Kowalsky, Wisconsin Center for Investigative Journalism.
SOURCE: Miguel Del Toral, U.S. Environmental Protection Agency. Documentation of lead service lines in the other 25 counties could not be identified.

About half of Wisconsin's lead service lines are in Milwaukee. A few months after the national news started to cover the lead in drinking water issue in Flint, the City of Milwaukee announced a moratorium on water main replacements in areas with lead service lines, a substantial area in the city (Deprey 2016). The city called the moratorium when new evidence was published showing that the vibrations and disturbance from construction could cause the protective anti-corrosive lining to flake off, exposing the water to lead. Later in 2016, the city would learn that partial replacement of lead service lines (in which the city replaced the portion of the line on private property) actually increases rather than decreasing the lead risk (St. Clair, et al., 2016).

Madison has been recognized as a leader in lead abatement. Madison has spent at least $19 million since 2001 to replace 8,000 lead lines between the water main and households, including city and residential sections. "The city covered half the cost of replacement, up to $1,000, for the 5,600 property owners who participated" (Schmidt 2016). In Madison, the vulnerability of Madison's lakes to both lead and the phosphorus anti-corrosive used by most communities to protect residents from lead exposure was a factor. Unlike communities discharging wastewater to rivers or large lakes, like Lake Michigan, the small size of the Madison lakes offered less dilution for lead-contaminated water reach that would reach the lakes and greater risk of algae and nuisance weed growth from the phosphorus additive.

Four other communities were at the leading edge of the current awareness about lead in drinking water. In Wisconsin Rapids, THINK Academy, a local school, found that its water had lead levels above the EPA standard; "The system failed lead tests once in 2013, twice in 2014 and once last year," (Litke 2016). Ultimately, the school district replaced all water fixtures in the interior of the building and is installing a water treatment system.

In Lake Mills, DNR records show 10 percent of the water system's tests topped 80 ppb [parts per billion] from 2013-15, and 20 percent were over the 15 ppb threshold," the EPA standard (Litke 2016). Lake Mills's experience in dealing with this issue also highlights an important and often unknown technical aspect of the lead in drinking water issue.

"Each water system tests only a fraction of its homes, which are presumed to be representative of the system as a whole. Lake Mills tested 40 homes in older areas with a higher likelihood of lead plumbing. High tests have resulted, but not in predictable ways.

" 'You could go to the same house every month for a year and get dramatically different tests whether or not they've done anything to alleviate the situation. It's a moving target,' Hermanson said, noting there is no apparent solution for the city aside from having affected residents run the water several minutes before using it."

These widely varying results from a series of lead tests of water from the same faucet is because lead does not leach off of pipes in a constant way, as one might expect. Lead flakes off. The water can test well below the EPA standard for months, and then show a spike well above the action level. Since the water sample needs to be taken from inside the home, water systems face major challenges in maintaining a surveillance program that is sufficient to catch problems that are intermittent. EPA officials warn that under current testing protocols, high lead levels are routinely missed (Schmidt and Hall 2016).

Planners' Roles in the Lead Pipe Issue

The Lake Mills case also highlights some of the response actions that planners, working with public health and public works staff, might be involved in assisting in carrying out. After the DNR issued notice of the violation of safe drinking water standards, it ordered Lake Mills “to do more public education and take other steps designed to give residents greater opportunities to replace lead pipes” (Verburg 2016).

"[T]he most significant action will be increased efforts to publicize recommendations aimed at reducing exposure — primarily running a tap for up to two minutes before drinking it or cooking with it."
"The city will send a letter annually to water customers and may conduct a public meeting or place an announcement on the city television station or website."

But drinking water experts are now recommending that the only reasonable long-term solution is replacement of the lead service lines. Up to now, cities have made this choice voluntary, not forcing property owners to replace their lead pipes. Even in Madison, a few homeowners have refused to have their lead service lines replaced.

In Lake Mills, according to city manager Steve Wilke,
" 'I know of three that have replaced the service line on their property,' said Wilke, who has been with the city since 2000. 'Most of the time when we have given them the option they have not wanted to do it.'
"In one case when the city replaced its end of the pipe, but the resident didn’t, the lead levels in the house spiked in tests taken shortly after the work was done, probably because the construction work shook loose corrosion that usually prevents water from coming in contact with the interior surface of the lead pipe, Wilke said."

In Milwaukee, the Common Council adopted a new policy for prioritizing service line replacements. In 2017, the City requires lead service lines to be replaced only if they are leaking, damaged during construction activities, or if the City portion of the service line needs to be replaced because of planned or emergency work on the water main. The property owner may hire their own contractor to replace the line and receive no subsidy or have a city contractor do the work and, in that case, have their cost limited to one-third of the average cost of replacement ($1600) and pay over 10 years as a special assessment (Behm 2016).

Other water systems with recent experience with high lead levels are Genoa City, Mosinee and the Fox Lake Correctional Institution in Dodge County. Each were required to perform public education and treat the water supply with phosphates to cease lead from continuing to leach into drinking water. Genoa and Mosinee were ordered to remove lead service lines and issue consumer notices, while Fox Lake was required to close and rehabilitate certain wells.

In Green Bay, the water utility has replaced about 1,700 remaining lead service lines, representing about 5 percent of the system after finding high lead levels in 2011. It was the first time the Green Bay Water Utility exceeded the action level for lead since the EPA established testing requirements in 1992. After conducting a corrosion study, Green Bay Water Utility discovered that the high lead levels were due to particulate matter, and worked with the DNR to create an action plan to reduce lead levels that continues to be implemented (Cite: General Lead Article). As of May 2017, Green Bay had replaced 460 lead service lines. It had 1,322 lines remaining in place. Green Bay’s water department is now working with the city to provide grants and zero percent interest loans to help homeowners cover these costs (Schmidt and Hall 2016).

"The city has been using a $500,000 federal grant, administered through the state Department of Natural Resources, and $300,000 of excess stadium tax money earmarked to provide grants to property owners

for changing out their lead pipes.

"The cost of replacing the pipes has been greater than expected, Powell said.
"The replacement program was built around an estimated cost about $3,000 per change, but it's averaging close to $4,800 per property as work crews discover unexpected obstacles. Pipes put in more than a 100 years ago can be covered by buildings, driveways or gigantic trees, Powell said."

Planners can play an important role in their communities in bringing the lead pipe issue to the attention of elected officials and their colleagues in the public works and water departments and working with public health professionals in their communities. This is especially true in smaller, older communities. Homes built before 1951 are at high risk of having lead service lines.
Planners' training and experience in doing outreach and public education can be an asset in addressing the issue. Lead in drinking water can be highly emotional for residents. Fear of health impacts, fear of unmanageable costs of replacing pipes, and the taint of government misconduct from the Flint episode all converge to create an emotionally volatile climate. In addition, the complexity of the science and regulatory framework around lead in drinking water is daunting and can be difficult to explain.

Planners also have a professional orientation toward assuring environmental justice that their colleagues in engineering and water system management may not be well-versed in. Planners can work with those professional colleagues to devise local public policies that assist low-income households in becoming as well-protected as more affluent households.
This requires planners to be part of a team of professional looking for the combination of financial, regulatory, and public education tools that will protect residents in the short-term and long-term. In the long-term, the pipes will need to be replaced. The timeframe, interim protective strategies, regulatory measures to support the long-term policy, and financial subsidies to private property owners are policy questions well within the purview of planners.

Members of the public will want answers about the distribution of cost and risk.

- Why should the city subsidize the replacement of pipes on private property?
- Since the dangers are significant, why does the city propose a 20-year implementation period?
- Are the interim protective measures recommended by the city (e.g., running water for two minutes (or longer) prior to using it, using water filters that can remove lead, purchasing bottled water, etc.) really protective and what are those costs? Why does the city not subsidize the costs of these interim measures to protect residents until their service lines are replaced?

Planners also have an ethical orientation toward considering environmental and social justice concerns that is needed in dealing with the lead pipe issue. In many communities, low-income and minority households are disproportionately likely to live in homes with lead service lines and are unable to afford replace the pipes (or other interim measures like bottled water or faucet filters). Planners can analyze proposed options and highlight the social and environmental justice concerns in different alternatives.

Planners are not on the front lines of the lead service line issue, but the kinds of skills that planners bring are valuable to the professional teams in communities working through these issues.

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Survey for Wisconsin Planners on Planning Education and Practice

Reminder, all APA - Wisconsin members are invited to complete a survey (link below) regarding planning education and practice. The survey is a part of a PhD dissertation project being completed by Wes Grooms with the University of Louisville's Department of Urban and Public Affairs (Wes is a 2014 graduate of the UW-Milwaukee MUP program).

The nature of this project requires a wide-range of perspectives regarding planning education and practice. Therefore, ALL Wisconsin APA members (students, recent graduates, practitioners, faculty, etc.) are encouraged to participate!

If you already completed this survey, thank you. If not, **please complete the survey by July 7**. Here is the link.

https://www.surveymonkey.com/r/KYWIAPA

Your input is extremely valuable. Thank you in advance for your participation!

Watch for email from APA-Wisconsin@uwm.edu for instructions and deadlines for chapter awards. Coming soon!

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Law Update

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For questions or comments about these cases, please contact: bwohm@wisc.edu.

Visit the Law and Legislation page any time to access the current and past issues of the Case Law Update.

U.S. Supreme Court

BREAKING NEWS:Courtesy of APA (planning.org)

Supreme Court Decision Reaffirms Importance of Local Planning Laws

CHICAGO — Today's [Friday's] decision in the U.S. Supreme Court case *Murr v. Wisconsin* reaffirms the importance of local planning and zoning laws in guiding local land use and reflects continued support of well-established "takings" doctrines. The American Planning Association and its Wisconsin Chapter filed an amicus brief in support of the state.

The 5-3 decision upholds the need for maintaining flexibility when reviewing takings claims. The Court recognized that establishing a formulistic, rigid approach to defining an adjacent land parcel could bring about significant unintended consequences and call into question the validity of many ordinary planning and zoning laws.

Tune in to APA's 2017 Planning Law Review on **July 5** to learn how the decision set a new regulatory takings test and what that means for planning. Every registration includes complimentary group access to the recorded webinar. **CM | 1.5 |** Law. [$160 for AICP members]

Cities Can Sue Banks Under Fair Housing Act for Predatory Lending Practices

In Bank of America v. City of Miami, the United States Supreme Court held that cities are an "aggrieved person" authorized to bring suit under the Federal Fair Housing Act against lending institutions for the economic impact on cities caused by discriminatory lending practices. Following the mortgage foreclosure crisis in 2008, the City of Miami sued the Bank of America and Wells Fargo alleging that the banks intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers, in violation of the Fair Housing Act. The

in Miami. Those foreclosures and vacancies harmed the City by decreasing the property value of the foreclosed home and the values of other homes in the neighborhood, thereby reducing property tax revenues to the City and forcing the City to spend more on municipal services to remedy blight and unsafe and dangerous conditions at properties that were foreclosed as a result of the banks' lending practices.

The banks argued that the City was not an aggrieved person and therefore lacked standing to bring the lawsuit. The U.S. Supreme Court, however, in a 5 to 3 decision, determined that the City's claims of financial injury were arguably within the zone of interests protected by the Fair Housing Act. The Court remanded the case back to the lower courts to determine if the actions of the banks were the proximate cause of the City's injury. According to the Court, the City must establish a "direct relation between the injury asserted and the injurious conduct alleged." Several similar cases are pending in other cities across the U.S.

Wisconsin Supreme Court

Local Discretion Upheld in Granting Conditional Use Permits

The case, AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee, 2017 WI 52, involved a proposed 265-acre silica sand mine in the Town of Arcadia in Trempealeau County. Land use in the Town falls under the County's zoning ordinance. The proposed mine would be located in an agricultural zoning district. Non-metallic mining is a conditional use within the district. AllEnergy applied for a conditional use permit shortly before the County imposed a temporary moratorium on new non-metallic mining activities. Following a public hearing on the permit, the County Environment & Land Use Committee voted seven-to-one to adopt 37 conditions for the mine but then immediately voted five-to-three to deny the permit based largely on the concerns raised at the public hearing about the potential negative impacts of the proposed mine on public health, public safety, and the aesthetics of the area. AllEnergy appealed the Committee's decision to the circuit court. The circuit court upheld the Committee's decisions. AllEnergy then appealed the circuit court decision to the Wisconsin Court of Appeals. In an unpublished decision, the Wisconsin Court of Appeals affirmed a circuit court order upholding Trempealeau County's action. AllEnergy then petitioned the Wisconsin Supreme Court to review the decision. The Wisconsin Supreme Court accepted the case for review.

A divided Wisconsin Supreme Court voted 4-3 to affirm the decision of the Court of Appeals upholding the County's denial of the conditional use permit. Justice Shirley Abrahamson wrote the "lead opinion" affirming the County's action. (A "lead opinion" is an opinion that states the decision of a majority of justices but represents the reasoning of less than a majority of the participating justices). Justice Ann Walsh Bradley joined Justice Abrahamson in her opinion.
Justice Annette Ziegler wrote a concurring opinion agreeing with the outcome but not agreeing with the reasoning of Justice Abrahamson. Chief Justice Patience Roggensack joined with Justice Ziegler in her concurring opinion. Justice Daniel Kelly wrote a dissenting opinion and was joined by Justices Michael Gableman and Rebecca Bradley. The absence of a majority opinion, however, makes the reasoning articulated in the three opinions very insightful, as discussed below.

AllEnergy appeal presented the Supreme Court with three issues:
I. Did the Trempealeau County Environment & Land Use Committee, an appointed body without the power to legislate, exceed its jurisdiction by denying a conditional use permit based on broad legislative concerns over the public health, safety, and welfare?
II. Did substantial evidence in the administrative record support the denial of a conditional use permit for

III. Should the court adopt a new doctrine that a conditional use permit applicant is entitled to the permit where (A) all ordinance conditions and standards are met and (B) additional conditions can be adopted that address potentially-adverse impacts from the use?

The lead opinion and the dissenting opinion present two different ways of looking at conditional uses. The lead opinion presents the first issue, regarding the jurisdiction of the Committee, as a delegation of authority issue. The lead opinion states that the Court needs to consider whether the applicable ordinance granted the County's Environment & Land Use Committee with the authority to take the action it took. The lead opinion cites the language in the county ordinance listing numerous factors to guide the Committee's action including directing the Committee to determine that the proposed use "will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area." The lead opinion cites prior Wisconsin case law declaring that generalized standards in zoning ordinances for conditional uses are acceptable. The lead opinion cites other Wisconsin case law upholding the authority of local ordinances to delegate discretionary authority to various boards, commissions, and committees. The lead opinion then quotes from the record the reasons the five Committee members articulated for denying the permit based on the factors listed in the ordinance and concludes that the Committee kept within its jurisdiction.

According to the lead opinion, "[i]n Wisconsin, and in many states, a conditional use is one that has been legislatively determined to be compatible in a particular area, not a use that is always compatible at a specific site within that area. In these states, the decision whether to grant a conditional use permit is discretionary. The relevant entity determines whether a particular site will accommodate a proposed particular use. In other states, decision makers have less discretion on requests for a conditional use permit."

The dissenting opinion takes the view that local governments have less discretion and concludes that the Committee exceeded its jurisdiction. According to the dissent, the jurisdiction of the Committee is limited to determining the appropriate conditions to control for the potentially hazardous aspects of the proposed mine. The dissent states that the "Committee exceeded its jurisdiction when it took upon itself the task of determining whether a sand mine, as a general proposition, is an appropriate use of the AllEnergy property."

The dissent cites several land use law treatises and several Wisconsin cases that discuss the distinctions between permitted uses and conditional uses in zoning. While conditional uses are not uses allowed as a matter of right, as in the case of permitted uses, conditional uses provide site-specific discretionary review of proposed uses that are generally deemed compatible or desirable in a particular zoning district. A conditional use designation did not give the Committee "free rein to deny an application."

According to the dissent, "[w]hen the Trempealeau County Board writes its zoning code, or considers amendments, the testimony it needs, and is appropriate to consider, is whether a type of use is compatible with a designated zoning district. This is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property."

Examining the language of the County's zoning ordinance the dissent concludes that the Trempealeau County Board had legislatively determined that sand mining is not inherently inconsistent with the agricultural zoning district for the property. "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

use, a land-use committee may not deny a permit because the committee's members object to the owner selling ice-cream on his property. Such objections are in order when the municipality adopts (or amends) its zoning ordinance and considers which conditional uses (if any) to include in each of its zoning districts. Upon adding a conditional use to a zoning district, the municipality rejects, by that very act, the argument that the listed use is incompatible with the district."

As to the second issue, regarding the sufficiency of the evidence, the lead opinion notes that local decisions are entitled to a presumption of correctness and validity. The Court only considers whether the Committee made a reasonable decision based on the evidence before it. According to the lead opinion, public expression of support or opposition can establish the substantial evidence needed to support decisions on conditional use permits. The lead opinion cites the pubic testimony presented to the Committee related to environmental impacts, health concerns, and aesthetics. AllEnergy contended that it presented expert testimony responding to these concerns but the lead opinion stated that it was not the role of the Court to re-weigh the evidence.

The dissent acknowledges that the testimony and concerns expressed at the public hearing were valid, but the dissent opines that these concerns should have been raised at the time the County developed its zoning ordinance. "Once the County adopts its zoning code, however, testimony about a proposed use has a narrower function." According to the dissenting opinion, the testimony should be used by the Committee to help "determine what specific standards AllEnergy would be required to satisfy before obtaining a sand mining permit." Here the dissent concluded the testimony was used to address a question already answered by the County Board—whether it would be advisable to operate a sand mine in the district.

On the final issue, AllEnergy argues that the Court should adopt a new doctrine followed in other states whereby if an applicant satisfies all the conditions in the ordinance (and those conditions cannot be based on subjective generalized standards), then the applicant has a right to the conditional use permit. The lead opinion, however, found that AllEnergy failed to provide a compelling reason for the Court to depart from long-standing precedent that allows local governments to determine whether a proposed conditional use is compatible for a specific site.

The dissent is more receptive to the new doctrine advocated by AllEnergy. The dissent would require more specific standards than found in the County's ordinance. According to the dissent, vague "public interest" standards force "permit applicants to play the 'guess what's in my head' game with the Committee." The dissent would have remanded the case to have the Committee to engage with the specifics of AllEnergy's proposal and determine whether appropriate conditions would protect against the hazards of the proposed mine.

While the concurring opinion agrees with the validity of the County's action, the concurring opinion is not able to join the lead opinion, because the lead opinion examines issues that are not necessary to the case. The concurring opinion believes that the lead opinion and the dissent make the case "much more complicated and potentially more far-reaching in effect than it should be." The concurring opinion agrees that the County's decision is entitled to a presumption of correctness and validity. According to the concurring opinion, the Committee kept within its jurisdiction and the legitimate environmental and health concerns, among others, supported the Committee's decision to deny the permit. For the concurring justices, these type of decisions involve "local concerns" best handled at the local level.

The approach advocated by AllEnergy and accepted by the dissenting opinion would force many communities to reexamine the specificity of the standards for conditional uses and would likely result in

scale sand mining, they might be prompted to develop standards for an industrial zoning classification in which frac sand mines would be a permitted use. Under the facts of this case, that would push the debate about the appropriateness of frac sand mines to the rezoning process rather than the conditional use permit process.

None of the three Supreme Court opinions in the case discuss the role of the local comprehensive plan in helping to provide guidance for whether a proposed conditional use might be contrary to the "public interest." Many local government zoning ordinances use compatibility with the local comprehensive plan as a standard for reviewing applications for conditional use permits. While this is still an acceptable standard that local governments can use, 2015 Wis. Act 391 clarified that state law does not mandate that local governments must use it as a standard.

Wisconsin Court of Appeals Opinions

Certiorari is Appropriate Standard for Reviewing TIF Challenge

Voters With Facts v. City of Eau Claire involved a lawsuit brought by a group of concerned citizens and others challenging the use of tax increment financing (TIF) for the "Confluence Project," a new performing arts center and residential development on a riverfront site in downtown Eau Claire. In particular, the citizens challenged the "blight" and "but for" determinations made by the various bodies involved with approving two tax increment districts (TIDs) for the project. These are two prerequisites to the use of tax increment financing under Wisconsin state statutes.

The challengers to the City's actions sought a declaratory judgment by the court that the City failed to follow the statutory requirements in approving the TIDs and a common law certiorari action that the City's actions were arbitrary, capricious, and outside the scope of the City's legal authority. The City moved to dismiss the action and the circuit court granted the dismissal. The challengers then appealed the circuit court decision to the Wisconsin Court of Appeals. The Court of Appeals upheld the circuit court's dismissal of the declaratory judgment action but reversed the circuit court's decision dismissing the common law certiorari action.

According to the Court of Appeals, under the TIF statutes, the "blight" determination and "but for" requirement are procedural requirements, not substantive rules. In other words, state statutes only require that a city or village assert that an area is blighted. They do not require that the city or village prove that the area is in fact blighted. As a result, the "blight" determination and "but for" are matters of legislative discretion and therefore not subject to judicial review as a matter of declaratory judgment (a court declaring that the city/village did not follow the statutes).

Nevertheless, the Court of Appeals determined that a court may review the City's actions by way of common law certiorari review Common law certiorari review is "on the record review" in which a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision. Based on this record, a court's review is limited to four inquiries. (1) whether the municipality kept within its jurisdiction; (2) whether the municipality proceeded on a correct theory of law-(3) whether the municipality's decision was arbitrary, oppressive, or unreasonable and represented the municipality's will and not its judgment-and (4) whether the evidence was such that the municipality might reasonably make the determination in question.

An issue for the challengers was whether the project costs for the TIDs included the costs for the

that is forbidden under Wisconsin's TIF statutes.

The Court of Appeals remanded the case to the circuit court for further proceedings under certiorari review of the challengers' allegations that the City lacked substantial evidence to make the "blight" and "but for" determinations to create the TIDs at issue and that those actions were done arbitrarily. This will allow the courts to review the record developed by the City supporting the use of TIF and look at the reasonableness of the City's actions approving the TID.
The decision is recommended for publication.

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