American Planning Association
Wisconsin Chapter
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February Case Law Update
February 28, 2011

[A summary of published Wisconsin court opinions decided during the month of February related to planning]

Wisconsin Supreme Court Opinions

Presumption of Correctness Given to Department of Revenue's Assessments

Nestle U.S.A., Inc. v. D.O.R., 2011 WI 4, involved a challenge to the property tax assessment for a specialized infant formula processing plant built by Nestle in Eau Claire. The Department of Revenue (DOR) assessed the plant following the Wisconsin Property Assessment manual. The specialized nature of the facility added significant costs to the construction of the facility. The DOR decided that the "highest and best use" of the property was as a powdered infant formula production facility. Nestle argued that the "highest and best use" was as an unspecified food processing plant because of the limited marketability of the specialized facility. Changing the highest and best use would significantly lower the assessment. The Wisconsin Supreme Court upheld the DOR's assessment, concluding that Nestle failed to present sufficient contrary evidence to rebut the presumption of correctness given to the DOR's assessment.

Wisconsin Court of Appeals Opinions

MMSD Liable for Damage to Property Caused by Deep Tunnel Project

In *Cianciola, L.L.P. v. Milwaukee Metro Sewerage*, the Wisconsin Court of Appeals an award for damages due to the Deep Tunnel project (a system of tunnels 300 feet below ground meant to control the discharge of polluted waste water during wet weather flows). Due to the project, the Cianciola property continues to settle resulting in the need for structural repairs to building foundations. The Court of Appeals held that the case was not barred by the statute of limitations due to the ongoing nature of the damage.

The case is recommended for publication.

Towns Authority to Vacate Alleys Upheld

In *Smerz v. Delafield Town Board* the Wisconsin Court of Appeals upheld the authority of towns to vacate alleys under section 66.1003 of the Wisconsin Statutes. The facts of the case are as follows. Several property owners in the Town of Delafield in Waukesha County petitioned the Town to discontinue two portions of unpaved alley. The Town granted their petition and ordered the alley segments vacated as requested as authorized under Wis. Stat. § 66.1003.

Several other property owners then filed a declaratory judgment action challenging the Town's action. They claimed that because the alleys were located within a recorded plat, the alleys were subject to Wis. Stat. ch. 236, which does not give town boards authority to act. The challengers to the Town's actions contended that on the County was authorized to vacate the alleys.

Wisconsin Statute § 66.1003(3) states that a "town board *may* discontinue all or part of an unpaved alley" when certain conditions are met. (Emphasis added.) Wisconsin Statute § 236.43 states that circuit courts "*may* vacate streets, roads or other public ways on a plat" if certain conditions are met. (Emphasis added.) Wisconsin Statute § 236.445 states that **county boards** "*may* alter or discontinue any alley in any recorded plat in any town in such county, not within any city or village." Town boards are not given similar authority in Chapter 236. The Court of Appeals found that none of the three grants of authority--§§ 236.43, 236.445, and 66.1003--are meant to be the exclusive means to discontinue an alley. One process does not take precedence over the other. Wisconsin Statute § 66.1003(3) is meant to provide an alternative to Wis. Stat. Chapter 236 that towns may use to vacate alleys.

The case is recommended for publication.

Personal Inconvenience Does Not Justify Zoning Variance

The Wisconsin Court of Appeals reaffirmed a longstanding rule for zoning variances in *Murr v. St. Croix County*.

Murr's parents purchased a lot on the St. Croix River in 1960 upon which they built a cabin. In 1963, they purchased an adjacent lot, which remained vacant. The approximately one and one-quarter acre lots contain approximately .48 and .50 acres of net project area. The lots were transferred to Murr and her siblings in 1994 and 1995.

Due to repeated flooding, Murr sought to reconstruct the cabin on higher ground by using fill. She initially planned to build in the same location. However, as suggested by a town planning commission, Murr ultimately requested to build further from the river to reduce the environmental impact. Murr requested eight variances or special exception permits under St. Croix County's Lower St. Croix Riverway Overlay District ordinance: (1) variance to sell or use two contiguous substandard lots in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade more than 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

The St. Croix County Board of Adjustment denied all of Murr's requests in a written decision. The Court of Appeals agreed with the Board finding that the request to relocate and rebuild the home in a new location was simply a matter of convenience since she could have flood proofed

the current home in its existing footprint. The Court of Appeals relied on long-standing Wisconsin case law that personal inconvenience alone does not constitute the unnecessary hardship required to grant a variance.

The case is recommended for publication.