American Planning Association
Wisconsin Chapter
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March Case Law Update
March 31, 2011

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

Wisconsin Supreme Court Opinions

DNR Not Required to Hold Hiring on Permit Related to Alleged Violation of Federal Clean Water Act

In ***Andersen v. Department of Natural Resources***, 2011 WI 19, the Wisconsin Supreme Court addressed the issue of whether the Wisconsin Statutes governing the State's water pollution discharge elimination program required the Wisconsin Department of Natural Resources (DNR) to hold a hearing on a petition to review a permit on the grounds that the permit failed to comply with the basic requirements of the federal Clean Water Act.

The case involved a petition by a group of citizens represented by the Midwest Environmental Advocates for review of a Wisconsin Pollution Discharge Elimination System (WPDES) permit that the DNR issued to Fort James Operating Company's Broadway Mill in the City of Green Bay. The petition challenged the permit for failure to comply with the basic requirements of the Federal Water Pollution Control Act Amendments of 1972 (the Clean Water Act) and related federal regulations. DNR denied the request for a hearing on the basis that the citizens challenged the permit as being contrary to federal law and that a challenge under Wisconsin's water pollution laws must be made based on Wisconsin law.

The citizens then sought judicial review of the DNR's decision. The citizens were joined by the Clean Water Action Council of Northeastern Wisconsin and the National Wildlife Federation. The case worked its way up to the Wisconsin Supreme Court, where Justice Ziegler, writing for the majority, agreed with the DNR that Wisconsin law did not require the DNR to hold a public hearing where the premise of the challenge is the failure to comply with requirements of the federal Clean Water Act.

Under the federal Clean Water Act, states can apply to administer their own water pollution control programs applying the standards of federal law. Wisconsin's WPDES program is approved by the United States Environmental Protection Agency (EPA) allowing the state to administer those aspects of the federal Clean Water Act. The EPA still reviews proposed permits for compliance with federal law. In the case of the permit for the Broadway mill the EPA did not object to issuance of the permit. Both the DNR and the Wisconsin Supreme Court seemed to be persuaded by this fact in deciding that the citizens were not entitled to a hearing on their challenge to the permit.

The case limits the avenue available to persons wishing to challenge the failure of state-issued water pollution control permits to comply with federal law. Chief Justice Abrahamson wrote a dissent, and Justice Bradley joined in the dissent.

Town Driveway Ordinance Upheld as Tool to Protect Farmland

A unanimous decision by the Wisconsin Supreme Court, ***Ottman v. Town of Primrose***, 2011 WI 18, recognizes the tool used by a growing number of towns under county zoning to address land development issues -- driveway ordinances.

The Ottman's purchased a 47.7-acre parcel in the Town of Primrose in Dane County. The land was zoned A-1 Exclusive Agricultural under the Dane County zoning ordinance. The Ottman's initially applied to the Town to build a field road because they intended to develop the parcel into a Christmas tree farm. The Town approved the field road. Later the Ottman's applied for a driveway permit and approval of a site plan for a primary farm residence under the Town's ordinances. The site for the residence was on the top of a hill on the property. The application stated that the Christmas tree farm could not be viable without a residence.

The Town of Primrose denied the driveway permit because it did not meet the requirements of the Town's Driveway Ordinance. The Town's Driveway Ordinance included an "Agricultural Productivity" clause. That clause states:

> *No driveway shall be approved in the Town of Primrose if the Town Board finds that the driveway will adversely impact productive agricultural land, unless the Town Board finds that the driveway is necessary to enhance the agricultural productivity of an adjacent parcel or the person requesting the permit can show that the parcel to be served by the driveway is capable of producing at least $6000.00 of gross income per year. Under any circumstance, the Town Board shall approve a driveway with the least impact on agricultural land.*

The Town's interpretation of the farm income requirement of this clause was to require proof of actual income, not speculative income. The Ottman's had not received any income yet from the Christmas trees they had planted on the property.

In denying the driveway permit, the Town Board concluded that because the Ottmans "[c]urrently. . . receive no agricultural income from the sale of trees from the property," they "therefore do not currently meet the farm income standards" of the Town of Primrose Driveway Ordinance. Due to the lack of farm income, the Board determined that "a residence constructed at this time would by definition be a 'non-farm' residence." It concluded that "[a] driveway built to service a non-farm residence in the location requested would violate Primrose's Land Use Plan which states that 'no roads or driveways shall be permitted to cross agricultural land to reach proposed non-farm development.'"

The Town Board also determined that "[e]ven if the Ottmans currently met the Town and County farm income requirements, they would not obtain approval of the farm house site they have requested . . . [t]he proposed site and driveway do not meet the 'least impact' requirements of the Ordinances or have the least impact among all the options available on the farm due to the fact that building a residence at the top of the hill will require a longer driveway that will needlessly consume a greater amount of agricultural land." Without a driveway permit, the building site plan could not be approved under the Town's ordinances.

The Ottmans sued the Town challenging the Town's interpretation of the Ordinance. The Ottmans alleged that the Agricultural Productivity Clause only requires that the land be "capable of producing" income so the Town erroneously required the Ottmans to demonstrate that their farm was "currently producing" income.

The Ottmans asked the Court to modify the existing standards established by the Court for judicial review of a municipal decision. Those standards require the courts to give great deference to the interpretations of local ordinances given by local governing bodies. In other words, the Court recognizes a presumption of correctness and validity to local decisions because locally elected officials are especially attuned to local concerns.

The Court recognized that courts should not defer to a municipality's interpretation of a statewide standard since that would give local governments disproportionate authority to influence legislative standards. However, in the case of local innovations, like the Town's driveway ordinance, the Court was unwilling to rewrite the Court's standards for judicial review and determined it would defer to the municipality's interpretation if it is reasonable.

The Court looked to how the Town's interpretation of the Ordinance furthers the goals related to agricultural preservation stated in the Town's land use plan. The Court found that the Town's interpretation of the farm income requirement to deny the permit was not unreasonable and was therefore entitled to a presumption of correctness.

Court Review of Property Tax Assessments

In ***Metropolitan Associates v. City of Milwaukee***, 2011 WI 20, the Wisconsin Supreme Court struck down 2007 Wis. Act 86 as violating the equal protection provisions of the Wisconsin Constitution. Prior to Act 86 a taxpayer could choose between two types of review of property tax assessments in circuit court -- common law certiorari review or statutory de novo review. Common law certiorari review is a limited review by the court of the record made before the Board of Review. De novo review is an independent circuit court action in which the circuit court creates its own record and gives no deference to the Board of Review's determination regarding a challenge to a property tax assessment. Act 86 allowed municipalities to pass an ordinance opting out of de novo review of assessments. The Act also created a new statutory certiorari review with certain rights and procedures.

The City of Milwaukee passed an ordinance opting out of de novo review. A company based in Milwaukee, Metropolitan Associates, challenged Act 86 as unconstitutional because it treated taxpayers in opt out municipalities differently than other taxpayers. Justice Gableman, writing

for the majority agreed that Act 86 was unconstitutional since the difference in treatment lacked a rational basis. Justice Abrahamson dissented and was joined by justices Bradley and Crooks.

Wisconsin Court of Appeals Opinions

Managed Forest Law Withdrawal Payment Goes to Annexing Village

In 1987, the owner of property in the Town of Somerset enrolled the property in the Department of Natural Resources' (DNR) managed forest land (MFL) program. Property owners who participate in the program have reduced property tax liability. The Village of Somerset later annexed and purchased the property and withdrew it from the MFL program. When it withdrew the property, the Village paid the DNR a withdrawal tax. Section 77.89(1) of the Wisconsin Statutes requires that the DNR pay the withdrawal tax to "each municipality in which is located the land to which the payment applies." The DNR determined that municipality was the Village and sent the withdrawal tax to the Village.

The Town sued the DNR and the village arguing it should get a share of the withdrawal tax since the land was in the Town for part of the time. The Wisconsin Court of Appeals disagreed with the Town and upheld payment of the withdrawal tax to the Village.

The case, ***Town of Somerset v. Department of Natural Resources***, is recommended for publication.