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Wisconsin Chapter
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July Case Law Update
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[A summary of published Wisconsin court opinions decided during the month of July related to planning]

Wisconsin Supreme Court Opinions

DNR Has Duty to Consider Impact of High Capacity Well on Waters for the State

Lake Beulah Mgmt. Dist. v. State of Wis. Dep't. of Natural Res., 2011 WI 54, involved a review by the Wisconsin Supreme Court of a published decision of the court of appeals reported in an earlier edition of the APA-Wis. Case Law Updates. The case involved the Wisconsin Department of Natural Resources' (DNR) decision to issue a permit to the Village of East Troy for an additional municipal well. The Lake Beulah Management District (LBMD) and the Lake Beulah Protective and Improvement Association (LBPIA) challenged the DNR's decision to issue the 2005 permit without considering the well's potential impact on nearby Lake Beulah, a navigable water. The LBMD and the LBPIA submitted a expert report written by a geologist concerning the impact the well would have on Lake Beulah. The DNR refused to consider the report and conduct an analysis of the impact of the well on the Lake and issued the permit for the well.

In a decision written by Justice Crooks, the Wisconsin Supreme Court looked to State Statutes and the Legislature's delegation of the State's public trust duties to the DNR to find that the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state. However, the Court did not require the DNR to investigate the potential environmental harm of every high capacity well permit application. The Court stated that to comply with its general duty, "the DNR must consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state. The DNR should use both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application, such that it must consider the environmental impact of the well or in some cases deny a permit application or include conditions in a well permit." The case reaffirms the strength of the public trust doctrine in Wisconsin and the obligation to protect the waters of the state.

The Court, however, found that DNR was not under a duty to consider the environmental impacts in the present case. The Court notes that in challenges to agency decisions, review is limited to the record. In this case, LBMD and LBPIA submitted their export report to an in-house DNR attorney and was not made part of the record. The permit for the well was initially issued in 2003. LBMD and LBPIA unsuccessfully challenged the 2003 permit in a contested case hearing and in Circuit Court. Because of the challenge, the Village did not begin construction of the well until the 2003 permit was set to expire. The Village formally requested

a permit extension from the DNR. The LBMD and LBPIA filed a motion in Circuit Court for reconsideration of the Court's dismissal of the challenge to the 2003 permit. That motion, filed with the DNR's in-house attorney, included the expert's report but came too late in the proceedings. The Supreme Court notes that citizens seeking to present evidence of potential harm must do so before the DNR makes a decision. They were too late given the facts of this case. The Supreme Court also noted that LBMD and LBPIA could have made a motion to correct or supplement the record on review under Wisconsin administrative law but they failed to do so.

Since the expert report was not part of the record, the Supreme Court affirmed the DNR's decision to issue the permit.

Lake Management District's Ordinance Preempted by State Law

A companion case to the above reported case also decided by the Wisconsin Supreme Court is *Lake Beulah Mgmt Dist. v. Village of East Troy*, 2011 WI 55. This case was also reported in an earlier edition of the APA-Wis. Case Law Updates.

This case involved an action brought by Lake Beulah Management District (LBMD) to enforce an ordinance adopted by LBMD that required the Village of East Troy to obtain a permit for its high capacity well that had already been issued a permit by the Wisconsin Department of Natural Resources (DNR). In a decision written by Justice Crooks, the Supreme Court concluded that the ordinance was invalid because it conflicts with, defeats the purpose of, and violates the spirit of the Legislature's delegation of authority to the DNR to regulate high capacity wells.

Dispute Over Location of Right-of-Way of County Highway

Affeldt v. Green Lake County, 2011 WI 56, involved a dispute over Green Lake County's removal of trees and fences along a county highway. In a decision written by Justice Ziegler, the Wisconsin Supreme Court noted there was still a factual dispute about whether the fences and trees were in the highway right-of-way and sent the case back to the Circuit Court for further proceedings. The dispute centers on whether the highway is a recorded highway that has been laid out and presumed to be four rods wide under Wisconsin law. The highway dates back to the late 1800s. Earlier Wisconsin law allowed county highways to be three rods wide. Also, over the years the property owners had engaged in activities that indicated a narrower right-of way width. The Supreme Court found these factual disputes were sufficient to send the case back to the Circuit Court to figure out the appropriate right-of-way.

Anti-trust Actions Against Local Governments Subject to Notice of Claim Requirements

E-Z Roll Off v. County of Oneida, 2011 WI 71, involved a restraint of trade case brought by E-Z, a solid waste hauler, concerning an agreement between Oneida County and Waste Management, Inc., for the disposal of municipal solid waste. Oneida County argued that E-Z could not bring suit because E-Z had not filed a timely notice of claim in accordance with Wis. Stat. § 893.80(1)(a). Under Wisconsin's notice of claim law, in order to commence a lawsuit against

a governmental entity, a claimant must, as a precursor to actually filing suit, serve written notice of the circumstances of the claim within 120 days after the happening of the event. Additionally, a claimant must present a written claim to an appropriate official. When such a claim is disallowed, a claimant has six months to bring suit. The question before the Wisconsin Supreme Court was whether anti-trust actions were exempt from the notice of claim requirements. Justice Gableman, writing for the majority, agreed with Oneida County that the notice of claim requirements applied and dismissed the case for E-Z's failure to comply with the requirements.

Voting Requirements Clarified for Vacating Plats of Jointly Owned Public Highways

*Dawson v. Town of Jackson*2011 WI 77, involved a review by the Wisconsin Supreme Court of a published decision of the court of appeals reported in an earlier edition of the APA-Wis. Case Law Updates. The case involved an application to the Town Boards of Cedarburg and Jackson in Washington County to vacate part of a jointly owned public highway surrounded by land owned by the Dawsons. The two town boards held a joint meeting to consider the Dawson's application. The meeting was attended by three of five Cedarburg board members and all five Jackson board members. At the meeting, all five Jackson board members voted in favor of the application to discontinue the road, but the three Cedarburg members voted against it.

Wisconsin road law requires that the approval of an order to vacate a jointly owned public highway requires approval of the governing bodies of the municipalities "acting together." Wis. Stat. § 82.21(2). At issue in the case is what is meant by the phrase "acting together." The Dawsons and the Court of Appeals, interpreted the phrase "acting together" to require that the votes of the town board members in attendance at a joint meeting be counted in the aggregate. The Town of Cedarburg, on the other hand, contends that the phrase "acting together" should be interpreted as encouraging cooperation while still permitting an independent vote on the application by each town board. The Wisconsin Supreme Court agreed with the Town of Cedarburg and reversed the decision of the Court of Appeals. In a decision written by Justice Prosser, the Wisconsin Supreme Court held that approval of both boards is necessary to approve a joint application like the one at issue in this case.

The Court also held that certiorari review is the prescribed method of appealing a highway order, or refusal to issue a highway order, and not declaratory judgment. The Dawsons had inappropriately brought this case as a declaratory judgment action.

Property Tax Assessment Exceeding Purchase Price Upheld

State of Wisconsin ex rel. Stupar River LLC v. Town of Linwood Portage County Bd. of Rev.. 2011 WI 82, involved an appeal of the property tax assessment for the 2005 tax year. In 2001, Stupar River purchased the subject property in the Town of Linwood for $830,000. In 2002, the Town of Linwood assessed the subject property for property tax purposes at $1,831,500. Stupar River challenged the assessment but it was ultimately upheld by the Wisconsin Court of Appeals. The assessed valued remained the same for the 2003 and 2004 tax years. For the 2005 tax year, the property assessment of the subject property was increased to $1,893,400. Stupar River then brought the present challenge. In an opinion written by Justice Gableman, the Wisconsin Supreme Court upheld the assessment based on the court's determination that the assessment

was made according to law and supported by a reasonable view of the evidence upheld the assessment.

Clinic Qualifies as Tax Exempt Property

Covenant Health Care System, Inc v. City of Wauwatosa, 2011 WI 80, involved a review by the Wisconsin Supreme Court of a published decision of the court of appeals reported in an earlier edition of the APA-Wis. Case Law Updates. Covenant Health Care System is the sole member of the St. Joseph Regional Medical Center, Inc., which in turn owns the St. Joseph Outpatient Clinic. In 2003, Covenant constructed a five-story building in the City of Wauwatosa to house the Outpatient Clinic. The Outpatient Clinic provides a broad range of outpatient medical services, including a 24-hour urgent care center.

Covenant filed timely Property Tax Exemption Requests with the City in each year from 2003 to 2006. Covenant sought a tax exemption for the Outpatient Clinic as property used exclusively for the purpose of a hospital under Wis. Stat. § 70.11(4m)(a). The city assessor denied the exemption for each of these four years and Covenant paid the assessed tax. Covenant then brought an action to recover the amount of the City's allegedly unlawful assessment. The City primarily argued that the Outpatient Clinic was a doctor's office, and therefore was not entitled to the property tax exemption. In the alternative, the City argued that the Outpatient Clinic was not exempt because it was used for commercial purposes and because a benefit inured to St. Joseph's sole member, Covenant.

After examining the facts regarding the use of the Clinic, the Wisconsin Supreme Court, in a decision written by Justice Gableman, held that the Outpatient Clinic is used for the primary purposes of a hospital and therefore qualifies as tax-exempt property. The Court determined that the Outpatient Clinic was neither a doctor's office nor a property used for commercial purposes within the meaning of § 70.11(4m)(a). Finally, the Court concluded that no benefit inures to any member of St. Joseph because the term "member" under § 70.11(4m)(a) does not include not-for-profit entities.

Wisconsin Court of Appeals Opinions

Adverse Possession of State Land

In *Wisconsin Dep't of Natural Res. v. Wied Trust*, the Wisconsin Court of Appeals upheld a Circuit Court decision that the Wieds obtained title to Department of Natrual Resources (DNR) land by adverse possession. In 1965, the Wied family purchased land abutting DNR land located on the south end of a peninsula on Lake Noquebay in Marinette County. The Wied parcel includes the northern (landward) portion of the peninsula so the only land access to the DNR parcel is across the Wieds' land. The Wieds began to mow the DNR parcel shortly after their purchase, and placed a lockable gate across the road/driveway serving both properties by 1970. The Wieds built a vacation house on the DNR land in 1986. The DNR filed a "complaint for possession of real property" in 2007, seeking removal of all physical encroachments and

restoration of the land. The Wieds answered by asserting they had acquired the land by adverse possession.

When the Wieds acquired their land in 1965, Wisconsin adverse possession law required forty years' possession to obtain title to state owned land. In 1980, the law was repealed and re-created to reduce the term of adverse possession to twenty years. The statute was again repealed and re-created in 1998 to add the requirement that adverse possession of state owned land be "based upon a continuously maintained fence line which has been mutually agreed upon by the current landowners" over 20 years. Wis. Stat. § 893.29.

The DNR argued that the 1998 version applied and that the Wieds had not satisfied the fencing requirement. (DNR argued in its reply brief that the 1965 forty-year adverse possession statues should apply but the Court refused to consider an issue first presented in a reply brief.) The Court of Appeals found that the Wieds satisfied the 1980 version, with adverse possession from 1986 to 2006, and the Wieds satisfied the 1998 version since that version did not terminate an already running period of adverse possession.

The decision is recommended for publication.

Court Upholds Order Setting Target Water Levels for Lake

Rock-Koshkonong Lake District v. State of Wisconsin Dep't of Natural Res. involved an appeal of a Wisconsin Department of Natural Resources (DNR) order setting target water levels for Lake Koshkonong, an impounded lake on the Rock River. The Rock-Koshkonong Lake District, Rock River-Koshkonong Association, Inc. and Lake Koshkonong Recreational Association, Inc. petitioned the DNR to raise the water levels of Lake Koshkonong. The DNR issued an order rejecting the petition, which was affirmed by an administrative law judge (ALJ) and the circuit court.

At issue is the DNR's interpretation and application of Wis. Stat. § 31.02(1) which grants the DNR authority to establish water levels for impounded lakes. The law authorizes the DNR to set water levels "in the interest of public rights in navigable waters or to promote safety and protect life, health and property." The District and two associations' challenges to the ALJ's decision concern whether the DNR considered all the factors § 31.02(1) properly requires and allows.

The District makes three arguments on appeal: (1) Wis. Stat. § 31.02(1) requires the DNR, under its authority to "protect property," to consider the potential economic effects the DNR's water level determination has on residential property values, business income and tax revenues, and the DNR's failure to consider such economic effects was erroneous; (2) the DNR exceeded the scope of its authority granted by § 31.02(1) when it considered the potential effects of proposed water levels on private, non-navigable wetlands; and (3) the DNR exceeded the scope of its authority under § 31.02(1) by considering wetland water quality standards under Wis. Admin. Code § NR 103 in setting the water levels for the lake.

The Wisconsin Court of Appeals, however, disagreed with these arguments. The Court supported DNR's interpretation and application of Wis. Stat. § 31.02(1), and concluded that: (1) the only reasonable construction of "protect property" under the statute does not require the DNR to consider the economic effects of its water level determinations on residential property values, business income and tax revenue; (2) the DNR did not exceed the scope of its authority under § 31.02(1) by considering the potential effects proposed water levels would have on adjacent wetlands; and (3) the DNR did not exceed the scope of its authority under the statute by considering wetland water quality standards under NR 103.

The case is recommended for publication.

Need to Exhaust Administrative Remedies in Tax Cases

In *Clear Channel Outdoor v. City of Milwaukee*, the Wisconsin Court of Appeals upheld the Circuit Court's decision dismiss Clear Channel and Lamar's complaints that the City of Milwaukee improperly assessed their advertising billboards. Clear Channel and Lamar objected to the City's decision to tax the billboards as real property rather than personal property. Both the Circuit Court and Court of Appeals characterized these as questions about the amount or valuation of the property taxed by the City. As a result, before they can challenge the assessment in court, the billboard companies must first raise these issues with the Board of Review, which the companies failed to do.

The case is recommended for publication.