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Wisconsin Chapter

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February Case Law Update
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A summary of Wisconsin court opinions decided during the month of February related to planning

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Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Town Authority in Shoreland Area Mistakenly Construed By Court

In Lagoon Lane, LLC v. Rice, Lagoon Lane sought to divide land it owned in the Town of West Bend in Washington County. The land was located within 1000 feet of Big Cedar Lake and was therefore located within the shoreland zoning jurisdiction of the County. The County approved the subdivision but the Town denied the subdivision because it failed to comply with the Town's setback, minimum lot size, and frontage requirements. The Town did not specify the specific ordinance that the subdivision violated though the minimum lot size and setback requirements were found in the Town's general zoning ordinance and the frontage requirements appear in both the Town's zoning and subdivision ordinances.

Lagoon Lane sought review of the Town's denial in circuit court. The circuit court concluded the Town improperly denied the subdivision "for zoning reasons." The circuit court noted that under the State's shoreland zoning law, Wis. Stat. §59.692, and the Court of Appeals decision in *Hegwood v. Town of Eagle Zoning Bd. Of Appeals*, 2013 WI App 118, the Town lacked authority to zone the shoreland areas within the Town. (As discussed below, this is not the current state of the law in Wisconsin.) The Town then appealed the circuit court's decision the Wisconsin Court of Appeals.

The Court of Appeals agreed with the circuit court. The Court of Appeals also incorrectly summarized the relationship of town authority and county authority in the shoreland area: "The power to zone shorelands in towns rests exclusively with counties." Neither the Court of Appeals nor the circuit court mention 2015 Wis. Act 41 enacted in response to the *Hegwood*

case. Effective July 3, 2015, Act 41 reestablishes the ability of towns to have concurrent zoning authority with the county in the shoreland area with certain limitations. Under Act 41, a town can adopt a general zoning ordinance under Wis. Stat. § 60.61 or § 60.62 that applies in the shoreland but the town zoning ordinance "may not impose restrictions or requirements in shorelands with respect to matters regulated by a county shoreland zoning ordinance enacted under 59.692." The language added by Act 41 is codified in Wis. Stat. § 60.61(3r) and 60.62(5). While the Court of Appeals' decision states that it is applying the 2015-16 version of the *Wisconsin Statutes*, the Court fails to note the language added by Act 41.

The Court of Appeals correctly notes that zoning and subdivision ordinances can contain significant overlap and that a town can enact the exact same restriction under both its subdivision and zoning authorities. While the Court correctly states that a town may enact subdivision regulations in the shoreland area, the Court is mistakenly convinced that the Legislature through the shoreland zoning program has removed the authority of towns to zone land within the shoreland area. The Town concedes that the setback and lot size requirements were enacted under the Town's zoning authority. The frontage requirement was enacted under both the Town's zoning and subdivision authorities but the Court concludes it is a zoning regulation. Because the Court thinks that the Legislature has removed town authority to zone in the shoreland area, the Court of Appeal agrees with the circuit court that the subdivision was improperly denied.

The case is recommended for publication in the official reports.

No "Walking Quorum" in Violation of Open Meetings Law

Zecchino v. Dane County involved a challenge by Adams Outdoor Advertising to the denial of a lease renewal for 3 billboards located at the Dane County Regional Airport. Adams alleged that before the vote on the lease one county board member emailed 8 other county board members about the lease. Adams alleged these emails amounted to a "walking quorum" in violation of Wisconsin's Open Meeting Law. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.

The Court of Appeals found no violation of the Open Meeting Law. The Court looked at the large size of the Dane County Board. The lease renewal was rejected in an 18-16 vote. 34 members voted. To influence the vote, a majority of 18 members would be needed. The one county board member who sent the emails only had contact with 8 members – less than one-fourth of the board. The Court also examined the content of the emails. According to the Court, none of the emails reflected a tacit agreement between the county board members to vote against the lease. The emails dealt with scheduling matters, or asked the other board members for their opinions. Most of the emails were one-way messages garnering few if any responses.

The case is recommended for publication in the official reports.

Short-term Rental Was a Legal Nonconforming Use

County of Walworth v. Hehir involved the issue of whether the use of a home for short-term rentals was a legal nonconforming use. Hehir purchased a single-family residence in 2009 and spent six or seven months rehabbing the property. In 2013 he began renting the property for short-term stays (less than 30 days). In December 2014 Walworth County adopted an amendment to the County Zoning Ordinances intended to address issues related to short-term rentals. In August 2016 Walworth County cited Hehir for illegally operating a "lodge" in a residentially zoned district as a result of the 2014 amendment to the County's zoning ordinances. Hehir challenged the citation arguing that the use of the property for short-term rentals was protected as a legal non-conforming use.

Under Wisconsin law, a structure used for a use allowed at the time a zoning ordinance is adopted or amended may continue even though it does not conform to the provisions of the new ordinance. A property owner bears the burden to prove by a preponderance of the evidence that the nonconforming use was an active and actual use that existed prior to the commencement of the new ordinance and has continued to the present. If the use is merely casual and occasional or incidental to the principal use, it does not acquire nonconforming use status.

The circuit court determined that Hehir met the burden of establishing that the use of the property for short-term rentals was a lawful nonconforming use. He expended time and money rehabbing the property and the property was not his primary residence although he occasionally stayed there with his family. In 2013 Hehir licensed the property as a tourist rooming house with the State of Wisconsin Department of Agriculture, Trade and Consumer Protection and renewed his license every year. Hehir testified that he continuously rented the property since July 2013 for periods of time from a weekend to two weeks. While Hehir did not have complete documentation of the rentals, he testified that the biggest gap between rentals was two months.

The Court of Appeals agreed that the evidence supported the circuit court's determination that Hehir's use of property for short-term rentals was an existing, nonconforming use at the time the County adopted the ordinance amendment.

The case is not recommended for publication in the official reports.[1]

[1] What is an "unpublished" opinion? Under Wisconsin law, an unpublished opinion may not be cited in any Wisconsin state court as precedent or authority. However, an unpublished opinion issued on or after July 1, 2009, may be cited for its persuasive value with certain exceptions. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Reminder: 2017 Wisconsin Act 59 added the following regarding short-term rentals:

Creates Wis. Stats sec. 66.0414 prohibiting local governments from enacting an ordinance prohibiting the rental of a residential dwelling for 7 consecutive days or longer. A local government may limit the total number of days within any consecutive 365 day period that a dwelling may be rented to no fewer than 180 days, if a residential dwelling is rented for periods of more than six but fewer than 29 consecutive days. A local government cannot specify the period of time during which the residential dwelling may be rented, but it may require that the maximum number of allowable rental days within a 365-day period must run consecutively. Act 59 requires persons who rent their residential dwelling to notify the local clerk in writing when the first rental within a 365 day period begins.

Act 59 also requires any person who maintains, manages, or operates a short-term rental for more than 10 nights each year, to: (a) obtain from the Department of Agriculture, Trade and Consumer Protection a license as a tourist rooming house, as defined in s. 97.01(15k), and (b) obtain from a municipality a license for conducting such activities, if the local government has enacted an ordinance requiring such a person to obtain a license. Act 59 specifies that if a local government has in effect an ordinance that is inconsistent with this provision, the ordinance would not apply and could not be enforced.

Finally, Act 59 adds language to the room tax law, Wis. Stats. Sec. 66.0615, making it clear that a municipality may impose the tax on lodging marketplaces (e.g., Airbnb) and owners of short-term rentals. A lodging marketplace must register with the Department of Revenue (DOR) for a license to collect taxes imposed by the state related to a short-term rental and to collect room taxes imposed by a local government. Once licensed, if a short-term rental is rented through the lodging marketplace, the lodging marketplace must: (a) collect sales and use taxes from the occupant and forward such amounts to DOR; (b) if the rental property is located in a local government that imposes a room tax, collect the room tax from the occupant and forward it to the municipality; and (c) notify the owner of the rental property that the lodging marketplace has collected and forwarded the sales and room taxes described in (a) and (b). A local government would not be allowed to impose and collect a room tax from the owner of a short-term rental if the local government collects the room tax on the residential dwelling from a lodging marketplace.

Unconstitutional Provisions Are Severable From Remainder of Ordinance

Green Valley Investments, Inc. v. County of Winnebago involved the latest in a series of court challenges to Winnebago County's regulation of adult entertainment establishments in the County zoning ordinance. In 2006 Green Valley opened an adult cabaret offering nude entertainment in violation of the County zoning ordinance. In 2015 the U.S. Court of Appeals for the Seventh Circuit found that the conditional use permitting process for adult entertainment establishments violated free speech protections under the First Amendment to the U.S. Constitution. The County argued that other provisions in the zoning ordinance pertaining to the sale of alcohol and setback requirements from other uses were severable and that the remaining ordinance was enforceable. The Seventh Circuit Court of Appeals held that severability was not a federal question so the state courts should answer it. This state court case was brought to answer the severability question.

The Wisconsin Court of Appeals noted that the County zoning ordinance included a severability clause. The Court noted that this clause is not controlling but is given great weight in determining whether valid provisions can stand separate from invalid provisions. The Court of Appeals concluded that the permitting process could be severed and the remaining provisions were a valid restraint on the local of adult entertainment establishments.

The case is not recommended for publication in the official reports.[2]

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]

[2] What is an "unpublished" opinion? Under Wisconsin law, an unpublished opinion may not be cited in any Wisconsin state court as precedent or authority. However, an unpublished opinion issued on or after July 1, 2009, may be cited for its persuasive value with certain exceptions. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.