

WAPA News

Wisconsin Chapter
American Planning Association

Winter 2005

Volume 2005, Number 1

Wisconsin Planners' **Meet & Greet** in San Francisco

Monday, March 21
Around 7 pm until ???

Location To Be Announced by
Email and the WAPA web page

For all Wisconsin planners, student
planners, and friends of planning.

URPL Student Named 2005 Congressional Fellow for APA

Alice Yates, a masters student in Urban and Regional Planning at the University of Wisconsin – Madison, has been selected as a recipient of the 2005 APA Congressional Fellowship for Urban Planning & Community Livability. Only two fellowships are awarded. The other fellow is C.J. Laffer of Denver, Colorado.

Alice will be working in the office of Senator Carl Levin of Michigan as a staff assistant for the Senate Smart Growth Task Force, an initiative of the bipartisan Northeast-Midwest Senate Coalition. C.J. will be working in the office of Representative Earl Blumenauer of Oregon as a staff assistant for the House Livable Communities Task Force. Both fellows will work on promoting federal legislation related to smart growth planning and community development.

Alice Yates Has Extensive Background

Alice received both her Bachelor of Science in Electrical Engineering and Master of Science in Technology and Policy from the Massachusetts Institute of Technology. She is currently working towards her Master of Science in Urban and Regional Planning at the University of Wisconsin in Madison. Alice comes to DC with an extensive work history in the areas of environmental and economic policy consulting. She has worked on smart growth analysis and policy development for the U.S. Environmental Protec-

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WAPANews is published four times each year by the Wisconsin Chapter of the American Planning Association to facilitate discussion among its members of planning issues in Wisconsin. Correspondence should be sent to:

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Change of Address: WAPA News does not maintain the address lists for any APA publication. All lists are maintained at the national office and are updated and mailed to the chapters each month. If you have moved, please contact Member Services Coordinator, APA National Headquarters, 122 S. Michigan Street, Suite 1600, Chicago, IL 60603-6107 or call (312) 431-9100 or FAX (312) 431-9985.

Membership Information: To become a member of the Wisconsin Chapter of the American Planning Association, simply become a member of the APA. An application form is provided on the back of this publication.

Professional Services Directory: Put your business in the newsletter. Advertising rates are \$40.00 per issue or \$150.00 per year. Send business card or camera-ready copy (2 inches wide x 3.5 inches long) to the newsletter editor at the address below. Digital copy may be sent as an attachment by email to wapa@uwm.edu.

Submission of Articles: WAPA News welcomes articles, letters to the editor, articles from the WAPA districts, calendar listings, etc. Please send anything that may be of interest to other professional planners in Wisconsin. Articles may be submitted by mail, fax, or email. Articles may be edited for readability and space limitations prior to publication. Content of articles does not necessarily represent the position of APA, the WAPA Executive Committee, or the editor.

Submit articles in electronic formats: Articles may be submitted on 3.5 inch floppy disks, CD-ROM, or via email. If submitting the article by email, send it to wapa@uwm.edu.

Graphics: Graphics are encouraged for inclusion with the article in paper or electronic format. Please be sure that graphics submitted in paper format are crisp and clear.

Calendar listings: Although the WAPA News is published only 4 times annually, the web page at www.wisconsinplanners.org provides instant access to information about events of interest to planners. If you are aware of an event, please contact the editor as soon as possible, preferably at least 1 week before the event. If submitting calendar events by mail, email, or voicemail, please be sure to include the sponsor of the event, the date, time, and place, and the title of the event, along with a description including any admission fees or limitations in availability.

Deadlines:

Winter issue: submit by January 15.

Spring issue: submit by March 15

Summer issue: submit by June 15

Fall issue: submit by September 15

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WAPA News is printed on recycled paper.

Three Wisconsin Planners Gain AICP Certification in November

The AICP exam is now offered twice each year. The newest recipients of AICP certification are:

Timothy Flynn, a transportation planner with HNTB Corp. in Madison. Tim, a graduate of the MUP program at UW – Milwaukee, has been doing traffic demand modeling, roadway corridor planning, and GIS work for the past six years.

Diana Kanter, associate planner, Town of Menasha. Diana was engaged last year and will be marrying in June. Diana is also a graduate of the UWM program.

Brea Lemke, city planner and zoning administrator

Continued on page 4

APA Congressional Fellows: *Continued from page 1*

tion Agency, and managed numerous real estate development projects as Vice President of MassDevelopment, the state of Massachusetts' economic development authority.

Fall Election Results

BY LARRY WARD

WAPA SECRETARY

EXECUTIVE DIRECTOR, SOUTHWEST WISCONSIN REGIONAL
PLANNING COMMISSION

Thanks to all the members who voted and to all who ran for office or were involved with drafting the By-Laws Amendments! And Congratulations to WAPA Executive Committee Members Stoll, Seboe and Rolfs!

And in particular, thanks to Past President Rollie Tonn for all his efforts in organizing the election!

NE Representative

Stoll 23; Bartz 18

SE Representative

Seboe 37
Sadowski (Write-in) 1

SW Representative

Rolfs 43

Referenda

Item 1 Passed 87 yes, 4 no

Item 2 Passed 85 yes, 4 no

Item 3 Passed 80 yes, 15 no

Item 4 Passed 85 yes, 4 no

Item 5 Passed 81 yes, 8 no

Item 6 Passed 78 yes, 15 no



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Spring AICP Exam and Review Opportunities

Beginning with the 2005 exam cycle, AICP is introducing a new application that combines the application and registration steps into one form and one fee. This eliminates the previous two forms and separate fee payments, and makes the process easier for applicants. Education and employment verifications for each degree and job listed in the application will continue to be required in order for your application to be considered complete for review. The deadline for registering for the May exam is March 15. You may schedule your exam anytime between May 9 and May 21. For more information, see the AICP website at <http://www.planning.org/certification/appinfo.html>.

The Wisconsin APA Chapter AICP Exam Review session will be held either April 30 or May 7. AICP exam registrants will be contacted about the date and details. Information will also be posted on the WAPA webpage at <http://www.wisconsinplanners.org/aicp/aicp.htm>.

The AICP Review Manual published by the APA Chapter Presidents Council is available through Nancy Frank, Chapter Professional Development Officer, for \$10. Please contact Nancy at 414-229-5372 or frankn@uwm.edu.

The Illinois APA Chapter invites Wisconsin planners to attend review sessions conducted by Mike Waiczis. Cost of the sessions and registration information, along with other details, are on the IL APA website at http://www.ilapa.org/prodevt/aicp/review_course.pdf.

CLUE Offers Plan Commission Workshops!

The Center for Land Use Education offers Plan Commission Workshops for newly appointed commissioners, veteran commissioners, and professional educators and planners whose job it is to support local commissions. The basic plan commission workshop is designed for newly appointed commissioners and can be tailored to address:

- Establishing a Plan Commission
- Recruiting and Retaining Quality Commissioners
- Roles and Responsibilities of the Plan Commission
- Comprehensive Planning Basics and the Planning Process
- Encouraging Public Participation
- Open Meetings and Public Records Laws
- Ethical Conduct and Decision-Making

For veteran commissioners, CLUE can design a workshop to address complex issues such as:

- Property Rights
- Zoning, Conditional Uses, Non-Conformities, and Subdivision Regulations
- Mapping Strategies for Farmland, Natural Resources, and Future Land Uses

- Acquiring Data for Comprehensive Planning
- Intergovernmental Cooperation
- Plan Implementation, Monitoring, and Enforcement
- Stormwater and Non-Point Pollution
- And other relevant topics.

To schedule or learn more about CLUE Plan Commission Workshops, please contact Doug Miskowiak at dmiskowi@uwsp.edu or (715) 346-4989 or the CLUE staff at (715) 346-3783.

Smart Growth Law: Misunderstandings Continue

Another recent newspaper article reports that some activists are connecting Wisconsin's "Smart Growth Law," which promotes comprehensive plans and requires certain local actions to be consistent with comprehensive plans by 2010, to nefarious motives at the United Nations.

Jay Tappen of the West Central Wisconsin Regional Planning Commission passed along to WAPA President Gary Peterson the most recent newspaper account reported in the *Rice Lake Chronotype*.

According to the newspaper story, the Town of Rice Lake Planning Commission agreed to hold a presentation on Smart Growth, as requested by town resident Roy Bannister. Forty-four people registered attendance, most from outside of the town. Bill Elmhurst, a retired logger from Neillsville, said that Wisconsin's comprehensive planning law represents implementation of the United Nations Agenda 21.

According to the UN Agenda 21 web page, Agenda 21 calls for efforts by the UN, governments and nongovernmental organizations at all levels (global, national, and local) to implement sustainable development. The text of Agenda 21 refers to itself as a "comprehensive plan of action."

Mr. Elmhurst considers Agenda 21 to be revolutionary and in violation of the Wisconsin Constitution's guarantee of "allodial rights."

A dictionary definition of "allodial rights" in land defines allodial rights as "real estate held in absolute independence without being subject to any rent, service or acknowledgement of a superior." Some property rights

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activists have interpreted this provision of the Wisconsin Constitution to forbid both the taxation and regulation of real property.

A 2003 Legislative Council Abstract reports a careful analysis of the term in our state constitution, its origin, and its interpretation by the Wisconsin Supreme Court.

The Abstract concludes that a line of cases in the Wisconsin Supreme Court interpreting the usage of the term “allodial” in the Wisconsin Constitution involve arguments “by the defendants, primarily in property tax delinquency cases, that the government lacks the authority to levy taxes on allodial land. The defendants in these cases have not persuaded the courts that ‘allodial’ means ‘free from regulation’” (Wisconsin Legislative Council 2003, 8).

Chuck Palmer, another speaker at the Town of Rice Lake meeting, cited “three lies” that surround the law: (1) municipalities have to do it; (2) the state will do it if municipalities do not; and (3) and that plans are always local and changes will be made at the local level.

By now, all Wisconsin planners should know what Wis.Stat. 66.1001 requires and does not require. Jay Tappen offers the following to assist planners in responding to members of the public that may have questions or misunderstandings about what the law requires and the alleged “three lies” that the public is being told about Smart Growth planning.

1. The first “lie” is that local governments are “required” to have a comprehensive plan after January 1, 2010 on if the local government wishes to regulate land use through zoning, subdivision control, official mapping, or shoreland zoning. Planners know that whether a local government is “required” to have a comprehensive plan will depend on what actions the local government wishes to take. “It is clear,” notes Tappen, “that a local government that does not participate in zoning, subdivision control, official mapping and shoreland zoning is not required to create a comprehensive plan.”

2. The second “lie” is that “The State (or County) will create a comprehensive plan for municipalities if they don’t.” This is false; that is, neither the state nor the county has the authority to create plans usurping municipal authority. As Tappen observes, “The planning and land use regulation authorities for the state, regional planning commissions, counties, cities, villages and towns have not fundamentally

changed with the new law. Local government authority to plan has not changed, just what has to be addressed in the plan (the nine elements) and how they plan (public participation and adoption requirements) has.”

The exception to this is local governments receiving state planning grants. The State may direct a local government to make changes in its plan to meet the requirements of the grant program before releasing the final grant payment.

3. Finally, the third “lie” is that plans are always local and changes will be made at the local level. This is not a lie, because this statement is true. Plans *are* always local and changes can only be made at the local level under current law.

The law has not changed the authority of local governments to create and amend their comprehensive plans. A local government has no authority to amend another jurisdiction’s plan. The plan must be adopted or amended by the political subdivision’s governing body by ordinance. Regional planning commissions adopt and amend their plans by resolution. In addition, no governmental unit is required to adopt another governmental unit’s comprehensive plan.

The comprehensive planning law does not require local governments to incorporate their plans into the regional planning commission’s comprehensive plan. It only says that the intergovernmental cooperation element of the comprehensive plan shall incorporate a regional planning commission’s plan if the local government has adopted all or part of it. In any case, 66.1001 (5), Wisconsin Statutes, emphasizes that the

Continued on page 12

AICP Recipients: *Continued from page 2*

for the City of Ashland. Brea is a graduate of the URPL program at UW – Madison. Since beginning her work in Ashland in July she has put the final touches on the city’s comprehensive plan and worked with the County of Ashland to hire a shared GIS position.

Both Diana and Brea served as student representatives to the WAPA Executive Board while studying for their masters degrees.

Focus on Ethics

When Do Local Officials Have A Conflict of Interest?

BY MICHAEL CHRISTOPHER

Abridged version. Complete text on the web.

To answer this question, it is necessary to consider applicable state law provisions, case law, and local ordinances, by-laws and rules of procedure. Many Wisconsin municipalities have adopted *Robert's Rules of Order* as their procedural rules. Section 44 of *Robert's Rules* provides:

No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization. ...

Also, it is important to remember that there may be specific codes applicable to certain officials. For example, a municipal court judge must also abide by the State Code of Judicial Ethics. However, in order to provide an overview that should guide the actions of public officials and help determine whether the official has a conflict of interest, a brief analysis of the State Ethics Code applicable to local officials and relevant criminal provisions would be helpful.

Subchapter III of Chapter 19, Wis. Stat., is the source of the State Ethics Code applicable to local officials. The policy behind the Code is to recognize that high moral and ethical standards are essential to free government. Although the Code recognizes that citizens who serve as public officials retain rights as citizens to interests of personal or economic nature, the standards of ethical conduct must focus on conflicts of interest which are substantial and material, as opposed to minor and inconsequential conflicts that are unavoidable in a free society. See § 19.45, Wis. Stat.

Illegal Influence; Soliciting or Accepting Things of Value.

No public official may solicit or accept from any

person anything of value **if it could reasonably be expected to influence the official's vote, actions or judgment.** State law does not prohibit officials from engaging in outside employment.

Wisconsin Ethics Board

Any county corporation counsel, attorney for a local governmental unit, or statewide association of local governmental units, may request the Board to issue an opinion concerning the interpretation of § 19.59, Wis. Stat. The Board shall review the request and may advise the person making the request.

The State Ethics Board has issued helpful guidelines on the following topics that can be accessed at: <http://ethics.state.wi.us/localofficials/localofficial1.htm>.

Michael Christopher's complete report on state ethics law as it applies to local officials is available on the WAPA web page.

Legislative Report: Continued on page 11

payers by living up to our commitment to local government and our schools. First, we will fully fund shared revenue.” In addition to a commitment to fully fund shared revenue, the Governor stated that, “...from prescription drugs to cell phones, we’ll allow local governments to take advantage of the buying power of the state.” Finally, he also addressed the Expenditure Restraint Program, which is a supplement to the shared revenue program awarded to municipalities that limit growth in spending. The Governor explained:

“And finally, we’ll make significant reforms to the Expenditure Restraint Program. State government spends about \$60 million a year to encourage municipalities to hold the line on spending, but loopholes allow some communities to get the incentive even with large property tax increases. In my budget, I will close the loopholes—so we reward communities that actually hold down property tax increases. We will expand it to cover counties as well as municipalities. And instead of just giving

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incentives to achieve a target property tax increase, we will provide bonuses for municipalities and counties that hold their property taxes even lower.”

The details of these and other initiatives discussed in the State of the State message are expected to be presented as a part of the Governor’s 2005-07 biennial budget bill, on February 8, 2005.

New Stand-Alone Legislation

Even though the Legislature has only been in session for a few days, several bills of interest have been introduced.

Property Tax Exemption for Art and Arts Education Centers – Senate Bill 3

On January 11, 2005, Senator Ted Kanavas (R-Brookfield) introduced Senate Bill 3, which creates a property tax exemption for arts and arts education centers.


This bill creates a property tax exemption for property that is owned or leased by an entity that is exempt from income tax under federal law, if the property is used for the purposes for which the federal income tax exemption is granted; the property includes one or more buildings that are owned or leased by the entity and are located within, or are surrounded by, a municipal park; and the property includes one or more theaters for the performing arts that are operated by the entity and the seating capacity of the theater or theaters is not less than 600 persons. Senate Bill 3 was referred to the Joint Survey Committee on Tax Exemptions.

To review a copy of SB 3, go to <http://www.legis.state.wi.us/2005/data/SB-3.pdf> on the Internet.

Size of County Boards of Supervisors and Cities’ Common Councils – Senate Bill 4

On January 11, 2005, Senator Ted Kanavas (R-Brookfield) also introduced Senate Bill 4, which makes changes relating to the size of the county board of supervisors in certain counties and the common council in certain cities.

This bill permits the board of supervisors of any county with a population of less than 500,000, except a county having only one town (currently, all counties except Milwaukee and Menominee) to decrease the number of supervisors on the board and adopt a new redistricting plan during the ten-year period between the adoption of decennial redistricting plans. The bill requires the redistricting plan to satisfy certain criteria that also apply to decennial redistricting plans. The bill further requires the districts to consist of contiguous whole wards in existence at the time at which the redistricting plan is adopted and requires the original numbers of the districts in their geographic outlines, to the extent possible, to be retained. The bill also permits the electors of any county whose board is permitted to enact an intra-decade redistricting plan to require the enactment of such a plan by



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petition and referendum.

The bill also permits the electors of any county whose board is permitted to enact an intra-decade redistricting plan to require the enactment of such a plan by petition and referendum at any time after the first election is held following enactment of a decennial redistricting plan. The bill specifies requirements for the petitioner, number of signatures, when the referendum must be held and what information must be contained in the referendum question.

The bill also provides that, if in a city that is solely contained within one county the aldermanic districts are coterminous with supervisory districts, the common council may revise the boundaries of aldermanic districts to maintain coterminous boundaries between aldermanic and supervisory districts, and may change the expiration date of the terms of any council member to an earlier date than the date provided under the current ordinance if required to implement the redistricting or to maintain staggered terms.

Senate Bill 4 is identical to 2003 Senate Bill 351, as amended by Senate Substitute Amendment 1, which was also introduced by Senator Kanavas. SB 351 passed the Legislature but which was vetoed by Governor Doyle because the legislation failed to limit the number of times a county board itself could adopt a redistricting plan that reduces the number of supervisors or the number of times a referendum question to downsize may appear on the ballot.

Senate Bill 4 has been referred to the Senate Committee on Veterans, Homeland Security, Military Affairs, Small Business and Government Reform for consideration. To review a copy of SB 4, go to <http://www.legis.state.wi.us/2005/data/SB-4.pdf> on the Internet.

Creation of a Joint Committee on State Mandates – Senate Bill 5

On January 12, 2005, Senator Alberta Darling (R-River Hills) introduced Senate Bill 5, which creates a legislative Joint Committee on State Mandates (committee). The committee consists of three majority party and two minority party members from each house.

SB 5 states that a piece of legislation that places any statutory requirement on a local governmental unit, must be referred at once to the committee and the legislation may not be considered further until the committee submits a report or 30 days have lapsed. If the committee's report concludes that the bill has a negative uncompensated fiscal effect on local governmental units, and the mandate is a wholly state-imposed mandate upon local governmental units, this bill requires the committee to offer an amendment to the bill appropriating funds to offset the cost of the mandate.

The bill prohibits the legislature from enacting legislation that imposes future state-imposed mandates unless the mandates receive a hearing before the committee or are funded. The bill also prohibits a state agency from promulgating a rule or taking an action that imposes a mandate, unless there is a sufficient amount to fund the mandate.

Senate Bill 5 also requires the committee to review and evaluate existing mandates.

This legislation was referred to the Senate Committee on Veterans, Homeland Security, Military Affairs, Small Business and Government Reform for consideration. To review a copy of SB 5, go to <http://www.legis.state.wi.us/2005/data/SB-5.pdf> on the Internet.

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Suzanne K. Schalig

Attorney Schalig, Brookfield City Attorney for the past twelve years, has joined the firm of Schmidt, Rupke, Tess-Mattner & Fox, S. C., and will concentrate her practice in land use issues, including zoning, development, and commercial real estate.

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Purpose

To give recognition to outstanding achievements in planning and to publicize persons and organizations whose activities advance planning in Wisconsin.

Eligibility

A WAPA or an APA member must submit the application. Planning Document and Plan Implementation nominations must be for projects located in Wisconsin and must have included a WAPA or an APA member throughout the planning process. Elected Official of the Year and Citizen Planner of the Year nominees must live and work in Wisconsin. Outstanding Journalism nominations must have a reporter from – and a story about – a Wisconsin community. No project may be considered if a member of the Jury – or his/her organization – had a role in planning or implementing a project.

Entries must be received by 5:00 p.m. on Thursday, March 31, 2005 and submitted to:
2005 WAPA Awards, c/o Carolyn Esswein, AICP, Planning and Design Institute, 241 N. Broadway,
Milwaukee WI 53202

***** Keep a copy for your records. *****

www.wisconsinplanners.org

Categories

Planning

Planning Document

- ✍ Large Jurisdiction (20,000 or larger population)
- ✍ Medium Jurisdiction (5,000 to 19,999 population)
- ✍ Small Jurisdiction (4,999 or smaller population)

Plan Implementation

- ✍ Large Jurisdiction (20,000 or larger population)
- ✍ Medium Jurisdiction (5,000 to 19,999 population)
- ✍ Small Jurisdiction (4,999 or smaller population)

Urban Design

- ✍ Large Project (more than 5 acres)
- ✍ Small Project (less than 5 acres)

Individual

- ✍ Elected Official of the Year
- ✍ Citizen Planner of the Year

Media

- ✍ Outstanding Journalism

Judging Criteria

Planning

1. Originality/Innovation
2. Transferability
3. Quality
4. Comprehensiveness
5. Public Participation
6. Role of Planners
7. Effectiveness/Results
8. Intergovernmental Cooperation

Urban Design

1. Originality/Innovation
2. Value Added to Surrounding Property
3. Quality
4. Effectiveness/Results

Individual and Media

1. Support of Planning/Planners
2. Effectiveness/Results

Questions

For more information on the 2005 WAPA Awards, please visit <http://www.wisconsinplanners.org> or contact:

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 c/o Planning and Design Institute, Inc.
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 Milwaukee, Wisconsin 53202
 ph: 414.271.2545 fx: 414.271.2542
 Email: ccesswein@pdisite.com



2005 Wisconsin Chapter of the American Planning Association Awards Application Form

Entries for the 2005 WAPA Awards are due by 5:00 p.m. on **Thursday, March 31, 2005**.
Materials received after this date will not be considered.

I nominate _____
for a 2005 WAPA Award in the category of _____.

Nominator

I certify that the credited parties performed the submitted work and meet all eligibility requirements.

Signature/Date

Print Name

APA Membership Number

Address

City/State/Zip

Phone/Fax

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How Associated with the Nomination

Nomination

Project Address/Location

or

Address of Individual Nominee or Media Contact

City/State/Zip

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Submission Requirements

The following attachments are mandatory. If any attachment is omitted, the application will not be considered. **Five (5) collated sets** of the following are required in order for the application to be considered for an award.

1. 2005 WAPA Awards Application Form.
2. An 8.5x11 three-ring binder up to one (1) inch in thickness containing all the required attachments – including a “CD-ROM Page” to hold CD-ROM media within the binder.
3. An Executive Summary of the nomination (one-page maximum).
4. A two-page explanation of how the nomination meets the judging criteria for the Planning, Individual or Media categories.
5. One (1) to three (3) one-page letters in support of the nomination.
6. For the **Planning** categories: The adopted Planning Document or Plan Implementation Document, ten (10) Powerpoint slides in 8.5 x 11 format – highlighting the project with a brief caption for each image. A three (3) to five (5) page summary of the document provided digitally on CD-ROM media in .pdf, .ppt and .jpg formats. List of all consultants and municipalities that worked on the document.
7. For the **Individual** categories: One (1) portrait of the individual nominee and up to five (5) Powerpoint slides in 8.5 x 11 format – highlighting the work of the individual with a brief caption for each image. The portrait and slides must be provided digitally on CD-ROM media in .jpg and .ppt formats.
8. For the **Media** category: One (1) essay, document, article, article series, or transcript that best represents the nomination. The text and any associated images must be provided digitally on CD-ROM media in .doc and .jpg formats.

Entries must be received by 5:00 p.m. on Thursday, March 31, 2005 and submitted to:
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Milwaukee WI 53202

***** Keep a copy for your records. *****



Wisconsin Chapter of the American Planning Association RETIREE RECOGNITION FORM

Entries for Retiree Recognition at the Spring 2005 WAPA Meeting are due by 5:00 p.m. on **Thursday, March 31, 2005.**

The Wisconsin Chapter of the American Planning Association would like to recognize current and former WAPA members for their contributions to the planning profession. If you have retired since 2003, complete this form and return it to the address at the bottom of this page. If you know of someone who has retired since 2003, please share this form with him/her. If you need additional room, please write the information on the back of this form.

Retiree Information

I certify that I am or was a member of the Wisconsin Chapter of the American Planning Association.

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Print Name

Address

City/State/Zip

Phone

Fax

Email

Employment History

Please list your employment history starting with your most recent position.

(Example: City of Anywhere, Planner I, 1976-2003)

Education

Please list your educational history starting with your most recent degree.

(Example: University of Somewhere, MUP, 1971)

Words of Wisdom

What is the biggest lesson you learned during your career that you would like to share with your fellow planners?



Yes, I would like to attend the Spring 2005 WAPA Meeting, May 18-19, 2005, in Sheboygan, Wisconsin. Please contact me for more information.

**Entries must be received by 5:00 p.m. on Thursday, March 31, 2005 and submitted to:
2005 WAPA Awards, c/o Carolyn Esswein, AICP, Planning and Design Institute, 241 N. Broadway,
Milwaukee WI 53202**

***** Keep a copy for your records. *****

Law Update

BY MICHAEL R. CHRISTOPHER, WAPA LEGAL COUNSEL
DeWitt, Ross, and Stevens S.C.
Madison, Wisconsin

United States Supreme Court Decisions to Be Made in 2005

The New Year will see oral arguments before the U.S. Supreme Court in a number of cases of great interest to lawyers and planners. In my September Legal Update, the case of *Kelo v. City of New London*, which poses the issue of whether a municipality's eminent domain authority can be used to benefit private development was discussed. To say that this decision will be of great interest is an understatement.

Kelo presents the question of whether the Fifth Amendment's requirement that a condemnation of property be for a public use is satisfied where the use in question is for economic development purposes that may increase tax revenues and improve the local economy. Residents of a New London, Connecticut neighborhood argued unsuccessfully to the Connecticut Supreme Court that the City's condemnation of their property – not because it was blighted, but because it was needed for a urban redevelopment project – was not for a public use, but for private gain. Oral argument in this case is scheduled for February 22, 2005, and I intend to immediately alert WAPA members to the decision and the possible impact in Wisconsin.

The case of *Lingle v. Chevron USA*, which will be argued at the same time as *Kelo*, is somewhat more esoteric but will also be quite important. *Lingle* involves a Hawaii statute that limits the amount of rent gasoline companies may charge lessees of gas stations. The High Court will be considering two questions. The first issue is whether the Fifth Amendment's just compensation clause allows courts to strike down state economic legislation on the ground that it does not substantially advance a legitimate state interest? The second issue is whether a court, in considering that question, must apply a deferential standard of review such as that is traditionally applied to economic legislation under the Fourteenth Amendment's due process and equal protection clause, or may decide it based on the evidence of whether the legislation will achieve its stated goal.

A third case that has important land use implications is the case of *San Remo Hotel, L.P. v. City and County of San Francisco*. The petition for *certiorari* was granted on December 10, 2004. This case presents the question of whether a landowner's Fifth Amendment regulatory takings claim is barred from federal court where a state court proceeding deciding the state law question resulted in a denial

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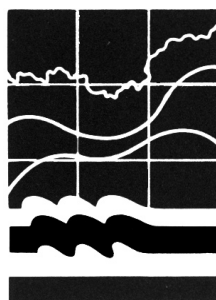
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WAPA Legislative Update

BY JORDAN K. LAMB

DEWITT ROSS & STEVENS S.C.

January 18, 2005

The 2005-06 Legislative Session Has Begun

The 2005-2006 legislative session began on January 3, 2005, when all new legislators were inaugurated. The session is currently scheduled to last through December 29, 2006. This spring, the Legislature will likely be consumed with reviewing the Governor's 2005-07 biennial budget bill, which he is expected to deliver on February 8, 2005. In addition, the Legislature will consider pieces of stand-alone legislation. As of January 17, 2005, five Assembly Bills and eight Senate Bills had been introduced.

Governor Doyle's State of the State Message

On January 12, 2005, Governor Jim Doyle delivered his State of the State message to both houses of the Legislature. Although the majority of his address focused on growing Wisconsin's economy, child care and education, he did address issues related to the state budget deficit and local government funding. He stated, "Tonight, I am announcing that my budget will fulfill the state's responsibility to the tax-

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Misunderstandings: Continued from page 4

comprehensive plan produced by the regional planning commissions is advisory only.

References

"Smart Growth Called 'Left Wing'" *Rice Lake Chronicle*, February 2, 2005.

Wisconsin Legislative Council, *Provision of the Wisconsin Constitution Regarding Feudal Tenures*, January 3, 2003.

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Legal Cases: *Continued from page 11*

of compensation, and the state proceeding was required to make the federal takings claim ripe for decision.

San Remo Hotel raises the infamous “catch-22” dilemma facing persons seeking to bring a regulatory takings claim in federal court. Such a claim is not ripe until the plaintiff has been denied compensation in state court, assuming state law provides an adequate remedy. But, if the claimant loses in state court, the federal court would decline to hear a federal takings claim on the ground that the issue has already been settled by the state court proceeding.

Also of interest, is the *City of Rancho Palos Verdes v. Abrams*, to be argued on January 19, 2005. The issue in this case is whether a party enforcing federal communications law limits on local zoning regulations is entitled to damages. *Abrams*, the owner of a communications tower, successfully sued to overturn the City’s height limit and then sought damages under 42 U.S.C. § 1983.

Does Federal Legislation Restrict Municipal Action Regarding Fair Housing?

The reach of the Federal Fair Housing Act (“FHA”) extends beyond private parties such as landlords, realtors, or developers. It also extends to municipalities that make land use decisions that have an impact on housing. However, many municipalities are unaware of their obligations and potential liabilities and are ready to take actions that violate the FHA. Municipalities commonly resist multi-family rental housing developments. If multi-family rental housing is also planned to be **affordable housing**, resistance increases. Most objectors to this type of housing are sophisticated enough not to use overtly racist language, but that does not diminish the pressure to reject a multi-family proposal.

Municipal land use restrictions which bar development of multi-family housing and/or affordable housing can constitute a violation of the FHA. Essentially, the FHA prohibits actions which make housing unavailable or otherwise deny housing to minorities and families with children. Municipalities are subject to suit by developers under the FHA and can be liable for injunctions, lost profits, damages and attorneys and expert witness fees if an FHA violation is found. For example, a municipal restriction of two bedrooms per multi-family unit has been judicially recognized to be a violation of the FHA, because its natural purpose is to discourage families from renting the unit.

A recent Wisconsin decision should be a warning to municipalities that they must take care not to violate the FHA when making land use decisions. Judge Charles Clevert of the United States Court for the Eastern District of Wisconsin ruled that the Village of Brown Deer had breached the FHA by asserting a 1973 covenant limiting multi-family units to two bedrooms as a reason to deny the developer to build affordable housing. After the decision, the parties mediated a settlement whereby Brown Deer paid \$1,550,000 in compensation.

This outcome shows that municipalities must take the FHA into account in land use decisions and that it has sharp teeth and is not a mere abstraction. This decision will undoubtedly reverberate among Wisconsin municipalities flirting with the notion of rejecting multi-family rental housing and have a significant deterrent effect.

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The Future of Voluntary Remediation Efforts

On December 14, 2004, the United States Supreme Court issued a decision in *Cooper Industries v. Aviall Services* which will have a dramatic impact – particularly in Wisconsin – on the effort to achieve voluntary environmental remediation.

The Court ruled that a company that has not been sued under CERCLA may not obtain contribution towards its remediation expenses. This ruling is contrary to the applicable state and federal law in Wisconsin before that decision, but it is the law of the land now. As a result of this decision, a company which voluntarily performs a remediation may not have any effective remedy against other parties who contributed to the problem. It also raises questions about whether a company which does a clean up pursuant to a unilateral administrative order has any contribution rights. This decision is particularly problematic in Wisconsin since there is no effective state law that establishes a contribution mechanism – either by statute or in case law.

The private sector may interpret this decision as justification for a current owner of a contaminated site not to take voluntary remediation steps since there may not be any vehicle to seek contribution from other parties, even though they have contributed to the problem.

This decision may be the impetus needed to establish a right of contribution statutorily when there are multiple parties that have contributed to an environmental problem. If this legislative change does not occur, the impact on infill development in Wisconsin could be considerable.

How Do Changed Conditions Affect The Enforceability Of An Easement?

On November 3, 2004, the Court of Appeals for District II decided an important case from Racine County entitled *AKG Real Estate, LLC v. Patrick J. Kosterman*. The issue confronted by the Court was whether an easement may continue to exist even after changed conditions made the purpose of the easement obsolete.

In 1960 about 4 acres of property were purchased for a homestead which were landlocked since the property was located about 800 feet from Highway 31 in the Town of Caledonia in Racine County. The deed contained two easements -- one for a 30-foot wide easement for ingress and egress between the property and Highway 31, while the second was an easement of 66 feet in width along the same path which the parties intended to allow for conversion to a public road.

AKG Real Estate ("AKG") purchased the vacant land adjacent to the homestead property, subject to these easements. While AKG was in the process of planning for a subdivision, Chapter 233 of the Wis. Admin. Code became effective, which required that WDOT approve any land division adjacent to a state trunk highway. Because the easement for the public road was too close to an intersection, the developer reconfigured their plat so that the easement would no longer be necessary. However, the homestead property owners refused to voluntarily terminate the private road easement which precipitated this legal dispute.




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The Court of Appeals affirmed that part of the trial court decision which held that the doctrine of changed conditions operated to extinguish the easement as soon as public road access became available to the defendant. The Court concluded that an easement may come to an end if the particular purpose for which it was granted has been fulfilled. Since the contemplated benefit of the easement was the ability of the homestead property owners to get to a public road in order to come and go when they needed to, the Court felt that it would be absurd to enforce the easement since it would require the defendants to constantly use the neighboring subdivision to obtain access when access could be easily achieved by an alternative means. Moreover, Wis. Admin. Code Ch. 233 now made this easement impracticable because it was deemed to be too close to another intersection. This case shows that even a recorded easement may not be enforced if circumstances have changed that now makes the easement no longer necessary. Thus, a literal reading of a recorded document may not be as enforceable as one might think.

Is Requiring The Removal Of Political Signs A Violation Of Free Speech?

A WAPA member who is a planner for the Town of Menasha requested that I report on the following case.

On April 9, 2004, the U.S. District Court for the Eastern District of Wisconsin ruled that Pewaukee's sign ordinance violated resident Fiedorowicz's free speech rights by restricting when he could put political signs in his yard. He wanted to erect signs that said: "Let Us Vote" that pushed

for a referendum to be held on whether the City and Village of Pewaukee should merge into one city. The referendum was never held.

The City's sign ordinance allowed residents to post signs from 45 days before an election to 7 days after it. This ordinance mirrored the State Department of Transportation's rule which had been in effect for 33 years at the time of the Federal Court decision, which is known as the "45-7" rule. Election campaign signs could have been posted under the City's ordinance within this timeframe without requiring a permit. If someone had wanted to post an election sign outside these limits, they could have sought a permit for a temporary sign for 30 days in a six-month period, even though the City permitted the use of church bulletin boards and real estate signs for longer periods of time.

In holding the ordinances unconstitutional, Judge Clevert held that "communication by signs and posters is virtually pure speech" and that for the "vast majority of the year the City of Pewaukee has completely foreclosed a venerable means of communication that is both unique and important." The City had argued that its ban was necessary for traffic safety and aesthetic reasons but Judge Clevert found that it had not justified its differential treatment of different types of signs and that requiring City approval of signs was an unconstitutional prior restraint. However, the impact of this decision went well beyond the issue of the legality of municipal regulation of political signs.

In June 2004, WDOT stopped enforcing a state code which did not allow political signs to be erected contrary to the "45-7" rule. WDOT has yet to decide whether their rule should extend the period of time that political signs can be maintained on private property, or whether to simply do away with the regulation altogether. In attempting to meet the Court's decision, WDOT could apply the "45-7" rule to other signs besides political ones but that decision could increase the number of interest groups who would oppose the regulation.

Any change would have to be reviewed by the State's Joint Committee on Administrative Rules which earlier this year suspended WDOT's enforcement of changes to Trans 233 made since 1999. In any event, any changes to this rule would not affect State code as to the location of political signs which cannot be placed anywhere within a public roadway's right-of-way.



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