WAPA News

Wisconsin Chapter
American Planning Association

Fall 2003 **Volume 2003, Number 4**

WAPA Fall Elections
Watch Your Mailbox

Please watch your mailbox for the WAPA Election Ballot. It will arrive in a plain envelope with a plain text return address from the University of Wisconsin - Milwaukee.

Ballots must be returned no later than December 12, 2003.

In this issue . . .

Smart Growth Under Siege

By Jason Valerius

Four years after its enactment, Wisconsin's Smart Growth legislation is facing the threat of wholesale repeal. Assembly Bill 435, currently under consideration by the Assembly Committee on Rural Affairs, would cancel Wis. Stat. 66.1001 and its two central requirements: 1) if a comprehensive plan is created, it must include the nine core planning elements, and 2) as of Jan 1, 2010, any action that affects land use must be consistent with the comprehensive plan.

cancel Wis. Stat 66.1001 and its two central requirements

In the many communities that have already embraced smart growth, this repeal attempt might appear to be just a short-sighted attempt to cut costs. To be sure, cost is one of the arguments being leveled against smart growth. But the more salient issues for many people, especially rural residents, are property rights and local control.

The most colorful criticism of smart growth voiced by some Wisconsin residents is that it is a United Nations plot to control local land use decisions. This bizarre claim is based on circumstantial evidence—the smart growth movement promotes sustainable development, and the U.N. has been working to promote some of the same goals through its Division for Sustainable Development. The U.N.'s Orwellian-sounding "Agenda 21", its program for sustainable development, was adopted by 178 nations at the Rio de Janerio conference in 1992. Conspiracy theorists' fires are easily fueled by vague statements such as this on the U.N. website: "Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment."

In truth, the smart growth movement has been developing in this country for decades and has only more recently been promoted worldwide through the U.N. Yet the "smart growth is a U.N. plot" theory persists because it plays to a common fear: smart growth usurps local control of land use decisions.

When Wisconsin legislators decided in 1999 to require that

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Nancy Frank, WAPA News Editor
Chair, Department of Urban Planning
School of Architecture and Urban Planning
University of Wisconsin--Milwaukee
P.O. Box 413
Milwaukee, WI 53201-0413
(414) 229-5372
(414) 229-6976 (fax)
Email: wapa@uwm.edu

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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.

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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.

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Winter issue: submit by January 15.
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Summer issue: submit by June 15
Fall issue: submit by September 15

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WAPA Officers Meet with Rep. Tammy Baldwin

WAPA President Gary Peterson and Legislative Liaison Tom Dabareiner met with Rep. Tammy Baldwin (2nd Cong. Dist.) to present to her a copy of Gene Bunnell's book, "Making Places Special." They also discussed TEA 21 reauthorization and thanked her for her positive vote on saving Enhancements. Rep. Baldwin offered some suggestions for how WAPA should promote other TEA 21 changes to the Wisconsin Congressional delegation.

Urban Parks Can Help Solve City Issues

Mary Eysenbach and Denny Johnson

APA National Offices – – The City Parks Forum, a special initiative of the American Planning Association (APA), is now offering a series of briefing papers that show how mayors, city managers, park planners and others can use healthy parks as a catalyst to address a wide range of municipal issues from improving the local economy to reducing crime.

use healthy parks to... improve the local economy and reduce crime

"While the benefits of urban parks are generally understood," said City Parks Forum Director Mary Eysenbach, "these reports are presented in a way that explicitly shows, for instance, the connections and relationships between urban parks and a community's revitalization."

Continued on page 13

2003 AICP Exam Results

Gregory Kessler, AICP
WAPA Vice President-PDO

Once again, Wisconsin surpassed the national passing rate for the AICP exam. Wisconsin's passing rate was 79% based upon 28 people who took the test in May. The national average was 61%.

I am once again planning on offering the Chapter's Presidents Council (CPC) Study Guide (6th Edition) and holding an exam preparatory workshop in 2004.

Note that December 9, 2002 **WAS** the application submission deadline to take the May 2003 American Institute of Certified Planners written exam. APA/AICP will re-open the online application for the 2004 exam cycle soon. Please visit WAPA's website: www.wisconsinplanners.org or the AICP website at: www.planning.org/certification for application information, AICP exam information and for resources that can help you prepare for the exam.

Congratulations to the following who passed the 2003 AICP exam.

Alicia Acken, University of Wisconsin Coop Ext.
Barbara Feeney
Kevin Firchow
Joy Gottschalk, Vandewalle & Associates
Robert Gottschalk, Vandewalle & Associates
Charles Handy, La Crosse County
Linda Horvath
Jonquil Johnston
Caron Kloser, HNTB Corporation
Vanessa Kuehner
Nicholas Lelack
Liat Lichtman
Jeffrey McVay
Dave Meurett
Kathleen Nardi
Diane Paoni
Peter Park, City of Milwaukee
Dan Rolfs
Becky Schlenvogt
Charles Wade
Carmen Wagner, Wisconsin DNR
Cathi Wielgus, Vandewalle & Associates

AICP Exam Format to be Computerized in 2004

The 2004 exam will be offered in two 12 day testing windows (May 8-22 and November 6-20) in a computer-based format at over 250 test centers in the United States. AICP will distribute and post more comprehensive information at their web site over the next month. WAPA members should periodically check the APA/AICP website at: http://www.planning.org/certification/index.htm for exam guideline updates, fees and preparation information.

Law Update

By Michael R. Christopher, WAPA Legal Counsel
DeWitt, Ross, and Stevens S.C.
Madison, Wisconsin

WAPA Legislative Update

By Jordan K. Lamb
DeWitt Ross & Stevens S.C.

October 15, 2003

Hearing Held on Assembly Bill 435 – Repeal of "Smart Growth" Law

Assembly Bill 435, introduced by Representative Mary Williams, repeals Wisconsin Statute § 66.1001, the comprehensive planning statute or "Smart Growth" law. This bill was referred to the Assembly Committee on Rural Affairs, chaired by Representative Eugene Hahn.

On October 9, 2003, the Committee on Rural Affairs held a public hearing on AB 435. Based on the preliminary Record of Committee Proceedings, forty-six individuals testified in favor of this legislation and seventy-seven registered in favor of this legislation. One individual, Michael Blaska from the Wisconsin Department of Administration, appeared for informational purposes only. Forty-seven individuals registered their opposition to the legislation, and the following twelve individuals testified against the bill:

1. Bev Anderson, Darlington
2. Mort McBain, Weston
3. Lisa MacKinnon, 1000 Friends of Wisconsin, Madison
4. Phil Salken, Realtors Association - South Central Wisconsin, Verona
5. Alice Morehouse, WISDOT, Madison
6. Michael Neuman, Preserve Our Climate Coalition of Dane Co., Madison
7. Gary Peterson, Wisconsin Chapter of American Planning Assoc., Madison
8. Charles Kell, Stevens Point
9. Betty Wolcott, Woodlands Land Preserve, Osseo
10. Steve Gutschick, Genoa City
11. Robert Gehring, Bassett
12. Rick Stadelman, Wisconsin Towns Association, Shawano

No executive session has been scheduled for this legislation.

New Stand-Alone Legislation

Assembly Bill 527 – Effectiveness of County Shoreland Zoning Ordinances

On September 18, 2003, Representative Scott Gunderson (a Republican from Union Grove) introduced AB 527, which was referred to the Assembly Committee on Urban and Local Affairs. Current law provides, with certain exceptions, that if a city, village, or town annexes a county shoreland area after a specified date and that area, before annexation, was subject to a county shoreland ordinance, then the county shoreland ordinance continues to be in effect and must be enforced by the annexing city, village, or town. This bill eliminates this requirement that the annexing city, village, or town continue to keep the ordinance in effect and enforce the ordinance. A public hearing was held on AB 527 on October 7, 2003. No executive action was taken. To review the full text of this proposal, go to http: //www.legis.state.wi.us/2003/data/AB-527.pdf.

Assembly Bill 551–Town Board Approval of County Development Plans

On October 2, 2003, Representative Donald Friske (a Republican from Merrill) introduced AB 551, which was referred to the Committee on Rural Development. Under current law, before a county development plan, or an amendment to a plan, may take effect, it must be adopted by the county board. Under this bill, neither a county development plan (in whole or in part), nor an amendment to a county development plan plan, may take effect in a town unless that town's board approves the county board's action. No public hearing has yet been scheduled on this legislation. To review the full text of this proposal, go to http: //www.legis.state.wi.us/2003/data/AB-551.pdf.

LRB 3204/2 – Changes to the "Smart Growth" Law

Representative Sheryl Albers (a Republican from Reedsburg) is proposing legislation that will make several changes to the "Smart Growth" law.

Beginning on January 1, 2010, under Smart Growth, any program or action of a local governmental unit that affects land use must be consistent with that local governmental unit's comprehensive plan. This bill reduces the number of programs or actions with which a comprehensive plan must be consistent. Under the bill, the only actions which must be consistent with a comprehensive plan are official mapping, local subdivision regulation, and zoning ordinances, including zoning of shorelands or wetlands in shorelands. In addition, the bill also reiterates that a regional planning commission's comprehensive plan is only advisory in its applicability to a political subdivision (a city, village, town, or county), and a political subdivision's comprehensive plan.

Although this legislation is not yet introduced, it had a public hearing before Representative Albers' Property Rights & Land Management Committee on October 8, 2003. (It is not yet available on the Internet. However, I have included the text of the Legislative Reference Bureau's analysis of this draft at the end of this Update.)

Update on Previously Introduced Legislation

Assembly Bill 340 – Town Maps

Assembly Bill 340, which was introduced on May 13, 2003 by Representative Sheryl Albers (a Republican from Reedsburg), passed out of the Assembly Committee on Property Rights & Land Management with a vote of 6-2 on October 8, 2003. This bill authorizes a town to adopt an official map at any time, and requires that a county development plan include the official map of any town in the county that has adopted a comprehensive plan. It is not available for scheduling for debate on the Assembly Floor. (Note: This is the Assembly companion bill to Senate Bill 110).

Assembly Bill 271 – Notices for Zoning Changes

Assembly Bill 271, which was introduced on April 18, 2003 by Representative Sheryl Albers (a Republican from Reedsburg) passed out of the Assembly Property Rights & Land Management Committee with a vote of 8-0 on October 8, 2003. This bill specifies that a town zoning committee must hold a public hearing and give notice of the hearing on a preliminary report on recommended zoning district boundaries and zoning regulations for such districts and that a town board give notice of a public hearing on a proposed zoning ordinance.

Assembly Bill 442 – Quorum Requirements for a Zoning Board of Appeals or Adjustment

Assembly Bill 442, introduced on July 21, 2003 by Representative Sheryl Albers (a Republican from Reedsburg), had a public hearing before the Assembly Property Rights & Land Management Committee on October 8, 2003. This bill required all municipalities or counties that have a board of appeals or adjustment to appoint alternate members of the board. The bill also specifies that for any such board to take action a quorum must be present and further specifies that a quorum is all members–elect of the board. No executive action was taken on this legislation.

Assembly Bill 493 – Approval of Conditional Use Permits

Assembly Bill 493, introduced by Representative Terri McCormick (a Republican from Appleton) prohibits a zoning entity from withholding approval of a conditional use permit for a reason that is not directly related to the requested conditional use permit. In addition, the zoning entity may not condition approval of such a permit on the property owner taking, or not taking, some action with respect to an existing use of the property, that is not directly related to the permit. This bill has been referred to the Assembly Committee on Urban and Local Affairs, chaired by Representative Scott

Gunderson.

I spoke with staff from Representative Gunderson's office on October 14, 2003 and learned that although this legislation has not yet been scheduled for a public hearing, it will likely get a hearing during this fall session.

Legislative Reference Bureau Analysis of LRB 3204/2 – Changes to the "Smart Growth" Law

Under current law, a county board may engage in zoning and land use planning by creating a county planning agency or by designating a previously constituted county committee or commission as the county planning agency. If a county board creates or designates such an agency, the agency is required to direct the preparation of a county development plan for the physical development of the towns within the county and for the cities and villages within the county whose governing bodies agree to have their areas included in the county plan.

Also under current law, a city or village, or certain towns that exercise village powers, may create a city, village, or town plan commission to engage in zoning and land use planning. If a city, village, or town creates such a commission, the commission is required to adopt a master plan for the physical development of the city, village, or town, including in some instances, in the case of a city or village, unincorporated areas outside of the city or village which are related to the city's or village's development.

Under the current law popularly known as the "Smart Growth" statute, if a local governmental unit (city, village, town, county, or regional planning commission) creates a comprehensive plan (a development plan or a master plan) or amends an existing comprehensive plan, the plan must contain certain planning elements. The required planning elements include the following: housing; transportation; utilities and community facilities; agricultural, natural, and cultural resources; economic development; and land use.

Beginning on January 1, 2010, under Smart Growth, any program or action of a local governmental unit that affects land use must be consistent with that local governmental unit's comprehensive plan. The actions to which this requirement applies include zoning ordinances, municipal incorporation procedures, annexation procedures, agricultural preservation plans, and impact fee ordinances. Also beginning on January 1, 2010, under Smart Growth, if a local governmental unit engages in any program or action that affects land use, the comprehensive plan must contain at least all of the required planning elements.

Under the bill, the only actions which must be consistent with a comprehensive plan are official mapping, local subdivision regulation, and zoning ordinances, including zoning of shorelands or wetlands in shorelands.

The bill also reiterates that an RPC's comprehensive plan is only advisory in its applicability to a political subdivision (a city, village, town, or county), and a political subdivision's comprehensive plan.

WAPA Legal Update

By Michael R. Christopher
DeWitt Ross & Stevens S.C.

September 16, 2003

There have not been too many significant Wisconsin Appellate Court decisions affecting land use since my last monthly review, so I want to summarize one Appellate case which I do think is important and then address the issue of how planners can be most effective in the courtroom.

As you know, many of the provisions of Chapter 66 represent a somewhat Byzantine labyrinth of municipal law regulations and procedures. One of the areas of Wisconsin municipal law which would qualify for an award for the most convoluted area of general municipality law is the topic of annexation and incorporation. Recently, the Court of Appeals *In the Matter of the Incorporation As a Village of Certain Territory in the Town of Campbell v. City of La Crosse*, waded through some complex questions regarding annexation and incorporation which were matters of first impression.

This case involves a lengthy struggle between the City of La Crosse and the Town of Campbell over competing annexation ordinances and incorporation petitions which directly affected the fate of the Town.

Before March, 1997, residents of certain properties in the Town petitioned for direct annexation to the City of La Crosse. On March 5, 1997, a Petition to Incorporate territory in the Town as the Village of French Island was filed with the La Crosse County Circuit Court. This petition included properties that were already subject to annexation proceedings, so the City of La Crosse moved to dismiss the petition, citing what is called the "rule of prior precedence" to support their contention that the Court could not consider the incorporation petition since annexation proceedings were pending. The Circuit Court denied the City's motion. Subsequently, the Circuit Court held that the annexation ordinance was invalid because the territories were not contiguous to La Crosse.

At that point, the matter became further complicated. The Town of Campbell moved to include the territory subject to earlier annexations in the incorporation petition. Before the Circuit Court acted on the motion, a second incorporation petition was filed in February, 2001 which was the subject of this appeal.

The La Crosse County Circuit Court dismissed the 1997 petition for incorporation since the 2001 incorporation petition purported to incorporate the entire Town of Campbell and therefore necessarily included within the description territory that had been annexed to La Crosse but returned to the Town by a decision of the Circuit Court.

However, the ongoing battle between the Town and the City became even more complicated. The legal description for the property to be incorporated contained a contingency clause providing that "should the Court of Appeals overturn the Circuit Court regarding the annexations, said parcels shall

be considered to be deleted from this description as to give rise to no conflict between the annexations and the incorporations."

Again, La Crosse moved to dismiss the 2001 incorporation petition contending that it violated the rule of prior precedence just as the 1997 petition had and that it contained an invalid contingent narrative legal description. The La Crosse County Circuit Court agreed with the City's argument and dismissed the 2001 incorporation petition. In the tradition of continuing the legal battle between the Town of Campbell and the City of La Crosse, the Town appealed that decision.

The first issue was how the Court of Appeals was going to apply the rule of prior precedence. The Town did not dispute that the annexation proceedings originated before the 2001 incorporation petition. However, the Town argued that the petition for incorporation did not violate the rule of prior precedence because the annexation proceedings lost its priority status when the ordinances were deemed to be invalid and dismissed by the Circuit Court. The Court of Appeals disagreed with that argument, finding that there is a strong presumption of validity accorded to direct annexations, so the Court of Appeals felt that a literal interpretation of the order that these filings were made was justified.

The Court of Appeals also agreed with the City that the contingent narrative description in the incorporation petition was not sufficient in that one must be able to determine the location of the territory subject to incorporation from the face of the petition, so this contingent language is in effect, "a moving target whose accuracy cannot be determined contrary to statutory directive." Therefore, the Court of Appeals concluded that the use of a contingent narrative description for the property to be incorporated is insufficient to satisfy the statutory requirements for incorporation set out in Wis. Stat. § 66.0203.

An analysis of this decision provides municipal officials and planners with two lessons. First, the decision reinforces the need to comply with legal technicalities involved in the annexation-incorporation adversarial process. Thus, a "rush to the courthouse" in order to ensure priority and precise wording in the petition without contingencies is critical. Second, if municipalities wish to enter into cooperative boundary agreements rather than to pursue the time consuming and expensive litigation process, the respective municipality or property owner's bargaining position will be greatly affected by their ability to closely follow the procedures of annexation and incorporation.

A number of months ago, a WAPA Board member asked me to summarize how a municipal official or planner can do an effective job in the courtroom. This is an extremely timely topic since land use decisions are often decided upon in an adversarial setting. My comments are certainly not exhaustive, but I believe that they will maximize one's chances to persuasively advocate in deposition and at trial.

1. Preparation is the absolute key. A witness who is ill-prepared or who equivocates could be extremely harmful.

2. Since most cases are settled out of court, preparation for your deposition is extremely important and should not be taken for granted. Many people are under the false assumption that since a deposition is preliminary and less formal than the witness' actual testimony at trial, people often believe that "they can wing" a deposition. Nothing is further from the truth.

3. Listen carefully to the questions asked of you. Allow for a few seconds for your attorney to object to the question, assuming that the questions are being posed to you by the other side.

4. Your testimony should include ample references to visuals. Charts and maps should be easy for the judge or jury to read and understand. This is an opportunity for you to educate as well as to persuade, so use this chance to inform the fact finder without being officious.

5. It is very important to maintain good eye contact with the judge or with the jury. Testifying can obviously be quite stressful, but try to communicate as naturally as possible. Keep in mind that often a case is decided upon credibility, so don't worry about not being smooth, but instead try to be as sincere as possible.

6. A municipal official or planner is often perceived as a witness who can be somewhat more objective as opposed to many other types of expert witnesses. Use that perception in strengthening the credibility of your testimony, but keep in mind that you have to balance the objectivity with your role to advocate for the client.

I believe that following these tips will be quite helpful in making you more effective in the courtroom.

Significant Court Decisions

By: Michael R. Christopher

July 15, 2003

Spot Zoning
Step Now Citizens Group v. Town of Utica Planning and Zoning Committee

We often hear the statement: "This is spot zoning. Spot zoning is illegal in Wisconsin." This case teaches us that spot zoning is not per se illegal in Wisconsin.

Algoma Ethanol, LLC ("Algoma") wanted to build a $36 million plant for the production of ethanol on the north 24 acres of a parcel in a predominantly rural area devoted to agricultural use. After holding three public informational meetings, the Town Board adopted an ordinance rezoning the property from agricultural to industrial to allow for the ethanol plant even though there was disagreement as to whether the rezoning was consistent with the Town Land Use Plan. However, the Town found that while the property was suitable for use as an ethanol plant, that the property would revert back to the Agricultural District if approvals, permits and test results were not obtained within 18 months. The

Winnebago County Board confirmed the Town's decision.

A citizens' group, Step Now, filed a declaratory judgment requesting that the Court find that the rezoning constituted illegal spot zoning. The Winnebago Circuit Court agreed with the Plaintiffs, finding that the rezoning was unreasonable and unconstitutional because the area rezoned was too small; the creation of jobs afforded by the plant was too little; the distance from a designated industrial area in the Plan was too great; and the distance from a private golf course and several residences was too little.

rezoning did not constitute illegal spot zoning.

The Court of Appeals reversed the Circuit Court, deciding that the rezoning did not constitute illegal spot zoning for a number of reasons. First, the Court determined that a zoning decision was a matter of legislative discretion and that courts should not be in the business of second-guessing a decision made by local officials. Second, the Court did conclude that this rezoning fell into the category of spot zoning because it did fit the definition for spot zoning which is "the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district." However, the Court went on to say that spot zoning is not necessarily inconsistent with the purposes for which zoning ordinances can be passed in that in certain circumstances, it is a necessary device to provide flexibility to comprehensive zoning ordinances. Moreover, a municipality must be given wide discretion in zoning decisions since those decisions often hinge on concepts such as the promotion of public welfare and general prosperity which can best be determined by representatives at the local level.

The Plaintiffs also contended that the rezoning constituted illegal spot zoning in that it was inconsistent with the Town's Land Use Plan. The Court held that such a plan was not mandatory but merely advisory. The Court went on to say that a logical interpretation of Wisconsin's Smart Growth Law was that before January 1, 2010, a local government unit's land use decisions did not need to be consistent with that local governmental unit's comprehensive plan.

Therefore, this case stands for the proposition that a court cannot substitute its judgment for that of the zoning authority and that spot zoning is not illegal if it is deemed to be in the public interest and not solely for the benefit of the property owner.

Governmental Immunity
Welch v. City of Appleton

On May 28, 2003, the Court of Appeals decided the above case, which reinforced the principle of governmental immunity, despite the fact that the facts seemed to justify an exception to this long-standing legal doctrine.

A City storm sewer ran underneath the Welch's home. A vertical drain pipe with an open grate was located approximately 15 feet from the rear foundation of the home. An extraordinary rainstorm occurred and at its peak, two inches of rain fell in 10 minutes. There was so much water in the system that the resulting pressure created a 20-foot geyser from the City's pipe. Because the ground sloped downward from the pipe toward the house, the water from the geyser pooled against their foundation, causing it to collapse. The collapsed home was irreparable and had to be demolished. Following the event, the City sealed the pipe with concrete and relocated the drain on the property to an area of lower elevation. The City found no obstruction in the sewer system and all mechanical components were in working order.

The Welches sued the City claiming that the City maintained a nuisance and that it was negligent in the operation and maintenance of the sewer system. Regarding the nuisance claim, the Welches correctly argued that there is no statutory or common law immunity doctrine that shields a municipality from maintaining a private nuisance. The Court stated that in order to prevail on a private nuisance claim, a Plaintiff must show that either the conduct was intentional and unreasonable or that the unintentional action constituted negligent, reckless or ultrahazardous conduct.

In this case, the Welches never contended that the City's conduct was intentional. Instead, they argued that the ponding in their backyard was foreseeable, that the flooding was foreseeable because the system was designed for a 10-year event at best, that the pipe in the Welch's yard could have been capped or relocated earlier and that the City did not install a safety valve or evaluate the water's escape plan. However, the Court rejected these arguments because the Plaintiffs did not show that the system itself had failed due to mechanical deficiencies. Rather, the Court concluded that it was unable to keep pace with the extraordinary rainfall.

The Court stated that Appleton was not obligated to build a sewer system at all or to build one large enough to carry away all the water in the street. However, it did accept the Plaintiff's argument that if the City first collects the water in the sewer and thereafter by negligent construction or maintenance allows it to escape onto adjacent land, the City may be liable. However, the Court concluded that the rainstorm was unforeseen and extraordinary and that the otherwise fully-operational sewer could not process the falling water fast enough. Thus, Court concluded that there was no negligent operation or maintenance of the system.

...immunity that protects municipalities from liability.

The final argument that the Welches made rested on their assertion that Appleton was not entitled to immunity because it failed to fulfill a *ministerial* duty. Wisconsin law only immunizes against actions done in fulfilling *discretionary* duties. A duty is ministerial "only when it is absolute,

certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." The Court concluded that the City's discretionary act of maintaining a sewer system did not bind the City to a ministerial duty.

Even though the Court went out of its way to show its sympathy with the damages suffered by the Welches, this case reflects the virtual impenetrable shield of immunity that protects Wisconsin municipalities from liability. Only under the most extraordinary circumstances can that shield be pierced.

Model Subdivision Ordinance Online

by Russell Knetzger, AICP
Milwaukee, Wisconsin

As with the model zoning ordinance discussed in the Summer 2003 "WAPA News," a model land division ordinance for use by anyone is now available on the WAPA web site, (www.wisconsinplanners.org).

The ordinance was drafted in January, 1992 for the Town of McMillan in far southwestern Marathon County. It was drafted under the auspices of the North Central Wisconsin Regional Planning Commission (NCWRPC), located in Wausau, Wisconsin. The Town of Marathon is the recipient of sprawl growth from the City of Marshfield, home of the famous Marshfield Clinic. Marshfield is in adjacent Wood County. The ordinance has been available from NCWRPC in hard copy and on diskette. It is intended the on-line access would relieve NCWRPC of such requests.

Is A Land Division Ordinance Necessary?

Wisconsin has some rural towns and incorporated hamlets that are not growing much, and might be able to function without a local land division ordinance. This is because Wisconsin Law, Chapter 236, provides a few basic protections to the local community, and because most Counties have land division ordinances that provide additional protections.

For example, it is not possible under Chapter 236 to create the right of way for a public street without the consent of the local community that would be receiving jurisdiction of that street. Said state law will also guarantee that absent a local ordinance to the contrary, the street right of way must be at least 66 feet wide, and any lots fronting on it must be at least 60 feet in width. County ordinances typically add a clause that no street can be created unless the local community also is satisfied with the improvements to be placed in the proposed street.

But if the local community, (using towns as the most likely example) has no "town road ordinance," the community is vulnerable to receiving a substandard road bed, paving, and drainage system, because neither Chapter 236, nor the typical County land division ordinance, goes into that kind of detail. Thus any town expecting even a small amount of land division activity, but wishing not to administer a land division ordinance, should have a road ordinance.

A community that has available public utilities such as sewer and water should by ordinance be able to impose the utilization of those utilities upon any construction within the boundary area of the utility district. Such an ordinance would typically be a building code or a general local ordinance. But if a lot is to be created with private intent to avoid conventional placement of a structure upon a street, the community without a land division ordinance may have difficulty insisting a street be extended and improved to the structure

There also still are land division ordinances in existence which regulate only "subdivisions" (5 or more lots within five years, each under 1.5 acres in size), which is the Chapter 236 definition. Thus especially in rural situations, large "country lots" or "lake lots" might be created without local government oversight.

For this reason, a modern subdivision ordinance will take the title "Land Division Ordinance" because <u>all</u> divisions of land are regulated, not just subdivisions. The model ordinance described herein regulates all divisions of 35 acres in size or smaller. The 35 acre number was taken from the minimum acreage needed to qualify for State of Wisconsin farmland preservation tax credits.

Teaming With the County

If a community only has minimal need for a local land division ordinance, or even communities with moderate platting activity feel overwhelmed by the administrative responsibilities of such an ordinance, it is recommended that the community team up with its County planning office. That means that by mutual agreement, the local community adopts its own ordinance, but allows for critical steps to be assumed for it by the County. The model ordinance contains such a County-partner provision.

The most critical step to allocate to the County, is that copies of maps and plats filed for action are distributed in a timely fashion to other communities and agencies listed in Chapter 236 for their review and comment. These include the Wisconsin Dept. of Administration, and state and county highway departments abutting land divisions. Where water frontage is involved the Dept. of Natural Resources will be a receiving agency. Nearby communities with Extraterritorial Jurisdiction under Chap. 236 are also entitled to copies.

Some counties will also help review storm water management plans, and where public sewer is not being provided, the County Sanitary function will review suitability of lots for soil absorption sewage treatment.

What is the Role of a Preliminary Map or Plat?

By common usage, a "plat" refers to a "subdivision" plan as defined above, and a "map" refers to a "land divi-

sion" other than a subdivision, what are commonly called "land splits" or "CSM's" (division by Certified Survey Map). Chapter 236 allows a community by ordinance to review and deal with a divider of land via "preliminary" drawings submitted by the divider. Both local governments and land dividers are more likely to engage in healthy give and take on the proposals in the drawings if the plans were not expensive to create, and can cheaply be modified. That is the purpose of Preliminary Maps or Plats.

An unfortunate trend over the past few decades has been for land division ordinances to impose ever more technical detail in Preliminary submittals, to the point that dividers are reluctant to make changes to their submittals, and some reviewers become reluctant to ask for changes.

Here is a test for whether your land division ordinance has gone too far in what is requested on a Preliminary Map or Plat: If your review body has created neighborhood plans, either ahead of time as part of master planning, or concurrently to show alternatives to what the divider has submitted, do those plans contain the same level of detail as your ordinance requires of a Preliminary submittal? If not, your community may be committing overkill on your preliminary submittal requirements.

Some communities have sidestepped this issue by calling for a "Concept Submittal" before submission of a Preliminary Plat or Map. Concept plans tend to require less rigorous information than an official Preliminary Plat or Map. The model ordinance does not provide for the Concept step because Chapter 236 establishes Preliminary Plats as the official "bargaining process", and once agreed to, an approved Preliminary is binding upon the Final Plat. Thus the Preliminary Plat/Map is a critical step, and not to be taken lightly.

To balance the need for enough information to make informed decisions, without turning the Preliminary step into a Final Plat, the model tries to set the Preliminary requirements at a reasonable level. The goal is to not burden the divider with expensive unnecessary detail, and yet provide enough information that both parties, the community and the divider, can live with the approved Preliminary Plan through final engineering and infrastructure installation. The model could, however, easily be adapted to include a Concept Plan stage.

What Role Do Design Standards Play?

Most local subdivision ordinances do, or should, contain "Design Standards" for street arrangement, block sizes, minimum and maximum road and drainage gradients, easements, lot proportions, and similar physical criteria. County ordinances are prone to downplay these criteria because their jurisdictions vary so much, from very rural, to suburban situations with utilities just outside corporate limits. Where the County ordinance does not contain standards suitable for your community, a local land division ordinance is called for.

downplay these criteria because their jurisdictions vary

It is important such standards be adhered to. At this point in Wisconsin's development history, dividers are resisting extending existing unimproved stub streets, or platting new stubs touching adjacent open lands. Blocks are becoming exceptionally long, well beyond the most lenient limits. Together these conditions create "you can't get there from here" situations of disconnected subdivisions. That pattern will defeat any ultimate sense of achieving "community."

What About Improvements and Parkland Dedication?

The model ordinance referred to herein provides for the possibility of all possible urban or rural improvements, ranging from streets with drainage swales and no walking paths, to full sewer and water utilities, and sidewalks. Storm water detention basins are included, plus the option for parks.

With regard to dividers dedicating parkland or "a fee in lieu thereof" toward the neighborhood park plan, Wisconsin's Impact Fee law is not used. Rather the model relies on the still valid earlier standard approved in the Wisconsin Supreme Court case of Jordan v. Menomonee Falls (28 Wis 2nd 608, 1965). Said earlier approach is easier to establish and administer, though it does require separate non-lapsing funds for each planned park. Such funds if held for long periods before use can be difficult to administer accurately.

Is a Model Development Improvements Contract Included?

Yes. It is taken from the version developed in Racine County in 1983 by a diverse committee of county and local planning staff and officials, plus private surveyors. Using a contract with dividers for improvements allows details to be bargained and agreed to that then become clearly defined and enforceable via the contract. The contract covers such items as: Who pays for municipal inspection fees of road and utility work, and how much? Is liability insurance being provided? If stub streets are extended to adjacent properties, how much reimbursement will later flow to the divider? Are financial sureties required that guarantee all work will be completed in a specific time?

The Irrevocable Letter of Credit has become the favored method of ensuring financial performance by the divider in completing the improvements to the division. A model Letter of Credit is included.

The model contract is also adaptable to enforcing developments under the Zoning Ordinance, where land divisions creating additional abutting public street rights of way s may not be occurring. Examples would be commercial or office centers with private drives, or private road condominium projects or Planned Unit Developments, including some forms of Conservation Subdivisions. All of these types of developments are better administered if a Development Contract has been bargained and executed between the developer and the local community.

Smarth Growth *Continued from page 1*

comprehensive plans actually be comprehensive, they recognized the increased cost of such planning and offered planning grants to towns, municipalities, counties, and regional planning commissions. Clark County was one of dozens of government units that jumped at the opportunity to apply, and in 2000 it was awarded a $57,000 grant to help fund plans for 23 of the county's 45 municipalities. Resistance began immediately.

At the center of the resistance to the smart growth planning process in Clark County is Clark Palmer, Chairman of the Committee for Fairness in Law. Originally formed to advocate for other issues, Palmer's group turned to smart growth and began convincing towns to drop out of the county-led process. Through letters to the editor and attendance at town meetings they convinced many residents that the county could and would subvert local land use decisions made by towns who took part in the state-financed planning process. They persuaded 8 of the 18 towns to drop out of the plan. Clark County Zoning Administrator Jay Shambeau made some efforts to advocate for the planning process, when invited to speak, but the county has respected the wishes of towns to withdraw from the process.

activists are feeding false beliefs about smart growth

Neighboring Marathon County received a 2002 grant for $862,000 that included all 53 of its municipalities. Or it did until Clark Palmer began fighting smart growth in Marathon County, too. So far only 3 towns have pulled out of the process, but County Planning Director Ed Hammer is frustrated. His complaint is that Palmer and a handful of like-minded activists are feeding false beliefs about smart growth, convincing residents that the county and the state will make land use decisions for them if they join in the smart growth planning process.

Portage County, just south of Marathon County, received a $500,000 grant in 2001, and they too have struggled to maintain the involvement of the 28 units of government that originally applied with the county. Two towns have pulled out of the process so far. The Town of Sharon dropped out after residents threatened to strip the town of zoning power altogether by voting to rescind village powers. County Director of Planning and Zoning Chuck Kell notes that these rejections of the planning process were not entirely home-grown—some of the most vocal smart growth opponents present at meetings were not county residents.

Portage County ...struggled to maintain the involvement of the 28 units of government

Wood County, just west of Portage County, saw the difficulties to the east, north, and west and decided to take a year to inform residents about smart growth before applying for a planning grant. Unfortunately, says County Planning Director Gary Popelka, their information sessions turned into debates. Clark Palmer traveled to the county to attend these sessions with Wood County resident Greg Swank, another prominent grass-roots voice against smart growth. The two men videotaped the proceedings and disputed the county's claims that the process would be locally controlled. By the end of the year the county's Planning and Zoning Committee decided that it was not worth the trouble of trying to win the hearts and minds of residents for smart growth and instead decided simply to develop a county plan without a grant.

Though concentrated in these central Wisconsin counties, Palmer's fight against smart growth has taken him as far as Langlade County in the northeastern part of the state. His April 1st speech to the county board helped convince the county to turn down a smart growth planning grant. All such "victories" are tallied on Greg Swank's anti-smart growth website: www.takebackwisconsin.com.

For counties that do accept smart growth grant money, withdrawals can disrupt the planning process because the state reclaims $12,000 per local government unit. Clark County was allowed a one-time replacement of four of the eight lost towns with new recruits, but still was denied $48,000 of funding. The lesson learned from this experience was the need to make local governments buy into the process, both literally and figuratively. Shambeau says participants should be required to provide both a non-refundable cash contribution and a resolution to create and adopt a comprehensive plan.

The efforts of Palmer and Swank have been successful, not only in convincing local communities to avoid smart growth, but also in the creation of AB 435. The bill was introduced by Representative Mary Williams, whose district runs north from Clark County and includes part of Marathon County. Rep. Williams' staff is quick to point out that the bill was created in response to citizen complaints about smart growth. A quick look at a legislative district map shows that 11 of the 17 co-sponsors of AB 435 are from west-central and northeast Wisconsin, areas where Clark Palmer has actively agitated against the legislation.

Only one co-sponsor does not represent a rural part of the state: Senator Tom Reynolds, whose district lies mostly in Milwaukee County. A conversation with Reynolds staff member Les Wakefield reveals a more informed and balanced set of arguments against the legislation. In Wakefield's view, and,

presumably, Reynolds' as well, smart growth is a good idea, especially for urbanizing areas, but it should not have been applied statewide in a "one-size-fits-all manner". They would like to see allowances made for rural communities that have neither the growth rate to justify extensive planning nor the budget to afford the planning process. Wakefield also voiced concerns about 1) the threat of lawsuits over "inconsistencies", 2) the inadequacies of Wisconsin planning expertise (both quality and quantity) to complete the hundreds of plans in the works, and 3) the possibility that an increase in plan-related data provided to the state Department of Administration allows an increase in control over communities.

Given this broader set of concerns, is repeal a genuine possibility?

Several months ago Representative Mary Hubler (D, Rice Lake) of the Committee on Rural Development submitted a list of questions about the smart growth legislation to the Wisconsin Legislative Council. The answers, prepared by Staff Attorney Mark C. Patronsky, suggest that many of the concerns about the law are unfounded. Here are some highlights:

- The statute "**does not** require a local government unit to adopt a comprehensive plan." If a plan is adopted it must have the statutory elements, and after Jan 1, 2010 any action that affects land use must be consistent with that plan, but the law doesn't require plans.
- The law does not prescribe specific qualitative outcomes for any of the nine elements. It only requires "consideration of potential need."
- Comprehensive plans prepared under the law do not have the power to determine local zoning.
- The state, its agencies, and regional planning commissions do not have the power to police local comprehensive plans after they are adopted.
- The law does not require a local government unit to hire a consulting firm to complete its plan.
- A repeal of the law would have no affect on a laundry list of 16 existing regulations and procedures, including annexation, boundary agreements, subdivision ordinances, local zoning, transportation improvements, park and open space acquisition, shoreland and wetland zoning, and erosion control and stormwater management.

a repeal would have no affect on on a laundry list of regulations

This last item is directed toward critics espousing their right to do as they see fit with their land. In the rhetoric of Palmer, Swank, and others, "smart growth" has often become a catch-all for any regulation that affects how landowners may use their property. Unpopular DNR regulation of wetlands and shoreland areas, for example, are cited by some opponents of smart growth as examples of why the law should be repealed. In truth, a repeal would have no affect on these regulations.

"Smart growth" is a term heavily laden with ideas such as compact living, mixed land use, public transportation, and open space preservation. The opponents of Wisconsin's smart growth legislation, most of them rural landowners, fear the imposition of these principles upon them by their county, region, or state governments. But their efforts to repeal the law have forced clarification of what the law does and does not do. It does not impose outcomes or specific decisions, rather, it requires that decisions must be made and adhered to. The challenge for planners is to convince skeptical communities that the decisions they make will be their own and will not be altered by state bureaucrats, or anyone else.

convince skeptical communities that the decisions they make will be their own

In the end, AB 435 is likely to fail. This possibility has been made more likely by a competing piece of legislation planned by Representative Sheryl Albers. Albers, whose district lies just south of Wood County, has prepared a bill that proposes to amend rather than repeal Wis. Stat. 66.1001. Specifically, the bill would weaken the consistency requirement by reducing the number of actions or programs that must be consistent with the comprehensive plan, and it would reiterate that regional planning commissions' comprehensive plans are merely advisory to towns, municipalities and counties (see the legislative update in this issue for more information about Rep. Albers' bill).

The compromise legislation, like AB 435, will gradually wend its way through the legislative process in the coming year, providing more opportunities for friends and foes to speak out about "smart growth". Planners wishing to join the chorus of voices can utilize some of the same tools used effectively by smart growth critics: send letters to local newspaper editors and state legislators. Stay tuned to WAPANews, www.wisconsinplanners.org, and www.takebackwisconsin.com to follow this continuing saga.

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Urban Parks *Continued from page 2*

Briefing papers published to date include "How Cities Use Parks For Community Revitalization" by Peter Harnik; "How Cities Use Parks For Community Engagement" by Mark Francis; and "How Cities Use Parks For Economic Development" by Megan Lewis, AICP.

grants have helped mid-sized cities address urban issues and improve the quality of life

Other topics to be addressed include using urban parks to reduce crime, improve public health, attract the "Creative Class," provide green infrastructure, undertake smart growth and enhance tourism. Copies of the briefing papers are available through APA's website at www.planning.org/cpf/briefingpapers.htm.

APA launched The City Parks Forum in 1999 with two grants totaling $2.55 million from the Wallace-Reader's Digest Funds and the Doris Duke Charitable Foundation. The program has helped mayors and park officials in mid-sized cities across the country use parks and public-private partnerships to address pressing urban issues and improve the quality of life in their communities.

Other park resources available include technical reports, case studies and proceedings from six Forum-organized conferences involving mayors from 25 cities.

WAPA Professional Services Directory

Professional Services Directory continues on page 14

WAPA Executive Committee

President, Gary Peterson, AICP
(608) 249-2514 (office) / (608) 249-6615 (fax)
maps@maps-inc.com

Past President, Rollie Tonn, AICP
(262) 569-2166 (office) / (262) 569-3238 (fax)
rtonn@wppisys.org

Vice Pres. of Prof. Dev., Greg Kessler, AICP
(262) 797-2445 (office) / (262) 780-4612 (fax)
gkessler@newberlin.org

Vice Pres. of Chapter Affairs, Thomas Dabareiner, AICP
(414) 359-2300 (office) / (414) 359-2314 (fax)
tdabareiner@hntb.com

Secretary, Lawrence Ward, AICP
(608) 342-1214 (office) / (608) 342-1220 (fax)
wardla@uwplatt.edu

Treasurer, Amy Emery, AICP
800-571-6677 or 920-735-6900 / 920-830-6110 (fax)
amy.emery@omnni.com

Director at Large, Carrie Johnson, AICP,
(262) 782-9650 (office) / (262) 796-6702 (fax)
johnsonc@ci.brookfield.wi.us

Director at Large, Tim Kabat, AICP
(608) 789-7512 (office) / (608) 789-7318 (fax)
kabatt@cityoflacrosse.org

N.W. District Representative, Mel Erickson, AICP
(715) 839-1657 (office) / (715) 839-4854 (fax)
mel.erickson@co.eau-claire.wi.us

S.E. District Representative, Nancy Frank, AICP
(414) 229-5372, (414) 229-6976 (fax)
frankn@uwm.edu

N.E. District Representative, Linda Stoll
(920) 738-7025 (office) / (920) 738-7025 (fax)
foxwolf@fwwa.org

S.W. District Representative, Jason Gilman, AICP
(608) 781-9590 (phone)
jgilman@charter.net
SW District website: www.wapasw.com

Planning Official Development Officer (Appointed)
Anna Haines
(715) 346-2386 (office) / (715) 346-4038 (fax)
ahaines@uwsp.edu

Student Representatives

UW - Madison

Olivia Parry and Brea Lemke
00parry@wisc.edu or brlemke@wisc.edu

UW - Milwaukee

Ryan Horton
rjhorton@uwm.edu

National Officers

Laurence C. Gerckens, AICP
AICP Director, Region IV
(800) 932-7675 (office)
(800) 932-7675 (fax)
lcgerckens@aol.com

APA National—Washington: (202) 872-0611
APA National—Chicago: (312) 431-9100
American Institute of Certified Planners (202) 872-0611

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