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American Planning Association
Wisconsin Chapter

Making Great Communities Happen

APA - Wisconsin Newsletter Spring-Summer 2018

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A note from Chapter President Jason Valerius

Dear Wisconsin Planners:

The APA-WI conference committee has received dozens of session proposals from around the state, and is working hard on preparing a top-notch Growing Inclusive Communities program for our fall conference at the beautiful Memorial Union on the UW-Madison campus on October 8th and 9th. The conference program is expected to be announced and registration opened in early August. In the meantime, we are excited to announce our slate of plenary speakers:

- Annette Miller of EQT by Design will open the conference, speaking on inclusion and engagement.
- Tim Hanna, Mayor of the City of Appleton, and Karen Nelson, Appleton's Diversity Coordinator, will speak on integrating equity and diversity in municipal operations.
- Revel Sims, PhD, Assistant Professor of Urban and Regional Planning in the UW-Madison's Department of Planning and Landscape Architecture, will speak on affordable housing challenges, evictions, and displacement.

We also have four exciting tours that will be available to conference attendees:

- UW staff and designers from SmithGroup JJR will show off the historic restoration of the Memorial Union and the brand new lakefront Alumni Park immediately to the east of the Union.
- Representatives from Stonehouse Development and American Family Insurance will lead tours of several buildings along Madison's booming Capitol East District, which, since the adoption of the East Washington Avenue Capitol Gateway Corridor Plan in 2008, has seen the addition of over 1,100 dwelling units and 700,000 square feet of commercial space.
- City staff and the Executive Director of Madison's downtown Business Improvement District will lead a walking tour of State Street and discuss partnerships between the City and the BID to implement the Ensuring a Vibrant Downtown Retail Destination strategic plan.
- City staff, along with representatives from Urban Assets, Ken Saiki Design, and the Monroe Street Merchants Association will show off progress on the reconstruction of the south end of Monroe Street, talk about how public engagement led to design of a new plaza, and discuss how Monroe Street merchants banded together to survive a major road reconstruction project. The tour will then conclude with a visit to the UW-Madison Field House and Camp Randall Stadium to hear about UW Athletics' plans for improving both of those facilities and constructing a new plaza along Monroe Street.

We are **still seeking conference sponsors** - consider signing on as a supporter of Wisconsin planning for the next year. We look forward to highlighting

our sponsors at the conference! Please contact Conference Coordinator Deb Nemeth at nemethplanning@gmail.com for more information.

We look forward to seeing you in October!

Sincerely,

Jason Valerius,
APA-WI President



Apologies to GRAEF. We neglected to include their ad before publishing the Spring-Summer issue.

2018 CHAPTER AWARDS CALL FOR NOMINATIONS

The Great Places in Wisconsin award solicitation was distributed in May. Remember that those submissions are due at the end of June.

On June 14, APA-Wisconsin Vice President for Awards sent out the Chapter Awards solicitation. Here are the details, but remember that you can find the details for BOTH the Great Places in Wisconsin recognition and the Chapter Awards on the APA-WI website at:

<http://wisconsinplanners.org/chapter-awards/>

Nomination deadline: Friday, July 13, 2018 at 3:00 PM

Entries shall be submitted DIGITALLY via email, Dropbox, or USB drive.

1. Email: awards@wisconsinplanners.org Subject line: APA Awards Nomination
2. Send via DROPBOX
3. USB drive to:

APA-WI Awards
c/o Kristan Sanchez, APA-WI VP Awards
GRAEF
1150 Springhurst Drive
Green Bay, WI 54304

PURPOSE

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

ELIGIBILITY

- An APA-WI or APA member must submit the application.

- Plan Document, Planning Tool, Urban Design, Neighborhood Planning, Plan Implementation and Spark Award nominations must be for projects located in Wisconsin and must have included an APA-WI 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. Innovations in Planning must have included an APA-WI member.
- No project may be considered if a member of the Jury, or his/her organization, had a role in planning or implementing the project. Jury members are selected from outside of Wisconsin.

JUDGING and ANNOUNCEMENT

The Awards Jury has the right to select one or more winners per category. Neither the Awards Jury nor the Chapter is under any obligation to grant an award in each category. The Awards Jury may also consider a nomination for an award in a category other than the category indicated by the Nominator.

Awards will be presented at the APA Wisconsin Conference in Madison October 8-9, 2018.

Nominators will be notified of award decisions in September 2018.

QUESTIONS

For questions, reach out to Kristan Sanchez, VP Awards, at:

awards@wisconsinplanners.org or 920.405.3821

CATEGORIES & CRITERIA

CATEGORIES: PLAN DOCUMENT, NEIGHBORHOOD PLANNING, PLANNING TOOL

Plan Document: Approved plan or report of unusually high quality and effectiveness.

Neighborhood Planning: Approved plan for a neighborhood that engages the residents, provides a unique vision for a new or redeveloped area, and is of unusually high quality.

Planning Tool: Approved regulation, ordinance, or program that is of unusually high quality and effectiveness.

Criteria: Plan Document, Neighborhood Planning, Planning Tool

1. Originality and Innovation (30 points)
2. Transferability (10 points)
3. Quality (20 points)
4. Public Participation (15 points)
5. Role of Planners (10 points)
6. Effectiveness and Results (15 points)

CATEGORY: URBAN DESIGN

Approved urban design concept for a new or redeveloped area of unusually high quality and design.

Criteria: Urban Design

1. Originality and Innovation (30 points)
2. Value Added to the Community (20 points)
3. Quality of the Physical Form (20 points)
4. Relationship to the Natural Environment (15 points)
5. Long-term Sustainability (15 points)

CATEGORY: INNOVATIONS IN PLANNING

Approved plan, activity, or event that expands the art and practice of planning. Examples could include: using new technology to improve planning efforts, best practices in sustainability, leadership in city or regional planning, or a creative public participation strategy.

Criteria: Innovations in Planning

1. Originality and Innovation (30 points)
2. Transferability (15 points)
3. Increased Understanding of Planning (20 points)
4. Role of Planners (15 points)

5. Effectiveness and Results (20 points)

CATEGORY: PLAN IMPLEMENTATION

Implementation of a project or plan that accomplishes its objectives in a substantial, timely, and effective manner and represents best practices in the field of planning.

Criteria: Plan Implementation

1. Community Acceptance and Support (20 points)
2. Environmental Planning and Impacts (15 points)
3. Value Added to the Community (points)
4. Quality (15 points)
5. Role of Planners (15 points)
6. Effectiveness and Results (15 points)

CATEGORY: SPARK AWARD [NEW Category]

Approved plan, plan document, or implementation of a project that is either, A) within a community where planning has not had a recent and/or historic foothold; or B) a project of limited scope and budget that has received community support and excitement (planning budgets under \$25,000 or staff equivalent).

Criteria: Spark Award

1. Community Acceptance and Support (50 points)
2. Value Added to the Community (20 points)
3. Role of Planners (20 points)
4. Quality (10 points)

CATEGORY: STUDENT PROJECT

An outstanding student planning project or paper. Students must be attending a planning program, or be within one year of graduation, at a Wisconsin university.

Criteria: Student Project / Paper

1. Originality and Innovation (40 points)
2. Potential Value Added (30 points)
3. Comprehensiveness (30 points)

CATEGORY: INDIVIDUAL AND MEDIA

Elected Official of the Year: An elected official who has made a substantial contribution to planning excellence in their community.

Citizen of the Year: A citizen who has made a substantial contribution to planning excellence in their community.

Outstanding Journalism: A story about a Wisconsin community or project that highlights an outstanding planning issue or raises public awareness of planning.

Criteria: Individual and Media

1. Support of Planning/Planners (50 points)
2. Effectiveness and Results (50 points)

SUBMISSION REQUIREMENTS

The following requirements are mandatory. If any item is omitted, the application will not be considered. Nomination submittal should be organized by each of the numbered sections below. Digital copy via email or dropbox of all submission requirements, or one (1) flash drive with all of the submission requirements. Note: kindly keep the plan document as a separate PDF file, without binding it to the rest of the submission packet.

1. 2018 APA-WI Awards Application Form.
2. Explanation of how the nomination meets the judging criteria for the category. Two (2) page maximum.
3. One (1) to three (3) one-page letters in support of the nomination.
4. Identify communities, firms, agencies, or individuals who should be listed on the award if you are selected as a winner.

5. Category-specific requirements:

A. Plan Document, Neighborhood Planning, Planning Tool, and Spark Award categories:

- Digital file in PDF format of the adopted/approved plan or planning tool OR a digital link to the plan/tool (if PDF, keep as separate file from the nomination submittal).
- Five (5) PowerPoint slides with bulleted talking points about the project.

- A one (1) to three (3) page summary of the document or tool (or summary of project for the Spark Award, if an implementation). List of all consultants and municipalities that worked on the document.

B. Urban Design, Innovations in Planning, and Plan Implementation categories:

- Digital file in PDF format of the approved plan or project OR a digital link to the plan (if PDF, keep as separate file from the nomination submittal).
- Five (5) PowerPoint slides with bulleted talking points about the project, in .pptx format.
- A one (1) to three (3) page summary of the project. List of all consultants and municipalities that worked on the project.

C. Student Project category:

- Digital file in PDF format of the student project or paper (if PDF, keep as separate file from the nomination submittal).
- Five (5) PowerPoint slides with bulleted talking points about the project, in .pptx format.
- A one (1) to three (3) page summary of the document or project. List of all students and faculty that worked on the project or paper.

D. Individual categories: One (1) portrait of the individual nominee in .pdf or .jpeg format and up to five (5) Powerpoint slides (in .pptx format) highlighting the work of the individual with a brief caption for each image.

E. Media category: One (1) essay, document, article, article series, or transcript that best represents the nomination. The text and any associated images should be provided in .doc or .jpeg formats.

Go to the webpage to download the pdf with the fillable application form: <http://wisconsinplanners.org/chapter-awards/>



A Focus on Racial Equity

Highlights from the Racial Equity Workshop

by Cassandra Leopold and Nancy Frank
University of Wisconsin - Milwaukee

Editors Note: I just learned this morning, when I received the Chapter President's note for this newsletter, that three of the speakers from the March workshop, which is featured in the story below, will be plenary speakers at our conference. This was an impressive workshop, and Appleton Mayor Hanna and his Diversity Coordinator, Karen Nelson, along with Annette Miller of EQT by Design, a Madison firm, will share their experiences at the conference as they did at the Appleton workshop. Some other highlights are described in the story below.

This spring, APA-WI co-sponsored a workshop on Racial Equity hosted by the Local and Regional Government Alliance for Racial Equity (or GARE) and supported by the City of Madison and Dane County. The workshop, held in Appleton in early March, brought together leaders and professional staff from local government, academic institutions, and non-profits. About eight APA-WI members attended.

Gordan Goodwin, GARE's Midwest Regional Project Manager, described the purpose of the workshop, saying he hoped that participants left



with an understanding of the government's role in the historic marginalization of communities of color. Armed with that understanding and tools for making change in "business-as-usual" practices, governments can review all policies and programs to critically consider whether racial bias remains. Planners are, of course, aware of the historic role of zoning in segregating people by race and income, as well as public planners' approval of private development covenants excluding people of color from new housing. According to Goodwin, however, while those race-based policies are no longer tolerated, institutional practices often reflect "implicit institutional racial biases that continue to perpetuate racial disparities."



Early in the day, trainers explained why GARE focuses on race rather than diversity or the whole range of ways that people experience bias, exclusion, and disadvantage. Jane Eastwood, a consultant in racial equity based in the Minneapolis-St. Paul area, explained racial inequities are deep and pervasive. Second, racial anxiety is on the rise. Third, the tools GARE teaches can be used to address other areas of marginalization as well. Finally, "specificity matters." We use race

to make judgments about who we trust and who we give the benefit of the doubt. The specific character of these judgments are different in their specific character than the ways people make similar judgments about women, gay people, or people with disabilities.

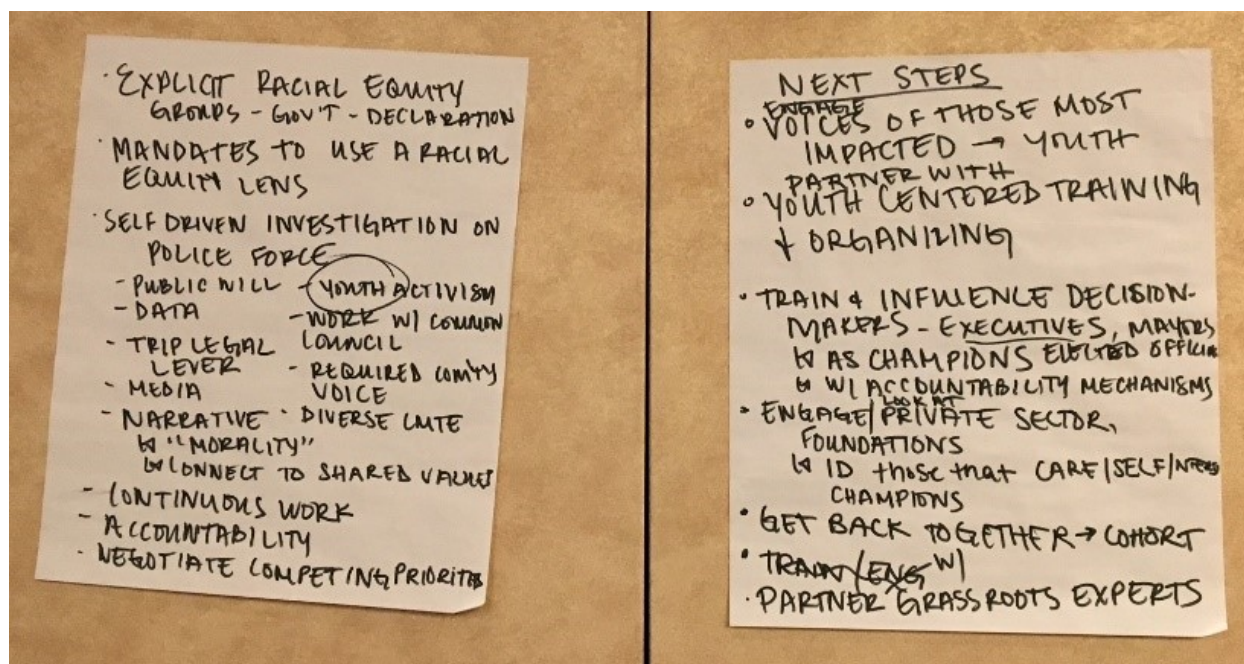
Although GARE focuses on racial equity, all strategies and policies need to benefit everyone in the community. Perhaps the benefit will not be equal, but everyone gains. Laura Urteaga-Fuentes, who works on homelessness and racial equity in Michigan, described how the focus on racial equity produces benefits for all, not just for racial minorities.

- Madison, Wisconsin took their federally-required equal opportunity report and changed it into an equitable hiring tool kit. As a result, hiring is more fair and transparent for all applicants.
- Ottawa County, Michigan does blind hiring (crossing out names, birthdays, etc.) from resumes and application materials before they are reviewed). Again, other potential sources of bias are reduced, as well as racial bias.

An important focus of the workshop was to demonstrate tools that leaders within local government can use to raise people's awareness of implicit bias and practices that reproduce racial inequity. Annette Miller, CEO of the Madison-based EQT by Design LLC, focused on designing engagement and inclusion to create meaningful involvement of the whole community, not just those who typically show up for public meetings.



One aspect of the GARE workshop that Ms. Miller especially appreciated was the cross-sectional participation at the workshop. Participants included both government staff and non-profit staff—groups that frequently work side-by-side in communities, but often do not take the time to have direct and focused conversations about race. When government does not start the conversation about race, others go silent. As a result, government staff (like planners) are unlikely to hear about the unintentional ways that a policy makes some people feel excluded and how these practices are interpreted as intentional, not inadvertent. Breakout sessions asked non-profit leaders to work



together in one group and government leaders to work in another group. Each group was asked to come up with strategies to address racial disparities. This allowed the participants to see, right there on the flipcharts, how different perspectives resulted in different conclusions about how governments need to respond to racial equity issues.

Citations:

Center for Social Inclusion. "GARE gathers leaders from across Wisconsin for Advancing Racial Equity: The Role of Government in Appleton, Wisconsin". April 3, 2018. www.centerforsocialinclusion.org.
<https://www.racialequityalliance.org/2018/04/03/advancing-racial-equity-the-role-of-government-in-appleton-wisconsin/>

Center for Social Inclusion (CSI). "Staff: Gordon Goodwin". 2017. www.centerforsocialinclusion.org.
<https://www.centerforsocialinclusion.org/staff/gordon-goodwin/>

Miller, Annette. "EQT by Design- Homepage". 2018. <http://eqtbydesign.com/>

Photo Captions & Credits:

Top left, Break Out Session for Advancing Racial Equity Conference in Appleton Paper Valley Hotel, Cassandra Leopold
 Middle right, GARE Project Manager Gordon F. Goodwin moderating at Racial Equity Conference, Cassandra Leopold
 Lower left, Take away notes of goals from non-profit break out session, Katie Bennett



HUD Snapshot of HUD-Assisted Households

By Nancy Frank, University of Wisconsin - Milwaukee

APA-WI Newsletter Editor

The June 2018 HUD User offered a link to an article about the HUD Snapshot, <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-061118.html>

The story offers a link to an interactive database that allowed me to create a comparison snapshot of Wisconsin HUD-supported households and the US as a whole. The series of tables below reveal a number of conclusions.

HUD-supported households (HUD Households) in Wisconsin are slightly more transient than HUD households in the US as a whole, and the number of people per housing unit is slightly less than the national rate.

Income for Wisconsin HUD Households is very similar to US HUD Households, but in Wisconsin, a smaller proportion of HUD Households receive income less than \$10,000 compared to nationally.

HUD Households in Wisconsin are more likely to be elderly. Forty-four percent of Heads of Household in Wisconsin HUD Households are 62 years or older compared to 39 percent nationally.

Wisconsin HUD Households are much less likely to be minority households.

On average, the waitlist time for Wisconsin HUD Households is only 18 months compared to 27 months nationally.

| Occupancy | US | Wisconsin |
|---|-----|-----------|
| % Occupied | 92 | 90 |
| % moved in past year | 11 | 14 |
| Number of people per unit | 2.1 | 1.7 |
| Average Family Expenditure per month (\$\$) | 337 | 323 |
| Average HUD Expenditure per month (\$\$) | 693 | 451 |

| Average Income | US | Wisconsin |
|--------------------------------------|----------|-----------|
| Household income per year | \$13,958 | \$13,759 |
| Household income per year per person | \$6,725 | \$7,900 |

| Income distribution | Percent in income range | |
|-----------------------|-------------------------|----|
| % \$1 - \$9,999 | 10 | 6 |
| % \$5,000 - \$9,999 | 29 | 22 |
| % \$10,000 - \$19,999 | 26 | 38 |
| % \$15,000 - \$19,999 | 14 | 17 |
| % \$20,000 or more | 20 | 17 |

| Source of Income | US | Wisconsin |
|--|----|-----------|
| % Households where wages are major source of income | 26 | 21 |
| % Households where welfare is major source of income | 4 | 1 |
| % Households with other major sources of income | 66 | 75 |

| Income compared to regional income | | |
|--|----|----|
| % of local median (household income) | 24 | 25 |
| % very low income (< 50% of median) | 94 | 95 |
| % extremely low income (30% of median or below poverty line) | 73 | 69 |

Household Make-up

| | US | Wisconsin |
|---|----|-----------|
| % 2+ adults with children | 4 | 2 |
| % 1 adult with children | 33 | 26 |
| % female head | 76 | 72 |
| % female head with children | 33 | 26 |
| % with disability, among Head, Spouse, Co-head, aged 61 years c | 34 | 48 |
| % with disability, among Head, Spouse, Co-head, aged 62 years c | 43 | 37 |

Age Distribution of Head of Household or spouse

| | US | Wisconsin |
|-------------------------------------|----|-----------|
| % 24 years or less (Head or spouse) | 4 | 4 |
| % 25 to 49 years (Head or spouse) | 41 | 36 |
| % 51 to 60 (Head or spouse) | 20 | 21 |
| % 62 or more (Head or spouse) | 35 | 39 |
| % 85 or more (Head or spouse) | 4 | 5 |

Race/Ethnicity

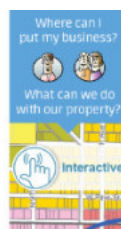
| | US Percent | Wisconsin |
|---|---------------|-----------|
| % Minority | 64 | 38 |
| %Black Non-Hispanic | 42 | 30 |
| %Native American Non-Hispanic | 1 | 1 |
| %Asian or Pacific Islander Non-Hispanic | 4 | 2 |
| %White Non-Hispanic | 35 | 60 |
| % Hispanic | 17 | 5 |

| | | |
|--------------------------------|----|----|
| Average months on waiting list | 27 | 18 |
|--------------------------------|----|----|

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American Planning Association
Wisconsin Chapter

Making Great Communities Happen

Harbinger in Spring: New Logo Previews Our New Website

I hope you noticed our new APA - Wisconsin logo. It is a harbinger of a APA-Wisconsin website, coming later this summer. APA is offering a new (and very welcome) service to all chapters and divisions. All APA-affiliated websites will be hosted on APA's server all using a more consistent look and navigation. At the same time, APA gave the chapter an opportunity to select a new logo color.

A board subcommittee is advising the webmaster (me) on colors, navigation, and content. Thank you to Sandy Scherer, Becky Roberts, and Kristan Sanchez.

How You Can HELP!!!!--Send Images

We need images. Every "landing page" (e.g., Membership, Knowledge Center, Conferences and Meetings, etc.) will have a large image. We want those images to be **Wisconsin images** rather than stock images that could have come from anywhere. Here are some ideas of things we are looking for:

- What our members do
- Outcomes of good planning--Wisconsin has lots of Great Places we can feature
- People (!) enjoying the outcomes of good planning, participating in planning meetings, etc. (You would be surprised how many images planner have with no people in them).

Also, help us come up with image ideas (even if you don't have one) to communicate more abstract ideas (e.g., Knowledge Center, AICP Certification (not the logo), Connect with APA Wisconsin, etc.)

Submission Info

1. **Verify that you own the image and can give us permission to use it:** Send an email to Nancy Frank (frankn@uwm.edu) testifying that you own the image.
2. **Send the image:** Attach the image to the email OR
3. If you have several images and you are a use shared cloud file storage, send a link to access the folder where you saved the images. If you are not a cloud user, let Nancy know and she will send you a link to our shared folder where you can save your images.
4. **If needed, provide photo credit information.** If you would like or need a photo credit, send the text for the photo credit; for example, Photo: Nancy Frank. We will create a photo credit page that will list the photos on each of the landing pages. If you do not need a credit, that's fine and makes our work easier. We will give you our personal thanks.

It will be fun to see your image whenever you go to look for information on the APA - Wisconsin webpage.





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Law Update

By Brian W. Ohm, JD
Dept. of Urban & Regional Planning
UW-Madison

For questions or comments about these cases, please contact: bwohm@wisc.edu.

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Visit the [Law and Legislation](#) page any time to access the current and past issues of the Case Law Update.

Case Law Update

March-May Case Law Updates

A summary of Wisconsin court opinions decided during the months of March and April related to planning

For previous Case Law Updates, please go to the Resources menu on the APA-Wisconsin website.

Wisconsin Supreme Court Opinions

Special Benefits has Same Meaning Under Eminent Domain Law As Special Assessment Law

CED Properties, LLC, v. City of Oshkosh, 2018 WI 24, involved a challenge to a special assessment imposed by the City of Oshkosh following the reconstruction of an intersection into a roundabout. To construct the roundabout, the City used its power of eminent domain to take a portion of property owned by CED Properties, Inc. During the eminent domain litigation, the City's appraisal expert testified during his deposition that the taking did not confer any "special benefit" on CED's property under Wisconsin's eminent domain law. Under that law, special benefits accruing to a property are used to offset the value of the property taken.

The City then imposed a special assessment on CED's property and other commercial properties to help fund construction of the roundabout. Under Wisconsin's special assessment enabling law, cities, villages, and towns can collect special assessment for "special benefits conferred upon the property" by the improvements. CED challenged the special assessment claiming that the project conferred only community or general benefits for better traffic flow and did not confer any special benefits to CED's property. CED argued that because the City conceded "special benefits" did not accrue to CED's property during the eminent domain action, the City forfeited the opportunity to assert "special benefits" to support the special assessment.

In a 5-2 decision (Justices Abrahamson and Ann Walsh Bradley dissenting) the Wisconsin Supreme Court ruled that the term "special benefits" means the same in both the eminent domain and special assessment law but noted that under special assessment law local governments could collect for benefits regardless of the improvement's effect on the property's market value. The City was therefore not foreclosed from trying to levy a special assessment. The Supreme Court remanded the case to the circuit court to determine whether the improvements conferred special benefits on CED's property.

Court Affirms City's Property Tax Assessment of Oil Terminals

In *Marathon Petroleum Co. v. City of Milwaukee*, two oil companies challenged the City of Milwaukee's property tax assessments for five oil terminals owned by the companies on the basis that the assessment improperly included the value of business contracts associated with the oil terminals. The Wisconsin Court of Appeals disagreed and upheld the City's assessments. According to the Court, the oil terminals have an income-generating capability. Under Wisconsin law, income that is attributed to the land, rather than personal to the owner, is inextricably intertwined with the land and is thus transferable to future purchasers of the land. This income may be included in the land's property tax assessment. Since there were no recent sales of the terminal, the City's assessor used a comparable sales approach for assessing the

terminals using the sales of 13 other comparable oil terminals. The City's assessor also verified the assessment using the income and cost approaches. The Court concluded that the assessments were not excessive.

The case is recommended for publication in the official reports.

Agricultural Use Value Assessment Does Not Require Crops Grown for Business Purposes

In 2003 the Ogdens purchased land classified as residential for property tax purposes. The Ogdens planted pine trees, apple trees, and hay on the property. In 2012 the assessor changed the property tax classification to agricultural and agricultural forest. In 2016 the assessor reclassified the property as residential since the crops grown on the property were not grown for a business purpose. If the property had remained classified as agricultural and agricultural forest, it would have been valued at \$17,100. When reclassified as residential, it was valued at \$886,000. The Ogdens challenged the assessment.

For The Wisconsin Court of Appeals in *The Peter Ogden Family Trust of 2008 v. Board of Review for the Town of Delafield*, determined that the assessment as residential was erroneous. The Court reviewed Wisconsin law whereby land devoted primarily to agricultural use must be classified as agricultural. The Court then noted references in the Wisconsin Statutes and the Wisconsin Department of Revenue rules that define "agricultural use" as the growing of crops. The Court did not find a requirement that the growing of crops must be for a business purpose.

The case is recommended for publication in the official reports.

Burial Sites Preservation

An equally divided Wisconsin Supreme Court (Justice Kelly did not participate) affirmed the decisions in two unpublished Court of Appeals cases dealing with Wisconsin's Burial Sites Preservation Law. (In cases where the Wisconsin Supreme Court is equally divided, the decision of the Court of Appeals becomes the controlling decision.) The cases are *Wingra Redi-Mix, Inc. v. Burial Sites Preservation Board* (*Wingra I*), 2018 WI 54, and *Wingra Redi-Mix, Inc. v. State Historical Society of Wisconsin* (*Wingra II*), 2018 WI 55. Both cases involve two Native American effigy mounds near Madison called the Ward Mound Group on three acres surrounded by a large quarry owned and operated by Wingra Stone Company, formerly known as Wingra Redi-Mix, Inc. The Court of Appeals decisions were discussed in the August 2017 APA-WI Case Law Update and provide a good review of Wisconsin's Burial Sites Preservation law found at Wis. Stat. § 157.70. The summary from the August 2017 Case Law Update is reprinted below.

The Burial Sites Preservation law requires that the Director of the State Historical Society identify and catalog human burial sites in the State including "sufficient contiguous land necessary to protect the burial site from disturbance." Under the law, no one may disturb a human burial site without authorization from the Director of the State Historical Society. The law authorizes the imposition of fines or imprisonment for unauthorized disturbance of burial sites. Burial sites are recorded with county Register of Deeds and the site may be exempt from property taxes under Wis. Stat. § 70.11(13m) if subject to a restrictive covenant/conservation easement.

Wis. Admin Code § HS 2.03(6)(a) allows the Historical Society to remove sites from the burial sites catalog if there is "sufficient evidence to indicate that a cataloged site does not contain any burials." Wingra Stone petitioned the Director of the State Historical Society to remove the mounds from the catalog on the basis of some evidence that the site does not contain human remains. The Director denied the petition. Wingra Stone then appealed the Director's decision to the Burial Sites Preservation Board, which affirmed the Director's decision. Wingra Stone next appealed to the circuit court and the circuit court affirmed the Board's decision. Wingra Stone appealed that decision to the Court of Appeals (the *Wingra I* case).

In *Wingra I*, the Court of Appeals found that Wingra Stone failed to provide sufficient evidence that Indian mounds did not contain human remains. Wingra Stone had presented an expert witness report from a UW-Madison geology professor and some historical literature indicating human remains may not be present. The State Historical Society countered with a report prepared by an archaeologist for the Society indicating that most effigy mounds are burial sites. The Society also pointed out flaws in the expert witness report prepared for Wingra Stone and inconsistencies in the literature provided by Wingra Stone.

In *Wingra II*, Wingra Stone petitioned the Director of the State Historical Society for permission to disturb the mounds as allowed under the Burial Sites Preservation law. The Director referred the petition to the Division of Hearing and Appeals (DHA) in the State Department of Administration, which conducted a contested case hearing and denied the petition. Upon review, the circuit court reversed the DHA's decision. The State historical Society and the Ho-Chunk Nation appealed the circuit court's decision to the Court of Appeals.

Under Wis. Stat. § 157.70(5)(c)2, the DHA's review of requests to disturb burial sites must:

“determine whether the benefits to the permit applicant in disturbing the burial site or the land outweigh the benefits to all other persons shown ... to have an interest in not disturbing the burial site or the land. [The DHA] shall weight the interest in the following order of priority: a. Direct kinship. b. A cultural, tribal or religious affiliation. c. A scientific, environmental or educational purpose. cm, Historical and aesthetic significance of the burial site. d. Land use. e. A commercial purpose not related to land use which is consistent with the purposes of this section. f. Any other interest which the board deems to be in the public interest.”

After a review of the proceedings before the DHA, the Court of Appeals determined the DHA's decision was based on substantial evidence that the interest in a cultural, tribal, or religious affiliation and the historical significance of the site outweighed Wingra Stone's interests in use of its land. The Court of Appeals reversed the circuit court's decision and affirmed the DHA's decision denying Wingra Stone's petition for a permit to disturb the Ward Mound Group.

Use Value Assessment for Agricultural Land Is Determined by Use

In *Thoma v. Village of Slinger*, 2018 WI 45, the Wisconsin Supreme Court reaffirmed that under Wisconsin law, classification of real property for tax assessments is based on how the property is being used. Zoning, injunctions, ordinances, and contracts do not trump actual use for tax assessment purposes. In this case, Thoma purchased agricultural land that he intended to develop into a residential subdivision. Thoma entered into a development agreement with the Village of Slinger which, among other things, included a restrictive covenant that prohibited Thoma from using the land for agriculture. In 2011, the Village sued Thoma to enforce the restrictive covenant and in 2012 obtained an injunction prohibiting Thoma from used the land for agricultural purposes. As a result of the injunction, the Village's tax assessor changed the use classification from agricultural to residential. Thoma challenged his 2014 tax assessment to the Village Board of Review which upheld the assessment. Thoma then appealed the Board's decision to the Circuit Court which affirmed the Board's decision. The Court of Appeals also affirmed the Board's decision. The Wisconsin Supreme Court accepted review and also affirmed the assessment. According to the Court, Thoma did not present any evidence that the property was used for agriculture. The Court noted that even though the Village tax assessor changed the assessment as a result of the injunction enforcing the restrictive covenant, actual use (not the injunction) controls whether a property qualifies for agricultural tax assessment purposes. (Agricultural uses, however, would violate the restrictive covenant.)

[To understand the impact of use value assessment, see the case summary in the March 2018 APA-WI Case Law Update where as agricultural land the assessed value was \$17,100 versus \$886,000 for residential uses.]

Wisconsin Court of Appeals Opinions

Court Acknowledges Mistakes Made in Earlier Decision

The February 2018 APA-WI Case Law Update included a summary of the Court of Appeals decision in *Lagoon Lane, LLC., v. Rice*. The summary is entitled “Town Authority in Shoreland Area Mistakenly Construed by Court.” On April 25th, the Court of Appeals issued a “slightly modified opinion” in that case to acknowledge the mistake in the earlier opinion but did not change the outcome of the case. The revised decision is available [here](#).

The case involves the Town of West Bend's denial of a land division within the shoreland zoning jurisdiction of Washington County. (The Town of West Bend has it's own general zoning ordinance and a subdivision ordinance. The shoreland area within the town also falls under the state-mandated County zoning ordinance.) The Court's 2013 decision in *Hegwood v. Town of Eagle Zoning Bd. of Appeals*, held that towns do not have any authority to zone land in the shoreland area covered by the state-mandated County shoreland zoning ordinance. In its decision in February, the Court of Appeals held that the Town's land division authority overlapped with its zoning power and was unenforceable based on the *Hegwood* decision. As noted in the February Case Law Update, the Court of Appeals failed to acknowledge 2015 Wisconsin Act 41 passed by the Legislature with the purpose of modifying the Court's decision in the *Hegwood* case by allowing town general zoning ordinances to apply within the shoreland area. (The changes resulting from Act 41 are summarized in the Perspectives on Planning publication “2015 Legislative Changes Affecting Wisconsin's Shoreland.”)

Following the release of the Court of Appeals decision in February, the Town filed a motion to reconsider its decision based on the changes following the passage of Act 41. Act 41 became effective before the Town's denial of the land division but the Town only became aware of the changes to Wisconsin law after the Court of Appeals released its decision in the case in February. Since the Town's attorney failed to provide the applicable statutory provisions to the circuit court when it reviewed the case, the Court of Appeals was unwilling to consider arguments raised for the first time on appeal. As a result, the Court of Appeals declined to address the effect of current law on the case. According to the Court, “the parties and public should understand that this opinion does not consider these relevant statutory amendments, but rather proceeds under the assumption that *Hegwood* remains unaltered and the statutory authority of towns to zone in the shoreland areas remains as it was at the time *Hegwood* was decided.

The original decision in February was recommended for publication. In the modified decision, the Court states that the decision will not be published and is "uncitable" (meaning the case does not establish any precedent for other cases).

DOT Authorized to Charge for Access to Public Records and to Limit Access to Database

Media Placement is a Louisiana-based company interested in obtaining motor vehicle accident reports from the Wisconsin Department of Transportation (DOT). Media Placement made a request under Wisconsin's public records law to access high volumes of individual accident reports using DOT's online database without paying for the reports. In *Media Placement Services, Inc. v. Wisconsin Department of Transportation*, the Wisconsin Court of Appeals concluded that Media Placement is not entitled to free access to the DOT's database because Wisconsin law allows the DOT to charge access fees for certain records and the right to access records does not extend to the right to access databases.

The case is recommended for publication in the official reports.

Court Upholds Annexation Ordinance

In *Town of Lincoln v. City of Whitehall*, the Wisconsin Court of Appeals upheld the City of Whitehall's annexation of land for a sand mine operation. The annexation followed the "direct annexation by unanimous approval" process under Wisconsin law that allows property owners in a town to petition a city or village to annex their land. The Court notes that these grassroots led annexations present a city or village with a "take it or leave it" decision.

In this case, the annexation was to occur in four phases. Phase one consisted of approximately 277 acres and shared a border with the City of approximately 3/4th of a mile. Phase 2 consisted of 292 acres along a ribbon of land approximately 1/4 mile wide. Phase three consisted of approximately 380 acres connected to phase two at its southern edge for about 1/4 mile. Phase four consisted of approximately 300 acres located to the west of phase three and shared a 1/2 mile border with phase three. The Town of Lincoln in Trempealeau County sought review of the annexation from the Wisconsin Department of Administration. The Department concluded the annexation violated the contiguity because the territory was an impermissible "balloon-on-a-string" configuration.

While the Town raised several issues with the annexation, the Court concluded that the Wisconsin Statutes limit the Town's challenge to the contiguity issue. The Court concluded that the annexed territory was not of an exceptional shape and thus met the contiguity requirement. The Court affirmed the dismissal of the Town's challenge to the annexation.

The case is recommended for publication in the official reports.

Court Upholds PSC Approval of Transmission Line

In *Town of Holland v. Public Service Commission*, the Town of Holland in La Crosse County challenged a decision of the Public Service Commission (PSC) of Wisconsin to grant a Certificate of Public Convenience and Necessity to construct and operate a high voltage transmission line known as the Badger Coulee Project. The Town challenged the need for the project and the adequacy of the environmental review.

In its decision, the Court of Appeals held that there was adequate support for the PSC's determination that the project satisfies the reasonable needs of the public for an adequate supply of electric energy as required by Wisconsin law. The Court of Appeals also found that the environmental impact statement prepared for the project was legally sufficient. The Town had also asked for a rehearing on the project before the PSC. The PSC denied the request and the Court of Appeals upheld the PSC's denial of the rehearing petition.

The case is recommended for publication.

Conditional Use Permits

Enbridge Energy Co., Inc. v. Dane County involved a conditional use permit issued by the Dane County zoning committee that allows the operator of a crude oil pipeline to significantly expand the volume of oil pumped through the line. The permit contains conditions requiring Enbridge Energy Company to "procure and maintain" insurance with detailed specifications that would, in the view of the zoning committee, ensure the availability of sufficient funds for remediation, clean up, and payment for damages in the event of a crude oil spill.

In 2015, the Wisconsin Legislature passed 2015 Wisconsin Act 55 which prohibits a counties from requiring an interstate hazardous liquid pipeline operator to obtain insurance if the operator "carries comprehensive general liability insurance coverage that includes coverage for

sudden and accidental pollution liability." § 59.70(25).

After the Act 55 insurance limitation took effect, Enbridge argued to the zoning committee that the new law required the committee to sever the insurance conditions from the permit, because Enbridge alleged that it "carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." The zoning committee denied the request and the County Board sustained the decision. Enbridge then sued the county.

Seven pipeline-area landowners also sued seeking an injunction to enforce the insurance conditions in the permit. The circuit court consolidated the landowners' injunction action and Enbridge's action into this single case, and permitted the landowners to intervene and defend the county-required insurance conditions.

The circuit court dismissed the landowners' action and granted Enbridge's request to sever the insurance conditions based on Act 55, leaving all other permit conditions in place.

The case was then appealed to the Wisconsin Court of Appeals. The Court of Appeals disagreed with the circuit court. The Court of Appeals held that the landowners are entitled to pursue enforcement of proper permit conditions in the injunction action. The Court of Appeals reversed the order severing the insurance conditions from the permit. The Court of Appeals concluded that the operator must show that: (1) the operator "carries" the insurance specified in Act 55, making this showing initially and at all times required by the permit; and (2) the operator carries liability insurance for "abrupt or immediate" pollution and "unexpected and intended" pollution. The Court found that Enbridge failed to make either showing and remanded the case to the circuit court, with directions to return the matter to the zoning committee, so that the committee can determine whether a permit should be issued to Enbridge that contains conditions sufficient to satisfy permitting standards established in the County's zoning ordinance.

The case is not recommended for publication.

U.S. Court of Appeals for the 7th Circuit Opinions Reasonable Accommodations for Persons with Disabilities

Valencia v. City of Springfield, 883 F.3d 959 (7th Cir. 2018), involved a challenge to the City of Springfield, Illinois, zoning ordinance requirements related to family care residences in single-family residential zoning districts. Plaintiff Individual Advocacy Group, Inc. ("IAG") is a non-profit organization that provides residential services to adults with disabilities. Such services allow disabled individuals to live in family-like settings in typical residential communities, a configuration commonly referred to as Community Integrated Living Arrangements ("CILAs"). IAG does not own or operate group homes. Rather, IAG clients rent individual dwellings on their own behalf, and then IAG provides in-home support.

In August 2013, Christine and Robyn Hovey agreed to rent a home located at 2328 Noble Avenue ("the Noble home") to three IAG clients. The Noble home is located in a residential district that allows both single-family detached residences and family care residences. The home is a one-story ranch house that resembles other dwelling units in the neighborhood. Although IAG employees are present any time the home is occupied, they do not drive marked vehicles, and there are generally no more than two staff cars present at any time.

In March 2014, after the Hoveys completed significant renovations, IAG clients J.M., J.D., and A.D. moved into the Noble home. Each possessed a substantial physical or mental impairment, and two were non-ambulatory. At the time, A.D. was a sixty-two year-old male who was confined to a wheelchair and almost completely nonverbal.

Unbeknownst to the Hoveys, IAG, or its clients, Sparc—another non-profit organization supporting people with developmental disabilities—had been operating a family care residence ("the Sparc home") across the street from the Noble home for approximately twelve years. Like the Noble home, the Sparc home is indistinguishable from other homes in the area. However, according to the City, the property lines of the Noble home and the Sparc home are separated by only 157 feet. The City's zoning code, however, requires a 600-foot separation between family care residences.

In August 2016, the City notified the Hoveys that a complaint had been filed because the Noble home was located within 600 feet of the Sparc home. The City informed the Hoveys that the Noble home residents would be evicted unless the Hoveys applied for a Conditional Permitted Use ("CPU"). The Hoveys applied for a CPU. At the hearing on the CPU, some neighboring residents asked that the CPU be denied because caregivers "rac[ed] up and down their block to get to work on time," "listen[ed] to ... loud music in their vehicles," "park[ed] on the wrong side of the street," and blocked driveways and sidewalks. The City voted to deny the CPU.

On December 22, 2016, IAG filed a complaint in the United States District Court for the Central District of Illinois. IAG alleged the City discriminated against the Noble home residents on the basis of their disabilities, in violation of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-31, Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-213, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). In

addition to monetary damages, IAG sought an order directing the City to grant their requested CPU and permanently refrain from treating the Noble home as a non-conforming use under the Code.

On January 11, 2017, IAG moved for a preliminary injunction to enjoin the City from instituting eviction proceedings against the Noble home residents during the pendency of the case. They limited the basis of the motion to theories of disparate treatment and reasonable accommodation. On August 3, 2017, the district court granted plaintiffs' motion, finding that plaintiffs possessed a reasonable likelihood of success under both theories of liability. This appeal to the Federal Court of Appeals for the Seventh Circuit (which includes Wisconsin) followed.

The Court of Appeals noted that a plaintiff may prove a violation of the FHA, ADA, or Rehabilitation Act by showing: (1) disparate treatment; (2) disparate impact; or (3) a refusal to make a reasonable accommodation. The Court focused on the reasonable accommodation claim. The FHA requires public entities to "reasonably accommodate a disabled person by making changes in rules, policies, practices or services as is necessary to provide that person with access to housing that is equal to that of those who are not disabled." After reviewing the facts the Court of Appeals held that IAG had shown a "better than negligible" likelihood of success on the merits of their reasonable accommodation theory and affirmed the granting of the preliminary injunction preventing the City from evicting the residents during the pendency of the case.

Adult Uses

In *HH-Indianapolis, LLC, v. Consolidated City of Indianapolis and County of Marion*, Indiana, HH-Entertainment, Inc., operates retail stores under the name "Hustler Hollywood" throughout the United States. HH wanted to open a store in the City of Indianapolis that would sell a variety of merchandise, including lingerie, gag-gifts, instructional DVDs and literature, marital aids, and sexual devices.

The City of Indianapolis and Marion County Consolidated Zoning and Subdivision Ordinance includes six different Commercial Zoning Districts. Adult entertainment businesses are prohibited from operating in the C-3 (Neighborhood Commercial) District as a right, although it may obtain a variance to operate in a C-3 district. However, an adult entertainment business may operate as a right in three of the six districts: C-4 (Community-Regional District); C-5 (General Commercial District); and C-7 (High-Intensity Commercial District).

HH entered into a lease at a property located in the C-3 district. Directly across the Street to the north of the Property is a C-4 district where HH could operate freely as an adult entertainment business as a right.

Instead of electing to seek a variance, HH appealed the City's interpretation that it was an adult bookstore or an adult service establishment to the Board of Zoning Appeals (BZA). The BZA affirmed the interpretation. HH then filed this lawsuit against the City in federal district court. HH sought declaratory and injunctive relief under three different First Amendment theories: (1) an as-applied challenge to the City's determination that HH is an adult entertainment business; (2) a facial challenge for vagueness to the definition of an "adult service establishment;" and (3) a facial challenge for overbreadth to the definition of an "adult service establishment." HH also sought relief under the Equal Protection Clause of the Fourteenth Amendment, and challenged the City's determination as arbitrary, capricious, and unsupported by substantial evidence under Indiana law.

HH filed for a preliminary injunction but the district court denied HH's motion. The court found that HH was unlikely to succeed on the merits under any of the First Amendment theories, or under the Equal Protection claim. Additionally, the court concluded that HH had not alleged an irreparable injury in its state law claim. HH then filed this appeal.

The federal Court of Appeals for the Seventh Circuit (which includes Wisconsin) reviewed the framework for analyzing zoning regulations of sexually oriented adult businesses under the First Amendment. Under this framework, regulations that do not prohibit adult businesses altogether, but merely regulate their location, are analyzed as time, place, and manner regulations. The regulations must be "content-neutral," meaning they are not aimed at the content of the adult businesses, but rather the harmful and undesirable "secondary effects" of such businesses on the surrounding community.

HH argued that the City's enforcement of the Ordinance, as applied to them, has "silenced" their ability to exercise their First Amendment rights at the location of their choosing. According to HH, the City classified them as an adult entertainment business in order to "suppress" unwanted speech. The Court of Appeals, however, concluded HH's speech had not been silenced or suppressed; rather, HH has only been told that it cannot operate in a particular commercial district and must move elsewhere. "Unquestionably, the City has provided HH with reasonable alternative avenues of communication in a number of other commercial districts, a fact HH does not dispute. HH may operate as a right in a C-4, C-5, or C-7 district, and a C-4 district lies directly north of the Property." "[T]he First Amendment requires only that [the City] refrain from effectively denying [HH] a reasonable opportunity to open and operate" an adult entertainment business within Indianapolis. There is simply "no First Amendment objection" when the City exercises its zoning power to reduce the secondary effects of adult businesses, and HH has alternative avenues of communication.

The Court of Appeals found that HH failed to establish that its as-applied First Amendment claim has a better than negligible chance of

success on the merits and affirmed the district court's denial of the issuance of a preliminary injunction.

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