American Planning Association
Wisconsin Chapter

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For questions or comments, please contact:
Brian W. Ohm, JD
Dept. of Planning + Landscape Architecture
UW-Madison
925 Bascom Mall
Madison, WI 53706
bwohm@wisc.edu

February Case Law Update
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A summary of court opinions decided during the month of February affecting planning in Wisconsin[1]

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Rezoning Survives Consistency Challenge

With the passage of Wisconsin's comprehensive planning law in 1999, many people feared it would become the full-employment act for lawyers. To date, we have not seen many reported cases. Here is one of the first!

Lakeland Area Property Owners Assoc. v. Oneida County involved a challenge to a rezoning for a gravel mine in the Town of Hazelhurst in Oneida County. Oneida County's zoning ordinance applies in the Town. In 2017, County Materials Corp. (CMC) petitioned the County to rezone a parcel of land from "Business" to "Manufacturing & Industrial" so CMC could seek a conditional use permit (CUP) to conduct nonmetallic mining on the Property. Both that Town and the County approved the rezoning in 2018 and the County later granted CMC a CUP allowing it to conduct nonmetallic mining on the property.

A group of property owners (Lakeland) filed suit against the County in January 2019 seeking a declaratory judgment that the rezoning of the Property violated Wis. Stat. § 66.1001(3) because it was inconsistent with the Town's comprehensive plan. The Oneida County comprehensive plan incorporated by reference the comprehensive plans for each town located in the County. They also sought a declaration of interest in mineral rights because three of its members allegedly owned the subsurface mineral rights for the land.

In response to the claim that the rezoning was inconsistent with the appliable comprehensive plan, the County raised the argument that the consistency requirement does not give rise to a private right of action. The Court did not address this issue because the County based the argument on an unpublished Court of Appeals decision subsequently reversed by the Wisconsin Supreme Court. The Court of Appeals faulted "the parties inadequate briefing on the issue" and assumed, without deciding, that § 66.1001(3) gives rise to a private right of action.

[1]Previous updates are available at: wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/

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Another issue in the case concerned which comprehensive plan applied. In May 2014, the Town rejected a rezoning application filed by CMC on the grounds that the proposed rezoning would be inconsistent with the Town's comprehensive plan adopted in 1999. In December 2017 CMC filed a nearly identical rezoning petition. The Town began taking steps to amend its comprehensive plan in December 2017, and it adopted an amended plan in January 2018. Lakeland argued the 1999 comprehensive plan should apply and not the 2018 plan. Lakeland based its argument on Wis. Stat. § 66.10015(2)(a), which states that a political subdivision "shall approve, deny, or conditionally approve" a zoning application "based on existing requirements, unless the applicant and the political subdivision agree otherwise." Because the Town's 1999 comprehensive plan was in effect when CMC filed its rezoning application, Lakeland argues the 1999 plan set forth the "existing requirements" for approval of that application under § 66.10015(2)(a).

The Court, however, found that CMC agreed that the County could apply the 2018 comprehensive plan when considering CMC's December 2017 rezoning application. The Court found the record clearly indicated that the Town Plan Commission, the Town Board, the County Planning and Development Committee, and the County Board all looked favorably on CMC's rezoning application. The Town's position had changed since 2014. Lakeland argued that an agreement under Wis. Stat. §66.10015(2)(a) must be "a formal reviewable agreement, and [must] at least [be] memorialized in meeting minutes." The Court rejected this argument because Section 66.10015(2)(a) merely states that when an applicant submits a zoning application, the existing requirements apply "unless the applicant and the political subdivision agree otherwise." Nothing in the statute's text indicates that such agreement must be formal, in writing, or memorialized in meeting minutes. The Court therefore determined the Town's 2018 comprehensive plan was the applicable plan.

Lakeland next argued that even if the County and CMC agreed to use the 2018 comprehensive plan, the circuit court erred by concluding the rezoning was consistent with that plan. The 2018 plan's "Future Land Use" map designates the future use of the Property as "Industrial." The County's rezoning of the Property from "Business" to "Manufacturing & Industrial" was consistent with that designation. However, Lakeland argued that the "Future Land Use" map cannot be considered when determining whether the rezoning was consistent with the 2018 comprehensive plan. For purposes of Wis. Stat. § 66.1001, the term "consistent with" means "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan." Sec. 66.1001(1)(am). Lakeland argued only the "narrative" portion of the plan can be considered in the consistency analysis. Nevertheless, the Court found nothing in the plain language of Wis. Stat. § 66.1001 that prohibits a map included in a comprehensive plan from being considered when determining whether a rezoning is consistent with that plan. According to the Court: "Given that the statute requires a comprehensive plan to include land use maps, it would be unreasonable to conclude that a decision maker may not consider those maps when determining whether a proposed change is consistent with the plan."

Lakeland also argued that regardless of what the "Future Land Use" map in the 2018 comprehensive plan shows, the rezoning at issue is inconsistent with the narrative portion of the plan, which stated that "[a]dditional industrial development will be welcomed in the Town in places away from [U.S. Highway] 51." Because the Property directly abuts U.S. Highway 51, Lakeland argued rezoning the Property to allow industrial use was inconsistent with this language. The Court of Appeals disagreed. According to the Court, the only reasonable interpretation of the plan's statement that the Town welcomes "additional" industrial development away from U.S. Highway 51 is that it refers to industrial development beyond that which already exists or has already been contemplated by the Town on the

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"Future Land Use" map. As such, the County's rezoning of the Property to permit industrial use was not inconsistent with the narrative portion of the 2018 comprehensive plan.

Finally, Lakeland noted that there was no evidence that either the Town or the County had performed a consistency analysis before approving the rezoning. Lakeland then asserted that the courts are "not the proper forum to conduct the consistency analysis in the first instance." The Court of Appeals, however, noted that Lakeland failed to cite any legal authority in support of its argument and concluded that as a matter of law the rezoning of the property was consistent with the Town's 2018 comprehensive plan and did not violate § 66.1001(3).

Lakeland's other claims related to mineral rights. Three members of Lakeland claimed they owned the subsurface mineral rights for the property and assigned their interest in the mineral to Lakeland. The Court, however, determined the interest in those rights had lapsed and dismissed the claim along with a claim for an unconstitutional "taking" of property.

The case is recommended for publication in the official reports.

Consistency and the Comprehensive Plan

For a further information on the consistency requirement under Wisconsin law and the role of maps versus the text of the plan see the discussion on consistency in: 2010 Updates to Wisconsin's Comprehensive Planning Law.

For a recent article on the analyzing consistency see Brian W. Ohm (2021) Analyzing Action/Plan Consistency: The Role of the Staff Report, Journal of the American Planning Association, 87:1,11-20, DOI: 10.1080/01944363.2020.1785926

Let me know if you have trouble accessing these publications and I can email you a copy.

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

No Regulatory Taking for Property You Do Not Own

RDB Property v. City of Berwyn, involved a regulatory taking claim against the City of Berwyn, Illinois. In late 2014 the City of Berwyn granted a zoning variance to the Turano Baking Company, which wanted to expand its parking lot. An existing parking lot stretched along one side of the street behind the business premises; the expanded lot ran along the other side of the street. Two streets run perpendicular to the parking lot.

The City agreed to allow Turano to cut off access to the re-configured parking lot from the perpendicular streets by ending them in cul-de-sacs. This had the effect of depriving RDB, whose property lay near the end of one of the newly blocked roads, of parking spaces on the city streets. The loss of street parking, they contended, diminished the value of their property. They also complained that without the street parking they had lost spots suitable for handicapped parking and that there was an aesthetic injury. Finally, they asserted that the value of their property suffered because of the increased noise, lighting, traffic, and safety problems stemming from the City's failure to enforce parking-lot ordinances.

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RDB sued the City under the Fifth Amendment of the U.S. Constitution for taking their property without just compensation. RDB alleged that they suffered a *per se*, physical taking because they characterized the City's cul-de-sac allowance as a physical encroachment on their nearby street parking. The Seventh Circuit Court of Appeals, however, dismissed the claim because "they do not, and never have, owned any street parking places. It is impossible to suffer a taking of property that one does not have."

Nativity Scene on Front Lawn of Courthouse Did Not Violate the First Amendment

Woodring v. Jackson County involved a challenge to a nativity scene on government property. Every year Jackson County, Indiana, allows private groups to set up a lighted nativity scene on the front lawn of its historic courthouse to celebrate Christmas. A resident of the County sued the County claiming the nativity scene violates the establishment clause of the First Amendment to the U.S. Constitution because it conveys the County's endorsement of a religious message.

The Court applied the test articulated in the U.S. Supreme Court 1999 case *American Legion v. American Humanist Association* summarized in the June 2019 APA-WI Case Law Update available here. Based on that decision, the Court held the nativity scene did not violate the establishment clause of the First Amendment. The photograph below appears in the Court's decision.

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