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Wisconsin Chapter

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

Wisconsin Supreme Court Opinions

State Agencies Must Consider Indirect Environmental Effects in EIS Determinations

In Applegate-Bader Farm, Inc. LLC, v. Department of Revenue, 2021 WI 26, the Wisconsin Supreme Court held that state agencies must consider the indirect environmental effects of a proposed action when deciding to prepare an environmental impact statement (EIS) under the Wisconsin Environmental Policy Act (WEPA).

Applegate-Bader Farm operates a farm on 11,000 acres of land in Green County. Roughly 2,000 acres are enrolled in the federal Wetland Reserve Easement program with a permanent conservation easement. Under Wisconsin's "use value" assessment program, agricultural land is assessed according to the income that could be generated from the rental of the land for agricultural use rather than the fair market value of the land (a higher value). Under the Wisconsin Department of Revenue's (DOR) administrative rule for agricultural use adopted in 2000, the land subject to the easements qualified for agricultural use taxation. In 2013, DOR began the process of revising the rule. A draft of the proposed 2013 rule included temporary and permanent conservation easements at both the state and federal levels for use value assessment. Some entities argued that farmers who permanently remove their lands from agricultural use should not be eligible for agricultural use value taxation. DOR modified the proposed rule. Under the final version of the rule, permanent federal or state easement holders were eligible for agricultural use value assessment only when the terms of the easement authorize an agricultural use.

WEPA requires that state agencies consider environmental impacts during decision making. If an agencies' assessment of potential environmental effects determines the decision may have a significant impact on the environment, the agency must prepare an environmental impact statement (EIS). DOR determined the rule would not have a significant impact on the environment so an environmental impact statement was not necessary.

In 2016, Applegate initiated this lawsuit against DOR challenging DOR's negative-EIS decision. Applegate's WEPA claim alleged that the final rule excluding wetlands protected by conservation easements under state and federal programs would result in the destruction, degradation and loss of wetlands in the state. Property owners would be reluctant to enroll wetlands in the program and farmers would allow their cows to graze in wetlands so the land would qualify for agricultural use value assessment.

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

The circuit court held that Applegate had not met the threshold for showing the potential for an environmental injury and dismissed the WEPA claim. The Wisconsin Court of Appeals affirmed the circuit decision holding that Applegate only alleged indirect environmental effects and did not allege direct environmental effects. The Wisconsin Supreme Court accepted review of the WEPA claim to clarify the the role of indirect environmental effects in agency threshold determinations on the need for an EIS.

In a 5 to 1 decision, the Wisconsin Supreme Court held that the Court of Appeals decision was incorrect. State agencies must consider both direct and indirect environmental effects of their major actions to determine whether those effects will have a significant effect on the environment. Indirect effects alone can meet that threshold. The Court stressed the decision applies to indirect environmental effects and not indirect socioeconomic impacts citing an earlier decision limiting the role of socioeconomic impacts in threshold decisions on the need for an EIS. The Supreme Court remanded the case to DOR noting that WEPA is a procedural statute and DOR may still conclude that an EIS is unnecessary. In the meantime, the Supreme Court stayed the enforcement of DOR's agricultural use value assessment rule pending DOR's compliance with WEPA.

Jurisdictional Offer Included All Property

Christus Lutheran Church of Appleton v. Department of Transportation, 2021 WI 30, involved a challenge to the jurisdictional offer made by the Wisconsin Department of Transportation (WisDOT) in an attempt to condemn a portion of Chirstus Lutheran's property located in Outagamie County for an expansion of State Highway 15. WisDOT offered $403,200 for the property which was $270,000 more than the appraised value of the property. The appraisal prepared by a consultant for WisDOT concluded that no severance damages would occur as a result of the project. WisDOT officials, however, determined the acquisition involved additional impacts including severance damages and determined that the higher offer was warranted.

Christus Lutheran filed the present action arguing that WisDOT's jurisdictional offer failed to follow statutory requirements. Wisconsin's eminent domain statutes require that the jurisdictional offer must be based on an appraisal of "all property to be acquired." Wis. Stat. § 32.05(2)(a). WisDOT's jurisdictional offer included compensation for severance damages but the appraisal concluded that no severance damages would occur. Upon review, the Wisconsin Court of Appeals held that the appraisal failed to satisfy the "all property" requirement and as a result WisDOT's jurisdictional offer was invalid.

The Wisconsin Supreme Court accepted review of the case and reversed the decision of the Court of Appeals. The Supreme Court concluded that the Court of Appeals conflated "property" and "damages." The statutory requirement focuses on property and WisDOT's appraisal included "all property." As a result, WisDOT jurisdictional offer was valid.

No Abandonment of Legal Nonconforming Use

Village of Slinger v. Polk Properties, LLC, 2021 WI 29, arose out of a long-term legal conflict between the Village of Slinger and Polk Properties. Polk owned 82 acres in the Village of Slinger, which the Melius family operated as a farm before Polk purchased the parcel in 2004. In 2007, the Village of Slinger rezoned the property to residential for Polk's planned 100-lot residential subdivision of the property. Two homes were constructed but sales of additional lots stalled due to the 2008 economic recession and the collapse of the real estate market. Melius continued to farm the property by cutting and removing vegetation from the land. The Village of Slinger sought an injunction from the circuit court

ordering Polk to stop the agricultural use of the property. The circuit court ruled in favor of the Village. Polk appealed the circuit court decision but the Wisconsin Court of Appeals affirmed the circuit court's ruling. The Wisconsin Supreme Court accepted review of the case.

The issue before the Supreme Court was whether Polk abandoned the nonconforming use of its property after the Village changed the zoning classification from agricultural to residential use for Polk's development. The Supreme Court noted that Wisconsin applies a two-part test to determine whether a property owner has abandoned the prior use: (1) actual cessation of the nonconforming use, which requires more than just a "mere suspension" of the use; and (2) an intent to abandon the nonconforming use.

Applying this test, the Wisconsin Supreme Court held that in order to establish a zoning violation, the property owner must have actually stopped the nonconforming use of the property. In this case, complete cessation never happened. While the efforts to develop the property may evidence Polk's intent to stop farming the property, the development activity did not establish actual cessation of farming. The Village argued that cessation of farming on part of the property constituted cessation of the use on the entire property. The Supreme Court disagreed. The Court concluded that Polk had not abandoned the nonconforming use and reversed the decisions of the lower courts that had attempted to stop the continued agricultural use of the property.

Wisconsin Court of Appeals Opinions

[No planning-related cases to report.]

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

[No planning-related cases to report.]