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July Case Law Update

July 31, 2022

A summary of court opinions decided during the month of July affecting planning in Wisconsin[[1]](#footnote-1)

*Wisconsin Supreme Court Opinions*

Compensation for Taking Limited Temporary Easements

[Backus v. Waukesha County](https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=540680), 2022 WI 55, arose from a dispute over the proper compensation for a temporary limited easement (TLE) that Waukesha County acquired over Gregory Backus's property to construct a highway bypass along the Backus property's rear lot line. The County believed it need pay Backus only the rental value of the TLE. Backus disagreed, arguing that Wis. Stat. § 32.09(6g), governing the condemnation of easements, applies and under the methodology of that Statute he is entitled to severance damages measured by the difference between the fair market value of the whole property before and after the completion of the project (a significantly higher amount of compensation).

The TLE was for the purposes of ingress and egress, operation of machinery, grading/creation of slopes, placement/removal of soil, and to remove/plant vegetation. The County terminated the TLE at the completion of the Project. In a 4-3 decision, the Wisconsin Supreme Court agreed with the County. In the majority opinion written by Justice Karofsky, the Court held that Wis. Stat. § 32.09(6g) applies only to permanent easements and does not apply to TLEs. Justices Rebecca Bradley, Ziegler, and Roggensack dissented.

Draft Contract Properly Withheld From Public Records Request

In [Friends of Fame Park v. City of Waukesha](https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=541478), 2022 WI 57, a group of City taxpayers filed a public records request seeking information about the City’s plans to bring amateur baseball to a park in the City. The City provided all documents in response to the request except for a draft contract with Big Top Baseball. The City withheld the draft contract because it had not been finalized and the City did not want to compromise the City’s negotiating and bargaining position by public disclosure of the draft. The Friends group believed withholding the draft contract was improper and sued the City the day before the City Council was scheduled to discuss the draft. The day after the City Council meeting, the City voluntarily released the draft to the Friends group.

In a 4-3 decision, the Wisconsin Supreme Court held that the City properly withheld the draft contract until after the City Council meeting. The majority opinion, written by Justice Hagedorn, also held that the Friends group was not entitled to attorney’s fees since the City acted properly in withholding the draft contract. Wisconsin’s public records law allows a party that prevails in an action to obtain documents withheld by the government to recover attorney fees for its efforts. The majority, however, questioned the theory governing the meaning of “prevailing party” and left open the question of whether voluntary compliance following the filing of a lawsuit allowed a requester to collect attorney fees. Justices Karofsky, Ann Walsh Bradley, and Dallet, dissented.

*Wisconsin Court of Appeals Opinions*

[No planning-related cases to report.]

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

Sign Case Remanded for Consideration of Recent Supreme Court Decision

In [GEFT Outdoor, LLC, v. City of Westfield](http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2022/D07-11/C:20-2915:J:Scudder:aut:T:fnOp:N:2901756:S:0), the Federal Court of Appeals for the Seventh Circuit reviewed a District Court’s decision holding that the sign regulations of City of Westfield, Indiana, violated the First Amendment Freedom of Speech guarantees of the U.S. Constitution. The regulations at issue prohibit off-premises signs, exemptions for certain signs, and the variance process for signs. A signage company challenged the regulations in Federal Court and the District Court invalidated the regulations relying on the Fifth Circuit Court of Appeals decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*, a case involving the City of Austin, Texas, sign regulations prohibiting off-premises signs and billboards.

The City of Westfield appealed the case to the Seventh Circuit Court of Appeals. The Seventh Circuit Court deferred deciding the case until the U.S. Supreme Court rendered its decision reviewing the Fifth Circuit Court of Appeals decision in *Reagan National Advertising of Austin, Inc. v. City of Austin*. The U.S. Supreme Court’s April 2022 decision in *City of Austin v. Reagan National Advertising of Austin, LLC.,* reversed the decision of the Fifth Circuit. The U.S. Supreme Court decided that the City of Austin’s regulations did not violate the First Amendment (see the [APA-WI April Case law update](https://wisconsin.planning.org/documents/6069/APA-WI_April_2022_case_law_update.pdf)).

Since the City of Westfield’s regulations are similar to those at issue in the City of Austin case, the Seventh Circuit Court vacated the District Court’s decision that Westfield’s regulations violated the First Amendment and remanded the case to the District Court for further proceedings consistent with the U.S. Supreme Court’s decision in *City of Austin v. Reagan National*.

Challenge to Siting of Obama Presidential Library Dismissed

[Protect Our Parks, Inc. v. Buttigieg](http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2022/D07-01/C:21-2449:J:Wood:aut:T:fnOp:N:2897409:S:0), involved the latest in a series of challenges to the Barack Obama Foundation building the Obama Presidential Center in historic Jackson Park on Chicago’s South Side. In this case, Protect Our Parks sued local, state, and federal officials alleging that environmental reviews performed for the project by federal agencies were inadequate under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and other similar laws. Protect Our Parks argued these laws require the agencies to consider alternatives to the Jackson Park site in their evaluation of possible environmental harms. According to the Seventh Circuit Court of Appeals, “[t]he problem with this argument is that none of the federal defendants had anything to do with the site selection—it was the City that chose Jackson Park, and the federal agencies had (and have) no authority to move the project elsewhere. Federal law does not require agencies to waste time and resources evaluating environmental effects that those agencies neither caused nor have the authority to change.”

The Presidential Center, however, is relying on federal funding for transportation improvements for access to the Center which did trigger environmental review under NEPA and NHPA. The Court of Appeals notes that NEPA is a procedural law, not a substantive law. The Court of Appeals determined the federal agencies followed the appropriate procedures for their limited review of the project and affirmed the decision of the District Court to deny Protect Our Parks motion for a preliminary injunction to stop the project.

1. Previous updates are available at: [wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/](https://wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/) [↑](#footnote-ref-1)