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American Planning Association
Wisconsin Chapter

Making Great Communities Happen

Fall-Winter 2017 Newsletter

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Legislative Update

By Drew Pennington

The Developer's Bill (AB770/SB640) and the Landlord's Bill (AB771/SB639) will continue being fast-tracked through the Legislature with a public hearing scheduled before the Assembly Committee on Housing & Real Estate at 10 AM on Wednesday, January 3, 2018 in Room 400 Northeast at the Capitol. A summary of the Developer's Bill was provided in the last Legislative Alert on 12/12/17.

SW District Rep and President-elect Jason Valerius testified against the Developer's Bill before the Senate Committee on Insurance, Housing, and Trade on December 13th. Please let me know if you're interested and available to testify against the Developer's Bill and/or Landlord's Bill on January 3rd. If there is enough interest, I may organize a breakfast briefing where we can gather ahead of time to discuss the bill and share talking points.

Another bill moving on a fast track through the legislative process would relax wetland protections (AB547/SB600). A joint public hearing is scheduled for 11 AM on Thursday, December 21before the Assembly Committee on Regulatory Licensing Reform and Senate Committee on Natural Resources. This bill would exempt nonfederal and artificial wetlands from certain DNR permitting requirements and requests that the EPA delegate review authority for discharge/fill permits to the DNR.

Please let me know if you have any questions, and let me know if you're interested in testifying on January 3rd.

NATIONAL PLANNING CONFERENCE

Make plans! Sign up for NPC18--New Orleans

Members (only) can register now for the 2018 National Planning Conference in New Orleans. **You're at the head of the line until January 19 for conference registration and tickets for mobile workshops, orientation tours, and other popular activities.** Check out the program, get acquainted with New Orleans, and sign up for NPC18!

Make the most of what you have — apply your organization's expiring 2017 funds to sign up for NPC18 now, when registration rates are lowest. Contact confregistration@planning.org for details.

Second proposal window opens

Also open now through January 10 is a proposal submission period for posters and timely sessions that respond to recent events or breaking planning issues.

Finally, **share your ideas** about educational programming at NPC19 in San Francisco by taking a short online survey. The survey closes January 5.

Brownfield Redevelopment News

New Wisconsin Brownfields Legislation and APA – WI Award for Brownfield Redevelopment Program in Washington County

New Brownfields Provisions: Act 70, signed November 27, 2017

Act 70 modifies a number of provisions of Wisconsin brownfield law. Many of the revisions in the bill had been recommended by the Brownfields Study Group. The new law:

- Exempts from the municipal debt limit loans to municipalities from the Wisconsin Trust Fund;
- Adds loans for brownfields to the list of purposes in Wis Stat 66.0627, which allows municipalities to make loans to private property owners for specified purposes and to repay in installments on the property tax bill;
- Exempts from the TIF debt limit when the funds will be used for environmental remediation on a one-time basis;
- Makes soil and groundwater vapor intrusion eligible for clean-up under Wisconsin Voluntary Party Liability Exemption (VPLE), as recommended by the Brownfield Study Group;
- Allows the subdivision or transfer of a VPLE property with notice and approval of the DNR, but without needing to repeat steps in the VPLE process.

Washington County's Site Redevelopment Program

"Brownfield is NOT a dirty word in our vocabulary." This positive message is how Economic Development Washington County welcomes visitors to its Brownfield Redevelopment page.

Since 2012, the county has been forging a partnership with the City of Hartford, City of West Bend, Village of Jackson, Village of Richfield and Village of Slinger. First, they came together to apply for a "Brownfield Coalition Assessment Grant for Hazardous Substances and Petroleum Brownfields," a special funding program at the US Environmental Protection Agency. (Note: the deadline for 2018 funding was November 16, 2017. Contact EPA (Joe Kraycik or Gerry Kirkpatrick at (610) 935-5577) to find out whether funding is anticipated for 2019.)

On May 28, 2014, Washington County planners learned that their proposal had received full funding —$600,000. The county would use these funds to "complete a community-wide inventory and

environmental site assessments on priority sites, complete remedial action plans and redevelopment plans for select sites and perform community outreach and education related to redevelopment opportunities."

The county formed a steering committee with representatives from each of the municipalities participating plus representatives from the Workforce Development Center, NAI MLG Commercial (a broker), and Economic Development Washington County (the county's economic development corporation). The grant also funded a team of consultants from Stantec and Vandewalle & Associates.

The coalition began by inviting the local communities and the county to identify sites that needed assessment for potential contamination and redevelopment potential. In all, 115 sites were identified. "All sites were scored using a three-tiered ranking system consisting of redevelopment feasibility, ability to advance community goals, and environmental conditions. Each tier was composed of criteria based on industry standards for gauging the level of effort and likelihood that a brownfield site will be and/or should be redeveloped."

This initial scoring narrowed the field of candidate sites for Phase I and Phase II assessments and, depending on the results of those assessments and other information, for development of a remedial action plan and redevelopment plan. To further narrow the field and prioritize these sites, the team considered additional factors (http://www.co.washington.wi.us/uploads/docs/src-siteselectionmemo-12-03-15.pdf):

- Potential to obtain site access;
- Potential to have the site deemed eligible for the EPA funding;
- Potential to obtain property owner/developer interest and cooperation;
- Potential level of local government interest and capacity to commit significant staff time for an effort extending over several years;
- Presence of groupings, promoting development on neighboring sites; or
- Potential complexity and cost of assessment, unusually expensive and possibly not a cost-effective use of funds, unless risks to human health or the environment were high.

Getting to this point required about six months of effort, mainly by the consultants and Washington County staff.

By the spring of 2017, six Phase I site assessments had been completed, four Phase II site assessments had been completed, and two redevelopment/reuse plans had been completed. An additional seven sites were in the process of obtaining agreements with the site owners for access to the site or awaiting the completion of planning. Some of the smaller communities completed an opportunity analysis "to identify key areas for future economic and community growth, and a detailed redevelopment plan."

	Funds allocated
Phase I ESA	$ 69,883.00
Phase II ESA	$ 231,414.00
Remedial Action Plan	$ 1,540.00
[illegible]	$ [illegible]

One of the success stories from the Site Redevelopment Program is the redevelopment of E.H. Wolf and Sons, a petroleum products distribution depot in Slinger. As of January 2017, the program had spent $41,000 to conduct Phase I and II assessments. With the information about conditions on the site from these assessments,

Redev/Reuse Plan	$	83,000.00
Total (to date)	$	385,837.00

Projects Funded, by funding category. 2017 Fact Sheet, Washington County Site Redevelopment Program.
http://www.co.washington.wi.us/uploads/docs/factsheet-32017.pdf

invest in improvements, estimated at "approximately $3.3 million or $80 of new property value for every $1 of [public] assessment money used."

To advance the redevelopment outreach, Economic Development Washington County put together a Redevelopment Site Analysis Tool, a searchable map highlighting sites that are ready for redevelopment—sites with a willing seller, clear ownership, a completed environmental assessment (due diligence), commitment of experienced public partners, and clear indications about public incentives that would be available for the development project.
https://businessreadywi.com/business-intelligence/redevelopment-tool/

At the APA - WI state conference in 2017, the Site Redevelopment Program was recognized with a chapter award for planning excellence. Congratulations!

Washington County Site Redevelopment Program (brownfields policy)
From left to right: Christian Tscheschlok, Economic Development Washington County; David Holmes, Stantec Consulting, Deb Sielski, Deputy Planning and Parks Administrator; Jolena Presti and Scott Harrington, Vandewalle & Associates

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Law Update

By Brian W. Ohm, JD

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

Visit the Law and Legislation page any time to access the current and past issues of the Case Law Update.

October and November Case Law Update

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

"Good Fences Make Good Neighbors": Cities and Villages Must Administer Law Regulating Fences on Farming and Grazing Land

Chapter 90 of the Wisconsin Statutes, a law dating back to the 1800s, requires that occupants of adjoining lands keep and maintain partition fences or markers between the lands when one of the adjoining properties is used for farming or grazing purposes unless the occupants of the lands on both sides mutually agree otherwise. Wis. Stat. § 90.03. Construction and maintenance of the fence is shared equally between the adjoining property owners. Chapter 90 is enforced by "fence viewers," defined in Chapter 90 as "[t]he supervisors in their respective towns, the alderpersons of cities in the respective aldermanic districts, and the trustees of villages in their respective villages." Wis. Stat. § 90.01. If an adjoining property owner has a dispute about the construction or maintenance of the fence, Chapter 90 establishes a process for the fence viewers and their local government to resolve the dispute.

In White v. City of Watertown, the Wisconsin Court of Appeals addressed the issue of whether cities and villages are responsible for administering and enforcing Chapter 90 when the adjoining lands are within their borders. Stuart and Janet White own land in the City of Watertown that they use as a farm, including livestock. Chapter 90 requires that the Whites maintain a partition fence between their land and the adjacent lands. The adjacent lands are residential properties. The Whites have a dispute with their neighbors about sharing the cost and maintenance of the fence as provided in Chapter 90. The Whites asked the City to assume Chapter 90 duties to resolve the dispute but the City refused. The Whites then initiated this lawsuit.

Chapter 90 is ambiguous. With the exception of the definition of "fence viewers" quoted above, most of the references to local government in Chapter 90 only include towns. After examining the legislative history of Chapter 90, the Wisconsin Court of Appeals concluded that the law also applied to cities and villages and that the City of Watertown had to assume Chapter 90 duties to resolve the dispute over the fence.

The case is recommended for publication in the official reports.

Jurisdictional Offer Higher that Appraisal in Condemnation

Upheld

Otterstatter v. City of Watertown involved a challenge to the City of Watertown's condemnation of Otterstatter's property as part of an airport expansion project. The City's appraila valued the Otterstatter property at $240,000. The City offered to purchase the property for this price but Otterstatter refused to consider the City's offer. The City later increased the offer to $270,000 but Otterstatter did not respond to the offer. The City then sent Otterstatter its jurisdictional offer of $270,000 informing Otterstatter that if he did not accept the jurisdictional offer within 20 days, the City would proceed with condemnation.

Otterstatter then filed this action challenging the City's right to condemn his property based on the City's alleged failure to provide him with an appraisal upon which the jurisdictional offer of $270,000 was based, as required by Wisconsin Eminent Domain law. According to Otterstatter, the $270,000 offer was $30,000 more than the City's appraisal and therefore was no "based upon" that appraisal in violation of Wisconsin law.

The Wisconsin Court of Appeals held that "based upon" does not mean that the jurisdictional offer must equal the appraisal. Rather the appraisal must be a "supporting part or fundamental ingredient of the jurisdictional offer." Based on the evidence, the Court concluded the City's $230,000 appraisal was a supporting part and fundamental ingredient of the $270,000 jurisdictional offer.

The case is recommended for publication in the official reports.

There were no planning-related decisions to report for the month of November from the United States Supreme Court, the Wisconsin Supreme Court, or the Wisconsin Court of Appeals. However, there was legislation enacted in Wisconsin during the month of November that changes the law related to recent U.S. Supreme Court and Wisconsin Supreme Court decisions reported in previous APA-WI case law updates over the past few months. This case law update summarizes the legislative changes to insure that members have the most current updates on the law in these areas.

New Legislation Affecting Substandard Lots: Responding to Murr v. Wisconsin

In November, the Wisconsin Legislature passed legislation in response to the United States Supreme Court decision last June in Murr v. Wisconsin. **While local governments did not need to make changes their ordinances in response to the Murr decision, Act 67, effective November 28th, should prompt local governments and state agencies to review their ordinances and rules as follows:**

- Cities, villages, towns, counties, and state agencies need to review their ordinances and rules to insure they do not require the merger of lots (both substandard lots and lots that conform to current ordinances and rules) without the consent of the owners of the lots that are to be merged.
- Cities, villages, towns and counties need to review their ordinances and practices related to substandard lots to ensure that they do not prohibit a property owner from selling or otherwise conveying an ownership interest in a substandard lot to another person or entity.
- In addition, cities, villages, towns and counties need to review their ordinances and practices to ensure they allow the use of a substandard lot as a building site if the substandard lot has never had a structure straddling the substandard lot and an adjacent lot. Any development on the substandard lot must conform to all other applicable ordinances. The application of other ordinances may limit what can be built on a substandard lot.

St. Croix County Zoning Ordinance that merged two substandard lots (referred to as "nonconforming lots" in many local ordinances) under common ownership for purposes of the application of the zoning ordinance and prohibited the owner from selling one of the substandard lots. The County's ordinance followed rules promulgated by the Wisconsin Department of Natural Resources for protecting the Lower St. Croix River after its designation by Congress as a National Wild and Scenic River. The U.S. Supreme Court decision articulated a new test for determining the relevant parcel for regulatory takings analysis and concluded St. Croix County's lot merger provision did not constitute a regulatory taking requiring the payment of just compensation. The new legislation, signed into law by Governor Walker as 2017 Wisconsin Act 67, places new limitations on the authority of local governments and state agencies to enact or enforce lot merger provisions similar to the one found in the St. Croix County Zoning Ordinance. In addition, Act 67 includes provisions affecting substandard lots in general.

The new substandard lot/lot merger limitations are found in Sections 23 through 26 of Act 67. Those sections create several additions to the existing section of the Wisconsin Statutes entitled "Limitation on Development Regulation Authority and Downzoning" found at section 66.10015 of the Wisconsin Statutes. Act 67 adds the following definition of a "substandard lot": "A legally created lot or parcel that met any applicable lot size requirements when it was created, but does not meet current lot size requirements." Wis. Stat. § 66.10015(1)(e).

Act 67 then prohibits cities, villages, towns, and counties from enacting or enforcing ordinances or taking any other action that prohibits a property owner from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot and the substandard lot is developed to comply with all other ordinances of the political subdivision. Wis. Stat. § 66.10015(2(e).

Finally, Act 67 prohibits cities, villages, towns, counties, and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged. Wis. Stat. § 66.10015(4).

New Legislation Affecting Conditional Use Permits: Responding to AllEnergy Corp. v. Trempealeau County

2017 Wisconsin Act 67 also includes changes to Wisconsin law governing conditional use permits following the recent decision of the Wisconsin Supreme Court in AllEnergy Corp. v. Trempealeau County reported in the May 2017 APA-WI Case Law Update. The AllEnergy case involved the denial of a conditional use permit for a proposed frac sand mind in Trempealeau County. The County voted to adopt 37 conditions for the mine, which AllEnergy agreed to meet, but then the County voted to deny the conditional use permit in part relying on public testimony in opposition to the mine. A divided Wisconsin Supreme Court upheld the County's denial of the conditional use permit acknowledging the discretionary authority of local governments in reviewing proposed conditional uses.

Act 67 follows the line of reasoning articulated by the dissent in the AllEnergy decision and limits local government discretion related to the issuance of conditional use permits. According to the Dissent in AllEnergy: "When the Trempealeau County Board writes its zoning code, or considers amendments, . . . is the stage at which the County has the greatest discretion in determining what may, and may not, be

rejects, by that very act, the argument that the listed use is incompatible with the district." "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

Act 67 adds new sections governing the issuance of conditional use permits to the various general zoning enabling laws for cities, villages, towns, and counties. Until the addition of these sections, the law governing conditional use permits was based on court decisions. The various local general zoning enabling laws did not include any references to the term "conditional use."

The new law adds the following definition of "conditional use" to the Statutes: "'Conditional use' means a use allowed under a conditional use permit, special exception, or other zoning permission issued by a [city, village, town, county] but does not include a variance."

Act 67 also includes the following definition of "substantial evidence," a term used in several places in the Act: "'Substantial evidence' means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion." This language softens the language of earlier versions of the bill that stated substantial evidence did not include "public comment that is based solely on personal opinion, uncorroborated hearsay, or speculation." Public comment that provides reasonable facts and information related to the conditions of the permit is accepted under Act 67 as evidence.

Act 67 then provides that "if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the [city, village, town, county] ordinance or imposed by the [city, village, town, county] zoning board, the [city, village, town, county] shall grant the conditional use permit." This new language follows the argument made by the plaintiffs and the dissenting opinion in the AllEnergy case. The use of the term "zoning board," however, is at odds with current Wisconsin law that allows the governing body, the plan commission, or the zoning board of adjustment/appeals to grant conditional uses. This "zoning board" terminology may lead to some confusion.

Act 67 also provides that the conditions imposed "must be related to the purpose of the ordinance and be based on substantial evidence" and "must be reasonable and to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal." In the past, sometimes there was confusion about whether local governments had the authority to place a time limit on the duration of a conditional use permit. This new statutory language clarifies that local government have that authority. Since local comprehensive plans can help articulate the purpose of ordinances that implement the plan, the requirement in Act 67 that the conditions relate to the purpose of the ordinance emphasize the importance of having a condition in the zoning ordinance that the proposed conditional use furthers and does not conflict with the local comprehensive plan.

Next, Act 67 provides that the applicant must present substantial evidence "that the application and all requirements and conditions established by the [city, village, town, county] relating to the conditional use are or shall be satisfied." The city, village, town or county's "decision to approve or deny the permit must be supported by substantial evidence."

Under the new law, a local government must hold a public hearing on a conditional use permit application, following publication of a class 2 notice. If a local government denies an application for a conditional use, the applicant may appeal the decision to circuit court. The conditional use permit can be revoked if the

applicant does not follow the conditions imposed in the permit.

The new conditional use law applies to applications for conditional use permits filed on and after November 28, 2017.

For more information about how planners may need to respond to this new law, see the box following this article.

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