American Planning Association
Wisconsin Chapter

Making Great Communities Happen

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January Case Law Update
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A summary of Wisconsin court opinions decided during the month of January related to planning

Previous Case Law Updates are available at: wisconsin.planning.org/policy-and-advocacy/law-updates/case-law-updates/

Wisconsin Supreme Court Opinions

Cities Bound by Wisconsin's Fence Law

White v. City of Watertown, 2019 WI 9, involved a long-standing dispute over the statutorily-prescribed procedure for resolving fence-related disputes between adjoining landowners In Wisconsin. The Whites own property in the City of Watertown that has been continuously farmed or grazed since 1839. Section 90.03 of the *Wisconsin Statutes* requires that land used for farming or grazing purposes must maintain a partition fence between adjoining properties. The partition fences dividing the White's farm from the adjoining properties is in need of repair. The statute requires that the adjoining property owners must bear maintenance expenses in equal shares. The Whites and their neighbors disagree over their financial obligations for the partition fence between their properties.

The *Wisconsin Statutes* include a procedure for quantifying maintenance costs and allocating them among the adjoining property owners. Section 90.10 of the *Wisconsin Statutes* provides that if there is a dispute, the aggrieved party may "complain to 2 or more fence viewers of the town, who . . . shall examine the fence." Section 90.07(2) of the *Wisconsin Statutes* requires that the fence viewers assign responsibility to the respective owners and "shall file such decision in the town clerk's office." The clerk then issues "a warrant for the amount of the listed expenses and fees upon the town treasurer payable to the person to whom the certificate was executed and delivered." *Wis. Stat*. § 90.11(2)(a). In light of these and other references in Chapter 90 to "towns," the City of Watertown interpreted Chapter 90 to apply only in towns leaving the City without authority to administer the enforcement procedures. The Whites then sued the City. The City moved to dismiss the case arguing that Chapter 90 did not give the City authority to act. The Circuit court, denied the motion holding that Chapter 90 applied to cities. The Wisconsin Court of Appeals affirmed the circuit court's decision. The City petitioned the Wisconsin Supreme Court to review the case and the Supreme Court granted the petition.

The Wisconsin Supreme Court's decision focused on the one reference to cities and villages in Chapter 90. Section 90.01 defines "fence viewers as "[t]he supervisors of their respective towns, the alderpersons of cities in their respective aldermanic districts, and the trustees of villages in their respective villages. . . . " In addition, the Court notes that section 990.01(42) of the *Wisconsin Statutes* states that "'Town' may be construed to include cities, villages, wards or districts." (Chapter 990 of the Wisconsin Statutes provides the rules for interpreting words and phrases in the Statutes.) In a unanimous decision written by Justice Daniel Kelly, the Supreme Court concluded that Chapter 90 "unambiguously authorizes the City to administer" the dispute resolution procedures in Chapter 90. (In

footnote 14 in the decision, the Supreme Court states that "it is possible" that villages do not have the authority to administer Chapter 90 and left resolution of the matter to a future case.)

DNR Lacked Authority to Unilaterally Amend Pier Permit

Myers v. Wisconsin Department of Natural Resources, 2019 WI 5, involved a challenge to DNR's attempt to amend a pier permit issued by DNR under Chapter 30 of the Wisconsin Statutes. The Myers completed construction of their pier in 2001 in accordance with the specifications set forth in a pier permit issued by DNR. In 2012 and 2013 the DNR received complaints from a neighboring riparian property owner alleging that the pier was causing shoreline erosion to the neighboring property. DNR investigated the matter and initiated proceedings to amend the permit. In a decision written by Justice Rebecca Dallet, the Wisconsin Supreme Court held that DNR did not have the authority under Chapter 30 to amend the permit. While the permit included a condition that DNR could amend or rescind the permit, the permit also stated that it was for the construction of a structure and would expire three years after issuance if the structure is not completed before then. The Supreme Court interpreted permits issued under section 30.12 of the Wisconsin Statutes as akin to a building permit. The permit allows for construction within a certain period of time and after the expiration of that period, the DNR no longer had the authority to amend the permit.

Alleged Nuisance Not Timely Filed

The Yacht Club at Sister Bay Condominium Assoc. v. Village of Sister Bay, 2019 WI 4, involved an alleged nuisance caused by live music late at night at a newly constructed pavilion in a park. In 2013, the Village of Sister Bay received an anonymous donation to construct to construct a performance pavilion in the Village's Waterfront Park. The Village accepted the donation and constructed the pavilion. Upon completion in August 2014, the Village began hosting performances at the pavilion. The nearby Yacht Club Condominium Association sued the Village on the basis that the pavilion concerts interfered with the quiet enjoyment of their property and therefore constituted a nuisance. The condominium association alleged that the performances create very loud noise aimed directly at its condominiums and the performances continue after official park hours, sometimes as late as midnight. In a unanimous decision of the Wisconsin Supreme Court written by Justice Ann Walsh Bradley, the Court concluded that the Yacht Club's lawsuit was not timely filed under Wisconsin's notice of claim statute, *Wis. Stat*. § 893.80(1d)(a). According to the Court, the Yacht Club failed to serve its written notice of injury within 120 days after the date of the last concert alleged to be a nuisance. The Court remanded the case to circuit court to determine whether the Village had actual notice of the Yacht Club's claim and was not prejudiced by the late filing of the notice of injury.

City Not Immune in Lawsuit Arising From Drowning During City-led Activity

Engelhardt v. City of New Berlin, 2019 WI 2, involved a lawsuit against the City of New Berlin and several other defendants alleging negligence in the tragic death of an 8 year old girl who drowned at a swimming pool during field trip organized and run by the City's Parks and Recreation Department. The person in charge of the field trip was informed that the girl could not swim. The girl drowned while staff and other children were changing in the locker room. In response to the lawsuit the City moved for summary judgment arguing it was immune from suit pursuant to the governmental immunity statute (*Wis. Stat*. § 893.80(4).) The circuit court denied the motion but the Court of Appeals reversed the circuit court's denial. The Wisconsin Supreme Court accepted review of the case and reversed the Court of Appeals holding that the City is not entitled to the defense of governmental immunity. In the majority opinion written by Justice Shirley Abrahamson, the Court decided that the facts of the case fell within

the “known danger” exception to governmental immunity. The known danger exception “applies when an obviously hazardous situation known to the public officer or employee is of such force that a ministerial duty to correct the situation is created.”

Wisconsin Court of Appeals Opinions

[No planning-related cases to report.]

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

RLUIPA Claims Against City Ripe for Review

In **Church of Our Lord & Savior Jesus Christ v. City of Markham,** the United States Court of Appeals for the Seventh Circuit (which applies to Wisconsin) raises several interesting questions related to the impact of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) on local zoning. The case arose in the City of Markham, Illinois

In 1985, the pastor of the Church of Our Lord & Savior Jesus Christ purchased a home in a residential zoning district of the City as a personal residence. In 2003, the congregation began meeting regularly at the house, with ten to twenty people attending Sunday morning services. Today, average attendance for a worship service is about thirty people. In 2012, due to growing attendance and an increase in religious activities, the church began a project to renovate the garage into a chapel. The project involved installing a new roof, new windows, and pews, and cost approximately $40,000.

The subject property is located in a single-family residential zoning district where churches are listed as a conditional use. The City does not have any zoning districts where churches are allowed as a permitted use. Other places of public assembly, such as auditoriums are permitted uses in certain zoning districts. After the project's completion, the city filed suit against the church in Illinois state court, seeking to enjoin its operation without a conditional use permit. The city did not issue any citations or formal notices to the church beforehand. In response to the lawsuit, the church applied for a conditional use permit that the City denied. The church also needed a variance from the City’s parking requirements but the church never applied for a variance.

Following the denial of the conditional use permit, the church initiated the present lawsuit in Illinois state court. The church amended the complaint to add an RLUIPA claim and the City removed the case to federal court. The church’s RLUIPA claims alleged that the City’s zoning ordinance does not treat churches on "equal terms" with other similar uses, that the City’s zoning ordinance imposes "unreasonable limitations" on religious uses because there are no districts where churches are permitted uses, and that the City’s zoning ordinance places a "substantial burden" on the exercise of religion.

Two years into the case, the City argued the case was not ripe because the church never applied for a variance from the City’s parking requirements. The City then passed an ordinance granting the variance and an ordinance granting the conditional use permit. The church refused to accept the conditions imposed by the City.

The City moved to dismiss the case. The district court granted the dismissal on the basis that it was not ripe because the church had never applied for a variance and the case was moot because the City had granted the variance and the conditional use permit.

Upon appeal to the Seventh Circuit Court of Appeals, the Court reversed the decision of the district court. According to the decision of the Court of Appeals: "The district court focused on the church not applying for parking variances before the lawsuit. But that issue is related only tangentially to the church's claims, which concern zoning use classifications, not parking. The ripeness of the church's claims does not hinge on pursuit of parking variances that will not resolve them. Nor can a conditional use permit from the city moot the church's claim that such a permit is not needed. The key question in this case is whether operating a church on the Property is a permitted or conditional use. The district court did not answer that question, but it is the necessary starting point for resolving the church's legal claims." The Court of Appeals remanded the case to the district court to answer that question and resolve the church's RLUIPA claims. Stay tuned to see what happens.

CRP Land

In **Mittelstadt v. Perdue,** Mittelstadt owned a tract of land in Richland County that was enrolled in USDA's Conservation Reserve Program (CRP) from 1987 to 2006. Participants in the CRP agree to remove environmentally sensitive land from agricultural production in return for payments from USDA. In 2006, USDA denied Mittelstadt's application to reenroll his land in the CRP due to a new definition of a "mixed hardwood" stand of trees. After exhausting his administrative appeals, he brought this action against the Secretary of the USDA. The district court affirmed the Secretary's rulings and entered judgment in favor of the Secretary. On appeal, the Court of Appeals affirmed the decision of the district court holding the USDA has broad discretion to change the definition used in the program to a more favorable pattern of hardwoods to better achieve the conservation objectives of the program.