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

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Wisconsin Supreme Court Opinions

Vested Rights Extends to All Land Identified in a Building Permit Application

Golden Sands Dairy LLC v. Town of Saratoga, 2018 WI 61, is the latest court decision in the dispute involving a proposed 6,388 acres dairy operation located primarily in the Town of Saratoga in Wood County. Golden Sands applied for a permit to build seven structures on 92 acres of its proposed 6388-acre operation. At the time of the application, the Town was under county zoning which zoned the land "unrestricted" meaning the land at issue could be used for any purpose. At the time of the application, the Town had completed its comprehensive plan and was in the process of adopting village powers so it could adopt its own zoning ordinance. Two days after Golden Sands applied for the building permit, the Town passed a moratorium on issuing building permits. The Town subsequently adopted a zoning ordinance that was then ratified by the Wood County Board. Under the Town's zoning ordinance, only two percent of the Town (and none of Golden Sands' land) was zoned for agricultural use. The Town refused to issue the building permit requested by Golden Sands. Golden Sands filed a mandamus action to compel the Town to issue the building permit. The circuit court and subsequently the Wisconsin Court of Appeals granted the writ of mandamus and the Town issued the building permit.

As that action was pending, Golden Sands initiated the present action asking that the court declare that Golden Sands could use all the land identified in its building permit application for agricultural purposes. The circuit court found that Golden Sands had a vested right to use the land identified in the application for agricultural purposes. The Court of Appeals reversed the decision of the circuit court distinguishing between the right to build a structure and the right to use land. Golden Sands petitioned the Wisconsin Supreme Court for review of the Court of Appeals decision. The Wisconsin Supreme Court granted the petition to review the case and in a 5-2 decision (Justice Abrahamson dissenting, joined by Justice Ann Walsh Bradley) reversed the Court of Appeals decision.

The majority opinion written by Justice Gableman notes that Wisconsin follows the "Building Permit Rule" under the Common Law whereby the right to use property consistent with current zoning vests at the time a building permit is filed that conforms to applicable zoning

regulations. The majority then concludes that the Building Permit Rule applies to all land specifically identified in the building permit application that was granted by the Town. As a result, Golden Sands has a vested right to use all the land for agricultural purposes.

In Footnote 10 of the majority opinion, the Majority acknowledged that subsequent to the initiation of this action the Legislature passed 2013 Wis. Act 74 creating Wis. Stat. sec. 66.10015 establishing a new vested rights law. (That law states: "if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based on existing requirements, unless the applicant and the political subdivision agree otherwise. An application is filed under this section on the date that the political subdivision receives the application." Wis. Stat. §66.10015(2)(a).) The Court notes that Act 73 applies prospectively so it does not apply to this case. The Court does not analyze the new statutory language and expressly states that its decision in this case "should not be read to intimate how courts should apply §66.10015."

Short-term Rental Not Prohibited By Restrictive Covenant

In *Forshee v. Neuschwander*, 2018 WI 62, the Wisconsin Supreme Court in a 6-1 decision (Justice Ann Alsch Bradley dissenting) held that the short-term and long-term rental of a home was not precluded by a clause in a restrictive covenant on the property that prohibited "commercial activity." In 2014 the Neuschwanders purchased a large building on Hayward Lake in Hayward, Wisconsin. The building was built by the Louisiana Pacific Corporation in the 1980s to provide short term stays to clients, vendors, politicians, and employees. The property consisted of two lots in a 15-lot subdivision. All lots were encumbered by a restrictive covenant that provided "There shall be no commercial activity allowed on any of said lots." After they bought the property, the Neuschwanders renovated the property and rented the property to vacationers through the website Vacation Rental By Owner. Several of the neighbors brought this action alleging that the Neuschwanders short-term rental of the property violated the "commercial activity" prohibition in the restrictive covenants.

The circuit court judge agreed with the neighbors. The Court of Appeals reversed. The Wisconsin Supreme Court accepted review of the case and affirmed the decision of the Court of Appeals. The lead opinion, written by Chief Justice Roggensack and joined by three of the justices, concluded that the term "commercial activity," which was not defined in the restrictive covenant, was ambiguous and narrowly interpreted the term to not preclude the rental of the property. Justice Abrahamson wrote a concurring opinion concluding that while the Neuschwanders the short-term rental was commercial activity *of* the property but it was not commercial activity *on* as written in the restrictive covenant. Justice Kelly also wrote a concurring opinion using a grammatical analysis of the restrictive covenant language. Justice Rebecca Bradley joined in that concurrence.

Tax Increment Financing Cash Grants to Developer Upheld

Voters with Facts v. City of Eau Claire, 2018 WI 63, arose out of the City of Eau Claire's approval of the "Confluence Project," a redevelopment project in downtown Eau Claire. The project

relied in part on tax incremental financing (TIF) derived from two tax increment districts. The plaintiffs, a group of City taxpayers, initiated this lawsuit seeking declaratory judgment on four claims. The first two claims challenged the validity of the City's findings of blight and the joint review board's "but for" findings required under Wisconsin's TIF law to show that the financing was necessary for the project to proceed. The third claim challenged the validity of a TIF cash grant made to the developer alleging the developer used the funding to demolish historic buildings, something that is not allowed under Wisconsin's TIF law. The fourth claim challenged the validity of the TIF cash grants alleging the grants functioned as a tax rebate or tax credit in violation of the Uniformity Clause of the Wisconsin Constitution (the Uniformity Clause requires that property taxes shall be uniform).

The circuit court and the Wisconsin Court of Appeals dismissed the lawsuit finding the plaintiffs did not have standing to bring the lawsuit. The Wisconsin Supreme Court accepted review of the case. In its decision, the Wisconsin Supreme Court assumed without deciding that the plaintiffs had standing to bring their claims, but in the 5-2 decision (Justices Rebecca Bradley and Kelly dissenting) the Supreme Court affirmed the dismissal by the Court of Appeals and remanded the first two claims for review by the circuit court.

The Supreme Court majority opinion, written by Justice Ziegler, determined that the plaintiffs' request for declaratory judgment on the first two claims was not appropriate because the findings are a legislative determination by the City and "a court cannot issue a declaration regarding the wisdom of a legislative determination." The Court majority concluded, however, that the first and second claims are subject to certiorari (or on-the-record) review. Unlike a declaratory judgment action, certiorari review by a court is limited to review of the record complied by the City. The court does not take any additional evidence. The review examines whether the city kept within its jurisdiction, whether it proceeded on a correct theory of law, whether it acted arbitrarily or unreasonably, and whether the evidence supported the City's blight and "but for" determinations. The evidence before the Supreme Court did not include the record compiled by the City so the Court remanded the case to the circuit court for certiorari review of the proceedings of the City and the Joint Review Board.

The Supreme Court majority upheld the Court of Appeals dismissal of the third claim because the plaintiffs did not allege facts that could establish that the developer used the City's cash grant to reimburse the developer's costs associated with demolishing historic buildings.

The Supreme Court majority also concluded that the plaintiffs' fourth claim failed because they did not allege facts that could establish that the TIF cash grant was intended or used to pay the developers' property taxes. As a result, the Court was unwilling to find that the cash grant violated the Uniformity Clause of the Wisconsin Constitution.

A Right to Visibility of Private Property is Not A Protected Property Interest

In *Adams Outdoor Advertising L.P., v. City of Madison,* 2018 WI 70, Adams Outdoor Advertising alleged a taking occurred because the City of Madison constructed a pedestrian bridge over the

Beltline Highway that blocked the visibility from the highway of the west-facing side of Adams' billboard. According to Adams, since the bridge blocked the visibility of the sign, the City deprived Adams of all economically beneficial use of the west-facing side of its billboard and the City must pay just compensation to Adams for the taking.

The City argued that no compensable taking occurred because property owners have no right to continued and unobstructed visibility of their property from a public road. In a 4-3 decision (Justice Rebecca Bradley dissenting, joined by Chief Justice Roggensack and Justice Kelly), a majority of the Wisconsin Supreme Court agreed with the City that visibility of private property from a public road is not a cognizable property right that could give rise to a takings claim. Justice Ann Walsh Bradley wrote the majority opinion.

Court Ends Practice of Deferring to Administrative Agencies' Conclusions of Law

In *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, the Wisconsin Department of Revenue (DOR) imposed a tax on Tetra Tech for the "processing" of river sediment into waste sludge, reusable sand, and water. Tetra Tech had been hired to help with the remediation of the pollution of the Fox River caused by several paper companies of the Fox River. The remediation was ordered by the U.S. Environmental Protection Agency. At issue was DOR's interpretation of the word "processing" to include the work performed by Tetra Tech. Tetra Tech claimed its work was not processing and therefore not taxable. All seven Justices of the Wisconsin Supreme Court agreed that the work of Tetra Tech was taxable because it was "processing." Five of the Justices also A agreed to upend decades of administrative law jurisprudence and held that the Court will no longer defer to administrative agencies' conclusions of law. Justice Kelly wrote the lead opinion and was joined by Justice Rebecca Bradley. Justices Ziegler and Gableman wrote concurring opinions agreeing with the change to administrative law but differing on the rationale. Chief Justice Roggensack joined in both concurrences. Justice Ann Walsh Bradley, joined by Justice Abrahamson, wrote a concurring opinion where she did not agree to end the practice.

Judicial deference to administrative interpretations of their rules developed decades ago as courts determined that they should defer to the expertise of the various administrative agencies on complicated issues. While the Court in Tetra Tech ended the practice, the lead opinion did acknowledge that under the Wisconsin Administrative Procedures Act courts should give "due weight" to the experience, technical competence, and specialized knowledge of an administrative agency as the court considers administrative cases. The case did not change the standard of review of an agency's findings of fact.

Wisconsin Court of Appeals Opinions

Defining "Rural" for County Implementation of Uniform Addressing Systems.

Town of Rib Mountain v. Marathon County involved a dispute between the Town and the County regarding the County's plan to implement a uniform addressing system in all unincorporated areas of

the County. The Town of Rib Mountain argued that Wis. Stat. §§ 59.54(4) and (4m), providing for a "rural" numbering system, permits the County to only implement the uniform addressing system in unincorporated areas that also qualify as "rural." The Court of Appeals agreed with the Town's interpretation and reversed the circuit court's judgment denying the Town's claims. The Court of Appeals determined that "rural area" is not synonymous with "unincorporated area." The Court of Appeals referred to dictionary definitions of "rural" and concluded "'rural' refers to areas that are characterized by comparatively lower densities of people or buildings, or areas that are characteristic of, or related to, the country – in other words, areas that are not urban." Some towns in Wisconsin (the unincorporated areas) are urban in character. The Town of Rib Mountain suggested that the County use the Wausau Metropolitan Planning Organization Planning Boundary as the dividing line between "urban" and "rural" but the Court took no position on whether that was appropriate and did not offer any criteria for where to draw the line between urban and rural.

The case is recommended for publication.

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

Environmental Report Sufficient Under NEPA

Highway J Citizens Group v. U.S Dept. of Transportation, 891 F.3d 697 (2018), involves the renovation of a 7.5 mile stretch of Highway 164 (formerly Highway J) in Washington County. Following the preparation of an environmental report, the Federal Highway Administration (FHA) found that it was unnecessary to prepare an environmental assessment or an environmental impact statement because the renovation would not have a significant effect on the environment and approved federal funding for the project. A group of local citizens sued challenging the adequacy of the report. The Court of Appeals for the Seventh Circuit affirmed the decision of the FHA. According to the Court, the National Environmental Policy Act "does not require an environmental impact statement whenever someone opposes a project; it requires only 'appropriate environmental studies'" and concluded that the report was such a study. Noting the relatively small size of the project, the Court also concluded that "although cumulative effects matter, the agency has discretion to consider when and how they are considered."