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Wisconsin Chapter

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

United States Supreme Court Opinions

Annotated Version of State Statutes Not Copyrightable

Georgia v. Public.Resource.Org., Inc., addressed the issue of whether states can copyright the materials that they create. The case involved the Official Code of Georgia Annotated (OCGA) published by the State of Georgia. In addition to including the official statutes of Georgia, the publication also includes annotations of court decisions interpreting the various statutes similar to those found in the Wisconsin Statutes. Public.Resource.Org (PRO), a nonprofit dedicated to facilitating public access to government records posted the OCGA online. The State of Georgia sued PRO for infringing on its copyright. The federal district court held the annotations were eligible for copyright protection because they had not been enacted into law. The Federal Court of Appeals for the Eleventh Circuit reversed, holding that the annotations were a government edict and not copyrightable. The US Supreme Court accepted review of the case and, in a 5-4 decision, agreed that the OCGA are ineligible for copyright protection.

Over a century ago, the U.S. Supreme Court created what is known as the "government edicts doctrine" whereby "officials empowered to speak with the force of law [judges and legislators] cannot be the authors of – and therefore copyright- the works they create in their official duties." Court opinions and statutes cannot be copyrighted. In a subsequent decision the U.S. Supreme Court applied the governmental edicts doctrine to non-binding, explanatory legal materials created by judges. In the Georgia case, the Court applies the government edits doctrine to non-binding, explanatory legal materials created by legislative bodies vested with the authority to make law. Because an arm of the legislature authors Georgia's annotations, the government edits doctrine puts the annotations outside the reach of copyright protection.

The Court notes "the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials." Local ordinances are not copyrightable. Presumably a local comprehensive plan in Wisconsin, adopted by ordinance by the local legislative body to provide the legal foundation for other ordinances, would not be copyrightable.

In sum, Justice Roberts, writing for the majority states that "whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable." It need not be material that carries "the force of law."

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

Clean Water Act Applies to Point Sources that Discharge to Groundwater

County of Maui v. Hawaii Wildlife Fund deals with the County of Maui's watewater treatment system (a point source) that discharges waste into the groundwater about a half-mile from the Pacific Ocean. The wastewater eventually makes its way through the groundwater to the Ocean. Several environmental groups brought the suit. They argued the wasterwater treatment plant needed a permit for the discharge under the Clean Water Act (CWA). The County (along with the federal government who filed an amicus brief in the case) argued that the CWA did not apply because the point source was not discharging into navigable waters. The Supreme Court in a 6-3 decision disagreed with the interpretation of the CWA taken by the County. According to the Court, as long as the pollutants are "fairly traceable" from the point source to navigable waters, a permit under the CWA would be required.

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

Damages Due to Road Grade Change Only Include Structural Damage, Not Loss of Value

United America, LLC, v. Department of Transportation addressed the issue of whether state law allowing a claim for damages to land caused by a governmental entity changing the grade of a street or highway includes damages for loss of the property's value due to the change. The state and local governments use their police power to change the grade of a street or highway. The change may or may not necessitate the taking of land under the power of eminent domain. When no land is taken, Wis. Stat. § 32.18 allows a landowner to file a claim for damages to their property caused by the grade change. When eminent domain is used, state law establishes a different process for claiming damages.

United America operated a gas station along Highway 51 in Lincoln County. Vehicular traffic would turn off of Highway 51 at an at-grade intersection with Northstar Road and access the gas station. In 2013 DOT began a safety improvement project to Highway 51. The project made the intersection a grade-separated crossing (an overpass) with no on- or off-ramps to Northstar Road. The gas station had no direct access to Highway 51. The gas station lost 90% of its business.

An appraiser for United America concluded the grade change reduced the value of the property by $528,500. United America initiated a claim for damages under Wis. Stat. § 32.18. The circuit court concluded that the use of "any" damages in Wis. Stat. § 32.18 allowed for any type of damages and awarded United America $528,500 plus costs. DOT appealed arguing that Wis. Stat. § 32.18 only allows for structural damages. The Court of Appeals agreed. The Court noted the Statute focused on any damages to "land" and not damages to the landowner. The Court also noted that at one time the gas station had direct access to Highway 51 but the former owner sold those rights to DOT in 1994 and received compensation for the loss of access rights to Highway 51.

The case is recommended for publication in the official reports.

Inverse Condemnation Claim Untimely

Southport Commons, LLC, v. Department of Transportation involved the timeframe for bringing an inverse condemnation claim. Southport owned property near I-94 in Kenosha County. In 2008 and 2009

DOT located a frontage road so as to bisect Southport's property. In 2016 Southport received a survey and wetland delineation identifying a significant increase in the size and amount of wetlands on the property resulting from DOT's construction project. In 2017 Southport sued DOT claiming inverse condemnation and seeking just compensation. The circuit court dismissed the claim because Wis. Stat. sec. 88.87(2)(c) requires that a claim must be filed "within 3 years after the alleged damage occurred."

On appeal to the Wisconsin Court of Appeals, Southport argued that the claim was timely because the 3-year period did not begin to run until Southport *discovered* the damage. The Court of Appeals disagreed finding that since the Legislature used the term "occurred" and not "discovered," "the statute means what it says." The Court affirmed the circuit court's decision to dismiss the inverse condemnation claim.

The case is recommended for publication in the official reports.

County's Pier Ordinance Unenforceable

Oneida County v. Sunflower Prop II, LLC. Involved a challenge to the application of Oneida County's pier ordinance. Sunflower owned property on Tomahawk Lake. Sunflower constructed a new pier extending 90 feet parallel to the shoreline with five branches protruding into the lake perpendicular to the shore. The County's pier ordinance required that lateral extensions on piers must be a "T" or "L" shape and cannot exceed 20 feet in total width. The County cited Sunflower for violating the Ordinance and Sunflower contested the citations in circuit court. The circuit court concluded the County had authority to regulate the pier. Sunflower appealed to the Wisconsin Court of Appeals.

Sunflower argued the pier qualifies for a permit exemption under the *Wisconsin Statutes*. Sections 30.12(1g)(f) and 30.13(1) of the *Statutes* provides that it is not necessary to obtain a permit from the Wisconsin Department of Natural Resources (DNR) if a pier meets the criteria listed in the statute. Section 30.13(2) authorizes a local government to regulate piers by enacting ordinances "not inconsistent with 30.13. The Court of Appeals concluded that a pier is exempt from local pier regulations if the pier is exempt under either 30.12 or 30.13 of the *Statutes*.

The Court of Appeals remanded the case to the circuit court to determine if the pier qualified for an exemption under the *Statutes* since it was not clear in the record before the Court.

The case is recommended for publication in the official reports.

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

First Amendment Rights

In O'Brien v. Village of Lincolnshire, Village taxpayers challenged the Village of Lincolnshire's use of taxpayer dollars to pay for dues to the Illinois Municipal League, an association of local governments, because they did not agree with political actions taken by the League. The Court of Appeals for the Seventh Circuit held that the taxpayers failed to establish a Frist Amendment violation because the conduct and messages at issue were governmental speech not private speech protected by the First Amendment.

US District Court for the Western District of Wisconsin

City of Madison Billboard Regulations Do Not Violate the First Amendment

Adams Outdoor Adver. Ltd. P'ship v. City of Madison, involved a challenge to the City of Madison sign ordinances related to billboards. The ordinance strictly regulates billboards, banning them in the city center and limiting them elsewhere. Adams Outdoor Advertising wanted to modernize its billboards and build more but is prohibited under Madison's sign ordinance. Adams Outdoor has challenged the ordinance several times before. This is the latest such challenge.

Adams Outdoor alleged that Madison's sign ordinance is unconstitutional on numerous grounds. But its primary claim is that the ordinance violates the First Amendment by drawing content-based distinctions between billboards and other kinds of signs, relying chiefly on the Supreme Court's 2015 decision in *Reed v. Town of Gilbert*. Both sides moved for summary judgment.

The district court found that Adams' claims are mostly ones that it brought, or could have brought, in a prior lawsuit against the City, so most of its claims are precluded. The court went on to find that even if they were not precluded by the earlier court actions, Adams' claims would fail on the merits. According to the court "[w]hether the Capitol Square should look like Times Square is a decision that Madison city government is entitled to make, even after *Reed*." The court discerns no constitutional infirmity in Madison's sign ordinance. The court granted summary judgment to the City and dismissed the case.