



June Case Law Update June 30, 2021

A summary of court opinions decided during the month of June affecting planning in Wisconsin¹

United States Supreme Court Opinions

Access Requirement Constitutes a Regulatory Taking

[Cedar Point Nursery v. Hassid](#) presented the U.S. Supreme Court with another opportunity to address the issue of regulatory takings. The case involved a California law that granted labor organizations a right to access an agricultural employer's property for the purpose of soliciting support for unionization. Under the law union organizers could be on the property for up to three hours per day, 120 days per year. Cedar Point Nursery and Fowler Packing Company sued to enjoin enforcement of the access regulation alleging it appropriated an easement for union organizers without compensation which was a *per se* taking under the Fifth Amendment to the U.S. Constitution (as applied to the states under the 14th Amendment).

In a 6-3 decision, the Court agreed that the access requirement constituted an uncompensated taking of private property in violation of the U.S. Constitution. The case follows the Court's precedent that establishes the right to exclude others as the most important stick in the bundle of property right even though the law only provided for temporary access.

The majority opinion acknowledges that government's access to private property to enforce criminal laws and health and safety inspections should not constitute a taking and government may still require that property owners grant a right of access as a condition of receiving certain benefits.

Federal Eminent Domain Power Allows Private Entities to Take State Property

In [PennEast Pipeline Co., LLC v. New Jersey](#), the State of New Jersey challenged PennEast Pipeline Co.'s use of the federal government's power of eminent domain. The Takings Clause of the Fifth Amendment to the U.S. Constitution ("nor shall private property be taken for public use, without just compensation") recognized the existence of the federal government's power of eminent domain. For centuries, governments have delegated the power of eminent domain to private parties.

In 1947, Congress amended the Natural Gas Act to authorize the Federal Energy Regulatory Commission (FERC) to delegate the federal government's power of eminent domain to private natural gas companies to acquire land to build interstate pipelines. In 2018 FERC granted PennEast Pipeline Co. a certificate of public convenience and necessity to construct a 116-mile pipeline from Pennsylvania to New Jersey. PennEast sought to condemn parcels of land owned by the State of New Jersey for the pipeline.

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

New Jersey challenged the use of eminent domain in this case and the case ultimately made its way to the U.S. Supreme Court where the Court addressed the issue of whether the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest.

New Jersey argued that an eminent domain action initiated in federal court to take land from a State is barred by the sovereign immunity of the States under the 11th Amendment to the U.S. Constitution. The 11th Amendment limits the ability of private parties to bring lawsuits against the States in federal court. Federal condemnation actions, such as that brought by PennEast, are initiated in federal court. The majority opinion of the Court, however, concluded that when the States ratified the U.S. Constitution, the States implicitly waived their sovereign immunity to be sued in federal condemnation actions. The majority also affirmed the ability of the federal government to delegate its eminent domain power to private entities.

The majority opinion was written by Chief Justice Roberts and joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh. Justices Barrett, Thomas, Kagan, and Gorsuch dissented.

Wisconsin Supreme Court Opinions

Inverse Condemnation Claim Untimely

[Southport Commons, LLC, v. Department of Transportation](#), 2021 WI 52, 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 that bisected Southport's property. In 2016 Southport received a survey and wetland delineation identifying a significant increase in the size 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.

Southport petitioned the Wisconsin Supreme Court to review the Court of Appeals decision. The Supreme Court granted the petition and affirmed the Court of Appeals decision agreeing that "occurred" does not mean "discovered." The Supreme Court also found that Southport failed to develop an argument that the damage to its property occurred gradually over a period of years so Southport did not raise an issue of material fact in the case.

Cooperative Boundary Plan Failed to Include City

[City of Mayville v. Department of Administration](#), 2021 WI 57, involved a challenged by the City of Mayville to a cooperative plan prepared under Wis. Stat. § 66.0307 by the Village of Kekoskee and the Town of Williamstown in Dodge County and approved by the Wisconsin Department of Administration (DOA). The Village of Kekoskee is surrounded wholly by the Town of Williamstown's territory. The plan provides for: (1) the "attachment" by the Village of all territory located in the Town of Williamstown

resulting in the elimination of the Town; (2) the renaming of the newly expanded Village of Kekoskee as the “Village of Williamstown”; and (3) the creation of a “Village of Williamstown Detachment Area” in portions of what would be the newly expanded Village territory which are adjacent to the City of Mayville. The City of Mayville is also surrounded wholly by the Town of Williamstown’s territory, and under the plan would be wholly surrounded by Village territory. DOA approved the plan and the City of Mayville challenged DOA’s approval in court. The circuit court reversed DOA’s approval of the plan finding that “Wis. Stat. § 66.0307 does not allow a cooperative plan ‘to be used to absorb an entire Township into a Village, as was done here.’” The Wisconsin Court of Appeals affirmed the circuit court’s decision.

According to the Court of Appeals, Wis. Stat. § 66.0307(2) requires that “[n]o boundary of a municipality may be changed or maintained under this section unless the municipality is a party to the cooperative [plan]” that changes the boundary. The Village Detachment Area in the plan allowed the City of Mayville to expand its boundaries through the detachment of territory from the Village of Williamstown. The Court of Appeals determined that the expansion of Mayville’s area envisioned by the Village Detachment Area would change Mayville’s boundary line so Mayville is required to be a party to the Plan under § 66.0307(2). The Court of Appeals concluded that DOA made an error of law in approving the plan because the plan did not include the City of Mayville as a party.

The Wisconsin Supreme Court granted a petition to review the Court of Appeals decision. The Supreme Court agreed with the Court of Appeals’ decision that Mayville should have been a part to the plan and affirmed the decision of the Court of Appeals. Both the Court of Appeals and the Supreme Court base their decisions on the failure to include Mayville as a party to the plan. Neither the Court of Appeals’ decision nor the Supreme Court’s decision addressed the circuit court conclusion that the cooperative planning statute cannot be used to absorb an entire town into a village.

Tax Assessment of Contaminated Property Appropriate

[Collison v. City of Milwaukee Board of Review](#), 2021 WI 48, involved a challenge to the City of Milwaukee Board of Review’s (Board) determination that property owned by Ronald Collison was properly assessed at a value of \$31,800. Located two blocks from Fiserv Forum, the new Milwaukee sports arena, the property includes a two-story steel and wood framed commercial building and an asphalt parking lot with space for approximately 12-15 vehicles. Collison argued that because the property is contaminated, he cannot sell it, and that accordingly the assessed value should be zero dollars. The City assessed the property using the income approach. Upon review, the Wisconsin Supreme Court concluded that by utilizing the income approach to value the property according to its highest and best use as a parking lot, the assessor properly considered the impairment of the value of the property due to contamination in arriving at a valuation pursuant to Wis. Stat. § 70.32(1m).

Wisconsin Court of Appeals Opinions

[No planning-related cases to report.]

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

[No planning-related cases to report.]