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Wisconsin Chapter

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For questions or comments, please contact:
Brian W. Ohm, JD
Dept. of Planning + Landscape Architecture
UW-Madison
925 Bascom Mall
Madison, WI 53706
bwohm@wisc.edu

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

United States Supreme Court Opinions

Justification Under RLUIPA Needed for Septic System Requirement to Apply to Amish Homes

Mast v. Fillmore County, 594 U.S. ___, involves a long-running dispute between officials in Fillmore County, Minnesota, and members of the Swartzentruber Amish community who reside in the County. In 2013, Fillmore County adopted an ordinance requiring homes have a modern septic system for the disposal of gray water (water used in dishwashing, laundry, etc.). The Swartzentruber Amish submitted a letter asking to be exempt from the requirement explaining that their religion forbids the use of such technology. The Minnesota Pollution Control Agency then filed an administrative enforcement action against 23 Amish families in the County demanding the installation of modern septic systems or face criminal penalties and civil fines.

The Amish filed suit in state court alleging the County's ordinance violated the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA). As an alternative, the Amish offered to install systems that clean gray water in large earthen basins filled with wood chips that filter water as it drains. These wood chip basins may be more primitive than modern septic systems, but other jurisdictions permit their use for the disposal of gray water. The County replied by filing a counterclaim seeking an order displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable if the Amish did not install septic systems within six months. The case proceeded to trial and the trial court sided with the County. The Minnesota Court of Appeals affirmed the decision and the Minnesota Supreme Court denied review of the case.

The U.S. Supreme Court granted review of the case, vacated the lower court's ruling, and remanded the case for further proceedings based on the Court's June decision in *Fulton v. Philadelphia*, 593 U.S. ___ (2021). In *Fulton*, a unanimous Court held that Philadelphia violated the First Amendment's protection for freedom of religion when the City terminated a foster care placement contract with Catholic Social Services (CSS) because CSS refused to certify same-sex couples as foster families.

Justice Gorsuch wrote a concurring opinion that provides direction to the Minnesota courts for the remand. According to Justice Gorsuch, *Fulton* makes clear that the Fillmore County misinterpreted RLUIPA. Under RLUIPA, "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest." Justice Gorsuch

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

states RLUPIA "requires the application of 'strict scrutiny.' Under that form of review, the government bears the burden of proving both that its regulations serve a 'compelling' governmental interest—and that its regulations are 'narrowly tailored.'"

Citing *Fulton*, Justice Gorsuch states: "Courts cannot rely on 'broadly formulated' governmental interests, but must 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants.' . . Accordingly, the question in this case 'is not whether the [County] has a compelling interest in enforcing its [septic system requirement] generally, but whether it has such an interest in denying an exception' from that requirement to the Swartzentruber Amish specifically." Gorsuch cites exemptions from the septic system mandate for campers, hunters, and owners of rustic cabins. As for the alternative approach suggested by the Amish, Gorsuch states that under RLUIPA, "It is the government's burden to show this alternative won't work; not the Amish's to show it will. '[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so.'"

Court Remands Takings Case in Light of *Knick*

The petitioners in Pakdel v. City and County of San Francisco, 594 U.S. ____ (2021), partially own a multi-unit residential building in San Francisco. When they purchased their interest in the property, the building was organized as a tenancy-in-common. Under that kind of arrangement, all owners technically have the right to possess and use the entire property, but in practice often contract among themselves to divide the premises into individual residences. Owners frequently seek to convert tenancy-in-common interests into condominium arrangements, which allow individual ownership of certain parts of the building.

San Francisco required that as a condition of converting a tenancy-in-common to a condominium the owner must first offer any tenant a lifetime lease. The petitioners sued in federal district court alleging that the lifetime lease requirement was an unconstitutional regulatory taking. The district court dismissed the case as not ripe since the petitioners had not sought compensation in state court.

Petitioners appealed the case to the Federal Court of Appeals for the Ninth Circuit. While the case was pending in the Ninth Circuit, the U.S. Supreme Court decided *Knick v. Township of Scott*, 588 U. S. ___, ___ (2019), which overruled the ripeness requirement and allowed property owners to initiate regulatory taking cases in federal court without first seeking compensation in the state courts. Rather than remand petitioners' claims in light of *Knic*k, the Ninth Circuit affirmed the district court's dismissal of the case noting that *Knick* left untouched the requirement that property owners may challenge only "final" government decisions.

A unanimous Supreme Court disagreed. According to the Court, "[t]he finality requirement is relatively modest." All a property owner must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" In this case, the Court found there was no question about the City's position requiring the lifetime lease as a condition of conversion to a condominium.

Something to look forward to . . . or not

The U.S. Supreme Court agreed to hear the appeal of a potentially important sign case during the Court's next term. The case *City of Austin v. Reagan National Advertising of Texas*, argues that the City's sign ordinance that treats on-premise digital signs differently than off-premise digital signs is not

content neutral in violation of the First Amendment following the Court's 2015 *Reed v. Town of Gilbert* decision.

Wisconsin Supreme Court Opinions

Court Clarifies DNR Authority to Consider Environmental Impacts of High-Capacity Wells

The Wisconsin Department of Natural Resources (DNR) is responsible for evaluating applications to operate high-capacity groundwater wells. For certain wells, the DNR must follow a specific environmental review process before approving the application. For all other wells, that process is not required, although the DNR sometimes still considers the potential environmental effects of a proposed well when evaluating the well's application. Clean Wisconsin, Inc. v. DNR, 2021 WI 72, involved eight well applications that fell into the latter category: a formal environmental review was not required, but the DNR had information that the wells would negatively impact the environment. Despite that knowledge, the DNR approved the applications after concluding it had no authority to consider the proposed wells' environmental effects.

Clean Wisconsin, Inc. and the Pleasant Lake Management District appealed that decision to the circuit court arguing that the DNR's decision was contrary to *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. In that case the Wisconsin Supreme Court held that the DNR had the authority and discretion to consider the environmental effects of all proposed high-capacity wells. The DNR argued that *Lake Beulah* is no longer good law because Wis. Stat. § 227.10(2m), enacted in 2011 as part of Act 21, limits an agency's actions to only those "explicitly required or explicitly permitted by statute or by a rule," and, for these wells, a formal environmental review was not required under Wis. Stat. § 281.34.3.

In a 4-2 decision, the Wisconsin Supreme Court held that the DNR erroneously interpreted the law when it concluded it had no authority to consider the environmental effects of the eight wells. According to the majority opinion, Wis. Stat. § 227.10(2m) does not alter the Court's analysis or conclusion in the *Lake Beulah* case. The Court found the Legislature had granted broad authority to consider the environmental impacts of high-capacity wells which met the "explicitly" requirements of Wis. Stat. § 227.10(2m). The Court remanded all eight well applications to the DNR.

DNR Has Authority to Impose Conditions on CAFO

The Wisconsin Supreme Court issued a companion case, Clean Wisconsin, Inc. v. DNR, 2021 WI 71, also addressing DNR's authority. The facts are as follows..Kinnard Farms, Inc. (Kinnard) operates a large concentrated animal feeding operation (CAFO) in the Town of Lincoln in Kewaunee County. In 2012, Kinnard wanted to expand its dairy operation by building a second site and adding 3,000 dairy cows. The expansion required Kinnard to apply to the DNR for reissuance of its Wisconsin Pollutant Discharge Elimination System (WPDES) to include both the original site and the proposed expansion. DNR reissued the permit.

Neighboring landowners who had private drinking wells and were concerned that Kinnard's proposed expansion would exacerbate current groundwater contamination issues petitioned for a contested case hearing alleging that the reissued WPDES permit was inadequate because, among other failings, it did not set a "maximum number of animal units" or "require monitoring to evaluate impacts to

groundwater." Following the hearing the administrative law judge (ALJ) ruled that the DNR needed to impose the conditions. The DNR sought an opinion on the matter from the Department of Justice (DOJ). The DOJ opined that the DNR did not have the authority to impose the conditions under Wis. Stat. § 227.10(2m) [discussed in the previous case summary]. The DNR Secretary issued an order reversing the ALJ's decision.

The neighboring sought judicial review of the matter in Kewaunee County Circuit Court and Clean Wisconsin filed a petition for judicial review in the Dane County Circuit Court. The two cases were consolidated in Dane County.

Like the above discussion summarizing the other *Clean Wisconsin v. DNR* case, in a 4-2 decision, the Wisconsin Supreme Court held that the DNR had the explicit authority to impose both the animal unit maximum and off-site groundwater monitoring conditions upon Kinnard's reissued WPDES permit, pursuant to the broad authority delegated by the Legislature to the DNR.

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.]