American Planning Association
Wisconsin Chapter

Making Great Communities Happen

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

April Case Law Update
April 30, 2022

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

United States Supreme Court Opinions

Off-premises/On-premises Distinction in Sign Code Not Subject to Strict Scrutiny

The sign code for the City of Austin, Texas, defined the term "off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." The definition was similar to the one used in the federal Highway Beautification Act. The code prohibited the construction of any new off-premises signs but allowed existing off-premises signs to remain as "non-conforming signs" if they did not "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." By contrast, the code permitted the digitization of on-premises signs.

Reagan National Advertising of Austin, LLC, an outdoor-advertising company that owns billboards in Austin, applied for permits from the City to digitize some of its off-premises billboards. The City denied the applications. Reagan sued the City alleging that the code's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment because it was content-based in violation of *Reed v. Town of Gilbert*, 576 U. S. 155 (2015). The federal district court held that the off-premises/on-premises distinction in the City's sign code was not content-based. The decision was appealed and the Federal Court of Appeals for the Fifth Circuit disagreed and reversed the district court's decision. According to the Court of Appeals decision, the City's code required a reader to inquire "who is the speaker and what is the speaker saying," "both hall-marks of a content-based inquiry" requiring strict-scrutiny of the justification for the ordinance by the courts (a very difficult standard to meet). The U.S. Supreme Court agreed to review the case.

In City of Austin, Texas v. Reagan National Advertising of Austin, LLC., a decision written by Justice Sotomayor (joined by Chief Justice Roberts, and Justices Breyer, Kagan, and Kavanaugh), the U.S. Supreme Court reversed the decision by the Fifth Circuit Court of Appeals and remanded the case to the lower courts for further proceedings. According to the majority opinion, the sign-code in the *Reed v. Town of Gilbert* case singled out specific subject matter for differential treatment. The Town of Gilbert developed different standards for 23 different categories of signs (political signs, ideological signs, directional signs, etc.). The *Reed* Court determined that these restrictions were content based.

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

Unlike the sign code at issue in *Reed*, however, Austin's off-premises/on-premises distinction did not single out any topic or subject matter for differential treatment. "[T]he City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny." The majority notes that "the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions." The majority opinion reaffirms the Court's longstanding precedents related to regulating off-premises signage, including prohibiting billboards.

Justice Breyer filed a concurring opinion arguing that the Court's reasoning in the *Reed* case was wrong. Justice Alito filed an opinion concurring in the judgment in part and dissenting in part. He agreed that the decision of the Fifth Circuit Court of Appeals should be reversed but on remand the courts should further investigate the distinction made in the City's code. For example, he notes that a sign placed on a commercial business stating "Attend City Council meeting to speak up about Z" would appear to fall within the definition of an off-premises sign and would thus be disallowed. Justice Thomas filed a dissenting opinion in which Justices Gorsuch and Barrett joined. The dissent argues that Austin's code is content-based and that the majority opinion replaces the *Reed* decision "with an incoherent and malleable standard."

Wisconsin Supreme Court Opinions

Residential Property Classification Supported By Evidence

Nudo Holdings, LLC, v. Board of Review for the City of Kenosha, 2022 WI 17, involved a dispute about whether the city tax assessor correctly classified a parcel as residential rather than agricultural. Under Wisconsin's agricultural use value assessment law, agricultural land is taxed according to it's value for agricultural use. This use value assessment typically results in a significantly lower comparative tax burden for agricultural property.

In 2017 Nudo Holdings purchased an undeveloped 8.9-acre parcel of land in the City of Kenosha for $100,000. The parcel was tax exempt at the time of purchase. For 2018 tax purposes, the city assessor classified the parcel as residential and assessed the value at $10,000 per acre. Nudo Holdings challenged the assessment arguing the parcel qualified as agricultural land. The Board of Review upheld the residential classification. Nudo Holdings challenged the Board's decision in circuit court and the circuit court reversed the board's determination concluding the Board incorrectly required the parcel to have a business purpose to qualify as agricultural land. Following the Wisconsin Supreme Court's 2019 decision in *Ogden Family Trust v. Board of Review*, a property owner need not have a business purpose for agricultural activity to establish agricultural use.

The circuit court remanded the case to the Board of Review to reconsider its decision based on the Ogden case. Nudo Holdings presented evidence of some walnut trees on a portion of the property and Christmas trees scattered around the property. However, Nudo Holdings was not able to point to any agricultural practices taking place on the property such as pruning or pest control or any evidence of harvesting walnuts or Christmas trees. The city assessor characterized the parcel as residential because the City's plans designated the parcel for residential development and there was a lack of physical evidence or any

other indication that the land was being farmed. The assessor testified that it was "a piece of land that has some things growing on it." The Board again upheld the assessor's classification of the property as residential. Nudo Holdings appealed the Board's decision to the circuit court and this time the trial court affirmed the Board's determination. Nudo Holdings appealed the circuit court's decision to the Wisconsin Court of Appeals and the Court found there was substantial evidence to support the City's determination that the land was not devoted primarily to agricultural use as required by the law. Nudo Holdings petitioned the Wisconsin Supreme Court to review the case and the Court granted the petition. The Wisconsin Supreme Court affirmed the decision of the Court of Appeals in a 4-3 decision.

The majority opinion focuses on the language in Wisconsin's use value assessment law that the qualifying land for the reduced assessment must be "devoted primarily to agricultural use." According to the majority, "agricultural use--even if it is the only 'use' the land is put to--does not mean the land is 'devoted primarily to agricultural use.' '[D]evoted primarily' is the key phrase here. Being 'devoted' to something means to be given over to and committed to that thing. And 'primarily' means chiefly or mainly. As a matter of plain English, an agricultural classification is only proper if the land is chiefly given over to agricultural use." [Citations omitted.]

The majority opinion also noted that the fact the land was vacant did not mean it was inappropriate to classify to land for residential use. Residential use is determined by the presence of dwellings or if residential use is likely or planned for the land.

Finally, the Court majority found the conclusion of the Board was supported by substantial evidence standard. The Board relied on the testimony of Mr. Nudo and the city assessor. The Court acknowledges that "substantial evidence" is "perhaps misnamed in view of modern parlance." According to the Court, substantial evidence test is not a high bar. "Substantial evidence" is evidence that reasonable persons could reach the same decision as the board and that the Court takes a "highly deferential" approach to the board's findings whereby the Court "may not substitute our view of the evidence for that of the board."

Wisconsin Court of Appeals Opinions

Condition Imposed on Land Division Constituted a Regulatory Taking

In Fassett v. City of Brookfield, the Court of Appeals held that The City of Brookfield's requirement that Fassett dedicate part of her property and pay for the construction of a new public street constituted an unconstitutional taking.

Fassett owns a rectangular 4.93-acre parcel of land (the Property) located between two subdivisions in the City of Brookfield. The two subdivisions each have a dead-end street named Choctaw Trail that terminates at approximately the middle of Fassett's property. In 2018, Fassett submitted a written request to split her property into four pieces, three single-family home sites and one out lot with wetlands to be dedicated to the City. Fassett's request included maps of three conceptual plans: (1) creating a cul-du-sac connected to the eastern portion of Choctaw Trail, but leaving the dead end on the western side; (2) connecting both Choctaw dead ends with a through street; and (3) using a shared driveway for the two proposed southern lots from the east, leaving the two Choctaw Trail dead ends in the adjacent subdivisions. Fassett stated she preferred the third option but the City approved the second option. Fassett then submitted a certified survey map creating the lots without the connecting road. The City

rejected Fassett's application. Fassett then sued the City for an unconstitutional taking and the circuit court held that the required land dedication and construction of the street connection as conditions for approval of Fassett's proposed land division violated the takings clauses of the United States and Wisconsin Constitutions. The City appealed the decision to the Wisconsin Court of Appeals and the Court of Appeals affirmed the circuit court's decision that the conditions were a regulatory taking.

The Court of Appeals' decision cites the U.S. Supreme Court's two-part "*Nollan/Dolan*" test for evaluating the constitutionality of exactions. First, government must establish an "essential nexus" between a legitimate governmental interest and the exaction (*Nollan*). Second, the government must demonstrate "rough proportionality" between the exaction and the impact cause by the development (*Dolan*). The Court of Appeals concluded the City failed to meet its burden of proof to show that the property dedication and street-connection conditions are required to mitigate negative impacts caused by the proposed land division. According to the Court, the City's condition seeks to mitigate, or improve, the impacts of the "status quo"—the existing dead-end streets. That condition was not created by Fassett's proposed land division, but by the platting of the earlier subdivisions abutting Fassett's property. The Court notes that when denying Fassett's application, the City repeatedly pointed to the City's goal of minimizing dead-end streets but the City failed to identify any anticipated impacts caused by the proposed land split, much less impacts that would be roughly proportional to the costs of the exaction. According to the Court, "there is not even an identified burden, i.e., increased traffic demands generated by the development that would necessitate connecting the two dead-end streets. It therefore follows that there can be no rough proportionality vis-à-vis the through-street condition. . ., elimination of pre-existing needs does not establish a constitutional basis to require that Fassett bear the costs of putting into place a public through street to benefit the public at large."

The case is recommended for publication in the official reports.

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

[No planning-related cases to report.]