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

March Case Law Update
March 31, 2023

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

Wisconsin Supreme Court Opinions

[No planning-related cases to report.]

Wisconsin Court of Appeals Opinions

The State and Local Governments Cannot Condemn Land for Sidewalks

The State Budget Bill for 2017, 2017 Wis. Act 59, amended Wis. Stat. § 32.015 and numerous sections of the Wisconsin Statutes to prohibit the use of the eminent domain (condemnation) to acquire land for "pedestrian ways." In *Sojenhomer LLC v. Village of Egg Harbor*, the Wisconsin Court of Appeals addressed the issue of whether a sidewalk is a "pedestrian way" thus preventing the Village from condemning land for a sidewalk.

Sojenhomer owns a parcel of real property nestled between County Highway G and State Highway 42 where the two roads converge in the Village of Egg Harbor in Door County. Sojenhomer's property is home to the Shipwrecked Brew Pub and Restaurant. Beginning in 2015, the Village began to discuss improving the safety of Highway G, which focused on the need for a sidewalk. The Village had received numerous complaints regarding the road, including that the road was too narrow and lacked both adequate parking and a safe place for pedestrians to walk forcing them to walk on Highway G which abutted the west side of Sojenhomer's property.

The Village developed a plan to address these deficiencies and in early 2020 issued an order authorizing the Village to use eminent domain to acquire certain real estate to complete the proposed improvements. The Village sent Sojenhomer a written offer to purchase fee title to 0.009 acres of additional right of way and a temporary limited easement of 0.071 acres of Sojenhomer's property for right of way reconstruction of Highway G. Sojenhomer obtained an appraisal of the Village's proposed acquisition and temporary limited easement, which valued Sojenhomer's loss at nearly three times the amount offered by the Village. Sojenhomer sent that appraisal to the Village and the Village served Sojenhomer a jurisdictional offer nearly doubling the amount of money originally offered. Sojenhomer rejected that offer.

Sojenhomer filed this action seeking to enjoin the Village from acquiring its property through condemnation. Sojenhomer alleged that the Village was only seeking to condemn its property to construct a sidewalk in violation of Wis. Stat. § 32.015. The Village filed an answer to Sojenhomer's complaint

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

arguing, among other things, that Wis. Stat. § 32.015 does not prohibit a municipality from condemning property to install a sidewalk because a sidewalk is not a "pedestrian way," as that term is used in § 32.015.

The circuit court agreed with the Village noting that that a sidewalk is considered part of a highway or street under Wis. Stat. §§340.01(58) and 66.0907, and that a sidewalk is "within the road right of way." In contrast, the court observed that a pedestrian way "is a walk for pedestrians, but it is not part of any highway or street." The court therefore determined that "no sidewalks are pedestrian ways and no pedestrian ways are sidewalks. This is true even though both sidewalks and pedestrian ways are walks for use of pedestrian travel."

Sojenhomer appeals the circuit court's decision to the Wisconsin Court of Appeals. The Court of Appeals disagreed with the lower court's decision and reversed and remanded the case for further proceedings. The Court of Appeals examined the way the term "sidewalks" and "pedestrian ways" are used in the statutes and concluded that the term "pedestrian ways" in Wis. Stat. §32.015 includes sidewalks because a sidewalk is a walk designated for pedestrian travel therefore falls within the general definition of "pedestrian way".

The decision is recommended for publication in the official reports.

APA-WI member Daniel J Lindstrom, Director of Development Services for the City of De Pere, shared with me the following directive from the Wisconsin Department of Transportation: As a result of the *Sojenhomer* decision, "all acquisition activities on parcels needed for sidewalks must be suspended immediately and without exception until further notice."

Gravel Construction Path is a Utility Structure Under State Shoreland Zoning Law

In *Delavan Lake Sanitary District v. Walworth County Board of Adjustment*, the Delavan Lake Sanitary District appealed an order of the circuit court affirming the Walworth County Board of Adjustment's decision to deny the District a permit to lay a gravel path over land near Delavan Lake. The District's wastewater collection system serves residences in the View Crest subdivision, located at the west end of Delavan Lake. The District holds an easement on land owned by the Delavan Lake View Crest Estates Corporation "to lay, operate and maintain a sewer [system]."

The District became concerned that the pipes and other system components in the View Crest subdivision were deteriorating, at risk of failure, and in need of immediate repair. The District needed to bring large vehicles and other equipment onto its easement for inspections and repairs. It concluded that portions of its easement needed to be reinforced so that they could support the weight of this equipment. The District applied to the Walworth County Land Conservation Division for a construction-site-erosion-control permit to lay a gravel path on portions of its easement but the County denied the District's application. Among its reasons, the County cited the District's failure to obtain the Walworth County Zoning Division's approval for the project and the County's determination that construction of the gravel path would violate its shoreland zoning ordinance.

The District appealed the denial to the County Board of Adjustment arguing the project was a "utility structure" and thus exempt from the County's shoreland zoning ordinance under Wis. Stat. § 59.692(1n)(d)5. The Board disagreed and upheld the denial. The District then appealed the denial to the circuit court. The circuit court agreed with the Board that the proposed gravel path was not a "utility

structure" under Wis. Stat. § 59.692(1n)(d)5 and thus not exempt from the County's shoreland zoning ordinance. The District then appeals to the Wisconsin Court of Appeals.

The Court of Appeals held that the Board proceeded under an incorrect theory of law. The Court of Appeals concluded the District's proposed gravel path constitutes a "utility structure" under Wis. Stat. § 59.692(1n)(d)5. The Court also found that Board did not make any findings as to whether a "feasible alternative location outside of the setback exists" for the proposed gravel path as required under Wis. Stat. § 59.692(1n)(d)5 to support a denial. According to the Court, the absence of any findings or evidence to the contrary, a denial on this basis would be arbitrary and unreasonable. Finally, the Court found no findings by the County whether the gravel path would be "constructed and placed using best management practices to infiltrate or otherwise control storm water runoff" as required by Wis. Stat. § 59.692(1n)(d)5. The Court of Appeals reversed the denial and remanded the case to the Board with directions for further consideration.

The decision is recommended for publication in the official reports.

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

Variance Procedure for Signage Did Not Violate the First Amendment

Monroe County, Indiana regulates signage as part of the County's zoning ordinance. GEFT Outdoor, a billboard company, leased property along Interstate 65 in Monroe County, Indiana, and wanted to erect a digital billboard. The County's ordinance did not allow the billboard so GEFT applied to the Monroe County Board of Zoning Appeals for a variance from the sign standards in the zoning ordinance. The board denied the variance. GEFT then sued the County in federal court arguing in apart that the Board had too much discretion over whether to grant variances which violated free speech protections under the First Amendment to the U.S. Constitution. The Seventh Circuit disagreed, finding that Monroe County's variance provision did not give so much discretion to the Board of Zoning Appeals that it violates the First Amendment.

The case is GEFT Outdoor, LLC v. Monroe County.