



# APA-WI Court Case Summaries

A summary of court opinions decided during the months of June - October 2023 affecting planning in Wisconsin

## Wisconsin Court of Appeals

- [State ex rel. Kurtzweil v. Sawyer Cnty. Zoning Bd. Of Appeals, 2023 WI App 43](#) (Published July 25, 2023).
  - **Summary:** Doug Kurtzweil owns property in Sawyer County adjacent to the Old Arrow Resort. The Old Arrow Resort consists of two habitual structures (cabins) on a single parcel, contrary to County zoning ordinances. However, because the Old Arrow Resort pre-dates the zoning ordinance, it enjoys legal non-conforming status. The cabins were used sparingly from 1978-2017. In 2017, the cabins were renovated to be used as short term rentals.
  - Mr. Kurtzweil asked the Sawyer County Zoning Department for a determination the cabins constituted use as a “resort” pursuant to the Sawyer County Zoning Code. The zoning administrator responded that it did not. Kurtzweil appealed the administrator’s determination to the Sawyer County Board of Appeals, which upheld the administrator’s decision.
  - Unhappy with the decision, Kurtzweil filed a complaint in Circuit Court, seeking certiorari review of the Board of Zoning Appeals’ decision. Despite property being served with the lawsuit, the Board chose not to file an answer within 45 days. Because of this, Kurtzweil filed a motion for default judgment. The Board responded, arguing that it was not procedurally required to file an answer to a request for certiorari. The Court of Appeals disagreed, and held that the Wisconsin statutes provide for multiple options to commence a certiorari action. In this case, Mr. Kurtzweil chose to do so by filing a summons and complaint, which the board was required to answer. Because it did not, Mr. Kurtzweil prevailed in the matter via default judgment.
  - **Key Takeaway:** If a local body politic is served with a summons and complaint, be sure to file an answer or risk default judgment.

## Wisconsin Supreme Court

- [Miller v. Zoning Bd. of Appeals, 2023 WI 46](#) (published June 6, 2023)
  - **Summary:** The Lyndon Station Village Board of Trustees granted a rezoning request upon a split vote. The deciding vote was cast by a trustee who was the mother of the applicant. Thomas Miller, a citizen in opposition of the re-zone, alleged that the trustee had a conflict of interest that should have precluded her from casting the deciding vote. Miller appealed the Village Board’s decision to the Village Zoning Board of Appeals



(ZBA). The ZBA upheld the Village Board’s decision. Miller sought certiorari review of the ZBA’s decision. The circuit court reversed on the grounds that the trustee’s apparent conflict of interest violated due process because that trustee was not a fair and impartial decision maker. However, the court of appeals reversed the circuit court and reinstated the ZBE decision. The supreme court affirmed the court of appeals, concluding that no due process rights to an impartial decision maker exist where legislative bodies as applied to legislative acts. This is distinguishable from when a legislative body is acting in an adjudicative capacity, such as a licensing hearing. Using that rationale, the supreme court held that a zoning change, which is ultimately a change in the law, is a purely legislative function and there is no right to an impartial decision maker for such decisions.

- **Key Takeaway:** Carefully identify the capacity in which your board, commission or committee is acting. If it is acting in a quasi-judicial capacity, due process must be afforded to all parties involved. If, however, the action is legislative, there is no concern as to whether members of the board, committee or commission have pre-judged the matter or have otherwise cast their vote for reasons that would not otherwise satisfy due process.
  
- [Wisconsin Prop. Taxpayers Inc. v. Town of Buchanan, 2023 WI 58](#) (published June 29, 2023)
  - **Summary:** In a case that was closely followed by budget-strapped municipalities across Wisconsin, the supreme court prohibited the Town of Buchanan’s attempt to impose a Transportation Utility Fee (TUF). More specifically, the town was not allowed to collect revenue from such a fee without decreasing its levy by a proportional amount.
  - In response to a budgetary concern over long term maintenance of its roads, the Town of Buchanan held a referendum asking town residents for their opinion as to how to deal with the financial shortfall. The three choices on the ballot were: (1) raising the property tax levy, (2) imposition of special assessments against benefitted properties or (3) creation of a TUF. The voters chose a TUF, and the Town Board adopted a corresponding ordinance. The fees collected from the TUF resulted in revenues 34% above the town’s statutory levy limit.
  - A group called Wisconsin Property Taxpayers Inc. (WPT) filed suit against the town alleging that the TUF violated municipal levy limit restrictions. The supreme court agreed. The court found that the TUF was actually a tax, and that the town’s levy could only be increased upon a referendum approving such an increase, which was not done in this case. Additionally, and separately, the court decided that the TUF was an illegal tax because its formula was derived from the class or a property (i.e. commercial versus residential) and not the value of the property, which is unlawful.
  - **Key Takeaway:** Be cautious when your municipality is considering a new fee, especially if the proposal attempts to avoid an offset against the municipal levy. Consider Wis. Stat. §66.0602(2m)(b)1 prior to your community approving such an ordinance.



## 7<sup>th</sup> Circuit Court of Appeals

- *Willow Way, LLC v. Vill. of Lyons, Illinois*, 83 F.4th 655 (7th Cir. 2023) (published October 5, 2023).
  - **Summary:** After receiving and ignoring multiple notices from the Village of Lyons to repair or raze a dilapidated residence, the property owner (Willow Way, LLC) sued the Village in federal court after the village demolished the structure and sold the property at auction to pay for the costs of demolition. Willow Way alleged that the village's actions constituted a taking without just compensation and violated principles of due process. The 7<sup>th</sup> Circuit decided that the demolition of a structure that constitutes a nuisance does not require compensation. Furthermore, the property owner's due process rights were satisfied by the notices that were delivered. The court also dismissed Willow Way's appeal on procedural grounds.
  - **Key Takeaway:** Always triple check that notice requirements are satisfied prior to taking action against private property. It is just as important to memorialize such notices through photographs (in the case of placarding) and receipts (such as certified mail), as it is to provide the actual notices.

The APA-WI Court Case Summaries are brought to you by Chris Smith, Attorney, and Samuel Schultz, Urban Planner, both of Von Briesen in collaboration with WI-APA Legislative Committee, Committee Chair, Heather Cleveland. If you have questions or concerns, please contact either Sam Schultz, [samuel.schultz@vonbriesen.com](mailto:samuel.schultz@vonbriesen.com), or Heather Cleveland, [heather@greenbicycleco.com](mailto:heather@greenbicycleco.com).