



APA-WI Court Case Summaries

A summary of court opinions decided during December 2023 affecting planning in Wisconsin.

Wisconsin Court of Appeals

[Sojenhomer LLC v. Vill. of Egg Harbor, No. 2022AP1991, 2023 WL 8596080](#) (Wis. Ct. App. Dec. 12, 2023)*

- **Summary:** This case deals with the denial of a conditional use permit application for the expansion of a restaurant to add a beer garden at an establishment called “Shipwrecked” in the Village of Egg Harbor. This application apparently caused quite the stir in Egg Harbor, because the matter lingered on through six (!) plan commission meetings. Additionally, members of the community started a GoFundMe page to raise funds for attorney fees to assist in defeating this application. The GoFundMe page included a graphic that warned that Egg Harbor could be known as Keg Harbor if this application were to be approved.
- Two important details should be noted from the Village’s plan commission record. First, two plan commission members donated to the GoFundMe account. Second, multiple commissioners acknowledged that the application had satisfied all of the requirements set forth in the Village Code.
- The two commissioners that donated to the fundraising effort did not completely recuse themselves from the proceedings, and the Plan Commission ultimately denied the application.
- Unhappy with the decision, Shipwrecked filed a complaint in Circuit Court, seeking certiorari review of the Plan Commission’s decision. The trial court agreed with Shipwrecked, and overturned the Village’s denial of the conditional use permit. The primary basis of the trial court’s decision was the violation of due process due to the two commissioners that donated to the fundraising effort to block the permit. In a rather extreme move, rather than remand the application back to the plan commission, the trial court simply granted the conditional use permit without conditions.
- The Village appealed, and largely abandoned any argument that the denial was proper. Instead, the Village focused on the remedy and urged the Court to remand the case back to the Plan Commission. Unfortunately for the Village, the Court of Appeals affirmed the trial court on all counts. The court reasoned that the participation of the two commissioners had “poisoned the well,” and it could not be un-poisoned. Additionally, the court noted that because the application apparently met all Village Code requirements, there was no other legal conclusion to which the Plan Commission could come. Thus, Shipwrecked’s conditional use application was approved.
- **Key Takeaway:** Make sure that due process rights are protected when conditional use applications are considered. The world has changed since 2017 Act 67, and this decision shows that a court will no longer uphold CUP denials based on public outcry alone.
- ***note that a publication decision has not yet been determined for this opinion, thus as of this writing it cannot be cited as precedent.**



[Associated Builders & Contractors of Wisconsin, Inc. v. City of Madison, 2023 WI App 59](#), 409 Wis. 2d 660, 998 N.W.2d 549

- **Summary:** In July 2021, a group of trade associations sued the City of Madison over the City’s “Bird-Safe Glass” ordinance (the “Ordinance”). The plaintiffs argued that the Ordinance, which requires the installation of “bird safe” mitigation measures on new building construction and expansion, was preempted by state statutes. Specifically, the plaintiffs alleged that portions of Wis. Stat. §101.02 (the “Statute”) prohibited a municipality from enacting any building code requirements that do not strictly conform to the Statute.
- In making its decision, The Court of Appeals examined the Statute. The Court noted that intent of the Statute was to ensure a uniform building code throughout the state to ensure that all places of employment and public buildings were safe in terms of notification, egress and escape in the case of fire, and such freedom from danger to adjacent buildings. The Statute expressly prohibits a local government from adopting an ordinance more restrictive than the Statutory minimums for constructing, altering, or adding to public buildings or buildings that are places of employment.
- The Court then applied Madison’s ordinance against the Statute. Importantly, the Bird-Safe Glass ordinance was a zoning ordinance, not a building code ordinance. However, adopting such an ordinance in the zoning code versus the building code is not, by itself, the determining factor. The Court examined how to define whether something is a building code standard. If the Bird-Safe Glass ordinance was actually a building code standard masquerading as a zoning ordinance, the plaintiffs would have likely prevailed. Unfortunately for them, the Court did not make that finding. Although sections of the applicable building code promulgated by the legislature includes sections on glass and glazing, the Court found those requirements to be related to the safety of the structure itself, which supported the spirit of the Statute. By contrast, the Bird-Safe Glass ordinance requires visual markings on the pane of glass, akin to a design standard typically found in a zoning code.
- **Key Takeaway:** When drafting ordinances that could arguably be construed as a building code standard, make sure to include a preamble explaining why the ordinance truly belongs in the zoning code. Such language may assist in defending a similar lawsuit, and may deter them altogether.

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, or Heather Cleveland, heather@greenbicycleco.com.