



American Planning Association
Wisconsin Chapter

Making Great Communities Happen

August 2007 - August 2008 Planning Related Court Decisions

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I. Local Government Authority

Transfer of Development Rights Case Ripe for Review

In *Olson v. Town of Cottage Grove*, 2008 WI 51, the Wisconsin Supreme Court held that a challenge to a town's transfer of development rights program was ripe for review by the courts. The Town of Cottage Grove in Dane County adopted a transfer of development right (TDR) program as part of the Town's subdivision ordinance in 2002. The purpose of the Town's TDR program is to preserve farmland and the rural characteristics of the area and maintain community separation between the Village of Cottage Grove and the City of Madison. The TDR program requires that developers seeking to subdivide land in areas designated for residential uses in the Town's comprehensive plan acquire development rights from areas designated as agricultural or open space/park districts in the Town's comprehensive plan.

Olson is a real estate developer who owns 69.72 acres of land that falls within a medium density residential district. A week prior to the adoption of the TDR program, Olson submitted a preliminary plat of a proposed development to the town. The plat was ultimately approved by the Town subject to the requirement that Olson acquire 10 TDRs and transfer them to the Town and County as provided in the Town's subdivision ordinance. Olson claimed he was unable to acquire the 10 TDRs. Olson then sued claiming: 1.) the Town's TDR program imposes an illegal exaction upon land division as a final condition of plat approval without statutory authorization in Chapter 236 of the Wisconsin Statutes enabling local regulation of the division of land; 2.) the ordinance constitutes an unlawful impact fee under Wisconsin's impact fee law in section 66.0617 of the Wisconsin Statutes; 3.) since the Town is under county zoning, the town did not have county approval to adopt the ordinance; and 4.) the application of the ordinance constituted a regulatory taking under the United States and Wisconsin Constitutions.

The Wisconsin Supreme Court's decision focuses exclusively on two procedural issues and DOES NOT address these claims raised by Olson. The procedural issues are the standard of review by the courts for these types of cases and whether the case was ripe for review. The circuit court and the Wisconsin Court of Appeals had held that the case was not ripe and therefore never addressed the merits of the claims made by Olson. The Supreme Court held that the standard for review is de novo giving the courts broader review authority, rather than only being limited to reviewing the record before the court for abuse of discretion. The Court also determined the facts of the case were ripe for review in that they presented a justiciable controversy.

The end result is that the Wisconsin Supreme Court sent the case back to the circuit court to address the merits of the claims made by Olson. The fundamental issue about local government authority to adopt transfer of development rights programs will need to wait for the resolution of this case.

Moratoria

On February 28, 2008, the Wisconsin Court of Appeals confirmed the authority of local governments to impose temporary moratoria on land divisions under Chapter 236 of the Wisconsin Statutes. The case is entitled *Wisconsin Realtors v. Town of West Point*, 2008 WI App. 40, 747 N.W.2d 68.

The facts of the case are relatively straight forward. In September 2005, the Town of West Point in Columbia County adopted an ordinance establishing a temporary stay on the acceptance, review, and approval of any applications for a land division or subdivision while the Town completed an update to its comprehensive plan. The Town, which is under county zoning, relied on the general law enabling the local regulation of subdivisions under Section 236.45(2) of the Wisconsin Statutes. The Wisconsin Realtors Association, along with the Wisconsin Builders Association, initiated a lawsuit arguing that section 236.45(2) of the Wisconsin Statutes did not authorize a town-wide moratoria because (1) section 236.45 authorizes only prohibitions on development “in areas,” not all areas of a municipality; (2) the Town’s ordinance failed to make applicable all of the provisions of Chapter 236; and (3) allowing moratoria under Chapter 236 would render meaningless the express grant of authority of section 62.23(7)(da) that authorizes municipalities that have not adopted a zoning ordinance to freeze existing uses while a “comprehensive zoning plan” is being prepared .

The Circuit Court for Columbia County decided that the Town of West Point had the authority under 236.45 to impose a moratorium. The Realtors Association and the Builders Association appealed the decision to the Wisconsin Court of Appeals. The Wisconsin Court of Appeals initially determined that, since the case raised issues that had never been decided before in Wisconsin, the case should be decided by the Wisconsin Supreme Court. The Wisconsin Supreme Court therefore did not issue an opinion in the case and certified the case to the Wisconsin Supreme Court. The Wisconsin Supreme Court accepted certification of the case. Following a briefing of the case and oral argument of the case, the Wisconsin Supreme Court deadlocked in a rare 3-3 tie. The seventh justice, Annette Ziegler, did not participate because of a conflict of interest due to her receiving campaign contributions from the Realtors and Builders. The Wisconsin Supreme Court then sent the case back to the Court of Appeals to finally decide the case.

The Wisconsin Court of Appeals disagreed with all the arguments made by the Realtors and Builders and held that municipalities do have authority under section 236.45(2) of the Statutes to impose a temporary prohibition on land divisions during the development of a comprehensive plan. It is not certain whether the Realtors Association or the Builders Association will petition to have the Wisconsin Supreme Court review the case. The case will serve as precedent for similar cases in other municipalities . . . MAYBE

Unhappy with the result, the Realtors and Builders Associations now want the Wisconsin Supreme Court to review the case again. To avoid a similar 3 to 3 tie vote, the Associations are asking the Wisconsin Supreme Court to rule that campaign contributions to a Supreme Court Justice are not grounds for not participating in the case. If the Court refuses, the Associations are asking that the Court adopt a new rule governing judicial conduct that states that receiving campaign contributions is not a basis for not participating in a case.

Stay tuned.

Town Driveway Ordinance Is A Valid Exercise of Town Police Power Authority

*Unpublished Wisconsin Court of Appeals Opinions of Note [**Unpublished Decisions Have Little Precedential Value**]*

The unpublished Wisconsin Court of Appeals in *Cook v. Town of Greenfield* presents an interesting discussion of the authority of towns with village powers to adopt restrictions on the length of driveways under their general police power authority. The Court of Appeals confirmed that towns with village powers have broad police powers under section 61.34 of the Wisconsin Statutes which confers the “power to act for the government and good order of the [town], for its commercial benefit and for the

health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means.”

The Town of Greenfield in Sauk County adopted a driveway ordinance limiting the length of driveways to 400 feet. The Court of Appeals upheld the ordinance as an appropriate exercise of the Town’s police powers and held that the ordinance was not a zoning ordinance (the Town is under County zoning and hence prevented from adopting its own zoning).

II. Zoning

Zoning Districts Must Include Permitted Uses

In July 2008, the Wisconsin Supreme Court addressed the basic issue of whether a zoning district must include some permitted uses. The case, *Town of Rhine v. Bizzell*, 2008 WI 76, involved the unincorporated community of the Town of Rhine in Sheboygan County north of Milwaukee. The Town had a zoning ordinance that included a “B-2 Commercial Manufacturing or Processing” district that expressly stated “[t]here are no permitted uses” and “[a]ll uses are conditional”. The ordinance listed six categories of conditional uses for the district: (1) fabrication of consumer or industrial commodities; (2) garbage, rubbish, offal, industrial waste and dead animal reduction or disposal; (3) quarrying; (4) mining and ore processing; (5) salvage yards for wood, metals, papers and clothing; and (6) stockyards.

The case arose after a private off-highway vehicle club purchased 77.2 acres of land zoned B-2 in 2003 and used the property for riding all-terrain vehicles (ATV). At the time of the purchase, the land had been zoned B-2 for 20 years. In 2004, the Town informed the club that it needed a conditional use permit to use the land. The club applied for a conditional use permit but the Town denied the permit. The club also applied to rezone the property but that request was also denied by the Town. The Town then sued to stop the ATV use. The Town alleged two causes of action. First, that the ATV uses violated the Town’s public nuisance ordinance. And second, the Town asked for a determination of whether the club was violating the Town’s zoning ordinance.

The trial court held that the town lacked standing to raise the public nuisance claim because the property at issue was not a public place. The trial court also determined that the Town’s zoning ordinance was unconstitutional. The Town appealed the trial court’s decision to the Wisconsin Court of Appeals. Because of the importance of the fundamental question presented in the case, the Wisconsin Court of Appeals did not issue an opinion in the case and certified the case to the Wisconsin Supreme Court. The Wisconsin Supreme Court accepted certification of the case.

The Wisconsin Supreme Court agreed with the trial court that the B-2 zoning district was unconstitutional. The Wisconsin Supreme Court found that the Town’s zoning district was arbitrary and unreasonable because it precluded any uses as a matter of right in the district. According to the Court, the Town’s precluding uses as a matter of right in the B-2 District bore no substantial relation to the public health, safety, morals or general welfare and hence was a violation of the Constitutional guarantee of substantive due process. The Court noted that the town’s exclusive reliance on conditional use permits “opens the door to favoritism and discrimination.” However, the Court did state that there may be limited circumstances, such in the case of floodplain zoning, in which not allowing any permitted uses is valid because the restriction bears substantial relation to public health, safety, morals, or welfare. The Supreme Court also held that the trial court had applied the wrong definition in the public nuisance claim and sent that issue back to the trial court for a new hearing.

To support its decision on the need for permitted uses in the zoning district, the Wisconsin Supreme Court cited several zoning treatises and publications of the American Planning Association including *Zoning Practice* and its predecessor *Zoning News*. Several issues of *Zoning Practice* play a prominent role in the Court’s opinion. The Court cited S. Mark White, “Classifying and Defining Uses and Building Forms: Land-Use Coding for Zoning Regulations,” *Zoning Practice* (September 2005), to note that conditional uses are different than permitted uses: “While a permitted use is as of right, a conditional use does not provide that certainty with respect to land use.” In addition, the Court quoted extensively from Gail Easley, “Conditional Uses: Using Discretion, Hoping for Certainty,” *Zoning*

Practice (May 2006), to support the Court's conclusion that "accepted zoning practice is to provide permitted uses as of right and then, in addition to permitted uses, the ordinance may provide for conditional uses." Later in the opinion, Easley's piece is used to support the Court's statement that "Conditional uses may be expressly permitted by the ordinance so long as the conditions are met, but this does not render them 'permitted uses.'" The Court also quoted from John B. Bredin's *Zoning News* contribution entitled "Common Problems with Zoning Ordinances (November 2002) to note the problems that arise when ordinances rely too heavily on conditional use permits. It is encouraging to see courts rely on APA publications to decide fundamental questions related to planning and zoning.

The Timeliness of Challenges to Boards of Appeals Actions

Hartford Citizens v. City of Hartford, 2008 WI App 107, involved a citizen group's challenge to the City of Hartford Planning Commission's approval of a final site plan for a Wal-Mart Supercenter. The citizen group appealed the approval to the Board of Zoning Appeals which upheld the Planning Commission's decision. Section 62.23(7)(e)(10) of the Wisconsin Statutes provides that lawsuits for the Circuit Court to review decisions of the board of appeals must be commenced within 30 days after the filing of the decision in the office of the board of appeals. In this case, the citizens group filed their lawsuit around 4:30 on the last day to commence a lawsuit within the 30 day limitation. The clerk of court followed the county's policy of filing papers received after 4:30 as if they were received the following day. The Wisconsin Court of Appeals deferred to this policy and held that the challenge to the board of appeals' decision was filed one day too late. The lawsuit was dismissed as untimely.

Zoning for One Person's Use

In *Bettendorf v. St. Croix County, 2008 WI App. 97, 754 N.W.2d 528*, the Wisconsin Court of Appeals addressed a unique procedural situation. In 1985, St. Croix County rezoned a parcel owned by John D. Bettendorf from agricultural-residential to commercial. The rezoning ordinance included the condition "This [is] only for John D. Bettendorf's use and is not assignable." In 2004, Bettendorf wanted to sell the property and sued the County alleging that zoning for one person's use was beyond the County's power and the phrase "is not assignable" should be severed from the ordinance and stricken. The County admitted that the rezoning for one person had been beyond its power and argued that the ordinance was not severable. Rather, the County argued the ordinance was void from the date of enactment meaning the parcel should revert back to the original agricultural-residential zoning. This is the second time the case was before the Court of Appeals and both times the Court agreed with the County that the ordinance was void from the date of enactment.

Town Ordinance Banning Signs in Agricultural Zones Not Preempted by State Law

The Wisconsin Court of Appeals in *Donaldson v. Town of Spring Valley, 2008 WI App. 61, 750 N.W.2d 506*, held that a town's zoning ordinance that did not allow signs in areas of the Town zoned for agriculture was not preempted by State law. The Town of Spring Valley, located in Rock County only permitted directional signs in areas zoned business or industrial. Donaldson wanted to erect a directional sign on land zoned agricultural. The land is adjacent to a state highway and therefore falls under Wis. Stat. § 84.30(3)(a). That section of the statutes prohibits signs along federal-aid highways (state highways) with a few exceptions. One of the exceptions is for directional signs "which are required or authorized by law, and which comply with rules . . . promulgated by the [Wisconsin DOT]." The proposed sign complied with DOT rules so Donaldson argued that the Town was preempted under Wis. Stat. § 84.30(3)(a) from prohibiting directional signs in agricultural zones adjacent to the state highway.

The Court of Appeals disagreed, holding that the phrase in the statute "authorized by law" allowed the Town to develop ordinances more restrictive than DOT's rules. Since the sign was prohibited under the Town's ordinance, signs were not "authorized by law" under Wis. Stat. § 84.30(3)(a).

Denial of Rezoning is Arbitrary Because No Legal or Factual Basis to Support the Decision

Staege v. Town of Norway involved the Court of Appeals review of the Town's denial of request to rezone a parcel of land from M-2 (general industrial) to M-3 (heavy industrial). The Town of Norway, in Racine County, is under county zoning. The county planner released a staff report that recommended approving the rezoning because the abutting lands were zoned M-3 and this parcel would create a reasonable block of M-3 zoning rather than the current scattered parcels of M-3 zoning.

The Town Board initially denied the rezoning. The property owner sought review by the circuit court. In its review of the record in the case, the circuit court was not able to find any stated legal or factual basis used by the Town to deny the rezoning. The circuit court remanded the case back to the Town for the Town to state the statutory or other criteria under which the Town denied the rezoning and the reasons why the facts of the case did not fit the criteria considered.

In response to the directive from the circuit court, the Town prepared a list of reasons for denying the rezoning. The circuit court now ruled in favor of the Town. The property owner appealed to the Wisconsin Court of Appeals. The Court of Appeals looked to the standard for judicial review of local zoning decisions: (1) whether the Town kept within its jurisdiction; (2) whether the Town proceeded on a correct theory of law; (3) whether the decision was arbitrary, oppressive or unreasonable, and represented the Town Board's will rather than its judgment; and (4) whether the Town might reasonably make the decision in question based on the evidence.

The Court of Appeals reviewed the list of reasons developed by the Town for the denial and did not find any specific legal criteria against which the Town Board measured the facts. The Board did not cite a single zoning ordinance to support its decision. The Court of Appeals also examined whether the Town Board's decision was arbitrary and capricious. The Court of Appeals noted that many of the reasons cited by the Town Board for denial of the rezoning were based on a series of past bad actions by the property owner unrelated to the present rezoning action. The Court of Appeals noted that the property owner has a right to have his rezoning request decided by an impartial board and the statements of the Town Board hinted at an impermissibly high risk of bias. According to the Court of Appeals, the "primary focus of zoning decisions must be the land *use*, and not the land *owner*." Finally, the Court of Appeals was not able to find any evidence in the record to support the Town Board's decision. The Court of Appeals therefore concluded that the Town Board's decision was arbitrary. The Court of Appeals remanded the case to have the Town Board reconsider the rezoning and to issue a decision "supported by on-the-record rationale that is free of bias, founded on applicable law, and supported by the evidence."

Zoning Ordinance Interpretation/Equitable Estoppel

Village of Hobart v. Brown County, 2007 WI App. 250, 306 Wis. 2d 263, 742 N.W.2d 907, presents the continuing saga of Brown County's efforts to site a waste transfer station at a closed landfill in the Village (formerly Town) of Hobart. Initially, the Town told the County that the zoning at the closed landfill was appropriate for a waste transfer station. Later, the Town informed the County that the zoning was not appropriate for the waste transfer station. Nonetheless, the County began to construct the waste transfer station based on advice from the County's corporation counsel that the County did not need approval or a building permit from the Town.

The Town then initiated this lawsuit for an injunction to prohibit the County from operating the waste transfer station. This case went to the Wisconsin Supreme Court in 2005. The Wisconsin Supreme Court found that it was not clear whether the County had violated any Town ordinance and sent the case back to the trial court to sort out the facts. The trial court found that the waste transfer station did not violate the Town's ordinances. The trial court also found that even if there had been a violation, equity would prevent the court from issuing an injunction.

In this, the most recent decision in this case, the Court of Appeals disagreed with the trial court. The Court of Appeals first found that the County had violated the Town's ordinances. In reaching this conclusion, the Court of Appeals shows how messy things can get in the administration of zoning ordinances. At issue was a 1986 zoning map that showed the site was in an exclusive agricultural district which does not allow waste transfer stations. The Town's argument is that it has not adopted a zoning

map since the 1986 map. The Town, however, showed the County a 1996 zoning map that designated the site as “public use.” Yet, the text of the Town’s zoning ordinance did not establish or define a “public use” designation. The County’s argument is that the 1986 map is invalid because it does not reflect the various rezonings adopted since 1986 by the Town. The County argued that the 1996 map shows the amendments to the town’s zoning ordinance. Nevertheless, the Court of Appeals notes that “[t]he County has cited no authority stating that an official zoning map must reflect all valid amendments to a zoning ordinance in order to retain validity.” Also, while the map stated that it had been adopted by the Town Board on June 10, 1996, the minutes of the Town Board meeting for that date did not indicate the adoption of a revised zoning map. As a result, the Court of Appeals concluded that the 1986 map was the applicable zoning map.

The County also argued that the waste transfer station was a legal non-conforming use because the site had been used as a landfill. The Court of Appeals concluded that converting the landfill to a waste transfer station was a changed use that was not entitled to legal non-conforming status. Finally, the Court of Appeals also concluded that the County violated the Town’s ordinances because it constructed the waste transfer station without a building permit as required by the Town.

The second issue on which the Court of Appeals disagreed with the trial court was on equitable estoppel. The County argued that the injunction preventing the operation of the waste transfer facility should be denied for equitable (fairness) reasons because the County relied on the Town’s original statements that the site was properly zoned. The Court of Appeals did not think equitable reasons should come into play since the County knew that the Town changed its mind about the zoning of the property prior to beginning construction.

III. Open Meetings & Open Records Laws

Quasi-Governmental Economic Development Corporations Must Follow the Open Meetings and Open Records Laws

The State in *State of Wisconsin v. Beaver Dam Area Development Corporation, 2008 WI 90*, asked the Wisconsin Supreme Court to determine whether a governmental economic development corporation is a quasi-governmental corporation subject to Wisconsin’s open meetings and public records laws. The case involved the Beaver Dam Area Development Corporation (BDADC).

In making the determination the Supreme Court articulated a “totality of circumstances” test: an entity is a quasi-governmental corporation if, based on the totality of the circumstances, it resembles a governmental corporation in function, effect, or status. The Court noted that the determination requires a case-by-case analysis and then concluded that based on the facts of the case, the BDADC is a quasi-governmental corporation subject to the open meeting and public records laws. The Court focused on the following factors:

- BDADC is funded exclusively by public tax dollars or interest on those tax dollars;
- At the time the lawsuit was filed, BDADC’s office was located in the City municipal building;
- BDADC was listed on the City website, with a web address of <http://www.cityofbeaverdam.com/EconomicDept/index.cfm>
- The City provided BDADC with clerical support and all of its office supplies, including paper, pencils, and postage;
- Under the terms of an agreement, all of BDADC's assets revert to the City if it ceased to exist;
- BDADC is obligated to open its books for City inspection;
- BDADC has to submit its annual management plan to the City;
- The mayor and another City official serve on the BDADC board of directors;
- BDADC has no clients other than the City;
- BDADC’s exclusive function is to promote economic development in and around the City, a function that prior to its creation had been performed by the City.

The Court also noted that economically important information could be protected from disclosure in a number of different ways including the closed session provisions of the open meetings law for meetings regarding purchases of public property, investing public funds or doing other public business whenever competitive or bargaining reasons require a closed session. Also informal meetings between companies and the executive vice president of the BDADC would not fall under the open meetings law. In addition, the Court noted the exceptions under the public records law for protection of records related to closed sessions, trade secrets, and situations where harm to the public from disclosure outweigh the benefit of disclosure to the public.

Finally, the Court noted that not all economic development entities are quasi-governmental corporations subject to the open meetings and public records laws. If the BDADC were organized differently so it did not have the factors listed above, the BDADC would not be a quasi-governmental body.

The Court indicated that its determination applies prospectively so as to avoid penalties for past violations of the open meetings laws.

Open Records Law and Private Consultants

WIREData, Inc. v. Village of Sussex, 2008 WI 69, involved a request under Wisconsin open records law by a real estate listing service company to obtain property assessment information. The local governments involved contract with a private contractor for property assessments. The case involved a complex set of facts and a number of different issues that are not all summarized here. Of most relevance to planners are three holdings of the Wisconsin Supreme Court that would also pertain to local governments that contract with private consultants for planning services.

The first is that the municipalities themselves were the "authorities" for purposes of the open records law. Accordingly, only the municipalities are the proper recipients of the relevant open records requests. Independent contractors are not the appropriate recipients of open records requests.

The second relevant holding in the case is that municipalities may not avoid liability under the open records law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and directing any requester of those records to the independent contractor assessors.

The third relevant holding relates to the form of electronic documents. The municipalities provided PDF files of the data requested. The real estate listing company, however, wanted the files in a different format that the company could easily manipulate. The Wisconsin Supreme Court disagreed with the Court of Appeals' statement that requesters must be given access to the electronic databases to examine them, extract information from them, or copy them. The Wisconsin Supreme Court held that the PDF versions of the requested data satisfied the open records law.

Open Records and Emails

In *State of Wisconsin ex rel. Gehl v. Connors*, 2007 WI App 238; 742 N.W.2d 530, the Wisconsin Court of Appeals upheld Dane County's denial of a public records request involving a longstanding land use dispute. Gehl made several public records requests for emails in October and November 2004. This case deals with the November request in which Gehl asked for emails that were sent from several County offices (such as the County Executive's office and the County Planning and Development office) to over 30 individuals for a period from 2000 to 2002. The inquiry was not limited by subject matter but sought emails containing from 16 to 47 search terms depending on the County office. Many of the search terms were fairly broad such as emails related to "land use plan" and "zoning authority." The County denied the request on the basis that it was without reasonable limitation as to subject matter.

A significant portion of Gehl's argument to the Court of Appeals concerned the fact that the County had deleted virtually all emails that existed prior to June 2002. Gehl wanted the County to search all backup tapes and hard drives to establish that the County failed to retain these documents. Citing prior case law, the Court of Appeals held that the County's alleged failure to keep sought-after records may not

be attacked under the Open Records law. Gehl's argument was framed as a violation of the Open Records law, and not Wis. Stat. § 19.21 that relates to record retention and is not part of the Open Records law.

The Court then agreed with the County's denial of the Open Records request because it was without a reasonable limitation as to subject matter as required under Wis. Stat. § 19.35(1)(h) of the Open Records law. While the Court of Appeals noted that the fact that a request may result in the generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited, in this case, the Court of Appeals determined that the burden on the County was too great.

IV. Condemnation

Claim for Relocation Benefits Time-barred

C. Coakley Relocation Systems v. City of Milwaukee, 2008 WI 68, involved the timeliness of filing for replacement property and relocation benefits related to a condemnation action. The Wisconsin Supreme Court held that claims for comparable replacement properties are governed by the relocation assistance law, not condemnation law. Rather than rely on statements in section 32.05(8) of the Wisconsin Statutes to create a new substantive right to replacement property, the claimant for replacement property must instead invoke the relocation assistance law (section 32.19 and 32.195 of the Wisconsin Statutes). However, a claim brought pursuant to the relocation assistance law must be brought within two years from when the condemning authority obtained physical possession. In this case, the City took physical possession of the relevant property on October 14, 2002, but Coakley did not file a notice of claim until December 13, 2004, and it first filed a formal complaint on September 29, 2005. The two-year statute of limitations in section 32.20 of the Wisconsin Statutes therefore bared Coakley's claims for relocation benefits.

“Unit Rule” Held Unconstitutional

City of Milwaukee v. Redevelopment Authority, 2008 WI App 24, recommended for publication by the Wisconsin Court of Appeals, held that the “unit rule” for valuing property was unconstitutional as applied to the unique facts in this case. The unit rule in condemnation cases requires that the property taken must be valued as a single entity, as if there were but one owner.

This case involved the condemnation of a hotel building located near Marquette University in downtown Milwaukee. The hotel was constructed in 1961 on property owned by the VFW. The VFW conveyed the property in exchange for a valuable leasehold interest. Under the terms of the lease, for \$1 per year for 99 years (plus an option to renew for another 99 years), the VFW could use 5250 square feet of the building. Like some leases, the lease did not include a forfeiture provision that stated the VFW as lessee would forfeit all rights upon condemnation.

The hotel was sold to Maharishi Vedic University in 1994, subject to the VFW lease. The Maharishi never occupied the building. The Redevelopment Authority for the City of Milwaukee began the process of acquiring the building for redevelopment. The Authority made a jurisdictional offer of \$440,000 that was allocated \$140,000 to the Maharishi and \$300,000 to the VFW for its leasehold interest.

The VFW appealed the adequacy of the award. The Maharishi did not join the appeal. The unit rule was used to value the property taken so the issue focused on the fair market value of the building as a whole. Following a trial on the issue of just compensation, the jury returned a verdict that the hotel building had no value. Because of the application of the unit rule, the VFW was prohibited from proving the value of its lease to the jury even though it was undisputed that the leasehold interest had great monetary value. The Wisconsin Court of Appeals found that the application of the unit rule in this unique situation would result in “manifest injustice of the prepaid long-term leaseholder receiving nothing for its interest in the property. It would not receive *any* compensation, let alone *just* compensation.” (Emphasis by the court.) The Court of Appeals therefore concluded that the use of the unit rule in this case was

unconstitutional and sent the case back to the trial court for a determination of the value of the VFW lease.

Inverse condemnation

Inverse condemnation is a procedure where a property owner petitions the court to institute condemnation proceedings. It often arises in cases alleging “regulatory takings.” If governmental regulations are found to go too far, government could be compelled to exercise its power of eminent domain and initiate condemnation proceedings to provide compensation to the owner of the regulated property. It can also arise in the non-regulatory context when government occupies private property.

In *Williams v. American Transmission Co.*, 2007 WI App 246; 742 N.W.2d 882, the Wisconsin Court of Appeals raised the question of inverse condemnation in the context of private enterprise that has been delegated the power of eminent domain by the Wisconsin Legislature.

American Transmission had maintained electrical poles and transmission lines on the Williams’ property since 1969 under an agreement with the prior owner of the land. After Williams purchased the property in 2003, he demanded that American Transmission remove the poles and transmission lines. Section 893.28(2) of the Wisconsin Statutes provides that telecommunication and power companies have a right to continue to use the real estate of another person if the companies establish a continuous use of that property for at least 10 years. The Court of Appeals concluded that the construction and maintenance of the poles and transmission lines constituted a “use of rights in real estate of another” for at least 10 years so American Transmission did not need to remove the poles and transmission lines.

While Williams apparently raised the issue that this statute arguably allows American Transmission to take land without paying for it (an unconstitutional taking), the Court of Appeals determined that Williams did not sufficiently develop the inverse condemnation argument. As a result, the Court of Appeals did not address this issue and left it for another day.

V. Intergovernmental Disputes

Town Highway Must Be In Existence to Qualify for County Bridge Aid

Town of Madison v. County of Dane, 2008 WI 83, involved a dispute arising from Dane County’s denial of a “bridge-aid” petition by the Town of Madison under section 81.38 of the Wisconsin Statutes. That statute obligates counties to share in the costs of construction or repairs to bridges “on a highway maintainable by the town.” In this case, the bridge was completed in March 2005 but the highway connecting to the bridge was not completed until August 2005. Dane County argued that it did not need to help pay for the bridge because the highway was not in existence at the time the bridge was completed. The Wisconsin Supreme Court agreed with Dane County holding that section 81.38 of the statutes requires funding only for those bridges built on highways in existence at the time of the bridge’s construction.

Authority of Towns to Contest Annexations

Town of Merrimac v. Village of Merrimac, 2008 WI App. 98, 753 N.W.2d 552, raises an issue regarding the ability of towns to contest annexations. Section 66.0217(11)(c) of the Wisconsin Statutes, enacted as part of 2003 Wisconsin Act 317, bars lawsuits by towns contesting the validity of direct annexations by unanimous approval. [Direct annexations by unanimous approval are the most common type of annexation in Wisconsin where a property owner wishing to have their property annexed to a city or village petitions the city/village to annex their property.]

This case involved a challenge to a direct annexation by unanimous approval where the Town alleged the property was not contiguous to the Village and the Village did not pay the Town a property tax set-off as required in section 66.0217(14)(a) of the Wisconsin Statutes. The Rule of Contiguity is a court-made rule that requires that a city or village can only annex land that is contiguous to the

city/village. In this case, 24 feet separated the property from the Village. Nevertheless, the Court of Appeals held that Section 66.0217(11)(c) of the Wisconsin Statutes barred the Town from contesting the annexation. In so ruling, the Court of Appeals refused to address the merits of the Town's case -- whether the annexation is void because of the Rule of Contiguity and whether the Village failed to comply with the property tax set-off.

When the Legislature passed 2003 Wisconsin Act 317, many people questioned the breadth of the legislation. This decision seems to confirm that courts will interpret the statute broadly thereby prohibiting the ability of towns to bring a lawsuit challenging any procedural or substantive deficiencies in an direct annexation by unanimous approval proceeding. The ruling also calls into question the Rule of Contiguity. If a proposed annexation is a mile away, will the courts still bar a town from contesting the lawsuit?

VI. *Miscellaneous Planning Cases*

Methodology for Detecting Asbestos

State v. Harenda Enterprises, Inc., 2008 WI 16, provides a detailed discussion of the proper method for testing whether material constitutes asbestos-containing material under NR 447.02 of the Wisconsin Administrative Code. The case deals with the violations of state law by Harenda Enterprises for failing to detect asbestos in work related to the renovation of the Milwaukee Auditorium in downtown Milwaukee.

Raze order upheld as reasonable

In *A&A Enterprises v. City of Milwaukee, 2008 WI App. 43, 747 N.W.2d 751*, the Wisconsin Court of Appeals upheld a raze order issued by the City of Milwaukee under section 66.0413 of the Wisconsin Statutes. The order required the razing of an apartment building in the City of Milwaukee owned by A & A. A prior owner had received a board-up order from the City to secure the property and had obtained a demolition permit but the demolition never took place. After A & A acquired the building it performed some preventative maintenance work on the building. Nevertheless, approximately 3 years after A & A acquired the building, it received an order requiring that A & A bring the property into compliance with City Ordinances within 60 days or have it razed. A & A appealed to the City's Standards and Appeals Commission and received a variance from the raze order on the condition that A & A have 6 apartment ready for occupancy in four months. A & A failed to comply with the conditions of the variance so the City revoked the variance and the razing of the property. A & A initiated this lawsuit to prevent the building from being razed.

The Court of Appeals upheld the City's raze order holding that A & A should have known that the prior owners had received a board-up order and had obtained a demolition permit. Based on the facts presented the Court of Appeals agreed with the City's determination that the building was a nuisance. The Court of Appeals noted that the property owner was given several periods of time within which to repair the building, but A & A failed to make the necessary repairs.

Special Assessment of Commercial Property (Excluding Residential Property) Upheld

Park Avenue Plaza v. City of Mequon, 2008 WI App. 39, 747 N.W.2d 703, involved a challenge to a special assessment levied by the City of Mequon under their police power pursuant to section 66.0703 of the Wisconsin Statutes for public improvements along Port Washington Road. Commercial property owners along Port Washington Road challenged the assessment because the City used a trip generation formula to apportion the assessments in accordance with the number of vehicle trips each property was projected to generate. The City also limited the assessment to commercial properties along the road and declined to levy the special assessment against residential properties along the road. The Court of Appeals upheld the City's approach as reasonable.

Municipal Assessment Methodology for Retail Property

In *Walgreen Co. v. City of Madison*, 2008 WI 80, the Wisconsin Supreme Court was asked to determine whether a property tax assessment of retail property leased at above market rent values should be based on market rents (as Walgreens argued) or if such assessments should be based on the terms of Walgreens' actual leases (as the City argued -- these terms are higher than the market rents). The case involved a complex set of facts surrounding two Walgreens stores in the City of Madison. The case required the Court to identify the correct methodology for assessing leased retail property for purposes of municipal taxation when the leases for such property contain monthly payments significantly above the market rental rate in part as a result of certain unique business and financing terms being incorporated into the contractual lease terms.

The Wisconsin Supreme Court determined that section 70.32(1) of the Wisconsin Statutes requires adherence to the *Wisconsin Property Assessment Manual*, absent conflicting law. The Court concluded that the *Manual* is consistent with both statutory and case law in Wisconsin requiring an income approach assessment of a leased retail property's fair market value of the fee simple interest to be based on market lease rates, not actual contract rates, as long as encumbrances to the property do not cause its leased fee value to fall below a market rate value. The City of Madison therefore needs to use the lower assessed value for the properties.

Insurance Coverage to Defend Private Enforcement Actions for Violating Private Deed Restrictions

In *Liebovich v. Minnesota Insurance*, 2008 WI 75, the Wisconsin Supreme Court held that a property owner's homeowners insurance company had a duty to defend a lawsuit brought by a neighbor alleging that the property owner violated a 125-foot setback covenant deed restriction by building a portion of his new home too close to the shore of Geneva Lake

Limitation on the Conveyance of Riparian Rights

In *Anchor Point v. Fish Tale Properties*, 2008 Wisc. App. LEXIS 525, the Wisconsin Court of Appeals voided the transfer of pier and boat slip use to an adjacent property owner because the transfer was in violation of state law.

In 2002, a prior owner executed an easement that granted a non-lake property the right to use some of a condominium's piers, boat slips and docks. Section 30.133(1) of the Wisconsin Statutes, however states that:

Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

The Court of Appeals held that the easement was a violation of this law.

In a similar case, *Berkos v. Shipwreck Bay*, 2008 Wisc. App. LEXIS 551, an adjacent property owner attempted to make the argument that Section 30.133(1) of the Wisconsin Statutes only applied to the sale of riparian rights, not the reservation of such rights by easement. The case involved an easement included in the Declaration of Condominium that reserved to the adjacent property owner the right to install piers. The Wisconsin Court of Appeals disagreed, holding that the easement reserved in the Declaration of Condominium for pier placement was void under Section 30.133.

Dedication of Public Access to Navigable Waters

Since 1923, Wisconsin law has required subdividers of riparian land to provide, at half-mile intervals or less, public access to the navigable lake or stream. This requirement currently is found in section 236.16(3) of the Wisconsin Statutes. The Wisconsin Court of Appeals in the case *Vande Zande*

v. Town of Marquette, 2008 WI App. LEXIS 639, addressed a dispute related to a public access in the Town of Marquette in Green Lake County.

The facts of the case are as follows. In 1970, a developer filed a certified survey map which designated a strip of land as “Public Access.” In 1974 the developer submitted a plat to the Town to create fourteen parcels and again designate the strip of land as “Public Access.” The Town approved the plat but never improved or maintained the parcel designated as “Public Access.” The deeds conveying other parcels in the plat purported to convey an undivided one-thirtieth interest in the public access. In 2006, the Town advised the purchasers of these parcels that their ownership interest was not valid. These property owners then sued the Town claiming that the public access was never properly created and that even if a public access was created, it ceased to exist.

The Wisconsin Court of Appeals concluded that, as provided in section 236.29(2), when a city, village, or town approves a plat and the plat is recorded, that approval constitutes an acceptance of the streets and other lands designated on the plat as dedicated to the public. No separate action is needed by a city, village, or town to accept the dedication. The Town’s approval of the plat in 1974 therefore constituted proper acceptance of the roads marked on it.

The Court of Appeals also concluded that the public lake access had not been discontinued. The Court relied on the changes to Wisconsin law resulting from 1997 Wis. Act 172. The Court notes that that Act made several things clear: a local government has no obligation to improve a lake or stream access, regardless of when that access was created; a lake or stream access may not be “discontinued” under section 80.32 of the Wisconsin Statutes (governing the discontinuance of highways) regardless of when that access was created; the exclusive means to vacate a public access is under section 236.43 of the Wisconsin Statutes; and the city, village, or town must agree to vacating the dedicated lands.

Utility Relocation Costs In Highway Improvement Projects

In *Wisconsin Electric v. Outagamie County*, 2008 WI App. 75, 752 N.W. 2d 388, upheld the language in the County’s zoning ordinance that required utility owners to pay the costs of relocating utilities located in the highway setback when the highway is expanded.

Wisconsin Electric obtained private easement rights from landowners to run utility lines along a county highway in the Town of Liberty in Outagamie County during the 1930s and 1950s. In 1964, the Town adopted the County Zoning Ordinance which included the following language:

Telephone, television, natural gas and power transmission lines may be constructed within the setback lines and additions to and replacements of existing lines may be made, provided that the utility owner first file with the County an agreement in writing that they will remove at their expense all new lines, additions and replacements constructed after the effective date of this paragraph, when such removal is necessary for the improvement of the highway.

In 2004, the County advised Wisconsin Electric of plans to expand the county highway. Wisconsin Electric relocated its utility lines and then charged the relocation expenses to the County based on a separate agreement between the County and Wisconsin Electric. The Court of Appeals held that the agreement was void and unenforceable because it was contrary to the above quoted ordinance. The court noted that the County did not have the power to enter into a contract contrary to its own ordinances. Applying the language of the ordinance, the Court of Appeals held that the County therefore did not need to pay the relocation costs.