

Planning Case Law Update
(Cases from March 1, 2010 - February 28, 2011)

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I. New Rule Defining the Unauthorized Practice of Law Impacts Certain Planners

The Wisconsin Supreme Court has adopted a new rule defining the practice of law that will have an impact on some planners, particularly private consultants, who are not licensed to practice law in Wisconsin. The new rule took effect January 1, 2011, and defines the practice of law as:

. . . the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (2) Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
- (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
- (5) Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

SCR 23.01(1).

Often, as part of planning processes, many non-lawyer planning consultants give advice to others about their legal rights. Consulting planners also are involved with drafting legal documents (zoning ordinances, TID plans, redevelopment plans, etc.) for another entity which affect the legal rights of persons. Consulting planners will need to develop processes for how to involve licensed attorneys in this work.

The rule exempts employees of governmental agencies, so planners employed by government agencies should not have to be too concerned about the application of the new rule to their work. SCR 23.02(2)(m). Private planning consultants would not fall within that exception because they are independent contractors and not employees.

The new rule also provides an exemption for all the other credentialed professions, including architects, landscape architects, engineers, and surveyors. SCR 23.02(2)(o). Planning is not a credentialed (licensed) profession. Planners who also hold one of these licenses may use the exemption if the work falls within the scope of practice allowed by that credential. This exemption applies to both public sector and private sector employees. The exception also applies to persons "performing services under the supervision of a professional holding a credential" under Chapter 443 of the Wisconsin Statutes so, for

example, in private firms with a landscape architect, the landscape architect would be able to supervise planners in the firm on certain planning documents.

The Supreme Court's final order approving the rule is available at:
<http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=52681>

II. Local Government Authority

A. Town Authority Preempted By Livestock Facility Siting Law

Larson Acres, Inc., applied to the Town of Magnolia in Rock County for approval of an expanded livestock facility for its dairy operation. The Town approved the application but attached conditions. Larson appealed to the Livestock Facility Siting Review Board challenging the imposition of several conditions. The Board ordered the issuance of the permit without the conditions. Several neighboring property owners along with the Town challenged the Board's action.

The Court of Appeals upheld the Board's actions. According to the Court of Appeals, the Town's authority to impose conditions on the issuance of the permit is preempted by the uniform standards established under the State's Livestock Facility Siting Law, Wis. Stat. § 93.90. That Law allows local governments to impose more stringent requirements than the state standards if they adopt the requirement by ordinance before an applicant files an application for approval and the standards are based on "reasonable and scientifically defensible findings of fact . . . that clearly show the requirement is necessary to protect public health or safety." The Court of Appeals concluded that the Town's conditions imposed (related to water quality concerns) did not meet these statutory requirements.

The case, entitled *Adams v. State of Wisconsin Livestock Facilities Siting Review Board*, is recommended for publication in the official reports.

B. Dissolution of Drainage District Was Not In the Public Interest

Town of Stiles v. Stiles/Lena Drainage District involved an appeal of a court order granting the Town of Stiles, Town of Lena, and Village of Lena's petition to dissolve the Stiles/Lena Drainage District in Oconto County. The district was created by order of the Oconto County Circuit Court in 1918 to promote farming under the state's drainage district law. The local governments petitioned for the dissolution of the District because of an acrimonious relationship between landowners and the District that had developed recently in part due to assessments for maintenance of drainage ditches.

State law allows a court to grant a petition for dissolution following a determination "that the public welfare will be promoted by dissolution of the district." The Court of Appeals determined that the public welfare would not be promoted by the dissolution of the districts because of the benefits the district provides -- drainage to the community, the coordination and uniformity provided by the District, and the Court of Appeals was not convinced the drainage facilities would be maintained without the District. The Court of Appeals then reversed the Order of the Circuit Court that had granted the Order dissolving the District.

The case is recommended for publication in the official reports.

C. Ordinance Regulating Withdrawal of Groundwater Preempted by DNR's Authority

In *Lake Beulah Management District v. Village of East Troy*, the Wisconsin Court of Appeals held that a 2006 ordinance adopted by the Lake Management District regulating the withdrawal of groundwater was preempted by the Legislature's explicit grant of authority to the Wisconsin Department of

Natural Resources (DNR) to permit the construction of certain wells. The case is a companion case to the one reported in the June case law update. The dispute involves a challenge by the Lake Beulah Management District to the Village of East Troy to operate an additional municipal water well.

Following DNR's approval of the well, and the commencement of litigation related to that approval, the Lake Management District adopted an ordinance entitled "An Ordinance Prohibiting the Net Transfer of Groundwater and Surface Water from Lake District Hydrologic Basin." The Ordinance prohibited the transfer or diversion of surface water or groundwater out of the District's jurisdiction without a permit. The Village refused to comply with the ordinance, arguing it was preempted by State law. This case involved the efforts by the Lake Management District to get the Village to comply with its ordinance. The Court of Appeals agreed with the Village that the Ordinance was preempted by state law. According to the Court of Appeals: "If a municipal body could make well construction contingent upon its own permit, based on its own standards, a DNR permit would be wholly insignificant, and the legislature's stated goal of creating a uniform scheme to supervise the extraction of groundwater would be eviscerated. Therefore, the Ordinance conflicts with the general laws of the state and is preempted by the state's delegation of authority to the DNR."

D. Suit Over BOA Decision Must Name the BOA and Not the City

Acevedo v. City of Kenosha involved a dispute over a child day care center operating in violation of the City of Kenosha's zoning ordinance. The City issued a cease and desist directive for the zoning ordinance violation and the day care operator filed an administrative appeal with the City's Zoning Board of Appeals (BOA) challenging the zoning administrator's interpretation of the City's zoning ordinance. The BOA affirmed the zoning administrator's interpretation of the ordinance. The day care operator then filed a certiorari action against the City of Kenosha in Circuit Court challenging the decision of the BOA. The City moved to dismiss the lawsuit arguing that the suit should be against the BOA, a separate body politic, and not the City. The Circuit Court agreed and dismissed the lawsuit against the City. The Court of Appeals affirmed the dismissal by the Circuit Court holding that when challenging a decision of the BOA, the BOA is the proper party to sue, not the City.

The case is recommended for publication.

E. Contractor Was Agent of City and Entitled to Governmental Immunity

Beverly Bronfled was injured when she tripped over a barricade protecting the work area for a road construction project for the City of River Falls. Bronfled sued Pember Companies, a subcontractor working on the road construction project alleging Pember negligently constructed barricades and safety signs and failed to maintain a safe site for the public. Pember argued that it was entitled to governmental immunity. Wis. Stat. § 893.80(4) immunizes local governments and their officers, employees, or agents from liability for acts involving the exercise of discretion or judgment.

In *Estate of Lyons v. CNA Insurance Cos.*, 207 Wis. 2d 446, 457, 558 N.W.2d 658 (Ct. App. 1996), the Court of Appeals extended Wis. Stat. § 890.80(4) immunity to government contractors. In that case, the Court concluded a contractor should not bear liability when "simply acting as an 'agent' of governmental authorities who had retained ultimate responsibility" for a project. An independent government contractor is an agent for purposes of Wis. Stat. § 893.80(4), and is therefore entitled to immunity, if: (1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

In this case, the Court of Appeals determined that Pember met the *Lyons* test and was therefore entitled to governmental immunity. As noted by the Court of Appeals, "if the City of River Falls had

placed the barricades at the Main Street-Maple Street intersection itself rather than delegating this task to Pember, it would be immune from suit pursuant to § 893.80(4).” It was therefore appropriate to apply the immunity to Pember. The case is *Bronfeld v. Pember Companies, Inc.*, and is recommended for publication.

F. Towns Authority to Vacate Alleys Upheld

In *Smerz v. Delafield Town Board* the Wisconsin Court of Appeals upheld the authority of towns to vacate alleys under section 66.1003 of the Wisconsin Statutes. The facts of the case are as follows. Several property owners in the Town of Delafield in Waukesha County petitioned the Town to discontinue two portions of unpaved alley. The Town granted their petition and ordered the alley segments vacated as requested as authorized under Wis. Stat. § 66.1003.

Several other property owners then filed a declaratory judgment action challenging the Town’s action. They claimed that because the alleys were located within a recorded plat, the alleys were subject to Wis. Stat. ch. 236, which does not give town boards authority to act. The challengers to the Town’s actions contended that on the County was authorized to vacate the alleys.

Wisconsin Statute § 66.1003(3) states that a "town board *may* discontinue all or part of an unpaved alley" when certain conditions are met. (Emphasis added.) Wisconsin Statute § 236.43 states that circuit courts "*may* vacate streets, roads or other public ways on a plat" if certain conditions are met. (Emphasis added.) Wisconsin Statute § 236.445 states that **county boards** "*may* alter or discontinue any alley in any recorded plat in any town in such county, not within any city or village." Town boards are not given similar authority in Chapter 236. The Court of Appeals found that none of the three grants of authority-- §§ 236.43, 236.445, and 66.1003--are meant to be the exclusive means to discontinue an alley. One process does not take precedence over the other. Wisconsin Statute § 66.1003(3) is meant to provide an alternative to Wis. Stat. Chapter 236 that towns may use to vacate alleys.

The case is recommended for publication.

III. Eminent Domain

A. Condemnation for Transmission Lines

Fields v. American Transmission Co. involves a dispute related to the valuations of property as part of a condemnation action initiated by the American Transmission Co. (ATC) to acquire an easement for a new high-voltage transmission line. The issue involved “whether pre-existing easement rights may be considered by a jury when determining just compensation.” The Court of Appeals held that yes, such evidence may be presented. The Court of Appeals also clarified that the jury is supposed to find before and after values of the whole property to arrive at the just compensation. The jury should not try to just determine the value of the property rights taken by the new easement because just compensation is based on the fair market value of the land as a whole. In addition, the Court of Appeals clarified that the date of evaluation is the date that is 2 years prior to the date of which the certificate of public convenience and necessity was issued for the new transmission line.

B. Court Limits Takings Causes of Action For Consequential Damage to Property

E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District, 2010 WI 58, involved the Wisconsin Supreme Court’s review of a Wisconsin Court of Appeals decision reported in the January 2009 WAPA Case Law Update. The case involved an inverse condemnation claim for damages resulting from the construction of Milwaukee Metropolitan Sewerage District’s “deep-tunnel” project. Construction of the project required the dewatering of E-L Enterprises property. The removal of the groundwater from the

site caused the wood piling supporting a building located on the property to rot so they no longer supported the building. The property owner had to replace the pilings with concrete.

The Sewerage District argued that the damage to property did not constitute a “taking” under Wisconsin law. Citing cases from the early 1900s on this issue, the Court of Appeals disagreed and held that such damages can constitute a taking. The Wisconsin Supreme Court, however, distinguished the present case from the historic cases relied on by the Court of Appeals and reversed the decision of the Court of Appeals.

According to the Wisconsin Supreme Court, **mere consequential damages to property resulting from governmental action are not compensable as a taking under either the Wisconsin or United States Constitutions unless the damage deprives a property owner of all or substantially all beneficial use of the property.** The Wisconsin Supreme Court distinguished the present case from the older cases relied on by the Court of Appeals that held that the removal a building’s lateral support due to street grading constituted a compensable taking. In the earlier cases, the removal of the lateral support of the soil entirely destroyed the value of the property for all purposes. In this case, while the building was damaged, the building was still usable.

The Supreme Court noted that the damage to E-L Enterprises’ building was caused by the alleged negligent construction of the sewer which is a claim in tort and not a cause of action for a taking. However, the District is not liable for negligence under the doctrine of governmental immunity.

C. Budget Transfer of Funds from the Injured Patients and Families Compensation Fund Constitutes a Taking

While not a planning case, in *Wisconsin Medical Society, Inc. v. Morgan*, 2010 WI 94, the Wisconsin Supreme Court decided that the section of the 2007-2009 state budget (2007 Wis. Act 20) transferring \$200 million from the Injured Patients and Families Compensation Fund to the Medical Assistance Trust Fund was an unconstitutional taking of private property without just compensation. (The Injured Patients and Families Compensation Fund was established in 1975 to help cover medical malpractice claims.) The case is an important reminder that the “takings” provision of the Wisconsin Constitution (“[t]he property of no person shall be taken for public use without just compensation therefor”) applies to all types of property, not just land (real property).

The Court’s opinion notes that there was no dispute that the state took money from the Injured Patients and Families Compensation Fund, did so for a public use (the Medical Assistance Fund) and did not compensate the Injured Patients and Families Compensation Fund. The sole issue was whether the health care providers have a property interest in the fund. Since the Injured Patients and Families Compensation Fund was established by the legislature as a formal trust fund held by the health care providers as named beneficiaries, the Court concluded that the health care providers have a constitutionally protected property interest in the Fund. The Court remanded the case to the circuit court requiring that the State replace the money removed from the fund, plus interest, and permanently barred the State from transferring money out of the Fund.

D. Jurisdictional Offer Needed for Litigation Expenses Fees in Condemnation Cases

The American Transmission Company (ATC) sought an easement from the Klemms to place high-voltage electric transmission lines across their property. ATC obtained an appraisal, which ATC provided to the Klemms, indicating the easement would decrease the value of their property by \$7,750. The Klemms agreed to a negotiated offer of \$7,750 compensation, with the understanding they had the right to appeal the amount. Accordingly, the Klemms conveyed the requested easement, which was recorded along with a certificate of compensation.

The Klemms subsequently exercised their right to appeal and the condemnation commission awarded the Klemms just compensation in the amount of \$10,000. The Klemms then sought litigation expenses pursuant to Wis. Stat. § 32.28. The circuit court held the Klemms were entitled to litigation expenses even though they accepted ATC's negotiated offer and there was, consequently, no jurisdictional offer. ATC appealed, arguing the court misinterpreted Wis. Stat. § 32.28(3)(d).

Section 32.28(3)(d) of the Wisconsin Statutes provides that litigation expenses shall be awarded to the condemnee if "[t]he award of the condemnation commission ... *exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer* by at least \$700" (Emphasis added.) The Wisconsin Court of Appeals interpreted the plain meaning of the statute and agreed with ATC. Since the Klemms accepted the negotiated offer and there was subsequently no jurisdictional offer, the statute did not require the payment of litigation expenses.

The case, *Klemm v. American Transmission Co., LLC*, is recommended for publication in the official reports.

E. Evidence of Environmental Contamination/Remediation Costs are Admissible in Eminent Domain Cases

260 North 12th Street, L.L.C. v. Stat of Wisconsin Department of Transportation presented a case where a jury awarded \$2,001,725 for the taking of property by the Wisconsin Department of Transportation for a highway project in Downtown Milwaukee. The award was more than the \$1,348,000 award from the DOT but less than the \$3.5 million sought by the property owner. The property owner appealed the jury award arguing that the trial court should not have allowed evidence concerning environmental contamination of the property taken and the related costs to remediate the property. The Wisconsin Court of Appeals disagreed and held that, in determining just compensation (the fair market value of the property taken), evidence of contamination and related remediation cost is admissible.

F. Taking of Property for a Roundabout Cannot Be Challenged on Safety Issues

Kauer v. Wisconsin Department of Transportation involved a challenge to a condemnation action that took land for the construction of a roundabout by the Wisconsin Department of Transportation (DOT) in Calumet County. The owners of the property subject to the eminent domain proceeding challenged the necessity of the condemnation alleging that the planned roundabout was an unsafe road design. Wanting to avoid, in the words of the Wisconsin Court of Appeals, "a battle of the experts as to the safety of competing road designs," the Court deferred to the determination by DOT that the road design was created with safety in mind and upheld the trial court's granting of summary judgment in favor of the DOT.

Nevertheless, the Court of Appeals warned that the holding did not mean that safety can never be an issue in eminent domain proceedings. According to the Court, "if the DOT's road design was obviously unsafe, that might be evidence that there was utter disregard for the necessity of the use of land." The Court also noted that there were other means for the landowners to challenge the safety of the DOT's road design under the Wisconsin Administrative Procedures Law.

Finally, the property owners also alleged there was a jurisdictional defect in the eminent domain proceedings because they only received part of the pamphlet "The Rights of Landowners under Wisconsin Eminent Domain Law" as required under the Wisconsin Statutes. The Court of Appeals did not agree that the failure to receive the entire pamphlet rose to the level of a jurisdictional defect.

G. Need to Strictly Follow Notice Requirements in Condemnation Appeal

Section 32.06(8) of the Wisconsin Statutes requires that for non-transportation eminent domain proceedings, after the condemnation commission determines its award, the clerk of court "shall": (1) send

notice of the award, including a copy of the award; (2) by certified mail with return receipt requested; (3) to the party seeking condemnation and to the landowner. In **Dahir Lands, LLC, v. American Transmission Co., LLC**, the clerk of court sent a copy of the award to the attorney had appeared for the landowner at the condemnation hearing via U.S. mail. Under section 32.06(10) a party has 60 days following the date of filing of the commissioner's award to appeal the award in circuit court. The landowner appealed the award after the 60 day limit. The American Transmission Company sought to dismiss the appeal as untimely. The Wisconsin Court of Appeals disagreed, concluding that strict compliance with section 32.06(8) is required. In this case, the notice was given to the landowner's attorney and not the landowner as required by the statutes and the clerk of court did not send the notice via certified mail with return receipt requested, also as required by statute. Since the clerk of courts had not complied with the statutory requirements, the Court of Appeals allowed the landowner's appeal of the commission's award to proceed.

The case is recommended for publication.

IV. Housing

A. Details Needed in Notice and Decision Denying Rental Assistance.

In **Bratcher v. Housing Authority of the City of Milwaukee** the Wisconsin Court of Appeals held that the Housing Authority denial of federal rent assistance was inadequate because the written notice and written decision failed to give adequate explanations of the reasons for denial. According to the Court of Appeals decision, the notice and the decision must include a brief statement of the reasons for decision. According to the Court of Appeals, the notice and decision fell short because they contained no facts related to the incidents giving rise to the decision and did not mention any specific evidence relied on by the hearing officer or elements of the law supporting the decision.

The case is recommended for publication in the official reports.

B. Challenge to Denial of Rental Assistance Must First Exhaust State Remedies.

Collins v. City of Kenosha involved a challenge to the decision of the City of Kenosha Housing Authority (KHA) upholding the termination of Collins' federally funded rent assistance. Collins never sought the state-proved remedy of certiorari review within 30 days of the final determination. Rather, more than two years after the denial, she brought a federal 42 U.S.C. § 1983 claim of deprivation of procedural due process. The Wisconsin Court of Appeals denied the claim stating that Collins should have pursued the remedy available under state law.

The case is recommended for publication in the official reports.

V. Taxation and Impact Fees

A. Unbuilt Condominium Units Taxed to the Developer

Saddle Ridge Corp. v. Town of Pacific, 2010 WI 47, involved a dispute about the property tax assessment by the Town of Pacific in Columbia County for 41 unbuilt condominium units in three condominiums developed by Saddle Ridge. The 41 units were declared and platted in the condominium instruments and assigned tax parcel identification numbers. The Town assessed the 41 tax parcels and sent notice of the assessment to Saddle Ridge. Saddle Ridge argued that since the units were not developed they could not be taxed as individual parcels and that until they are built, the units are only vacant land that is part of the common elements owned by the condominium association. As part of the common elements, the Saddle Ridge argued that the owners of the built units should pay the taxes on the land. The Supreme

Court disagreed finding that Saddle Ridge owns the inbuilt condominium units and these units are tax parcels properly assessed to Saddle Ridge.

The Court's opinion provides an overview of the law of condominiums in Wisconsin. The Court states its concern that the developer's interpretation could open the door for a developer to avoid paying taxes by never constructing a unit.

B. Presumption of Correctness Given to Department of Revenue's Assessments

Nestle U.S.A., Inc. v. D.O.R., 2011 WI 4, involved a challenge to the property tax assessment for a specialized infant formula processing plant built by Nestle in Eau Claire. The Department of Revenue (DOR) assessed the plant following the Wisconsin Property Assessment manual. The specialized nature of the facility added significant costs to the construction of the facility. The DOR decided that the "highest and best use" of the property was as a powdered infant formula production facility. Nestle argued that the "highest and best use" was as an unspecified food processing plant because of the limited marketability of the specialized facility. Changing the highest and best use would significantly lower the assessment. The Wisconsin Supreme Court upheld the DOR's assessment, concluding that Nestle failed to present sufficient contrary evidence to rebut the presumption of correctness given to the DOR's assessment.

C. Challenges to Impact Fees Must First Use Appeal Process Provided in the Ordinance.

St. Croix Valley Home Builders Assoc., Inc. v. Township of Oak Grove involved a challenge by a local builders association to the impact fee ordinance adopted by the Town of Oak Grove located in Pierce County. As required by Wisconsin impact fee enabling law (Wis. Stat. § 66.0617), the Town's ordinance included an appeal process for challenging the Town's impact fees. The Builders Association did not use that appeal process and brought a challenge to the fees directly to Circuit Court. The Town argued that the Association could not seek judicial relief until after it had exhausted administrative remedies -- following the process for an appeal under the Town's ordinance. The Court of Appeals agreed with the town that the exhaustion of administrative remedies should apply in this case -- "Because the Association's claims could have been resolved administratively, requiring it to use the ordinance's appeal process promotes judicial efficiency."

D. Clinic is Not Tax Exempt

Covenant Healthcare System, Inc. v. City of Wauwatosa involved an appeal by the City to the circuit court's decision that the Clinic was a nonprofit hospital and thus a tax-exempt property under Wis. Stat. § 70.11(4m)(a). The Clinic included a 24 hour Urgent Care, services at the Clinic were provided under license of a nearby hospital, the Clinic was constructed to hospital standards, and the Clinic's services qualified for hospital-based reimbursement through Medicare. In a very fact-specific decision, the court determined that the Clinic was a doctor's office and not a hospital and therefore did not qualify for the tax exemption.

The case is recommended for publication in the official reports.

E. Tax Assessment Methodology Must be Uniform

U.S. Oil Co., Inc. v. City of Milwaukee involved the City of Milwaukee's appeal of a Circuit Court judgment vacating the City's \$14 million tax assessments of U.S. Oil's property as excessive under the Wisconsin Constitution's Uniformity Clause. The City initially assessed the property--consisting of three oil terminals at the Granville Terminal Complex--at about \$6 million, relying on a 2002 sale of the subject property. When U.S. Oil challenged these assessments, the City reassessed the property at over \$14 million, this time using the "income" assessment approach instead of the "sales" approach. All of the other

properties at the Granville Terminal Complex remained assessed according to the “sales” approach. As a result, U.S. Oil's per-barrel assessments were more than double all of the others.

The Wisconsin Court of Appeals agreed with the Circuit Court’s conclusion that the \$14 million reassessments violated the Uniformity Clause. According to the Court of Appeals, by assessing U.S. Oil--and only U.S. Oil--using the “income” approach when it could have similarly reassessed all comparable properties, the City created a situation in which “other comparable properties were assessed significantly below fair market value, thus amounting to a discriminatory assessment of [U.S. Oil's] property.” The Court of Appeals reinstated the initial \$6 million assessments.

The case is recommended for publication.

VI. *Administrative Law*

A. *Contested Case Hearing Appropriate*

Andersen v. Department of Natural Resources arose in response to a decision by the Wisconsin Department of Natural Resources (DNR) denying a hearing on the Wisconsin Pollutant Discharge Elimination System (WPDES) permit for the Fort James Operating Company in Green Bay. During the public comment phase of the permit process, a group of individuals and environmental organizations objected to the phosphorus limitation proposed in the permit. The DNR issued the permit anyway. The group of individuals and environmental organizations then requested a hearing to challenge the permit based on the concerns about the phosphorus limits plus new objections to the permit based on the failure of the permit to limit mercury discharges. The DNR denied the hearing request because the mercury objections were not raised during the public comment period. The DNR also denied a hearing based on the phosphorus claims because the phosphorus provisions were based on federal law and DNR claimed it did not have the authority to determine whether permit provisions authorized by state law comply with federal law (DNR argued only the United States Environmental Protection Agency could make that determination).

The Wisconsin Court of Appeals disagreed with the DNR. The court ordered DNR to hold the hearing. According to the court, under the state laws creating the WPDES, comments on a contested matter in a permit do not need to be received by the DNR prior to a final decision on a permit application. In addition, the court concluded that DNR has the authority to determine whether discharge permit provisions authorized by state regulations comply with federal law.

B. *Need to Include a Visible Emissions Standard*

Sierra Club v. Wisconsin Department of Natural Resources involved a dispute over a coal fired power plant in Marathon County. The Wisconsin Department of Natural Resources (DNR) is responsible for administering the federal Clean Air Act in Wisconsin as has developed administrative rules for that purpose. The Sierra Club challenged the DNR’s “best available control technology” (BACT) determinations for the air emissions construction permit for the plant. Upon review of the actions by the DNR, the Court of Appeals upheld the reasonableness of the BACT limits set by the DNR for sulfur dioxide emissions and nitrogen oxide emissions. The Court of Appeals also upheld the DNR’s selection of dry flue gas desulfurization technology to control sulfur dioxide emissions.

The Court of Appeals, however, found that the failure of the DNR to include a visible emissions standard for the plant was inconsistent with NR 405.02(7) of the Wisconsin Administrative Code. A visible emissions standard for coal-fired plants limits the amount of opacity of emissions exiting a particular smoke stack. DNR took the interpretation that the BACT limits for pollutants that make up visible emissions provided a surrogate for a visible emissions standard. The Court of Appeals disagreed with DNR’s interpretation. The Court held that the DNR needed to include a visible emissions standard,

recognizing that limiting visible emissions may further limit the emissions of particulate matter and sulfuric acid mist.

The case is recommended for publication in the official reports.

C. DNR Must Independently Evaluate Environmental Impacts of New Wells When There is Evidence of Potential Adverse Impact

Lake Beulah Management District v. State of Wisconsin Department of Natural Resources involved a challenge to issuance of permits for a fourth municipal water well for the Village of East Troy in Walworth County. The Lake Beulah Management District and the Lake Beulah Protective and Improvement Association challenged the issuance of the permit because the DNR did not independently consider the environmental effects of the well before approving the permit. The DNR relied on a report prepared by a consultant for the Village that stated the well “would avoid any serious disruption of groundwater discharge to Lake Beulah.” The Management District and Improvement Association retained an expert who concluded that the Village’s consultant reached erroneous findings about the water table and the aquifer’s condition.

The Court of Appeals decision confirms that the DNR has authority and duty to consider the Public Trust Doctrine in its analysis of high capacity well approvals. According to the Court of Appeals: “. . . wells have everything to do with waters of the state--they withdraw groundwater, one type of water which comprises the definition of waters of the state.” However, the Court of Appeals concluded that “there is no requirement mandating the DNR to do a full examination of every well to see if the public trust doctrine is affected.” In this case, the Court of Appeals held that the DNR misused its discretion in not more fully investigating the impacts of the well because of the scientific evidence that suggested the well might have an adverse affect on the waters of the state.

The case is recommended for publication in the official reports.

D. Challenge to Nonmetallic Mining Reclamation Permit Thrown Out On Procedural Defect

Bergstrom v. Polk County involved a challenge to the issuance of a nonmetallic mining reclamation permit issued by the Polk County Land and Water Resources Department. Eighteen Polk County property owners unsuccessfully challenged the issuance of the permit in administrative proceedings. The property owners then sought review of the permit in the circuit court (trial court). Wisconsin Statutes governing civil court procedure require that a summons and complaint to initiate a lawsuit against a county must be personally served on the county board chairperson or the county clerk. In this case, the attorney for the property owners mailed the summons and complaint to the Polk County corporation counsel.

Polk County moved to dismiss the complaint because the property owners failed to follow the requirements for service on the County. The circuit court denied the county’s motion stating that dismissal of the lawsuit would be “unduly harsh.” The county appealed to the Wisconsin Court of Appeals and the Court reversed the circuit court’s decision finding that the facts of the case did not justify departing from the requirements of the rules of civil procedure.

The case is recommended for publication.

VII. Water Law

A. Court Upholds Erosion Control Efforts

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the U.S. Supreme Court **unanimously agreed** with the decision of the Florida Supreme Court that the Act **did not** constitute a taking. The U.S. Supreme Court decision is important support for Florida's beach restoration efforts and similar coastal erosion control efforts in other states.

Another significant issue in the case, however, remains undecided. A plurality of the U.S. Supreme Court (meaning the opinion that announces the decision of the Court, but **NOT** a majority) held that the decision of a state supreme court could constitute a uncompensated "taking" under the Fifth Amendment to the U.S. Constitution as applied to the states through the Fourteenth Amendment. While this is a very narrow legal issue, as an issue related to federalism, the Court's decision potentially opens the door for the U.S. Supreme Court to review state court decisions based exclusively on state constitutional provisions. This case can be viewed as an effort to expand the U.S. Supreme Court's authority, similar to the expansion of the Court's authority in *McDonald v. City of Chicago*, the Court's decision this term that held for the first time that the Second Amendment (right to bear arms) applied to state and local governments.

At issue in the *Stop the Beach* case was Florida's 1961 Beach and Shore Preservation Act. Under the Act, a local government can apply to the State for permits to restore a beach. The State establishes a fixed erosion-control line that replaces the fluctuating mean high-water line. Sand is then dumped seaward of the erosion-control line to restore the beach. Under Florida water law, the state owns title to submerged lands and the state's title to those lands continues if the lands are filled. As a result, a beach owned by the public is created between the private property that ends at the erosion-control line and the water.

A group of private beachfront property owners sued claiming that the Act constituted a taking of their private property rights because it took their property right to have their property touch the water and the fixed erosion-control line took away the future right to accretions -- the slow change that may occurs naturally as sand is deposited. The Florida Supreme Court held that the Act did not constitute a taking under Florida law. Despite the sentiment among four Justices that a state supreme court decision could constitute a taking, the U.S. Supreme Court unanimously agreed with the decision of the Florida Supreme Court that the Act did not constitute a taking.

B. Lawsuit Against City for Stormwater Damage Not Brought in Time

Hocking v. City of Dodgeville, 2010 WI 59, involved the Wisconsin Supreme Court's review of a Wisconsin Court of Appeals decision reported in the June 2009 WAPA Case Law Update. The Hockings purchased their home in the City of Dodgeville prior to the development of the surrounding land. Following the development of the surrounding land, storm water run-off from the new development began to collect on the Hocking property, both inside and outside their residence, causing damage to their home and erosion of the land. The Hockings sued the City alleging the City was negligent in the approval of the surrounding development and negligent in the maintenance of the City streets in the surrounding development. The Wisconsin Supreme Court affirmed the decision of the Wisconsin Court of Appeals upholding the trial court's dismissal of the case because it was not brought in a timely fashion.

Wis. Stat. § 893.89(2) provides, in relevant part, that:

"no cause of action may accrue and no action may be commenced against any person involved in the improvement to real property after [10 years immediately following the date of substantial completion of the improvement to real property] for any injury to property arising out of any

deficiency or defect in the design, land surveying, planning, supervision [of construction of, or] construction of the improvement to real property.”

This statutory bar does not apply to a person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee, or for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

In this case, the Hocking’s initiated their lawsuit more than 10 years after the completion of the surrounding development. The Court did not find that any of the exceptions to the 10 year limitation applied. First, the Court found that the City did not warrant or guarantee the development. Second, while the Court found that the flooding of the Hocking property was the result of City actions that occurred when the streets were constructed during the development of the surrounding property, the flooding was not the result of the City’s maintenance of those streets.

VIII. Miscellaneous Planning Cases

A. Personal E-mails Not Subject to Open Records Law

In *Schill v. Wisconsin Rapids School District*, 2010 WI 86, the Wisconsin Supreme Court held that personal e-mails are not subject to disclosure under the Wisconsin Public Records Law. The case is one of first impression in Wisconsin, dealing with a form of communication that was not available at the time the Public Records Law was passed. The facts involved a request by a third party to have the Wisconsin Rapids School District release all the emails of several teachers for about a six week period of time. The teachers did not object to the release of work-related e-mails. The teachers, however, did object to the release of personal e-mails -- e-mails that contain only personal information whose contents have no connection to a government function.

The School District had a written Internet Use Policy that permits employees to use their school e-mail accounts for occasional personal use limited to times that did not interfere with the user’s job responsibilities. There was no allegation that the teachers violated this policy. The Court noted that the case did not involve the right of the government employer to monitor, review, or have access to the personal e-mails of public employees using the government e-mail system. The Court concluded that the Public Records Law did not require the disclosure of the purely personal emails and remained the case to the circuit court to enjoin the School District from releasing the contents of the personal emails.

Subsequent to the Court’s decision the Wisconsin Attorney General’s office issued a memorandum with the following guidance for following the law: “If there is *any* aspect of the e-mail that may shed light on governmental functions and responsibilities, the relevant content must be released as any other record would be released under the Public Records Law. If a document contains both personal and non-personal content, a records custodian may redact portions of the document so that the purely personal information is not released.” The full memorandum is available at:

http://www.doj.state.wi.us/news/files/Memo_InterestedParties-Schill.pdf.

B. Private Communities: The Emerging Area of “Community Association Law”

In *Solowicz v. Forward Geneva National*, 2010 WI 20, the Wisconsin Supreme Court affirmed the decision of the Wisconsin Court of Appeals reported in the January 2009 WAPA case law update. The case involved a lawsuit brought by several condominium owners within a development known as “Geneva National” in Walworth County challenging the developer’s continued control over the development.

Geneva National is a private “master-planned” community comprising 1600 acres “with an overarching development scheme established to create a high end golf and leisure community, containing restaurants, golf clubs, tennis clubs, swimming clubs, single family homes, multiple family homes,

wooded hiking trails, private streets with gated access to the community.” The multi-family residential buildings were developed as condominiums. (Other parts of the master-planned community were developed under different ownership arrangements.) The entire development is controlled by a Community Declaration, a restrictive covenant that is the “master governance scheme for the entire development.”

The Community Declaration created two governing bodies to control the development: the Community Association and the Geneva National Trust. The Community Declaration gave the developer significant control over these two governing bodies. The Geneva National Trust has the authority to act in “sole and absolute discretion” to adopt and enforce architectural standards, implementing rules and regulations governing use of the property, and granting variances to restrictions set forth in the Covenant. The Trust's expenses are paid by the unit owners. The Association maintains Geneva National's private roadways, medians, entrances and property, and provides utilities and can levy assessments on property owners to pay for improvements.

The condominium owners who initiated the lawsuit were upset over some significant special assessments for certain improvements. They alleged that Geneva National's governing structure granted the Developer an unreasonable amount of control that violated Wisconsin's Condominium Ownership Act found in Chapter 703 of the Wisconsin Statutes, and argued the actions of the developer amounted to “taxation without representation to infinity.” The Condominium Ownership Act limits the duration of a developer's control over a condominium project. A condominium developer may maintain control only for three years or until seventy-five percent of the units are sold, whichever comes first, or ten years for an expandable condominium. Wis. Stat. § 703.15(2)(c). Here, the developer still had control after eighteen years. Only fifty-two percent of the maximum allowable units have sold but the Community Declaration grants the developer control until eighty-five percent have sold.

The Wisconsin Supreme Court, agreeing with the Court of Appeals, held that **the Community Ownership Act (Chapter 703 of the Wisconsin Statutes) did not apply to the Community Declaration** because the Community Declaration is not a document that creates condominiums under Chapter 703. As the Supreme Court noted, the condominium declaration is the operative instrument that creates a condominium under Chapter 703. The Community Declaration is different from that declaration. Wisconsin has no statutory guidance for the large-scale planned community created by the Community Declaration which is one of the reasons for some of the confusion in the case.

The Court then provides the following guidance for what is a “planned community”:

We agree with the court of appeals' statement that planned communities, such as Geneva National, “are an entirely different type and level of development than condominiums.” A condominium is a form of ownership of real property that combines two separate forms of ownership interest: the individual ownership of the dwelling unit and the undivided common ownership, with other unit owners, of the common elements of the condominium parcel. While we found varying characteristics of similarly planned communities, there are several key components that appear to be common to most such communities. First, these communities generally are large developments that usually include a mix of commercial, recreational and residential property, including condominiums. Second, a keystone to such communities is an overall development scheme that not only permits individual units to operate under their own individual governing documents, but also subjects the entire development to a master governing body, which ensures the entire community is developed according to its stated purpose. The communities function as semi-autonomous, private quasi-towns. (Citations omitted.)

The Court stresses that the Community Declaration is a contract between the Developer and those who choose to purchase property within Geneva National. The Court applies ordinary contract law rules and finds that since the terms of the Community Declaration are unambiguous and do not violate any

common law principle, the Court is unwilling to void the contract. Again, it is a situation of “buyer beware.”

C. Personal Inconvenience Does Not Justify Zoning Variance

The Wisconsin Court of Appeals reaffirmed a longstanding rule for zoning variances in *Murr v. St. Croix County*.

Murr's parents purchased a lot on the St. Croix River in 1960 upon which they built a cabin. In 1963, they purchased an adjacent lot, which remained vacant. The approximately one and one-quarter acre lots contain approximately .48 and .50 acres of net project area. The lots were transferred to Murr and her siblings in 1994 and 1995.

Due to repeated flooding, Murr sought to reconstruct the cabin on higher ground by using fill. She initially planned to build in the same location. However, as suggested by a town planning commission, Murr ultimately requested to build further from the river to reduce the environmental impact. Murr requested eight variances or special exception permits under St. Croix County's Lower St. Croix Riverway Overlay District ordinance: (1) variance to sell or use two contiguous substandard lots in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade more than 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

The St. Croix County Board of Adjustment denied all of Murr's requests in a written decision. The Court of Appeals agreed with the Board finding that the request to relocate and rebuild the home in a new location was simply a matter of convenience since she could have flood proofed the current home in its existing footprint. The Court of Appeals relied on long-standing Wisconsin case law that personal inconvenience alone does not constitute the unnecessary hardship required to grant a variance.

The case is recommended for publication.

D. Wisconsin Attorney General Opinion: Coordination Resolutions Not Recognized Under Wisconsin Law

The Wisconsin Attorney General, J.B Van Hollen, issued an attorney general's opinion regarding the “Coordination” resolutions that a number of towns in Wisconsin have adopted as an alternative to preparing a comprehensive plan. By adopting the resolution these towns believe it gives them the authority that imposes affirmative duties on the federal government, the state, and other local governments to coordinate their land use activities with those of the towns adopting the resolution. The Attorney General Opinion concludes that such a “coordination” power does not exist under Wisconsin law. The opinion is “[OAG-3-10](#)” issued on June 22, 2010.

IX. Federal Court of Appeals for the Seventh Circuit Opinions (includes Wisconsin)

A. RLUIPA

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, the Federal Court of Appeals for the Seventh Circuit considered the proper standard for applying the equal-terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. That provision states that “no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” § 2000cc(b)(1).

The River of Life church wanted to relocate to a part of the Village of Hazel Crest, Illinois, which is zoned commercial. The commercial zoning prohibits non-commercial uses such as churches and a variety of secular noncommercial uses. The church sued the Village under RLUIPA. The Seventh Circuit Court did not look favorably on the challenge and announced a new test. Unlike other Federal Circuit Courts that look to the regulatory *purpose* of the ordinance for determining if religious institutions are treated on equal terms with secular institutions, the Seventh Circuit decides to focus on zoning *criteria*. According to the Court: “‘Purpose’ is subjective and manipulable, so asking about ‘regulatory purpose’ might result in giving local officials a free hand in answering the question ‘equal with respect to what?’ ‘Regulatory criteria’ are objective and it is federal judges who will apply the criteria to resolve the issue.”

Looking at the criteria of the Village’s commercial zoning district that excluded both secular and religious noncommercial uses, the Court concluded that the religious institutions were treated on equal-terms with the secular institutions prohibited in the district. The Court also noted the challenges posed by its test: “Of course we can’t be certain, or even confident, that a particular zoning decision was actually motivated by a land-use concern that is neutral from the standpoint of religion. But if religious and secular land uses that are treated the same (such as the noncommercial religious and secular land uses in the zoning district that River of Life wants to have its church in) from the standpoint of an accepted zoning criterion, such as “commercial district,” or “residential district,” or “industrial district,” that is enough to rebut an equal-terms claim and thus, in this case, to show that River of Life is unlikely to prevail in a full litigation.”

B. Takings and Substantive Due Process

Bettendorf v. St. Croix County involved a Wisconsin zoning dispute that made its way to the United States Court of Appeals for the Seventh Circuit. The facts of the case are as follows. John Bettendorf owns property located in St. Croix County. When Bettendorf acquired the property, it was zoned agricultural-residential. In December 1984, Bettendorf applied to the St. Croix County Planning, Zoning, and Parks Committee to re-zone a portion of his property to commercial so that he could operate a trucking terminal there. In 1985, the Committee approved the rezoning ordinance on condition that the commercial re-zoning was only for Bettendorf’s use and was not transferable. The ordinance contained a condition that the parcel would revert to agricultural-residential upon the death of Bettendorf or by Bettendorf’s transfer of the parcel to a new owner. Bettendorf later sued to have the conditional language stricken from the ordinance. The Wisconsin Court of Appeals invalidated the entire ordinance.

Bettendorf then brought this lawsuit in federal court. He argued that the County’s removal of the commercial zoning designation following the Court of Appeals’ decision to invalidate the 1985 ordinance constitutes a taking. He also contended that the state court proceedings and resulting decision by the County to revoke the ordinance it had granted in 1985 did not provide adequate substantive and procedural due process protections. The Seventh Circuit Court of Appeals disagreed.

Noting that it was Bettendorf that initiated the lawsuit that invalidated the County ordinance, the Court did not amount to a taking since the parcel was not “‘practically useless,’ as the takings jurisprudence requires.” As to the substantive due process claim, the Court noted that, “A government entity must have exercised its power without reasonable justification in a manner that ‘shocks the conscience’ in order for a plaintiff to recover on substantive due process grounds.” The Court did not find that the County’s decision to revoke the commercial designation could be considered conscious-shocking or arbitrary, especially since the County rescinded the ordinance as a result of Bettendorf’s lawsuit.

Finally, the Court determined that Bettendorf was afforded adequate process in the state court system so there was no procedural due process violation.