



## **January Case Law Update January 31, 2012**

**[A summary of published Wisconsin court opinions decided during the month of January related to planning]**

### ***Wisconsin Supreme Court Opinions***

[No planning related decisions to report.]

### ***Wisconsin Court of Appeals Opinions***

#### **Conveyance For Highway Was an Easement, Not Fee Title**

[\*Berger v. Town of New Denmark\*](#) involved a quest to determine whether two lots in the Town of New Denmark in Brown County are buildable lots under the Town's zoning ordinance. The lots are zoned A-1 which requires a minimum area of 35 acres and a frontage of at least 500 feet. Both lots are bordered on one side by a County Highway. To calculate the total acreage of the parcels, the Town Board excluded the land occupied by the County Highway. The Board concluded each parcel contained approximately 34.5 acres. As a result, the two lots were not buildable as zoned.

The Bergers initiated this lawsuit challenging the Town's decision. The Town argued Brown County owned the land under the highway so it should be excluded from the determination of parcel size. The Bergers argued they owned the land under the highways. The Court examined the conveyance documents for the highway land. Those documents stated that the land was conveyed to the County "for highway purposes as long as so used." The Court of Appeals determined that this language only granted an easement to the County, not fee title. The Court of Appeals agreed that the Bergers owned the land under the highway.

The Court of Appeals remanded the case to the Circuit Court to determine if the parcels are otherwise buildable and whether the zoning ordinance allowed for the inclusion of public right-of-ways when calculating acreage.

The case is recommended for publication.

#### **Criteria in Subdivision Ordinance Not Unconstitutionally Vague**

[\*Guse v. City of New Berlin\*](#) involved a challenge to the City of New Berlin's rejection of an application to divide a parcel into two lots. The City Council rejected the subdivision based on the following provisions of the City's subdivision ordinance:

New lots within existing residential subdivisions may be prohibited under any of the following criteria:

- (1) When the new lot area is less than the average of the existing lots within the subdivision excluding unbuildable lots; or
- (2) When the new lot width is less than the average width of the existing lots within the subdivision excluding unbuildable lots; or
- (3) The subdivision was platted over 25 years ago.

The lot owned by Guse was platted over 25 years ago, the proposed lots would also be smaller in area and width than the average in the subdivision.

Guse challenged the City's decision arguing that the ordinance did not set forth adequate standards for decision making. An ordinance is unconstitutionally vague if "it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic enforcement." The Court of Appeals, however, found that the above standards were fairly specific and hence not unconstitutionally vague.

Guse also argued that the City's action was arbitrary and capricious because there were two parcels on his side of the street and three smaller lots on the other side of the street. The Court of Appeals, however, found that "inconsistencies in determinations arising by comparison are not proof of arbitrariness or capriciousness."

The case is recommended for publication.