

Planning Case Law Update
(Cases from January 1, 2009 - February 12, 2010)

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I. Local Government Authority

A. PCS Transmission Line Permitting Process Preempts Local Ordinances

In *American Transmission Co. v. Dane County*, 2009 WI App 126, 772 N.W.2d 731, the Wisconsin Court of Appeals held that the Legislature has expressly withdrawn the power of local governments to act on any matter that could have been addressed in the Public Service Commission's (PSC) administrative proceeding resulting in the issuance of a certification of public convenience and necessity for a high-voltage power line.

The case arose out of a dispute between the American Transmission Company (ATC) and Dane County over the whether the construction of three transmission lines in Dane County was subject to the county's shoreland erosion control and wetland ordinance requirements. The permitting of high-voltage transmission lines in Wisconsin requires the approval of the PSC through the granting of a certificate of convenience and necessity. Section 196.491(3)(i) of the Wisconsin Statutes provides: "If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed."

Dane County asserted that this provision of the statutes only applied to local regulations that would block a project. The Court of Appeals determined that even if Dane County were not going to impose conditions beyond those contained in the PSC order, the County's "permit process in itself is an additional impediment or inhibiting factor in the installation and utilization of the transmission lines." As a result, the Court held that Dane County had no authority to apply its ordinances to the transmission line projects under the above-referenced statute.

The Court of Appeals noted that under the PSC's permitting process, the PSC, in conjunction with the Department of Natural Resources, is charged with considering environmental factors and land use and development plans for the area of the project. Although Dane County appeared in one of the proceeding for the projects, the County failed to raise local environmental issues at that time. As a result of the case, **if local governments have concerns about large electric generating facilities or high-voltage transmission lines, they need to participate in the PSC proceeding and raise the concerns as part of those proceedings.**

B. Special Statute Allowing Town of Ledgeview to Incorporate is Unconstitutional

State ex rel. Kuehne v. Burdette, 2009 WI App 119, 772 N.W.2d 225, involved a challenge to Section 66.0203(11) of the Wisconsin Statutes, passed in 2007 as part of the state's budget bill. That section of the statutes allowed the Town of Ledgeview in Brown County to bypass the normal process for

incorporating into a village. (Ledgeview had petitioned to incorporate in 2003 but did not meet the statutory requirements of the normal incorporation process so the Department of Administration dismissed the incorporation petition.) The Court of Appeals declared the 2007 statute unconstitutional.

Section 66.0203(11) reads as follows:

“TOWN OF LEDGEVIEW IN BROWN COUNTY MAY BECOME A VILLAGE. (a) The town of Ledgeview, in Brown County, may become a village if the town holds, and approves, an incorporation referendum as described in s. 66.0211(3). None of the other procedures contained in ss. 66.0201 to 66.0213 need to be fulfilled, and no approval by the department's incorporation review board under s. 66.0207 is necessary for the town to become a village.

(b) The town of Ledgeview, in Brown County, shall enter into a boundary agreement with the city of De Pere under s. 66.0307, except that the agreement need not be completed before the town holds a referendum on incorporation.”

Article IV, section 31(9) of the Wisconsin Constitution prevents the legislature “from enacting any special or private laws . . . [f]or incorporating any city, town or village” Since Section 66.0203(11) applies only to the Town of Ledgeview, the Court of Appeals quickly concluded: “We discern no serious argument that WIS. STAT. § 66.0203(11) is anything other than a special or private law” rather than a general law with uniform incorporation procedures that other towns could also use. The Court of Appeals also concluded that the statute specifically provides for Ledgeview to incorporate as a village, thus violating the Constitutional prohibition.

C. Local Regulation of Wind Energy Systems Requires a Case-by-Case Approach

In *Ecker Bros. v. Calumet County*, 2009 WI App 112, 772 N.W.2d 240, the Wisconsin Court of Appeals addressed the process local governments must use to regulate wind energy systems under section 66.0401 of the Wisconsin Statutes.

Section 66.0403(1) reads as follows:

(1) **AUTHORITY TO RESTRICT SYSTEMS LIMITED.** No county, city, town, or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system . . . or a wind energy system . . . unless the restriction satisfies one of the following conditions:

- (a) Serves to preserve or protect the public health or safety.
- (b) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (c) Allows for an alternative system of comparable cost and efficiency.

Calumet County adopted an ordinance that set minimum setback, height and noise requirements for any wind energy system in the County. The County’s ordinance divided the systems into two categories, small and large, and established a uniform set of restrictions for each category.

The Ecker Brothers were farmers with one turbine on their farm who wanted to build additional wind turbines on their farm. They brought a facial challenge to the type of regulation used by the County and did not challenge the substance of the regulations. According to the Court of Appeals, the case “boils down to the proper method for restricting wind energy systems: (1) a conditional use permit procedure that restricts systems as needed on a case-by-case basis, or (2) an ordinance creating a permit system with across-the-board regulations based on legislative policy-making.” The Court then concluded that the statute only authorizes the first approach.

The Court of Appeals, stated that section 66.0403(1) “requires a case-by-case approach, such as a conditional use permit procedure,” in which a local government must rely on the facts of the individual situation to make case-by-case restrictions. The Court interprets section 66.0403(1) to prohibit local governments from using ordinances that establish uniform requirements for setbacks, etc. The Court call these uniform restrictions “one size fits all” and arbitrary. As a result, the Court of Appeals determined that the County exceeded its authority under section 66.0403(1) when it adopted it wind energy ordinance.

As a result of this case, local governments with ordinances regulating wind and solar energy systems should review those ordinances to insure that they follow a case-by-case permitting process rather than using uniform standards that everyone applicant must follow. The case-by-case approach will most likely require greater analysis of each application and stronger justification for the standards used in each permit than would be required for a uniform standard. Following a case-by-case approach will also move the regulatory process from a standard set by legislative means, to which courts give great deference, to a more quasi-judicial process subject to greater scrutiny by the courts.

II. Zoning

A. PUDs can reflect changes in underlying zoning

Janacek Inv., Inc. v. City of New Berlin, an unpublished opinion of the Wisconsin Court of Appeals (meaning it has limited precedential value), provides an interesting situation involving a planned unit development (PUD). A developer planned to construct a mixed-use facility comprising a hotel, conference center, indoor water park, retail shops and restaurants in the City of New Berlin in southeastern Wisconsin. A PUD ordinance for the project was adopted in January 2001 making the underlying zoning B-1 with a PUD overlay.

The stated purpose of the PUD was "to create a zoning district that allows creative project design and flexibility from the rigid development standards of underlying zoning districts." The PUD stated that the conference center would feature a five-story hotel and two levels of below-grade parking, and provided that "[b]uilding height shall conform to existing zoning ordinances." The City's zoning ordinances in effect at the time the PUD was approved limited hotel building height in B-1 zoning districts to fifty-five feet. However, soon after the adoption of the PUD, the City revised its zoning code to allow hotels to exceed the maximum height requirement of 55-feet by up to 2 floors if underground parking was provided. In December 2006, Deer Creek submitted a request for use approval under the PUD to the Plan Commission. The use approval took advantage of the changes to the underlying zoning and proposed a seven-story, ninety-four-foot-high hotel with five levels of below-grade parking.

The Plan Commission granted the use approval and a neighboring property owner initiated this challenge to the approval. The neighboring property owner argued that "existing zoning ordinances" meant existing at the time the PUD was created. If not, the neighbor argued that it would mean the City substantially changed the plans for the proposed development under the original PUD, thus effectively amending the PUD ordinance without proper notice. The City and Developer argued that the phrase “existing zoning ordinances” meant the ordinances that exist at the time use approval is sought.

The Court of Appeals sided with the City and the developer and found that the City's approval of the larger hotel was proper. The Court seems to have been persuaded by its conclusion that the City meant this PUD to be flexible and the City had this project in mind when it amended the zoning ordinance to provide the additional floor credit for underground parking.

B. Use Variance/Area Variance Distinction

Driehaus v. Walworth County, 2009 WI App 63, 317 Wis. 2d 734, 767 N.W.2d 343, involves a longstanding dispute between neighbors over the conversion of a garage. Driehaus owns more than seventeen acres of property, with over six hundred feet of frontage on Geneva Lake. The property is zoned C-2, Upland Resource Conservation District and included two residences and an eight-car garage. The garage was built in 1906 and is located less than three feet from the property's boundary line. The Walworth County Shoreland Zoning Ordinance (shoreland ordinance) requires a twenty-foot minimum side yard setback for all dwellings in a C-2 zoning district.

In 1999, Driehaus applied for a building permit to make certain improvements to the garage and convert the upper portion storage area to a single-family residence but the permit was denied because the shoreland ordinance only allows one principal structure to be located on a lot. Driehaus then filed an application for a zoning permit to "rehab" the existing two-story garage with the County and was again unsuccessful.

On April 5, 2000, Driehaus filed an application with the County zoning committee for a conditional use permit (CUP) for a planned residential development for three dwellings. The zoning committee voted to conditionally approve the CUP; however, one of the conditions imposed was that Driehaus obtain all required zoning permits, including a variance to the twenty foot lineal side yard setback requirement found in the shoreland ordinance. The zoning committee then decided to hold further proceedings and to make its own decision on the variance and did not refer the matter to the Board of Adjustment. The committee held a hearing on the variance and voted to grant Driehaus a variance to the twenty foot lineal side yard setback requirement.

The neighboring property owners then filed a lawsuit challenging the zoning committee's decision to grant the variance. The circuit court dismissed the lawsuit but was overturned in an earlier Court of Appeals decision. The Court of Appeals in the earlier action held that the zoning committee had no jurisdiction to consider the variance and sent the case back to the County for a decision on the variance by the Board of Adjustment. The Board of Adjustment denied the variance. Driehaus then challenged the Board's denial of the variance. The Circuit Court upheld the denial. Driehaus then appealed the Circuit Court's decision to the Court of Appeals.

On appeal, Driehaus argued that the Board applied the wrong legal rule to the facts of the case. Rather than focus on the dimensional aspects of the variance, he asserts, the Board denied his petition based on the proposed use of the property. Under *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401, the standard for granting an area variance is "unnecessarily burdensome" while the standard for granting a use variance is the more stringent "no reasonable use" standard.

The Court of Appeals did not agree that the Board applied the wrong standard. The Court of Appeals noted that under *Ziervogel*, use can be a factor in the board of adjustment's consideration of area variances. The Court of Appeals then went on to note that in this case the Board's decision rested on several findings, including: (1) the garage could continue to be used for storage as it has been without a variance, (2) the "hardship" of needing another dwelling was self-created and of a personal nature, (3) the setback requirements were not unnecessarily burdensome to Driehaus' 17.91 acre lakeshore estate, (4) the detriment to the neighboring properties was apparent, and (5) a variance under these facts would undermine the purpose of the zoning law. The Court of Appeals upheld the variance concluding that the Board's findings represented an appropriate application of the law to a reasonable view of the facts, and its decision was neither oppressive nor arbitrary.

C. A Use For 12 Days Does Not Establish a Legal Nonconforming Use

In *Town of Cross Plains v. Kitt's Korner, Inc.*, 2009 WI App 142, 775 N.W.2d 283, the Wisconsin Court of Appeals held that the adult entertainment provided at a tavern for twelve days before the effective date of an ordinance amendment prohibiting that use in that zoning district did not constitute a nonconforming use.

In early 2005, a tavern business called Kitt's Korner was operating in the Town of Cross Plains, Dane County. Bow-Wow Entertainment, LLC, owned and operated an adult entertainment tavern in North Bristol, Dane County. As a result of the opening of this establishment, Dane County officials became aware that Dane County ordinances did not contain any provisions regulating adult entertainment and they began to consider proposals to address this. On January 31, 2005, a County Board committee voted to approve an amendment addressing adult entertainment. The proposed amendment was scheduled for action by the County Board on February 18, 2005.

On February 11, 2005, Bow-Wow purchased all of Kitt's stock. A managing member of Bow-Wow, testified that at the time he began negotiations for the purchase of Kitt's Korner, he was aware an amendment requiring a zoning change for an adult entertainment tavern was going to be adopted sometime in early 2005.

On the night of February 11, Kitt's began presenting nude dancers. A manager of Bow Wow acknowledged that he started on this date in order to attempt to beat the ordinance amendment and to be "grandfathered" in under the existing ordinance. Kitt's then offered adult entertainment every night from 5:00 p.m. until 2:00 a.m.

On February 19, 2005, the County Board adopted an adult use amendment to the Dane County Zoning Ordinance. The amendment became effective on February 23. However, on February 21, 2005, Kitt's obtained a building permit and thereafter began remodeling the events area to add balconies, private viewing cubicles, a stage with poles, dressing rooms, lighting, and other improvements. The Town revoked Kitt's liquor license and a dispute arose over the lawfulness of the adult entertainment.

Kitt's Korner looked to Wis. Stat. § 59.69(10)(a) and argued it had vested rights as an established nonconforming use under Wisconsin law. Wis. Stat. § 59.69(10)(a) states that zoning ordinances "may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure, or fixture is used at the time that the [zoning] ordinances take effect." The Town argued the adult entertainment offered by Kitt's was not a legal nonconforming use. The Wisconsin Court of Appeals agreed with the Town.

The Court's decision addressed two issues. The first was: What, if anything, in addition to a use actually occurring on the effective date of the ordinance amendment, is required to constitute a vested interest for purposes of protection as a nonconforming use under Wis. Stat. § 59.69(10)(a)? The Court concluded that, "in order for a use to be protected as a nonconforming use, the business owner must have a *vested interest* in the continuance of that use, meaning that, were the continuance of the use to be prohibited, *substantial rights* would be adversely affected. In the context of § 59.69(10)(a)--relating to trade and industry--this will ordinarily mean that there has been a *substantial investment* in the use or that there will be a *substantial financial loss* if the use is discontinued." (Emphasis Added.)

The Court next noted that to determine whether Kitt's Korner's had established *substantial rights* (had made a substantial investment or would suffer a substantial financial loss) depended on resolution of a second issue. The second issue was: What is the effect of the owners' *knowledge* of the pending ordinance amendment before they began to make expenditures and incur liabilities to establish the new adult entertainment use?

The Court concluded that, in order to acquire a vested interest in a use for protection as a legal nonconforming use under Wis. Stat. § 59.69(10)(a), “the business owner must reasonably rely on the *then-existing ordinance* when making expenditures and incurring liabilities. In the circumstances of this case, we conclude that, because the *owners knew* of the pending ordinance amendment before they made expenditures and incurred liabilities to establish the use, *they did not reasonably rely on the then-existing ordinance.*” (Emphasis added.) In other words, because of Bow Wow’s knowledge of the proposed ordinance change, the Court of Appeals viewed the proposed ordinance as the “then-existing” ordinance and the last minute efforts by Kitt’s to frustrate the County’s pending ordinance change would not work to establish a nonconforming use.

D. A Dispute About the Definition of “Floor Area”

In *Propp v. Sauk County*, 2010 Wisc. App. LEXIS 9, the Wisconsin Court of Appeals provided guidance for what is meant by “floor area” as used in Section 59.692(1v) of the Wisconsin Statutes.

Propp owns a house on Lake Wisconsin in Sauk County. She began construction of a deck that, when completed, would extend 400 square feet into the 75 foot shoreland setback. (Part of the deck would not extend into the setback.) Section 59.692(1v) of the Wisconsin Statutes requires that the county must grant special zoning permission for structures in the shoreland setback area if certain conditions apply. One of the conditions is that “[t]he total floor area of all of the structures in the shoreland setback area of the property will not exceed 200 square feet.” Similar provisions are contained in the Sauk County Shoreland Zoning Ordinance. Sauk County notified Propp that the deck was in violation of the ordinance.

Propp then sought a special land use permit in which she proposed to remove the outermost area of deck floorboard so the remaining part of the deck flooring would be 200 square feet. Propp’s proposal left the deck support system for the larger-sized deck in place (exposed floor joists, an I-beam, and two posts). The County denied the permit based on an interpretation of the term “floor area” that included the total area within the perimeter of the deck’s support system.

Both the Circuit Court and the Court of Appeals disagreed with this interpretation. The Court of Appeals noted that neither chapter 59 of the Wisconsin Statutes nor Sauk County’s Shoreland Zoning Ordinance defined “floor area.” As a result, the Court of Appeals turned to a dictionary definition of the term “floor” meaning “. . . the part of a room upon which one stands.” The Court of Appeals then concluded that “the term ‘floor area’ unambiguously encompasses only the surface portion of Propp’s deck floorboards and, therefore, does not include portions of the deck’s support system that extend beyond the floorboards.” The Court of Appeals noted that there are other terms that could have been used if the intent was to describe the total square footage enclosed by a structure, “such as the ‘footprint’ of the structure, the total area of the structure, or even just saying the total size of the structure itself.”

Since a portion of the deck was outside the setback, the County also argued that the total floor area of the deck exceeded the 200 square foot limit. The Court of Appeals found this interpretation to be inconsistent with the language of the statutes that referenced the “total floor area of all the structures *in* the shoreland setback area.”

The decision is recommended for publication.

E. Denial of Wireless Facility Based on Aesthetic Concerns Upheld

Helcher v. Dearborn County, 2010 U.S. App. LEXIS 2653 (7th Cir., 2010) involves an appeal by a wireless telecommunications provider of a Board of Zoning Appeals decision to deny a conditional use permit to construct a wireless communication facility on agricultural land due to objections regarding the impact of the facility on the aesthetics of the area. The provider argued the Board's decision did not comply with the provisions of the Federal Telecommunications Act of 1996, 47 U.S.C. § 332(c) because the denial did not comply with the "in writing" requirement of the Telecommunications Act; that the Board's decision was not supported by substantial evidence; that the denial of the permit effectively prohibits Bell from providing wireless communication services; and that the Board's decision unreasonably discriminated among wireless providers. The Federal Court of Appeals for the Seventh Circuit did not agree.

According to the Court, the requirement of that a denial must be "in writing" is met so long as the written decision contains a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons -- a decision "in writing" is adequate if it provides an explanation that allows a court, in combination with the written record, to determine if the decision is supported by substantial evidence

In this case, the "writing" issued by the Board was the seventeen-page "Zoning Board of Appeals Minutes" for the meeting. The Minutes clearly delineated the issues that arose with the application, the evidence that was presented by both the applicants and by the residents to the Zoning Board, the concerns of the applicants and residents of the area, and the concerns of the Board members. The Minutes also cited the specific provisions of the Ordinance that the majority of the voting members found were not met by the application. The Minutes therefore met the standard of allowing the Court to determine if the decision is supported by substantial evidence.

Based on this written record, the Court next decided that the Board's decision was supported by substantial evidence. The Court concluded that the provider had not adequately considered placing the tower on land zoned for manufacturing, business, or for highway interchanges. The Court agreed that the facility, a 190-foot industrial-looking tower, would not be harmonious with an agricultural setting and that is one of the reasons that the Ordinance requires that wireless providers consider seven other categories of zoned property before resorting to placement on agricultural land.

Finally, the Court also found that the remaining two arguments of the provider had no merit. Because of the possible alternative locations, the Court did not agree that the Board's rejection of the permit effectively prohibited the provider providing wireless communications services. Also, the Court did not find that the Board's denial unreasonably discriminated between wireless providers. According to the Court, it was difficult to see how this particular provider could make a claim that other carriers were treated more favorably when none had been allowed to build a new tower since the inception of the Ordinance.

III. Condemnation

A. Unit Rule in Condemnation Cases is Constitutional

In *City of Milwaukee v. Redevelopment Auth.*, 2009 WI 84, 319 Wis. 2d 553, 768 N.W.2d 749, the Wisconsin Supreme Court **reversed** the decision of the Wisconsin Court of Appeals that struck down the application of the unit rule in the particular facts of this condemnation case as unconstitutional.

The Court of Appeals decision was reported in the February 2008 WAPA Case Law Update. The 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.

The case was then appealed to the Wisconsin Supreme Court which reversed the decision of the Court of Appeals. In a decision written by Chief Justice Abrahamson (with Justices Ziegler and Gableman concurring, and Justices Prosser, Crooks, and Roggensack dissenting), the Supreme Court held that using the unit rule in the case did not violate the just compensation clause of the Wisconsin Constitution. According to Justice Abrahamson, “the VFW receives just compensation when it receives no compensation for its leasehold interest to a property that has no value.” In the eyes of the Court, when awarding just compensation to owners of partial interests in the property, the sum of the parts cannot be greater than the whole. While Justice Abrahamson recognized that a departure from the unit rule may be appropriate in rare and exceptional circumstances, this case did not present such an exceptional situation. The Court also noted that contract law offered a tool to lessees like the VFW to guard against problems like the Maharishi Vedic University’s failure to maintain the property prior to the condemnation.

B. Damage to Property Can Be a Taking

E-L Enterprises v. Milwaukee Metro. Sewerage, 009 WI App 15, 316 Wis. 2d 280, 763 N.W.2d 231, involved an inverse-condemnation claim for 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 a building located on the property to settle.

The Sewerage District argued that the damage to property did not constitute a “taking” under Wisconsin law. Citing a long line of cases from the early 1900s on this issue, the Court of Appeals disagreed and held that such damages can constitute a taking.

C. Role of Project Influenced Valuation Evidence in Eminent Domain Actions

Spanbauer v. State of Wisconsin Dept. of Transp., 2009 WI App 83, 320 Wis. 2d 242, 769 N.W.2d 137, involves an effort to exclude certain comparable property evidence used by the appraiser for Mr. Spanbauer in response to a condemnation action initiated by the Wisconsin Department of

Transportation to take the Spanbauer land for a roundabout in the Town of Oshkosh in Winnebago County.

Wisconsin's eminent domain statutes state that any increase or decrease in the fair market value of the subject property caused by the public improvement may not be taken into consideration in determining just compensation. WIS. STAT. § 32.09(5)(b). The appraiser for Mr. Spanbauer used a comparable property sale to Kwic Trip in the determination of fair market value of the Spanbauer property. Kwic Trip purchased the property after the announcement of the plans for the highway project. The Wis.DOT argued that the sale to Kwic Trip was influenced by the highway project and Wisconsin's project influence statute created a bright-line prohibition against including project influenced comparable sales in an eminent domain action. The DOT argued that the evidence of the Kwic Trip sale should be excluded from the case.

The Wisconsin Court of Appeals, however, disagreed. The Court of Appeals found that knowledge of a highway project did not automatically mean that the sale was project influenced. Rather, the Court concluded that this case presented a factual dispute regarding whether the sale to Kwic Trip was influenced by knowledge of the project. As a result, the Court held that it was appropriate for the trial court to send the information about the Kwic Trip sale to the jury for their determination if the Kwic Trip sale was project influenced.

Review denied, 2009 WI 99, 775 N.W.2d 532.

IV. Intergovernmental Disputes

A. City's Actions Did Not Constitute Controlling Influence in Annexation

In *Sanitary Dist. No. 4 - Town of Brookfield v. City of Brookfield*, 2009 WI App 47, 317 Wis. 2d 532, 767 N.W.2d 316, the Wisconsin Court of Appeals examined the level of a City's influence in an annexation. The City was approached by a property owner seeking annexation to the City. The City helped prepare the legal description and maps for the properties involved in the annexation. The Sanitary district claimed that because of this assistance, the City was the real and controlling influence in advancing the annexation petition in violation of the rule of reason. The rule of reason is a court created doctrine that requires that annexations meet three requirements: (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness; (2) some reasonable present or demonstrable future need for the annexed property must be shown; and (3) no other factors must exist which would constitute an abuse of discretion on the part of the municipality.

The Court of Appeals concluded that the City's actions merely assisted the property owner's expressed desire to annex property and were not a controlling influence in violation of the rule of reason. The Court also addressed some irregularities in who signed the annexation petition on behalf of the companies that owned the properties and concluded the signatures were not improper.

Petition for review denied, 2009 WI 99; 319 Wis. 2d 212; 775 N.W.2d 101

B. Town's Approval of Condominium Violated Village ET Moratorium

In *Village of Newburg v. Town of Trenton*, 2009 WI App 139, 773 N.W.2d 500, the Wisconsin Court of Appeals held that the Town of Trenton in Washington County violated a temporary moratorium enacted by the Village of Newburg in the Village's extraterritorial jurisdiction. The Village's moratorium, enacted under the extraterritorial zoning process outlined in section 62.23(7a) of the Wisconsin Statutes, prohibited the town from changing the zoning or land within the extraterritorial

jurisdiction of the Village (one and one-half miles beyond the border of the Village) for 2 years. (There is no county zoning in Washington County. All the towns administer their own zoning ordinances.)

While the moratorium was in place, the Town approved a six-unit condominium development on a parcel zoned for “country estate residential” located within the Village’s extraterritorial jurisdiction. The zoning allowed for single-family residential development at densities of one dwelling unit per acre. The proposed condominium development included one commercial/industrial unit and five residential units. The Village argued the development required a rezoning, an action prohibited by the moratorium. The Town argued that since the development was condominium, the zoning process did not apply.

The Court of Appeals noted that while section 703.37 of the Wisconsin Statutes states that zoning may not prohibit the condominium form of *ownership*, the proposed *use* envisioned by for the condominium development must comply with applicable zoning ordinances. If a condominium development proposes a use for a parcel of land prohibited by the zoning for that parcel, the Town needs to rezone the parcel if it wants to approve the development, something the Town could not do because of the moratorium. The Court declared the Town’s approval of the condominium development to be a “de facto rezoning” in violation of the Village’s moratorium.

The case is recommended for publication.

C. City is a “customer” of city-owned electric utility

In *Wisconsin Power & Light Co. v. Public Serv. Comm’n of Wisconsin*, 2009 WI App 164, the Wisconsin Court of Appeals upheld the decision of the Public Service Commission (PSC) to allow the City of Wisconsin Dells’ Water and Light Utility to provide electricity to several condominium developments near the Chula Vista Resort. At issue was section 196.495 of the Wisconsin Statutes that prohibits electric utilities from providing electric services to premises that are already receiving electric services from another utility and sets standards for determining which utility has the right to serve new customers.

Chula Vista petitioned to have the City of Wisconsin Dells annex two parcels to get access to City water and sewer for new condominium complexes and other facilities Chula Vista planned to build. At the time the City annexed the parcels, Wisconsin Power and Light (WP&L) was the only utility providing electric service in the area. After the annexation, the City built three sewer lift stations and a well in the annexed area to serve the new development. Since 196.495 allows public utilities to extend electric service to serve their own facilities, the PSC authorized the City to provide electricity to the lift stations.

After completion of the condominiums, the City began providing electricity to them. WP&L then sought a ruling from the PSC that it had exclusive rights to provide electric service in the annexed area. Under the standards for serving new customers in 196.495, service can be extended from a line “actually used to serve a customer.” WP&L argued that since the City was only providing electricity to City facilities, the City was not providing electricity to a “customer” in the area. The Court of Appeals disagreed with WP&L’s argument finding that the City sewer and water utilities were customers because they were billed for services by the City’s electric utility, the same as private customers. The City was therefore allowed to provide electricity to the new development at Chula Vista.

D. One Town, One Vote Does Not Apply When Discontinuing a Highway

Dawson v. Town of Jackson, 2010 Wisc. App. LEXIS 7, involved an application by the Dawsons to discontinue a town highway shared by the Town of Cedarburg and the Town of Jackson in Washington County. Section 82.21(2) of the Wisconsin Statutes outlines the procedure to discontinue a highway

located on the line between two municipalities. According to that Statute, the governing bodies “acting together, shall proceed” to approve or deny the discontinuance.

The Towns held a joint hearing. All five town board members from Jackson attended but only three of the five town board members from Cedarburg attended. At the hearing, the five Jackson board members voted unanimously in favor of discontinuing the highway and the three Cedarburg members voted unanimously against discontinuing the road. The Dawsons asserted that their application to discontinue was approved five-to-three. Cedarburg asserted that the vote was a tie -- one town in favor and one town against -- so the discontinuance was not approved.

The Court of Appeals agreed with the Dawsons, finding that if the legislature had intended to allow one municipality to block an attempt to discontinue a highway, the legislature could have required approval by both governing bodies, rather than requiring that governing bodies “acting together” could take action.

This decision certainly puts local governments with smaller governing boards at a disadvantage.

The decision is recommended for publication.

V. *Taxation and Special Assessment*

A. **Property Assessment for Commercial Properties**

Allright Prop., Inc. v. City of Milwaukee, 2009 WI App 46, 317 Wis. 2d 228, 767 N.W.2d 567, involved a challenge to the City of Milwaukee’s assessment for general property tax purposes of \$10,115,000 for a parking lot near the entrance to General Mitchell International Airport. The City followed the Wisconsin Department of Revenue’s *Wisconsin Property Assessment Manual for Wisconsin Assessors* and used the “income approach” and “cost approach” to value the property because the City’s assessor could not find any recent sales of large parking lots.

Allright Properties challenged the assessment arguing that the City failed to follow the *Property Assessment Manual*. Allright’s appraiser based his assessment on the lease value of the property for a parking lot and arrived at a value of \$3,300,000. The Wisconsin Court of Appeals upheld the City’s assessment finding that the City properly followed the *Manual* for assessing property when comparable sales are not available. The Court of Appeals also rejected Allright’s argument that the City violated the uniformity Clause of the Wisconsin Constitution. Allright’s property was assessed at \$25 per square foot while surrounding commercial land was assessed at between \$2.50 and \$4 per square foot. According to the Court of Appeals, uniformity requires that the evaluation and the rate of assessment of all properties be uniform: “We decline to mandate equality of land values for commercially zoned property.”

Petition for review denied. 2009 WI 99, 319 Wis. 2d 212, 775 N.W.2d 101.

B. **Statute Limiting Court’s Review of Assessments Found Constitutional**

In *Metropolitan Assocs. v. City of Milwaukee*, 2009 WI App 157; 774 N.W.2d 821, the Wisconsin Court of Appeals upheld the process under Wis. Stat. § 74.37 for challenging real property assessments.

Section 74.37 originally provided that a property owner for file a claim of excessive assessment with the taxing authority and if the claim was disallowed, the property owner could bring a lawsuit in circuit court to recover the claim. This statute, however, did not apply in Milwaukee County. In

Milwaukee County, property owners were limited to an on the record review by the circuit court of the decision of the local board of review regarding the claim.

In *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis.2d 630 N.W.2d 141, the Wisconsin Supreme Court struck down the exclusion of Milwaukee County from the procedures of section 74.37 as an unconstitutional denial of equal protection to Milwaukee County taxpayers. The Legislature subsequently amended § 74.37 to allow any community the ability to opt out of the procedures of § 74.37. The City of Milwaukee decided to opt out of the procedures of § 74.37 and Metropolitan Associates brought this lawsuit claiming the opt out provision also violated equal protection. The Wisconsin Court of Appeals disagreed. The Court found that the opt out provision addressed the concerns raised by the Wisconsin Supreme Court in the *Nankin* case.

The case is recommended for publication.

C. Custodian's Residence Owned by Church is Not Exempt from Property Taxes

In *United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 776 N.W.2d 280, the Wisconsin Court of Appeals held that the custodian's residence owned by the Wauwatosa Avenue United Methodist Church was not eligible for a property tax exemption under Wisconsin law.

Section 70.11 of the Wisconsin Statutes provides a list of exemptions to the state tax laws. In subsection 4, property owned and used by exclusively by religious institutions is exempted. The religious property exemption also applies to housing for pastors, their ordained assistants, members of religious orders, and ordained teachers. Since this list is not exhaustive, the church argued that the custodian's residence was exempt because the custodian is reasonably necessary for the functioning of the church. The Court of Appeals disagreed. The Court found that the custodian's "main work is not integral or necessary to the functioning of the church in its primary purpose, which is spiritual guidance and formation."

VI. Water Law

A. Homeowners Who Do Not Alter Surface Water Flow Owe No Duty To Remedy Flooding of Adjacent Property

In *Hocking v. City of Dodgeville*, 2009 WI 70, 318 Wis. 2d 681, 768 N.W.2d 552, the Wisconsin Supreme Court held that uphill landowners owed no duty of care to abate naturally occurring surface water that runs downhill onto the Hockings' property.

The Hockings purchased their home prior to the development of the adjacent land. After development of the land surrounding their home, the Hockings experienced significant water problems due to the increased stormwater runoff from the adjacent properties. This decision by the Wisconsin Supreme Court involves a negligence lawsuit brought by the Hockings against the adjacent homeowners who purchased their home after it had been built.

The Wisconsin Supreme Court's decision first reviews the four-element analysis used by Wisconsin courts to determine whether an actionable claim for negligence has been stated. The four elements are: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and (4) actual loss or damage resulting from the breach.

The Court next evaluates whether the neighboring homeowner owed a duty to the Hockings to abate the surface water running onto the Hocking property. The Court recognizes that Wisconsin follows

the “reasonable use” rule to analyze surface water problems. Under this rule, a landowner must use his land reasonably, and a duty to act will arise if the landowner's use of his land that resulted in altering the flow of surface waters is unreasonable. The Court then concludes that the neighbors’ conduct did not involve a use of their property that altered the flow of surface water. Therefore, their use was not unreasonable, and they have no duty to abate the flow of stormwater. According to the Court, “The defendants merely purchased a home, lived in that home, paid property taxes, and established a tie to the community in which they live. They are living the American dream by owning a home. Their conduct----living in their home----does not deviate from typical behavior. They did not create the flow of rainwater or alter the property so to create this problem on the Hockings’ property.” While the neighboring homeowner was not negligent, the Court hints that the outcome might be different for the developer of the adjacent properties since the developer allegedly caused the problems.

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

A companion case to the above Wisconsin Supreme Court decision is the Wisconsin Court of Appeals decision in *Hocking v. City of Dodgeville*, 2009 WI App 108, 770 N.W.2d 761. This case involved the timeliness of the Hockings’ lawsuit. In the decision the Wisconsin Court of Appeals upheld 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 of Appeals also found that the exceptions to this 10 year limitation did not apply. First, the Court found that the City did not warrant or guarantee the development. Second, the Court of Appeals 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 and were not the result of the City’s maintenance of those streets.

C. Replacement Public Access To River Found To Be Equivalent

Citizens For U, Inc. v. Wisconsin Dept. of Natural Res., 2010 Wisc. App. LEXIS 57, involved a challenge to a decision of the Wisconsin Department of Natural Resources (DNR) approving a petition by Wood County to abandon a portion of a County Highway that provides public access to the Wisconsin River. The public access is on land owned by the Consolidated Water Power Company. Consolidated was required to provide public access on its property as a condition of its license to operate a hydroelectric dam on the River. The subject land is now part of a proposal to construct a residential development. Consolidated proposed replacing the public access to a site about four miles upstream. DNR approved the replacement under Section 66.1006 of the Wisconsin Statutes.

A citizens group challenged the DNR’s approval on the basis that the replacement did not provide comparable access. DNR found the proposed improvements to the replacement access actually made it superior to the existing access. The court of Appeals agreed.

The decision is recommended for publication.

VII. Privatopia

A. Condominiums

Apple Valley Gardens Assoc., Inc. v. MacHutta, 2009 WI 28, 316 Wis. 2d 85, 763 N.W.2d 126, involved a lawsuit brought against condominium owners who rented their unit. At the time they purchased the unit, the declaration of condominium creating the unit contained no restriction regarding rental of the units. However, the condominium association later amended the condominium bylaws to prohibit rental of the condominium units. The owners leased their condominium unit to a new tenant over the association's objection, claiming that the rental prohibition was ineffective because it had not been added to the condominium declaration. The association then filed this lawsuit to enforce the bylaws amendment prohibiting rentals.

The Wisconsin Supreme Court held in favor of the association. According to the Court's decision, a condominium bylaws amendment prohibiting the rental of condominium units is permissible under Wis. Stat. § 703.10(3); the condominium declaration in this case does not conflict with the bylaws amendment prohibiting unit rental and is therefore enforceable; and the bylaws amendment constitutes a mere restriction on the use of the condominium units, and does not in any way affect the quality of the units' title or marketability.

B. Private Communities: Buyer beware

Solowicz v. Forward Geneva National, 2009 WI App 9, 316 Wis. 2d 211, 763 N.W.2d 828, involved a lawsuit brought by several condominium owners of a development known as "Geneva National" in Walworth County challenging the developers continued control over the development.

Geneva National is a private "master-planned" community comprising 1600 acres with single- and multi-family homes, commercial and recreational property, golf courses and other recreational options. The multi-family residential buildings were developed as condominiums. There is also a restrictive covenant that controls the orderly development of Geneva National.

The restrictive covenant created two governing bodies to control the development: the Community Association and the Geneva National Trust. The restrictive covenant 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 restrictive covenant grants the developer control until eighty-five percent have sold.

In deciding the case, the Wisconsin Court of Appeals made a distinction between “master-planned communities” and condominiums to hold that master-planned communities are not subject to the limitations of Chapter 703. The Court of Appeals noted the distinction under real estate law between a restrictive covenant running with the land and the instruments required under Chapter 703 to create condominiums. The Court also notes that the development included major parts that were not designated as condominiums.

The Court of Appeals’ decision also draws an somewhat artificial distinction between the definition of a “condominium” and the definition of a “master-planned community.” Rather than rely on Chapter 703 of the Wisconsin Statutes for a definition of a “condominium,” the Court adopts the *Random House Dictionary* definition that focuses on condominiums as a building type rather than a form of ownership: “an apartment house, office building, or other multiple-unit complex, the units of which are individually owned, each owner receiving a recordable deed to the individual unit purchased, including the right to sell, mortgage, etc., that unit and sharing in joint ownership of any common grounds, passageways, etc.” This definition ignores the fact that in addition to multi-unit complexes, condominiums can also be detached single-family housing developments and can include mixed uses.

Unable to find a definition of “master-planned community” in the dictionary, the Court turns to the *Random House Dictionary* definition of a “master plan” (“A master plan develops or improves (land, a community, a building complex, or the like) through a long range plan that balances and harmonizes all elements.”) and the *Random House Dictionary* definition of a “community” (“a locality inhabited by a group whose members ‘share government, and often have a common cultural and historical heritage.’”) Taking these together, the Court of Appeals develops the following definition of “a master-planned community:” “a private quasi-town that may include different types of homes (even condominiums), commercial property, private streets and parks, and other recreational facilities like golf courses, and is designed to attract a certain kind of person.” Not understanding that a community like Geneva National could be structured in its entirety as a condominium, the County found a stark difference between condominiums and master-planned communities and held that Chapter 703 was not intended to include master-planned communities.

Overall, the Court of Appeals is not sympathetic to the plight of the condominium owners. The court notes that the condominium owners “bought-in with [their] ‘eyes wide open.’ If [they are] now opposed to how the Developer maintains this unique community, . . . then [the] remedy is to sell [the] condominium to end the contract. We will not void an entire method of community development because a few condominium owners have formed their own ideas about what the future of planned communities should be. Nor will we make a public policy decision to limit this type of development when the Covenant complies with contract principles and provides clear and specific standards . . . “

IX. Contract law issues

A. Use of Consulting Engineers

In *Becker v. Crispell-Snyder, Inc.*, 2009 WI App 24, 316 Wis. 2d 359, 763 N.W.2d 192, the Court of Appeals held that the developer in the case had third-part beneficiary status to sue on a contract between the Town of Somers in Racine County and the Town’s engineering firm. The Town of Somers recruited the developer to build a subdivision in the Town. The developer hired one engineering firm to do some work. The Town then forced the developer to use the Town’s engineers, a consulting firm. The Town assured the developer the fees would be within 1 to 2% of the other firm. The fees ultimately charged by the Town’s engineers greatly exceeded what the Town had promised. The Court of Appeals

agreed that the developer could sue based on the contract between the Town on the Town's engineers and what transpired in this case was a breach of that contract.

Petition for Review Denied. 2009 WI 34; 316 Wis. 2d 719; 765 N.W.2d 579.

B. Democracy in Action: The Town Meeting

Town of Clayton v. Cardinal Construction, 2009 WI App 54, 317 Wis. 2d 424, 767 N.W.2d 605, presented the issue of whether a contract between the Town of Clayton in Winnebago County and a construction company for the construction of a fire station was void because the Town Board lacked the authority to contract absent approval by the town electors. Sections 61.10(2)(e) and (f) of the Wisconsin Statutes requires approval by town electors at a town meeting for the purchase of land and construction of buildings. On two occasions, the town electors voted down a proposal to buy land and construct a new fire station. Nevertheless, the town board chair advised the board that the board did not need elector approval. The Town Board then entered into an agreement with Cardinal Construction for the new fire station.

The Town Board was promptly voted out of office and was immediately notified by the new town board that the contract was cancelled. Cardinal Construction then sued the town to enforce the contract. The Court of Appeals held that the contract was not valid because the Town did not have the approval of the town electors as required by state law. The Town of Clayton has village powers.

Petition for Review Denied. 2009 WI 99; 319 Wis. 2d 213; 775 N.W.2d 102.

C. Development Agreement Waiving Annexation Rights Upheld

Town of Waukesha v. 164 of Waukesha Ltd. P'ship 2009 WI App 147, 774 N.W.2d 814, emphasizes the important strength of contract law.

In 2005, a developer proposed a commercial development located in the Town of Waukesha. The developer told the town board chair that the City of Waukesha did not want retail at that location. The scenario was similar to one faced by the town earlier where the City initially did not want development of a grocery store, the Town approved the development, and then the developer petitioned to annex the property to the City, which the City approved. To avoid a repeat of the earlier scenario, the town board chair asked the developer enter into an agreement waiving the developer's right to annex the property to the City. The developer agreed to the waiver. Under the terms of the agreement, the developer consented to pay \$250,000 in liquidated damages to the Town in the event the developer petitioned to annex the property to the City.

One of the steps in the development approval process was the approval of a certified survey map (CSM) for the development. The Town Board approved the CSM subject to the conditions imposed in the agreement.

Waukesha County then informed the developer that it could not approve the CSM until several requirements were met. Several months later the developer decided to expand the project. The expanded development would require a new CSM approval by the Town. The developer then petitioned the City of Waukesha to annex the property. The Town sued for breach of the development agreement.

The developer argued that because there is no express grant of authority for a town to request an annexation waiver from a property owner, the authority does not exist. The Town countered that there is no express prohibition of this type of agreement and the agreement fell within the broad corporate powers of towns. The Wisconsin Court of Appeals agreed with the Town.

The developer also argued that under *Hoepker v. City of Madison Plan Commission*, 209 Wis. 2d 633, 563 N.W.2d 145 (1997), the Town could not condition approval of the development on an annexation waiver. *Hoepker* involved the City of Madison's conditioning the approval of a plat on the developer annexing the land to the City. The Court of Appeals distinguished the *Hoepker* case, viewing it as a situation where the City coerced the property owner to annex the property. The Court of Appeals did not view the Town's requiring the developer to enter into the annexation waiver as coercive.

IX. Miscellaneous Planning Cases

A. Denial of Rent Assistance Cannot be Based on Hearsay Evidence

Williams v. Housing Auth. of the City of Milwaukee, 2010 WI App 14, involved the review of a decision of the Housing Authority of the City of Milwaukee denying an application for rent assistance through the Authority's Housing Choice Voucher Program. The Authority denied the application based on an uncontested disorderly conduct citation Williams had received. The back of the citation included a statement by the responding police officer about Williams' conduct. Federal law allows the Authority to deny rent assistance based on violent criminal activity and the Authority used the officer's statement to support the denial.

Since the citation was not contested, there was no trial on the citation to substantiate the statement made by the police officer so the statement is hearsay evidence. In criminal matters, a person accused of criminal activity has the right to confront witnesses to challenge the credibility of the witness' testimony. Without that direct confrontation, the officer's statement is a mere repetition of what he heard others say - - hearsay -- and can be excluded.

The Wisconsin Court of Appeals held that the Authority based the denial solely on uncorroborated hearsay evidence. As a result, the Authority lacked sufficient evidence on which to base the denial.

The decision is recommended for publication.

B. Religious Land Use and Institutionalized Persons Act

The Seventh Circuit Court of Appeals issued a decision in two consolidated cases involving the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.S. § 2000cc et seq. (RLUIPA). RLUIPA provides that a government land use regulation "that imposes a substantial burden on the religious exercise of a . . . religious assembly or institution" is unlawful "unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). The Act also provides 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," *id.*, § 2000cc(b)(1), or that "discriminates against any assembly or institution on the basis of religion or religious denomination." *Id.*, § 2000cc(b)(2).

The first decision, *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531 (7th cir. 2009), involved a religious sect with a religious mission of providing living facilities to homeless and other needy people. The sect wanted to rent the apartments as single-room-occupancy units to house victims of Hurricane Katrina. The City of Chicago initially denied the sect a permit to allow that to happen, even though the prior owner had rented the apartments as single-room occupancy units. The Court of Appeals found that the City's denial imposed a substantial burden on the sect and there was no possible

justification for it. The Court also found the sect's equal protection claim was supported by the allegations of the complaint.

The second case, *Trinity Evangelical Lutheran Church v. City of Peoria*, 591 F.3d 531 (7th cir. 2009), involved a challenge to the application of the Peoria's historic landmark law. The Church wanted to demolish an apartment building it owned that had been designated an historic landmark by the City so the Church could build a religions facility. The City refused to allow the demolition and the Church sued the City alleging the City's denial violated RLUIPA. The court disagreed finding that the burden imposed on the church by the landmark designation that prevented it from demolishing the building was modest. According to the court, the building had not been rendered uninhabitable by the designation. The Church could have sold the building and used the proceeds to finance new construction elsewhere.

C. Regulation of Adult Businesses Requires Evidence of Secondary Effects

Several adult-oriented businesses sued the City of Indianapolis after the City revised its adult-business ordinances to require a license for any retail outlet that devotes 25% or more of its space or inventory to, or obtains at least 25% of its revenue from, adult books, magazines, films, and devices. The City's previous ordinance set the threshold at 50%. To withstand scrutiny under the freedom of expression guarantees of the First Amendment to the United States Constitution, these type of licensing requirements must be based on studies that show the adverse secondary effects that these types of businesses have on a community.

In *Annex books v. City of Indianapolis*, 581 F.3d 460 (7th Cir., 2009), the Court of Appeals for the Seventh Circuit held that the studies that the City relied on to justify the ordinance did not establish the causal relationship between adult entertainment businesses and crime because they focused on businesses that offered live entertainment. Three of the four businesses that challenged the ordinance did not offer live entertainment. In addition, while the City also relied on arrest information, the Court found that the evidence concerning arrests at a bookstore that also offered private viewing was insufficient as it failed to show whether the arrests occurred during the time frame in which the ordinance prohibited operation or whether the number of arrests was significant. The businesses had also presented a study that showed that the type of bookstores they operated did not have significant e secondary effects. The City did not offer any critique of that study. The Court was therefore not convinced the City had met its burden of proving secondary effects and remanded the case for an evidentiary hearing.

For another Seventh Circuit decision on secondary effects evidence see *New Albany DVD, LLC. v. City of New Albany*, 581 F.3d 556 (7th Cir. 2009).