



## January Case Law Update January 31, 2010

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

No decisions to report for the month of January.

### ***Wisconsin Court of Appeals opinions***

#### **A Dispute About the Definition of “Floor Area”**

In [\*Propp v. Sauk County\*](#), 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.

### **One Town, One Vote Does Not Apply When Discontinuing a Highway**

[Dawson v. Town of Jackson](#) 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.

### **Replacement Public Access To River Found To Be Equivalent**

[Citizens For U, Inc. v. D.N.R.](#) 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.