



March Case Law Update March 20, 2008

Wisconsin Supreme Court

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

Wisconsin Court of Appeals published opinions

Raze order upheld as reasonable

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

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

This case is recommended for publication.

Special Assessment of Commercial Property (Excluding Residential Property) Upheld

[**Park Avenue Plaza v. City of Mequon**](#) involved a challenge to a special assessment levied by the City of Mequon under their police power pursuant to section 66.0703 of the Wisconsin Statutes for public improvements along Port Washington Road. Commercial property

owners along Port Washington Road challenged the assessment because the City used a trip generation formula to apportion the assessments in accordance with the number of vehicle trips each property was projected to generate. The City also limited the assessment to commercial properties along the road and declined to levy the special assessment against residential properties along the road. The Court of Appeals upheld the City's approach as reasonable.

This case is recommended for publication

Moratoria Case Finally Decided by Wisconsin Court of Appeals

On February 28, 2008, the Wisconsin Court of Appeals confirmed the authority of local governments to impose temporary moratoria on land divisions under Chapter 236 of the Wisconsin Statutes. The case is entitled [**Wisconsin Realtors v. Town of West Point**](#).

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

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

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

The Wisconsin Chapter of the American Planning Association filed a “friend of the court” brief in support of the authority of local government in Wisconsin to use moratoria.

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

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

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

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

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