American Planning Association
Wisconsin Chapter
Making Great Communities Happen

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July Case Law Update
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[A summary of published Wisconsin court opinions decided during the month of July related to planning]

Wisconsin Supreme Court Opinions

Towns May Not Unilaterally Change Alcohol License

Wisconsin Dolls, LLC v. Town of Dell Prairie, 2012 WI 76, involved a situation where the Town of Dell Prairie in Adams County issued a liquor license for Wisconsin Dolls, an adult-oriented establishment under Chapter 125 of the Wisconsin Statutes. On the application form the premises was described as "all 8 acres of resort." Not all acres were developed. The Town later became concerned that Wisconsin Dolls could construct many new buildings on its premises and serve alcohol in each of them without filing an application for a new license. Upon renewal of the license, the Town unilaterally reduced the description of the premises. Wisconsin Dolls sued.

In an opinion written by Justice Prosser, the Wisconsin Supreme Court held that towns may attach conditions to an alcohol beverages license, including limitations to the described premises, when the license is initially granted. However, if a town later wishes to modify the premises described in the license, especially a modification that disadvantages the licensee, it must pass a valid regulation or ordinance under Wis. Stat. § 125.10(1) (allowing towns to adopt additional regulations for the sale of alcohol that do not conflict with Chapter 125), find grounds for revocation or nonrenewal under Wis. Stat. § 125.12, or negotiate the consent of the licensee. Here the town did not follow any of these requirements so the Court decided the Town was not permitted to unilaterally reduce the description of the premises when it renewed the alcohol beverages license.

The Court acknowledged that towns may have other ordinances that might limit the proliferation of buildings. While the Court does not specifically identify any ordinances, presumably a zoning ordinance could be used to limit the number of buildings that could be constructed on the site. The Court refused to apply the holding to liquor licenses issued by cities and villages.

Livestock Siting Law Preempts Local Regulation

Adams v. State of Wisconsin Livestock Facilities Siting Review Board, 2012 WI 85, is the first case to reach the Wisconsin Supreme Court involving local authority to regulate livestock facilities following the passage of the Livestock Siting Law in 2004 (Wis. Stat. 93.90) and the related rules implementing the law adopted by the Department of Agriculture, Trade and Consumer Protection in 2006 (ATCP 51). The rules establish procedures and standards that local governments must follow if they want to regulate the siting and expansion of large scale

livestock facilities. In a decision written by Justice Gableman, the Wisconsin Supreme Court acknowledged the broad scope of the new law.

The case involved provisions in a zoning ordinance first adopted by the Town of Magnolia in Rock County in 1977. The provisions attempt to protect water quality by prohibiting activities that result in discharges to navigable water that exceed the standards in NR 102 of the Wisconsin Administrative Code. The Town later amended the ordinance to include NR 140, 141, and 809 related to groundwater and drinking water protections.

In 2006, Larson Acres, Inc., applied under the state Livestock Siting Law for a permit to construct a facility to house 1,500 animal units. In 2007, the Town of Magnolia issued a conditional use permit (CUP) that included seven conditions imposed for protecting the town's surface and ground water. The Town believed it had the right to deny the application outright but concluded it was better to grant the permit with the conditions. Larson Acres appealed the Town's decision to the State Siting Board established under the 2004 Livestock Siting Law, challenging five of the seven conditions. The Siting Board reversed four of the five conditions challenged and modified other remaining condition challenged. The Town sought review of the Siting Board's decision in the circuit court, the court of appeals, and ultimately the Wisconsin Supreme Court.

The Wisconsin Supreme Court determined that since this was a case of first impression for the agency, the Court did not need to give any weight to the agency's interpretation of the statute. The Court then went on to makes the following points:

First, the legislature has expressly withdrawn local government power to regulate livestock facility siting by: a.) creating uniform state standards that all local governments must follow; b.) mandating that local governments may not disapprove CUPs for livestock facilities, with limited exceptions; and c.) requiring local governments to grant CUPs for livestock facilities.

Second, by requiring the promulgation of state standards for livestock facility siting, the legislature expressly withdrew the power of local governments to enforce varied and inconsistent livestock facility siting standards.

Third, the legislature has expressly withdrawn, with limited exceptions, the power formerly reserved to local governments to disapprove livestock facility siting permits.

Fourth, the Siting Law not only expressly withdraws local government power to <u>disapprove</u> livestock facility siting permits absent some narrow exception, but also expressly withdraws local government power to impose certain conditions when they <u>grant</u> such permits. When local governments grant a livestock facility siting permit, they must condition the permit on compliance "with the applicable state standards." Wis. Stat. § 93.90(3)(ae). This requirement imposed by the legislature upon local governments that grant livestock facility siting permits pertains to <u>all</u> such permits, and leaves no authority to the local government to grant permits in a manner inconsistent with the Siting Law.

The Town of Magnolia attempted to make use of the provisions in the Siting Law that limits the types of conditions a local government may impose when granting a CUP. If a local government wished to impose a condition on a requirement not contained in the state standards, it must "[a]dopt[] the requirement by ordinance before the applicant files the application for approval," and 2) "[b]ase[] the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision." § 93.90(3)(ar).

Despite the provisions in the Town's zoning ordinance siting water quality standards adopted by the Wisconsin Department of Natural Resources, the court held that the Town could not rely on the facts found by the State. As a result, the Court concluded the Town failed to adopt fact finding to support the standards it sought to impose in the CUP. The Town therefore improperly imposed all of the challenged conditions. Nevertheless, the Court also held that the Siting Board had the authority to modify the conditions included in the CUP.

Chief Justice Abrahamson dissented in the case and was joined by Justice Bradley.

Wisconsin Utility Company Avoids Stringent State Review By Locating Facility in Minnesota

Wisconsin Industrial Energy Group, Inc. v. Public Service Commission of Wisconsin, 2012 WI 89, involved a challenge to the Public Service Commission's review of an application by Wisconsin Power and Light to construct a 200 megawatt wind power electric generating facility in Freeborn County, Minnesota. Since the facility would be built outside Wisconsin, the PSC decided to review the project under the "Certificate of Authority" statute rather than the more demanding review required under the "Certificate of Public Convenience and Necessity" statute. Even though the facility will be built in Minnesota, it will generate electricity solely for Wisconsin consumers and the cost of the facility will be paid exclusively by Wisconsin ratepayers.

In a decision written by Justice Roggensack, the Wisconsin Supreme Court deferred to the PSC's interpretation of the statutes that limits the application of the certificate of public convenience and necessity process to in-state facilities. Justice Bradley wrote a dissenting opinion in which she was joined by Chief Justice Abrahamson.

Court Establishes Standard for Takings in Airplane Overflight Cases

In ***Brenner v. City of New Richmond***, 2012 WI 98, the Wisconsin Supreme Court was presented with the following question: In airplane overflight cases, is the proper standard for determining a taking (1) whether the overflights are low enough and frequent enough to have a direct and immediate effect on the use and enjoyment of property, or (2) whether the overflights deprive the property owner of all or substantially all beneficial use of the property?

In a decision written by Justice Prosser, the Wisconsin Supreme Court concluded that a taking occurs in airplane overflight cases when government action results in aircraft flying over a

landowner's property low enough and with sufficient frequency to have a direct and immediate effect on the use and enjoyment of the property.

The case involved the extension of a runway at the New Richmond Regional Airport owned and operated by the City of New Richmond. Several adjoining landowners sued the City alleging the runway extension amounted to the compensable taking of an easement because the resulting overflights adversely effected the use, enjoyment, and value of their properties.

The Court then remanded the case to the circuit court to make further factual findings and apply the taking standard articulated by the court to determine whether there were takings of the properties in this case.

Wisconsin Court of Appeals Opinions

[No planning related decisions to report.]

Federal Court Opinions

The U.S. Court of Appeals for the Seventh Circuit held in ***John Doe v. Elmbrook School District***, that Elmbrook School District in Brookfield violated the Establishment Clause of the U.S. Constitution by holding high school graduations at Elmbrook Church between 2000 and 2009. (Wisconsin falls under the jurisdiction of the Seventh Circuit Court of Appeals.)

The Establishment Clause found in the First Amendment to the U.S. Constitution prohibits the government from making laws "respecting an establishment of religion." During several graduations, members of the church passed out evangelical literature in the church's lobby, which was decorated with religious posters and banners. In the sanctuary, where religious services were held, there was a large cross and other religious symbols.

A group of students and their parents sued to stop the practice of holding graduation ceremonies at the church. The Seventh Circuit Court of Appeals held that "conducting a public school graduation ceremony in a church – one that among other things featured staffed information booths laden with religious literature and banners with appeals for children to join 'school ministries' – runs afoul of the First Amendment's Establishment Clause."