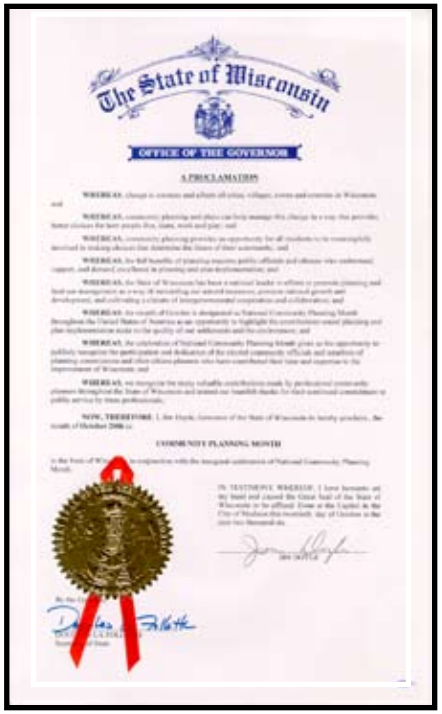
WISCONSIN CHAPTER / AMERICAN PLANNING ASSOCIATION

WAPA Newsletter



Governor Doyle Pronounces October "Community Planning Month"

Thanks to the efforts of WAPA board member David Boyd, FAICP, Governor Doyle issued a proclamation declaring October to be Community Planning Month. This effort is based on a nationwide initiative by APA to have public officials and the media recognize the value of planning. The proclamation describes the many contributions of planning in the State of Wisconsin and recognizes the efforts of both public officials, members of communities, and professional planners in improving the environment and quality of

Continued on page 3

Fall 2006

The WAPA Newsletter is published electronically four times each year by the Wisconsin Chapter of the American Planning Association to facilitate discussion among its members of planning issues in Wisconsin. Correspondence should be sent to:

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Submission of Articles: WAPA News welcomes articles, letters to the editor, articles from the WAPA districts, calendar listings, etc. Please send anything that may be of interest to other professional planners in Wisconsin. Articles may be submitted by mail, fax, or email. Articles may be edited for readability and space limitations prior to publication. Content of articles does not necessarily represent the position of APA, the WAPA Executive Committee, or the editor.

Submit articles by email attachment. Graphics are encouraged

Deadlines:

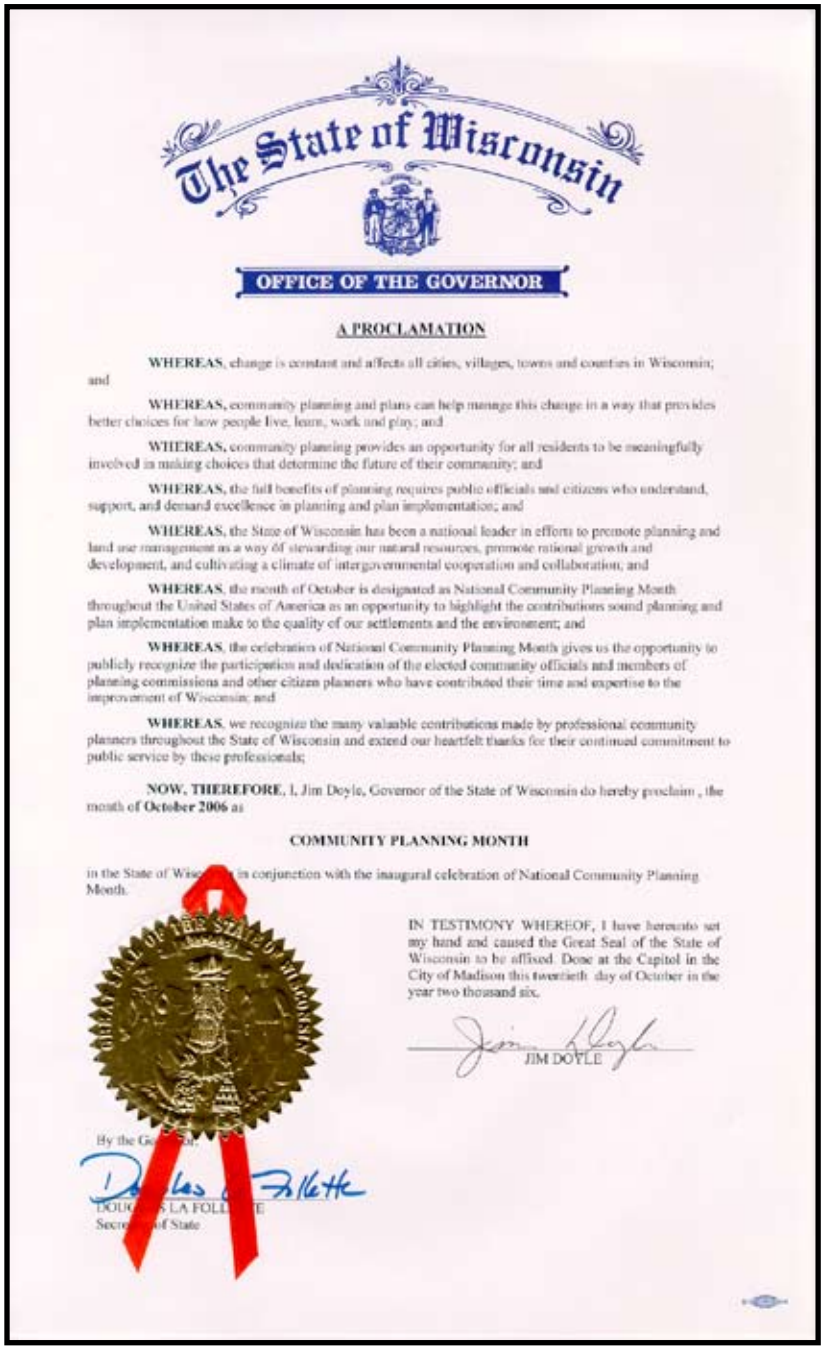
Winter issue: submit by January 15.
Spring issue: submit by March 15
Summer issue: submit by June 15
Fall issue: submit by September 15

WAPA Executirve Committee

Visit the WAPA webpage for up-to-date news and information between issues of the WAPA Newsletter.

Monthly legal and legislative updates are posted during the last half of each month. Look up information about events sponsored by WAPA, APA, and other organizations with programming related to planning.

life in Wisconsin communities. Planners around the state used the Governor's proclamation as an opportunity to encourage local media to run stories about the role of planning in their communities.



The State of Wisconsin

OFFICE OF THE GOVERNOR

A PROCLAMATION

WHEREAS, change is constant and affects all cities, villages, towns and counties in Wisconsin; and

WHEREAS, community planning and plans can help manage this change in a way that provides better choices for how people live, learn, work and play; and

WHEREAS, community planning provides an opportunity for all residents to be meaningfully involved in making choices that determine the future of their community; and

WHEREAS, the full benefits of planning requires public officials and citizens who understand, support, and demand excellence in planning and plan implementation; and

WHEREAS, the State of Wisconsin has been a national leader in efforts to promote planning and land use management as a way of stewarding our natural resources, promote rational growth and development, and cultivating a climate of intergovernmental cooperation and collaboration; and

WHEREAS, the month of October is designated as National Community Planning Month throughout the United States of America as an opportunity to highlight the contributions sound planning and plan implementation make to the quality of our settlements and the environment; and

WHEREAS, the celebration of National Community Planning Month gives us the opportunity to publicly recognize the participation and dedication of the elected community officials and members of planning commissions and other citizen planners who have contributed their time and expertise to the improvement of Wisconsin; and

WHEREAS, we recognize the many valuable contributions made by professional community planners throughout the State of Wisconsin and extend our heartfelt thanks for their continued commitment to public service by these professionals;

NOW, THEREFORE, I, Jim Doyle, Governor of the State of Wisconsin do hereby proclaim , the month of **October 2006** as

COMMUNITY PLANNING MONTH

in the State of Wis in conjunction with the inaugural celebration of National Community Planning Month.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Wisconsin to be affixed. Done at the Capitol in the City of Madison this twentieth day of October in the year two thousand six.

JIM DOYLE

By the G

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The Benefits of Planning: An Interview with Dick Rogers

WAPA Editor Nancy Frank interviewed Dr. Richard Rogers, former Mayor of Fennimore, about ways that planning helped the City of Fennimore.

WAPA: The Wisconsin Chapter Board of APA has been trying to collect stories about how planning and communities that plan actually are able to save money, better meet the needs of their citizens, and basically have stronger, healthier communities. Larry Ward said that you'd have some specific examples that you could share with us.

Mr. Rogers: Sure, absolutely! The City of Fennimore was going through Smart Growth planning and we used our regional planning commission staff to do that and we got some funding from the State for that because we worked in cooperation with the Fennimore township as well. And so, once we finished our comprehensive plan, we thought that would be a great time to look at some strategic plan for the community, and we were looking at the development of a vision statement (mission statement) and then looking at some long term objectives, five year, and then some one and two related shorter term objectives. So we brought in, we used at that time a consultant that came in from Blackhawk Technical College, and we committed a Saturday.

It took around nine hours; she took us through the whole formal planning process. There's a SWOT system—the strengths, weaknesses, opportunities and threats for the community. We had involved all the members of the city council, the major employees of the community, our city clerk and our director of public works. We had representatives from our chamber of commerce, and representatives from our industrial development corporation, so the city was well represented.

So on the basis of that day, then, we developed a draft plan with our mission statements, our vision statements for the community, and then related five-year long term goals and one-year short term goals. We went through a review of that. We looked at the original draft, made some modifications on that, and then came up with a more formal planning document. On the basis of that, then we

had quarterly reviews with the members of the city council and looked at our achievements related to those, especially one and two year objectives.

Then, that was year one in our planning process. Then year two, we used a different consultant that came in and then we looked at the progress after we had reviewed our goals and so forth, the objectives over the one year on a quarterly basis. We had a formal meeting another Saturday, and then we looked again at our total achievements for that particular year. And then the consultant helped us with developing modified objectives of some new one year and some modified five year [goals] and that was interesting because the same group was involved at that time—members from the chamber of commerce and members of our industrial development corporation plus city employees and then all members of the city council and myself as mayor. We developed some revised long-term objectives, the five-year ones, and then developed some new ones and two-year objectives as well.

An interesting thing about that, that only took us little bit over five hours because the members of the council had—and other members that were there—had developed some skills in regard to dealing with our discussions and developments of those kinds of objectives. And then, again, we had our quarterly reviews of that and then we met the following year with the same consultant and did the same thing and we just spent the morning doing that because again we had developed some pretty essential skills in regard to the planning process.

The other thing that was interesting about the process was that members of the city council and I…I don't think any of them had ever been involved in a long-term planning process like that really or were looking forward then, even though they were committing time on a Saturday to do this. I think they were very, very excited and showed a great deal of enthusiasm for the continued development of our planning process.

And, again, it wasn't something that we did and then set aside and forgot about. We did the quarterly reviews with the city council and went back and looked at all the goals and objectives that we had. I think that it was a great process as far as I think looking at it from the perspective of the budget. I think it helped us put together a budget

process that was related to our overall planning process, and I think it also gave directions to our various city employees. Our city clerks, our director of public works, and then, of course, their staff and personnel.

We have an individual who is responsible for working with the chamber and also with our industrial development corporation, and she had some definite goals and objectives as well in regard to that strategic plan.

The other thing that was extremely helpful for us was we're going through a major street renovation in 2007 and our entire main street will be completely redone starting in April and completion is planned for around November. On the basis of our planning in 2004, we got various committees together. We had a blue ribbon committee which had overall responsibility for the other five committees that were developed to help plan and get ready for that project. Those committees included a signage committee, streets—a beautification committee, a committee working on finance, you know, to help develop some fund-raising activities and that type of thing to provide money for various kinds of things that we thought would impact on that street improvement. We had a committee for various kinds of events during 2007 so we could continue to attract people to the community. And then the overall blue ribbon committee monitors progress of those committees.

So [planning] also helped us to prepare for that major street project and, of course, that will be going right through our whole commercial area. So those committees are still functioning and operating, and their work will not be done until, of course, the street project is started in April of 2007.

So there were a lot of real positive outcomes, and the other thing—I think it helped us then to also use the smart growth plan that was put together in cooperation with our Southwest Wisconsin Regional Plan Commission and their staff working with us on that. So I saw a lot of positive outcomes based on our strategic planning process. Then, like I say, I don't think the community had ever done anything quite that formal before.

WAPA: Well, that's really interesting. I've got some follow-up questions.

Mr. Rogers: Oh, absolutely!

WAPA: I was wondering if you could talk a little bit more about the connection between the smart growth plan and the strategic plan and those processes. I understand you did the smart growth plan first and then strategic planning?

Mr. Rogers: Yes, because I think it got people oriented to the planning process. Most of the time all the

members of the council were involved and, you know, people that were interested in the overall smart growth planning process. And it got people oriented and looking at the planning process. And then, of course, the question was now how can we use this to benefit our community and that was kind of…initial discussions, well how do we go about now strategic planning related, specifically, to the community and that was an outgrowth of that smart growth planning.

WAPA: And then the committee structure around the street renovation next year, that was one of the goals of the strategic planning?

Mr. Rogers: Yes, it was because we looked at that and knew that it was going to be quite an impact for the community. Because, again, you know, it goes right through the commercial area, and I think it got us started thinking about that three years in advance which really helped to get the other committees oriented. I did forget one committee; it was a committee to help the development access to rear of all of our commercial sites, and that work is pretty much all completed now, so it really helped us to get focused on that and do the kinds of things necessary well in advance of the street process itself.

WAPA: Well, that sounds like a definition of planning to me.

Mr. Rogers: Oh yes, and again I think what happens is that people focus in the planning process. And the other thing I liked was how people became excited about it and enthusiastic about it and were willing to commit to time and to develop the skills necessary to be involved in planning.

WAPA: So, do you see the smart growth planning process as a piece of creating that enthusiasm about planning in general?

Mr. Rogers: Yes, I think so, because with the Smart Growth planning there should be some outgrowth of related planning. I think the Smart Growth plan is a good idea but it's so comprehensive. You know, many times it's almost overwhelming for people. So I think you have to take that and then deal with that on the basis of now how does this fit into a more logical, more condensed version in strategic planning for the various governments involved . . . yes.

WAPA: That's an interesting point. I think you're right that very often the

comprehensive plans are a little bit broad for people to get their minds around.

Mr. Rogers: Well, I think so and then, oftentimes, there's a type of planning that may end up on the shelf someplace and just gathers dust.

WAPA: Well, how about that: your smart growth plan. Do you think its gathering dust or can you see other direct benefits already besides the strategic plan and all the benefits that came out of that?

Mr. Rogers: Oh, I think absolutely, and I think it did help in cooperative kinds of things between our city government and, then, the township of Fennimore as well. Yes.

WAPA: OK. And was there anything else about infrastructure besides what you talked about already with closing down of that street this summer?

Mr. Rogers: Well, I think part of the plan, you know, helps to encourage that the developers that are in the community to do some things. You know, we've got some pretty good development going on as far as housing development is concerned. And so I think also that…the other impression I've got and it's hard to put a finger on it right now, but I think it helps in developing a sound entrepreneurial environment for the community as well, as you look at trying not only to maintain the businesses that you have in the community, but also to look at possibility of attracting new commercial and industrial interest in the community.

WAPA: OK. Let me just make sure I understood that. So, by entrepreneurial, do you mean that it helps the city better understand how it could foster entrepreneurial activities?

Mr. Rogers: Well, you know, how you establish an entrepreneurial environment, and supporting, showing that you are a community that is supportive of business retention and new business development. And I think any type of planning process you go through should certainly illustrate that commitment on the basis of a community. Yes.

WAPA: OK. Is there anything else that you wanted to share?

Mr. Rogers: No, I think overall just the results of our planning process I think were very, very positive.

WAPA: Thank you so much for your time. This is going to make a great article.

Mr. Rogers: You're welcome!

Law Update

By Michael R. Christopher and
Benjamin C. Grawe
WAPA Legal Counsel
DeWitt, Ross, and Stevens S.C.

August 23, 2006

Madison's Inclusionary Zoning Ordinance for Rental Units is Declared Void

Summary

On August 10, 2006 the Court of Appeals unanimously decided that Madison's inclusionary housing ordinance is pre-empted by a State statute entitled "Municipal Rent Control Prohibited." The Court ruled that the portion of the Madison ordinance applicable to rental dwelling units is void because State law expressly withdraws the power of the City to enact a local

ordinance provision relating to rental dwelling units.

Analysis

The City of Madison enacted MGO Section 28.04 (25), entitled "Inclusionary Housing." The stated purpose of the ordinance is "to further the availability of the full range of housing choices for families of all income levels in all areas of the City of Madison." The ordinance required a development with ten or more rental dwelling units to provide no less then 15% of the total number of dwelling units as inclusionary dwelling units for families with annual incomes at or below 60% of the Area Median Income ("AMI"). The monthly rental price which includes the rent and the utility cost shall be no more than 30% of the tenant's monthly income. A lawsuit challenging this provision was brought by the Apartment Association of South-Central Wisconsin, Inc. ("Association") alleging that the ordinance limiting the rental price for inclusionary dwelling units seeks to regulate the amount of rent charged for rental units and thus violates Wis. Stat. § 66.1015. This statute provides:

Municipal rent control prohibits. (1) No city, village, town or county may regulate the amount of rent or fees charged for the use of a residential rental dwelling.

(2) This section does not prohibit a city, village, town, county, or housing authority or the Wisconsin Housing and Economic Development Authority from doing any of the following:

(a) Entering into a rental agreement which regulates rent or fees charged for the use of a residential rental dwelling unit it owns or operates.

(b) Entering into an agreement with a private person who regulates rent or fees charged for a residential rental dwelling unit.

The essence of the City's position was that the ordinance does not violate the statute because subsection (2)(b) permits it to "enter . . . into an agreement with a private person who regulates rent . . . for a residential dwelling unit." According to the City, the applicable ordinance section is an agreement between property owners and the City because it applies only when property owners choose not to develop their land in accordance with existing zoning or land division status and choose instead to seek the benefits of rezoning or land division. The Dane County Circuit Court agreed with the City's position and therefore granted summary judgment in favor of the City and dismissed the complaint.

To better understand the Court of Appeals' decision, a brief analysis of the pre-emption doctrine would be helpful. Article XI, section 3(l) of the Wisconsin Constitution vests in cities and villages the right to "determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall effect every city or village . . ." In Wis. Stat. §§ 62.04 and 62.11(5) the legislature has given cities broad powers including addressing matters of local affairs that are also matters of statewide concern. However, a city's ability to regulate matters of statewide concern is limited. If the State chooses to legislate on a matter that is of statewide concern then it pre-empts a local ordinance in each of the following four situations:

The Legislature has expressly withdrawn the power of the municipality

to act;

• The ordinance logically conflicts with the State legislation;

• The ordinance defeats the purpose of State legislation; or

• The ordinance violates the spirit of the State legislation.

If any of these four tests is met, then the municipal ordinance is void.

The City asserts that it enacted the ordinance at issue pursuant to the zoning powers granted it under Wis. Stat. § 62.23(7)(a). This section grants the City the authority to enact zoning regulations for the purpose of promoting the health, safety, morals and the general welfare of the community. The Association does not argue that the ordinance provision is invalid for any reason other than it conflicts with State law.

The preemption argument centers on the question of whether the City ordinance falls within the provisions of subsection (2)(b) of the State Law as quoted above. The Association argued that this section is plainly not an "agreement" but an imposition of rent control by regulation. The Court of Appeals concluded that the only reasonable construction of subsection (2)(b) is that the City is not prohibited from entering into an agreement with a private person whereby that person agrees to regulate rent. The Court of Appeals also agreed with the Association that the ordinance is plainly not a "mutual understanding" or a "manifestation of mutual ascent" between the City and the applicant. It is plainly a regulation that imposes a requirement on all applicants for zoning map amendments, subdivisions or land divisions that in order to develop property with ten or more rental dwelling units they must charge no more then a specified amount of rent for no less than a specified percentage of rental dwelling units. The Court rejected the City's argument that in every instance that the City issues a license or permit or grants approval of any kind for which conditions are imposed by ordinance, the City is "entering into an agreement" with the applicants as to those conditions because the applicants could choose not to engage in the activity for which conditions are imposed. The Court felt that this was not a reasonable construction of the phrase.

Conclusion

In summary, the Court of Appeals decided that the legislature has expressly withdrawn the power of the City to enact a local ordinance such as the one in this case because the ordinance regulates the amount of rent that property owners in the specified circumstances may charge for rental dwelling units. The Court also concluded that the limited exception as to limitations on rent is not applicable because it is plainly not a "agreement" with the property owners to whom it applies. The Court recognized that in deciding that there was pre-emption, the importance of the City's local concerns and the goals it is attempting to achieve are laudable. However, when the subject is of statewide concern, local control must yield when any one of the four tests as described above are met. Because the Court determined that the first test has been met, namely, that the legislature's expressed withdrawal of the powers of municipalities to act is applicable, this

provision of the ordinance is void. It is highly likely that the City will appeal this decision to the Supreme Court although they must do so by September 9.

Proposed Wind Turbines Gets the Green Light

Summary

On July 5, 2006 the Court of Appeals affirmed the Manitowoc County trial court decision supporting a decision to approve the construction of a 49 turbine wind energy park made by the Manitowoc Board of Adjustment. The Court ruled that the Board decision afforded proper notice to the public and allowed adequate time for the public to be heard and employed a reasonable interpretation of the Wind Energy System Ordinance.

Analysis

On October 27, 2004 Navitas-Energy, Inc. ("Navitas") applied to the Board for a conditional use permit to construct Twin Creeks Wind Park, which includes 49 proposed wind turbines. The Board was required to conduct a hearing on the application within 60 days of receiving it and to provide a Class 2 notice of the hearing. A Class 2 notice requires that two insertions be published prior to the hearing in the official newspaper. Navitas' application was placed on the agenda for the Board's December 20, 2004 meeting. The Board published the public hearing notice on December 8 and December 13. The notice stated, in relevant part:

Navitas wishes to construct and operate a 49 turbine wind farm in A-3 agricultural zoned district. The turbines are proposed to be located on the following properties . . . (affected property owners listed) interested persons are urged to attend the meeting. Those wishing to submit written testimony may do so up to and including the time of said hearing.

In addition to publishing the official notice, the Board sent notice of the meeting to adjacent property owners by courtesy copy of a letter addressed to Navitas.

At the December 20, 2004 hearing attendees were invited to speak in favor of or against the Navitas application but asked to limit their remarks to five minutes. Following a power point presentation by the Navitas

representative, a number of local residents spoke against the project. They reiterated concerns about the project's impact on their quality of life, health and safety. Many also shared the opinion that they had received inadequate notice of the proposed project and of the hearing. After a staff presentation which included comments relating to the possible need of variances to setback requirements, the Board voted 3-1 to grant the conditional use permit.

On appeal, the Court of Appeals gave significant deference to the Board's decision and stated that the Court would not substitute their digression for that of the Board. Thus, the Court stated that the plaintiffs had the burden of overcoming the presumption that the Board's decision was a correct one.

The first issue on appeal was whether the Board had the legal authority to grant a setback variance as part of the conditional use permit process. The plaintiffs argued that to obtain a variance an applicant has to establish a hardship which is a separate zoning determination from the question of whether a conditional use permit should be

granted or not. In addition, the plaintiffs contended that Navitas was required to meet that hardship test for each wind tower in the system. In rejecting these arguments, the Court concluded that the Board's interpretation that the granting of a "conditional use" or "variance" were one in the same despite the fact that the public notice did not specifically refer to "setback variances" this was not a substantive defect in the notice. Furthermore, the Court relied on a provision of State law which promotes renewable energy resources, including wind power, Wis. Stat. § 66.0401. Thus, the Court concluded that the term "variance" as used in the wind energy system ordinance does not implicate the technical legal meaning typically employed in a zoning analysis.

As to the hearing procedure, the plaintiffs challenged the manner in which the Board conducted the hearing, particularly the five minute time limit. The plaintiffs argued that this limitation was arbitrary and capricious. The plaintiffs argued that the applicant was afforded much more time then five minutes in their initial presentation and that the Board's time limitation unfairly prejudiced the opponents' position. However, the Court concluded that the initial presentation provided the context for the entire debate and that the plaintiffs did not cite any authority on the question of time limitation at the hearing. The Court further stated that in light of the fact that 16 people had the opportunity to speak against the project, it was clear that all who wished to speak had the chance to do so. Therefore, the Court concluded that the review of the hearing transcript revealed nothing unreasonable about the time limit or how it was implied.

Finally, the plaintiffs contended that there was insufficient evidence in the record to support the Board's decision to grant a conditional use permit. Plaintiffs argued that the evidence presented in opposition to the wind energy park was disregarded by the Board. However, the Court stated that it is not their role to conclude that substantial concerns might overcome the Board's decision but rather the absence of substantial supporting evidence. It is the Board and not the Court that determines the weight to be given the evidence of record. The Court concluded that they had no choice but to uphold the Board's decision where, as here, it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion.

This is yet another example of a

Court giving significant deference to a Board of adjustment decision.

September 18, 2006

Court of Appeals Says No to Property Tax Exemption for Childcare Facility Summary

On June 20, 2006, the Court of Appeals rejected property tax exemption plans by a child daycare facility operated on property in Milwaukee County. The Milwaukee Regional Medical Center Inc. ("Center") argued that it was exempt from taxes levied by the City of Wauwatosa because the property that they leased was owned by Milwaukee County, and under Wis. Stat. § 70.11(2), the property is exempt from general property taxes if it is "property owned by any county." However, the Court of Appeals ruled that the property the Center leased from the County was no longer "owned" by the County since it had transferred some of its interests in the property to the Center under the lease. A petition for review to the Wisconsin Supreme Court is pending regarding the decision in Milwaukee Regional Medical Center Inc. v. City of Wauwatosa.

Analysis

The Center is a charitable organization and exempt from federal income taxation. It holds a 50-year lease with Milwaukee County for county land in the City of Wauwatosa. The trial court ruled that the Center was entitled to a property tax exemption and directed the City to refund to the Center property taxes it had paid under protest. The City appealed that decision.

At the Court of Appeals, the Center cited Wis. Stat. § 70.11(2) which provides: "Leasing the property exempt under this subsection, regardless of the lessee and the use of the leasehold income does not render that property taxable." The Court of Appeals explained that if following a transfer of interest, the governmental entity is still the "owner," then leasing the property does not make the property taxable. However, if the governmental entity transfers sufficient interests in the property so the governmental entity is no longer the "owner", the property is taxable for so long as the transferee retains those interests.

The law prior to this case was that Milwaukee County would be the owner if it derived consequential benefits from the property and had substantial control focused on preserving or enhancing those benefits. Thus, this Court felt that Milwaukee County would have to meet this two-pronged test in order for the Center to be exempt from paying general property taxes to the City of Wauwatosa.

In this particular fact situation, Milwaukee County not only received no financial benefit from the arrangement but also had lost the use of and the potential income stream from the 1¾-acres it leased to the Center at an annual rent of one dollar. Also, the Court of Appeals found it to be significant that the County specifically permitted the Center to use this property as collateral for loans.

Unless the Wisconsin Supreme Court reverses this decision, this is yet another example of appellate courts denying property tax exemption claims that were often previously granted.

Does a Special Exception Use Permit Survive A Ruling That The Underlying Ordinance Is Invalid?

Summary

On August 24, 2006, the Court of Appeals reversed a decision by the St. Croix County Circuit Court ruling that a previously approved special exception use permit did not grant the property owner an unconditional right to operate a business on his property when the underlying ordinance was later ruled invalid.

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WAPA has established an endowment fund at the Madison Community Foundation to support scholarships to students in planning. Your contribution can help it grow.

For information about contributing to the endowment, contact WAPA Treasurer Carolyn Seboe at: cseboe@hntb.com or 414-359-2300.

Analysis

In March 1985, the St. Croix County Board re-zoned a portion of a property owner's property to allow him to continue the use for commercial purposes on the condition that if he sold the property, it would revert to agricultural residential. Thus, the re-zoning decision was not assignable (the ownership clause). In 1990, the same property owner was granted a special exception use permit to build a truck repair shop and transfer point by the St. Croix County Board of Adjustment without any conditions as to who would own the property.

The property owner commenced an action against St. Croix County to obtain a declaratory judgment that his special exception use permit was valid and transferable. He argued that the ownership clause of the 1985 ordinance was invalid and severable from the remainder, leaving his property re-zoned commercial without any conditions.

he County agreed that the ownership clause of the 1985 ordinance was invalid and therefore contended that the entire ordinance was void because the invalid ownership clause was not severable from the remaining portion of the ordinance. Further, it sought a judgment declaring the special exception use permit granted in 1990 as invalid based on the invalidity of the underlying ordinance. The Circuit Court granted summary judgment for the property owner, agreeing with him that the ownership clause was invalid, that the 1985 ordinance was severable and that the property owner could transfer his special exception use permit to a subsequent purchaser.

The Court of Appeals agreed with the County that the 1985 ordinance was not severable because without the ownership clause, the ordinance did not comport with the intent of the County Board.

It is well-established that if a statute or ordinance has two distinct parts that are separable and not dependant on each other, the invalid portion can be severed leaving the rest of the ordinance in effect. However, when the void part of an ordinance was incorporated as a trade-off to the otherwise valid portion, it must be presumed that the legislature would not have passed one portion without the other, so the whole statute must be held void.

Based on this legal test, the Court of Appeals concluded that the language of the ordinance re-zoning Lot 1 only for this particular property owner made it clear that the County Board intended to re-zone the land only with that limitation. If the ownership clause is diluted, the ordinance is given a meaning clearly not intended by the County Board, namely, that the re-zoning of a portion of his property becomes permanent and assignable. The Court concluded that this interpretation of the ordinance cannot be reconciled with the clear intent of the County Board to rezone the property specifically for this property owner's benefit and to disallow commercial use upon transfer of the property. Striking the ownership clause subverts the very meaning of the ordinance and the intent of the County Board in enacting it. Because the County Board would not have re-zoned the property without an ownership clause, the Court of Appeals concluded that the 1985 ordinance was not severable. Thus, the invalidity of the

ownership clause necessarily invalidated the entire ordinance.

Once the Court concluded that the underlying zoning ordinance was not severable, it agreed with the County's argument that a special exception use permit is a component of a zoning ordinance that must comport with the underlying zoning. The property owner's special exception use permit did not comport with agricultural residential zoning, the 1990 permit was invalid. A special exception use or "conditional use" permit is allowed within the provisions of a zoning ordinance where a particular use, although not inherently inconsistent with the zoning may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone.

Conditional Use

As in most zoning codes, the St. Croix County Zoning Code lists permitted uses and special exceptions which are granted permits only upon approval by the Board of Adjustment. When the Board of Adjustment approved the 1990 application from the property owner for a special exception use permit, that parcel was designated a commercial district by the 1985 ordinance. Thus, to issue the special exception permit, the Board of Adjustment was required to find that a truck repair shop and transfer point were compatible with commercial use. However, because the Court concluded that the 1985 ordinance was invalid and that it was not severable, the parcel is zoned agricultural residential. Thus, the Board of Adjustment had no jurisdiction to grant a special exception use permit because the use was incompatible with the underlying zoning ordinance.

It is a bit strange that in this case the County was allowed to argue that an ordinance they enacted was invalid. However, the property owner did not develop the argument that a County may not challenge its own ordinances so the ultimate result makes sense. This case also reinforces the idea that the zoning decision relates to pieces of property and not to certain individual property owners.

What Options Do Property Owners Have When They Must Choose What To Do About Damaged Or At-Risk Non-Conforming Flood Plain Structures?

The job of a local zoning official is never easy but dealing with non-conforming structures may be the one issue that drives many of them into less demanding work. The determination of how to deal with non-conforming structures becomes even more complex when the zoning official must consider floodplain, shoreland and wetland zoning programs which must be administered in dangerous or sensitive natural resource areas. Recent changes in statues and administrative codes provide more options for property owners faced with making the hard choices about what

Wisconsin Act 455

to do with damaged or at-risk non-conforming floodplain structures.

In 1997, Wisconsin Act 455 was signed into law. The legislation permits non-flood damaged structures to be repaired, reconstructed or improved in order to restore the structure to its pre-disaster condition without limits based on the "Fifty Percent Rule" or regulatory constraints of local or state minimum flood plain management standards. Such natural occurrences as fire, windstorm, snowstorm, ice storm or other similar events would qualify for this exemption.

In order to take advantage of this exemption, the structure must be restored to the size, use and location that it had immediately before the disaster occurred. In addition, while local and state regulations are waived, the structure must still comply with minimum FEMA standards.

In 2004, Ch. NR 116 was modified to offer more opportunities for non-conforming property owners to properly flood proof their structures. In the past, any cost associated with a structural modification, including elevation, counted against the 50 percent cumulative lifetime cap on that structure. The cap is based on the structure's current equalized assessed value. State code now excludes from that cap the cost associated with correcting a legal, non-conforming structure if that structure is elevated to or above the Flood Protection Elevation ("FPE"). For property owners in dangerous floodway areas, this provides more incentive for elevating a structure, since they will still have the full 50 percent allowance to be used for other structural repairs, modifications or additions. Another incentive is that structures destroyed or damaged beyond 50 percent of value by a flood disaster are not covered by this exemption and would have to meet all local and state standards in order to be rebuilt. For structures in the floodway, that would mean relocating the structure to an area outside of the floodway.

Unlike the statutory change for non-flood damaged structures, the Administrative Code change for exemption of elevation costs is a minimum standard and can be modified by local communities to provide increased protection for property owners and to reduce the community's liability for permitted development in the floodplain.

October 17, 2006

Can the Prevailing Party in an Open Records Case be Compensated for Attorneys' Fees?

Summary

The open records law provides that a party who prevails in whole or in substantial party who seeks general public records is entitled to attorneys' fees. However, if a party seeks "personally identifiable information," that person is entitled to actual damages if the authority willfully or intentionally withholds the documents but the applicable section of the open records law does not provide that the damages include The payment of attorneys' fees.

Analysis

On September 21, 2006, the Court of Appeals for District IV decided the

case of *Kang v. Board of Regents of the University of Wisconsin System*. Kang was denied admission to a University PHD program after he failed the qualifying examination on three separate occasions. He made numerous open records requests for information relating to his examinations. The University released some documents but delayed or withheld other documents to which Kang was entitled. Kang then filed an action for mandamus, asking the Court to order the University to produce the documents they continued to withhold. The Circuit Court found that while the University had intentionally and willfully withheld documents to which Kang was entitled to they were not continuing to withhold any such documents once the litigation was commenced. The trial court awarded Kang damages and attorneys' fees. The University appealed the attorney fee award and the Court of Appeals reversed that portion of the trial court decision. Under the open records law, if an authority denies or delays access to records, the requester may bring an action for mandamus asking a court to order release of the record. See sec. 19.37(1)(a). In another section of the open records law, the statute lists the type of damages that are recoverable in a mandamus action, depending on the type of documents sought. If a party is seeking general public records and that person prevails in whole or in substantial part in the action, then attorneys' fees are included in the recoverable damages. However, if a party is seeking "personally identifiable information," the party is not entitled to reimbursement for attorneys' fees even if they prevail in the action.

Judge Dykman who wrote the Court of Appeals decision recognized that denying Kang attorneys' fees for his mandamus action to obtain records from the University could be considered contrary to the legislative intent in enacting the open records law. However, the Court states that to award Kang attorneys' fees in a case where he is requesting personally identifiable information would be contrary to the intent of the legislature. In fact, the Court recognizes that the state of the law as to whether attorneys' fees should be included in the actual damages incurred by a requestor of records who prevails in the litigation, may be illogical but it is a problem that the legislature should deal with and not the courts.

Do Special Assessments Have to be Levied Uniformly?

Summary

The Wisconsin Supreme Court invalidated a portion of a special assessment levied against 18 condominium owners by a town sanitary district to finance a sanitary sewer system. The court concluded that the assessment was unreasonable because it was not levied uniformly and that the effect of the methodology imposed an inequitable cost burden on the condominium owners as compared with the benefit accruing to them.

Analysis

The Green Lake Sanitary District ("District") operates a waste water treatment plant and a sanitary sewer collection system. The District adopted a resolution to extend sanitary

sewer service to additional properties within the District by using its special assessment powers. The special assessment included two components: an "availability assessment" to cover the costs of making the sewer available to each lot and a "connection assessment" to cover the costs of the infrastructure needed to transport sewage to the treatment plant. The availability assessment of $4,730 was levied against each lot or parcel of record receiving sewer service. The connection charge of $5,930 was individually levied against every habitable unit on a lot and every structure connected to the sewer system on any lot that did not include a habitable building.

The Wisconsin Supreme Court invalidated the "availability charge" component finding that there was no nexus between the availability charge assessed against the condominium owners and the district's recovery of the capital cost to provide sanitary sewer service to individual lots. In addition, the Court found that the availability charge was not reasonable in that other lots with multiple, habitable units that were provided the same sewer service were assessed only one availability charge. Finally the Court held that the District did not show that the condominium owners received a greater benefit then what was provided to other lots that were affected by the service extension.

The lesson in *Steinbach v. Greenlake Sanitary District* is that although municipalities have wide discretion in determining a special assessment methodology, it still must be reasonably related to the benefit accruing to the condominium owner as compared with the benefit derived by other assessed property owners.

Are Municipal Zoning Codes Designed to Encourage Redevelopment?

Many municipal planners would answer the above question with a resounding "no." Many present zoning codes reflect a planning philosophy that contains a strict separation among residential, commercial, industrial and recreational uses. In addition, zoning code provisions relating to parking availability and set back requirements among many other provisions can impose serious hurdles to achieve smart growth redevelopment.

There are a number of different approaches that either have been implemented or are being considered to bring municipal zoning codes into the 21st Century. One approach is being considered by the City of Greenfield whereby niche sectors in particular zones would be created to attract similar businesses. The assumption supporting this approach is that to have specialized clusters of similar or complementary businesses would draw people from greater distances more than if a municipality had a hodgepodge of various developments. For example, the Greenfield planners have recommended that a particular zone be created to permit only furniture or design stores. Another zone in the City is recommended to permit medical-related uses. It is possible that this "niche sector" approach

to land use planning could result in sustainable municipal redevelopment.

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Correction and Reaction from Charles Erickson, Planning Director, City of Greenfield

While we are going through the process of updating our comprehensive land use plan, we are not creating "niche sectors in particular (commercial) zones in order to attract similar businesses." Greenfield planners have not " recommended that a particular zone be created to permit only furniture or design stores" And we have not recommended to create "....another zone is recommended to permit medical-related uses."

Background is this: There was a local newspaper article reporting on one of the recent monthly meetings of the Land Use Steering Committee. During that meeting there was discussion with our consultant (Vandewalle & Associates) about how development patterns over time and on their own (i.e., with sage guidance from the local planning department, of course) had created situations in a couple of our commercial corridors where like-type businesses had seemingly "grouped themselves."

These developments had occurred in the broad "Commercial" zoning districts. And since we were talking about "comp. plan" features and redevelopment opportunities and compatible land uses, this "niche" stuff really was more of a marketing and/or economic development emphasis.
It is hard enough sometimes to get positive redevelopment activities; restricting that process even further by doing some type of "niche zoning" is not part of our planning effort.

UWM's New High School for Urban Planning and Architecture: Two Steps Forward

UWM's effort to found a small Milwaukee Public Schools (MPS) high school for urban planning and architecture moved two steps closer to becoming a reality recently. On October 31, the MPS school board approved granting a charter to the school. On November 1, over thirty professionals in planning, architecture,

landscape architecture, community development, and engineering gathered at the UWM School of Architecture and Urban Planning for a curriculum design charrette.

The high school, named SUPAR—School for Urban Planning and Architecture, will use the theme of community-building to support student learning. The goal of the school is to improve high school completion rates by providing individualized instruction through problem-based learning. Students will learn their high school subjects—math, literature, writing, science, and social studies—by working on projects in the community.

The effort to create a small, public high school focused on urban planning and architecture was launched over two years ago, when the UWM Urban Planning program committed staff time and a studio in Spring 2005 to explore the feasibility of sponsoring the development of a high school. In Fall 2005, the Urban Planning faculty formed a planning team and began to recruit members from outside the program.

By November, the team included faculty members and students in urban planning and architecture, an MPS teacher, an MPS high school student, and faculty from the Milwaukee Area Technical College. This group put together a $50,000 proposal to the Technical Assistance and Leadership Center (TALC) for a year of intensive planning with coaching by TALC staff. The proposal was funded, and over the spring and summer of 2006, the planning team has grown to include over twenty people from the professionals

and community. During the coming ten months, more detailed planning for the school will move forward toward the Fall 2007 opening of the school.

A key milestone for the planning effort was the approval of the team's application for a charter by the Milwaukee School Board on October 31. The planning team will now work directly with MPS administration to identify a location for the school, assign teachers, and recruit students.

The curriculum design charrette invited professionals from urban planning, architecture, engineering, landscape architecture, community development, and economic development to brainstorm project ideas for high school students. Working on a wide range of possible topics in city-building—from globalization to land use, and from equity to infrastructure—professionals identified specific project ideas and the specific high school learning objectives that students could address through each project. The SUPAR curriculum committee will use the charrette outcomes to develop a menu of project choices for students. Another charrette will be held during the winter or early spring to bring parents and community members into the curriculum development process.

The idea of using planning and design as a context for learning is not new. The American Planning Association, American Institute of Architecture, Urban Land Institute, and American Society of Civil Engineers all have developed after school or enrichment programs for middle and high schools students that introduce them to the professions and skills involved in sound city development. For several years, UWM's planning program has offered its own pre-college program for middle and high school students, called PUPS (Pre-Urban Planners). Nationally, a handful of high schools offer a curriculum based on architecture, engineering, construction, or a combination of these topics. According to the planning team's research, SUPAR will be the first high school to include urban planning as a key focus of the curriculum. UWM's effort was highlighted in the October 2006 issue of APA's *Planning* magazine.

The curriculum planning charrette was just the first of a myriad of opportunities for professionals to become involved with the high school. With the support of WAPA, the SUPAR planning team will continue to publicize events related to the high school through the WAPA email list.

For more information about SUPAR, please visit the webpage at www.supar.org.