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Land Use Legislative Update Spring 2012

The Wisconsin Legislature ended its 2011-2012 general session on March 15, 2012. Prior to adjourning, the Legislature passed a number of bills that may affect land use. Below is a summary of the bills that were recently passed.

Municipalities Allowed to Establish Time Limits for Variances to Zoning Ordinances-2011 Senate Bill 300 (2011 Wisconsin Act 135)

SB 300 allows municipalities to establish time limits for variances to zoning ordinances. Currently, counties and cities can grant use variances or area variances. A use variance allows an individual to use property in a manner that is not permitted by zoning ordinances. An area variance allows an individual to maintain property that does not meet dimension restrictions such as setback, frontage, height, bulk, density, and area zoning requirements. This bill allows a county or city to enact an ordinance that specifies expiration dates for zoning variances. To specify an expiration date for a variance means to specify a date when the action authorized in the variance must be commenced or completed. If a county or city had an ordinance specifying an expiration date before the effective date of this bill, the expiration date is still valid. If a county or city did not have an ordinance prior to the effective date of this bill, the zon-

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Municipal Water Legislative Update Spring 2012

The Wisconsin Legislature ended its 2011-2012 general session on March 15, 2012. Prior to adjourning, the Legislature passed a number of bills that may affect municipal water and wastewater utilities. Below is a summary of the bills that were recently passed.

Department of Natural Resources Required to Administer Water Pollution Credit Trading Program-2011 Senate Bill 557 (2011 Wisconsin Act 151)

SB 557 requires the Wisconsin Department of Natural Resources (DNR) to administer a water pollution credit trading program. Currently, the DNR only has to administer at least one pilot program. Generally, people cannot discharge pollutants into Wisconsin waters from a point source (eg: a pipe) without a DNR permit that specifies discharge limits. Under the trading program, dischargers can exceed their permit limits under the following circumstances: (1) if another individual with a permit agrees to reduce discharges below his or her permit level; (2) if another individual without a permit agrees to reduces discharges below his or her current level; (3) if the discharger pays the DNR or a local government to reduce water pollution; (4) if the discharger agrees to construct a project or implement a plan that reduces water pollution from sources other than the permitted source; or (5) if the discharger agrees to reduce the amount of discharge under another permit he or

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Regulating Sand and Gravel Pits Is Not Necessarily Zoning

Sometimes it matters which way you skin a cat. In *Zweifelhofer v. Town of Cooks Valley*, 2012 WI 17 (Feb. 8, 2012)(6-0, J. Prosser not participating), the validity of a town ordinance regulating nonmetallic mining depended on whether it constituted a zoning ordinance or was properly adopted under the town's general police powers. The town had not adopted county zoning and had the authority to adopt its own zoning ordinance, but any town zoning ordinances needed county board approval. The town passed the nonmetallic mining ordinance without obtaining the county's approval and several property owners challenged its validity.

The circuit court granted summary judgment for the plaintiffs, holding that it was a zoning ordinance because it "covers the immediate use of land" and "is a pervasive regulation of the use of land." Id. ¶3 n1. The court relied primarily on *Gordie Boucher Lincoln-Mercury Madison, Inc. v. City of Madison Plan Commission*, 178 Wis. 2d 74, 503 N.W.2d 265 (1993), which was overruled by *Wood v. City of Madison*, 2003 WI 24, 260 Wis. 2d 71, 659 N.W.2d 31. The court of appeals certified the issued to the supreme court, which reversed.

The nonmetallic mining ordinance applied to all property throughout the town. The town board had the discretion to allow mining on a case-by-case basis and to set conditions that it deemed appropriate for each site. The approvals were referred to as "conditional use permits." The ordinance stated that it was adopted under the authority of sections 60.10(2)(c) and 61.34, Wis. Stats. Section 60.10(2)(c) gives towns the authority to adopt village powers. Section 61.34 lists the general police powers delegated to villages. Conspicuously absent from the ordinance was any reference to sections 61.35 or 62.23, which authorize villages to adopt the zoning powers delegated to cities.

The opinion explains that zoning is a subset of general police powers and contains a lengthy discussion of how to tell whether an ordinance constitutes zoming. It concludes that there is no bright-line test and that it comes down to weighing the similarities and differences between an ordinance and what the court calls "traditional zoning." There is substantial

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Municipal Water Legislative Update

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she has below levels authorized in that permit. In each of the previous circumstances, there must be a written, binding agreement. Programs must comply with the federal Water Pollution Control Act. Programs are only allowed if they result in water quality improvement, if they involve the same pollutant or water quality standard, and if the increase and the reduction in pollution occurs within the same water basin or portion of a water basin. This bill eliminates the previous five year time restriction on trade agreements.

New DNR Permitting Procedures Established for Activities Affecting Navigable Waterways and Other Changes Made to DNR Environmental Permitting Procedures-2011 Senate Bill 326

General and Individual Permits for Activities Affecting Navigable Waterways. SB 326 establishes new procedures for the DNR's general and individual permitting processes for activities affecting navigable waterways. Currently, individuals that want to conduct an activity in or near a navigable waterway often need a general or individual permit from the DNR. This bill makes numerous changes to DNR notice requirements and timelines for approving these permits. The bill repeals the requirement that the DNR provide general permits through the administrative rule-making process. General permits are now valid for five years and can be renewed, modified, or revoked. For individual permits, if the DNR fails to make a decision about a permit within the new timelines, a permit is considered approved.

Permit Application Approvals. SB 326 establishes statutory deadlines by which the DNR must approve or disapprove certain environmental permit applications. It directs the DNR to set other deadlines by rule. If the DNR fails to approve or disapprove an application by the required deadlines, it must refund the applicant fees and the applicant can appeal as if the DNR disapproved the application. The DNR cannot disapprove an application solely because it is unable to complete its review before the deadline. Previously, the DNR was required to set the deadlines under which it refunded applicant fees.

Water and Sewage Facilities. SB 326 requires the DNR to establish an expedited procedure for the approval of water and sewage facility plans. The expedited procedure will apply if the DNR determines that the plan design: (1) is a common construction and size or is for a minor addition to an existing facility; (2) is submitted by a registered professional engineer; (3) is submitted by a person who has designed similar facilities and none of those similar facilities has caused adverse impacts to the environment; (4) contains no unusual siting requirements or other unique design features; and (5) is not likely to have an adverse impact on the environment.

Wisconsin Pollution Discharge Elimination System Permits and Stormwater Management Permits. SB 326 gives the DNR the authority to renew Wisconsin Pollution Discharge Elimination System (WPDES) permits and stormwater management permits for an additional five year period if the permit holder requests an extension.

Grading Banks on Navigable Waterway. SB 326 allows individuals to grade or remove topsoil from the bank of any navigable waterway when the exposed area is more than 10,000 square feet if the grading or removal is authorized under a stormwater discharge permit or a county shoreland zoning permit.

Bridges and Culverts. SB 326 repeals the statute that exempted municipalities from individual and general permitting requirements for the construction and maintenance of highway bridges. The DNR must now issue a general permit authorizing the construction, reconstruction, and maintenance of bridges and culverts that are part of a transportation project carried out under the direction and supervision of a municipality.

Low Hazard Dams. SB 326 requires the DNR to establish an expedited procedure for the approval of low hazard dams if certain criteria are satisfied.

DNR Water Quality Certification Standards for Wetlands Replaced with Wetland General Permits and Wetland Individual Permits-2011 Senate Bill 368 (2011 Wisconsin Act 118)

SB 368 eliminates water quality certification standards for wetlands. Under current law, an individual that wants to fill in a wetland must have the DNR certify that the activity will not violate the state's water quality standards for wetlands. This bill replaces the water quality certification standard with wetland general and individual permits. It requires the DNR to issue certain types of wetland general permits and authorizes the DNR to prohibit discharges under general permits in specified wetlands. The bill also creates a process for wetland individual permits and gives the DNR more flexibility to approve proposed projects. The DNR must establish a mitigation program for wetland individual permits. Mitigation is the restoration, enhancement, creation, or preservation of wetlands to compensate for adverse impacts to other wetlands. Finally, the bill modifies penalties for wetland violations, provides the DNR with broad authority to prosecute wetland discharge violations, and modifies fees for activities related to navigable waters.

DNR Drilling Regulations Expanded to Include Heat Exchange Drilling-2011 Senate Bill 156 (2011 Wisconsin Act 150)

SB 156 expands current law regulating well drilling businesses and drillers to include heat exchange drilling. Heat exchange drilling is a process used to install geothermal closed-loop heat exchange systems underground. Previously, the law regulating well drilling only applied to wells constructed for obtaining groundwater for human consumption. Now, heat exchange drilling businesses must also be registered and heat exchange drillers must be licensed. The DNR may not issue heat exchange drilling licenses unless an applicant passes a DNR examination, has been a registered drilling rig operator for two of the last five years, and has heat exchange drilling experience. The applicant must also comply with training and continuing education requirements. The bill also authorizes the DNR to inspect heat exchange drillholes on both private and public property. If a drillhole is contaminated or polluted, the DNR can require individuals to make corrections or repairs, or can discontinue the drillhole use.

Several Provisions Added to Property Assessed Clean Energy Program Loans-2011 Senate Bill 425 (2011 Wisconsin Act 138)

SB 425 adds several provisions to the law regarding Property Assessed Clean Energy (PACE) program loans. Currently, political subdivisions (towns, villages, cities, and counties) can make or oversee PACE loans to property owners that make improvements on their property to more efficiently use energy and water. The political subdivisions can collect loan repayments as a special charge on the property owners' tax bills. Individuals can pay PACE special charges in installments. Under the new law, a political subdivision that imposes PACE special charges and allows installment payments can let the third party that provided financing for the PACE program project collect the installments. A delinquent PACE special charge installment becomes a lien on the PACE property. If the political subdivision uses PACE for a project that costs $250,000 or more, it must require the property owner to obtain a written guarantee from the contractor or project engineer that the project will achieve a savings-to-investment ratio greater than one or that the contractor or engineer will pay the owner any shortfall. If the political subdivision uses PACE for a project that costs less than $250,000, it can require a third party technical review of the projected savings before making the loan.

DNR Authorized to Waive Legal Requirements for Pollutant Discharges for Certain Agricultural Research Projects-2011 Senate Bill 402

SB 402 authorizes the DNR to waive the legal requirements for pollutant discharges into Wisconsin waters for certain agricultural research projects. Currently, the DNR administers the laws related to pollutant discharges. The laws contain many requirements, including one that individuals have water pollution discharge permits before they discharge pollutants into Wisconsin surface water or groundwater. Prior to this bill, the DNR could waive the permit requirement for research projects that evaluated advanced agricultural nutrient management tools and precision agriculture technology if three conditions were met. The three conditions are that: (1) the DNR determines that the project is unlikely to have a negative impact on or threaten the environment or public health; (2) the DNR reviews and approves the project before it begins; and (3) the individual operating the project agrees to maintain compliance with surface water and groundwater requirements and to regain compliance if a violation occurs. If the agricultural research projects meet these conditions, this bill now allows the DNR to waive any legal requirements related to discharging pollutants instead of just the permit requirement.

References to the Federal Financial Hardship Grant Program Under the Clean Water Fund Program Eliminated-2011 Senate Bill 288

SB 288 eliminates references to the federal financial hardship grant program under the Clean Water Fund Program (CWFP). The CWFP provides loans to municipalities for projects that control water pollution including wastewater treatment and urban storm water runoff projects. According to the DNR, it used all the money from the federal grant program in 2002 and there is no indication that the federal government will provide any additional grant money. The DNR asked for this bill in order to clarify the CWFP statute and make the language easier for individuals to understand.

Towns Prohibited from Electing Supervisors to Geographic District Seats

In an informal opinion dated March 16, 2012, the State of Wisconsin Government Accountability Board (GAB) decided that while town board supervisors may be elected to either numbered or unnumbered seats, there is no statutory authority for a town to elect supervisors by geographic district rather than at large.

The GAB issued the informal opinion in response to an inquiry by the Town of Cedarburg. For years the Town supervisors were elected according to numbered, geographic districts. Electors were limited to voting only for the numbered supervisor corresponding to the geographic district in which the elector lived.

In its opinion, the GAB focused on several provisions of Chapter 5 of the Wisconsin Statutes, which deals with elections. The GAB noted that Wis. Stat. (Chapter 5) §5.60(6)(a) provides for two possible ballot forms - one for electing supervisors to numbered seats (if approved at an annual town meeting) and one for electing supervisors if the seats are not numbered. The GAB then observed that neither this statutory section nor any other provisions of Chapter 5 provide authority for towns to elect supervisors to positions based on geographic district rather than at large.

In arriving at this conclusion, the GAB recognized that Wis. Stat. §5.15(1)(a) requires that every city, village and town in the state be divided into wards. However, subsection (c) of that statute expressly provides that such wards are only to be used in the adjustment of county supervisor and city aldermanic districts. Notably absent from subsection (c) is any reference to towns. The GAB determined that this lack of any mention of towns in subsection (c) shows that wards created within a town are for the convenience of electors in determining where electors should vote, but are not to be used to create separate districts for town offices.

Cedarburg was proceeding with the spring election on the basis of the existing geographic district supervisor designations. However, to protect the integrity of each elector's right to vote for all supervisor offices, the GAB ordered Cedarburg to retain the numbered seat designations and allow every elector to vote for each numbered seat for which an election was being held.

— Jeffrey P. Clark

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ing variance does not expire unless a county's board of adjustment or a city's board of appeals specified an expiration date for the variance at the time it granted the variance. An ordinance adopted after the effective date of this bill cannot specify an expiration date for a variance granted before the effective date of this bill. The bill also states that zoning variances remain in effect even when property is sold.

Municipalities' Ability to Impose Development Moratoriums Limited-2011 Senate Bill 504 (2011 Wisconsin Act 144)

SB 504 limits the ability of a municipality to enact a development moratorium ordinance. Municipalities can only enact a moratorium on rezoning, subdividing, or other division of land if they have: (1) developed or are developing a comprehensive plan unless one is not required; (2) obtained a written report from a registered engineer or public health official stating that a moratorium is needed to prevent a possible overburdening of public facilities or to prevent a significant threat to the public health or safety; (3) adopted a resolution stating that a moratorium is needed to prevent a possible overburdening of public facilities or to prevent a significant threat to the public health or safety; and (4) held at least one public hearing to discuss the proposed ordinance. The ordinance must describe the need for the moratorium, the specific action the municipality intends to take to alleviate the need for the moratorium, and the area where the ordinance applies. The ordinance must provide an exemption for any rezoning or subdividing that would have no impact, or slight impact, on the problem that created the need for the moratorium. Initially, municipalities can enact moratoriums for no longer than twelve months. However, municipalities can extend a moratorium for an additional six months if they amend the ordinance.

Towns Allowed to Contest Direct Annexations by Unanimous Approval-2011 Assembly Bill 181 (2011 Wisconsin Act 128)

AB 181 allows towns, under certain circumstances, to bring legal actions to contest the validity of direct annexations by unanimous approval. Direct annexation by unanimous approval is one of several methods that cities and villages can use to annex unincorporated land. Previously, towns did not have any authority to bring legal actions for these types of annexations. This bill allows a town to ask the Department of Administration (DOA) to review a direct annexation by unanimous approval within thirty days of the enactment of the annexation ordinance. The DOA must review the annexation to determine if the annexation violates one or both of the following limitations: (1) a city or village cannot annex territory unless it is contiguous to the annexing city or village; and (2) a city or village cannot annex territory if no part of the city or village is located in the same county in which the territory being annexed is located unless the town in the territory provides a supporting resolution. The DOA must send a copy of its findings to the town, affected landowners, and the annexing city or village within twenty days of receiving the town's request. If the DOA does not respond within twenty days, it is assumed that the DOA found no violation. If the DOA finds that the annexation violates either of the two limitations above, the town can challenge the annexation in circuit court within forty-five days. The bill provides that the losing party is responsible for paying court costs and the winning side's reasonable attorney fees.

No Regulatory Taking Occurred Despite Zoning District Having No Uses Permitted as of Right

Zoning districts in which no uses are permitted as of right and in which an owner must secure a conditional use permit to make any use of the land were held facially unconstitutional in *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780. However, the fact that a zoning ordinance failed to include any uses permitted as of right in a particular district does automatically give rise to a valid regulatory takings claim by owners of property in such a district. *Butzen v. City of Sheboygan Falls*, 2011 AP 1204 (February 29, 2012).

Butzen operated a scrap metal recycling business in the city in a C2 commercial zoning district in the 1990s. The business grew over time and, as is not unusual with this type of business, it came to look like a junkyard in the eyes of city officials. In January 2000, the plan commission notified Butzen that his property no longer complied with the city zoning code, but that with some cleanup and modifications, he could run a commercial recycling center if he obtained a conditional use permit. He applied for a permit in February 2000.

In April 2000, before acting on Butzen's application, the city adopted Ordinance No. 11, which eliminated all permitted uses in C2 zoning districts. All uses would require a conditional use permit from the city. The city's Public Health and Welfare Committee advised Butzen that it would consider recommending that he be granted a conditional use permit if he took some remedial steps over the next months. The city set a deadline of December 25, 2000, for him to complete the cleanup or risk denial of the permit. When that deadline passed, the city set a three-part deadline of January 15, February 1, and July 1, 2001 for various phases of the cleanup. When Butzen missed the first two deadlines, the city ordered him to cease all operations, which he did. He negotiated another deadline, but failed to meet that also and made no further use of the property.

Butzen did not appeal the plan commission's determination that he needed a conditional use permit to the board of appeals under section 62.23(7)(3), nor did he seek administrative review of the city's denial of his application. In November 2007, Butzen filed a new application for a conditional use permit, but it was rejected as incomplete.

In 2008, the supreme court issued its decision in *Town of Rhine*. Butzen then resumed use of his property and successfully sought a declaratory judgment holding the city's Ordinance No. 11 unconstitutional. He then brought a regulatory takings claim against the city arguing that it had deprived him of all economically beneficial use of his property. The circuit court dismissed his claim and the court of appeals affirmed.

The court of appeals adopted the circuit court's two-pronged rejection of Butzen's argument. First, the court found that the plan commission's determination that he needed a conditional use permit and the city's denial of his application were premised on the prior ordinance. Consequently, the declaration years later that Ordinance No. 11 was unconstitutional was not a substantial factor in causing him any injury. Second, the decision that he needed a conditional use permit to operate a commercial recycling center did not mean that he was deprived of all economically beneficial use of the property since the property could still be used for all the uses that were permitted as of right in the prior ordinance.

— Mark J. Steichen

Regulating Sand and Gravel Pits Is Not Necessarily Zoning

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overlap between zoning and other police powers and the same objective can sometimes be achieved through either zoning or other police powers.

The court concluded that there are many differences between this ordinance and traditional zoning. First, the ordinance does not divide the town into districts, restricting mining to only certain locations within the town. Second, mining is neither permitted as of right nor absolutely prohibited anywhere in the town. The court views traditional zoning as establishing districts that categorize uses that are permitted or prohibited. The court deems the tool of conditional uses as being a hallmark of modern zoning. In any case, the ordinance's use of the term "conditional use permit" for the mining approvals was not dispositive. Third, the ordinance regulates mining based on the nature of the activity, rather than the location of the property. The locations where mines will be allowed to operate are incidental to the determination of how the activity of mining can be conducted in relation to other land uses in the vicinity. Finally, the ordinance regulates only the activity of mining; it does not govern any other uses of property in the town. Traditional zoning attempts to regulate comprehensively all potential land uses within the jurisdiction.

The supreme court was unanimous in setting out the method for deciding whether an ordinance constitutes zoning. Nevertheless, it is clear from the opinion, that the determination is very fact specific and many factors are considered. No one factor is determinative.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

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