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Short-Term Rental Regulation – Litigation Uncertainty

Over the last decade, many Wisconsin municipalities have seen a significant increase in the proliferation of short-term rentals, driven by the growth of marketplace providers like Airbnb and VRBO. In response to this increase, some municipalities have sought to prohibit or restrict short-term rentals. In an attempt to strike a balance between municipal regulation and individuals' property rights, the Wisconsin Legislature created Wis. Stat. § 66.1014 in the 2017 WI Act 59, Biennial Budget Act.

This statute provides two significant limitations on municipal regulation of short-term rentals:

(1) Municipalities cannot prohibit the rental of a residential dwelling[1] for 7 consecutive days or longer. *See* Wis. Stat. § 66.1014(2)(a).

(2) Municipalities can limit the total number of days within a 365-day period in which a residential dwelling may be rented to 180 consecutive days, but municipalities cannot specify when that 180-day period will be. Such limitation only applies to residential dwellings rented for periods of more than 6 but fewer than 30 consecutive days. *See* Wis. Stat. § 66.1014(2)(d)1.

While these restrictions certainly limit municipal regulation, they also provide important openings for municipalities to regulate short-term rentals. Based on the statute, municipalities have the power to prohibit short-term rentals for less than 7 consecutive days. Municipalities also have the power to limit short-term rentals of 7 to 29 consecutive days to a consecutive 180-day period within a 365-day period. These are substantial limitations on the operation of short-term rentals.

The statute also provides municipalities with authority to regulate short-term rentals in two additional respects:

(1) Municipalities can enact an ordinance requiring those who maintain, manage, or operate short-term rentals for more than 10 nights each year to obtain a license or permit for such activities. *See* Wis. Stat. § 66.1014(2)(d)2.b.

(2) Municipalities can enact an ordinance regulating short-term rentals that is not inconsistent with the limitations on municipal regulation in Wis. Stat. § 66.1014. *See* Wis. Stat. § 66.1014(2)(c).

These provisions allow municipalities to impose permit or licensing requirements on short-term rentals and provide an opening to impose other restrictions and requirements that are consistent with the statute's limitations. As long as a restriction does not effectively prevent short-term rentals of 7 consecutive days or more for at least 180 consecutive days in a 365-day period, it should comply with the statute. However, municipalities should still be mindful of other potential limitations on their power to regulate short-term rentals, such as the prohibition

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on regulating the amount of rent or fees charged for the use of a residential dwelling unit pursuant to Wis. Stat. § 66.1015. Municipalities should also be mindful of whether a regulation requires the use of their zoning or police powers.

Even with Wis. Stat. § 66.1014, municipal regulation of short-term rentals remains a flash point for litigation, with the Wisconsin Realtors Association's (WRA) Legal Action Program and the Wisconsin Institute for Law & Liberty (WILL) pursuing lawsuits against municipalities for their short-term rental ordinances. Despite this plethora of litigation, there remains limited case law to guide municipalities.[2] Until the courts are able to weigh in, municipalities may find it helpful to consider the following issues that have led to litigation when crafting their own regulations:

- Requiring short-term rental property to be the owner's primary residence.[3]
- Limiting rental days to 120 days per year.[4]
- Requiring a tourist housing permit to operate a short-term rental, which could be revoked for cause.[5]
- Requiring rentals of no more than 7 days per month within the months of May through September.[6]
- Requiring short-term rentals to be owner occupied for at least 175 days per year.[7]
- Requiring a conditional use permit to operate a short-term rental.[8]
- Limiting the number of occupants to 8 regardless of the number of bedrooms.[9]
- Requiring the owner or designated agent to reside within the county.[10]
- Requiring authorization for municipal staff/officials to enter and examine any short-term rental for purposes of ensuring compliance.[11]
- Refusal to issue a short-term rental license until non-conforming driveways are brought into compliance with zoning requirements.[12]
- Limiting short-term rentals to 4 bedrooms and prohibiting the use of other rooms for sleeping purposes regardless of whether more bedrooms are present.[13]

While circuit courts have upheld some of these regulations, municipalities should be mindful that these decisions are being appealed. Therefore, municipalities should consider the uncertainty such appeals pose and the potential risk of litigation when contemplating short-term rental regulations. Municipalities are encouraged to work with their attorneys when contemplating short-term rental regulations.

— Eric Hagen

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***Oitzinger v. City of Marinette* – A Closed Session Cautionary Tale**

Knowing when and how to properly close a meeting for "competitive or bargaining reasons" under Wis. Stat. § 19.85(1)(e) is not always easy. In *State ex rel. Oitzinger v. City of Marinette*, 2025 WI App 19, 19 N.W.3d 663 (*Marinette*), the Wisconsin Court of Appeals offers a primer on how to proceed properly when entering closed session in general and when using that exception specifically.

The case involved two separate common council meetings held on successive days to discuss matters related to PFAS contamination in the city's water supply. On October 6, 2020, the council elected to enter into closed session to discuss an equipment cost donation agreement with a party responsible for the PFAS contamination. On October 7, 2020, the city elected to close the meeting to discuss a consultant's memo regarding the potential provision of alternative drinking water to the neighboring Town of Peshtigo, whose residents had also been impacted by the PFAS contamination. While both meetings were noticed for closed session, in neither instance was the council provided with any other advance information before entering the closed session.

After the meetings, Alderman Oitzinger alleged that various procedural violations had occurred and filed a complaint with the district attorney before then commencing a lawsuit in circuit court against the city and the common council pursuant to Wis. Stat. § 19.97(4). The circuit court found that the October 6 closed session had been properly held because it involved ongoing negotiations, but it held that the October 7th closed session was illegal because it involved a theoretical future issue that involved no negotiations or bargaining positions in need of protection at the time of the meeting. The decision was appealed and upheld as to the October 7th meeting but reversed as to the October 6th meeting.

The Court of Appeals focused its analysis on the procedural requirements of the competitive bargaining exception under Wis. Stat. § 19.85(1)(e), which provides that closed sessions may be held when "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, *whenever competitive or bargaining reasons require a closed session*" (the "bargaining exemption", emphasis added by the Court). *Marinette* at ¶ 24. The Court's analysis confirms that there are several crucial steps to ensure that a meeting is properly closed and reiterates the limitations on using the bargaining exemption.

First, before entering closed session, the Open Meetings Law (OML) requires that a governing body

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Court of Appeals Upholds County Board Denial of Rezoning Petition Based on Inconsistency with Town Comprehensive Plan

The Wisconsin Court of Appeals recently affirmed the Iowa County Board of Supervisors' decision to deny a landowner's request to rezone agricultural land to a district that allowed quarrying as conditional use. The Court's decision in *Dyersville Ready Mix Inc. v. Iowa County Board of Supervisors et al.,* 2024AP1091 (April 10, 2025) reaffirms the deferential standards applied on a certiorari review of rezoning decisions.

The landowner wanted to quarry limestone and dolomite on a parcel of approximately 100 acres of land in the Town of Bringham. The land was zoned A-1, designated for Exclusive Agricultural uses, which did not allow quarrying as either a permitted or conditional use. The landowner requested the parcel of land be rezoned to AB-1, designated for Agricultural Business use, which allowed quarrying if a conditional use permit (CUP) was obtained. The landowner simultaneously filed two petitions, one requesting that the county rezone the parcel to AB-1 and one requesting a CUP to allow quarrying on the parcel.

Under Wis. Stat. § 59.69(5)(e), the town board has the option to file a resolution recommending denial of a zoning change. In this case, the Bringham Town Board recommended against granting what it referred to as the "quarry application" because it found the application to be inconsistent with the Town's Comprehensive Plan in a number of different ways, which it supported with citations to the Plan. The County Planning and Zoning Committee (the P & Z Committee) then reviewed the application and held a public meeting and heard public comments on the application. The P & Z Committee also recommended denial of the rezoning petition because of inconsistencies with the Town of Brigham Comprehensive Plan. Finally, the County Board held a public hearing on the rezoning petition and did not approve the rezoning.

Initially, the landowner successfully filed a declaratory judgment action with the Circuit Court challenging the zoning decision, but the Court of Appeals reversed the Circuit Court and held that the more deferential certiorari standard was the proper standard of review for a decision to deny a rezoning. The Circuit Court then applied the certiorari standard and upheld the County Board's decision. The landowner appealed that decision to the Court of Appeals, and the Court of Appeals also affirmed the Board's decision.

In a common law certiorari review like this one, the reviewing court is limited to considering four factors: (1) whether the county board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the county board could reasonably reach the determination under review. The reviewing court is also limited to considering the record as compiled by the municipality and does not take additional evidence from the parties. Municipal decisions on certiorari review are entitled to a "presumption of correctness and validity" and the challenging party bears the burden of overcoming that presumption. In addition, local zoning decisions are recognized as a "legislative function" of the county board, meaning that reviewing courts are particularly deferential to municipal decisions and will not substitute their judgment for that of the municipality's governing body.

In challenging the County Board's decision, the landowner argued that the Board proceeded on an incorrect theory of law because it adopted the P & Z Committee's reasoning in whole and, according to the landowner, the P & Z Committee improperly applied the standards set out in the County's ordinances for granting CUPs, rather than the standards for granting a rezoning. The Court of Appeals held that it was unnecessary to determine what standard the P & Z Committee applied because the County Board did not simply adopt the P & Z Committee's reasoning but instead exercised its own legislative discretion.

The Court also determined that the landowner did not prove that the County Board applied an incorrect legal standard. Under the County's zoning ordinances, the County Board must make eight findings in order to approve a rezoning petition, including that the petition is consistent with both the County and Town Comprehensive Plans. The Town of Brigham's Comprehensive Plan included among its goals the preservation of agricultural land and the natural beauty of the Town. The Court determined that the County Board could have denied the petition on the valid grounds that rezoning to a district which included a number of non-agricultural conditional uses (among them a quarry, a cheese factory, an airport, and an ethanol or bio-fuel plant) was not consistent with the goal in the Town's Comprehensive Plan of preserving available agricultural land for growing crops.

The record showed that the County Board members were repeatedly reminded of the correct standard to apply when considering whether to approve or deny the zoning petition, and nothing in the record proved that the Board did not apply that standard. Indeed, some of the submissions and comments in the record referenced the agricultural preservation of the land in the face of quarrying or other possible conditional uses under the requested zoning designation. The Court determined that some County Board Members' apparent concern with "local control" was sufficient to indicate the Board was concerned with whether the rezone was consistent with the Town's Comprehensive Plan—a valid reason to deny a rezoning under the standards set out in the County's ordinances. The Court also affirmed that the County Board was allowed to consider the potential conditional uses in the requested zoning district when deciding whether to approve or deny the petition and was not

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be sufficiently informed of the reasons necessitating a closed session and establishes a clear record as to why the exemption needs to be invoked. With respect to the October 6th meeting, the Court emphasized that the common council had never seen a draft of the donation agreement, did not engage in any discussion about the agreement in open session, and had no general understanding of the substance of the agreement or status of the negotiations before entering into closed session.

The same was true with the October 7th meeting as the council had never seen the consultant's memo that was subject of the closed session; did not engage in any discussion before entering into closed session; and was not otherwise provided sufficient information to assess whether a closed session discussion was justified.

Second, a closed session may be held only for those portions of an agenda item that justify an exemption—if the remainder of the discussion of the agenda item could be held in open session, it must be held in open session. The Court found that in both meetings substantive discussions about the nature of the issues could have been held in open session, and the meetings closed once and only if it became clear that aspects of either the donation agreement or water supply alternative would be subject to negotiation.

Third, a closed session may only occur for competitive and bargaining reasons under Wis. Stat. § 19.85(1)(e) when the governing body has "no other option" than to enter into closed session and when there are current or certain, and not just hypothetical or possible, negotiations or bargains contemplated. In the Court's view, this was clearly not the case with either meeting.

With respect to the donation agreement, there was evidence in the record that no further negotiations would occur and that the party with whom negotiations had occurred was fully aware of all the issues surrounding the need for the equipment and the terms of the donation agreement. The mere "possibility" that a counteroffer could be made to the responsible party did not justify holding the entire meeting in closed session. *Marinette* at ¶ 61. Had such a counteroffer been a possibility, the proper procedure would have been for the mayor to provide notice that a possible closed session could become warranted following open session discussion of the negotiated agreement terms.

With respect to the October 7th meeting, the Court acknowledged that there were numerous circumstances surrounding the possibility of providing an alternative water supply to Peshtigo, but the Court found that these were speculative at best—there was no request on the table to negotiate the provision of water to the town and the consultant's review of these alternatives "was never meant to facilitate the Council making any decisions about providing water to Peshtigo." *Id.,* ¶ 67. The Court reasoned that the "public deserved to know" the consultant's conclusions that the city had paid for. *Id.,* ¶ 70.

In finding that hypothetical negotiations were not a reason for a closed session under the bargaining exemption, the Court compared the bargaining exemption to the language in Wis. Stat. § 19.85(1)(g) that allows conferring with legal counsel with respect to litigation that it is or is likely to become involved in. *Id.*, ¶ 69. The Court reasoned that if hypothetical negotiations were contemplated by the OML, the legislature would have included similar language—but they did not. *Id.*

Finally, the Court emphasized that the city was not without options. It could have noticed a possible closed session following open session presentation of the consultant's report. Had the council decided to negotiate with Peshtigo following discussion of the consultant's report, it could have gone into closed session (if properly noticed). At that point, "[i]t would have been appropriate to use closed sessions to protect those competitive or bargaining interests by developing its negotiation strategy—including acceptable terms, limits, or contingencies—secretly." *Id.*, ¶ 71.

The Court also noted that while the city had attempted to justify the closed session *post hoc* by saying that special counsel had discussed some legal liabilities related to the various scenarios, the city had failed to notice the closed session under Wis. Stat. § 19.85(1)(g)—a reminder to always notice each possible exemption that applies to a matter to be discussed in closed session.

Although *State ex rel. Oitzinger v. City of Marinette* does not blaze any significant new ground in the OML jurisprudence, it stands as a cautionary tale that while a closed session may be convenient or desired, it is not always legally permissible. Even legally permissible closed sessions should be properly convened and limited in scope, and members of public bodies should be sufficiently informed of the need for a closed session prior to being asked to vote to adjourn to one.

— Jared Walker Smith

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limited to considering only the permitted uses within that zoning district.

This case reinforces the fact that a decision to grant or deny a petition to rezone property is a legislative decision that is entitled to a deferential certiorari standard of review. It also makes clear that it is proper for a governing body to consider the conditional uses allowed in various zoning districts when making a rezoning decision. Nevertheless, municipalities should distinguish between rezoning petitions and CUP applications, consider them separately, and carefully apply the proper legal standards when acting on each.

— Liz Leonard and Julia Potter

Arrest Record Discrimination Includes Protections for Records of Civil Forfeitures

Employers are significantly restricted under the Wisconsin Fair Employment Act (WFEA) in how they may use an individual's "arrest record" to make an employment decision. The WFEA defines "arrest record" expansively as: "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority."

Recently, in *Oconomowoc Area School District v. Cota*, the Wisconsin Supreme Court ruled that arrest record discrimination covers arrest records related to non-criminal (e.g., civil forfeitures punishable only by fines) as well as criminal offenses. This decision overruled a lower court's ruling which held that an individual only received "arrest record" protections related to criminal activity. Moving forward, employers must comply with the Wisconsin Supreme Court's decision. Thus, an employer could not refuse employment to an individual solely because they were arrested for a non-criminal offense, such as a first-offense OWI, which is a non-criminal offense in Wisconsin (unless the circumstances of the crime or pending charge are substantially related to the circumstances of the job to be performed).

Importantly, even after this decision, employers are still permitted to refuse employment or to terminate an employee who was arrested for an offense if the employer conducted its own independent investigation of the circumstances of the arrest and if the employer is genuinely satisfied as a result of that investigation that the employee committed the act for which they were arrested and that such an act violates the employer's policies or expectations. In this case, the employer did not conclude that the employees committed the offense at issue and only came to that conclusion following conversations with law enforcement and the district attorney's office. The key factor for this exception to apply is that the investigation must be truly independent and cannot merely rely upon a police report or an arresting officer's assurance that the individual will be found guilty. At a minimum, an employer would need to interview the employee or other witnesses to determine whether the misconduct occurred.

In this case, the employer should have acted right away based on its own investigation, rather than wait for the police to complete their investigation and rely on some of the opinions of the police and DA. The district's instincts in wanting some confirmation of what they already suspected about the theft of the property normally would seem to be sound reasoning, but in this case caused the Court to determine they improperly relied on the "arrest" rather than their own investigation.

Additionally, in the public sector, employers should provide employees with a Garrity Warning before interviewing an employee regarding potential criminal matters, which informs employees of their duty to cooperate with their employer's investigation but that the information provided to the employer cannot be shared with law enforcement.

Arrest record discrimination is a complex area of law and contains many nuances. We encourage employers to reach out to a member of the Boardman Clark Municipal Law Practice Group with questions.

— Storm B. Larson, Brian P. Goodman, and Douglas E. Witte

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[1] "'Residential dwelling' means any building, structure, or part of the building or structure, that is used or intended to be used as a home, residence, or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others." Wis. Stat. § 66.1014(1)(b).

[2] As of writing this article, there are only 2 potentially citable cases that even reference Wis. Stat. § 66.1014 (*City of Wautoma v. Marek*, 2024 WI App 32, 7 N.W.3d 718 and *Sullivan v. Town of Stockholm*, 402 F. Supp. 3d 534 (W.D. Wis. 2019)), and neither of those cases provide any clarification on municipal regulation of short-term rentals under the statute.

[3] Upheld by circuit court, appeal pending in *WRA v. City of Neenah, Winnebago County,* Case No.: 22-CV-707. Proceedings stayed by stipulation in *WRA v. Village of Plover* (Portage County Case No.: 23-CV-314).

[4] Found to be in violation of Wis. Stat. sec. 66.1014 in *WRA v. City of Neenah*, Winnebago County Case No.: 22-CV-707.

[5] Upheld by circuit court, appeal pending in *WRA v. City of Neenah*, Winnebago County Case No.: 22-CV-707.

[6] Upheld by circuit court, appeal pending in *WRA v. Polk County*, Polk County Case No.: 23-CV-72.

[7] Dismissed by stipulation in *WRA v. Town of Rib Mountain*, Marathon County Case No.: 23-CV-660. Ordinance remains unchanged.

[8] Case pending - *WRA v. Columbia County*, Columbia County Case No.: 24-CV-364.

[9] Case pending - *WRA v. Columbia County*, Columbia County Case No.: 24-CV-364.

[10] Case pending - *WRA v. Village of Ephraim*, Door County Case No.: 25-CV-17.

[11] Case pending - *WRA v. Village of Ephraim*, Door County Case No.: 25-CV-17.

[12] Temporary injunction enjoined enforcement of short-term rental ordinance while owner pursues appeal of municipal denial of short-term rental license due to non-conforming driveway (case pending – *Adam White et al v. Village of Sister Bay* et al, Door County Case No.: 24-CV-81).

[13] Case pending - *Hunter Clinton, et al v. Village of Sister Bay* et al, Door County Case No.: 24-CV-119.

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