The Year in Review:
*A Summary of Wisconsin Planning Cases from June 1, 2013 – July 1, 2014 and Recent Legislation*

Extension Report 2014-2
July, 2014

Brian W. Ohm
Professor and UWEX Planning Law Specialist
The Year in Review:
A Summary of Wisconsin Planning Cases from
June 1, 2013 – July 1, 2014 and Recent Legislation

Extension Report 2014-3
July, 2014

Brian W. Ohm
Professor and UWEX Planning Law Specialist
The Year in Review:
A Summary of Wisconsin Planning Cases from June 1, 2013 – July 1, 2014 and Recent Legislation

Compiled by
Brian W. Ohm, J.D.
Planning Law Specialist
Department of Urban & Regional Planning,
University of Wisconsin-Madison/Extension
bwohm@wisc.edu

I. Zoning
II. Intergovernmental Issues
III. Inverse Condemnation, Regulatory Takings, and Condemnation
IV. Water Law
V. Property Taxation and Special Assessment
VI. Governmental Immunity
VII. Highways and Streets
VIII. Open Meetings/Public Records
IX. Miscellaneous Planning Cases
X. Federal Court Opinions
XI. Recent Wisconsin Legislation Related to Planning

I. Zoning

A. Town Zoning of Shorelands Limited

In Hegwood v. Town of Eagle Zoning Board of Appeals, 2013 WI 118, the Wisconsin Court of Appeals addressed the relationship of town general zoning to county shoreline zoning. The Court of Appeals held that, except for towns that adopted general zoning prior to the adoption of the county shoreline zoning ordinance, towns do not have authority to regulate shorelands. The Court of Appeals decision raises some significant issues and leaves many questions unanswered regarding the distinction between general zoning used to establish the use of property and special overlay zoning used to establish standards to protect water resources.

The dispute involved land located near the shoreline in the Town of Eagle in Waukesha County. Hegwood built an outdoor fireplace and pergola on the shoreline and applied for an after-the-fact variance from the 20 foot setback requirement in the County’s Shoreland and Floodland Ordinance. The County approved the pergola on the condition that Hegwood remove the roof and allowed the fireplace to remain. Hegwood then applied to the Town for a variance from the Town’s general zoning ordinance that also included a 20 foot setback. The Town Board of Appeals denied the application.

Hegwood then sued the Town by filing a certiorari action seeking reversal of the BOA decision on the basis that only the County has the authority to regulate shoreland under Wisconsin law. The Town made two basic arguments in defense of the lawsuit. First, the Town argued that the lawsuit should not have been brought as a certiorari action (appropriate for challenging variance decisions). Rather, the Town argued that the suit should have been brought as a declaratory judgment action since the dispute was about town authority to regulate shorelands. The Court of Appeals disagreed.
Second, the Town argued that it has concurrent zoning with the county over shoreland areas. Hegwood, however, argued that Wis. Stat. § 59.692 (the mandatory shoreland zoning provisions for counties) vests counties with exclusive authority to zone shorelands in all incorporated areas and thus the Town lacked the authority to enforce its general zoning ordinance on Hegwood’s property along the shoreland.

Wis. Stat. § 59.692 requires that counties adopt shoreland zoning ordinances consistent with the standards developed by the Wisconsin Department of Natural Resources (DNR). The county ordinance applies unilaterally to all shoreland property located in the unincorporated (towns) areas of the county. County shoreland zoning follows different procedures than county general zoning. County general zoning does not apply unilaterally to all unincorporated areas of the county. Towns have the ability to approve the application of county zoning within the town. Those towns that decide not to have county zoning apply in the town can either be unzoned, or adopt their own zoning ordinance.

The shoreland zoning standards developed by the DNR primarily focus on standards for setbacks, vegetative buffers, etc. The standards do not fully address the various uses that may occur along the shoreline (e.g., different types of residential uses, commercial uses, etc.) As a result, many counties treat their shoreland zoning ordinance as an overlay ordinance. The county then relies on general zoning (either the county general zoning ordinance or the town general zoning ordinance) to regulate the uses along the shoreline. This was the situation presented in this case -- the county shoreland zoning ordinance overlaying the town general zoning ordinance.

Since the town’s ordinance was adopted after the county shoreland zoning ordinance, the court of appeals held that the town did not have concurrent jurisdiction with the county over the shoreland area. To support its decision, the Court of Appeals cited Wis. Stat. § 59.692(2)(b) that provides: “If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.” The Court of Appeals interpreted this provision to mean that the legislature gave the authority for adopting shoreland zoning exclusively to the county and only preexisting town ordinances that were more restrictive than the county’s shoreland zoning ordinance could remain in effect.

In footnote number 8, the Court of Appeals notes that nothing in its opinion affects the authority of towns to zone areas “in or along natural watercourses, channels, streams or creeks ... related to non-navigable waters.” This statement is confusing given that virtually all natural watercourses, channels, streams or creeks will be navigable waters. It is also not clear how the Court’s analysis applies to situations where counties have recently adopted new shoreland zoning ordinances in response to DNR’s revised shoreland zoning rules in NR 115.

The decision is recommended for publication. The Town of Eagle petitioned the Wisconsin Supreme Court to review the Court of Appeals decision but the Supreme Court denied accepting review of the case so the Court of Appeals decision is the law of the land.

B. Court Upholds Conditional Use Permit for Frac Sand Mine

O’Connor v. Buffalo County Board of Adjustment involved a citizen’s challenge in the Wisconsin Court of Appeals to the granting of a conditional use permit (CUP) for a frac sand mine operation in Buffalo County. On January 13, 2012, R&J Rolling Acres, LLP, applied to Buffalo County for a CUP to establish a frac sand mining operation on property that was zoned agricultural. Rolling Acres estimated that 80 trucks would leave the property every weekday. At a public hearing on the CUP Rolling Acres
clarified that it expected 126 trucks to leave the site each day. The Buffalo County Board of Adjustment voted to deny the CUP based on the Board’s concern that the large number of trucks leaving the property each day would decrease traffic safety. The Board observed that there would be 252 total trucks on a given day (126 traveling to the site and 126 trucks leaving the site) which equated to one truck every 3.33 minutes over a 14 hour hauling period.

On March 27, 2012, Rolling Acres submitted a second CUP application. The application changed the proposed number of trucks from 80 to 126, as stated at the meeting, and proposed to have trucks hauling six days per week instead of five. At the hearing on the second application, the Board tabled the matter for 60 days while the Wisconsin Department of Transportation conducted a Traffic Safety Impact Assessment. The Assessment found that the road could handle the increased traffic volumes and that the truck traffic would not move the roads into a different statistical range for crashes or safety. The board then granted the CUP, subject to 43 conditions including limiting the number of trucks leaving the site to 105 per day and prohibiting hauling on weekends and certain holidays.

The granting of the CUP was then challenged in court on two issues: (1) the Buffalo County zoning ordinance does not allow frac sand mining as a conditional use in the agricultural district; and (2) after the Board denied Rolling Acres first CUP application, it was prohibited from considering the merits of the second application. The citizen challenging the CUP also argued the Board “acted arbitrarily, unreasonably, and outside its jurisdiction by granting a CUP with no information ... about the identity of [Rolling Acres’] partners.” In reviewing the case, the Wisconsin Court of Appeals rejected the challenge.

In examining the County’s zoning ordinance, the Court deferred to the Board’s interpretation of the ordinance. The ordinance listed the following as conditional uses in the agricultural district: “Manufacturing and processing of natural mineral resources indigenous to Buffalo County incidental to the extraction of sand and gravel and the quarrying of limestone and other rock for aggregate purposes...” The Board argued that “for aggregate purposes” only modified the terms “the quarrying of limestone and rock.” The citizen challenging the permit argued that “for aggregate purposes” modified the entire sentence meaning that the extraction of sand could only be for aggregate purposes (for use in cement, asphalt, or similar materials). While the Court of appeals acknowledged the sentence was ambiguous, the Court determined the Board’s interpretation was reasonable and deferred to that interpretation.

With regard to the second application, the Court of Appeals found nothing in Wisconsin statutes or case law that prevented Rolling Acres from submitting a second CUP application. The Court acknowledged that a local government may enact a rule prohibiting a party whose application has been denied from filing a new application absent a substantial change in circumstances. In this case, Buffalo County did not have such a limitation.

As for the argument that the argument that the Board acted arbitrarily because it did not ask for information about Rolling Acres partners, the Court could not find any legal authority that required the disclosure of this information before granting a CUP.

The case is recommended for publication in the official reports.

C. CUP Revocation Must Include Statement of Reasoning for the Decision

Oneida Seven Generations Corp. v. City of Green Bay involved a challenge to the City of Green Bay Common Council’s revocation of a conditional use permit (CUP) issued to Oneida Seven Generations for a waste to energy facility. The CUP had been issued for the facility by the city but citizens concerned about the environmental impact of the facility convinced the Common Council to
revoke the CUP on the grounds that Oneida Seven Generations misrepresented the environmental impact of the facility.

The Wisconsin Department of Natural Resources and the U.S. Department of Energy found no significant environmental effects in their review of the facility. The City Plan Commission voted unanimously to not revoke the CUP.

In reviewing the Common Council’s decision to revoke the CUP, the Wisconsin Court of Appeals noted that the decision to revoke a CUP involves the exercise of a municipality’s discretion. “A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards.” (Citations omitted.) The Court reversed the Common Council’s revocation of the CUP because the Court found that the Common Council failed to articulate any rationale for its decision. The Court found the “absence of any identifiable false statements” in the record “troubling.” Nowhere in the Common Council’s decision did the City actually identify any alleged misrepresentations that would have justified the revocation. The Court also was influenced by the unanimous decision not to revoke the CUP by the City Plan Commission. According to the Court, “the City chose to ignore the Plan Commission’s recommendation at its own peril.”

The case is not recommended for publication in the official reports.

II. Intergovernmental Issues

A. Town and Sanitary District Cannot Challenge Dual County Unanimous Annexation

Darboy Joint Sanitary District No. 1 v. City of Kaukauna, 2013 WI APP 113 presented the Wisconsin Court of Appeals with the issue of whether the Town of Harrison (located in Calumet county) and/or the Darboy Joint Sanitary District No. 1 have standing to challenge a unanimous annexation by the City of Kaukauna (located in Outagamie County). The annexation involved eight acres of land previously within the Town and served by the Sanitary District.

Wis. Stat. § 66.0217(2) authorizes cities to annex land if all the electors and property owners within the property petition a city or village to annex their land (otherwise known as “direct annexation by unanimous approval”). The statutes also provide that if no part of a city or village is located in the same county as the territory that is the subject of the annexation, the town board must adopt a resolution approving the proposed annexation. Wis. Stat. § 66.0217(14)(b)1. In this case the Town did not adopt such a resolution.

The Town and the Sanitary District brought this lawsuit challenging the annexation. The city argued that the Town is prevented from challenging the annexation under Wis. Stat. § 66.0217(2). That section of the Statutes states: “No action on any grounds, whether procedural or jurisdictional, to contest the validity of [a direct annexation by unanimous approval] may be brought by any town.” The Town argued that this section of the Statutes does not bar its suit unless the City can first show the annexation complied with the procedural requirements of the statutes. The Court of Appeals disagreed with the Town and ruled that the plain language of Wis. Stat. § 66.0217(2) prevented the town from suing the City.

The Court of Appeals also held that since the Sanitary District was not able to cite any statute that gave it the right to challenge annexations (a “legally protected interest”), the Sanitary District had no standing to challenge the annexation.
The case is recommended for publication in the official reports.

B. City Has No Extraterritorial Plat Approval Authority to Deny Proposed Plat Based on Density Standards

In *Lake Delavan Property Co. v. City of Delavan*, 2014 WI APP 35, the Wisconsin Court of Appeals further limited city and village extraterritorial plat approval authority. The case involved the proposed development of approximately 600 homes in the Town of Delavan in Walworth County. The development is within the City of Delavan’s extraterritorial plat approval jurisdiction that extends to land within one and one-half miles of the City’s limits. The Town is under county zoning and the area of the proposed development is zoned residential. The proposed development is within the planned sanitary sewer service area designated by the Southeastern Wisconsin Regional Planning Commission and was designated as a “traditional neighborhood” in the City’s 1999 comprehensive plan and “urban density residential” in the Town and County comprehensive plans.

The City later amended its comprehensive plan to designate the area as “agricultural” and amended its subdivision ordinance to place a density limit of no more than one residence per 35 acres within the City’s extraterritorial jurisdiction. Lake Delavan Property Co. submitted a preliminary plat to the City, Town, and County for approval. The City denied the plat.

Lake Delevan Property Co. challenged the City’s denial of the proposed plat arguing that the density requirement in the City’s subdivision ordinance was a regulation of land use prohibited by state law. 2009 Wis. Act 399 amended Wisconsin’s subdivision statutes to prohibit a city or village from denying a plat or certified survey map “on the basis of the proposed use of land within the extraterritorial plat approval jurisdiction” of the city or village unless the denial is based on extraterritorial zoning regulations. Wis. Stat. § 236.45(3)(b). The City argued that it is appropriate for subdivision regulations to establish lot sizes and the City’s requirements were merely a density restriction, not a use restriction.

The Wisconsin Court of Appeals, however, did not agree with the City. The Court of Appeals held that the City’s subdivision regulations were land use restrictions. Citing no authority other than “[c]ommon knowledge and experience” the Court of Appeals held that the subdivision ordinance’s “blanket density requirements effectively preclude residential development throughout the extraterritorial jurisdiction.” To support its conclusion that the subdivision ordinance was a use prohibition, the Court of Appeals also noted the language in the City’s ordinance that stated the ordinance was enacted “in order to protect rural character and farming viability.” The Court of Appeals then ordered the approval of the proposed plat.

The case is recommended for publication. The City of Delevan has petitioned the Wisconsin Supreme Court for review of this decision but the Supreme Court denied accepting review of the case so the Court of Appeals decision is the law of the land.

C. Incorporation of Area of Two Towns Met Minimum Acreage Requirement

*Walt v. City of Brookfield*, involved a challenge to a petition to incorporate 4.075 square miles located within the Town of Brookfield and the Town of Waukesha in Waukesha County. The Town of Waukesha along with the Cities of Brookfield and Waukesha and the Village of Sussex sued to stop the incorporation. The Town of Waukesha did not consent to the incorporation of a portion of its territory. The Town brought a motion to dismiss the incorporation petition on the basis that the incorporation did not meet the 4 square mile minimum area requirement under Wisconsin law because the area sought to be incorporated from each town, standing alone, was less than 4 square miles.
The Wisconsin Court of Appeals decision in the case held that the statutes governing incorporation do not require the consent of the town. As a result, the Court of Appeals held that the proposed incorporation met the 4 square mile minimum area requirement. In a footnote the Court of Appeals noted that subsequent to the initiation of the lawsuit, the Legislature created Wis. Stat. § 66.0203(4m) that requires each town approve an incorporation if the area to be incorporated involves portions of two towns.

The case is not recommended for publication.

D. Newly Incorporated Village Annexing Remainder of Town Does Not Violate Rule of Reason

*Ries v. Village of Bristol* involved a challenge in the Wisconsin Court of Appeals to an annexation by referendum of the Town of Bristol in Kenosha County into the Village of Bristol. In 2008 the Town of Bristol petitioned to incorporate 18 square mile (over half the Town) as the Village of Bristol. The Wisconsin Department of Administration dismissed the petition but recommended the Town file a new petition including less territory. The Town subsequently filed a new petition for incorporation for 9.2 square miles. This incorporation was approved. Soon after the incorporation, the Village petitioned the circuit court for a referendum on whether to annex the remainder of the Town to the Village. The referendum passed and the Village enacted an ordinance annexing the remainder of the Town to the Village.

A resident initiated a lawsuit challenging the annexation on the grounds that it violated the rule of reason for annexations. The rule of reason is a court-made doctrine for review of annexations. An annexation satisfies the rule of reason when three requirements are met: (1) exclusions and irregularities in boundary lines are not the result of arbitrariness; (2) there is a reasonable present or demonstrable future need for the annexed territory; and (3) no other factors exist that constitute an abuse of discretion on the part of the annexing municipality. Failure to satisfy any of these requirements renders the annexation invalid.

The citizen challenging the annexation argued that the annexation violated the rule of reason because the Village abused its discretion “by using the annexation process as a manipulative technique to circumvent the requirements” for incorporation. The Wisconsin Court of Appeals, however, could not find any provision in either the annexation of incorporation statutes that prohibits a village from annexing territory that did not meet the requirements for incorporation. According to the Court, “it is permissible for a village to annex territory by referendum that the village was precluded from incorporating because of failure to meet the statutory requirements for incorporation.”

The citizen also argued that the annexation was prohibited because it did not meet the essential characteristics of a village test under Wisconsin law. The Court of Appeals, however, noted that this test is used to determine whether a village may be incorporated and has no application to the annexation process.

Finally, the challenger argued that there was no reasonable need for the annexation. The Court, however, found a reasonable need for services in the Town provided by the Village. The Court therefore dismissed the challenge to the annexation.

The case is not recommended for publication.
III. Inverse Condemnation, Regulatory Takings, and Condemnation

A. “You Heard It Through the Grape Vine” – Court Has Jurisdiction to Consider Raisin Growers Takings Claims

In *Horne v. Department of Agriculture*, 569 U. S. ____ (2013), decided June 10th, 2013, the U.S. Supreme Court held that the United States Court of Appeals for the Ninth Circuit had jurisdiction to hear a takings challenge brought by some California raisin growers. The raisin growers challenged the California Raisin Marketing Order adopted under the Agricultural Marketing Agreement Act of 1937 as a “taking” in violation of the Fifth Amendment to the United States Constitution. Under the Marketing Order, raisin growers are required to turn over a percentage of their crop to the Federal Government as a method to stabilize raisin prices. Some raisin growers refused to surrender the required portion of their raisins and the U.S. Department of Agriculture imposed significant fines and penalties. The growers sued claiming that the sanctions were an unconstitutional taking or private property without just compensation. The case made its way to the United States Court of Appeals for the Ninth Circuit which refused to decide the takings claim because it concluded that a takings claim against the federal government must be brought in the Federal Court of Claims. In a unanimous decision written by Justice Thomas, the U.S. Supreme Court disagreed and held that under the provisions of the Agricultural Marketing Agreement Act of 1937, it was appropriate for the Court of Appeals for the Ninth Circuit to decide the takings claim.

B. Court Clarifies that Nolan/Dolan Analysis Applies to Monetary Exactions

*Koontz v. St. Johns River Water Management District*, 570 U. S. ____ (2013), answered the question over whether the U.S. Supreme Court’s takings tests for conditions imposed on development (exactions) announced in *Nollan v. California Coastal Comm’n* (1987) and *Dolan v. City of Tigard* (1994) only applied to government demands that it be given an interest in real property (as was the case in *Nollan* and *Dolan*) or whether the tests also applied to demands for money. In *Nollan* and *Dolan*, the Court held that government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his/her property unless there is a nexus (connection) and rough proportionality between the government’s demand and the effects of the proposed land use. The application of the *Nollan/Dolan* tests to monetary exactions had split the lower courts and commentators for years. The Court in *Koontz* decided that government demands for the relinquishment of funds linked to a development project also need to meet the nexus and rough proportionality standards.

*Koontz* owned a 14.9 acre parcel of land near Orlando, Florida. A large portion of the parcel was classified as wetland and subject to various protections under Florida law that give regional water management districts permitting authority over certain developments impacting the waters of the state. Koontz sought to develop a 3.7 acre parcel of the land. To mitigate the environmental effects of the development, he offered to give a conservation easement to the Water Management District that would prevent any future development of the remaining 11.2 acres. The District deemed the conservation easement to be inadequate and informed Koontz that it would approve construction only if Koontz agreed to reduce the size of the development to 1 acre and give the District a conservation easement on the remaining 13.9 acres or if Koontz agreed to hire contractors to make improvements to district-owned wetlands several miles away or something equivalent. Koontz believed these demands to be excessive in light of the environmental effects of his development and sued under a provision in the Florida statutes that allows property owners to recover “monetary damages” if a state agency’s action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”

The lower Florida courts held that the additional mitigation requirement in the form of payment for offsite improvements to the District’s property lacked both a nexus and rough proportionality. The Florida Supreme Court reversed the lower court decisions siding with other court decisions that said
Nollan and Dolan do not apply to conditions imposing monetary exactions. The U.S. Supreme Court then decided to review the case to resolve the split among the lower courts on the question of the application of Nollan and Dolan to monetary exactions.

In a 5-4 decision, the U.S. Supreme Court reversed the decision of the Florida Supreme Court. The majority opinion, written by Justice Alito, expresses no view on the merits of the Koontz’s claim. Rather, the Court announces the expansion of the Nollan and Dolan tests to monetary exactions and remands the case to the Florida Supreme Court for a decision based on the Nollan and Dolan analysis.

On the one hand, the decision of the U.S. Supreme Court acknowledges that “because the government often has broad discretion to deny a permit that is worth far more than property it would like to take,” “land-use permit applicants are especially vulnerable” to government coercing people to give up constitutionally protected rights. “By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. [Citations omitted.] So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable.”

On the other hand, the Court acknowledges that it supports requiring “that landowners internalize the negative externalities of their conduct” as “a hallmark of responsible land-use policy.” Otherwise, “many proposed land uses threaten to impose costs on the public . . .”

According to the Court, “Nollan and Dolan accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a “nexus” and “rough proportionality” between the property that the government demands and the social costs of the applicant’s proposal. [Citations omitted.] Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in “out-and-out . . . extortion” that would thwart the Fifth Amendment right to just compensation. [Citations omitted.] Under Nollan and Dolan the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”

The Court further held that the application of the Nollan/Dolan principles do not change depending on whether the government approves a permit on the condition that the applicant turn over property (a condition subsequent) or denies a permit because the applicant refuses to do so (a condition precedent). The Court refused to discuss what remedies might be available for a Nollan/Dolan unconstitutional conditions violation (how does one determine the amount of “just compensation” that is due?) In this case, the permit was denied and the condition was never imposed so nothing had been “taken.” According to the Court, “whether money damages are available is not a question of federal constitutional law.” In this case, a Florida legislative enactment allows for “monetary damages” so the Court remands the case to the Florida Supreme Court to apply the Nollan/Dolan analysis and if the Florida Court determines the conditions were improper to decide what monetary damages might be due under Florida law.

Finally, the U.S. Supreme Court allows permitting authorities to offer multiple alternatives “so long as ... at least one alternative ... [satisfies] Nollan and Dolan.” The Court also stresses that the decision in Koontz does not alter the line of cases that establish that taxes and user fees are not “takings.”
[Note: Some of the commentary on the Koontz case takes a “sky is falling” perspective stating that the decision “has jeopardized local governments’ ability to ensure that the costs of new development are fairly born by its developers and users” and the decision “significantly limits government’s ability to demand concessions from real estate developers.” These comments overstate the impact of the case. If local governments follow the requirements of Wisconsin’s impact fee law, they will meet the Nollan/Dolan standards. Likewise, various state programs that require mitigation, such as the State’s wetland laws, are also set up to meet the Nollan/Dolan standards. For other monetary conditions, government planning bodies need to practice good planning and insure there is a connection between the money required and the way the money will be used (don’t ask for money for a new fire truck if the demonstrated impact will be a need for stormwater improvements) and that the amount of money demanded is roughly proportional to the cost of dealing with the impact of the development (exact cost accounting is not required).]

C. Taking of an Uneconomic Remnant Results in Taking the Entire Parcel

Waller v. American Transmission Co., LLC., 2013 WI 77, involved the condemnation by the American Transmission Company (ATC) of two easements for transmission lines on land owned by the Wallers. One easement would expand an existing transmission line easement from 20 feet to 45 feet. The second easement would be 45 feet located within a 50 foot highway setback on the property. As a result, over one-half of the property would be under easement and render the residential improvements on the property totally obsolete. ATC appraised the loss at $74,500 (a 57% loss in value). An appraiser for the Wallers valued the loss of $116,500 (an 88% loss in value). ATC offered to purchase the entire Waller property for $132,000. ATC also offered to purchase just the easements for $99,500. The Wallers rejected those offers. The case ultimately went to a jury who decided the easements resulted in a 70% decline in value.

The Wallers initiated a right-to-take action in which they argued that because the easements would cover more than half of their property and render the residential improvements obsolete they would be left with an economic remnant under Wisconsin law. As a result ATC would need to take the entire parcel. Wis. Stat. § 32.06(3m) defines “uneconomic remnant” as “the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability.”

In a decision written by Justice Prosser, a majority of the Wisconsin Supreme Court held that the taking of the two easements left the Wallers’ property as an uneconomic remnant. The Court also held that the “right-to-take” procedure followed by the Wallers was the proper and exclusive way to raise a claim that a property owner is left with an uneconomic remnant (as opposed to the separate process for determining the amount of compensation). Finally the Court held that the Wallers were entitled to recover their litigation expenses and relocation expenses from ATC. Justice Gableman did not participate in the case.

In a dissenting opinion, written by Justice Bradley who was joined by Justice Abrahamson, Justice Bradley made the argument that it was not appropriate under Wisconsin law to define the entire Waller property as an uneconomic remnant. She also argued that the uneconomic remnant claim should be raised at the valuation proceeding rather than the procedure that allows a property owner to contest the right of the condemnor to take property. Based on the facts of the case, the dissent also disagreed with the payment of litigation and relocation expenses.
D. Diminution in Value of Property Due to Loss of Direct Access is Admissible Evidence

118th Street Kenosha, LLC v. Wisconsin Dept. of Transp., 2013 WI App 147, involved an appeal of a circuit court decision to prohibit the property owner from introducing evidence of the diminution in value of its property due to a loss of direct access to a public road. As part of a highway reconstruction project, the Wisconsin Department of Transportation (WisDOT) eliminated access to a shopping center from 118th Avenue in the City of Kenosha. WisDOT created a new entrance by taking a temporary easement along a private road that lead to 118th Avenue.

The property owner contested the damage award for the taking. WisDOT requested that the circuit court exclude evidence related to the loss in value to the property due to the loss of direct access. WisDOT argued that the loss of access and the taking of property for a new access were two distinct acts. According to WisDOT, since the taking of property for the new access did not result in the loss of direct access, the evidence should be limited to the cost of taking the temporary easement. The circuit court agreed.

On appeal, the Wisconsin Court of Appeals determined that WisDOT’s argument “ignores reality.” Since the taking of the easement was for an access to replace the access eliminated by WisDOT, the Court of Appeals held that the taking of the easement was integrally connected with the property’s loss of direct access so the circuit court should have allowed the evidence in determining the fair market value of the property taken. The Court of Appeals reversed the circuit court’s decision and remanded the case to the circuit court for proceedings consistent with the Court’s opinion.

The decision is recommended for publication.

E. Destruction of Property Due to Failure of Lake Delton Dam Was Not a Taking

Fromm v. Village of Lake Delton involved a lawsuit resulting from the 2008 failure of the 1927 dam on Dell Creek that created Lake Delton. The Village took over ownership of the dam in 1994 and made no changes to the structural design of the dam. As a result of the failure of the dam in 2008 due to unusually heavy rainstorms, Fromm’s residence and the land on which it was built were swept into the river destroying all structures and taking away a substantial quantity of the land.

Fromm sued the Village for a taking of private property in violation of the Wisconsin and United States Constitutions. The circuit court dismissed the case due to Fromm’s failure to identify a specific action by the Village that caused the flooding event. The Wisconsin Court of Appeals affirmed the judgment of the circuit court in favor of the Village.

The decision is recommended for publication.

F. Jury Award That Exceeded Values Offered By Experts Was Reasonable in Condemnation Case

Geise v. American Transmission Co. LLC, involved the appeal of a jury award based on before-and after-taking values that exceeded those presented by both the expert for the property owner and the experts for American Transmission Co. (ATC). The award was for the taking of two easements totaling 2.89 acres for an electric transmission line. ATC argued the jury verdict was not supported by credible evidence since the jury’s values exceeded the range of values offered by the experts. The Wisconsin Court of Appeals disagreed. The Court found that there is no rule that limits the jury to the range of values supplied by appraisal experts. The jury is free to weigh all of the evidence offered at trial and make adjustments to the figures offered by the experts.
The case is recommended for publication in the official reports.

IV. Water Law

A. Multi-State Water Compact Does Not Trump State Law

_Tarrant Regional Water District v. Herrmann_, 569 U. S. ___ (2013), decided by a unanimous U.S. Supreme Court on June 13, 2013, resolved a dispute between a Texas regional water authority and the State of Oklahoma over the efforts of the Texas water authority to acquire water from Oklahoma. The dispute involved the Red River Compact, a multi-state compact approved by Congress that allocates water rights among the States within the Red River basin as it winds through Texas, Oklahoma, Arkansas, and Louisiana. Rapid population growth in the Dallas-Ft. Worth region has strained regional water supplies. The Tarrant Regional Water District wanted to divert water from Oklahoma but knew that Oklahoma would likely deny a permit due to Oklahoma laws that prevent out-of-state diversions of water. The Water District claimed that it was entitled to acquire water under the Compact from within Oklahoma and that therefore the Compact pre-empted several Oklahoma statutes that restrict out-of-state diversions of water. The Supreme Court, in a decision written by Justice Sotomayor, sided with the State of Oklahoma.

The case centered on the interpretation of the Compact under principles of contract law. The Water district argued the provisions of the Compact given each state equal rights to the allocation of water within certain limits created “a borderless common in which each of the four signatory States may cross each other’s boundaries to access a shared pool of water.” The Authority argued the Compact pre-empted Oklahoma’s water statutes.

The Court noted that “[w]hile the Compact allocates water rights among its signatories, it also provides that it should not ‘be deemed to … [i]nterfer[e] with or impair the right or power of any Signatory State to regulate within its boundaries the appropriate, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact.’” Recognizing that the States hold an absolute right to all navigable waters and the soils under them as an essential attribute of sovereignty, the Court was unwilling to interpret the Compact to mean that Oklahoma had contracted away its sovereign right to control water within its boundaries. The Court did not find that the Compact provided Texas with any cross-border rights to Oklahoma’s water.

B. Wisconsin Supreme Court Limits Reach of the Public Trust Doctrine

In _Rock-Koshkonong Lake District v. Department of Natural Resources_, 2013 WI 74, the Supreme Court issued an important decision on the scope of Wisconsin’s Public Trust Doctrine and the authority of the Wisconsin Department of Natural Resources (DNR) to regulate lake levels. [The Public Trust Doctrine provides that the waters of the state are held in trust by the state for the benefit of all. It is an ancient legal concept that originated under Roman law concepts of common property and has been recognized for centuries under English and American Common Law. The Northwest Ordinance of 1787, creating the territories including the area that one day would become the State of Wisconsin, states that “navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free....” This language was also included in the Wisconsin Constitution, creating the State of Wisconsin. In Wisconsin, the Public Trust Doctrine has been interpreted to mean that the State owns the navigable waters of the state and land under navigable lakes. The Legislature has delegated to the DNR administration of the state’s public trust responsibilities.]
The case involved a dispute about water levels on Lake Koshkonong located in Jefferson, Rock, and Dane Counties. The Indianford Dam, located in Rock County, affects water levels on Lake Koshkonong. Chapter 31 of the Wisconsin Statutes grants the DNR authority to regulate dams and bridges affecting navigable waters in the state. The dam was originally constructed in the 1850s, reconstructed around 1917, and rehabilitated in 2002. It had fallen into disrepair in the 1960s and as a result, the water levels almost always exceeded the water level set by the DNR in a 1991 water level order. In 2002, after the rehabilitation of the Indianford Dam restored full operating capability to the dam's gates, the water levels on Lake Koshkonong began to reflect more closely the levels set by the 1991 order. As a result, water levels on the lake dropped below recorded levels since the 1930s.

On April 21, 2003, In 2003 the Rock-Koshkonong Lake District, Rock River-Koshkonong Association, Inc., and Lake Koshkonong Recreational Association, Inc. petitioned the DNR, pursuant to Wis. Stat. § 31.02(1), to amend the 1991 order to raise the DNR - designated water levels of Lake Koshkonong. The Petitioners contended that the 1991 order was "not consistent with the public interest" because lower water levels on Lake Koshkonong led to severe restrictions on recreational boating and in many cases "piers must be extended far from shore to reach navigable water depths." In addition, the District expressed concern for the effect that the winter drawdown in the 1991 order had on shore erosion, plants, and animal species. The DNR rejected the Petition, and its denial was affirmed by an administrative law judge in a contested case hearing, by the Rock County Circuit Court, and by the court of appeals. The Wisconsin Supreme Court accepted review of the case.

The case presented the Wisconsin Supreme Court with four issues:

First, what level of deference, if any, should be accorded to the DNR's conclusions of law under the circumstances of this case?

Second, did the DNR exceed its authority in making a water level determination under Wis. Stat. § 31.02(1) by considering the impact of water levels on private wetlands that are adjacent to Lake Koshkonong and located above the ordinary high water mark?

Third, did the DNR exceed its authority in making a water level determination under Wis. Stat. § 31.02(1) by considering wetland water quality standards in Wis. Admin. Code § NR 103?

Fourth, did the DNR err in making a water level determination under Wis. Stat. § 31.02(1) by excluding evidence and refusing to consider the impacts of water levels on residential property values, business income, and public revenue?

The Court rendered its opinion, split 4 to 3. Justice Prosser wrote the opinion for the majority. The majority concluded:

First, the DNR's conclusions of law are not subject to deference by the courts because the DNR's water level order is heavily influenced by the DNR's interpretation of the scope of its own powers, its interpretation of the Wisconsin Constitution, its disputed interpretation of Wis. Stat. § 31.02(1), and its reliance upon statutes and rules outside of Wis. Stat. ch. 31.

Second, the DNR properly considered the impact of the Petition's proposed water levels on public and private wetlands in and adjacent to Lake Koshkonong under Wis. Stat. § 31.02(1).

Third, the DNR was entitled to consider the water quality standards in Wis. Admin. Code § NR 103, promulgated under Wis. Stat. ch. 281, when making a Wis. Stat. § 31.02(1) water level determination. According to the Court, by statute, the DNR is responsible for writing and enforcing
wetland water quality standards in this state. It would therefore be unreasonable for the DNR to ignore statutes and its own administrative rules when making a water level determination affecting wetlands. As a result, the DNR may consider § NR 103 water quality standards when making a water level determination under Wis. Stat. § 31.02(1) that affects wetlands and may apply these standards when appropriate after weighing the factors in the statute. However, DNR is not required to apply ch. 281 standards in making a determination under Wis. Stat. § 31.02 because ch. 31 is excepted from the provisions of ch. 281.

And finally, the Court concluded that DNR erroneously excluded most testimony on the economic impact of lower water levels in Lake Koshkonong on the residents, businesses, and tax bases adjacent to and near Lake Koshkonong. During the contested case proceeding, the Petitioners presented expert testimony (including the testimony of a land use planning consultant) about the negative impact of the lower lake levels on property values. According to the Court, this evidence was relevant to the DNR’s decision-making under Wis. Stat. § 31.02(1). Although the DNR is granted substantial discretion in its decision-making under the statute, it must consider all probative evidence when its decision is likely to favor some interests but adversely affect others. In this case, the DNR’s exclusion of most economic evidence was inconsistent with its acceptance of competing economic evidence that helped sustain its water level decision. The court held that the DNR did not need to consider “remote” economic impacts and that evidence of economic impacts is not dispositive – after consideration of the economic impacts, DNR could still reject the petition.

The Court remanded the case to the circuit court for further proceedings consistent with the decision.

Three Justices (Crooks, Abrahamson, and Bradley) dissented in the case. The dissenting opinion, written by Justice Crooks, primarily disagreed with the majority on the second and forth issues. On the forth issue, the dissent believes that a straightforward interpretation of Wis. Stat. § 31.02(1) does not require that the DNR consider secondary impacts like economic impacts. In addition, prior Wisconsin Supreme Court decisions focusing on the Wisconsin Environmental Policy Act have held that DNR does not need to consider secondary socio-economic impact.

Of greatest concern to the dissent, however, was the unnecessary over-reaching by the majority to decide the second issue. According to the dissent, the second issue -- whether DNR exceeded its authority in making a water level determination under Wis. Stat. § 31.02(1) by considering the impact of water levels on private wetlands that are adjacent to Lake Koshkonong and located above the ordinary high water mark -- is solely an issue of statutory interpretation. Both the majority and the dissent agree that the DNR had the statutory authority to consider the impact of the Petition’s proposed water levels on public and private wetlands in and adjacent to Lake Koshkonong. However, the majority unnecessarily also focuses on the constitutional and common law principle of the Public Trust Doctrine. In so doing, the majority construits the doctrine and misreads the Courts prior decisions, especially the landmark case of Just v. Marinette County.

The majority held that the DNR inappropriately relied on the Public Trust Doctrine for its authority to protect non-navigable land and non-navigable water above the ordinary high water mark. According to the majority, the DNR only has police power-based statutory authority (authority that is subject to change by the Legislature) to consider the impacts on wetlands adjacent to navigable waters. The DNR does not have authority under the constitutionally-based Public Trust Doctrine to consider those impacts. The majority attempts to limit the Public Trust Doctrine to the state’s ownership of navigable waters despite the Court’s precedent in Just that used the Public Trust Doctrine to uphold the state’s mandatory shoreland zoning regulations. According to the dissent, it was not necessary for the majority to decide this case by limiting the application of the Public Trust Doctrine.
The Court's decision attempts to limit the Public Trust Doctrine to a legal construct for determining ownership of navigable waters in the State. It prohibits the DNR from using its Public Trust responsibilities to consider how its actions might impact what the public owns -- water. As stated by the dissent, "This represents a significant and disturbing shift in Wisconsin law."

C. **Court Upholds State Requirement to Restore Wetland**

In *State of Wisconsin v. CGIP Lake Partners, LLP*, 2013 WI APP 122, the Wisconsin Court of Appeals reversed the Circuit Court decision denying the State's request for an injunction requiring the property owner remove a road and restore a wetland.

The case involved the illegal fill for a driveway to a home. The driveway bisected a wetland. The State determined that the driveway was not necessary because there was an alternative route to the home thereby providing a practicable alternative to filling the wetland for the driveway. The State brought this enforcement action requesting both penalties and injunctive relief to remove the fill. The Circuit Court ordered $30,135.85 in penalties but denied the injunctive relief based on equitable reasons due to the Department of Natural Resources not following the proper procedure in the permit process.

The Court of Appeals reversed the Circuit Court's denial of injunctive relief. In its decision, the Court of Appeals follows the standard set forth in *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 175 (1998). *Forest County v. Goode* sets forth a rebuttable presumption that the court should grant an injunction. The burden is on the defendant to convince the court that there are compelling equitable reasons to deny injunctive relief. In this case the Court of Appeals found that the Circuit Court had improperly shifted the burden to the State to show specific instances of environmental harm caused by the road.

The decision is recommended for publication.

D. **WDNR Failed to Consider Cumulative Impact of High Capacity Wells**

In *Family Farm Defenders, Inc. v. Wisconsin Department of Natural Resources*, the Wisconsin Court of Appeals held that an environmental assessment (EA) prepared by the Wisconsin Department of Natural Resources (WDNR) failed to consider the cumulative effects on the environment of two new high capacity wells under the Wisconsin Environmental Policy Act (WEPA). The case involved an application by Richfield Dairy to construct and operate a large dairy facility on property owned by the dairy in Adams County in the Central Sands region of Wisconsin. Richfield Dairy applied for a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to address manure and related wastewater from the proposed facility and applied for two high capacity wells.

The WDNR was required under WEPA to conduct an EA of the application for the WPDES permit. WEPA requires that the WDNR consider the cumulative effects of high capacity groundwater pumping on the environment within the region in the EA. Based on the EA the WDNR determined that an environmental impact statement was not required for the construction of the wells. Several citizens groups challenged the adequacy of the EA on the grounds that it did not demonstrate that the WDNR considered the effects of high capacity groundwater pumping in the region.

The Court of Appeals determined that to assess cumulative effects, the EA must "include an analysis of the cumulative environmental effects of past, present, and 'reasonably anticipated' similar or related activities." The Court then concluded that the EA only examined the effects of the two wells and
not the cumulative effects of the two wells in conjunction with other high capacity wells in the region. The case was remanded to the WDNR to consider the cumulative effects of the two wells.

The case is not recommended for publication.

E. Challenge to WPDES Permit Requires Exhaustion of Administrative Remedies

In *Clean Water Action Council of Northeast Wisconsin v. Wisconsin Department of Natural Resources*, 2014 WI App 61, the Clean Water Action Council of Northeast Wisconsin (CWAC) brought a lawsuit in circuit court challenging the reissuance of the Wisconsin Pollutant Discharge Elimination System (WPDES) permit for Appleton Coated LLC. The circuit court dismissed the case because CWAC proceeded directly to judicial review of the DNR’s actions without first obtaining a contested case hearing before the DNR for review of WPDES permit decisions as provided under Wisconsin law. The Wisconsin Court of Appeals affirmed the dismissal by the circuit court.

The case is recommended for publication in the official reports.

V. Property Taxation and Special Assessment

A. Appeal of One Special Assessment Was Sufficient Notice of Challenge to Related Special Assessment

*CED Properties LLC v. City of Oshkosh*, 2014 WI 10, involved special assessments levied by the City of Oshkosh against a corner lot property owned by CED Properties located at the intersection of Jackson Street and Murdock Avenue for improvements to the intersection. The City levied two separate special assessments against CED based on standard city practice to issue a separate special assessment for each street that abuts a property.

Under Wisconsin’s special assessment laws (Wis. Stat. § 66.0703(12), a property owner has 90 days after publication of the final resolution imposing the assessment to initiate an appeal of the special assessment in circuit court. CED initiated the appeal of Murdock Avenue special assessment within the 90 days. After the 90 day period, CED filed an amended complaint in an attempt to also appeal the Jackson Street special assessment. The City challenged the Jackson Street assessment as untimely and prevailed before the circuit court and the Wisconsin Court of Appeals. In a unanimous decision, the Wisconsin Supreme court reversed the Court of Appeals holding that the original appeal of the Murdock Avenue assessment provided reasonable and sufficient notice to challenge the entirety of the special assessments levied against CED’s property.

B. Taxpayer has Burden of Proof in Challenge to Classification of Property for Property Tax Assessment

*Sausen v. Town of Black Creek Board of Review*, 2014 WI 9, involved a challenge to a property tax assessment on the grounds that the assessor’s classification of the property was erroneous. The town assessor classified the property as “productive forest land” and assessed the property at $27,500. The property owner argued the parcel should be classified as “undeveloped land” and should be assessed at $13,750. The parcel in dispute was a 10 acre parcel occasionally used for hunting with low grade woods. The parcel was not used to produce commercial forest products.

In an opinion written by Chief Justice Abrahamson, the Wisconsin Supreme Court held that reviewing courts should defer to decisions made by local boards of review in classifying property and taxpayers bear the burden of proof to prove that the assessor’s classification is erroneous. In this case, the
Court determined that the taxpayer did not meet the burden of proving the classification was erroneous and upheld the Town’s classification.

C. Presumption of Just Property Tax Assessment Difficult to Overcome

Bonstores Realty One, LLC, v. City of Wauwatosa, 2013 WI App 131, involved a challenge to the City of Wauwatosa’s property tax assessment for the Boston Store department store located at Mayfair Mall. Bonstores contended the assessment was excessive and presented an appraisal in support of this contention. Under Wis. Stat. § 70.49(2), local property tax assessments are presumed to be just and equitable. The circuit court concluded that Bonstores failed to overcome by “significant contrary evidence” the statutory presumption that the property was justly assessed. The Wisconsin Court of Appeals affirmed the decision of the circuit court. The Court of Appeals concluded the statutory “presumption is not ‘overcome’ just because contrary evidence (even ‘substantial’ contrary evidence) is presented.

The decision is recommended for publication.

D. Remedy in Property Tax Assessment Challenge Should Not Include Windfall

In 3301 Bay Road LLC v. Town of Delevan, 2014 WI APP 18, a group of lakefront property owners challenged their property tax assessments as both excessive and in violation of the tax uniformity clause of the Wisconsin Constitution. The circuit court found the Town violated the uniformity clause because the Town under-assessed non-lakefront property at forty-five percent below fair market values but the Town did not provide a similar reduction for lakefront properties. The circuit court also determined that the lake-front property assessments were excessive and adopted the fair market values presented by the property owners to calculate refunds for excessive assessments. The circuit court based the property owners’ refund on the amount the property owners would have paid in property taxes if the under-assessed properties had been properly assessed.

The property owners appealed the decision of the circuit court to the Wisconsin Court of Appeals arguing that the refund should have been calculated at forty-five percent below the fair market values of the properties. The Court of Appeals disagreed with the property owners. The Court of Appeals acknowledged the discretion given to the circuit court in fashioning an equitable remedy in property tax assessment appeals. The Court of Appeals found that the circuit court did not erroneously exercise its discretion in calculating a refund that did not include a “windfall reduction” based on the underassessment of other properties.

The case is recommended for publication.

E. Challenge to Tax Assessment Must Begin with the Board of Review

Northbrook Wisconsin, LLC, v. City of Niagara, 2014 WI App 22, involved a lawsuit for excessive 2011 assessment for a hydroelectric plant. The City moved to dismiss Northbrook’s complaint. The City argued Northbrook was required under Wis. Stat. § 74.37(4)(a) to challenge the 2011 assessment before the Board of Review prior to filing an excessive assessment claim. Northbrook responded it was not required to object before the Board of Review because the City did not send it a notice of assessment, pursuant to Wis. Stat. § 70.365. In reply, the City asserted under that statute it was not required to send Northbrook a notice of assessment because the assessed value of Northbrook’s property did not change between 2010 and 2011. The circuit court agreed with the City and dismissed the challenge to the assessment. The Court of Appeals agreed with the circuit court and upheld the dismissal. According to the Court, the City was not required to send Northbrook a notice of assessment in 2011, and,
consequently, the City’s failure to send a notice of assessment did not exempt Northbrook from objecting before the Board of Review.

The case is recommended for publication.

F. Classification Proper But Reassessment Needed

In *West Capitol, Inc. v. Village of Sister Bay*, West Capitol appealed a circuit court judgment to the Wisconsin Court of Appeals that reduced the 2009 assessment of the value of real property it owns in the Village of Sister Bay from $4,487,500 to $3,935,000. West Capitol claims the circuit court erred in two respects. First, West Capitol argued it is entitled to a fifty-percent reduction in the 2009 assessment because its property meets the statutory definition of “undeveloped land.” See Wis. Stat. §§ 70.32(2)(c)4., (4). Second, West Capitol argued the circuit court erred by concluding the property’s assessed value in 2009 should have been the same as in 2010.

West Capitol’s property is a 16.86-acre parcel in Sister Bay with about 610 feet of Green Bay shoreline. The parties stipulated that the property; (1) is heavily wooded and “preserved in its natural state;” (2) does not contain any buildings or dwellings; (3) is not used for agricultural or manufacturing purposes; (4) is not primarily devoted to buying and reselling goods for a profit; (5) is not used for the production of commercial forest products; and (6) was zoned “B-1 general business district” as of January 1, 2009. It is also undisputed that the property does not generate any income.

For property tax assessment purposes, the Village classified the property as “residential.” West Capitol argued that the property should have been classified as “undeveloped.” Undeveloped land is assessed at fifty-percent of its full value. The statutory definition for “undeveloped” land requires, in part, that the land is unproductive. The Village contended the property was not unproductive because it was “perfectly developable shoreline acres.” The Wisconsin Court of Appeals agreed that the property should not be classified as undeveloped. However, the Court of Appeals found that the circuit court erred when it decided the 2010 Assessment should be the same as the 2009 assessment. The Court of Appeals therefore ordered that the property should be reassessed to determine the 2010 assessment.

The case is recommended for publication.

G. Is Notice of Objection to Assessments Necessary?

The decision of the Wisconsin Court of Appeals in *Walgreen Co., v. City of Oshkosh* is another in a series of property tax assessment cases where the property owner did not file an objection to its assessments as required by statute, but argued that notice of objection was not necessary to proceed with its claim for a tax refund. Wisconsin case law provides a narrow exception to strict compliance with Wis. Stat. § 70.47(7) where two factors are present: (1) the previous year’s assessment is under challenge at the time of the first meeting of the board of review (BOR) for the current assessment year and (2) the current year’s assessment is the same as the previous year’s. The linchpin to the exception is the knowledge on the part of the taxing district that the assessment amount is still disputed, which excuses the need for another objection.

According to the Court of Appeals, the record in this case is silent as to whether Walgreen’s challenges to the prior year’s assessments were pending as of the first meeting of the BOR for the assessment year relevant to this appeal. The Court therefore reversed the circuit court’s dismissal of Walgreen’s challenge to the assessment and remanded the case to the circuit court for findings of fact on the timing of Walgreen’s challenges to the prior year assessments.

The case is recommended for publication.
VI. Governmental Immunity

A. MMSD Not Immune for Damages Caused by Deep Tunnel and Must Abate the Private Nuisance

In Bostco, LLC v. Milwaukee Metropolitan Sewerage District, 2013 WI 78, a majority of the Wisconsin Supreme Court Justices held that once a governmental body has notice that a private nuisance it negligently maintains is causing significant harm, the governmental body can no longer claim immunity as a defense to a lawsuit under Wis. Stat. § 893.80(4). (A private nuisance is a condition that interferes with a private interest.)

The case arose out damage to the Boston Store located in downtown Milwaukee caused by the Milwaukee Metropolitan Sewerage District's (MMSD) deep tunnel project. The Milwaukee Deep Tunnel was constructed in the early 1990s to collect and store both storm water runoff and sewage until the Deep Tunnel's collections could be transported to Milwaukee's sewage treatment plant. The Boston Store is one block west of the Deep Tunnel's North Shore segment. First erected in the 19th century, Boston Store consists of five interconnected buildings that rest upon wood pile foundations that were driven into the ground to support the buildings' columns. At the time of construction, the pilings were below the water table and were fully saturated, thereby preventing their deterioration. As a result of the Deep Tunnel the water enclosing the pilings was drawn down and the Boston Store buildings began to suffer substantial structural damage.

Bostco filed this lawsuit and the MMSD argued it was immune from the suit. In a decision written by Justice Roggensack, a majority of the Wisconsin Supreme Court justices disagreed. Justice Gableman wrote a concurring opinion and Justices Abrahamson and Bradley dissented. Justice Prosser did not participate in the decision.

Under Wis. Stat. § 893.80(4), where a negligent act was undertaken pursuant to the legislative, quasi-legislative, judicial or quasi-judicial functions of government, immunity may apply. The majority concludes that MMSD is not entitled to immunity. Bostco's nuisance claim was grounded in MMSD's negligent maintenance of its Deep Tunnel, which maintenance constituted a continuing private nuisance. Because MMSD's maintenance of the continuing private nuisance is not a legislative, quasi-legislative, judicial or quasi-judicial function, MMSD is not entitled to immunity. Once MMSD had notice that the private nuisance it negligently maintained was causing significant harm, immunity was not available for MMSD.

Because MMSD does not have immunity for its negligent maintenance of the Deep Tunnel, the majority also concluded that MMSD had a duty to abate the private nuisance that MMSD caused by its negligent maintenance of the Deep Tunnel, after MMSD had notice that the nuisance was a cause of significant harm. The Court remanded the case to the circuit court for a hearing to establish whether an alternate method will abate the continuing private nuisance MMSD maintains or whether lining the Deep Tunnel with concrete is required for abatement.

Chief Justice Abrahamson wrote a strong dissent arguing that MMSD was immune for suit because the Tunnel was operating as designed. She argues the case drastically increased governmental liability. She also disagrees with the requirement that MMSD had a duty to abate the nuisance because the abatement, which in this case could cost millions of dollars, circumvents the $50,000 damage cap for governmental liability that was enacted by the Legislature to protect the taxpayer and the public purse.
B. Court Clarifies Standards for Government Contractors to Claim Immunity

In *Showers Appraisals, LLC v. Musson Bros., Inc.*, 2013 WI 79, the Wisconsin Supreme Court reversed the Court of Appeals decision finding a governmental contractor was protected from a lawsuit under the governmental immunity statute. The case arose from flood damage to the Showers' property located in the City of Oshkosh. Showers sued Musson and the City of Oshkosh claiming the damage was due to the negligent actions of Musson Bros., Inc., and the City as part of storm sewer work Musson was performing as a contractor for the Wisconsin Department of Transportation. In the case against Musson, the lower courts found that Musson was a governmental contractor entitled to immunity under Wis. Stat. § 893.80(4). The Supreme Court, in a decision written by Justice Roggensack, reversed the decisions of the lower courts and remanded the case for further proceedings to the circuit court. Justices Crooks wrote a concurring opinion in which he was joined by Justices Abrahamson and Bradley.

Based on the facts of the case, the Supreme Court concluded that where a third party's claim against a governmental contractor is based on the allegation that the contractor negligently performed its work under a contract with a governmental entity, the governmental contractor must prove both that the contractor meets the definition of "agent" under Wis. Stat. § 893.80(4) and that the contractor's act is one for which immunity is available under § 893.80(4). To prove it was acting as a governmental entity's agent in accordance with a three-part test adopted by the Wisconsin Court of Appeals in *Estate of Lyons v. CNA Insurance Cos.*, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996). That test for determining if the contractor is an agent of the government is: (1) the government approved "reasonably precise specifications" for the work of the contractor; (2) the contractor's work conformed to those specifications; and (3) the contractor warned the government about dangers related to its work that were known to the contractor but not the government.

In this case, the Court determined Musson had not shown that it was acting as a governmental entity's agent for purposes of the alleged injury-causing conduct because Musson was not acting pursuant to "reasonably precise specifications."

The Court also concluded that, pursuant to the plain language of Wis. Stat. § 893.80(4), a governmental contractor seeking to assert the defense of immunity should clearly allege in the pleadings why the injury-causing conduct comes within a legislative, quasi-legislative, judicial or quasi-judicial function as set out in § 893.80(4). In the context of this case, a governmental contractor would be required to assert that it was implementing a decision of a governmental entity that was made within the scope of the governmental entity's legislative, quasi-legislative, judicial or quasi-judicial functions. Adherence to these statutory requirements for immunity under § 893.80(4) will avoid extending blanket immunity for claims of negligently performed work against governmental contractors when the sole basis for immunity is that the work was performed pursuant to a contract with a governmental entity. Allowing governmental contractors to claim immunity in such instances would vastly expand the doctrine of governmental immunity.

Applying this rationale to this case, the Court concluded that Musson would not be entitled to immunity for Showers' claims that Musson negligently performed its work under a government contract, because Musson had not made a showing that Musson was an agent implementing a governmental entity's decision made within the scope of the entity's legislative, quasi-legislative, judicial or quasi-judicial functions.

Instead, the Court stated that Showers' claims should be analyzed no differently than negligence claims against other contractors. Musson may therefore be liable if Showers is able to show that in performing its work under the government contract, Musson had a duty of due care to Showers, that Musson breached that duty, and that such breach was a cause of Showers' damages.
VII. Highways and Streets

A. Soil Sampling For Highway Project Did Not Violate 4th Amendment Protection From Unreasonable Search and Seizure

*Wisconsin Central Ltd v. Gottlieb*, 2013 WI App 61, involved a challenge to the Wisconsin Department of Transportation’s (DOT) collecting soil samples from Wisconsin Central’s property as part of the planning for a highway overpass over the rail road tracks on Lakeshore Drive leading into and out of the City of Fond du Lac. Wisconsin Central agreed to the overpass to remedy a troublesome railroad crossing. Wisconsin Central also consented to soil sampling as part of the design phase for the project. The DOT’s initial sampling discovered a site owned by Wisconsin Central adjacent to the project corridor which prompted DOT to recommend additional investigation. Wisconsin Central objected to this sampling but DOT collected the soil samples nonetheless. Wisconsin Central initiated this lawsuit arguing that DOT’s taking the samples without a warrant was an unreasonable search and seizure in violation of Wisconsin Central’s Fourth Amendment rights. The Wisconsin Court of Appeals disagreed. According to the Court, this was not an issue of unreasonable search and seizure since Wisconsin Central had consented to soil sampling as part of the design phase of the project.

The case is recommended for publication.

B. Encroaching Properties Do Not Rebut Street Width for Entire Street

In *Village of Brown Deer v. Balisterri*, 2013 WI APP 137, the Wisconsin Court of Appeals addressed the issue of whether the Village of Brown Deer needed to take property for its street improvement plan. The dispute surrounded the interpretation of Wis. Stat. § 82.31(2)(a) providing that an unrecorded highway that has been worked as a public highway is presumed to have a width of 66 feet. Some residents of the Village challenged the presumption that the streets were 66 feet wide because three properties on one street encroached upon the 66 foot street width. The residents contended that the rebuttal of the 66 foot street width for the three properties extended to the entire street. The circuit court disagreed. The Court of Appeals affirmed that decision that the rebuttal of the 66 foot street width for three properties did not extend to the entire street.

The decision is recommended for publication.

VIII. Open Meetings/Public Records

A. Employee Safety Outweighs Disclosure of Public Records

In *Ardell v. Milwaukee Board of School Directors*, the Wisconsin Court of Appeals recognized a limited exception to the disclosure of public records under Wisconsin’s Public Records Law when there are documented and well-founded safety concerns for the public employee who is the subject of the public records request.

Wisconsin law includes a presumption favoring disclosure of public records. However, the Court of Appeals acknowledged that the presumption is not absolute. In this case, the person requesting the documents had a history of violence against the employee about whom he was requesting documents. While the school district originally indicated it would turn over the records, the district later decided against disclosure of the records. This lawsuit was an effort to compel the school district to disclose the documents. Based on the requestor’s history of violence and harassment of the employee, the circuit court and the Court of Appeals determined that the records request was not a legitimate one. Rather the intent
was to continue to harass and intimidate the employee. Both the circuit court and the Court of Appeals agreed that the schools district properly withheld the disclosure of the records. The case is recommended for publication in the official reports.

B. City Must Disclose Vote Taken During Closed Meeting

*Journal Times v. City of Racine Board of Police and Fire Commissioners* involved a newspaper’s request for the motions and roll call votes taken at a closed meeting to discuss the search for a new police chief. There were three finalists for the position - two minority candidates and one nonminority candidate. The nonminority candidate withdrew his application. At the closed meeting to discuss the withdrawal, the Commission decided to reopen the search to review a “broader pool of candidates.” Wisconsin Open Meetings law expressly requires that motions and votes be recorded for closed meetings as part of the public record. The City initially refused to release the information but made it available after the newspaper initiated this lawsuit since the City did not have any basis for withholding the information. Wisconsin’s public records law allows for the awarding of attorney fees if the lawsuit was a reason for the release of the information. The Wisconsin Court of Appeals remanded the case back to the circuit court to decide if the lawsuit was a reason for the release of the information and, if so, the amount of attorney fees and costs to be awarded.

The case is recommended for publication in the official reports.

IX. Miscellaneous Planning Cases

A. Standard of Judicial Review of Municipal Nonrenewal of Alcohol Licenses

In *Nowell v. City of Wausau*, 2013 WI 88, the Wisconsin Supreme Court held that challenges to municipal decisions not to renew an alcohol license are subject to certiorari review by the courts. The case involved a challenge to the City of Wausau’s decision not to renew a Class B alcohol license for the “JI Willy’s” tavern due to a number of problems including excessive noise, nudity, and failing compliance checks involving underage persons. The City followed all the appropriate notice and hearing procedures for the decision. The issue for the Supreme Court was to determine the appropriate standard of review for a court to apply when reviewing the substance of local government decisions not to renew alcohol licenses.

There are generally two standards of judicial review of local government decisions -- certiorari review and de novo review. De novo review affords more limited deference to local decisions. It involves a new hearing of the matter, conducted as if the original hearing by the city never occurred. Certiorari review affords greater deference to local decisions. Under certiorari review, the reviewing court presumes the local government’s decision is correct and valid. The court limits its review to: 1) whether the municipality kept within its jurisdiction; (2) whether it acted according to 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 it might reasonably make the order or determination in question.

In this case, the circuit court applied the certiorari standard of review and upheld the decision of the City. Upon appeal, the Wisconsin Court of Appeals held that the de novo standard of review was appropriate and reversed the decision of the circuit court. The Wisconsin Supreme Court accepted review of the case and held that certiorari is indeed the correct standard of review and reversed the decision of the Court of Appeals. The Court based its decision on the legislative history of the alcohol licensing enabling statute, prior cases, and the Court’s historic deference to legislative police power functions like regulating alcohol. According to the Court, the granting of a liquor license is a legislative function and
“[p]ermitting a circuit court to determine de novo whether a liquor license should be granted would, in essence, improperly transfer that legislative function from the municipality to the court.”

B. Failure to File Notice of Claim Bars TIF Challenge

Urban Planning and Development, LLC, and its partners, entered into development agreements with the Village’s Community Development Authority (CDA) to build: 1) condominiums, 2) an office building with a brew pub, and 3) a professional building, along the Milwaukee River in downtown Grafton. The development was part of an improvement plan for the TIF district. As an incentive to develop this area, the CDA paid the developers $1,316,000. The developers agreed that if the improved properties were not assessed at a certain minimum value, they would pay the Village the difference between the assessed tax and the projected tax. To secure this guarantee to make up the shortfall, if any, the developers, in two of the agreements, agreed to provide a letter of credit to the CDA. In two of the agreements the CDA agreed to make certain improvements to the area, or agreed that the Village would make the improvements, including the construction of a Riverwalk.

The developer subsequently filed suit against the Village claiming that various acts and omission by the Village related to the improvements caused the properties’ assessed value to fall short of what the parties anticipated, triggering the contractual obligation to pay the tax difference. The Village moved to dismiss the case because the developer did not give the required statutory notice under Wisconsin’s notice of claim statute (Wis. Stat. §893.80) requiring formal notice of a claim before a party can bring a lawsuit. This notice requirement provides governmental bodies with an opportunity to negotiate a settlement of the claim, avoiding the expense of litigation. Prior to initiating the lawsuit, the developers had filed a notice of circumstances of the claim. The notice, however, was defective in that it did not include all the statutory required information, such as the date of the even giving rise to the claim. The Wisconsin Court of Appeals agreed with the Village that the notice was defective and dismissed the case.

The case is entitled Urban Planning and Development, LLC v. Village of Grafton and is not recommended for publication.

C. Unlawful to Lease Land Enrolled in Managed Forest Land Program

State v. Lautenbach involved land enrolled in the State’s Managed Forest Land (MFL) Program, a program established in 1985 to encourage the management of private forest lands for productive commercial use. Landowners who enroll in the program receive a property tax reduction as an incentive to keep the land in productive forest use. At the time of enrollment, the landowner must designate whether the land will be open or closed to the public for recreational purposes. The MFL program prohibits the leasing of MFL property for recreational purposes.

In this case, Lautenbach managed land owned by Wayne Logcrafters that was enrolled in the MFL program and closed to the public. Lautenbach leased the land for recreational purposes. The State cited Lautenbach for violating the MFL law. Lautenbach argued the lease prohibition only applied to land that was open to the public. The Wisconsin Court of Appeals, looking at the plain language of the relevant statute for the MFL found that the law makes no distinction between open and closed lands for purposes of prohibiting leases of the land for recreational purposes. Lautenbach was therefore in violation of the MFL.

The case is not recommended for publication.
D. Wind Siting Rule Valid

_Wisconsin Realtors Association v. Public Service Commission_ involved a challenge to Wis. Admin. Code ch. 128, the recently adopted rules limiting local authority to regulate wind energy facilities. The Wisconsin Realtors Association, the Wisconsin Builders Association, the Wisconsin Towns Association, and several individuals, sued the Wisconsin Public Service Commission (PSC) challenging the validity of the rule because it was promulgated without a housing impact report as required under the Wisconsin Administrative Procedures Act. Section 227.116(2) of the Wisconsin Statutes requires that if a proposed rule “directly or substantially affects the development, constriction, cost, or availability of housing in the state” the Wisconsin Department of Administration must prepare a housing impact report.

The PSC argued that a housing impact report was not required because the rule did not directly or substantially affect housing. The parties challenging the rule argued that the rule’s setback requirements and the noise and shadow flicker standards affected housing.

The Wisconsin Court of Appeals agreed with the PSC and refused to invalidate the rule. The Court found that the parties challenging the rule interpreted the housing impact report requirement of the Administrative Procedures Act too broadly. According to the Court, “a housing impact report is not required simply because the subject matter of a proposed rule relates to housing, or because the rule tangentially affects housing in some way.” The Court acknowledged the PC considered “voluminous evidence about wind energy systems’ effects on housing” and reasonably concluded that wind energy systems do not negatively affect residential property values.

The case is not recommended for publication in the official reports.

X. Federal Court Opinions

A. RLUIPA Claim Fails in Denial of Permit for Bible Camp

The Seventh Circuit Court of Appeals decided a religious land use challenge in _Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro_, 734 F.3d 673 (7th Cir. 2013). Eagle Cove sought to construct a Bible camp on thirty-four acres of property that they own on Squash Lake in the Town of Woodboro in Oneida County. The Town is under County Zoning. Eagle Cove believes that their religion mandates that the Bible camp must be on the subject property. Eagle Cove also believes that they must operate the Bible camp on a year-round basis. The land was not specifically purchased for the construction of the proposed camp and has been owned by the same family since 1942. The land is zoned single family residential and the Town’s comprehensive plan, adopted in 2009, has a policy to "encourage low density single family residential development for its lake- and river-front properties."

Eagle Cove filed a petition with Oneida County to rezone the subject property to a Recreational zoning district. The County sent a copy of the rezone petition to Woodboro for its consideration. Woodboro recommended that the County deny the petition because it was not consistent with the Town’s comprehensive plan and it would conflict with the existing single-family development surrounding Squash Lake. The county then denied the rezoning. Eagle Cove then applied for a conditional use permit. The Town recommended denial for similar reasons and the County did not grant the permit.

Eagle Cove then filed an action in the United States District Court for the Western District of Wisconsin asserting that the land use regulations by Woodboro and Oneida County deprived Eagle Cove of rights set forth under various provisions in Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the freedom of religion clauses of the United States and the Wisconsin Constitutions. The District Court found no violation of RLUIPA or the U.S. or Wisconsin Constitutions. The case was then
appealed to the Seventh Circuit Court of Appeals. The Court of Appeals agreed with the District Court. The Court of Appeal’s opinion upholding the denials of the rezoning and the conditional use permit focuses on the alleged RLUIPA violations.

RLUIPA prohibits governmental land use regulations from totally excluding religious assemblies from a jurisdiction. In this case, year-round recreational camps are not allowed within Woodboro’s borders. The Seventh Circuit Court of Appeals, however, determined that the County should was the appropriate unit of analysis since Woodboro is under county zoning. [Note: the Court’s discussion of this issue clearly shows that the court does not fully understand the complex town/county zoning relationship.] Since year-round recreational camps are permitted elsewhere in the County, the Court denied Eagle Cove’s total exclusion claim. The Court also noted that religious assemblies could occur on the land at issue, just not a year-round camp.

Eagle Cove also sought relief under the substantial burden provision of RLUIPA, which requires land use restrictions on religious assemblies be in furtherance of a compelling governmental interest and use the least restrictive means possible to achieve that interest. The Court of Appeals found no such burden. According to the Court, “RLUIPA is meant to protect religious freedoms from impermissible land use regulations, it is not meant to allow religious exercise to circumvent facially-neutral zoning regulations. Eagle Cove is not requesting relief from an unjust law or ordinance implemented by the County that inhibits their religious activity; rather, they seek special treatment on the basis of their religious purpose.”

Eagle Cove next argued the regulations imposed an unreasonable limitation on religion in violation of RLUIPA. RLUIPA’s unreasonable limitation provision prevents government from adopting policies that make it difficult for religious institutions to locate anywhere within the jurisdiction. The Court of Appeals found no such limitation. According to the Court, the County’s zoning ordinance “has a neutral purpose that incorporates Woodboro’s Comprehensive and Land Use Plans. It seeks to uphold the rural and rustic nature of the town and the area surrounding Squash Lake. Nonetheless, it allows for religious assemblies throughout Oneida County and on the subject property. Eagle Cove has had reasonable opportunity not only to seek rezoning and a conditional use permit, but also to look for other land in Oneida County that would serve its purpose. It chose not to do so. While it may be said that Eagle Cove’s insistence on a year-round Bible camp on the subject property without seeking alternatives is unreasonable, Oneida County’s zoning regulations that seek to preserve the character of the area around Squash Lake are not.”

The final RLUIPA claim was based on the “equal terms” provision of RLUIPA. That provision prevents governmental land use regulations that treat religious institutions on less than equal terms with similarly situated institutions that do not have a religious affiliation. Since the County zoning ordinance forbids year-round recreational camps outright, religious or secular, the Court of Appeals found that religious uses were treated on equal terms.

B. Establishment Clause


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

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

While the U.S. Supreme Court originally accepted this case for review, it decided not to review the case even in light of the Court’s highly publicized decision in May in the case Town of Greece v. Galloway in which the Court held that prayers at local government meetings does not violate the establishment clause of the First Amendment.
XI. 2013-14 Wisconsin Legislation Related to Planning

2013 Wis. Act 1.

Regulation of ferrous metallic mining and related activities, procedures for obtaining approvals from the Department of Natural Resources for the construction of utility facilities, making an appropriation, and providing penalties.

2013 Wis. Act 7.

Methods of providing assistance under the Clean Water Fund Program and the Safe Drinking Water Loan Program and projects that are eligible for assistance under the Clean Water Fund Program.

2013 Wis. Act 12.

Adds joint local water authorities created under s. 66.0823 to the provisions in the Statutes related to the cost of replacement or relocation of certain municipal utility facilities required by the construction of a freeway and eligibility for the safe drinking water loan program.


Changes the compensation structure by which a Milwaukee County supervisor may be paid and the term length of a Milwaukee County supervisor; affects the right of an annuitant under the Milwaukee County Employee's Retirement System to be rehired by Milwaukee County; limits the authority of Milwaukee County to enter into certain intergovernmental agreements, removes and clarifies some authority of the Milwaukee County board, increases and clarifies the authority of the Milwaukee County executive, and deletes obsolete statutory references. Part of the changes are subject to approval by a referendum.

2013 Wis. Act 20.

This was the State Budget Bill. It includes uniform requirements local governments must follow if they want to regulate mobile telecommunications towers. It also prohibits local governments from regulating food or nonalcoholic beverages based on portion size or nutritional criteria. In addition, it limits local authority to enact ordinances related to construction site erosion control and makes local governments bear the burden of proving that a reasonable relationship exists between the fee and the service for which the fee is imposed.

2013 Wis. Act 35.

Allows for continued operation and expansion/improvement of sport shooting ranges that were existing on July 16, 2013, as a legal nonconforming use.

2013 Wis. Act 38.

Changes the municipal incorporation law to require town board approval of each town if the area to be incorporated is comprised of portions of two towns.

2013 Wis. Act 50.

Expanding the authority of the Town of Somers in Kenosha County to create tax incremental financing districts.
2013 Wis. Act 51.

Expanding the authority of the town of Brookfield in Waukesha County to create tax incremental financing districts.

2013 Wis. Act 62.

Doubles the amount available under the State’s historic rehabilitation tax credit (a supplement to the federal historic rehabilitation tax credit) to 20% from 10% (the State Budget ill, Act 20, had raised it to 10% from 5%). The Department of Revenue and the State Historical Society will need to submit a report in 2017 on the economic impacts of the tax credit to determine whether the program should be continued after 2017.

2013 Wis. Act 74.

Vested rights. If a person submits an application for any “permit or authorization for building, zoning, driveway, stormwater, or other activity related to land development” the local government must approve, deny, or conditionally approve the application solely based on the regulations, rules and ordinances in effect at the time of application unless the applicant and the local government agree otherwise. If approvals are required by multiple local governments, the project must be reviewed based on the ordinances, rules, in regulations in effect at the time an application was filed for the first approval.

An application for an approval expires not less than 60 days after filing if all of the following apply: (1) The application does not comply with form and content requirements; (2) The political subdivision has, not more than 10 working days after the filing, provided the applicant a written notice of noncompliance. The notice must specify the defects in the application and notify the applicant of the date on which the application will expire if the defects are not remedied; (3) The applicant fails to remedy the defects by the specified date.

This law first applied to an application for an approval filed on the effective date of the Act, December 14, 2013.

2013 Wis. Act 80.

Repeals the requirement that shoreland annexed into a city or village or incorporated in a city or village must continue to enforce the county shoreland zoning ordinance. It requires that cities and villages enact shoreland zoning ordinances, by July 1, 2014, that apply to shoreland annexed by a city or village after May 7, 1982, and any shoreland area that was subject to a county shoreland zoning ordinance prior to being incorporated as a city or village. The ordinance must meet the following minimum requirements:
1. Shoreland setback to be at least 50 feet from ordinary highwater mark; but may have a setback for principal buildings in shoreland that is the same as immediately adjacent building on each side of the land on which a principal building is being constructed or 35 feet, whichever is greater
2. Must require that for shoreland with vegetation that vegetative buffer zone must be maintained 35 feet back from ordinary highwater mark
3. May allow a viewing or access corridor in vegetative buffer zone that is no greater than 30 feet wide for every 100 feet of shoreline.

The Wisconsin Department of Natural Resources and the League of Wisconsin Municipalities have developed a model ordinance that is available on the League’s website.
2013 Wis. Act 140.

Establishes the location of the historic shoreline of Lake Michigan in the City of Milwaukee to clarify that the State's Public Trust doctrine does not apply to an area proposed for a new high-rise development in the City.

2013 Wis. Act 183.

Authorizes a city or village to require the Department of revenue to redetermine the value of the tax incremental base of certain tax incremental districts.

2013 Wis. Act 193.

Authorizes towns that meet the following criteria to have same Tax Incremental Finance authority as cities and villages (1) Population over 3,500; (2) Equalized value over $500 million; (3) TID must be in sewer service area served by wastewater treatment plant. The Wisconsin Towns Association estimates there are approximately 75 towns over 3,500 in population but less with $500 million of equalized value. However, not all of these towns have sewer service areas.


Limits the liability of owners of sport shooting ranges and limits the applicability of noise restrictions in local zoning ordinances and changes in local zoning related to existing sport shooting ranges.

2013 Wis. Act 270.

Creates a state building code council to oversee rules related to the construction of public buildings and places of employment. Prohibits cities, villages, and towns from enacting or enforcing an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless the ordinance strictly conforms to the state rules.

2013 Wis. Act 272.

Authorizes local subdivision ordinances to specify a greater number of parcels into which certified survey mays (as opposed to plats) may subdivide land zoned for commercial, industrial, or mixed-use development. Prior law limited the use of certified survey maps to 4 or fewer parcels. It does not apply to land zoned for residential uses. In addition to adopting an ordinance to allow this (the law also allows the use of a resolution) the law requires that the local government have a planning agency, that the local government receives the recommendation of the planning agency and holds a public hearing before adopting the ordinance or resolution, and the ordinance or resolution must specify the maximum number of parcels into which land may be divided by certified survey map. The law also adds some additional requirements for review of certified survey maps if the local government allows for their use to divide more than four parcels.

2013 Wis. Act 280.

Limits the security a town or municipality may require as a condition of plat approval to ensure certain public improvements are made. The subdivider may choose whether to satisfy a requirement for security of public improvements as a condition of plat approval with a performance bond or a letter of credit. Upon substantial completion of the required public improvements, an approving authority may not require
a subdivider to maintain security in an amount that is more than the total cost to complete the public improvements that are not completed plus 10% of the total cost of the completed public improvement and may not require the subdivider to maintain security for more than 12 months from the date the public improvements are substantially completed. “Substantially completed” is defined as when the binder coat is installed on roads to be dedicated, or in a case of where not roads are to be dedicated, when 90% of the public improvements by cost are completed.

2013 Wis. Act 287.

This law is the result of an agreement to allow the remaining four towns in Waukesha County to get out from county zoning. The law specifies that towns located in counties exceeding 380,000 in population that are located adjacent to a county that has a population exceeding 800,000 cannot adopt or amend a zoning ordinance without county board approval.

2013 Wis. Act 299.

Allows the use of tax increment financing for parking structures that support redevelopment activities.

2013 Wis. Act 336.

Authorizes school boards that have a 10 year capital improvement plan to create a capital improvement trust fund.

2013 Wis. Act 347.

Limits the treatment of licensed manufactured home communities as nonconforming uses.

2013 Wis. Act 352.

Expands the statewide total amount of land that may be designated an agricultural enterprise area from 1 million to 2 million acres.

2013 Wis. Act 358.

This law makes numerous changes related to the practice of professional land surveying. Of interest to planners are the numerous changes to the platting requirements in Chapter 236 and the requirement that unless you are a registered land surveyor, if you prepare “a map that depicts temporary trails, easements, or other uses of land” that map must include the following statement: “This map is not a survey of the actual boundary of any property this map depicts.” There are a number of exceptions to this requirement that may apply to at least some planners including the following:

1.) employees or agents of the department of natural resources, department of agriculture, trade and consumer protection, department of transportation, public service commission, board of commissioners of public lands, or department of military affairs who creates a geographic information systems map if done within the scope of his or her employment or agency;

2.) registered architects and engineers.
2013 Wis. Act 378.

Provides municipal wastewater treatment plants with a statewide variance from wastewater discharge limits for phosphorus. The law focuses on sources of phosphorus discharge that cannot meet current discharge limits without making major facility upgrades (aka ‘affected sources’). The law makes a variance available to ‘affected sources’ if it is found that it is not feasible for those sources to meet current discharge limits without causing substantial and widespread adverse social and economic impacts on a statewide basis (referred to as “finding of infeasibility”). An affected facility is eligible for a variance from its phosphorus discharge limits if it certifies that it cannot achieve compliance without a major facility upgrade. The variance consists of two principal elements: a schedule by which the affected source must, over 20 years come into compliance with its phosphorus discharge permits and one of the following: 1.) payments to a county in an amount equal to $50 per pound of phosphorus discharge by the affected source in excess of the amount it would discharge if it met its discharge limit (the funds are to be used to reduce the phosphorus pollution in the same water basin as the affected facility); 2.) enter in to an agreement with DNR to implement projects to reduce phosphorus pollution, or 3.) enter in to an agreement with a third party to implement projects to reduce phosphorus pollution from nonpoint sources in the watershed.