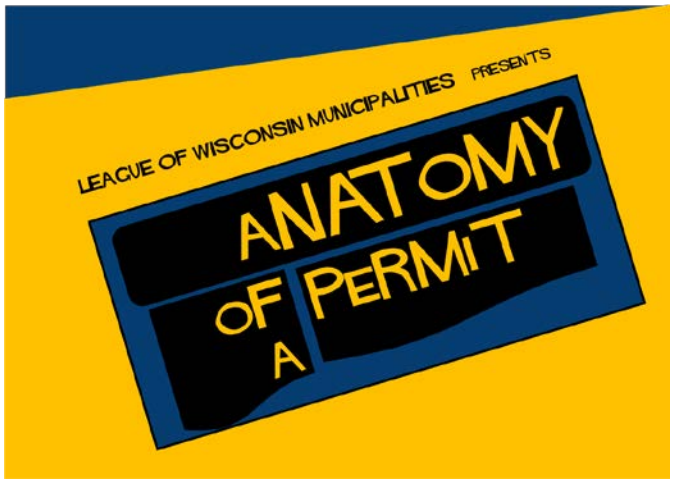
LEAGUE OF WISCONSIN MUNICIPALITIES
2017 ANNUAL CONFERENCE

Appleton, Wisconsin

OCTOBER 20, 2017



ANATOMY OF A PERMIT

Part Three:

STATE AND FEDERAL COURT RELIEF FROM LICENSING AND PERMIT DECISIONS

Atty. David C. Moore[1]
Nowlan & Mouat LLP
Janesville, WI

Nowlan & Mouat LLP

[1] The presenter gratefully acknowledges the assistance of Rachel Potter, 3rd year student at the University of Wisconsin – Madison Law School, in preparing this presentation.

ROUTES THROUGH THE COURT SYSTEM

- **Certiorari Review – With and Without a Statute**

  "Certiorari is used to test the validity of decisions made by administrative or quasi-judicial bodies." *Acevedo v. City of Kenosha*, 2011 WI App 10, ¶ 8, 331 Wis. 2d 218, 793 N.W.2d 500.

  "Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411.

  "It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971).

- **Constitutional Challenges**

  42 U.S.C. § 1983:

  "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

- **Alternative Courts**

  - State circuit court
  - Federal district court

CERTIORARI REVIEW

- **Definition**:

  "A writ of superior court to call up the records of an inferior court or a body acting in a quasi-judicial capacity." *Certiorari*, Merriam-Webster Dictionary (11th ed. 2016).

- **Statutory Certiorari**:

  e.g., Wis. Stat. 62.23(7)(e) 10.:

  "Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, *commence an action seeking the remedy available by certiorari. . . .*"

- **Common Law Certiorari**

  Whenever there is no express statutory method of review. *Coleman v. Percy,* 96 Wis.2d 578, 588, 292 N.W.2d 615 (1980).

- **Standard of Review**

  - There are four standard inquiries laid out in common law:

    - (1) "[W]hether 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." *Nowell v. City of Wausau*, 2013 WI 88, ¶ 48, 351 Wis. 2d 1, 838 N.W.2d 852.

  - Unless the statute limits or enlarges the scope of review, it is confined to the same four inquires as common law certiorari and the record of the administrative proceedings. *E.g., State ex rel. Ruthenberg v. Annuity & Pension Bd.,* 89 Wis. 2d 463, 474, 278 N.W.2d 835 (1979); *State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee,* 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979).

  - "Certiorari review accords the decision of the local governmental entity a presumption of 'correctness and validity.'" *AllEnergy Corp. v. Trempeleau Cty. Env't & Land Use Comm.*, 2017 WI 52, 375 Wis. 2d 329, ¶ 88, 895 N.W.2d 368; *citing Kapischke v. Cty. Of Walworth*, 226 Wis. 2d 320, 328, 595 N.W.2d 42 (Ct. App. 1999).

  - "The board's findings will not be disturbed if any reasonable view of the evidence sustains them." *Kapischke,* 266 Wis. 2d at 328; *State ex rel. Morehouse v. Hunt,* 235 Wis. 358, 291 N.W. 745, 749 (1940).

- **Time Limitations**

  - Set by statute (usually 30 days)

  - If a statute does not apply or does not specify a time limitation, action must be brought within 6 months. *Firemen's Annuity & Ben. Fund of Milwaukee v. Krueger*, 24 Wis. 2d 200, 206, 128 N.W.2d 670 (1964).

- **Beginning an Action**

  - There are three different ways to begin a certiorari action. *Nickel River v. City of LaCrosse*, 156 Wis. 2d 429, 431-432, 457 N.W.2d 333 (Ct. App. 1990).

    1) Summons and complaint (Wis. Stat. § 801.02(5) permits the procedures for civil actions to be applied to certiorari proceedings, allowing it to be filed by summons and complaint).

    2) Service of an appropriate original writ.

    3) Filing of a complaint if service of the complaint and an order is made upon the defendant.

  - If writ procedure is used, the writ must be served within the required time period (30 days under most statutes – 6 months under common law).

  - "Complaint and order" method is an option for an emergency situation where the case may be moot before a response would be filed. *See generally Koenig v. Pierce Cty. Dep't of Human Servs.*, 2016 WI App 23, ¶ 20, 367 Wis. 2d 633, 877 N.W.2d 632 (discussing the use of a complaint and order in an emergency situation).

    - If you choose this option, you do not have to prove there is an "emergency." *Id.*, ¶ 21.

    - Wis. Stat. § 801.02(5) does not require that the order be signed within the 30-day time limit; the beginning of the action is measured from when the complaint is filed. *Id.*, ¶ 26.

  - In almost every circumstance, it most practical to use a summons and complaint. It is the most familiar method and has less procedural complications.

- **Certiorari Review of Conditional Use Permit Decisions**

  - Certiorari review is available for conditional use ("special exception") permit decisions.

  - Wis. Stat. § 62.23(7)(e) 10.:

    "Any person or persons, jointly or severally aggrieved by any decision of the *board of appeals*, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, commence an action seeking *the remedy available by certiorari*. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board of appeals and on due cause shown, grant a restraining order. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. *If necessary for the proper disposition of the matter, the court may take evidence,* or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. *The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review*."

  - The statute dictates:

    - 30-day time limit from *filing of decision*

    - The court *may* take additional evidence

  - What if the decision was <u>not</u> made by the board of appeals?

    - Wis. Stat. § 62.23 (7) (e) 10. is "exclusive" as to "a zoning board's decision." *Dujardin v. Barry*, 121 Wis. 2d 694, 359 N.W.2d 179 (Ct. App. 1984)(UNPUBLISHED).

    - Wis. Stat. § 62.23(7)(e) 10. permits certiorari review of decisions made by *the board of appeals.*

    - But, the city council and plan commission has authority to "consider applications for special exception permits."

      - Wis. Stat. § 62.23(7)(e) 10.:

        "The council which enacts zoning regulations pursuant to this section shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in

accordance with general or specific rules therein contained. *Nothing in this subdivision shall preclude the granting of special exceptions by the city plan commission or the common council* in accordance with the zoning regulations adopted pursuant to this section which were in effect on July 7, 1973 or adopted after that date."

- Conditional use permits are considered special exceptions under the statue:

  "[W]e construe sec. 62.23(7)(e)1, Stats., [to allow] a municipality to authorize, by ordinance, a town board the exclusive power to consider applications for special exception permits." *Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 273, 461 N.W.2d 827 (Ct. App. 1990).

- Does the procedure required by statute apply?

  - "The City does not cite to a statute that places a time limit on certiorari review of a *determination of a common council* denying a CUP application. Rather, the City cites to Wis. Stat. § 62.23(7)(e)10. (2015-16), which governs the *time limit on certiorari review of a decision of a city zoning board of appeals*. That, however, is inapplicable here, as the appeal was from the Common Council's final decision. *Therefore, as the circuit court correctly concluded, the six-month time limitation for common law certiorari applies . . . .*" *Hartland Sportsmen's Club, Inc. v. City of Delafield,* 2016 AP 666, Aug. 30, 2017 (District II, unpublished).

  - If the statute is determined to not apply, common law certiorari is available, which allows more time to file.

- Taking evidence – statutory certiorari vs. common law certiorari

  - Wis. Stat. § 62.23 (7) (e) 10 explicitly authorizes the court to take evidence if it is necessary for proper disposition of the matter.

  - This is an expansion beyond common law certiorari, which only permits the court to review the administrative record.

- **A Digression: Are Re-zoning Decisions Appealed by Certiorari?**

  "[T]he case law on the procedure for and scope of a court's review of a zoning or rezoning request does not appear to be consistent. Review by certiorari tests the validity of a judicial or quasi-judicial decision . . . and the court's review is generally limited to review of the record before the decision-maker. . . . The legislative process does not have the same requirements for presenting evidence and making a record as do quasi-judicial proceedings. Most of the challenges to zoning and rezoning decisions that we are aware of are not by means of certiorari review of a record but an action alleging the decision to be unconstitutional.

However, Beverly Materials is correct that in [*State ex rel. Madison Landfills, Inc. v. Dane County,* 183 Wis. 2d 282, 515 N.W.2d 322 (Ct. App. 1994)], we reviewed the denial of a rezoning petition using the standard of review for a certiorari proceeding. At the same time, we cited [*Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966)] for our limited role in reviewing the decision, *Id*. at 288, and we did not, as Beverly Materials suggests in its brief, refer to "substantial evidence" as the appropriate test in reviewing the evidence.Rather, mindful of *Buhler*, we stated that "the extent of our authority" was to determine if the denial of the petition for rezoning "was arbitrary, unreasonable and not based on the evidence before it.'"

Beverly Materials, LLC v. Town of LaPrairie Bd. of Supervisors, 2007 Wisc. App. LEXIS 1142 (unpublished, internal citations omitted.)

- **Liquor Licenses**

  - Wis. Stat. § 125.12 (2) (d):

    "The action of any municipal governing body in *granting or failing to grant, suspending or revoking* any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, may be reviewed by the circuit court for the county in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality. The procedure on review shall be the same as in civil actions instituted in the circuit court. The person desiring review shall file pleadings, which shall be served on the municipal governing body in the manner provided in ch. 801 for service in civil actions and a copy of the pleadings shall be served on the applicant or licensee. The municipal governing body, applicant or licensee shall have 20 days to file an answer to the complaint. Following filing of the answer, the matter shall be deemed at issue and hearing may be had within 5 days, upon due notice served upon the opposing party. The hearing shall be before the court without a jury. Subpoenas for witnesses may be issued and their attendance compelled. The decision of the court shall be filed within 10 days after the hearing and a copy of the decision shall be transmitted to each of the parties. The decision shall be binding unless it is appealed to the court of appeals."

  - The statute does not address whether certiorari review should be applied, but the Supreme Court has determined that certiorari review is appropriate. *Nowell v. City of Wausau,* 2013 WI 88, ¶ 3, 351 Wis. 2d 1, 838 N.W.2d 852.

  - There is a particularly strong interest in the police power to regulate alcohol. The "states, under the broad sweep of the Twenty-first Amendment, are endowed with something more than the normal police power in regulating the sale of liquor." *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 217, 313 N.W.2d 805 (1982).

- The court allows evidence to be taken that is relevant to one of the four prongs of certiorari review. The "circuit court is to address, the evidence the court takes should be relevant to one of the four prongs of certiorari review … such an approach accords a licensee broad latitude to introduce evidence under prong three. At the same time, it accords the appropriate deference to the municipality's exercise of its police powers." *Nowell v. City of Wausau,* 2013 WI 88, ¶ 48, 351 Wis. 2d 1, 24–25, 838 N.W.2d 852, 863–64

- Certiorari review also extends to decisions to not renew alcohol licenses. *Wisconsin Dolls, LLC v. Town of Dell Prairie,* 2012 WI 76, ¶¶ 18–19, 342 Wis. 2d 350, 815 N.W.2d 690.

- **Municipal Administrative Decisions Generally**

  - Wis. Stat. § 68.13 (1):

    "Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within *30 days* of receipt of the final *determination*. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision."

  - Opting Out

    - Wis. Stat. § 68.16:

      "The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations."

    - Can the municipality "opt out" of everything except § 68.13?

      - This is an underdeveloped area of law.

      - If a municipality opts out of the statute "and has not provided for judicial review by certiorari, review by common law certiorari is available." *Toubl v. Town of Beloit,* 2011 WI App 58, ¶ 11 n.2, 332 Wis. 2d 806, 798 N.W.2d 320 (UNPUBLISHED); *citing Franklin v. Housing Authority of Milwaukee,* 155 Wis. 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990).

      - Can the municipality adopt its own time limit for certiorari review?

        - The language of the statute suggests that a municipality **could** adopt its own time limit.

        - What if the time limit adopted was prohibitively short?

- What does "30 days of receipt of the final determination" mean?

  - *Pulera v. Town of Richmond*, 2017 WI 61, 375 Wis. 2d 676, 896 N.W.2d 342. This case concerned changes to an intersection of a road. In order to make these changes, portion of two portions of town roads were discontinued. A resident filed certiorari petition and the town alleged the petitions were untimely. The statutory provision for appeal referenced § 68.13

    The Supreme Court concluded "that the thirty-day period during which certiorari review is available for a town board's highway order to lay out, alter or discontinue a highway begins to run on the date that the highway order is recorded by the register of deeds."

    Query: What happens if the decision is not to issue the order?

- **Remedies**

  - Conditional Use Permit appeal: "The court may reverse or affirm, wholly or partly, *or may modify the decision brought up for review*." Wis. Stat. § 62.23(7)(e) 10.

    - Only if this statute is the basis for appeal? What about common law certiorari?

  - Chapter 68 appeal: "The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1).

    - A certiorari court cannot order a board to provide equitable relief. *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶ 13, 337 Wis. 2d 484, 805 N.W.2d 127.

    - Reversal

      "Outright reversal is appropriate when the due process violation cannot be cured on remand . . . Because a new hearing with a constitutionally sufficient notice could cure the due process violation in this case, Guerrero is not entitled to outright reversal." *Id.* at fn. 5.

    - Remand

      "[R]emand is appropriate when the due process violation can be corrected without permitting the agency to introduce new evidence or assert new allegations." (Court cites *State ex rel. Gibson v. DHSS*, 86 Wis. 2d 345, 353, 272 N.W.2d 395 (Ct. App. 1978) for the proposition that "a remand permitting correction of the due process violation with a second hearing is within the jurisdiction of a court on certiorari review.") *Id*. at fn. 5.

- Can the court effectively require the issuance of a permit?

  - Does a decision to "modify" include the issuance of a permit?

    Pre-Chapter 68 mandamus claim:

    State ex rel. O'Neil v. Hallie, 19 Wis. 2d 558, 120 N.W.2d 641 (1963):

    The Wisconsin Supreme Court dealt with a town that chose to arbitrarily deny a permit to operate an outdoor theater, although a license had been previously issued to another theater. The court held that, "[b]y licensing the existing outdoor theater the town board has effectively estopped itself from refusing to license other outdoor theaters" unless there was evidence that "the entertainment offered will differ substantially from that already offered at the existing outdoor theater." *Id.* at 567. Thus, the court held that the refusal of a license to the second applicant was "a denial of the equal protection of the laws and constitutes an arbitrary and capricious administration of the police power by the town board of Hallie." *Id*. at 568. The court found that "[t]o refuse a license to "O'Neil on the facts in the instant action is a denial of the equal protection of the laws and constitutes an arbitrary and capricious administration of the police power by the town board of Hallie." Thus, the court directed "the trial court to issue a peremptory writ of mandamus requiring the defendants . . . to issue a license" to the applicant. *Id*. at 568.

    "It is a fundamental rule of law that arbitrary administration of an ordinance contravenes the provisions of the Fourteenth amendment relating to due process and equal protection of the laws." *Id.* at 567.

CONSTITUTIONAL CHALLENGES

- **§ 1983 Claims**

  - "[T]here is a distinction between presenting an equal protection argument in a Wis. Stat. ch. 68 certiorari proceeding and asserting an equal protection claim for money damages under § 1983." *Hanlon v. Town of Milton*, 235 Wis. 2d 597, 604-605, 612 N.W.2d 44, 48 (2000)

  - "One purpose of a § 1983 claim is to create a tort remedy for the deprivation of federal constitutional rights by government action. The relief available to a litigant from the circuit court under Wis. Stat. § 68.13(1) is limited. Under § 68.13(1) the court can only affirm, reverse, or remand for additional proceedings in accord with the court's judgment. In contrast, remedies demanded by Hanlon in his § 1983 claim included monetary damages and reasonable attorney fees." *Hanlon*, 235 Wis. 2d at 604.

  - "[U]nder Wis. Stat. § 68.13(1), an individual has 30 days after receiving a final determination from a municipality in which to seek certiorari review. However a six-

year statute of limitation governs § 1983 claims." *Hanlon,* 235 Wis. 2d, ¶ 25; *Hemberger v. Bitzer,* 216 Wis. 2d 509).

- Constitutional challenges are not required to be joined with certiorari claims, but they can be. *Hanlon,* 235 Wis. 2d, ¶ 27.

- **Standard of Review**

  - Constitutional challenge to zoning ordinance must be proven beyond a reasonable doubt. *State ex. rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

- **Substantive Due Process**

  - To bring a substantive due process claim a plaintiff must demonstrate either that the ordinance infringes on a fundamental liberty interest or that the ordinance is arbitrary and unreasonable. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

  - Rational Basis Attacks

    - The burden is on the plaintiff to prove that the ordinance lacks a rational relationship to a valid government objective. *Thorp v. Town of Lebanon,* 2000 WI 60, ¶ 40, 235 Wis. 2d 610, 612 N.W.2d 59.

    - To have a legitimate end, ordinance must have a rational relationship to public health, safety, morals, or general welfare. *State ex. rel Grand Bazaar Liquors, Inc. v. Milwaukee*, 105 Wis. 2d 203, 211, 313 N.W.2d 805 (1982).

      In *Grand Bazaar*, the court found that an ordinance requiring alcohol licensees to receive at least 50% of their income from liquor sales did not have a rational relationship to a legitimate end.

      - The city cited limiting the number of total licenses and encouraging adherence to liquor regulations as the rational bases for the ordinance. *Id.* at 210.

      - The court reasoned that the ordinance served to classify applicants for a license, but did not limit the amount of liquor licenses and that there was no evidence there was a problem with adherence to liquor ordinances.

      - The ordinance must actually seem to accomplish the stated goals.

      - An ordinance that effectively only allows conditional use permits violates substantive due process rights because it did not bear a rational relationship to a legitimate end. *Town of Rhine v. Bizzell,* 2008 WI 76, ¶ 43, 311 Wis. 2d 1, 751 N.W.2d 780.

- Attacks on Standardless/Unconstitutionally Vague Ordinances

  - When an ordinance delegates power to a municipal legislative body without standards to exercise that power, the delegation "constitutes an unlawful delegation of power to the members" of the body. *Hobart v. Collier*, 3 Wis. 2d 182, 188, 87 N.W.2d 868 (1958).

    Standardless Ordinances:

    - Allow for arbitrary and uncontrolled discretion. *In re Garrabad*, 84 Wis. 585, 594, 54 N.W. 1004 (1893).

    - Open the door to favoritism and discrimination. *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis. 2d 1, 11, 130 N.W.2d 304(1964).

  - Example of standardless/unconstitutionally vague ordinance:

    - *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis. 2d 1, 11, 130 N.W.2d 304 (1964). City ordinance permitted gas stations only if they were approved by the zoning board, and provided no standards but in a separate section of the ordinance that state the ordinance shall be held to the minimum requirements for the promotion of public health, safety, convenience, prosperity or general welfare.

    - What is a standard? Example of a challenged ordinance:

      "[T]he Common Council *may* consider the following *factors*:

      - Whether the building in which the proposed licensed establishment is to be located is in excess of 4000 sq. ft.;
      - Whether the proposed licensed establishment is located more than 1500 feet from school district property;
      - Whether the proposed licensed establishment would derive less than fifty percent (50%) of its gross revenue from the sale of alcoholic beverages;
      - Whether the proposed licensed establishment has submitted a plan that adequately ensures that all alcohol sales will be conducted in compliance with all state laws and local ordinances;
      - Whether the proposed licensed establishment demonstrates a positive impact to the community;
      - Other *factors* which the Common Council *may deem relevant* to a specific application."

- Examples of appropriate standards – see Matt Dregne outline, pp. 4-10 – still good law after *Humble Oil*?

    - *Wadhams Oil Co. v. City of Delavan*, 208 Wis. 578, 243 N.W. 224 (1932); *Lerner v. City of Delavan*, 203 Wis. 32, 233 N.W. 608 (1930); ***Smith v. Brookfield***, 272 Wis. 1, 9-10, 74 N.W.2d 770 (1956).

- **Equal Protection Claims**

    - Two levels of scrutiny are applied to equal protection challenges:

        - The first is strict scrutiny, which applies to statutes that involve fundamental interests or rights, or suspect classifications or discrete and insular minorities. *State ex. rel. Watts v. Combined Community Serv.*, 122 Wis. 2d 65, 81, 362 N.W.2d 104(1985).

        - Unless the Plaintiff is alleging that they belong to a suspect class, the level of scrutiny is a rational basis test. *State ex. rel. Watts v. Combined Community Serv.*, 122 Wis. 2d 65, 81, 362 N.W.2d 104(1985).

    - The rational basis test is the same for equal protection and due process claims that are not subject to strict scrutiny. *Medeiros v. Vincent*, 431 F.3d 25 (1st Cir. 2005).

    - 5-part test for reviewing equal protection challenges in Wisconsin based on classification:

        1) All classification must be based upon substantial distinctions
        2) The classification must be germane to the purpose of the law (rationally related to articulated purposes)
        3) The classification must not be based upon existing circumstances only
        4) The law must apply equally to each member of the class
        5) The characteristics of each class should be so far different from those other classes as to reasonably suggest the propriety of substantially different legislation

        Omernik v. State, 64 Wis.2d 6, 19, 218 N.W.2d 734 (1974); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 215, 313 N.W.2d 805 (1982).

    - Creating a class for the purpose of limiting competition in *Grand Bazaar*:

        - The record "supported the conclusion that the ordinance was supported by special interest groups as an anticompetitive measure to keep large retail stores out of the retail liquor business." *Id. at* 209-210.

        - The purpose articulated by the City, however, was to limit the number of retail liquor outlets.

- The ordinance has to seem to accomplish the stated goals.

- "First, there is no evidence in the record to demonstrate that there is any public need to limit the number of new liquor licenses. Second, we note that the Common Council retains the ultimate right to limit the number of licensed establishments, with or without this ordinance. Ultimately, as we view it, the ordinance only discriminates among *applicants* for a license; it does not limit the number of licenses issued." *Id.* at 212 (emphasis by the court).

o Arbitrary administration as an equal protection claim?

- "It is a fundamental rule of law that arbitrary administration of an ordinance contravenes the provisions of the Fourteenth amendment relating to due process and equal protection of the laws." *State ex rel. O'Neil v. Hallie*, 19 Wis. 2d 558, 567, 120 N.W.2d 641 (1963)

- **Remedies Under § 1983**

o Attorney fees

- Under 42 U.S.C. § 1988 (b), the "prevailing party" may seek an award of attorney fees. "[A] prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 297, 340 N.W.2d 704 (1983).

o Injunctive relief

- "Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 659, 98 S. Ct. 2018 (1978).

o Damages

- Punitive damages are not available against municipalities under § 1983, unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259, 101 S. Ct. 2748, 2756 (1981).

- Compensatory damages are available against municipalities. *Id.*

PRACTICAL TIPS

- **The Record** – Supplementing the record in litigation
- **E-mails** – Diving deep into motivation
- **The Reality of Tactical Delay** – in zoning and land division regulation
    - The risks of post-construction reversal