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The Municipality
April | 2021

Feature

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On the Cover

“The Roots” multifamily apartment project encompasses about 15 acres and the village of Kimberly’s Treaty Park. The park memorializes the “Treaty of the Cedars,” which ceded the land from the Menominee Indians to the town of Buchanan in 1836. The winding trail system symbolizes paper running through the rolls and many features within the park preserve the papermaking heritage of the village.

In January 2008, the 119-year-old Kimberly Paper Mill closed, and the site was subsequently sold in 2011 to a demolition company which gutted the mill and left a 90-acre blighted site. The village purchased the 90-acre property, created TID 6, and aggressively began the process of completing demolition and providing the infrastructure required to transform it into a residential and commercial riverfront landscape. By the end of 2020, much of the 90 acres has been redeveloped through the team efforts of the village board and staff, McMAHON, and private developers.

Photo credit: McMAHON https://mcmgrp.com/
One of my social media idols is Wausau Mayor Katie Rosenberg. She has figured out the secret sauce of using social media as a valuable communication tool, without going (too far) off the deep end. You may recall that the mayor became briefly famous for a pithy but honest election-night tweet. Mayor Rosenberg has a knack for connecting with the public to stir up good local conversation, and to bring a smile to peoples’ faces. If you ask me, we could use more of both — especially the second part.

So don’t be surprised that the League is shamelessly stealing a hashtag from Mayor Katie. Several weeks ago, she suggested that the upcoming spring election be dubbed #TakeYourLeggieToWork Day, and the League wants to encourage you to take her up on that suggestion. Invite your state representative or senator to tour your polling setup and show them how things work.

As you know, I’m a longtime advocate of bringing legislators behind the curtain of local government. It’s the best way I know to help them understand the opportunities, needs, and challenges of serving citizens locally. Whether it’s a behind-the-scenes look at election management or a private tour of the sewer treatment plan (don’t ask me why that fascinates me...it just does), the people who represent your citizens in Madison can only benefit by understanding “how things work.”

While you could #TakeYourLeggieToWork on a police ride-along, park maintenance tour, or road project, giving them a behind-the-scenes briefing on elections would be especially timely. Elections are under the microscope, both in Wisconsin and nationally. The pandemic drove millions of people to vote by mail. In response, local leaders had to reinvent the balloting process, both the in-person variety for social distancing, and absentee voting, which was built around a much lower volume of voters. We think you did an amazing job with both parts, and we want you to show that off. You are the experts. Share that expertise with state policy makers.

And, don’t forget to take pictures and post them on social media! Use the hashtag #TakeYourLeggieToWork. Mayor Rosenberg would be proud of you.
Local government planning is a central feature of land use in Wisconsin. Over 20 years ago the Wisconsin Legislature enacted Wisconsin's comprehensive planning law to promote local planning. During the 1990s, land use bubbled up as a major public policy issue in the state. A disparate group of stakeholders representing organizations that often do not see eye-to-eye on issues, especially land use, came together to develop the legislation that would become the comprehensive planning law. The organizations included: the Wisconsin Realtors Association, 1000 Friends of Wisconsin, the Wisconsin Builders Association, the League of Wisconsin Municipalities, the Wisconsin Counties Association, the Wisconsin Towns Association, the Wisconsin Alliance of Cities, the Wisconsin Chapter of the American Planning Association, and others. Governor Tommy Thompson signed the legislation into law in late 1999.

While the comprehensive planning law is sometimes referred to as the "Smart Growth" law, that title is not included in the law. The law enables cities, villages, towns, counties, and regional planning commissions to prepare comprehensive plans. The comprehensive planning law is as important to land use and community development today as when it was first enacted. Since its enactment, the comprehensive planning law has helped move Wisconsin from a state where the majority of local governments did not plan, to a state where local planning matters and most local governments have a plan to inform decision-making.

What is Planning?

What do we mean by “planning”? Businesses plan for how they intend to operate. Individuals are encouraged to plan for retirement. Professor Coleman Woodbury, who helped establish the Department of Urban and Regional Planning at UW-Madison in the early 1960s, defined “planning” as “the process of preparing, in advance, and in a reasonably systematic fashion, recommendations for policies and courses of action, with careful attention given to their possible by-products, side effects, or ‘spillover effects.’”

Comprehensive plans are a particular type of plan prepared by local governments throughout the United States. They should not be confused with a comprehensive zoning ordinance. The plans are comprehensive in that the plans encompass many of the functions that make a community work. While the comprehensive plan serves as a blueprint for the community’s physical development, the plan must also attempt to clarify the relationship between physical development policies and social and economic goals. For example, decisions made regarding new streets and roads will have an impact on future land use patterns. Land use patterns can affect people’s access to jobs and economic development activities. Is housing available in the community for people who work in those jobs? A comprehensive plan is usually the only public document that describes the community as a whole in terms of its mutually supporting systems. Each plan must reflect the unique circumstances of the community to help shape policies and courses of action contained in the plan.

A Quick Review of Wisconsin’s Comprehensive Planning Law

Wisconsin’s comprehensive planning law asks local governments to identify and assess the issues and opportunities facing the community and articulate a vision for the future. The law then asks communities to prepare policies and courses of action for many issues that are vital to the function of local government – issues related to housing, transportation, utilities and community facilities, agricultural, natural and cultural resources, economic development, intergovernmental...
cooperation, and land use. The plans should consider the interrelationships of those functions and help coordinate the plans, programs, and procedures of a community.

The law requires that citizens be involved throughout the planning process. In addition to citizens, the local plan commission needs to be involved in developing the plan. Ultimately, however, the elected local officials are responsible for adopting the plan.

**Implementing the Local Comprehensive Plan: Consistency**

Once adopted, the hard work is not over. A comprehensive plan outlines actions a community should take and gives guidance for making both simple and complex decisions. Local governments need to take action to implement their plan through the adoption of regulatory ordinances, other plans, fiscal devices, and other actions. Implementation of the comprehensive plan must be linked to the local budget, cooperation with other units of government, and the needs and capabilities of the private sector.

The comprehensive planning law elevates the importance of the plan by requiring that certain decisions must be consistent with the comprehensive plan. According to the comprehensive planning law, decisions to enact or amend official mapping ordinances, subdivision/land division ordinances, general zoning ordinances, and shoreland/wetland zoning ordinances must further (or not contradict) the objectives, goals, and policies contained in the local government’s comprehensive plan.

Wisconsin law also includes numerous requirements for consistency that predate the 1999 comprehensive planning law and other requirements added by the Wisconsin Legislature since 1999. Many of the pre-1999 consistency requirements refer to the “master plan.” Since a master plan and comprehensive plan are now defined as one and the same, these consistency requirements apply to comprehensive plans prepared under the 1999 law.

The pre-1999 consistency requirements include the following: tax increment financing districts must be in “conformity” with the comprehensive plan of the city, village, or town; construction site erosion control and stormwater management ordinances must “accord and be consistent with any comprehensive zoning plan;” architectural conservancy districts, business improvement districts, and neighborhood improvement districts must have a “relationship” to the comprehensive plan; urban redevelopment plans must be “in accord” with the comprehensive plan; and public school facilities funded by bonds issued by redevelopment authorities in first class cities must be “consistent” with the city’s comprehensive plan. Comprehensive plans can also help establish the basis to include non-housing facilities for certain programs funded by the Wisconsin Housing and Economic Development Authority; establish street widths in cities and villages; help determine the appropriate location for medical waste incinerators; or authorize the rezoning of registered lands for nonmetallic mineral extraction operations.

In addition to these consistency requirements that predate the 1999 comprehensive planning law, the Wisconsin Legislature has passed several laws since 1999 that also include consistency requirements. 2007 Wisconsin Act 43 amended section 66.0307(3)(c) of the Wisconsin Statutes to require that cooperative boundary agreement plans “shall describe how it is consistent with each participating municipalities' comprehensive plan.” Also, 2007 Wisconsin Act 227 requires that certain communities prepare water supply plans that include “[a]n analysis of how the plan supports and is consistent with any applicable comprehensive plan...” 2009 Wisconsin Act 28 revised the Farmland Preservation Program to require that farmland preservation zoning ordinances must be “substantially consistent with a certified farmland preservation plan” and the farmland preservation plan must be “consistent with the comprehensive plan.” 2007 Wisconsin Act 40, establishing statewide standards for the regulation of wind energy facilities, provides that cities, villages, towns, and counties “may deny an application for approval if the proposed site of the wind energy system (of at least one megawatt) is in an area primarily designated for future residential or commercial development, as shown in a map that is adopted, as part of a comprehensive plan...” Finally, the local comprehensive plan is a factor that will be considered by the Wisconsin Department of Natural Resources when rating local government projects proposed for funding under the State’s Stewardship Program.

The requirements that certain actions relate to the local comprehensive plan dictate a more thorough analysis of how the policies in a plan apply to a particular action. If a local decision is challenged in court, the reviewing court expects local decision-makers to be able to articulate the reasons for their decision. Relying on the plan helps build the record for the local decision and establishes the legal basis to support the decision.

If a community is going to establish goals and policies, consistency requirements mean the community needs to take affirmative steps to further those goals and policies. Comprehensive plans should mean what they say. The development review process should be a collaborative and dynamic process where the applicant is able to articulate how a
project fits with the community’s goals, policies, and objectives of the local comprehensive plan.

**Housing Affordability Report**

Housing affordability is a significant issue for many communities, in Wisconsin and nationally. The 2017 Wisconsin Act 243 added a requirement that cities or villages with a population of 10,000 or more persons prepare a report on the implementation of the housing element in the local comprehensive plan. Cities and villages needing to prepare the report must complete the report by January 31 of each year and post the report on the local government’s website.

Evaluating a plan after it is adopted is a standard part of the planning process. Even before the Legislature enacted this reporting law, a number of local governments adopted an annual plan evaluation process. The housing affordability report reinforces the need for an annual review of how well the local government is following its comprehensive plan and the requirements of the comprehensive planning law. If necessary, the need to prepare the report presents an opportunity to recommend new and innovative policies and courses of action to address affordable housing issues that the community can incorporate in updates to the local comprehensive plan.

**The Need to Update the Comprehensive Plan**

A comprehensive plan is not a static document. It needs to be continually updated as conditions change. The comprehensive planning law recognizes that change is inevitable and requires that, at a minimum, local governments update their plan at least once every 10 years. Despite the requirement in the law to update plans, a number of local governments have plans that were adopted more than 10 years ago. These plans need to be updated. Local officials can find themselves in an uncomfortable situation if someone does not like a decision that relates to the comprehensive plan but the plan has not been updated in the last 10 years.

**Building a Culture of Planning**

Many Wisconsin communities embrace the importance of comprehensive planning. Recent examples of notable comprehensive planning achievements include the comprehensive plans recognized as award winners by the Wisconsin Chapter of the American Planning Association – the City of Sun Prairie, the City of New Richmond, the City of Madison, and the City of South Milwaukee. The City of Monroe’s Comprehensive Plan received a Bronze Level Award from the Sustaining Places Initiative of the national office of the American Planning Association. And finally, the City of Eau Claire received special recognition from the National Civic League for including a health element in the city’s Comprehensive Plan. All communities in Wisconsin need to build on these successes by continuing to use the comprehensive planning process to acknowledge and take action to address the challenging issues facing citizens and their communities.

**About the Author:**

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1. Wisconsin’s comprehensive planning law can be found in Wis. Stat. § 66.100.
2. Wis. Stat. §§ 66.105(4)(g) for cities and villages and 60.85(3)(g) for towns.
4. Wis. Stat. §§ 66.1007(1)(f); 66.1109(1)(f); and 66.1110(2)(d).
7. Wis. Stat. § 234.01(7).
8. Wis. Stat. § 236.56(2).
12. Wis. Stat. § 91.00(1)(f).
15. For more details on the content of the report see Wis. Stat. § 66.10013.
The League has partnered with the nationally known Congress for the New Urbanism (CNU) and a broad group of Wisconsin organizations on an exciting new zoning guide to help communities create more workforce and “missing middle” housing. The CNU partnership is based on work done in other states; work that caught the eye of the League.

“We reached out to CNU because we admired the zoning guides they recently produced for Vermont and Michigan communities,” said League Deputy Director Curt Witynski. “Their approach is practical and implementable by communities that look a lot like Wisconsin communities.”


The Michigan guide can be found at this address: http://placemaking.mml.org/wp-content/uploads/2019/01/RRC_UG-Final.pdf

Witynski said this is not just another research project. “We are impressed by the approach CNU’s Project for Code Development takes in developing these zoning guides. The emphasis is on making incremental changes, rather than wholesale rewriting of a zoning code. This approach stresses helping local governments identify and implement the smallest code changes needed to achieve the biggest impact.”

Witynski observed that comprehensive updating of zoning codes can be overwhelming and time consuming, particularly for small communities with little or no staff or resources. Incrementally addressing the most critical needs for code reform offers communities a practical yet efficient way to respond to housing affordability challenges.

The CNU process was also attractive to the League because it does not stop at publication. In addition to developing a zoning guide, CNU will also work with the League and its partners to develop and provide training for municipal staff and private planning consultants on implementing the guide. The training will focus on the methodology of incremental code reform and the process and implementation described within the guide. It will cover how to use the documents, navigate the steps, and determine where to start. The training sessions will include content geared for a range of audiences, including municipal officials, planning professionals, stakeholder partners, and locally based consultants.

The goal of the guide and the training is to show that bite-sized changes are possible and can have an immediate impact on removing obstacles to the development of workforce and missing middle housing.

Another important part of the CNU project is the breadth of the partnership. Witynski contacted the major players in Wisconsin real estate development and received pledges of...
financial and/or technical support from an impressive list, including:
Wisconsin Realtors Association
Wisconsin Builders Association
AARP-Wisconsin
Wisconsin Housing and Economic Development Authority (WHEDA)
The National Association of Industrial and Office Parks (NAIOP)-Wisconsin
American Planning Association – Wisconsin

It will take a full year to develop the zoning guide, but the process has already begun. CNU has convened working sessions with the partners and several Wisconsin municipalities to analyze and obtain a better understanding of Wisconsin’s unique regulatory framework. The goal is to identify common state and local barriers to new housing affordability and workforce housing development. The heart of the effort will involve the CNU team working directly with 4-6 case study communities. At these virtual workshops, the communities and the CNU team will review and discuss how their land use regulations work or do not work for creating more affordable and missing middle housing.

CNU will use the information obtained from these case studies to develop an initial draft of a zoning guide tentatively titled: Enabling Better Places: Users’ Guide to Neighborhood Affordability. The League and its project partners will then have multiple opportunities to comment and offer revisions. The goal is for CNU to deliver a final draft of the guide by the end of 2021, with training to occur early in 2022.

Contact Curt Witynski, League Deputy Executive Director, if you have any questions or are interested in hearing more about this exciting project. witynski@lwm-info.org

Levy Limits Should be Based on New Construction Only

Curt Witynski, Deputy Executive Director, League of Wisconsin Municipalities

Wisconsin’s levy limit law prohibits property tax levy increases from one year to the next by more than the percentage change in equalized value due to new construction, less the value removed because of building demolitions. According to Legislative Fiscal Bureau staff, demolitions caused a $409.3 million reduction in the statewide net new construction calculation for 2020. The $9,265,520,500 net new construction number DOR released in August 2020 would have been $9,674,863,400 if demolitions were not included. In 2020, the statewide allowable levy would have increased from 1.60% to 1.67%, a mere 0.07%.

While removing “net” from “net new construction” would have a relatively minor impact statewide, basing each community’s allowable levy on its new construction, without adjustment for demolitions, would be particularly helpful for communities having no vacant land available for development. Municipalities without vacant land are limited to engaging in redevelopment and infill projects, which often involve demolition of existing old buildings.

Join the League in urging legislators to modify the levy limit law by removing the need to subtract the value associated with demolitions. Basing the allowable levy increase on new construction only, as opposed to net new construction, would allow additional levy flexibility for communities that are built out and unable to annex land for development.
Waterfront property is some of the most valuable property in the state. That is particularly true in our urban areas. In the past several decades throughout the state, we have seen the redevelopment of waterfront property into wonderful public and private amenities. The evolution of the Milwaukee RiverWalk is just one example of the transformation of a waterway that was an unattractive industrial riverfront into a vibrant recreational corridor surrounded by restaurants, shops, condominium developments, and public access.

Unfortunately, such transformations have been less common in some of our urban lakefront properties, particularly along the Great Lakes waters. Some lakefront areas have become parks, but others remain brownfields or underutilized areas that lack any public access to the water or the land. Why is that? In large part, an outdated view of the Public Trust Doctrine has created uncertainty of title and restrictions on public private partnerships that limit redevelopment options. It is time to take a new look at the Public Trust Doctrine to serve public interests in our navigable waters here in the 21st century.

The Public Trust Doctrine and Filled Lakebed

The Public Trust Doctrine provides that the navigable waters of the state are to be held in trust by the state for the benefit of the public. The Public Trust Doctrine is found in the Wisconsin constitution at Art. IX s. 1 as follows:

…the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States…

Among other things, the Public Trust Doctrine has been interpreted to mean that title to natural lakebeds as existing at statehood, including those in the Great Lakes, is held by the state. State v. Block, 114 Wis. 2d 454, 462, 338 N.W.2d 492 (1983); Illinois Steel Co. v. Bilot, 109 Wis. 418 (1901); State v. Trudeau, 139 Wis. 2d 91 (1987).

But what happens when those waters are not “forever free”? What happens when lakefront waters have been filled and are now dry land? That is not an uncommon situation. In fact, many waterfront areas, especially those along our Great Lakes, have extensive areas that were filled decades ago and often in the 1800s or early 1900s.

How did that happen? It’s not happening much now. Since at least the 1970s, any fill or structure into navigable waters, has been subject to strict regulatory review – as it should. But historically things were different. There has always been a certain amount of natural fill as shorelines erode and redeposit sediment. The legal terms for this process are accretion and reliction and it is a legal doctrine that recognizes that shorelines are not fixed points. Shorelines evolve over time.

In addition to natural processes, there has also been fill activity. Some of it was unauthorized fill such as dumping of slab wood from northern sawmills into Lake Superior during the logging era. In other cases, fill resulted from general authorizations to promote development. Municipalities were authorized to set docklines allowing large solid piers to be constructed into the lakes for commercial shipping. In some cases, the areas between these piers were filled for warehouses, granaries, or other developments. The creation of municipal bulkhead lines often furthered this purpose. In yet other cases, there were specific lakebed grant authorizations to allow fill for various purposes including parks and railroads.

Today you can compare the current shorelines of many cities on the Great Lakes with those from the government survey in the 1800s and see the remnants of this activity. The city of Superior is one such example (see map on page 12).

So how are these filled areas treated under the Public Trust Doctrine? Some claim that because the public trust vests the title to the beds of natural lakes to the state, “once lakebed always lakebed,” and any private use of former lakebed must be for public purposes authorized by the state. As discussed below, the history and case law of the Public Trust doctrine is neither that simple nor that inflexible. Unfortunately, the “once lakebed always lakebed” mantra has dominated the discussion of lakefront property and has created significant problems for redevelopment of these properties.

Three Examples

Superior. If you travel along State Highway 53 through Superior and then continue into Duluth Minnesota, you...
The 8 Domains of Livability

The availability and quality of these community features impact the well-being of older adults – and help make communities more livable for people of all ages.

1. **Outdoor Spaces and Buildings**
   People need public places to gather – indoors and out. Green spaces, seating, and accessible buildings (elevators, zero-step entrances, staircases with railings) can be used and enjoyed by people of all ages.

2. **Transportation**
   Driving shouldn’t be the only way to get around. Pedestrians need sidewalks and safe, crossable streets. Dedicated bicycle lanes benefit nondrivers and drivers alike. Public transit options can range from the large-scale (trains, buses, light rail) to the small (taxis, shuttles, or ride share services).

3. **Housing**
   AARP surveys consistently find that the vast majority of older adults want to reside in their current home or community for as long as possible. Doing so is possible if a home is designed or modified for aging in place, or if a community has housing options that are suitable for differing incomes, ages, and life stages.

4. **Social Participation**
   Regardless of a person’s age, loneliness is often as debilitating a health condition as having a chronic illness or disease. Sadness and isolation can be combated by having opportunities to socialize and the availability of accessible, affordable, and fun social activities.

5. **Respect and Social Inclusion**
   Everyone wants to feel valued. Intergenerational gatherings and activities are a great way for young and older people to learn from one another, honor what each has to offer and, at the same time, feel good about themselves.

6. **Work and Civic Engagement**
   Why does work need to be an all or nothing experience? An age-friendly community encourages older people to be actively engaged in community life and has opportunities for residents to work for pay or volunteer their skills.

7. **Communication and Information**
   We now communicate in ways few could have imagined a decade ago. Age-friendly communities recognize that information needs to be shared through a variety of methods since not everyone is tech-savvy, and not everyone has a smartphone or home-based access to the internet.

8. **Community and Health Services**
   At some point, every person of every age gets hurt, becomes ill, or simply needs some help. While it’s important that assistance and care be available nearby, it’s essential that residents are able to access and afford the services required.

Chart and text used with permission of AARP. Learn more about AARP’s livability work at AARP.org/Livable and by subscribing to the free, weekly AARP Livable Communities e-Newsletter at AARP.org/Livable-Subscribe or by texting Livable to 50757.
will be struck by the contrast between the two cities on the same lake. As the map above shows, much of this area was filled lakebed. Significant redevelopment of the waterfront in Superior has been stymied in part by lack of clarity of title and the inability to redevelop this filled area for private purposes. This restricts both public access as well as community development and redevelopment.

**Sturgeon Bay.** A bulkhead line was created along the Sturgeon Bay canal recognizing the fill that had occurred between two large docks. An old granary and other buildings had been constructed decades ago but were abandoned and became tax delinquent. The city took over this land, remediated the site contamination, and then attempted a TIF for a mixed public private development on site with private businesses and a public walk. This was challenged as impermissible on former lakebed. After several years of litigation trying to determine the original shoreline, a determination was reached resulting in most of the site being declared former lakebed that could not be redeveloped.
Milwaukee. There is considerable fill along the Milwaukee shoreline from the base of the bluff to the current shoreline. Much of the fill was placed as the result of former railroad corridors and other fill. Some was authorized by lakebed grants, some not. Much of this area is used for public parks and marinas, but several years ago there was an attempt to develop a parcel several blocks inland from the lakefront to include a high-rise development known as the Couture Center. Again, issues were raised that this could not occur because it was once lakebed. Eventually, there was special legislation recognizing a shoreline sufficiently lakeward of the project site to allow the project to move forward. See Wis. Stat. s. 30.2038 and associated legislative history from 2013 Act 410.

These cases illustrate three basic points. First, they all represent situations in which fill has existed for decades, and in many cases since the 1800s. No one, not even the most dedicated Public Trust advocates argue that the fill should be removed or that actual navigation will occur on these locations. In fact, in many cases, these areas have had buildings or other structures and have paid taxes. In the case of Couture, the land at issue was separated from the lake by many blocks of separate parcels.

Second, these cases demonstrate that trying to establish where the shoreline was at statehood – and more particularly the ordinary high-water mark – is a challenging prospect. The original government survey of the state included many inaccuracies, especially along bodies of water, where the boundaries between lake or river beds and other low-lying areas like wetlands are difficult to determine, even with present-day methods. The combination of the dynamic nature of Great Lakes waters and the evolution of commercial harbors, urban areas, and other lakeshore development has resulted in considerable changes in the lakebed shoreline as compared to the original government survey. In many cases, these changes occurred between the time of the government survey and the date of statehood, resulting in there being no reliable documentation of the location of shorelines on the date of statehood. The historical record on the extent of natural or artificial changes to lakebed areas before and after statehood is often incomplete and inconclusive. Similarly, the extent to which artificial fill has been authorized and the uses of such areas is often unclear. The Sturgeon Bay record demonstrates the near impossibility of answering the question of where the lakebed was at statehood.

Third, the lack of clarity in the law creates uncertainty of title leading to resolution through years of litigation, special legislation, or no resolution at all. None of these is an acceptable way to resolve issues on some of the most valuable areas in the state. This uncertainty does not benefit public rights in navigable waters nor promote the public interest in redevelopment of these critical urban corridors. Nor is it a result dictated by the Public Trust Doctrine.

Public Trust Doctrine Application

Although the “once lakebed always lakebed” has its adherents, actual case law is more complex and more flexible. In fact, throughout the 1900s the courts have held that the location of the title to lakebeds may be altered under the common law doctrines of accretion and reliction through both natural processes and through the placement of artificial fill. The result is that there are numerous cases in which artificial fill in lakes has been recognized as land joining the riparian owner through the doctrine of accretion and reliction. In Heise v. Village of Pewaukee, 92 Wis. 2d 333, 345, 285 N.W.2d 859 (1979) the court found that land along Pewaukee Lake included portions of the former lakebed. “We hold that regardless of whether the land in the Lake Street extension was formed as a result of natural or artificial processes, the Village of Pewaukee has title to the land by virtue of its ownership of Lake Street up to the original shoreline.” Similar results have been found in numerous other cases. See, De Simone v. Kramer, 77 Wis. 2d 188, 199, 252 N.W.2d 653 (1977); W.H. Pugh Coal Co., v. State, 105 Wis. 2d 123 (1981); Doemel v. Jantz, 180 Wis. 225 (1923); Angelo v. Railroad Comm’n, 194 Wis. 543 (1928); and Jansky v. City of Two Rivers, 227 Wis. 228 (1938).

Moreover, the Public Trust Doctrine is not a fixed and ridged set of concepts. From a historic perspective, the Public Trust has always evolved to meet the demands of what is in the public interest including natural resource and economic needs of the public. In the late 1800s, concepts of the public trust facilitated changes to navigable waters to bring saw logs to market. As noted above, by the early 1900s, the public trust was interpreted to allow intrusions into navigable waters to facilitate the development of commercial harbors as well as water power. As recreational uses have increased, public trust principles were extended to protect shoreland areas and water quality. The fact is that throughout this state’s history, the concepts of the public interest always included considerations of economics as well as natural resources. To adopt interpretations of the public trust that ignore the current needs for improved public access and redevelopment is contrary to this long, flexible history of the public trust doctrine.
Where to Go From Here

We need to engage in discussions that search for solutions that maximize the value, enjoyment, and usage of our most valuable waterfront resources. How do we encourage public access, redevelopment, and vibrant urban corridors? There needs to be a way to clear title on the historic unauthorized fills and to provide more flexible uses for areas of historic fill originally authorized for commercial uses like piers and wharfs that are no longer used for those purposes. This kind of positive public use of our resources is not only permitted by the Public Trust Doctrine, it is exactly the kind of flexibility that the Public Trust Doctrine has embodied since statehood.

About the Author:

Paul Kent is senior partner with Stafford Rosenbaum LLP in Madison, Wisconsin. His practice focuses on environmental regulatory matters with a particular emphasis on water issues for municipalities. He serves as legal counsel and lobbyist for the Municipal Environmental Group Wastewater Division, an association of approximately 100 communities that advocates for municipalities on wastewater issues. He has co-taught the environmental law course at the University of Wisconsin Law School since 1989 and has authored several publications including *Wisconsin Water Law in the 21st Century* which is available online at www.wisconsinwaterlaw.com. Contact Paul at pkent@staffordlaw.com.
Communities have always understood that parks and recreation are important, but this last year has certainly underscored that importance, especially in terms of impacts on health and well-being. Many community leaders are using the new year to rethink how and where they provide public park space and how to make that space more inclusive. But, where do municipalities turn as available land becomes not just competitive, but scarce, and as budgets attempt to toe the line between “wants” and “needs”? They get creative.

**Creative Solutions**

**Pocket Parks** - Pocket parks work well in higher-density urban areas because they are small (typically no more than ¼ acre), created on underutilized land or vacant lots. Amenities can vary, but typically include open space, play equipment, and places for socializing. According to the National Recreation and Park Association (NRPA), pocket parks should be accessible, comfortable spaces where people can easily meet and socialize. The Riverfront Pocket Park in the City of Sauk City, Wisconsin, is a great example. This park was originally a small, vacant parcel between two buildings on the Wisconsin River. The park now includes an ADA-accessible path, places for play, socializing, and taking in views of Sauk City’s downtown and riverfront.

**Pop-Up Parks** - Pop-up parks are temporary park spaces, found in unsuspecting locations such as parallel parking stalls, parking lots, or in streets as extensions of sidewalks. The definition of temporary could be a one-time event or an installation evolving over several years. The benefits of pop-up parks are that they can be used to pilot new ideas, challenge the way we think about public space, and are relatively low in cost. Duchess Plaza in the downtown area of Wisconsin Dells first opened in 2016. This pop-up park is located on a portion of a closed road and used as a free entertainment plaza. Host to concerts, café tables and chairs, the plaza is warmed...
by decorative lighting features, planters, and a large three-dimensional mural painted on the road surface.

**Stormwater Management Areas** - Stormwater management areas offer the unique opportunity for multipurpose use, yielding spaces that not only convey and retain stormwater and conserve wetland ecosystems, but can also be used for public greenspace. Small parks and trails or boardwalks are typically very compatible with retention ponds, drainage areas, and wetlands. And due to the prevalence of flooding in these areas, passive recreation opportunities like walking trails and nature observation are generally preferred. Heron Pond in Belknap, Illinois, is a great example of this cross functionality. This pond and wetland property is part of the Little Black Slough Nature Preserve and is home to over 100 endangered and threatened plant and animal species in the Ohio River floodplain. The area features educational opportunities, restrooms, and boardwalk trails through the wetlands and drainage ways, with opportunities for fishing and canoeing.

**Inclusive, Functionally Diverse Parks** - In high-density urban areas where infill development or redevelopment is occurring, it can be difficult to find any open space at all, let alone land available to dedicate to new parks. To accommodate new residents brought in by development and to attract future residents to the area, communities might focus on expanding experiences at existing parks. Adding places to play, relax, eat, socialize, and exercise increases the potential for a variety of users to visit – and revisit – these public spaces. And, performing an Americans with Disabilities Act (ADA) audit of both existing and proposed upgrades will offer amenities of interest and engagement to a diverse pool of users in terms of age, ability, and mobility.
A 2010 master plan created for Lake Mirror Park in Lakeland, Florida, had a goal of transforming its existing park space, with restoration and upgrades to seven acres of open space surrounding the lake and seven acres of recreation and leisure facilities. The result includes a stormwater pond, play area, splash pad, multiple picnic areas, botanical garden, grand promenade and public art throughout. It has since become one of the top destinations for large public and private events and has led to additional upgrades, funded by both public and private investors.

**Public-Private Partnerships** - Existing businesses sometimes have unused or underutilized open space on their properties. This presents a unique partnership opportunity. In some cases, agreements that issue tax breaks to participating businesses can be made in exchange for shared greenspace. The Home Depot Backyard in Atlanta, Georgia, is one of the most known examples of public-private partnership. This 11-acre greenspace behind the Atlanta Falcons' Mercedes-Benz Stadium is used as parking for home teams on game days and as public gathering space on other days, where it hosts a variety of public programs and activities ranging from arts and cultural to health, wellness, and educational events. The site is a partnership between the Atlanta Falcons, Atlanta United, Blank Family of Businesses, Mercedes-Benz Stadium, and the city of Atlanta.

**Small Spaces, Huge Benefits**

The benefits of parks go far beyond simply being spaces where people can recreate. According to Community Commons, a resource website run by the Institute for People, Place and Possibility (IP3), there are seven vital conditions for community well-being:

- Basic need for health and safety
- Lifelong learning
- Meaningful work and wealth
- Humane housing
- Reliable transportation
- Thriving natural world
- Belonging and civic muscle

Parks touch every one of these conditions and are an important part of what brings people and businesses to our communities and keeps them there.

**Health and Safety** - According to the National Recreation and Parks Association (NRPA), when individuals use green spaces, they have fewer health issues, improved blood pressure, cholesterol levels, and reduced stress – which leads to a lower incidence of depression. According to a report by the NRPA titled "The Economic Impact of Parks," "Diabetic individuals taking 30-minute walks in a green space experienced lower blood glucose levels than spending the same amount of time doing physical activity in other settings. Thirty minutes of walking in nature resulted in larger drops in blood glucose than three hours of cycling indoors."

**Lifelong Learning** - Recreation programming in parks, in addition to providing physical and mental health benefits, also provides lifelong opportunities for learning. Park and recreation departments across the country have outdoor programming for all ages, from art and nature photography classes to organized sports leagues. These are generally very affordable and a great way to get outside and stimulate both mind and body.

**Meaningful Work, Wealth, and Humane Housing** - According to the NRPA, economic research has shown that properties located near parks and greenspaces have consistently higher values than those located farther away. In addition, 85% of people who responded to a 2019 “engagement with parks” survey stated that they look for high-quality parks when choosing a place to live.

**Reliable Transportation** - Parks and park corridors often provide shared-use paths for transportation and recreation. These paths provide an important alternate means of traveling for those who prefer to walk or bike and for those who lack other means of transportation due to age, income, or disability. Shared-use paths also provide important connections to public transit. According to the National Household Travel Survey conducted by the Federal Highway Administration, 85% of transit trips begin and end with walking, and nearly one in six walking trips is made for the purpose of accessing public transit.

**Thriving Natural World** - Parks and green spaces also play an important role in protecting the environment and preserving wildlife habitats. They aid in stormwater management for flood control, and establish environmental corridors which are safe havens for migratory birds and butterflies. Trees in particular are effective in reducing heat island effects within urban areas and sequestering carbon from the atmosphere to combat climate change. Local parks also help connect people to nature and encourage broader environmental stewardship.

**Belonging and Civic Muscle** - Public parks are unique because they have the potential to be accessible to anyone in a community, regardless of age, gender, race, ability, socioeconomic status, or ethnicity. Though we often find that disparities exist
in the distribution and quality of parks and recreation amenities, many parks and recreation departments across the U.S. are now rethinking how to engage and provide benefits to residents who do not currently have access to parks. If parks can be more inclusive, they have the potential to function as a nucleus of neighborhood activity, where residents can gather for social events, recreational activities, and meetings about local issues – creating a more holistic overall sense of community.

Rethinking the Future of Our Parks

Indeed, the benefits of community parks and recreational spaces far outweigh the constraints placed on them by urban grids and geography. As our world population continues to grow and as suburban sprawl and rural development continue at a rapid pace, there is no better time than now to stake a claim on property for the development of these essential public spaces. Your community’s health, diversity, social equity, and economic stability depend on it.

About the Authors:

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About MSA Professional Services, Inc.

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Save Money: Publish Budget Amendments on Municipality’s Website

Under a little-known change in the municipal budget law, municipalities may now publish budget amendments by posting the change on the municipality’s website instead of paying for publication of a class 1 notice in the newspaper.

2019 Wisconsin Act 42, which authorized local governments to adopt two-year budgets, also changed the requirement in Wis. Stat. § 65.90(5)(a) for publishing municipal budget amendments. The change took effect November 23, 2019, but few communities are aware of it. Prior to this change, municipalities had to publish a Class 1 notice of every budget amendment within 15 days of the change.

A municipality must amend its budget any time the amounts of appropriations stated in the budget change or if the purpose for which the money will be used changes. A two-thirds vote of the members elect of the governing body is required to amend a budget. The municipality must notify the public of the change by either publishing a Class 1 notice of the amendment within 15 days after amending the budget or posting a notice on the municipality’s website within 15 days after the change is made. Wisconsin Stat. § 65.90(5)(a).

The city of Brookfield recently relied on this change to stop paying for newspaper publication of municipal budget amendments and instead posts them on the following budget amendment page that they have created on their website: https://www.ci.brookfield.wi.us/Search?searchPhrase=Budget%20Amendment%20Resolutions

Questions? Contact Curt Witynski at witynski@lwm-info.org
Wisconsinites Went Outdoors in the Pandemic. How Should Policymakers Respond?

Wisconsinites increased participation in a range of outdoor activities during the COVID-19 pandemic, state and local data show. While the durability of this shift is unknown, policymakers may wish to consider it as they craft state and local budgets for public lands and recreational and conservation programs.

With unemployment soaring and many activities curtailed, outdoor pastimes were among the few available in much of 2020 while maintaining social distance.

In Wisconsin, state parks and trails, sporting goods, birding apps, and state fishing and hunting licenses saw increased sales or usage during that period, according to data examined by the Wisconsin Policy Forum. Various localities also saw increases in sales of cross-country ski permits, nature preserve visits, and bike trail usage.

Much of this trend may subside as the pandemic hopefully recedes. Yet some of the increase could prove durable enough to ease strained budgets in these areas by boosting user fee revenues.

As state and local officials begin crafting budgets, they may also want to give thought to whether spending levels on parks, public lands, boat ramps, and other green space are adequate to handle the high demand.

Notably, state lawmakers must decide in the coming months whether to renew the state's Knowles-Nelson Stewardship program, set to expire on June 30, 2022. The state plays a significant role in financing capital spending for land purchases or facilities through this program, which uses bonding to finance state and local land purchases for public recreation and environmental conservation as well as improvements on public lands.

In his 2021-23 budget bill, Gov. Tony Evers is proposing to more than double the authorized borrowing for the program to $70 million per year and shift how that funding is divvied up.

Looking to the local level, between 2000 and 2018, increases in spending for parks and recreation by counties and municipalities in Wisconsin modestly outpaced their rise in overall operating and capital spending.

Moving forward, much of what happens with spending on parks operations likely will depend on local governments, since they shoulder most of that responsibility in Wisconsin. U.S. Census Bureau data show Wisconsin ranks in the bottom half of states for parks and recreation operating spending overall, and second to last for spending at the state level.

Officials could look to enhance collaboration across local governments to provide parks and recreation amenities. If policymakers wish to consider increasing revenue for these programs, options could include increasing park and camping fees, expanding the amount of privately run indoor lodging at state parks, or allowing more sponsorships or advertisements.

Larger changes could include replacing vehicle admission sticker and state trail passes with individual park admission passes, or letting motorists buy a state parks sticker when renewing their vehicle registration.

Neighboring Minnesota offers a model for more robust investment in outdoor programs: Its voters in 2008 passed a sales tax of 0.375% to fund priorities that include conservation, clean water, parks and trails, ensuring clean water, and the arts.

This information is a service of the Wisconsin Policy Forum, the state’s leading resource for nonpartisan state and local government research and civic education. Learn more at wispolicyforum.org
One of the League’s primary legislative efforts is to reverse the decades-long slide in state support for municipal services such as police and fire protection, elections, and parks. While state financial support for these services, known as “shared revenue,” remains in the top 10 of “state programs,” it has struggled to maintain its place.

The shared revenue slice of the pie is at an all-time low. At one time, municipal services claimed a full 90% of state income tax revenue (at the time there was no state sales or corporate tax). When Wisconsin became the first state to adopt a constitutionally-defensible income tax, the bulk of the money, more than 90%, was to be returned to local governments.

Over the years, this came to be known as “Return to source” revenues, in recognition that the income was earned locally, and therefore the taxes generated should be used on local programming. In fact, the argument that most of the money would be returned to local governments was a major factor that helped convince Wisconsin voters to support the creation of the income tax.

As the state’s priorities ebbed and flowed over the years, first responders and other municipal services struggled to remain a state priority. The portion of state resources dedicated to other priorities grew and the local services share shrank.

Today, although the income tax and shared revenue are no longer directly linked, the percentage returned to local services would be roughly 15%, a significant drop from what the voters approved in 1911.

Apples-to-apples comparisons among different state programs are difficult, as programs are merged together, divided, or other changes are made. In real dollar terms, however, the fact is that shared revenues have shrunk significantly. Between 2001 and 2018, shared revenues to municipalities and counties went from $951.2 million to $825.4 million, a drop of more than 13% in real, not inflation-adjusted, dollars. When inflation is factored in, the drop is even more significant.

About the Author:

Jerry Deschane is the League’s fifth Executive Director since the League was founded in 1898. Contact Jerry with comments or questions at jdeschane@lwm-info.org
Picture yourself on a Saturday morning with a cup of coffee in hand. You sit down at the computer to finish up a work presentation you are expected to deliver the next week. You notice unexplained browser toolbars popping up and your device running slower than normal.

Then it happens… ATTENTION!! YOUR FILES ARE ENCRYPTED!! … reads a message on your PC.

Your heart sinks and your mind races through the files saved on your device. Has your network been hacked? When was the last external backup? How did this happen?

The message proceeds with ominous instructions for Bitcoin remittance in exchange for the decryption key. You call your IT department and you are instructed to disconnect your PC as the extent of the breach is determined.

This harrowing example is all too familiar: a seemingly innocuous work task turns into a violating and potentially costly nightmare for you and your organization.

Municipalities are a prime target for hackers because of the essential services they provide to citizens. Government entities are among the three biggest targets from small towns to big cities.¹ The FBI has reported state and local governments as visible targets for ransomware attacks.

Ransomware demands stop municipalities in their tracks. The business of servicing citizens is disrupted in a moment of crisis to either pay a faceless ransom demand, or press forward with an incident response that does not capitulate to a threat actor. Despite up-to-date antivirus software and appropriate internal controls, municipalities fall victim to malware infections every day. Many have an aversion, justifiably, to paying an extortion demand made by a cyber criminal. Often, the cost of recovery can outweigh the ransom demand. In the highly publicized cyber attack on the city of Atlanta, the extortion demand was $51,000 to be paid in Bitcoin. Atlanta refused and Mayor Keisha Lance Bottoms testified to congress in June of 2019 that the city had already incurred $7.2 million in associated costs.² The calculus of weighing present ransom costs against the costs of unseen, future vulnerabilities is at the center of what municipalities are facing nationally. Adding layers of defense to avert a potential cyber attack is not very costly and can protect the system network from infiltration from a cyber criminal. Best practices to prevent a ransomware infection include secure remote desktop protocol (RDP) with strong passwords, utilization of two-factor authentication, offline segregated backups, spam filtering and email configuration, and next generation anti-virus software.

In the winter of 2020, a supply chain attack was uncovered stemming from software provided by the IT management company, SolarWinds. SolarWinds had been breached nearly a year prior and its software, supplied to thousands of customers across all industries, was deployed with vicious malware. During the months that the malware went undetected, threat actors gained access to top secret government agencies and proprietary intellectual capital worth billions. The purpose of the attack appears to be espionage but also underpins the potential for supply chain attacks to be used with financial motives. Third-party vendor relationships are a necessary element to operating most municipalities. Proper vetting and active monitoring of a municipality’s supply chain is paramount.

It would be a nice twist if the moral of the opening story was that cyber risk could be mitigated by eliminating Saturday morning work, but the truth is, good cyber hygiene requires organizational buy-in at all levels, effective controls, a cyber incident response plan, and a business continuity plan that includes appropriate levels of insurance coverage.

The Municipality  |  April 2021
About the Author:

Based in Chicago, Nick Pottebaum serves as Vice President in Tokio Marine HCC’s Cyber & Professional Lines division specializing in bolt-on reinsurance placements for cyber and specialty insurance products. Nick joined Tokio Marine HCC in 2019 from CNA where he held leadership roles in both underwriting and corporate development. Nick has 13 years of industry experience and began his career at KPMG LLP. He is a CPA and CFA charterholder. Contact Nick at NPOTTEBAUM@tmhcc.com


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About 20 years ago, people began thinking differently about urban wood—originating from the forest just outside our front doors. At that time, the devastation caused by the emerald ash borer spurred communities to consider a new approach to managing urban tree removals.

Diverting urban wood logs from waste streams and utilizing them in more beneficial ways was not a new idea. But as the invasive beetle resulted in city and village streets peppered with fresh tree stumps, municipalities across the Midwest began to rethink how to maximize the value of the trees they had cut down as they developed response plans. The public also took heartfelt notice. Businesses, organizations, and community members began to assess the benefits of urban canopies that connect us to our natural world and the untapped economic, health, and environmental value in urban wood logs. At the same time, there was a growing interest in sustainable design and construction.

I have always imagined that at this transformational time, when so many were considering new ways to manage urban forests, someone at the back of a meeting hall raised their hand, and said, “We should utilize all of these trees.” It’s that realization that spurred what has been called the “Urban Wood Movement.”

Soon after, public and private efforts to process logs from urban trees—ash or otherwise—emerged and expanded. This effort helped turn what could have been a costly process into a potential revenue stream for industries built around wood.

As a result, Wisconsin soon emerged as a national leader in developing coordinated approaches to effectively utilize urban trees removed for unavoidable reasons, such as insects and storm damage. Urban trees from population centers across the state are being diverted from waste streams to higher-use destinations, reclaiming the value they provided and reinvesting it back into our communities.

Since its founding in 2014, Wisconsin Urban Wood (WUW) has partnered with the state and municipalities to increase urban forest benefits. In accordance with the WUW motto, members advance the sustainable recovery and highest and best use for the products of urban and community forests.

We continue to see how coordinated efforts to deliver on this commitment enrich our economy and our natural and built environments. Wisconsin’s 2020 Statewide Forest Action Plan stresses how our state’s strong history of collaboration among forestry stakeholders will be key to advancing strategies to sustain this natural resource, including the viability of urban wood utilization. Likewise, the Wisconsin Urban Forestry Council has led several efforts to support coordinated urban wood utilization strategies, including creating an urban wood utilization issue group, encouraging academic institutions to include urban wood utilization in curriculum, and having design and building representatives on the council to advise on urban wood matters. Collaboration is truly the way forward.

To understand how the urban wood industry is moving Wisconsin communities forward as leaders in urban wood utilization, it is helpful to look at WUW’s origin. In the early days of the “Urban Wood Movement,” I attended many events throughout the Midwest on the emerald ash borer and utilization of “nontraditional” urban wood. A popular attraction at these events was the portable sawmill. Seeing the sawmill turn these logs into quality boards highlighted the innate potential in urban wood.

As awareness of the benefits of this natural resource continued to grow, so did the need for the infrastructure, supply chain, and industry standards to move the logs and their benefits into our built environments. Many asked these early event organizers,
“What are you going to do with all of that lumber?” Answering this question is what ultimately inspired the urban wood movement to come together in an official capacity as WUW.

While wood has been considered, specified, and sourced much the same way for around a century, here we were with a new resource, controlled in every way by nature – from supply to appearance. Essentially, we were offering a new wood product in a market with existing familiar, well accepted, and highly standardized materials options.

To respond to the abundance of urban wood logs and potential, WUW members – representing cities, government agencies, arborists, sawmills, woodworkers, and beyond – began dedicating their expertise to connect each link in the urban wood supply chain, making productive, profitable use of these logs. They began working with municipalities and counties to establish models for efficiently managing this resource, customizing strategies to meet communities’ unique needs, capacity, and cultures.

The urban wood movement was successfully uniting industries and communities, bringing people together in stewardship of the trees from the places we collectively call home. WUW gave an official voice to the state’s urban wood industry. And eventually, WUW inspired the establishment of the Urban Wood Network, connecting our state to a larger national effort. WUW is now a chapter of the Urban Wood Network, as well as the catalyst for its creation.

Awareness, demand, and confidence in this precious resource continue to increase. Urban wood can now be specified like any other wood product and is being used in more and more projects. It can be found on construction sites and in large-scale projects like the Fiserv Forum in Milwaukee. Furthermore, opportunities to maximize utilization of urban trees and capture their natural benefits can be found in almost all communities across our state. According to a 2001 USDA Forest Service report, if recovered and repurposed, wood from our country’s urban forests could produce nearly 4 billion board feet of lumber annually. More recent studies estimate a number greater than 7 billion board feet.

Looking to the future, WUW stands ready to support more Wisconsin municipalities in developing approaches to get the most from their urban forest products and expand the public benefits of trees. Members advise and support all links in the urban wood supply chain and all areas of urban forestry management. They guide cities to strengthen their supply of this raw material for everything from chips to pulp, and most importantly, the high-value saw logs that feed established and new markets. WUW helps communities reap the benefits of full-circle urban forest management. Communities that direct their urban trees to WUW members are assured that their origin will be maintained, they will be properly milled and kiln dried to standards, and their benefits will be returned back to the community.

**Stoughton Wisconsin Serves as a Model**

WUW proudly refers to the multi-organization model for recovery of urban wood as the “Stoughton Model.” In this model the city forester takes a leading role in developing relationships with community members and organizations to recover and use wood from urban tree removals. The forester provides logs or lumber; the groups process, make, and sell products made from the city trees; and in Stoughton’s case, a local industry provided funds to build their first portable solar-electric kiln. Money made from the wood is used to support the individual programs.

City of Stoughton’s Forester, John Kemppainen, works with the local high school wood shop teachers, the senior center, and local industry to sustain its urban wood program. The city’s efforts garnered regional and national attention for recovering Stoughton’s trees to produce lumber, a system for urban wood education and outreach, and a community-based tree ethic.
While urban wood utilization models look different from city to city, working with WUW to create and incorporate them into municipal management plans yields consistent returns, including cost savings, job creation, carbon emissions reduction, and reinvestment in the local economy. Most importantly, the effort enriches lives, strengthening residents’ connection to trees.

Together, WUW and communities are coming together to transform how we see and steward the trees outside our front doors. For municipalities interested in moving forward with their urban wood utilization, WUW welcomes your call. As a resource and reliable partner, our network is here to help you capture the complete worth of your community trees from seed to sawdust.

About the Author:
Dwayne Sperber has dedicated himself to building the urban wood industry. Dwayne is called on to provide urban wood utilization guidance and products across sectors including municipalities, academia, arborists, design professionals, manufacturers, and suppliers. Dwayne is the owner of Wudeward Urban Forest Products, a member of the Wisconsin Urban Forestry Council, board member of the Forest Exploration Center, and founding member and advisor of Wisconsin Urban Wood and the Urban Wood Network. Contact Dwayne at dwayne@wudeward.com Learn more about Wisconsin Urban Wood at www.wisconsinurbanwood.org

Tree Diversity Made Easy
Mark Freberg, Jeffrey Treu, and the WIDNR Urban Forestry Council, Tree Species Diversity Issue Group

Dutch elm disease of the 1960s taught us a lesson about the importance of tree diversity in our urban forests. Maple, ash, honeylocust, and linden were mainly used to replace the elms that died. We made progress, but the limited types of trees available meant our urban forests were still not diverse enough. About 20 years ago municipal foresters started practicing the 10/20/30 rule: 10% species, 20% genus, and 30% family of any one type of tree. A current tree inventory can provide information to work toward this desired goal. One easy solution for increasing diversity is to reduce plantings of maple, honeylocust, and linden if those tree species are abundant. “Don’t put all your eggs in one basket” applies to tree selection too.

Achieving species diversity is a gradual process and it takes persistence, but it can be accomplished one tree at a time. Check the League’s website for a full copy of this article, providing a list of tree species resources https://lwm-info.org/828/ The-Municipality-Magazine
This article explores how the rule of law applies to decisions made by municipal officials. In particular, it examines differences between how the rule of law applies to broad-based policy decisions (such as adopting a budget or enacting a new law of general application) on the one hand, and decisions about specific projects or individuals on the other.

There is a noticeable difference between how candidates for legislative office and candidates for judicial office conduct themselves. Candidates for legislative office are free to be vocal about their positions on matters of public policy and how they would vote on specific legislative proposals. This information helps voters evaluate candidates and decide who they want to support. Legislators are expected to be responsive to public sentiment. Candidates for judicial office walk a different line, particularly when talking about how they would vote on specific issues that might come before them if they are elected or appointed to serve. We see this dynamic play out dramatically in hearings before the Senate Judiciary Committee to consider nominees to the United States Supreme Court or other judicial offices. Senators push the nominee to explain their position on issues that may come before the court, and the nominee carefully explains that they cannot prejudge a matter that is likely to come before the court.

Members of city councils and village boards are in an interesting position, because on some days they make legislative decisions, and on other days they are called upon to make quasi-judicial decisions. At times, matters can be made even more difficult by requiring local officials to make quasi-judicial decisions in a politically charged atmosphere, frequently involving specific land use proposals.

Local officials make countless decisions about specific land use and development proposals. Examples include decisions about conditional use permits, site plan approvals, variances, and virtually any other situation in which a person is requesting some kind of special zoning approval or permission required under a zoning code. Other examples include land divisions and requests for special exceptions under land division regulations. Outside the land use context, officials decide whether they may consider a person’s arrest and conviction record in alcohol licensing decisions, decide cases involving the suspension or revocation of an alcohol license, and decide disciplinary matters before police and fire commissions. In all of these types of cases (land use or otherwise), sometimes called quasi-judicial proceedings, officials must make factual determinations about an individual situation, and then apply the applicable law to those facts. The decision-making process and elements of due process of law in quasi-judicial decisions are fundamentally different from legislative, policy decisions.

One essential element of quasi-judicial decision-making is a fair and impartial decision-maker. In a case called Marris v. City of Cedarburg, the Wisconsin Supreme Court considered an appeal from a board of zoning appeals decision about whether Marris’ property had lost its legal nonconforming use status. Marris claimed the chairperson of the board had prejudged her case before the hearing, based on several statements the chairperson made before the hearing, including referring to Marris’ legal position as a “loophole” in need of “closing,” and suggesting that the board should try to “get her [Marris] on the Leona Helmsley rule.” (Leona Helmsley was convicted of federal income tax evasion and other crimes in 1989.) The court noted that zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate area, and the adjudicative, legislative, and political nature of the zoning process. The court determined that the chairperson’s statements indicated prejudgment of the case, and created an impermissibly high risk of bias, requiring reversal of the decision.

The principle that an applicant is entitled to a fair and impartial decision maker reminds me of an understandable but concerning approach I once observed a local official take with a conditional use permit applicant. A homeowner had requested approval of something that required conditional use approval. The plan commission chair told the applicant that they should work...
with their neighbors to address the neighbors’ concerns before asking the plan commission for a decision. The plan commission chair saw this as simply encouraging people to be good neighbors. But in the case of a quasi-judicial decision, an applicant should not be asked to work out a solution with neighbors. On the other hand, if an applicant is seeking to rezone their property, then it is legally appropriate to consider political support or opposition to the proposed zoning change, and an applicant would be well-advised to consult with their neighbors and build political support. This is because changing zoning is legislative in nature, while acting on a conditional use permit application is quasi-judicial.

To serve as an impartial decision-maker, I recommend following a few simple rules. First, don’t discuss the case with anyone outside the official proceedings. If constituents (or even the applicant) want to discuss the case, don’t do it. Don’t allow yourself to be “lobbied” on quasi-judicial matters. Second, don’t attempt to investigate the facts of the case on your own, outside the official proceedings. Allow the facts to be developed and presented during the formal proceedings. Third, be judicious about what you say about the matter, at all times.

Another essential element of quasi-judicial decision-making is to make factual findings based on evidence, and specifically evidence presented during the official proceedings. Although the rules of evidence that would apply in a courtroom don’t apply to a hearing on a conditional use permit, decisions in those and similar proceedings must be based on “substantial evidence.” The Wisconsin legislature recently adopted legislation expressly requiring “conditional use” decisions to be based on substantial evidence. Wis. Stat. § 62.23(7)(de). The statute defines “substantial evidence” as “facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.” This definition can prove challenging, particularly for members of the public who want to be heard at a public hearing, but are not versed in the law defining substantial evidence. Speculative assertions and personal opinions will not provide a legitimate evidentiary basis to support a decision.

A third essential element of quasi-judicial decision-making is for decisions to be based on existing legal standards. The decision-maker’s job is to apply the “substantial evidence” to the applicable legal standards, and use that process of legal reasoning to make a decision. This process of making decisions is the essence of what it means to be a government of laws, and also shows the intersection between legislative decision-making and judicial decision-making. I once saw a city alderperson faced with voting on a development proposal say something like, “we tell them what to do, they don’t tell us what to do.” In the context of passing legislation, that is true enough. But once a specific development application is made, the time for legislating is over, the time for judging has begun, and then it is the law that must guide the decision, not policy preferences or responses to public sentiment.

The requirement that decisions be based on existing law is brought home by Wis. Stat. § 66.10015(2), which states: “if a person has submitted an application for an approval, the political subdivision shall approve, deny or conditionally approve the application solely based on existing requirements, unless the applicant and the political subdivision agree otherwise.” Decisions in individual cases must be based on the law, and once an application has been submitted, it is too late to change the rules. If you care about the quality of land use and development in your community, the important takeaway is this: an ounce of prevention (i.e., forward-thinking legislation to guide future decision making) is worth a pound of cure (i.e., attempting to force a proposed development to conform to your policy preferences without existing legal standards to achieve that result). Investments in careful planning (such as a Comprehensive Plan), and carefully crafted zoning, land division, building, stormwater management, and other standards are the key to achieving your desired policy outcomes.

Finally, I don’t want to leave the impression that legislative decisions can be made without regard to the rule of law, because there are legal constraints even when legislating. Some legal constraints are obvious, such as constitutional prohibitions on legislation that discriminates on the basis of race. The more common and difficult problem, particularly in the context of land use regulation, is the need to provide adequate standards when adopting legislation to guide future decision-making. It is common, for example, for a zoning code to define certain uses as conditional uses, and require a plan commission to evaluate proposed conditional uses on a case-by-case basis, based on the specific circumstances of the case. As discussed above, those individual cases must be decided based on the existing standards in the ordinance. The challenge then, is to adopt legally sufficient standards that will achieve the desired policy result.

For example, imagine an ordinance that says a plan commission must approve a conditional use only if it thinks the proposed conditional use is a “good idea” at the proposed location. Most of
us would find that to be an unhelpful standard for a plan commission to follow. There is good reason to think that it would be more than unhelpful, and cross the line into legally insufficient territory. But the “is it a good idea” standard is not very different from a conditional use standard that is fairly typical in zoning codes, and that requires the plan commission to determine whether a proposed conditional use is “contrary to the public health, safety, and general welfare” at the proposed location. The legislature has provided some direction on this issue in Wis. Stat. § 62.23(7)(de)2.b., which states that the requirements and conditions for obtaining a conditional use permit that are specified in a zoning ordinance “must be reasonable and, to the extent practicable, measurable....”

In conclusion, whether legislating or judging, there is no escaping the rule of law. While that can make our jobs more challenging at times, in the end that is what makes us truly different from political systems that are not based upon the rule of law. That is what protects us from arbitrary and capricious decisions by those in power. As municipal officials, you are custodians of the rule of law. Keep it well.

Powers of Municipalities 941

About the Author:
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Costly Missteps

Controversial land use decisions are already challenging, but decisions that do not follow appropriate procedures can cost both wasted time and money. The League of Wisconsin Municipalities Mutual Insurance (LWMMI) provides liability insurance for most of Wisconsin’s cities and villages, and CEO Matt Becker said, “Undoubtedly, land use cases are among the highest-dollar claims brought against them. The cost of doing it wrong can easily run into the millions. Even winning can cost a lot of money.” He cited a couple recent examples (details removed for confidentiality).

A development was rejected by a village, resulting in a lawsuit that raised issues of equal protection, open meetings, and due process law violations, and alleging a conflict of interest on the part of one board member. The lawsuit was settled, but not before $150,000 in legal costs were spent defending the village.

Another development case claimed more than $50 million in damages. The property owner filed a public records demand that ran thousands of pages. That request shut down city hall for a time. Although both issues have been settled, legal costs for both parties reached six figures.

“Land use controversies come with the job for local officials,” Becker concluded. “You may not be able to please all sides; council members and trustees need to respect everyone in the process, understand the law and local ordinances, and listen carefully to the guidance of their legal counsel.”
Local governments primarily regulate land use through planning, and zoning and land division regulations. Although zoning and land division regulations sometimes overlap (e.g., both might regulate lot size), these powers’ sources of authority are distinct and the regulations differ in nature. Sometimes the characterization of an ordinance as zoning or subdivision will impact its validity. This article provides a basic overview of zoning and subdivision regulatory authority and then summarizes a recent Wisconsin Supreme Court decision reviewing the framework Wisconsin courts use to determine whether a regulation is a zoning or subdivision regulation and demonstrating how that determination impacted the regulation’s validity.

Zoning Authority

Wisconsin Stat. § 62.23(7)(am) grants Wisconsin cities and villages zoning authority to “promot[e] health, safety, morals or the general welfare of the community.” Accordingly, cities and villages may enact zoning ordinances regulating and restricting “the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, subject to s. 66.10015(3) the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures.” Through zoning, cities and villages may divide the municipality into districts and, within such districts, regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land.”

Zoning regulations must be made in accordance with a comprehensive plan, and “designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to preserve burial sites . . . .” Such regulations shall be made with “reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.”

Municipalities with a plan commission and adopted zoning ordinance may follow the specific process outlined in Wis. Stat. § 62.23(7a) to exercise extraterritorial zoning power in unincorporated areas within their extraterritorial jurisdiction.

Land Division Regulations

Chapter 236 of the Wisconsin Statutes governs platting of lands and recording and vacating of plats. It imposes certain minimum requirements and defines “subdivision” as a division of a lot, parcel, or tract of land by the owner or the owner’s agent for the purpose of sale or of building development and to which any of the following applies:

1. The division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area.
2. Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years.

Under § 236.45(2)(ac), any municipality, town or county that has established a planning agency may enact a subdivision ordinance that is more restrictive than ch. 236, except that local subdivision ordinances may not be more restrictive regarding ch. 236 time limits, deadlines, notice requirements, or other provisions that protect a subdivider.

Like zoning regulations, subdivision regulations should promote the community’s “public health, safety and general welfare . . . .” Subdivision regulations should be “designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land” and must be “made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the
buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.”

Local subdivision ordinances may include provisions regulating divisions of land into parcels larger than 1 1/2 acres or divisions of land into less than 5 parcels, and with certain exceptions may prohibit the division of land in areas where such prohibition will carry out the above purposes. A local subdivision ordinance may regulate land division within the municipality’s extraterritorial plat approval jurisdiction as well as within the municipality’s corporate limits. Where multiple governing bodies or agencies have authority to approve or object to a plat and the requirements conflict, the plat shall comply with the most restrictive requirements. Any municipality may waive its right to approve plats within its extraterritorial plat approval jurisdiction by a resolution of the governing body recorded with the register of deeds incorporating a map or metes and bounds description of the area outside its corporate boundaries within which it shall approve plats. A municipality may rescind this waiver at any time by resolution of the governing body recorded with the register of deeds.

A municipality may not deny approval of a plat or certified survey map under §§ 236.45, 236.10 or 236.13 on the basis of the proposed use of land within the municipality’s extraterritorial plat approval jurisdiction, unless the denial is based on a plan or regulations, or amendments thereto, adopted by the governing body under § 62.23(7a)(c).

Recent Wisconsin Supreme Court Decision

Although zoning and subdivision regulations share common purposes, they differ in nature and the authority to enact them comes from distinct sources. A recent Wisconsin Supreme Court decision, Anderson v. Town of Newbold, 2021 WI 6, demonstrates the relevance of a regulation’s characterization as zoning or subdivision and reviews the framework Wisconsin courts use to determine whether a regulation is properly characterized as zoning in nature.

Anderson sought certiorari review after the Town of Newbold plan commission denied his request to divide his lakefront property with 358.43 feet of frontage into two separate lots, one with 195 feet of shoreline frontage and one with 163.43 feet of frontage. The commission’s denial was based on a town ordinance requiring lots on Lake Mildred to have a minimum width of 225 feet. Anderson claimed the town ordinance was a shoreland zoning ordinance and that Wis. Stat. § 59.692 prohibited the town from enforcing local shoreland zoning standards that were more restrictive than state law. The town claimed the ordinance was a lawful exercise of its subdivision regulation authority. The circuit court held that the town’s ordinance was a subdivision ordinance rather than a shoreland zoning ordinance and that the town had authority to enact it. The court of appeals affirmed, as did the Wisconsin Supreme Court in a 5-2 decision.

In reaching its decision, the Court reviewed the purpose behind limitations on shoreland zoning and earlier case law establishing that while zoning and subdivision regulations may overlap, they provide separate and distinct means of regulating land development. The earlier cases instruct that if a regulation is authorized by and within the purposes of ch. 236, the fact that it may also fall under the zoning power does not preclude a local government from enacting the regulation pursuant to the conditions and procedures of ch. 236.

In concluding that the town ordinance was not a zoning ordinance, the Court reviewed the functional framework it laid out in Zwiefelhofer v. Town of Cooks Valley, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362, when it concluded that a town’s nonmetallic mining ordinance was not a zoning ordinance and therefore did not require county approval. This functional approach catalogs the characteristics of traditional zoning ordinances and commonly accepted zoning purposes and examines the ordinance in question to determine whether it should be classified as a zoning ordinance. No single characteristic is dispositive, and the conclusion is not a simple tally of the similarities and differences. The analysis must be specific to the ordinance at issue and, depending on the circumstances, some characteristics, may be more significant than others.

The following nonexclusive list of characteristics of a zoning ordinance inform a court’s determination of whether an ordinance is a zoning ordinance:

• Zoning ordinances typically divide a geographic area into multiple zones or districts.
• Within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited.
• Zoning ordinances traditionally control where a use takes place versus how it takes place.
• Traditionally classifying uses in general terms, zoning ordinances attempt to comprehensively address all possible uses in the geographic area.
• Zoning ordinances traditionally make a fixed, forward-looking determination regarding what uses will be permitted as opposed to case-by-case determinations.
• Traditional zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to continue said use despite not conforming to the ordinance.

Noting that subdivision ordinances must be liberally construed in favor of subdivision authority, the Court stated that the first two characteristics (dividing a geographic zone into multiple zones or districts and allowing or prohibiting certain uses) were dispositive here and that the absence of any use restriction – the hallmark of a zoning ordinance – established that the town’s ordinance was not a zoning ordinance. Because the shoreland zoning restrictions in § 59.692(1d) only applied to ordinances enacted under that section, it did not preclude the town from regulating lot frontage pursuant to its subdivision authority under ch. 236.

Platting 174 and Zoning 526

1. Wisconsin Stat. § 62.23 applies to villages by virtue of Wis. Stat. § 61.35.
3. Wis. Stat. § 66.1009(3) limits down zoning ordinances. A “down zoning ordinance” is a zoning ordinance that decreases the development density of the land to be less dense than was allowed under its previous usage or that reduces the permitted uses of the land, that are specified in a zoning ordinance or other land use regulation, to fewer uses than were allowed under its previous usage. Wis. Stat. § 66.1009(1)(c).
4. A comprehensive plan is “a guide to the physical, social, and economic development of a local governmental unit” and must address 9 elements (issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural and cultural resources; economic development; intergovernmental cooperation; land use, and implementation). Wis. Stat. § 66.1001(1)(a)2 and (2). For cities and villages, the comprehensive plan is the “master plan” adopted under Wis. Stat. § 62.23(3) to guide and accomplish a “coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote public health, safety, morals, order, convenience, prosperity or the general welfare, as well as efficiency and economy in the process of development.”
5. Wis. Stat. § 62.23(7)(c).
6. Id.
7. Extraterritorial zoning jurisdiction means the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village. Wis. Stat. § 62.23(7a)(a).
8. Wis. Stat. § 236.02(12)(am). “Subdivision” does not include a division of land into 5 or more parcels or building sites by a certified survey map in accordance with an ordinance enacted or a resolution adopted under § 236.34(1)(ar). Wis. Stat. § 236.02(12)(bm).
10. Id.
12. This is the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village. Wis. Stat. § 236.02(5).
14. Wis. Stat. § 236.10(5).

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A “100% healed” policy is one that requires employees to be released by their health care provider with no restrictions prior to returning to their jobs. These policies can violate state and federal disability discrimination laws and employers should eliminate or edit them to minimize legal exposure. This article examines the reasons these policies should change and outlines alternatives.

**Disability Law Provisions**

The federal Americans with Disabilities Act (ADA)\(^1\) and the Wisconsin Fair Employment Act (WFEA)\(^2\) require that employees with a disability be provided a reasonable accommodation, if one exists and if it does not pose an undue hardship or direct threat to safety. Reasonable accommodation is any change or modification to a job, to the way an employee performs a job, or to the work environment that allows an employee with a disability to perform his or her job.

The ADA obligates employers to engage in an “interactive process” with a disabled employee to determine what reasonable accommodations exist that permit the employee to work despite the disability. The term “interactive process” simply refers to the obligation on both the employer and the employee to have a discussion around how to accommodate an employee’s disability.\(^3\)

The WFEA does not expressly speak to an interactive process. However, court and administrative decisions have held that employers must discuss with employees what reasonable accommodations exist, and that a violation of the WFEA occurs if the employee can show that a reasonable accommodation would have been identified had the employer engaged in that discussion.\(^4\)

**How 100% Healed Policies Violate the Law**

A requirement that an employee be 100% healed violates disability laws because it does not allow for interactive discussion to determine whether an employee’s restrictions can be reasonably accommodated; there is nothing to discuss because the policy mandates that employees return only when they are healed.

“An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is, be “100%” healed or recovered – if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship. Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a ‘direct threat.’”\(^5\)

The Equal Employment Opportunity Commission (EEOC) looks closely into allegations that an employee has been adversely affected by a 100% healed policy, and it has targeted employers who have these policies over the past few years. One such case is instructive.

The employee in a lawsuit filed by the EEOC against a beverage company worked as a warehouse manager. He suffered an embolism and was hospitalized. The employee requested to return to work after his health provider released him to return with lifting restrictions. The company refused the request, insisting that he be fully healed before returning to work. The employee asked for additional unpaid leave to recover enough to comply with the completely healed requirement, but was terminated instead.

The EEOC filed a federal court lawsuit against the employer in September 2019, and the EEOC’s regional attorney and district director stated at that time:

“Employers cannot simply deny a request for accommodation because of a policy; the ADA requires employers to engage in the interactive process and offer reasonable accommodation. Employers have an obligation to give individualized consideration to reasonable requests for accommodations. Too often, instead of working with an employee with a disability to find an accommodation that works for all parties, employers simply fire employees seeking accommodation instead of meaningfully engaging in the interactive process required by the ADA.”\(^6\)

**Practical Application**

The case illustrates employer obligations to consider all requests for accommodations, to give each one individual consideration, to engage in the interactive process, and to eliminate requirements for 100% healing prior
to return to work.\textsuperscript{7} Employers should rewrite policies to reflect these principles.

The law does not consider every employee with a medical condition to be disabled as that term is defined under state or federal law. However, the analysis of who meets the statutory definitions of a person with a disability is a decision best made in consultation with an employment attorney.\textsuperscript{6}

Absent this consultation, the safest course of action is to treat a request for return to work with restrictions as one for reasonable accommodation, and to engage in an interactive discussion with the employee to determine what accommodations exist that permit the employee to perform the job despite the restrictions. Employers should document all discussions, and should train their managers to understand the obligations involved in returning an employee to work.

Conclusion

Employers should eliminate any policy or practice that requires employees to be 100\% healed before they can return to work. They should rewrite policies to be flexible and allow an employee to return to work, even with restrictions, provided the employer can accommodate those restrictions without undue hardship or posing a direct threat to safety.

Employees 370

\begin{itemize}
\item 1. 42 U.S.C. §§ 12101 et seq.
\item 2. Wis. Stat. §§ 111.31-111.395.
\item 5. Equal Employment Opportunity Commission, Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016); see also Kaufman v. Petersen Health Care Vll, LLC, 769 F.3d 958 (7th Cir. 2014) (permitting an employer to require that an employee be 100\% healed would negate the ADA's requirement that an employer provide reasonable accommodation if it enables an employee to perform his job).
\item 6. https://www.eeoc.gov/newsroom/eeoc-sues-allsite-beverage-disability-discrimination
\item 7. For the same reasons expressed in this article, employers should not have mandatory leave cut-off policies, for example, a policy that calls for an employee's termination after 12 weeks of leave. These policies have been deemed unlawful by the EEOC as well.
\item 8. A common misconception is that work comp injuries are not covered by disability laws; however, work-related injuries are subject to the same analysis under disabilities laws as any other medical condition.
\end{itemize}
Robert Heinlein, the so-called dean of science fiction writers, wrote in *Time Enough for Love* that “progress isn’t made by early risers. It’s made by lazy men trying to find easier ways to do something.” So it is with electronic meetings – something for many of us that was born from COVID-19 necessity. Yet, as the pandemic wanes, the push to continue with electronic meetings will be made largely because they are convenient and easy. Many do not see progress here, but instead fear of running afoul of proper parliamentary procedure or, worse, Wisconsin’s Open Meetings Law.

The fears of this technological advance are not unjustified. However, as Isaac Asimov once noted, “any technological advance can be dangerous. Fire was dangerous from the start, and so (even more so) was speech - and both are still dangerous to this day - but human beings would not be human without them.” Thankfully, at least from a parliamentary procedure perspective, any fears that might have existed may be allayed with the recent publication of *Robert’s Rule of Order Newly Revised* (RONR, 12th Ed.).

For the first time the RONR expressly contemplates electronic meetings for a parent body such as a common council or village board. Initially, it is important to note that under RONR 9:30, the default provision for these bodies is that a meeting must be held as a “single official gathering in one room or area.” Electronic meetings for a parent body must be expressly authorized in the bylaws for the body. RONR 9:31. For a governmental body, this means your code of ordinances should authorize electronic meetings. Accordingly, if your municipal code adopts Robert’s Rules but you have not codified authority to hold electronic meetings, a conflict exists that could subject actions taken to potential legal challenges.

In making the decision to authorize electronic meetings, RONR advises that specific rules should be established to guide participation in the meeting, keeping in mind that “simultaneous aural communication is essential to the deliberative character of the meeting.” RONR 9:34. To assist in this regard, the 12th Edition includes a 14-page appendix with sample rules that could be used depending on the type of electronic meetings to be used by the body.

Before addressing the suggested rules, the oft-repeated caution about Robert’s Rules should be repeated here – the rules are drafted with larger deliberative bodies in mind, and they often do not translate well to smaller local government bodies. The suggested rules provide an excellent example of this caution in that they do not include any rules related to access and/or participation in an electronic meeting by members of the public.

Perhaps such rules are unnecessary for large deliberative bodies, but for local governments in Wisconsin such rules are critical since they help address many fears raised by electronic meetings under the Open Meetings Law. You should discuss your rules with your municipal attorney to ensure your electronic meetings do not run afoul of the Open Meetings Law.

The sample rules proposed in RONR are based upon four meeting scenarios. First, a full-featured internet meeting. This meeting type utilizes an internet service that integrates audio and/or video with text and voting capabilities. The second meeting type is a mixed telephone and internet meeting. Here, participants utilize the phone to communicate and the internet for the purpose of having secret votes and sharing documents. Third is a speakerphone meeting. Under this approach, the majority of members meet in person while some members may call in to participate by speaker phone. Finally, the telephone-only option, which is self-evident.

Within these meeting scenarios, the proposed rules address multiple aspects that you will want to consider should you wish to authorize electronic meetings. On the simpler side, the rules address how notice of the meeting is provided and the process for attending the meeting. More complex considerations include how to count a quorum depending on the location of members, how to handle motions and voting, and technical issues like if and when a member can be forcibly muted or disconnected.
This column cannot address all of the permutations because those communities that choose to authorize electronic meetings will each do so in different ways. Those communities that choose to go this route are well-advised to review all of the proposed rules to best tailor your rules to your meeting structure. As discussed above, such review should also involve an analysis of the Open Meetings Law to ensure there is no conflict with your rules.

About the Author:

Brian C. Sajdak is a member of Wesolowski, Reidenbach & Sajdak, S.C. where he serves as municipal counsel to multiple southeast Wisconsin municipalities. In addition to his municipal law practice, he also practices in the areas of zoning and land use, condemnation, tax assessment, civil litigation, and real estate law. Mr. Sajdak earned his B.S. degree from the University of Wisconsin-Madison and his J.D. degree from Marquette University Law School. He is a member of the State Bar of Wisconsin where he is a member of the Administrative and Local Government Law Section and the Government Lawyers Division. Mr. Sajdak served two terms on the Administrative and Local Government Law Section Board, including serving as the Chair of the Section, and is a past Co-Chair of the Public Education Committee’s Publications & Technology Task Force. Contact Brian at brian@wrslegal.net

1. For additional coverage of the changes in the 12th Edition of Robert’s Rules, see the “For the Good of the Order” columns in The Municipality by Daniel Foth in the September 2020 and Michael May in February 2021.
2. All subsequent citations in this column to RONR are to the 12th Edition.

Legal Captions

Employees 370
HR Matters article by Attorney Lisa Bergersen explains how “100% Healed” policies, requiring employees to be released by their health care provider with no restrictions prior to returning to their jobs, can violate state and federal disability discrimination laws. To minimize legal liability such policies should be eliminated or rewritten to be flexible and allow an employee to return to work, even with restrictions, if the employer can accommodate those restrictions without undue hardship or posing a direct threat to safety.

Platting 174
Zoning 526
Article provides overview of Wis. Stat. § 62.23(7) zoning authority and § 236.45 local subdivision regulation authority and summarizes Wisconsin Supreme Court decision in Anderson v. Town of Newbold, 2021 WI 6, which reviews functional analysis courts use to determine whether an ordinance is a zoning ordinance and holds town ordinance imposing minimum width on lakefront lot was a lawful exercise of town’s subdivision authority rather than a shoreland zoning ordinance regulating shoreland zoning more restrictively than state law.

Powers of Municipalities 941
Article by attorney Matt Dregne (Stafford Rosenbaum LLP) emphasizes importance of rule of law, particularly in context of land use decisions, and distinguishes how it applies when making legislative decisions versus when making quasi-judicial decisions that require an impartial decision-maker to decide a particular matter after making factual findings based on evidentiary record and applying existing legal standards.

Board of Review Training Requirement

The Board of Review (BOR) hear property owners’ objections to their tax assessments. In 2021, Wisconsin Law requires that at least one member of the BOR obtain Wisconsin Department of Revenue (DOR) approved training within two years of the BOR’s first two-hour meeting. While it is recommended that all BOR members be trained, the law requires that only one member undergo training. (Wis. Stat. §§ 70.46(4) & 73.03(55).) Only 2021 training is certified.

The UW-Madison Division of Extension Local Government Education, the Wisconsin Department of Revenue (DOR), the Wisconsin Towns Association, and the League of Wisconsin Municipalities again partnered to develop the 2021 Board of Review (BOR) training. A new “How to Conduct a Board of Review Hearing” video and updated materials are available here: https://localgovernment.extension.wisc.edu/board-of-review-training/
# Upcoming Events & Workshops

## April-August 2021

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<td>April 20</td>
<td><strong>Cyber Security Workshop</strong></td>
<td>Webinar</td>
<td>2PM-3:30PM</td>
<td>$25 (free to LWMMI Insured)</td>
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<td>Multiple Dates to Choose from:</td>
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<td>May 7, May 21, and June 4</td>
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<td><strong>Local Government 101 Webinar</strong></td>
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<td>9AM—4PM</td>
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<td>June 9-11</td>
<td><strong>Clerks, Treasurers, &amp; Finance Officers Institute</strong></td>
<td>Webinar</td>
<td>9AM—4PM</td>
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<td>August 19-20</td>
<td><strong>Chief Executives Summer Workshop</strong></td>
<td>In-Person</td>
<td>9AM-4PM</td>
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<td>August 30-September 1</td>
<td><strong>Attorneys Institute</strong></td>
<td>In-Person</td>
<td>9AM-4PM</td>
<td>$295 Member</td>
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<td><strong>Elkhart Lake, Osthoff Resort</strong></td>
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Don’t forget our monthly Membership Roundtable. Free and open to all members. Second Tuesday of every month at noon.

More information on the League website! [www.lwm-info.org](http://www.lwm-info.org)

Note: For in-person events, the League will closely monitor the COVID-19 pandemic situation. Decisions to hold these events in-person will be confirmed with careful consideration, keeping the health and safety of our members at the forefront. If in-person event is cancelled due to COVID-19, our intent is to hold the event virtually on same days.
Transitions

City Administrator: Eagle River - Robin Ginner; Rhinelander - Zach Vruwink
City Administrator/Utilities Manager: Plymouth - Jordan Skiff
Directed Enforcement Officer - PC: Howard - Brandon Dhuey
Director of Operations: Lodi - Terry Weter

Director of Public Works: Black Earth - Matt Kahl; Browntown - Brian Wilde; Fitchburg - Bill Balke; Fond du Lac - Paul DeVries; Neillsville - Luke Fremoth; Sturtevant - Jack Feiner
Finance Director: Racine - Kathleen Fischer
Trustee: Black Earth - Jared Brammerson, Scott Patchin
Village Administrator: Greenville - Travis Parish

RETIRESMENTS

Niagara. Mayor George Bousley is retiring after 32 combined years with the city (formerly village) of Niagara. He served from 1975–1995 and from 2009 to the present. He also served on the League Board from 1984-1986. In addition, George was a Marinette County Board Supervisor from 2000 – 2012, including eight years as the Chairman, and he served in the US Army from 1957–1963. During his tenure, George managed many changes to the community's infrastructure, including 14 years of working to bring natural gas to Niagara. He organized a group of committed volunteers to celebrate Niagara’s centennial in 2014 (that was quite the celebration!) and always treated citizens and businesses fairly and respectfully.

George and his wife of nearly 65 years, Rose, have 5 children, 14 grandchildren, and 3 great-grandchildren. Every governor since 1973 has visited Niagara, except for Governor Evers, and Mrs. Bousley has made her “famous” chocolate chip cookies for their visits.

One more fun fact: George runs or walks every day and, as of March 9 has logged 27,673 miles since he retired from his business in 1999. (It is 24,901 miles around the earth.)

Have an update? Please send changes, corrections, or additions to Robin Powers at rpowers@lwm-info.org, fax (608) 267-0645 or mail to the League at 131 West Wilson Street, Suite 505, Madison, WI 53703

Board President, Todd Schmidt

Empathy is the ability to see things from someone else’s point of view. Empathy involves viewing people for their essential human worth and gives acknowledgement to how they feel.

“Especially in these uncertain and turbulent times, leaders won’t be able to help team members adapt without understanding and acknowledging their emotions and feelings. As leaders advance in their careers, it is the soft skills that produce hard results. Empathy is a foundational soft skill. For leaders, empathy is a superpower.”

Longtime City Manager Dr. Frank Benest wrote this conclusion in his October 2020 issue of ICMA Career Compass. Dr. Benest gave five reasons as to why empathy is critical to being an effective leader, especially now amidst crisis. He explains that empathy… 1) creates connections and relationship, 2) enhances influence in times of turbulence, 3) informs leaders with data related to feelings and emotions, 4) allows better comprehension of opportunities and challenges, and 5) affords understanding true life experiences of those we serve.

As we strive in local government to lead with humility, let’s commit to be empathetic with others as a core superpower. If you have the perfect story of how being humble and empathetic has benefitted your community and those you lead, please let me know. I would enjoy the opportunity to learn about your story, and perhaps share it so we can all grow and thrive as leaders across Wisconsin. I can be reached directly at tschmidt@waunakee.com or (608) 850-5227.
MPIC is a leading provider of property insurance solutions for Wisconsin public entities. Organized and founded with the support of the Wisconsin Municipal Mutual Insurance Company (WMMIC), Cities and Villages Mutual Insurance Company (CVMIC), and the League of Wisconsin Municipal Mutual Insurance Company (LWMMI), we are specialists in towns, villages, cities, counties, and special districts.
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*Based on number of issues from 2009 through 2020, according to Ipreo MuniAnalytics and Thomson Reuters.