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FROM THE EXECUTIVE DIRECTOR

SAY IT AGAIN, SAM

The public says you’re throwing away 37 cents of every tax dollar; stop that. Gallup recently published a poll that asks the public to estimate how much money local, state and federal governments waste. According to Gallup, the public thinks local governments use 63 cents wisely and fritter away the rest.

Be thankful you’re not the governor or the president. According to the poll, people think the state wastes 42 cents per dollar and the federal government burns a whopping 51 cents. You folks are penny-pinchers in comparison to your Wisconsin and U.S. partners.

My first reaction to this poll was that it was about as useful as asking the public to estimate how many chipmunks it would take to pull a semi-trailer load of peanuts. The question is nothing more than a cheap setup for bad jokes about government workers. But my second reaction is that you & I need to do a better job communicating. The idea that one-third of local budgets are wasted is ridiculous, but apparently a large chunk of the public believes it. We have a credibility problem. And lack of credibility is usually tied to lack of communication.

I’ve been in the communication business for over three decades, advising everyone from governors to church groups. They’d often complain that the public just doesn’t get it. Those complainers get the same answer every time: the problem isn’t the public, the problem is us. (Of course, when I say this to the governor it comes out a lot more diplomatically). Stop blaming the audience and start looking at your communications plan.

How often do you explain your local budget to your voters? Pie charts are wonderful things; is there one on your municipal web site? Is it easy to find? Do you communicate regularly to voters, either through columns in the local paper or a municipal newsletter? Do you mix it up and try new communication tools when old ones get stale? Many communities do a great job of communicating. They do all these things and more. But others believe it’s not a priority, and they’re just too busy. Or they do it once a year and call it good.

Communication is not a one shot deal; you have to keep doing it. If the public paid that much attention to anything, your brother in the advertising business would be unemployed. Taxpayers have priorities and you aren’t one of them. It takes at least three, and usually more, hits before a message sinks in.

There’s a rule in politics: perception is reality. The public will act based on what it thinks, and it will think based on what it knows, and it will know based on what it’s been told. There are plenty of messengers telling the public that the government wastes money. You’re one of the few who will tell them differently. That’s part of your job.

JERRY DESCHANE

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The recent Wisconsin Court of Appeals decision in *Lake Delavan Property Co., LLC, v. City of Delavan*,¹ limits the authority of cities and villages to use density standards to control proposed plats in their extraterritorial area. The Wisconsin Supreme Court did not grant the City of Lake Delavan’s Petition for Review so the Court of Appeals decision is the last word on the extent of a city or village’s extraterritorial plat approval jurisdiction. In light of the case, it is important to review what cities and villages can and cannot do to address development concerns in their extraterritorial areas.²

The first section of this article provides a summary of the history of the law related to extraterritorial plat review in Wisconsin. It highlights the major cases that have shaped extraterritorial plat review by cities and villages by limiting their authority to impose city/village requirements for public improvements and the conditioning of plat approval upon annexation. It also reviews the recent legislation limiting city/village authority to deny plats based on the proposed use of land and the various cases, including the recent City of Delavan case, that address city/village authority to consider land use as part of plat review. The second part of the article reviews the authority that cities and villages still have in the exercise of extraterritorial plat review. This authority relates primarily to the suitability of land for the proposed development and the quality of the proposed subdivision. The article also summarizes other options available to cities and villages.

1. **Background on Extraterritorial Plat Review**

Over fifty years ago, Wisconsin researchers acknowledged that “[o] ne of the most important powers a community possesses is the right to approve the way in which undeveloped land is divided for urban use.”³ Wisconsin has a long history of laws regulating the subdivision of land dating back to 1833 when Wisconsin was part of the Michigan Territory. Those laws have continued to evolve over time to address the needs of society. In 1909, after the industrial revolution and the corresponding growth of cities, the Wisconsin Legislature gave cities extraterritorial plat control. With the rapid urbanization that occurred following the end of World War II, Wisconsin researchers placed a renewed focus on the land division process and the need for extraterritorial controls to encourage better land use planning: “The trend to country living has turned whole sections some distance from large cities into semi-urban areas.”⁴ This research helped provide the justification for a significant revision of the Wisconsin laws regulating land division in 1955,

1. 2014 WI App 35, 353 Wis. 2d 173, 844 N.W.2d 632, review denied 2014 WI 50, 354 Wis. 2d 864, 848 N.W.2d 859.
2. The extraterritorial jurisdiction of first, second, and third class cities extends three miles beyond their corporate boundaries. For fourth class cities and villages, the extraterritorial plat review jurisdiction extends one-and-a-half miles beyond their boundaries.

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The Current Status of Extraterritorial Plat Approval Authority in Wisconsin

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establishing the basic legal framework for the platting of land that is in place today, including extraterritorial plat review. Researchers continue to recognize the importance of subdivision controls today — the division of land "establishes a virtually permanent pattern of community growth and leaves a legacy for future generations."5

When the current statutes governing the division of land in Wisconsin were adopted in 1955, they expanded the extraterritorial plat control for cities.6 Today, the extraterritorial jurisdiction for plat review covers the unincorporated area (towns) within three miles of the corporate limits of a first, second, or third-class city and within one-and-a-half miles of a fourth class city or a village.7 The statutes give overlapping approval authority to the town, the county, and to the city or village (unless the city or village elects not to exercise its extraterritorial authority) for proposed land divisions in the extraterritorial area.8 City or village land division requirements do not unilaterally trump requirements that may be found in the county or town ordinance. With multiple jurisdictions having approval authority over land divisions in the extraterritorial area and potentially conflicting requirements, the statutes provide that the proposed subdivision must comply with the most restrictive requirements.9 It is possible that three different subdivision ordinances could apply to a proposed subdivision in the extraterritorial area. City and village ordinances often have the most restrictive requirements. However, if a town’s ordinance has more restrictive provisions, then those provisions apply over the less restrictive provisions found in any city or village ordinance.

Subdivision regulations are different than zoning ordinances and other land use controls, but sometimes there is an overlap between the tools. “Zoning relates to the type of building development which can take place on the land; subdivision control relates to the way in which the land is divided and made ready for building development.”10 Zoning law is also a more recent development than subdivision law. The first zoning enabling laws were passed in 1917. Communities have long recognized that the needs of residential subdivisions are different than other uses, such as an industrial park subdivision, and often have different subdivision requirements for the different uses.11 More recently, some communities have adopted different subdivision standards for “conventional” residential subdivisions and for “conservation” residential subdivisions.

While the Wisconsin Legislature gave cities extraterritorial plat control in 1909, the Legislature did not authorize extraterritorial zoning until the 1960s.12 The process for adopting extraterritorial zoning is very different than the exercise of extraterritorial plat review. Extraterritorial zoning requires the establishment of a joint zoning body comprised of an equal number of town and city/village officials to develop and help administer the extraterritorial zoning ordinance.13

The scope of the extraterritorial plat approval jurisdiction has been the subject of numerous Wisconsin Supreme Court and Wisconsin Court of Appeals decisions. The cases limit the authority of cities and villages to require that plats in the extraterritorial area comply with city/village requirements for public improvements and limit the authority of cities and villages to condition a plat approval on annexation to the city/village. In addition, in 2010 the Legislature amended the platting statutes to prohibit a city or village from denying a land division on the basis of the proposed use of land. It is important to review these decisions and the recent amendment to the extraterritorial platting statutes by the Wisconsin Legisla-

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6. For more information about subdivision regulation in Wisconsin see Chapter 6, “Subdivision/Land Division Regulation,” in Brian W. Ohm, Wisconsin Land Use & Planning Law (2013).
7. Wis. Stat. sec. 236.02(5).
10. Melli, supra note 4 at 391.
11. Melli and Devoy, supra note 3 at 59.
13. Prior to the establishment of an extraterritorial zoning ordinance, the statutes allow a city or village to impose a limited freeze on existing zoning or uses while the city/village works with the town on the development of an extraterritorial zoning ordinance.
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In the 1989 decision *Rice v. City of Oshkosh*, the Wisconsin Supreme Court interpreted Wis. Stat. sec. 236.13(2)(a) to mean that cities and villages could not impose public improvement requirements on plats in the extraterritorial area. Section 236.13(2)(a), Stats., provides in part: “As a further condition of approval, the governing body of the town or municipality within which the subdivision lies may require that the subdivider make and install any public improvements reasonably necessary. . . .” Even though cities and villages also have jurisdiction over plats in the extraterritorial area, since the proposed subdivision was not physically located within the city or village, the Supreme Court was unwilling to allow cities and villages to require public improvements. Rather, the Court believed that since the town would be financially responsible for the public improvements, the town’s requirements should apply:

Public improvements are subject to the political and financial base of the area directly involved. In the case before us, the City is not financially responsible for the public improvements they require. . . . The legislature left this decision of public improvements to the governmental unit most accountable for such decisions. . . .

Subsequent decisions by the Wisconsin Court of Appeals have expanded upon the holding in *Rice v. City of Oshkosh*. One case that builds upon the financial accountability rationale is the 2003 decision in *Rogers Development, Inc. v. Rock County Planning and Development Committee*. The case examines the authority of county subdivision ordinances to require public improvements in towns. The Court of Appeals in *Rogers Development* relied on the *Rice* case to support its decision that counties do not have the authority to apply county standards for public improvements in towns because authority over public improvements resides with the local government required to maintain them — in the *Rogers Development* case this meant the towns. While *Rogers Development* is not an extraterritorial plat review case, the decision provides the following definition of “public improvement” which might provide guidance for cities and villages also trying to understand what is meant by the term:

"public improvements” as used in ch. 236 is one that improves the value or utility of the subdivision and is made available for use by the public.

In another 2003 decision, *KW Holdings, LLC v. Town of Windsor*, the Wisconsin Court of Appeals recognized an exception to *Rice* under the annexation statutes. If a city or village is in the process of annexing the territory that is being subdivided, the city/village can apply its requirements for public improvements.

In 2007, the Court of Appeals applied the *Rice* decision in *Town of Delton v. Liston*. The case involved the extraterritorial application of the City of Baraboo’s subdivision ordinance. The ordinance had a provision applicable to its extraterritorial area which provided that the “minimum lot or parcel size for a lot or parcel to be used for residential purposes where the lot or parcel is not served by a public sanitary sewer system shall be 20 acres per dwelling unit.” The Wisconsin Court of Appeals held that this “ordinance provision plainly has the effect of requiring a public sanitary sewer system for lot sizes smaller than twenty acres” and is therefore void because it conflicted with the Supreme Court’s decision in *Rice v. City of Oshkosh*.

The City of Baraboo subsequently amended its ordinance. The City still applies the 20 acre minimum lot size...
but it deleted the reference to the need to be served by a public sanitary sewer system. The City’s ordinance states that this minimum lot size requirement does not apply to areas within the Town of Baraboo Sanitary District. The ordinance also includes provisions for exceptions to the minimum lot size requirement thereby adding a degree of flexibility to its application. A copy of the relevant provisions of the City of Baraboo’s ordinance is included in the Appendix on line at lwm-info.org.

b. Conditioning Approval on Annexation

In the 1997 case of *Hoepker v. City of Madison*, the Wisconsin Supreme Court held that a city or village cannot condition approval of a plat in the extraterritorial area on annexation of the proposed subdivision to the city or village. The Court’s decision was based on the annexation statutes and related case law that frown upon cities and villages exercising undue influence to encourage property owners to annex their land to the city or village.

In *Hoepker*, the Supreme Court did not force the City to approve the plat. Rather the Court remanded the matter to the City and noted that the City could deny the development if it determined the land is unsuitable for the proposed development. The Court added that “if the City rejects the plat on suitability grounds, it must inform the Hoepkers of the particular facts upon which it bases its conclusion, and provide them with an opportunity to present evidence regarding suitability at a public hearing.”

**c. Land Use**

In the 1993 decision, *Gordie Boucher Lincoln-Mercury Madison, Inc. v. City of Madison Plan Commission*, the Wisconsin Court of Appeals determined that extraterritorial regulation of land use was solely the province of zoning and could not be accomplished under a municipality’s extraterritorial plat approval authority. The City had rejected a proposed certified survey map because it was for a use inconsistent with a City plan for the area. After reviewing the difference between plat approval and zoning, the Court of Appeals concluded that while Chapter 236 confers “broad regulatory authority” on cities, “that authority relates to the quality of the subdivision or land division and not to the use to which the lots in the subdivision or land division may be put.” The City could therefore not reject the land division based on a conflict with the uses identified in the City’s plan.

Ten years later, in *Wood v. City of Madison*, the Wisconsin Supreme Court reversed the *Boucher* case on the issue of use, concluding that Wis. Stat. ch. 236 “does authorize a municipality to reject a preliminary plat under its extraterritorial jurisdictional authority based upon a subdivision ordinance that considers the plat’s proposed use.”

The *Wood* case involved a 51.96 acre parcel in the City of Madison’s extraterritorial plat approval jurisdiction in the Town of Burke. Much of the parcel was zoned for agricultural use though part of the parcel was zoned for commercial use. The *Woods* sought to divide the parcel into eleven lots. The Woods wanted to rezone nine of the proposed new lots from “Agricultural” to “Commercial.”

The City of Madison Department of Planning and Development issued a report analyzing the proposed plat under both the “Criteria for Agricultural Land Division” and the “Criteria for Non-Agricultural Land Division or Subdivision” of Madison General Ordinances. The report stated that the preliminary plat failed to meet the agricultural land division criteria because it did not “assist and assure the continuation of agricultural land use on this property.” In considering the preliminary plat under the non-agricultural land division criteria, the report concluded that the development of the commercial lots would be incompatible with and would negatively impact the remaining lots and adjacent agricultural lands. It also concluded that commercial development would not constitute “infill,” as little of the surrounding area featured commercial use. An addendum to the report indicated that “the Planning Unit concludes that the proposed subdivision plat does not meet the standards for approval at this time.” The City denied the plat.
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Extraterritorial Plat Approval

The Woods challenged the denial in court based on the Gordie Boucher case arguing that the City of Madison could not consider land use as a factor when denying a plat. The Wisconsin Supreme Court held that the Court of Appeals had been in error in the Gordie Boucher case and overruled the case. The Supreme Court held that cities and villages could consider land use when exercising plat review authority in the extraterritorial area.

Seven years after the Wood decision, the Wisconsin Legislature enacted 2009 Wis. Act 399, which created 236.45 (3) (b) of the Wisconsin Statutes. Act 399 was an effort to limit the Supreme Court’s decision in Wood. Act 399 states, in part, “a municipality may not deny approval of a plat or certified survey map . . . on the basis of the proposed use of land within the extraterritorial plat approval jurisdiction of the municipality, unless the denial is based on a plan or regulations, or amendments thereto, adopted by the governing body of the municipality under sec. 62.23 (7a) (c) [extraterritorial zoning].”

In response to Act 399, the City of Madison amended the relevant sections of its subdivision ordinance to comply with the ban. The amended sections as they relate to the extraterritorial area are included in the Appendix (available online at lwm-info.org.)

The recent case Lake Delavan Property Co., LLC, v. City of Delavan, presented the Wisconsin Court of Appeals with the opportunity to interpret city and village extraterritorial plat approval authority under Act 399. In its decision in the City of Delavan case, the Wisconsin Court of Appeals further limited city and village extraterritorial plat approval authority based on Act 399.

The case involved the proposed development of approximately 600 homes in the Town of Delavan in Walworth County. The development is within the City of Delavan’s extraterritorial plat approval jurisdiction that extends to land within one and one-half miles of the City’s limits. The Town is under county zoning and the area of the proposed development is zoned residential. The proposed development is within the planned sanitary sewer service area designated by the South-eastern Wisconsin Regional Planning Commission and was designated as a “traditional neighborhood” in the City’s 1999 comprehensive plan and “urban density residential” in the Town and County comprehensive plans.

The City later amended its comprehensive plan to designate the area as “agricultural” and amended its subdivision ordinance to place a density limit of no more than one residence per 35 acres within the City’s extraterritorial jurisdiction. Lake Delavan Property Co. submitted a preliminary plat to the City, Town, and County for approval. The City denied the plat. Lake Delavan Property Co. challenged the City’s denial of the proposed plat arguing that the density requirement in the City’s subdivision ordinance was a regulation of land use prohibited by 2009 Wis. Act 399. The Court argued that it is appropriate for subdivision regulations to establish lot sizes and the City’s requirements were merely a density restriction, not a use restriction.

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

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continued on page 364

27. The City of River Falls is an example of a city that for many years has extraterritorial zoning ordinances with the adjacent towns.

28. There is an ambiguity in Act 399. Act 399 prohibits cities and villages from denying proposed plats based on use. In the Wood case, the City did not deny the plat based on use. Rather the City took the use as provided by the County zoning for the parcel and determined the proposed plat did not meet the City’s quality standards for those types of uses. For example if the developer had proposed an agricultural use that met the City’s standards for agricultural subdivisions, the City would have approved the plat. Likewise if the developer had proposed an industrial use that met the City’s standards for non-agricultural subdivisions, the City would have approved the plat. It is not clear that Act 399 prohibits Madison from continuing to use the same process upheld by the Court in the Wood case.

29. 2014 WI App 35, 353 Wis. 2d 173, 844 N.W.2d 632, review denied 2014 WI 50, 354 Wis. 2d 864, 848 N.W.2d 859.
peals then ordered the approval of the proposed plat.

In light of these court decisions and Act 399, the question facing cities and villages is what is left of their extraterritorial plat review authority. This question is explored below.

2. Remaining Authorities for Cities and Villages in Their Extraterritorial Areas

On its face, the intent of the Wisconsin Legislature was not to repeal the extraterritorial plat review authority of cities and villages when it passed Act 399. Based on the various extraterritorial plat review court decisions, it is still possible to discern some authority of cities and villages to review plats in their extraterritorial area. This authority is explored below.

a. The Suitability of Land For The Proposed Development

In the Hoepker case discussed above, the Wisconsin Supreme Court noted that the City of Madison could deny a proposed plat in its extraterritorial jurisdiction if it determined the land is unsuitable for the proposed development. The 1993 Wisconsin Court of Appeals decision in Busse v. City of Madison,30 provides some helpful guidance on the authority of cities/village to deny plats in their extraterritorial area based on land suitability. The case involved a proposed plat for a parcel that straddled the boundary between the City of Madison and the Town of Westport. All lots and streets in the proposed plat were in the Town. The City of Madison used its extraterritorial plat review authority to reject the plat based on a finding that the land was not suitable for development in accordance with the following provision in its ordinances:

No land shall be subdivided which is held by the City Plan Commission to be unsuitable for use by reason of flooding, bad drainage, soil or rock formations with severe limitations for development, severe erosion potential, or unfavorable topography, or any other feature likely to be harmful to health, safety or welfare of future residents or landowners in the proposed subdivision or of the community.

The City Plan Commission in applying the provisions of this section shall in writing recite the particular facts upon which it bases its conclusion that the land is not suitable for the proposed use, after affording the subdivider an opportunity to present evidence regarding such suitability at a public hearing.

In its decision in the case, the Court of Appeals held that it was acceptable for the City to deny the plat based on the City’s finding that the parcel was unsuitable for development under the above-quoted provision of the City’s subdivision ordinance.

Land suitability issues can also arise in the context of the need for a city or village to find a proposed plat unsuitable because it may conflict with existing or planned public investments by the city or village. To explore the scope of city/village extraterritorial authority to protect existing and planned public investments from unsuitable development, it is instructive to explore the application of the authority of counties to review plats within cities and villages.

While counties have authority to approve plats in the unincorporated areas, counties have the authority to object to plats located within incorporated areas (cities and villages) on the basis of a conflict with park, parkway, expressway, major highways, airports, drainage channels, schools, or other planned public developments.31 Obviously with the inclusion of schools, the Legislature was not limiting this authority to planned public developments of the county. The Statutes distinguish between approval and objecting authorities. Under state statutes, if a county objects to a plat in a city or village, the city or village cannot approve the subdivision until the objections have been satisfied.32 The use of objecting authority could result in significant revisions to the proposed subdivision. If the objections cannot be satisfied, it would be similar to if the county had denied the plat.

30. 177 Wis.2d 808, 503 N.W.2d 340 (1993), review denied 510 N.W.2d 136.
32. Wis. Stat. sec. 236.12(3).
the Municipality November 2014

the county and school districts. Likewise, cities and villages should still have authority to deny proposed plats that would have an adverse impact on existing or planned city improvements and services. This should not run afoul of Rice and its progeny.

It may be helpful to explore some examples. If a county owned an airport within the borders of a city or village, the Legislature has authorized special airport zoning that the county could adopt to restrict the height of buildings and try to encourage more compatible uses around the airport. A county could also use its authority to review plats within cities and villages. Let us assume the county has plans for an expanded runway. The city in which the airport is located has zoned much of the land around the airport for residential uses. Let use also assume someone proposes a residential subdivision a mile from the end of the runway. The county could object to a proposed residential subdivision based on residential uses not being a compatible use. The plat could not be approved unless the proposed subdivision can satisfy the concerns raised in the county’s objection. It might be that the county could say, it must be an agricultural use or a commercial use such as warehouses. It might be that the county’s concerns are about the density of the residential use and that fewer homes (generating fewer noise complaints) would be an acceptable use.

Other types of public developments can raise other concerns about the compatibility of the proposed use near the development. For example, assume someone proposes a residential subdivision in a city near the planned expansion of the county landfill. The county could object to the development. Nonresidential uses may not result in an objection by the county. Another example might be a proposed industrial subdivision in a city adjacent to a county park. The county may find the industrial park conflicts with the park uses but a residential subdivision to not raise similar conflicts. While the ability of a city/village to require adequate public facilities may be difficult to enforce in light of the Rice case, a city should still have authority to deny proposed plats that would have an adverse impact on existing or planned city improvements and services.

CITIES should insure that their ordinances include requirements that plats in the extraterritorial area meet requirements for land suitability. The language approved by the Court of Appeals in the Busse case is a good example. In addition, it might be advisable to also add language similar to what appears in the City of Madison ordinance included in the Appendix related to the impact on planned city services.

b. The Quality of the Proposed Land Division

In the Gordie Boucher case discussed above, the Wisconsin Court of Appeals concluded that while cities and villages could not condition approval of a plat in the extraterritorial area based on the proposed use of land, cities and villages had authority related to “the quality of the subdivision or land division.” It is not totally clear what the Court means by “quality.” From a planning standpoint, “quality” of subdivisions often relates to design requirements such as requirements for sidewalks, whether the subdivision is served by public sanitary sewers, etc. After Rice, however, a city or village is limited in its ability to impose requirements for public improvements. Other “quality” elements such as lot size, the location of a house on a lot, landscaping requirements, etc., would not meet the definition of “public improvement” adopted by the Court in the Rogers Development discussed above that requires the improvement “is made available for use by the public.”33

In addition, the Court in the Gordie Boucher case recognized:

Section 236.45(1), Stats., emphasizes that the public health, safety and general welfare are to be promoted thereunder by regulations designed to further the quality of the subdivision and its integration into the community, e.g., “the orderly layout and use of land”; “adequate light and air”; “prevent[ing] the overcrowding of land”; “avoid[ing] undue concentration of population”; and “facilitat[ing] adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements.” If the local regulation is intended to enhance the quality of the individual subdivision or division of land, it may be imposed in a subdivision regulation as well as a zoning ordinance. One of

33. 2003 WI App 113, para. 13. The Court’s decision assumes that all towns have standards for public improvements. This is not the case because many smaller towns rely on the County’s subdivision ordinance and do not have their own town standards for public improvements.
the principal objectives of the 1955 repeal and recreation of ch. 236, Stats., was to give localities the authority to impose specific quality requirements upon subdivisions. [Citations omitted.]

Certainly the provision of open space or greenspace is a quality requirement which an approving authority may impose as a condition of approval of a subdivision or other division of land. A residential development requires parks, playgrounds and greenspace to provide residents with amenities which contribute to the quality of residential living. A developer may be required to provide such amenities or to contribute to their cost. [Citations omitted.] An approving authority may condition approval of a subdivision or other division of land upon preservation of natural features, natural resources and environmentally sensitive lands. The creation and preservation of open space, occasioned by the layout of a subdivision or other land division, is the legitimate object of an approving authority’s concern.34

While lot size and lot layout requirements can help provide for open space and greenspace on privately owned land, parks and playgrounds are usually considered public improvements. It would seem that the statements in the Gordie Boucher case about parks and playgrounds run counter to the Wisconsin Supreme Court’s decision in Rice prohibiting the application of city/village requirements for public improvements.35 Nonetheless, cities and villages should be able to apply requirements for lot size, lot layout, etc., that can help promote open space and greenspace as quality requirements.

It is not entirely clear from the Lake Delavan case whether the decision applies only to density requirements or to lot size requirements as well. Density requirements are different than lot size requirements. Under Delavan ordinance, the lot size could range from one acre on up, depending on the size of the parcel being divided and the overall density of the area. The language used by the Court in the Lake Delavan raises some uncertainty whether the case was also talking about lot size.

There is a considerable variation in how communities address the quality of the proposed land division based on lot size. The City of Madison does not specify any lot size but refers to the lot size of the adjacent development pattern for evaluating the compatibility of the proposed land division. The City of Middleton also does not directly specify lot size; however, the City will not approve any division of land that creates five or more parcels of 35 acres or less within a period of five years. The City of Baraboo specifies a minimum lot size of 20 acres.

Cities should use a minimum lot size of x acres with no reference to use in the ordinance. The lot size would apply regardless of use -- residential uses, commercial uses, agricultural uses, etc. This approach would seem enforceable under Act 399 since it is a generic lot size and not tied to use. Nevertheless, if the Lake Delavan case is interpreted to say that cities and villages can no longer establish lot sizes in the extraterritorial area, then the 5 acre lot size would not be workable. Until a court (or the Legislature) clearly states that cities and villages have no authority to establish lot sizes in their extraterritorial areas, cities should explore amending their ordinance to establish a lot size requirement.

c. Submittal Requirements

Cities/villages can require the same review process (the documents required for submittal, the payment of review fees, etc.) for plats in the extraterritorial area as they require for plats in the Municipality.

34. 178 Wis.2d at 96-98.
35. Another problem with the Gordie Boucher case is that it makes several statements which are no longer true following the passage of the State’s 1999 comprehensive planning law (1999 Wis. Act 9). For example, the Court makes the statement that the city’s master plan does not have preeminence over county zoning. 178 Wis.2d at 90-91. The county planning enabling law has long provided that city and village comprehensive plans must be included in the county comprehensive plan without change and control in the unincorporated territory. Wis. Stat. sec. 59.69(3)(b) and (c). The consistency requirement in the comprehensive planning law establishes that county zoning must be consistent with the county’s comprehensive plan. Wis. Stat. sec. 66.1001(3). Arguably, since city/village comprehensive plans must be included in the county’s plan, this could give the city/village comprehensive plan preeminence over county zoning.
plats within the city/village borders. It is important to remember that the city and adjacent towns may define a “subdivision” differently. A land division that may require a plat under the city’s ordinances may be allowed to be divided as a certified survey map under the town’s ordinance. Therefore, it may not be appropriate to only rely on the documents submitted to the town. A city may need to ask for additional information from applicants for plat approval in the extraterritorial area that they do not require of applicants in within the city. For example, the city may have to ask for relevant town plans or information regarding compliance with town public improvement requirements. Cities/villages can also include provisions, such as a provision for “exceptions” to the ordinance, to provide the flexibility to modify the standards in the ordinance given unique situations that may arise.

d. Other Extraterritorial Tools – Official Maps

Even though cities and villages cannot impose requirements for public improvements in subdivision ordinances following the Rice case, cities and villages can at least preserve future right of ways for some public improvements in their extraterritorial area through official mapping. Enacted in 1941, Wisconsin’s official mapping law allows cities and villages to officially map streets, highways, parkways, waterways, railroad right-of-ways, and public transit facilities extending three miles beyond the corporate limits of first, second, or third class cities and 1.5 miles beyond the corporate limits of fourth class cities and villages. The law then allows local governments to prohibit the issuance of a building permit for any building proposed to be located on the existing or planned facilities included on the official map.

e. Cooperative Boundary Agreements

In addition to extraterritorial plat review and the extraterritorial application of official maps, cities and villages should be encouraged to develop cooperative boundary agreements with adjacent towns and explore extraterritorial zoning as an outcome of the cooperative planning process. Cities and villages should also explore ways to work cooperatively with the county and any regional planning commission on these issues.

f. Other Approaches

In addition to the ordinances summarized above from cities that have been the subject of lawsuits over extraterritorial plat review, the extraterritorial provisions in the subdivision ordinances of other cities present alternative approaches. The City of Middleton in Dane County, for example, prohibits all subdivisions in the City’s extraterritorial jurisdiction. The city defines a subdivision as the act or creation of five or more parcels of 35 acres or less within a period of five years. The city does allow minor subdivisions in the extraterritorial area. The extraterritorial provisions from the City of Middleton are included in the Appendix. (Online at lwm-info.org.)

Act 399 encourages cities and villages to work with the adjacent towns to develop extraterritorial zoning ordinances if the city or village wishes to control the use of land in the extraterritorial area. The City of Hartford builds upon this concept and provides that the City will not approve land divisions of less than 35 acre lot sizes unless the City and relevant town have an extraterritorial zoning ordinance that applies to the area proposed to be subdivided. This provides an incentive for the towns and the City to work together to develop a mutually agreeable zoning ordinance for the area. The relevant language for the City of Hartford ordinance is included in the Appendix. (Online at lwm-info.org.)

There is nothing dramatically different in that ordinance as compared to some of the other ordinances.

3. Conclusion

Cities should be sure they make full use of their official mapping authority and should also explore cooperative approaches, such as cooperative boundary agreements, with the adjacent towns. In response to the Lake Delavan case, cities should insure that their ordinances do not include a density policy and reference about the purpose of the extraterritorial review is to protect rural character and farming viability. Platting 171

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1. How does annexation or detachment of territory containing “Class B” liquor licenses affect a municipality’s quota?

If territory containing premises covered by a non-reserve or reserve Class B liquor license is annexed to a municipality and if the municipality’s quota would not otherwise allow a non-reserve or reserve Class B liquor license for the premises, the municipality’s quota is increased to include the license of each premises in the annexed territory. Detachment of territory decreases the quota of the remainder by the number of non-reserve or reserve Class B liquor licenses issued for premises in the detached territory, except that detachment does not decrease the quota of the remainder to less than one license per 500 persons or less than one license. See Wis. Stat. sec. 125.51(4)(c) and (d).

2. Can a member of a municipality’s governing body hold another office or position of employment with the municipality?

With a few limited exceptions, the answer is no. The law prohibits the same person from holding two public offices or an office and a position where one post is superior to the other or where, from a public policy perspective, it is improper for the same person to hold both. Otradovec v. City of Green Bay, 118 Wis.2d 393, 347 N.W.2d 614 (Ct. App. 1984). In Otradovec, the court of appeals held that the office of alder-
man was incompatible with the position of appraiser in the city assessor’s office because the alderman could vote on the contracts setting the terms of his employment and could vote on the appointment of his boss, the assessor. The court held that abstention would not cure the conflict. *Id.*

Thus, the general rule is that a governing body member cannot hold another municipal office or position unless it is specifically authorized by statute. This is because the governing body exercises control over such matters as the salaries, duties and removal or discipline of most other municipal officers and employees. Even where a department is under the control of a board or a commission, like the police and fire commission or a utility commission, the governing body still exercises budgetary and general supervisory control over the departments and appoints board or commission members. Compatibility of Offices 583.

There are a few statutory exceptions which should be noted.

- Governing body members may represent the governing body on city, village or town boards and commissions where no additional compensation other than a per diem if one is paid to other board or commission members is paid such representatives. Sec. 66.0501(2).
- A volunteer fire fighter or emergency medical technician or first responder in a city, village or town whose annual compensation, including fringe benefits, does not exceed $15,000 may also hold an elected office in that city, village or town. Sec. 66.0501(4).
- A member of a governing body may also serve as county supervisor. Sec. 59.10(4).

3. **What happens if someone takes an incompatible office or position of employment?**

Although case law establishes that a person taking a second, incompatible office is deemed to have vacated the first office (*Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941)), it is not clear what the result of holding an incompatible office and position of employment is. In *Otradovec*, the court of appeals went along with the circuit court’s decision to allow the person to choose between the office and position and declined to decide whether a person taking an incompatible office would be deemed to have vacated the position or would be able to choose which to keep.

4. **Can a person vote to fill his/her own vacancy on a municipal governmental body such as a village board or city council?**

No. There are two basic scenarios presented by this question. The first is where the outgoing member seeks to vote before he or she has actually vacated the office. The second is where the member seeks to vote after he/she has actually vacated his/her office.

In the first scenario, the outgoing member cannot vote on the vacancy because there is no vacancy to fill. The outgoing member is still a member of the body at the time of the vote.

In the second scenario, the former member cannot vote on the vacancy because he or she is no longer a member of the body. As a non-member, that person has no authority to cast a vote on any issue as part of the body they no longer belong to.
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<th>Size</th>
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In a 5-4 decision the Court held in Town of Greece v. Galloway that Greece did not violate the First Amendment by opening its meetings with a prayer. From 1999-2007 all pray givers were Christian, and some referred to Jesus. The Court concluded that legislative prayer is not required to be nonsectarian and that the prayers in this case weren’t coercive. In Marsh v. Chambers, the Court held the Nebraska Legislature didn’t violate the First Amendment by opening its sessions with a prayer delivered by a chaplain paid from state funds. The proposition that Marsh allows only nonsectarian prayer “is irreconcilable with the facts of Marsh and with its holding and reasoning.” Only allowing nonsectarian prayer would require state legislatures and local governments to “act as supervisors and censors of religious speech” and it isn’t clear when a prayer is sectarian. Prayer before town board meetings isn’t coercive just because citizens who attend meetings often have business before the board. Prayers in this context — and the state legislative context where citizens can only address the legislature by invitation — aren’t intended for the public but for the lawmakers “who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.”

In Lane v. Franks the Court held unanimously that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by a subpoena, outside the course of his or her ordinary responsibilities. Edward Lane, a program director at a public community college, claimed he was fired in retaliation for testifying at a criminal trial that he fired a state legislator who was on his payroll but wasn’t doing any work. The First Amendment protects public employee speech made as a citizen on a matter of public concern. In Garcetti v. Ceballos the Court held that when public employees speak pursuant to their official job duties they are speaking as employees and not as citizens for First Amendment purposes. It was undisputed that Lane’s ordinary job duties did not include testifying in court proceedings. Lane learned about what he spoke about at work but “the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee-rather than citizen-speech. The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” The Court did not decide whether the First Amendment protects truthful subpoenaed speech made as part of a public employee’s ordinary job duties.

In a unanimous opinion in McCullen v. Coakley the Court held that a Massachusetts statute making it a crime to stand on a public road or sidewalk within 35 feet of an abortion clinic violates the First Amendment. The Court reasoned the law “burden[s] substantially more speech than necessary” to achieve the state’s interests in ensuring public safety, preventing harassment, and combatting obstruction at clinic entrances. The Court offered state and local governments three suggestions, other than generic criminal statutes, to deal with public safety problems at abortion clinics: passing legislation similar to the federal Freedom of Access to Clinic Entrances Act which prohibits injury, intimidation, or interference toward someone seeking an abortion; criminalizing following and harassing people entering a clinic; and criminalizing obstruction of clinic entrances. The SLLC’s amicus brief asked the Court not to rule in a way that would limit state and local government’s ability to use buffer zones to protect public safety in a variety of contexts.

The Court held 6-2 in Schuette v. Coalition to Defend Affirmative Action that voters may by ballot prohibit affirmative action in public university admission decisions. In 2006 Michigan voters adopted a constitutional amendment which prohibited preferential treatment in admissions to public universities on the basis of race, sex, color, ethnicity, or national origin. The majority of the Court concluded this
amendment does not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy, in a plurality opinion joined only by Chief Justice Roberts and Justice Alito, concluded that this case is about who and not how the debate over racial preferences should be resolved. “There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.” Justices Sotomayor and Ginsburg dissented; Justice Kagan did not participate in the case. While this case was limited to the use of race in public university admission decisions, Michigan’s constitutional amendment also prohibits the use of racial-preference in state and local government employment and contracting. Presumably, these provisions are also constitutional.

In *Burwell v. Hobby Lobby* the Court held 5-4 that the Affordable Care Act’s birth control mandate violates the Religious Freedom Restoration Act (RFRA), as applied to closely held corporations. RFRA provides that the federal government “shall not substantially burden a person’s exercise of religion.” As relevant to state and local governments, the Court concluded closely held corporations are “persons” under FRFA. The Dictionary Act defines person to include corporations, and the Court saw “nothing in FRFA that suggests a congressional intent to depart from the Dictionary Act definition.” The Religious Land Use and Institutionalized Persons Act (RLUIPA) bars state and local governments from enforcing land use regulations that substantially burden “the religious exercise of a person.” If for-profit corporations are “persons” under RFRA they are also likely “persons” under RLUIPA. As Justice Ginsburg points out in her dissenting opinion quoting the SLLC’s amicus brief, this will have negative consequences for state and local governments: “[I]t is passing strange to attribute to RLUIPA any purpose to cover entities other than ‘religious assembl[ies] or institution[s].’ That law applies to land-use regulation. To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would ‘dramatically expand...
the statute’s reach’ and deeply intrude on local prerogatives, contrary to Congress’ intent. Brief for National League of Cities et al. as Amici Curiae 26.”

The Clean Air Act’s (CAA) Good Neighbor Provision prohibits upwind states from emitting air pollution in amounts that will contribute significantly to downwind states failing to attain air quality standards. In EPA v. EME Homer City Generation the lower court concluded that upwind states must be given a chance to allocate their emissions budgets when they are known, before the federal government can do so, and that EPA can only rely on physical contributions to air pollution when determining responsibility for downwind pollution. The Court, in a 6-2 opinion, disagreed. The Court concluded the CAA does not require that states be given a second opportunity to file State Improvement Plans (SIPs) after EPA has informed them of their emissions budgets. The CAA makes it clear that once EPA has found a SIP inadequate, EPA has a statutory obligation to issue a Federal Improvement Plan. The Court further concluded that the Good Neighbor Provision does not require EPA to disregard costs and consider only each upwind state’s physically proportionate responsibility for each downwind state’s air quality problem. “EPA’s cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, workable, and equitable interpretation of the Good Neighbor Provision.”

States and local governments filed on both sides in this case.

In Utility Air Regulatory Group v. EPA the Court held 5-4 that EPA cannot require stationary sources to obtain Clean Air Act permits only because they emit greenhouse gases. But, the Court concluded 7-2, EPA may require “anyway” stationary sources, which have to obtain permits based on their emissions of other pollutants, to comply with “best available control technology” (BACT) emission standards for greenhouse gases. The Court reasoned that permitting all newly covered stationary sources for greenhouse gas emissions “would place plainly excessive demands on limited governmental resources is alone enough reason for rejecting it.” EPA’s regulations would increase the number of permits by the millions and the cost of permitting by the billions. To avoid the result described above, EPA issued the “Tailoring Rule,” which increased the permitting threshold for greenhouse gases from 100 or 250 tons per year to 100,000 tons per year initially. The Court concluded EPA “has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” Finally, the Court held if a stationary source is already being regulated because of its emissions of other pollutants it may be subject to BACT emission standards for greenhouse gases. “Even if the text [of the Clean Air Act] were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA’s interpretation is unreasonable.”

In Harris v. Quinn the Court held 5-4 that the First Amendment prohibits the collection of an agency fee from home health care providers who do not wish to join or support a union. Medicaid recipients who would otherwise be institutionalized may hire personal assistants. In Illinois, the Medicaid recipient is the employer and is responsible for almost all aspects of the employment relationship, but the personal assistant is a state employee for collective bargaining purposes. A number of personal assistants did not want to join the union or pay it dues. In Abood v. Detroit Board of Education the Court held that state and local government employees who don’t join the union may still be compelled to pay an agency fee to cover the cost of union work related to collective bargaining. The Court refused to extend Abood to personal assistants who aren’t “full-fledged” public employees. What justifies an agency fee is that unions must promote the interests of members and nonmembers alike, meaning they cannot negotiate higher pay for members or only represent members in grievances. This justification has little force where a union cannot negotiate pay or represent nonmembers (or members) in grievances. While the Court was highly critical of Abood, it did not overrule it. This ruling is a setback for personal assistants in other states that followed Illinois lead and allowed them to unionize.

In Marvin M. Brandt Revocable Trust v. United States the Court held 8-1 that the United States does not own abandoned railroad rights-of-way it granted in the General Railroad Right-of-Way Act of 1875. The Court ruled against the United States “in large part because it won when it argued the opposite before this Court more than 70 years ago in the case of Great Northern Railway Co. v. United States.” The United States and the SLLC argued that the Court should not read Great Northern so broadly and that a series of federal statutes grant the United States title to abandoned 1875 rights-of-way (unless a state or local government establishes a “public highway,” including a recreational trail, within one year of abandonment). While the Justices discussed at oral argument the SLLC’s argument that state and local governments have relied on these

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in statutes, the Court concluded they don’t apply because “[they] do not tell us whether the United States has an interest in any particular right of way; they simply tell us how any interest the United States might have should be disposed of.” This case only impacts abandoned 1875 rights-of-way, not all abandoned railroad corridors. See Rails to Trails Conservancy, How Will The Decision Affect My Local Rail-Trail, http://www.railstotrails.org/resources/images/graphics/SCOTUS-decision-affects-infographic_Rails-to-Trails-Conservancy02.png.

In a 5-4 decision in Michigan v. Bay Mills Indian Community the Court held that Michigan’s suit against the Bay Mills Indian Community to stop the tribe from operating a gaming facility on non-Indian lands is barred by tribal sovereign immunity. Indian tribes retain historic sovereign immunity and cannot be sued unless Congress abrogates sovereign immunity. The Indian Game Regulatory Act (IGRA) abrogated sovereign immunity for gaming activity on Indian land that violates a Tribal-State compact. Bay Mills opened a casino about 125 miles from its reservation. Michigan asked the Court to overturn its precedent that held that there is no exception to sovereign immunity for illegal activity occurring outside of Indian lands. The Court refused “for a single, simple reason: because it is fundamentally Congress’s job, not ours, to determine whether and how to limit tribal immunity.” The Court pointed out that Michigan has many powers over illegal Indian gaming other than suing a tribe including: denying a gambling license, seeking an injunction for gambling without a license, injunctive relief against tribal officers for unlawful conduct, and prosecuting those who maintain or frequent an unlawful gambling establishment. And in their compacts states can and have negotiated a waiver of sovereign immunity for gaming outside Indian lands.

Miscellaneous 16
Unincorporated Associations Are Not Subject to Wisconsin’s Public Records Law

Unincorporated associations like the League of Wisconsin Municipalities and the Wisconsin Counties Association (WCA) are not “authorities” under Wisconsin’s public records law and are not subject to the public record law’s requirements. Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Ass’n., 2014AP249 (Ct. App. Sept. 18, 2014) (recommended for publication).

This case arose after the Wisconsin Counties Association responded to a records request from the Wisconsin Professional Police Association (WPPA) by asserting that it was not subject to the public records law. WPPA sued, and both parties filed cross-motions for summary judgment. The circuit court granted summary judgment to WCA, agreeing that WCA, as an unincorporated association, is not an authority subject to the public records law.

The court rejected WPPA’s argument that despite being an unincorporated association, WCA could be considered an “authority” as a “quasi-governmental corporation” using a dictionary definition of “corporation” and relying on the factors set forth in State v. Beaver Dam Area Development Corp, 2008 WI 90, 312 Wis.2d 84, 752 N.W.2d 295 where the Supreme Court applied a totality of circumstances to conclude that a private development corporation which resembled a governmental corporation was an authority as a “quasi-governmental corporation” The court agreed with WCA that to be a quasi-governmental corporation, an entity must first be a corporation, and WCA is not a corporation. The court rejected WPPA’s alternative argument that WCA constitutes a “governmental body” because it was raised for the first time on appeal.

Public Records 147
The Supreme Court decided numerous Fourth Amendment and qualified immunity cases involving police officers during its 2013-2014 term. The Fourth Amendment prohibits unreasonable government searches and seizures.

State and local government officials can be sued for money damages in their individual capacity if they violate a person’s constitutional or federal statutory rights. Qualified immunity protects government officials from such lawsuits where the law they violated isn’t “clearly established.”

**FOURTH AMENDMENT CASES**

In *Riley v. California* the Court held unanimously that generally police must first obtain a warrant before searching an arrested person’s cell-phone. The Fourth Amendment requires police to obtain a warrant before they conduct a search unless an exception applies. The exception at issue in this case is a search incident to a lawful arrest. In *Chimel v. California* the Court identified two factors that justify an officer searching an arrested person: officer safety and preventing the destruction of evidence. Four years later in *United States v. Robinson* the Court held that police could search a cigarette pack found on Robinson’s person despite the absence of these two factors. The Court declined to extend *Robinson* to searches of data on cell phones. Applying the first *Chimel* factor the Court observed that “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.” The Court also was not convinced that destruction of data through remote wiping (third party deletion of all data) or data encryption (an unbreakable password) were prevalent problems. The Court readily admitted that its decision will impact law enforcement’s ability to combat crime. But privacy comes at a cost and warrants are faster and easier to obtain now than ever before.

In *Fernandez v. California* the Court held that if a defendant objects to the search of his or her home that objection may be overridden by a co-tenant after the defendant is no longer present. Walter Fernandez told police they could not search his home. But after he was arrested and removed from the premises for suspected domestic violence, the woman he was living with consented to a search. In *Georgia v. Randolph* the Court held that if a defendant is physically present and objects to a warrantless search, a co-tenant cannot override that objection.

The Court refused to extend *Georgia v. Randolph* when the objecting defendant is no longer present. While the defendant pointed out the police were responsible for his absence, the Court noted that his removal was objectively reasonable. The Court also rejected Fernandez’s argument that his objection should remain effective until he changed his mind. *Georgia v. Randolph* was based on the “widely shared social expectation” that if you call on someone and one of the tenants says you are not welcome, you would not enter. The “calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the door.” Police have been waiting since 2006 to find out if the Court would extend *Georgia v. Randolph*.

In *Navarette v. California* an anonymous 911 caller reported that a vehicle had run her off the road. The Court held 5-4 that a police stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated. The tip of dangerous driving was sufficiently reliable because by identifying specific details about the vehicle the caller necessarily claimed eyewitness knowledge of what happened, police located the vehicle where the caller indicated it would be, and the caller used the 911 system, which readily identifies
callers and therefore discourages them from lying. Driving someone off the road creates reasonable suspicion of drunk driving because “[t]hat conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness.” While the officer didn’t observe additional suspicious conduct after spotting the vehicle and watching it for five minutes, police do not have to give suspected drunk drivers a “second chance for dangerous conduct [that] could have disastrous consequences.” This case is noteworthy because the Court departed from the normal Fourth Amendment requirement that anonymous tips be corroborated.

In *Plumhoff v. Rickard* the Court held 7-2 that police officers didn’t violate the Fourth Amendment when they shot and killed the driver of a fleeing vehicle to end a dangerous car chase. Alternatively, the Court unanimously held the officers were entitled to qualified immunity. Donald Rickard was pulled over because his vehicle had only one operating headlight. He drove away and was pursued by police. He drove over 100 miles an hour and passed more than two dozen vehicles before exiting the highway where he made contact with three police cars. Rickard’s tires were spinning and his car was rocking back and forth when Officer Plumhoff fired three shots into his car. Rickard then reversed his car, nearly hitting an officer on foot, and again fled. Officers fired 12 shots more killing Rickard and his passenger.

Rickard’s surviving daughter argued that the Fourth Amendment did not allow the police to use deadly force to end the chase and that even if police were permitted to fire their weapons, they fired too many shots. The Court disagreed concluding the use of deadly force was reasonable because “[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.” The number of shots wasn’t unreasonable because “if police officers are justified in firing at a suspect in order to end a severe threat to
public safety, the officers need not stop shooting until the threat has ended.” Finally, the Court concluded that even if the use of deadly force violated the Fourth Amendment the officers would be entitled to qualified immunity. The most on point Supreme Court case at the time of this case granted qualified immunity where the facts were less favorable to the officer than the facts in this case. So it was not clearly established the force in this case was unreasonable.

**Qualified Immunity Cases**

In *Wood v. Moss* the Court unanimously granted qualified immunity to two Secret Service agents who moved anti-Bush protesters a block further from the President than pro-Bush supporters. Pro- and anti-President Bush demonstrators had assembled in Jacksonville, Oregon on opposite sides of the street on which President Bush’s motorcade was supposed to travel. After the President made a last-minute decision to have dinner at the outdoor patio dining area of the Jacksonville Inn, the protesters moved down the street in front of the Inn. Secret Service agents moved them two blocks down the street, about a block further away from the Inn than the supporters. The anti-Bush protesters sued claiming the agents violated their First Amendment right to be free from viewpoint discrimination. The Court had little trouble concluding the agents were entitled to qualified immunity: “No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President.” The agents acknowledged that they could not disadvantage one group of speakers without an objective security rationale. Here, pro-Bush demonstrators had no direct access to the Inn because the side of the Inn they faced was totally blocked by another building. But the anti-Bush protesters would have been in weapons range of the President had they not been moved two blocks because only a parking lot separated them from the patio.

In an unauthored opinion in *Stanton v. Sims* the Court reversed the Ninth Circuit’s refusal to grant qualified immunity to a police officer who kicked open a gate hitting the homeowner while in “hot pursuit” of someone the officer thought committed a misdemeanor. The Ninth Circuit concluded that it was clearly established that a police officer may not enter someone’s property without a warrant while in “hot pursuit” of someone suspected only of a misdemeanor. The Supreme Court disagreed “summariz[ing] the law at the time [the officer] made his split-second decision to enter [the homeowner’s] yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeals affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.” It seems likely that the Court will decide the underlying Fourth Amendment issue in this case soon.

In *Tolan v. Cotton* the Court sent a qualified immunity claim back to the Fifth Circuit concluding that it failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case,” and should have credited Tolan with regards to “lighting, his mother’s demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting.”
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Legal Captions

The following are legal captions. All legal articles are published in full on the League’s webpage at <www.lwmlinfo.org>. Copies are also available from the League office. Please include the subject heading and number when making the request.

Liability 430

Legal note by Lisa Soronen of SLLC reviews Fourth Amendment and qualified immunity cases involving police officers decided by the U.S. Supreme Court during its 2013-2014 term, including Riley v. California (police must obtain warrant before searching arrested person’s cell phone), Fernandez v. California (co-tenant could consent to search of home after tenant who refused search is gone), Nava- rette v. California (police stop after anonymous caller reported vehicle had run her off road complied with 4th amendment because police officer had reasonable suspicion under totality of circumstances), Plumhoff v. Rickard (officers didn’t violate 4th amendment when they shot and killed driver of fleeing vehicle to end a dangerous car chase and, alternatively, were entitled to qualified immunity), Wood v. Moss (qualified immunity granted to secret service agents who moved anti-Bush protesters a block further from the President than pro-Bush supporters), and Tolan v. Cotton (qualified immunity claim sent back to 5th Cir. because Court concluded 5th Cir. had failed to view the evidence most favorably to the non-moving party, a person shot by police). 9/30/14. The complete text of this legal note is on page 379 of this Municipality.

Miscellaneous 16

Legal note by Lisa Soronen of SLLC summarizes U.S Supreme Court cases of interest to local governments and decided during the 2013-2014 term, including Town of Greece v. Galloway (legislative prayer need not be nonsec-

Captions continued on page 385
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Legal Captions

Captions from page 383

tion), Lane v. Franks (First Amendment protects a public employee who provides truthful, sworn testimony, compelled by a subpoena, outside the course of his or her ordinary responsibilities), McCullen v. Coakley (statute making it crime to stand on public road or sidewalk within 35 feet of abortion clinic violates 1st Amendment), Schuette v. Coalition to Defend Affirmative Action (Michigan voters could by ballot prohibit affirmative action in public university admission decisions), Burwell v. Hobby Lobby (Affordable Care Act’s birth control mandate violates Religious Freedom Restoration Act as applied to closely held corporations), EPA v. EPE Homer City Generation (Clean Air Act’s Good Neighbor Provision, which prohibits upstream states from emitting air pollution in amounts that will contribute significantly to downwind states failing to attain air quality standards, does not require that states be given a second opportunity to file State Improvement Plans (SIPs) after EPA has informed them of their emissions budgets and does not require EPA to disregard costs and consider only each upstream state’s physically proportionate responsibility for each downwind state’s air quality program), Utility Air Regulatory Group v. EPA (EPA cannot require stationary sources to obtain Clean Air Act permits only because they emit greenhouse gases but may require “anyway” stationary sources, which have to obtain permits based on their emissions of other pollutants, to comply with “best available control technology” emission standards for greenhouse gases), Harris v. Quinn (First amendment prohibits collection of agency fee from home health care providers who do not wish to join or support a union), Marvin M. Brandt Revocable Trust v. United States (United States does not own abandoned railroad right-of-ways it granted in the General Railroad Right-Of-Way Act of 1875), and Michigan v. Bay Mills Indian Community (Michigan’s suit against Bay Mills Indian Community to stop tribe from operating gaming facility on non-Indian lands was barred by tribal sovereign immunity). 9/30/14. The complete text of this legal note is on page 373 of this Municipality.

Police 312

Legal note by Lisa Soronen of SLLC reviews Fourth Amendment and qualified immunity cases involving police officers decided by the U.S. Supreme Court during its 2013-2014 term, including Riley v. California (police must obtain warrant before searching arrested person’s cell phone), Fernandez v. California (co-tenant could consent to search of home after tenant who refused search is gone), Navarette v. California (police stop after anonymous caller reported vehicle had run her off road complied with 4th amendment because police officer had reasonable suspicion under totality of circumstances), Plumhoff v. Rickard (officers didn’t violate 4th amendment when they shot and killed driver of fleeing vehicle to end a dangerous car chase and, alternatively, were entitled to qualified immunity), Wood v. Moss (qualified immunity granted to secret service agents who moved anti-Bush protesters a block further from the President than pro-Bush supporters), and Tolan v. Cotton (qualified immunity claim sent back to 5th Cir. because Court concluded 5th Cir. had failed to view the evidence most favorably to the non-moving party, a person shot by police). 9/30/14. The complete text of this legal note is on page 379 of this Municipality.

Public Records 147

Unincorporated associations like the League of Wisconsin Municipalities and the Wisconsin Counties Association are not “authorities” under Wisconsin’s public records law and are not subject to the public record law’s requirements. Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Ass’n, 2014AP249 (Ct. App. Sept. 18, 2014) (recommended for publication). 9/30/14. The complete text of this legal note is on page 377 of this Municipality.

Platting 171

Legal comment by Brian Ohm summarizes history of law related to extraterritorial plat review in Wisconsin and reviews case law governing extraterritorial plat approval authority in Wisconsin, including Lake Delevan Property Co. , LLC v. City of Delevan, 2014 WI App 35, review denied, 2015 WI 50, which limited the authority of cities and villages to use density standards to control proposed plats in their extraterritorial area. Comment explains the authority that cities and village still have in exercising extraterritorial plat review, primarily related to the suitability of land for the proposed development and the quality of the proposed subdivision, and also summarizes other options available to cities and villages. 9/30/14. The complete text of this legal comment is on page 358 of this Municipality.
Classified Ads Policy: Member municipalities receive free insertions. Non-member advertisements are billed $100 per insertion. All ads are subject to editing if necessary. All ads are also placed on the League website at lwm-info.org. Ads should be sent to classified@lwm-info.org or faxed to (608) 267-0645. The next deadline is November 10 for the December 2014 Municipality.

Administrator - Price County, Wisconsin, located in beautiful Northwestern Wisconsin is currently seeking candidates for the position of County Administrator. This position is responsible for all County Administration functions in a rural County with a population of 14,159 and an annual budget of approximately $21 million. Ideally candidates will have demonstrated experience in all facets of public administration for a minimum of three years, including budget preparation and administration, supervisory management, fiscal management, human resources and public relations. A minimum of a bachelors degree in Public Administration, Finance, Business Administration or a related field, followed by relevant experience or an equivalent combination thereof. Compensation package based upon qualifications and experience. To apply, please send or email a resume along with letter of interest indicating salary requirements to: Northwest Regional Planning Commission, Attn: Myron Schuster, 1400 South River Street, Spooner, WI 54801 (email: mschuster@nwrpc.com). Resumes must be received by November 7, 2014.

Assessing Services RFP - Sealed proposals, labeled “City Assessing Services RFP” and sealed fee schedules, labeled “City Assessing Services Financial Information,” will be received at the City Clerk-Treasurer’s Office, 700 Edison Street, Antigo, WI 54409 until 2:00 p.m. CST on November 5, 2014, at which time the Assessing Services RFP envelopes will be opened and read publicly. Said proposals shall be for providing assessing services for years 2015-2019 with a revaluation in 2015 and maintenance for 2016-2019. Specifications are available at the City Clerk-Treasurer’s Office, 700 Edison Street, Antigo, WI 54409 and on the City’s website: www.antigo-city.org. No proposal may be withdrawn for a period of sixty-days (60) after the proposal opening. The City reserves the right to reject any and all RFPs, cancel all or part of the RFP, waive any minor irregularities, and request additional information from proposers. The City shall not reimburse proposers of this RFP for any expenses incurred in preparing proposals, or, if it desires, any interviews that it may choose to conduct. This RFP does not obligate the City to accept or contract for any services.
Chief Building Inspector – Waukesha. Under the general direction of the Director of Community Development, this position manages and supervises all inspection functions related to the enforcement of municipal building codes and housing improvement program including supervision of building inspection. Provides City wide inspection services for all forms of residential, industrial and commercial new and/or rehabilitated construction, sets and collects fees and issues permits in accordance with code, ordinance and statute requirements. Required: Two years course work in structural engineering, architecture or architectural engineering or a relevant field with four years of increasingly responsible experience in construction supervision, building inspection, plan checking, civil engineering, surveying or similar fields or combination of training and experience. (A bachelors degree may be substituted for one year of experience). Certification in the State of Wisconsin Uniform Dwelling Code for Construction, Electrical, Plumbing and Energy HVAC and Commercial Certification of HVAC and Construction. Preferred: Architectural license. Must have a valid Wisconsin Driver’s License and an excellent driving record. Applicants MUST complete an application. Apply to the Human Resources Department, Room 205, Waukesha City Hall, 201 Delafield St., Waukesha, WI 53188 by 4 p.m., November 7, 2014. Application form available at http://www.ci.waukesha.wi.us/web/guest/hrforms or in Human Resources Department. EOE/AAE.

Clerk/Administrative Assistant - The Village of Thiensville (pop. 3,222) in Ozaukee County is seeking highly qualified applicants for the position of Clerk/Administrative Assistant. Salaried, exempt position reporting to the Village Administrator that is responsible for carrying out statutory municipal clerk duties including, but not limited to, strong knowledge of election procedures, records management, tax collection, record keeping, municipal licenses, public relations activities such as newsletter production and website maintenance, and perform various other administrative tasks, which include periodic handling of confidential information. Includes some night meetings and record keeping of proceedings. Computer skills are essential. This position requires knowledge of Election Administration laws, state voter registration system and all its functions (SVRS) or willingness to learn. Preferred

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Community Planner - Arcadia (population 2,929) is looking for an innovative professional with community planning experience to join our staff. Qualifications include a bachelor’s degree with background in community planning, business management, zoning, or engineering. A significant employment history that can demonstrate the above background requirements may replace some of the educational requirements where then a minimum of two successful years of post-high school education shall be considered. Interested candidates should submit their Resume and cover letter, including three business references, and at least one personal reference to the following address: City of Arcadia, Attn: Personnel Committee, 203 West Main Street, Arcadia, WI 54612. The City of Arcadia is an equal opportunity employer. The deadline for Resume submittal is Friday, November 14, 2014. A more detailed job description can be found on-line at www.cityofarcadiawi.com

Paramedic - The City of River Falls has 1 opening for a Regular FT Paramedic. Competitive Benefit Package (24-hour shift schedule). WI residency is not required; 45 minute call back is required. To see a detailed position description, qualifications, and to apply online, visit www.rfcity.org. Closing date is open until filled. An Equal Opportunity/Affirmative Action Employer.

Transit Manager - City of Eau Claire, Wisconsin (pop. 66,000), a university community that serves as a regional center in northwest Wisconsin, is seeking qualified candidates

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for the position of Transit Manager. The Eau Claire Transit system provides public transportation to one million riders per year on a 15-route hub bus system, together with a paratransit program operated under a private vendor contract. The Transit system consists of 33 employees that include 25 full-time bus operators. Desirable qualifications include a minimum of five years supervisory experience in public transportation or a related field and a Bachelor’s Degree. Experience managing the operational aspects of a paratransit and fixed-route bus program similar in scope and complexity is preferable. Salary range is currently $62,183 to $79,155 DOQ. The online application and full job description are available on the City website at www.EauClaireWI.gov/jobs. Application deadline: November 10, 2014. Equal Opportunity Employer.

Public Works Employee - The Village of Biron. Experience in auto mechanics and small engine repair is required. Water and sewer experience preferred but not required. Experience in snow plowing, street/utility maintenance, mowing and computer skills is a plus. High School graduate or equivalent is required. Completion of water certification will be required in two years from date of employment. Applicant must hold or be able to obtain a valid WI CDL within 6 months. Employees work rotating weekends and holidays. This is an hourly full time position with benefits. Village of Biron participates in the WRS Retirement program. The rate of pay is defined in the Village’s Employee Handbook. Resumes can be mailed to the Village of Biron, 451 Kahoun Road, Wis. Rapids, WI 54494. The deadline is 4:00 p.m. on November 26, 2014.

FOR SALE

Truck and Plow - 2003 Ford S-Duty F2 Pickup Truck w/ Western Plow. 1991 GMC Bus. Both items have low miles and may be viewed at the Bagley Sewer Plant located at 500 Bailey Lane. These items are being sold ‘as is’ with NO stated or implied warranty. Contact the Village President, Dave ‘Buck’ Schott, with any questions. The deadline for submitting bids is 4:00 p.m. on Monday, November 10th, 2014. Bids may be mailed to: Village of Bagley, PO Box 116, Bagley, WI 53801, ~OR~ dropped off at The Bagley Village Office, 400 Jackley Lane, Bagley, WI 53801. The bids will be reviewed at the next Village Board Meeting scheduled for Tuesday, November 11th, 2014, at 7:00 p.m. Meetings are held at the Bagley Community Building, 400 Jackley Lane, Bagley, WI. The Village Board reserves the right to reject any and all bids.

Used Street Lights - The Village of Benton has used street lights for sale. Make great yard lights! 250 Watt HPS Lights-21 available for $25 each or best offer. 400 Watt HPS Lights-5 available for $25 each or best offer. 400 Watt Mercury Vapor Bulbs-NEW! Several available. Free for hauling. Contact the Village of Benton office at (608) 759-3721 or email info@bentonwi.us if interested.
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Retirements —

The League thanks the following for their service to Wisconsin’s municipalities.

Neillsville. Bradley Lindner retired as Chief of Police on September 30, 2014 after 33 years of service to the city.

Oconto Falls. Police Chief Mike Roberts retired on June 3, 2014 after 35 years of service to the department. He was honored and presented with a ring by the City, Council, and Mayor for his dedication and service to the community.
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