Environmental Law

Wetland Individual Permit – Consideration of Entirety of Proposed Project

***Kohler Co. v. Wisconsin Dep't of Nat. Res.*, 2024 WI App 2 (filed Dec. 5, 2023) (ordered published Jan. 31, 2024)**

HOLDINGS: The holdings in this case are summarized in numbered paragraphs in the text that follows.

SUMMARY: The Kohler Company owns a 247-acre property in the city of Sheboygan on which it proposed to construct and operate an 8,000-yard, 18-hole golf course. The property includes 81 wetlands of various types on 47 acres. The proposed project would completely fill 3.69 acres of wetlands.

Kohler applied for and received a wetland individual permit from the Wisconsin Department of Natural Resources (DNR) to discharge dredged material or fill material into the 3.69 acres of wetlands. Intervenors Claudia Bricks and Friends of the Black River Forest (FBRF) then filed for a contested case hearing, which the DNR granted.

After the hearing, an administrative law judge (ALJ) issued a decision and order reversing the DNR's issuance of a permit, finding that the DNR did not have enough information when it issued the permit to adequately analyze the "significant adverse impact[s]" to wetland functional values (WFVs), water quality, or "other significant adverse environmental consequences" (¶ 1). *See* Wis. Stat. § 281.36(3n)(c)3. Put another way, "the DNR did not have sufficient evidence to support its finding that the 'proposed project' would not result in significant adverse environmental impacts" (¶ 30).

In reaching this conclusion, the ALJ defined the "proposed project" as "the construction and operation of the proposed golf course" (*id.*). The DNR adopted the ALJ's decision as its own final decision. The Kohler Company petitioned for judicial review, and the circuit court affirmed the ALJ's decision.

On appeal, Kohler argued that the ALJ "(1) erred when he considered the entire proposed project when assessing the permit application, including wetlands and unregulated activities not related to the specific 3.69 acres of wetlands to be filled; (2) incorrectly found that the DNR did not have enough information at the time it issued the permit; (3) made findings that were unsupported by substantial evidence (namely, that the proposed project would cause cumulative impacts and that nutrients and pesticides would reach the groundwater and wetlands and would cause significant adverse impacts); (4) improperly reversed the DNR's decision instead of modifying the permit; and (5) erred when he required the DNR and Kohler to make 'quantitative findings' with regard to secondary impacts" (¶ 2).

In a lengthy and technical opinion authored by Judge Gill, the court of appeals affirmed. Its numerous conclusions included the following:

1) Wis. Stat. section 281.36(3n)(b) and (c) "require the DNR to consider the entirety of a 'proposed project' when addressing a wetland individual permit, not just the wetlands within a proposed project. By its plain meaning, § 281.36(3n)(c) instructs the DNR to determine whether a proposed project will result in 'significant adverse impact[s]' to WFVs and water quality, and whether the proposed project will result in 'other significant adverse environmental consequences'" (¶ 3). This review necessarily requires the DNR to consider impacts beyond the physical footprint of directly affected wetlands.

2) The ALJ's decision that the DNR did not have enough information when it issued the permit to adequately analyze the "significant adverse impacts" to WFVs, water quality, or "other significant adverse environmental consequences" was supported by substantial evidence (¶ 4).

3) There was substantial evidence to support the ALJ's finding that the DNR lacked information to determine whether nutrients and pesticides would reach the groundwater and wetlands and whether they would cause significant adverse impacts (*see id.*).

4) The ALJ did not err by reversing the DNR's decision without first modifying the permit because Kohler never raised this issue with the ALJ and therefore forfeited any argument that the ALJ should have modified the permit (*see* ¶ 5). The ALJ did not possess the authority to modify the permit conditions *sua sponte* (*see* ¶ 80). The hearing notice defining the issues to be decided did not include whether the ALJ could, or should, amend the permit conditions if the ALJ found them lacking in scope (*see* ¶ 81). *See* Wis. Stat. § 227.44(2)(c).

In a footnote, the court observed that "Kohler does not raise an argument on appeal regarding WIS. ADMIN. CODE § NR 2.14(2), which states that '[e]vidence submitted at the time of hearing need not be limited to matters set forth in pleadings, petitions or applications. If variances of this nature occur, then the pleadings, petitions or applications shall be considered amended by the record.' We therefore will not consider the relevance of § NR 2.14(2) further" (¶ 84 n.26).

5) The ALJ did not require the DNR or Kohler to make "quantitative findings" regarding secondary impacts (¶ 5).

Family Law

Maintenance – De Novo Hearings – Timeliness – Attorney Fees

***Jahimiak v. Jahimiak*, 2024 WI App 5 (filed Dec. 21, 2023) (ordered published Jan. 31, 2024)**

HOLDINGS: 1) The 60-day time limit set by statute for de novo hearings is not mandatory. 2) The circuit court failed to adequately explain its modification of a maintenance award. 3) The circuit court properly granted attorney fees.

SUMMARY: David Jahimiak and Ann Jahimiak were divorced in 1999. In June 2022, a court commissioner modified the maintenance award after a hearing. On June 10, 2022, Ann filed a motion for a hearing de novo in the circuit court. The motion indicated that the hearing would be held on Aug. 22, 2022. This date was not within the 60-day period prescribed by Wis. Stat. section 767.17(3). David filed a motion on Aug. 18, 2022, asking that the hearing not be held. The court nonetheless conducted the de novo hearing,


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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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modified the maintenance award, and granted attorney fees.

The court of appeals affirmed in an opinion authored by Judge Blanchard. The central issue was whether the circuit court lost competency to hold the de novo hearing by failing to conduct it within the 60-day period prescribed by Wis. Stat. section 767.17(3). The court held that it did not because the statute's command that the hearing "shall" be held within 60 days is directory – not mandatory.

The opinion exhaustively assesses the statute's background, language, and policy. The court was "especially struck by the fact that the mandatory interpretation would subject parties in family law cases to potentially extremely harsh consequences, losing all possibility of either circuit court review of court commissioner rulings or appellate court review of circuit court rulings that can fall outside the control of parties and circuit courts. If enlargement of the 60-day window were impossible, parties through no fault of their own could forever lose the ability to obtain the benefits of valuable legal rights" (¶ 40).

Nonetheless, the court could find no "logical path" that supported the circuit court's modification of the maintenance award. It directed the court to reconsider the facts but did not compel it to hold a new hearing (*see* ¶ 58). Finally, the court upheld the award of attorney fees to Ann on the ground that David had "engaged in overtrial" (¶ 65).

Motor Vehicle Law

Operating a Vehicle While Having a Detectible Amount of a Restricted Controlled Substance in the Blood – Metabolites of Cocaine

***State v. VanderGalien*, 2024 WI App 4 (filed Dec. 29, 2023) (ordered published Jan. 31, 2024)**

HOLDINGS: 1) The inclusion of metabolites of cocaine in the definition in Wis. Stat. section 340.01(50m)(c) of a "restricted controlled substance" for purposes of prosecution under the Wisconsin Motor Vehicle Code is constitutional. 2) The circuit court did not err in denying the defendant an evidentiary hearing on various other postconviction claims

SUMMARY: The defendant pleaded no contest to offenses involving the operation of a motor vehicle with a detectable amount in his blood of a restricted controlled substance: a metabolite of cocaine (cocaine metabolite benzoylecgonine or BE). The convictions involved offenses codified in the Criminal Code (homicide and causing great bodily harm by operation of a motor vehicle while having a restricted controlled substance in the blood) and one offense codified in the Motor Vehicle Code (causing injury by operation of a motor vehicle while having a restricted controlled substance in the blood).

[*Note:* The definitions of a "restricted controlled substance" are identical in the Criminal Code and the Motor Vehicle Code, though in this case the defendant's argument focused only on the Motor Vehicle Code definition and the court of appeals confined its analysis to the definition codified in Wis. Stat. section 340.01(50m)(c). In both codes, a "restricted controlled substance" includes "cocaine or any of its metabolites."]

The defendant challenged the constitutionality of Wis. Stat. section 340.01(50m)(c), arguing that the prohibition against having a detectable amount of an inactive, non-impairing metabolite of cocaine in the blood while driving for purposes of prosecution under the

Wisconsin Motor Vehicle Code violates substantive due process (*see* ¶ 18). In this facial attack on the statute, he argued that the statute cannot be enforced under any circumstances because there is no impairment with the mere presence of an inactive, non-impairing metabolite of cocaine in one's system. This attack does not implicate a fundamental right or suspect class and therefore is subject to rational-basis scrutiny (*see* ¶ 21).

The circuit court denied the defendant's motion to dismiss based on the defendant's uncontroverted expert testimony that cocaine breaks down (that is, it metabolizes) into metabolites (including BE) very quickly and that BE remains in the bloodstream for much longer. Thus, in the case of a driver with cocaine in the body at the time of a collision, cocaine might be out of the bloodstream by the time blood is drawn but BE will be detectable when the blood is drawn.

The circuit court reasoned that the Wisconsin Legislature has taken a zero-tolerance approach, reflected here by prohibiting having a detectable amount of BE in the blood while operating a vehicle, and that this approach has a rational basis (*see* ¶ 6). In an opinion authored by Judge Kloppenburg, the court of appeals affirmed.

Wis. Stat. section 340.01(50m) is part of a statutory scheme that creates a zero-tolerance approach to driving a motor vehicle after illegally ingesting a restricted controlled substance, without regard to impairment (*see* ¶ 23). The supreme court has determined that the legislature rationally concluded that this approach is the best way to combat drugged driving and that it is constitutional. *See State v. Luedtke,* 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592 (*see* ¶¶ 23, 25).

In this case the specific question was whether having an inactive, non-impairing metabolite such as BE in the blood while driving bears a reasonable and rational relationship to the legislative purpose of promoting roadway safety and preventing drugged driving (*see* ¶ 27). The court concluded that the defendant failed to meet his burden "to show that the legislature could not have reasonably determined that the inclusion of inactive, non-impairing metabolites such as BE in the definition of a restricted controlled substance is a reasonable means of combatting drugged driving" (¶ 29).

The court looked to the testimony of the defendant's expert to illustrate why it was rational for the legislature to include metabolites in the definition of a restricted controlled substance. "Indeed, as [the defendant's] own expert testified, an individual may ingest cocaine and, up to nine hours later, while the cocaine is still detectable in the individual's blood, operate a motor vehicle. The individual could then be stopped and arrested and have blood drawn one or two hours after the individual had been driving. At that point, the cocaine will likely no longer be detectable and only BE will be detectable. In such a case, BE accurately indicates that the individual had a detectable amount of cocaine in the individual's blood at the time of driving" (¶ 28).

Accordingly, the court concluded that the inclusion of metabolites of cocaine in the Wis. Stat. section 340.01(50m)(c) definition of a "restricted controlled substance" for purposes of prosecution under the Wisconsin Motor Vehicle Code is constitutional (*see* ¶ 3).

The court of appeals also concluded that the circuit court did not err in denying the defendant an evidentiary hearing on various other postconviction claims, including prosecutorial conflict of interest and ineffective assistance of counsel.

Property

Flooding – Municipalities – Time-Barred Claims

***Ricciardi v. Town of Lake*, 2024 WI App 3 (filed Dec. 5, 2023) (ordered published Jan. 31, 2024)**

HOLDING: Various claims brought against a municipality for flood damage were time barred.

SUMMARY: Carl and Phyllis Ricciardi sued the town of Lake for flood damage to their property, which, they alleged, resulted from repair of a road abutting their property. The circuit court granted summary judgment to the town.

The court of appeals affirmed in an opinion authored by Judge Stark. It concluded that the owners' various claims were untimely. The undisputed facts showed that the road was resurfaced in 1990 and a culvert was installed in 2011. The owners purchased the property, where they operate a mobile home park, in 2015. No evidence showed that the prior owners complained about flooding caused by the road's resurfacing or the culvert's installation (*see* ¶ 9).

The court of appeals held that the plaintiffs' claims are governed and precluded by Wis. Stat. section 88.87. "We agree with the Town that pursuant to Wis. Stat. § 88.87 and *Pruim* [*v. Town of Ashford*, 168 Wis. 2d 114, 483 N.W.2d 242 (Ct. App. 1992)], the only claims that are permitted under the statute – provided the property owner complies with the notice requirements under § 88.87(2)(c) – are those for inverse condemnation under Wis. Stat. ch. 32 and equitable claims for relief 'other than damages'" (¶ 21). In sum, the owners' common-law claims are barred by Wis. Stat. section 88.87 (*see* ¶ 29).

The inverse-condemnation claims also were untimely under Wis. Stat. section 88.87(2). "[T]he damage that has occurred due to the governmental entity's failure to construct or maintain a highway or railroad grade pursuant to Wis. Stat. § 88.87(2)(a) manifests itself when there is surface water accumulation, and any claim by an affected property owner must be brought under § 88.87. If flooding does not occur or does not occur within three years of the governmental entity's faulty maintenance or construction – i.e., when the damage occurred – the claim is barred" (¶ 38).

The owners' argument that the "damage occurred" whenever the "flooding occurred" had been rejected by case law (¶ 40). In this situation, the prior owners never complained.

"Absent any evidence that some other action by the Town violated the provisions of Wis. Stat. § 88.87(2)(a), we must conclude that installing the culvert [in 2011] is the event that activated the protections of the statute. Without that conclusion, there is no causation linking the Town to the flooding and providing the Ricciardis a remedy under the statute. Therefore, the damage in this case that impacted the function of the culvert/road for removing or directing water occurred, at the latest, when the culvert was installed. Accordingly, this was the event that triggered the three-year statutory notice deadline for the Ricciardis to bring their claim" (¶ 44). **WL**