Case Law Update
WCCA 2019 Fall Conference

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Blue Harbor, Sheboygan WI
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Six Cases

- *Leibungduth Storage & Van Service, Inc. v. Village of Downers Grove, Il*

  No. 16-3055 (7th Cir. 2019) – Seventh Circuit

- *Enbridge Energy, Co., Inc. v. Dane County*
  2019 WI 78 – WI Supreme Court
- *Town of Rib Mountain v. Marathon County*
  2019 WI 50 – WI Supreme Court
- *Carlin Lake Association, Inc. v. Carlin Club Properties, LLC*
  2019 WI App 24 – WI Court of Appeals
- *Eco-Site, LLC v. Town of Cedarburg*
  2019 WI App 42 – WI Court of Appeals
- *Vilas County v. Bowler*
  2019 WI App 43 – WI Court of Appeals

Leibungduth Storage & Van Service, Inc. v. Village of Downers Grove No. 16-3055 (7th Cir. 2019)

- Issue: First Amendment challenge to the Village of Downers Grove, Illinois sign ordinance.

Leibungduth Storage v. Downers Grove – continued –

- The village's ordinance prohibited any sign painted directly on a wall, and limits the size and number of signs for commercial buildings.
- The ordinance did not require permits for holiday decorations, temporary signs for personal events, noncommercial flags, political and noncommercial signs, and several other signs.

Leibungduth Storage v. Downers Grove – continued –

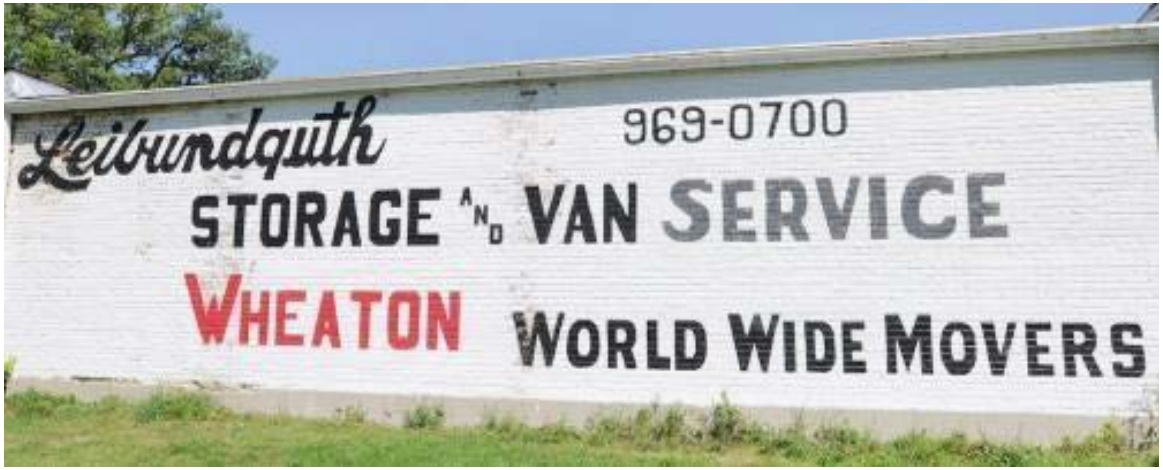
- Leibundguth sued alleging that the ordinance violates the First Amendment "because it is riddled with exceptions and therefore is a form of content discrimination" under *Reed v. Town of Gilbert* decided by the U.S. Supreme Court in 2015.

Leibungduth Storage v. Downers Grove – continued –

- The district court held that since the ordinance only regulates commercial speech the ordinance was valid.
- Leibungduth appealed.
- On appeal, the court determined it did not need to decide whether *Reed* applied because Leibundguth was "not affected by the problematic exceptions."

Leibungduth Storage v. Downers Grove – continued –

- Leibundguth had one sign painted on a wall, another sign that was too large, and a third wall had two signs – the signs amounted to over 500 square feet of signage, exceeding the limit of 159 square feet under the ordinance.



Leibungduth Storage v. Downers Grove – continued –

- The exceptions listed in the ordinance do not require permits, but does not exempt those signs from the other requirements of the ordinance.

Leibungduth Storage v. Downers Grove – continued –

- The ordinance has exceptions for signs that do not require permits, but does not exempt those signs from the other requirements of the ordinance.
- Therefore, the court explained that the sign painted on the wall "would fare no better if it were a flag or carried a political message."

Leibungduth Storage v. Downers Grove – continued –

- The court also noted that to pass muster, the sign ordinance must:
  - be an aesthetic rule that is justified without reference to the content of speech;
  - serve a significant government interest; and
  - leave open ample channels for communication.
- The village provided evidence that painted wall signs deteriorated faster than other signs and can become "downright ugly."
- The court also noted that people view signs as a necessary evil and "smaller = less evil."

Leibungduth Storage v. Downers Grove – continued –

- Takeaway: "Unless the government has engaged in content or viewpoint discrimination, that aesthetic judgment supports legislation." However, if you have to read the sign to determine compliance with the ordinance, you may have a problem.

Leibungduth Storage v. Downers Grove – continued –

- Also worth noting: The court did note the recent decision by the 6th Circuit (*Thomas v. Bright*), which held the on-premise v. off-premise distinction when used in regulating signs was subject to a "strict scrutiny" level of review (almost always fatal) under *Reed*.

Enbridge Energy, Co., Inc. v. Dane County 2019 WI 78

- Issue: Is severing unenforceable conditions from a conditional use permit an appropriate remedy (or rather should the matter be remanded the county to determine whether the county could issue a permit that satisfies its standards without those conditions).

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Dane County issued a conditional use permit to Enbridge for expansion of a crude oil pipeline.
- The CUP contained two conditions that required Enbridge to have insurance to ensure there was adequate funding for remediation, clean up, and payment for damages in the event of a spill.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- However, in 2015, the Legislature passed 2015 Wisconsin Act 55 that prohibits a county from requiring an interstate hazardous liquid pipeline operator to obtain insurance if the operator carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Enbridge had such insurance, so it argued to the county that the new law required the that the now unenforceable insurance conditions be severed from the permit.
- The County denied the request, and kept the insurance requirement in the final CUP.
- Enbridge sued.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- The circuit court sided with Enbridge and severed the insurance conditions, but left the CUP and all of the other permit conditions in place.
- The county appealed, and the court of appeals reversed.
- The court of appeals found that Enbridge failed to make the necessary showings to demonstrate that it had the insurance necessary to prohibit the county from including its conditions regarding insurance.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- The case was remanded to the circuit court, with directions to return the matter to the county, so that the county could determine whether a permit should be issued that contains conditions sufficient to satisfy permitting standards established in the zoning ordinance.
- Enbridge appealed and the Supreme Court agreed to hear the matter.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Reversed.
- After determining that that the insurance provisions in the CUP were unenforceable under the statute, the court considered the proper remedy.
- The county argued for remand and Enbridge wanted the court to modify the permit and by removing the conditions.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- The court reject the county's request for remand.
- First, it determined that courts have express authority to modify CUPs under the statute.

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Second, the court came down pretty hard on the county.

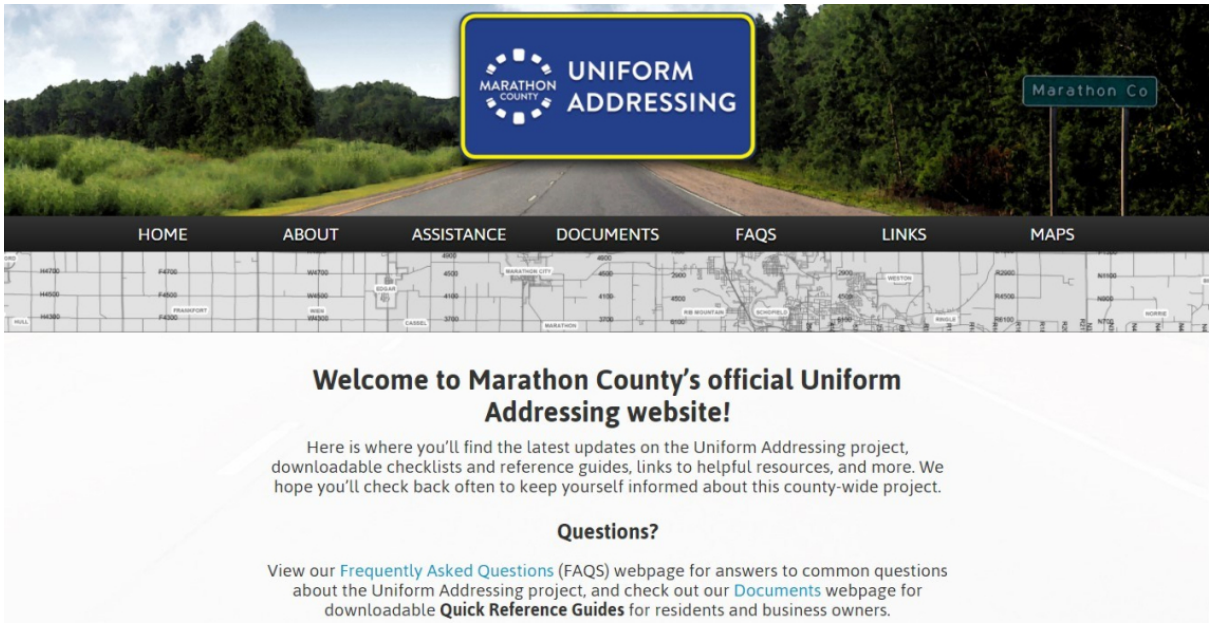
  In this case, it would be even more absurd to force Enbridge to repeat the permitting process when the County Board knowingly issued a CUP with unlawful conditions. Remanding the case to the Zoning Committee would not remedy the County Board's inclusion of unlawful conditions so much as it would reward Dane County for imposing "impermissible, extra-legal conditions."

Enbridge Energy, Co., Inc. v. Dane County – continued –

- Takeaway: First, do not include conditions that are known to be unenforceable in a CUP. Second, generally be careful when approving CUPs. If the conditions are an integral part of the approval, that needs to be spelled out and addressed in the permit, or deny the permit because that concern cannot be satisfied.

Town of Rib Mountain v. Marathon County 2019 WI 50

- Issue: Can a county implement a uniform addressing system in any unincorporated area or only a "rural" part of a town?



Town of Rib Mountain v. Marathon County – continued –

- Marathon County enacted an ordinance creating a uniform addressing system in the county.
- The ordinance applied "to each road, home, business, farm, structure, or other establishment in the unincorporated areas of the County."

Town of Rib Mountain v. Marathon County – continued –

- Rib Mountain filed a lawsuit against the county, seeking declaratory and injunctive relief.
- The town argued that the county's authority to implement a naming or numbering system under Wis. Stat. §§59.54(4) and (4m) extended only to "rural" areas in towns, not the entire town.

Town of Rib Mountain v. Marathon County – continued –

- The county argued that the statue granted it the authority to establish a "rural naming or numbering" in towns, i.e. that the term "rural" refers to the type of system, not a geographic area.
- The circuit court agreed with the county.

Town of Rib Mountain v. Marathon County – continued –

- The town appealed and the court of appeals reversed.
- The court of appeals used common dictionary definitions to conclude that the term "rural" meant an area that is not "urban."

  Wis. Stat. §59.54(4) Rural naming or numbering system. The board may establish a rural naming or numbering system in towns for the purpose of aiding in fire protection, emergency services, and civil defense….

Town of Rib Mountain v. Marathon County – continued –

- The county appealed and the Supreme Court agreed to hear the matter.
- Reversed.
- The Supreme Court looked at the text of the statute, and explained that the legislature conferred authority on counties to "establish a rural naming or numbering system in towns for the purpose of aiding in fire protection, emergency services, and civil defense."

Town of Rib Mountain v. Marathon County – continued –

- The court concluded that the use of the term "rural" in the statutes "merely describes the naming or numbering system" and that and the word was not meant as a geographical limitation on counties to establishing the numbering system, *i.e.* it was surplusage and has no independent operative effect.

Town of Rib Mountain v. Marathon County – continued –

- Takeaway: Unlike the court of appeals decision, there is clarity on a county's authority to adopt a rural numbering system in unincorporated towns.

Town of Rib Mountain v. Marathon County – continued –

- Oh, and about that surplusage issue…
  - *See Enbridge*: "Such an interpretation needlessly leaves 'sudden' and 'accidental' with the same meaning, which our rules of statutory interpretation counsel against. 'If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."
  - *v. Town of Rib Mountain*: "Even though our interpretation results in declaring 'rural' surplusage, the canon against surplusage is not an imperative that must be followed inexorably regardless of where that leads. Rather, the surplusage canon merely instructs that statutory language should be read 'where possible to give reasonable effect to every word.' We recognize that "[s]ometimes drafters do repeat themselves and do include words that add nothing of substance."

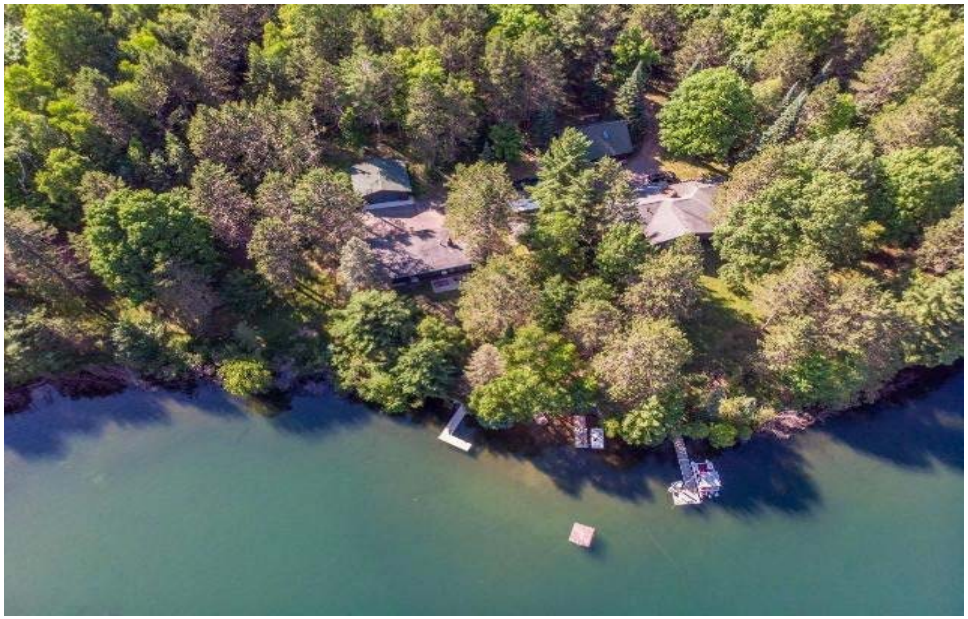
Carlin Lake Ass'n v. Carlin Club Properties 2019 WI 24

- First thing to notice – this is a zoning case without any zoning authority as a party.
- Under Wis. Stat. §59.69(11): "…Compliance with [zoning] ordinances may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation."

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- Issue: There were multiple issues on appeal, but most pertinent was whether the landowners had a right to enforce the county's zoning ordinance.

Carlin Lake Ass'n v. Carlin Club Properties – continued –



- Carlin Club owed two lots on Carlin lake, and previously had a lodge, bar, and restaurant on one of its properties.

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- In 2015, the county became aware that Carlin Club was planning to pump water from the well on the "Lodge property" for the purpose of being transported, bottled and sold as a commercial product at another site.

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- The zoning administrator notified Carlin Club that its proposed use was not permissible.
- Subsequently, the corporation counsel issued an opinion concluding that the proposed use would not violate the zoning ordinance, as pumping and transporting water for commercial sale would not be "inconsistent with the property's present grandfathered use."

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- Several landowners sued to prevent Carlin Club's proposed use.
- The circuit court ruled in favor of the landowners.
- On appeal, the court of appeals first had to determine whether the landowners had a right to bring the lawsuit to enforce the county's zoning ordinance.

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- Wis. Stat. §59.69(11) provides in relevant part:

  "Compliance with such ordinances may also be enforced by injunctional order at the suit of the county or an owner of real estate within the district affected by the regulation."

- Carlin Club argued that the statute only allows a property owner to bring suit if they are "an owner of property in the district, who is affected by the regulation, i.e., a [county] property owner who can show special damage due to a violation of the regulation."

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- The court disagreed:

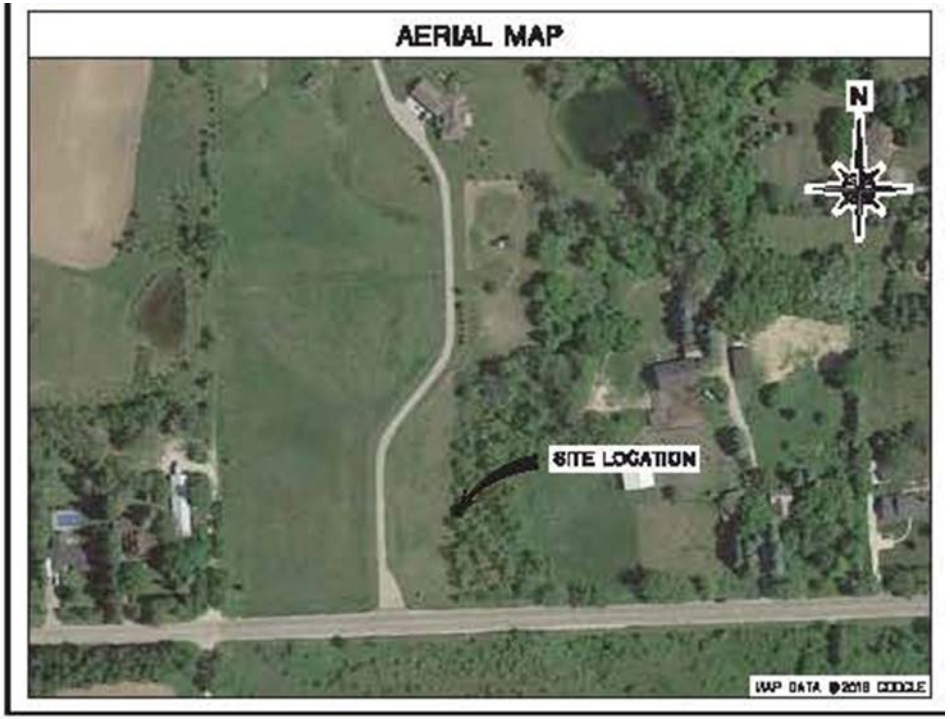
  Wis. Stat. §59.69(11) is not ambiguous because it is not capable of being read in two or more ways by reasonable, well-informed persons. A plain reading of the statute shows that the phrase "affected by the regulation" qualifies the location of the real estate owned, not any condition relative to the real estate owner. Indeed, the statute precisely defines the physical area in which a property owner's real estate must be located to allow a property owner to enforce a county zoning ordinance under § 59.69(11): "within the district affected by the regulation." There is nothing ambiguous about this straightforward definition.

Carlin Lake Ass'n v. Carlin Club Properties – continued –

- Takeaway: Even though the county may not determine there is a violation, that's not the end of the story. Property owners may bring their own litigation to enforce our ordinances.

Eco-Site, LLC v. Town of Cedarburg 2019 WI App 42

- Issue: Challenge to the denial of a conditional use permit for a wireless communication tower.



Eco-Site, LLC v. Town of Cedarburg – continued –

- T-Mobile wanted to move its cellular equipment to new a site in the Town of Cedarburg that was about 1300 feet away from its existing tower.
- The proposed site was zoned A-1 Agricultural – telecommunication towers are a conditional use in A-1.
- The proposed tower site is surrounded by land zoned residential.

Eco-Site, LLC v. Town of Cedarburg – continued –

- The town board denied the application because it determined that the application failed to meet three of six standards in the town's zoning ordinance and one requirement in Wis. Stat. §66.0404.

Eco-Site, LLC v. Town of Cedarburg – continued –

- The reasons given by the Town for denial included:
  - The considerable and foreseeable loss in value to the surrounding properties particularly given the rural and rustic nature of the property, and the loss of property sales in the area as a result of the prospect of the tower;
  - The incompatibility of the 120-foot monopole with the adjacent land, which the Town is struggling to keep rural and rustic;

Eco-Site, LLC v. Town of Cedarburg – continued –

- Reasons for denial – continued:
  - The 'dropping a metal tower in the middle of' a 'beautiful and scenic area' would be detrimental the public health, safety, and general welfare; and
  - Eco-Site's failure to explain why its 'search ring' for other locations was so small, therefore failing to provide an application that was complete under Wis. Stat. § 66.0404(2)(b)6.

    If an application is to construct a new mobile service support structure, an explanation as to why the applicant chose the proposed location and why the applicant did not choose collocation, including a sworn statement from an individual who has responsibility over the placement of the mobile service support structure attesting that collocation within the applicant's search ring would not result in the same mobile service functionality, coverage, and capacity; is technically infeasible; or is economically burdensome to the mobile service provider.

Eco-Site, LLC v. Town of Cedarburg – continued –

- Eco-Site sued, but the circuit court upheld the town's decision and Eco-Site appealed.
- Eco-Site argued that the town misapplied its zoning ordinances in determining that the tower would be incompatible with the adjacent land.
- It also argued that Wis. Stat. §66.0404(4)(g) prohibits local governments from denying mobile telecommunication towers "solely on aesthetic concerns."

Eco-Site, LLC v. Town of Cedarburg – continued –

- The court of appeals first noted that even though the tower was allowed as a conditional use in the A-1 district:

  "there is no presumption that a 'conditional use is *ipso facto* consistent with the public interest or that a conditional use is a use as of right at a particular site within an area zoned to permit that conditional use.'"

Eco-Site, LLC v. Town of Cedarburg – continued –

- According to the court, evidence from the public hearings supported the conclusion the tower would be incompatible with adjacent land.
- Residents presented sufficient evidence of the "substantial diminishment" in the value of adjacent properties if the tower is built:
  - One resident cited two studies showing loss in property values near towers;
  - A developer stated he lost a potential sale due to the tower proposal.

Eco-Site, LLC v. Town of Cedarburg – continued –

- Even though the stated reasons for town's decision included comments on the aesthetics, the court of appeals noted that the language in Wis. Stat. §66.0404 prohibits basing a denial of a proposed tower "solely" on aesthetic concerns.
- Since the town also based its denial on the economic impacts of the tower, the town did not base its decision "solely" on aesthetics.

Eco-Site, LLC v. Town of Cedarburg – continued –

- The court of appeals also determined that substantial evidence supported the town's decision to deny the permit for the tower.
- "Substantial evidence" is evidence where reasonable persons could decide as the town did.
- It is less than a preponderance of the evidence but more that a mere scintilla of evidence and more than conjecture and speculation.

Eco-Site, LLC v. Town of Cedarburg – continued –

- The court also noted that overcoming the substantial evidence test is difficult because reviewing courts are deferential to local government decision makers and certiorari review "accords the decision of the local governmental entity a presumption of correctness and validity."

Eco-Site, LLC v. Town of Cedarburg – continued –

- Takeaway: Despite what you might otherwise be hearing, cell tower siting was not preempted by Wis. Stat. §66.0404.

Vilas County v. Bowler
2019 WI App 43

- Issue: Enforcement of the county's ordinance establishing a uniform addressing system in the unincorporated areas of the county.

Vilas County v. Bowler – continued –

- The Bowlers owned a resort consisting of their residence and 9 cabins available for short-term rental.
- In 2008, Vilas County adopted a Uniform Addressing System Ordinance.
- The ordinance required that all structures for human habitation should be assigned a uniform addressing number.

Vilas County v. Bowler – continued –

- The ordinance also required that where more than one principal structure exists, each structure should be assigned an address.
- The county informed the Bowers that they had to name their private road and address numbers would be assigned to the 10 structures on their property.

Vilas County v. Bowler – continued –

- The Bowers objected and refused to allow the county to access their property.
- The filed a lawsuit to enforce the ordinance.
- The circuit court concluded that the rental structures could be considered "residences" so it was proper to provide addresses for those structures.

Vilas County v. Bowler – continued –

- The Bowlers appealed.
- The court of appeals affirmed.
- Like the circuit court, the court of appeals concluded that the Bowlers' residence and each of the nine rental units is a "principal structure" under the ordinance.

Vilas County v. Bowler – continued –

- Takeaway: Not earth shattering, but defining terms matters when drafting ordinance. Clear up ambiguity before a court has to.

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