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LAWNS: A LARGE PART OF WISCONSIN'S LANDSCAPE

By Lynn Markham, UW-Extension Center for Land Use Education

In spring many folks are making plans for their lawn. You may be planning a trip to the store to get lawn supplies or calling a lawn care company that promises to transform your lawn into a lush, green carpet of grass.

Green grass is an iconic part of American home life. There is nothing like running your toes through the lush green or smelling the freshly mown grass. Some amount of lawn in the right place can be great, but our love affair with lawns can have some unexpected consequences. Before you start your annual lawn routine, consider the following.

One lawn is only a small piece of land, but when you add up all the lawns across the country they cover over 40 million acres – larger than the entire state of Wisconsin. Within Wisconsin, turfgrass is the state's fourth largest crop in terms of acreage, covering an estimated 1.2 million acres of home lawns, parks, roadsides, golf courses, athletic fields and sod farms. Lawns for

homes and apartments make up nearly two-thirds of this acreage.¹

In the home and garden market, 163 million pounds of pesticide active ingredients were used in the United States in 2001, the most recent year for which data is publicly available.² The next sections discuss the potential of these pesticides to cause cancer and suggest tips for creating a lawn that is safe for all.

Step 1: Forget the pesticides

Children and pets like to play on lawns. There are 35 active ingredients in pesticides used frequently on lawns, and over 185 other active ingredients which are used less frequently. Pesticides include herbicides to control weeds, insecticides, and fungicides. Weed-and-feed products contain pesticides.

How are lawn pesticides tested for safety? According to the U.S. Environmental Protection Agency (EPA) lawn pesticides are tested to see whether they cause irritation, sensitization, or toxicity after a single exposure to various parts of the body. EPA has often required additional studies for new pesticides based on their chemical structure. However, they do not routinely require long-term toxicity testing.³

The EPA reviewed the top 10 lawn and garden pesticides for their potential to cause cancer. The results of their review are shown in Table 1. One of the pesticides is a probable carcinogen, three are possible carcinogens, and two have suggestive evidence of carcinogenicity.



Table 1: Top 10 home and garden pesticides

Pesticide	Type	Pounds of active ingredient used in the U.S. in 2001 ¹	Potential to cause cancer ⁴
2,4-D	H	8-11 million	Not classifiable as to human carcinogenicity
Glyphosate (Roundup)	H	5-8 million	Evidence of non-carcinogenicity for humans
Pendimethalin	H	3-6 million	Possible human carcinogen
Diazinon	I	4-6 million	Not likely to be carcinogenic to humans. EPA eliminated all residential uses December 31, 2004 ⁵
MCPP	H	4-6 million	Suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenic potential
Carbaryl	I	2-4 million	Probable human carcinogen
Dicamba	H	2-4 million	Not classifiable as to human carcinogenicity
Malathion	I	2-4 million	Possible human carcinogen
DCPA (Dacthal)	H	1-3 million	Possible human carcinogen
Benfluralin (Benefin)	H	1-3 million	Suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenic potential

H=herbicide, I=insecticide

Carcinogen: a chemical that causes cancer

How do lawn pesticides affect wildlife? Birds are injured and killed more by insecticides than any other type of pesticides. People should be extremely cautious when using insecticides and should attempt to limit their use to emergency situations only. At least 40-50 different insecticides (organic-phosphates and carbamates, which include malathion and carbaryl from the top 10 list of lawn pesticides above) are known to kill birds even when the label instructions and rates are followed.⁶

Herbicides and fungicides are usually not considered acutely toxic to birds, but have been shown to cause endocrine and other internal system effects, which can impact reproduction and other normal functioning of birds.⁶

A 2004 study found that frogs exposed to Roundup, which contains glyphosate, the most common lawn pesticide, had abnormal growth and abnormal sex organs.⁷

Step 2: Consider all the options for your yard

How do you want to use your yard? Clearly there are many landscaping options and your choices will likely depend on what uses you have in mind for your yard. Do you want to use your yard as a place to play... relax... watch birds...have a picnic...plant flowers or tomatoes...or all of these?

Once you've decided how you want to use your yard, consider the following recommendations for creating and maintaining a pesticide-free lawn⁸ as well as other areas in the yard to explore.

Key #1: Start with healthy turf

Maintaining a weed free lawn without pesticides can be as simple as keeping the turf canopy dense by judiciously using fertilizers, using corn gluten meal annually to prevent weeds, and pulling or spot-treating the occasional weed. Eliminating existing weeds will rely on hand pulling or renovation of weed-infested areas. If you're establishing a lawn or renovating problem areas,

laying sod is a good place to start because it has no weeds and provides dense turf cover.

Key #2: Fertilize properly

Proper fertilization, along with appropriate watering and mowing practices, is one of the most critical aspects of a successful pesticide-free turf management program. If recommended by a soil test report, apply fertilizer or lime at the appropriate times of year and at the correct rate. Lawn & Garden Fertilizers is a UW-Extension publication that includes details about when and how much to fertilize.⁹

Key #3: Consider using corn gluten meal for weed control

Applying corn gluten meal to established lawns at 10 to 50 pounds per 1,000 square feet in May is a way to prevent weeds and fertilize at the same time. Applying corn gluten meal at a rate in the higher part of this range will more effectively prevent weeds, cost more and deliver more nitrogen. Ten pounds of corn gluten meal contains 1 pound of nitrogen.

Key #4: Water seldom if at all

Rainfall alone is often sufficient to sustain lawns. Watering is very rarely recommended by UW-Extension specialists for home lawns. This is due in part to the fact that ground water levels are falling in southeast Wisconsin, Dane County and central Wisconsin.¹⁰ During extended periods of drought the grass leaves will stop growing and turn brown, but dormant plants can remain alive for 2-3 months. For pesticide-free lawns, watering may be used during droughts to keep the grass growing when plants that are more tolerant of drought (including crabgrass and many broadleaf weeds) have a competitive advantage. Consider rainbarrels to collect the runoff from rooftops to water plantings. Any watering should be done early in the morning to reduce the amount of water that is lost to evaporation.

Key #5: Optimize your mowing or plant a fine fescue mix to minimize mowing

Mow the lawn at a height of at least

AREAS TO EXPLORE

People choose to have more or less lawn in their yard depending on how they use it. Some people follow the suggestion to “only mow where you go.” To create areas to explore in your yard, consider:

- Trees and shrubs. Think shade, fruit, or a place to hang a swing. Native trees and shrubs can create habitat for birds – a natural source of insect control.
- Shade gardens of attractive native ferns and spring flowers that also provide homes for frogs and toads – another natural source of insect control.
- Patches of native prairie that provide long-lasting flowers – food for butterflies as well as food and nesting materials for birds.
- Trails and paths around or through natural areas.
- Gardens for flowers, herbs, strawberries or veggies.
- Boardwalks or bridges.
- Rocks and logs.

For Wisconsin-specific resources related to native plants, see:

- Wild Ones, an organization that provides information about landscaping with native plants, has 12 local chapters in Wisconsin www.for-wild.org
- Wisconsin Native Plant Sources provides a list of nurseries that sell seeds and plants for natural landscaping <http://dnr.wi.gov/org/water/wm/dsfm/shore/documents/nativeplants.pdf>



three inches using a sharp mower blade to maximize rooting and shade for potential weeds. Follow the “one-third rule” and never mow off more than one third of the grass tissue at a single time. Fine fescue grasses, sometimes marketed as “no mow turf,” do well in full sun and shade but are not appropriate for high traffic areas or areas with wet, compacted soils. Look for the following species in a fine fescue mix: Chewings fescue, hard fescue, and creeping red fescue. Fine fescue sod is available from many growers.

Key #6: Aerate when needed

Aeration, removing cores of soil from the ground, is recommended when soil is compacted, when the thatch layer is more than one inch thick, and before seeding into an existing lawn. Most lawns will benefit from being aerated every 1-5 years. Sandy soils generally

don't become compacted and rarely need to be aerated.¹¹

In conclusion, there are many things we can do in our own yards to make them safe for kids, pets and wildlife.

The author gratefully acknowledges the review and contributions of Robert Korth and Patrick Goggin, UW-Extension Lakes; Nancy Turyk and Paul McGinley, UW-Stevens Point Center for Watershed Science and Education; Christine Mechenich; Doug Soldat and John Stier, UW-Madison Department of Soil Science; Chad Cook and John Haack, UW-Extension Natural Resources Educators; Ken Schroeder, Portage County UW-Extension; Randy Slagg, Portage County Planning, Zoning and Land Conservation; and Bret Shaw, UW-Madison Department of Life Sciences Communication.

¹ Wisconsin Agricultural Statistics Service. 2001. 1999 Wisconsin Turfgrass Industry Survey. Wisconsin Department of Agriculture, Trade and Consumer Protection. Madison, WI.

² U.S. Environmental Protection Agency, 2004. Pesticides Industry Sales and Usage: 2000 and 2001 Market Estimates. www.epa.gov/oppbead1/pestsales/01pestsales/market_estimates2001.pdf

³ Cornell University Cooperative Extension. No date. Questions and Answers on Lawn Pesticides. <http://psep.cce.cornell.edu/issues/lawnissues.aspx>

⁴ Information about whether lawn pesticides cause cancer comes from the following report: Chemicals Evaluated for Carcinogenic Potential. 2007. U.S. Environmental Protection Agency. Some of the data in this report is from the early 1990s (e.g. glyphosate report was published in 1991). In some cases there has been significant research published about the cancer causing potential of these chemicals since the EPA decision was made. For example the following three reports published after the EPA's glyphosate decision found exposure to glyphosate was associated with an increased incidence of non-Hodgkin's lymphoma: McDuffie, H.H. et al. 2001. Non-Hodgkin's lymphoma and specific pesticide exposures in men: Cross-Canada study of pesticides and health. *Cancer Epidemiology, Biomarkers & Prevention* 10:1155-1163; Hardell, L., M. Eriksson, and M. Nordström. 2002. Exposure to pesticides as risk factor for non-Hodgkin's lymphoma and hairy cell leukemia: Pooled analysis of two Swedish case-control studies. *Leukemia and Lymphoma* 43:1043-1049; De Roos, A.J. et al. 2003. Integrative assessment of multiple pesticides as risk factors for non-Hodgkin's lymphoma among men. *Occupational and Environmental Medicine* 60(9):E11.

⁵ U.S. Environmental Protection Agency. Diazinon: Phase Out of all Residential Uses of the Insecticide. www.epa.gov/opp00001/factsheets/chemicals/diazinon-factsheet.htm

⁶ U.S. Fish and Wildlife Service. No date. Bird Hazards: Hazards to birds that may be found in your city. www.fws.gov/birds/uctmbga/bird-hazards.html

⁷ Howe, C.M. et al. 2004. Toxicity of glyphosate-based pesticides to four North American frog species. *Environmental Toxicology and Chemistry* 23:1928-1938.

⁸ Adapted from a personal communication with Doug Soldat, Department of Soil Science, University of Wisconsin-Madison, 2/25/2010.

⁹ Korb, Gary, James Hovland, and Steven Bennett. 2008. Lawn & Garden Fertilizers. UW-Extension. <http://clean-water.uwex.edu/pubs/pdf/home.lgfert.pdf>

¹⁰ Wisconsin Groundwater Coordinating Council Report to the Legislature. 2009. <http://dnr.wi.gov/org/water/dwg/gcc/rtl/2009fullreport.pdf>; Clancy, Katherine, George J. Kraft, David J. Mechenich, 2009. Knowledge Development for Groundwater Withdrawal Management around the Little Plover River, Portage County Wisconsin: A Report to the Wisconsin Department of Natural Resources in Completion of Project: NMG0000253 www.uwsp.edu/cnr/watersheds/Reports_Publications/Reports/LittlePlover2009.pdf; Presentations and a draft report by Kraft and Mechenich have found that the drawdown affecting the Little Plover River also affects other parts of central Wisconsin. www.uwsp.edu/cnr/watersheds/Reports_Publications/Reports/gwpumpcentralsands2010draft.pdf

¹¹ Stier, John C. 2000. Lawn aeration and top dressing, University of Wisconsin-Extension. <http://learningstore.uwex.edu/assets/pdfs/A3710.pdf>

WHAT HAPPENED TO THE PHOSPHOROUS? HOMEOWNER INFORMATION ON NEW TURF FERTILIZER RESTRICTIONS

By Wisconsin Department of Agriculture, Trade and Consumer Protection

When you buy lawn fertilizer this spring, you will notice that the turf fertilizer products sold at retail will no longer contain phosphorus or P.

Beginning April 1, 2010, new state regulations restrict the use, sale and display of turf fertilizer that is labeled as containing phosphorus or available phosphate. This type of fertilizer cannot be applied to lawns or turf in Wisconsin unless the fertilizer application qualifies under certain exemptions.

Homeowners, renters and others who do their own lawn care will have to follow the new law. In addition, there are restrictions that professional lawn and landscape businesses must follow as well as sales and product display requirements for businesses that sell lawn or turf fertilizer.

Background

Phosphorus is an essential plant nutrient. Plants only absorb the amount of phosphorus they can use. Extra phosphorus can wash into lakes, rivers and streams which can lead to algae blooms and declining water quality. The law's intent is to provide protection to Wisconsin's water resources from phosphorus run-off.

Reading a Fertilizer Label

Fertilizer labels carry a series of three numbers that indicate the amount of total nitrogen (N), available phosphate (P), and soluble potash (K) in the package, also referred to as N-P-K. Fertilizers that also contain pesticides, sometimes called "weed and feed," will also carry the three numbers for nitrogen, phosphate and potash.

Use Restrictions

Under the new law, turf fertilizer that is labeled as containing phosphorus or available phosphate cannot be applied to residential lawns. There are some exceptions to this rule.

New Lawns: Fertilizer labeled as containing phosphorus or available phosphate can be used for new lawns (seed or sod) during the growing season in which the grass is established.

Phosphorus Deficient: Fertilizer labeled as containing phosphorus or available phosphate can be used if the soil is deficient in phosphorus, as shown by a soil test performed no more 36 months (three years) before the fertilizer is applied. The soil test must be performed by a soil testing laboratory.

Non-Turf Use: Fertilizer labeled as containing phosphorus or available phosphate can be applied to pastures, land used to grow grass for sod, or any other land used for agricultural production or home gardens.

Purchasing Turf Fertilizer with Phosphorus

Fertilizer retailers cannot display turf fertilizer that is labeled as containing phosphorus or available phosphate. However, retailers can post a sign indicating if fertilizer containing phosphorus is available for purchase. If you need to purchase fertilizer because of one the exceptions listed above, you should ask your retailer if

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For More Information, contact Charlene Khazae, fertilizer program manager, 608-224-4541 or email charlene.khazae@wisconsin.gov.



This product contains 24 percent nitrogen, 0 percent phosphate and 12 percent potash.

2009 WISCONSIN PLANNING AND ZONING CASE LAW UPDATE

By Brian W. Ohm, JD, University of Wisconsin-Madison/Extension

This summary was originally published by the Wisconsin Chapter of the American Planning Association. Additional case law and legislative updates are available on the WAPA website: www.wisconsinplanners.org/law/

Use can be a Factor in Considering Area Variances

Driehaus v. Walworth County involves a longstanding dispute between neighbors over the conversion of a garage. Driehaus owns more than seventeen acres of property, with over six hundred feet of frontage on Geneva Lake. The property is zoned C-2, Upland Resource Conservation District and included two residences and an eight-car garage. The garage was built in 1906 and is located less than three feet from the property's boundary line. The Walworth County Shoreland Zoning Ordinance (shoreland ordinance) requires a twenty-foot minimum side yard setback for all dwellings in a C-2 zoning district.

In 1999, Driehaus applied for a building permit to make certain improvements to the garage and convert the upper portion storage area to a single-family residence but the permit was denied because the shoreland ordinance only allows one principal structure to be located on a lot. Driehaus then filed an application for a zoning permit to "rehab" the existing two-story garage with the County and was again unsuccessful.

On April 5, 2000, Driehaus filed an application with the County zoning committee for a conditional use permit (CUP) for a planned residential development for three dwellings. The zoning committee voted to conditionally approve the CUP; however, one of the conditions imposed was that Driehaus obtain all required zoning permits, including a variance to the twenty foot lineal side yard setback requirement found in the shoreland ordinance. The zoning committee then decided to hold further proceedings and to make its own decision on the variance and did not refer the matter to the Board of Adjustment. The committee held a hearing on the variance and voted to grant Driehaus a variance to the

twenty foot lineal side yard setback requirement.

The neighboring property owners then filed a lawsuit challenging the zoning committee's decision to grant the variance. The circuit court dismissed the lawsuit but was overturned in an earlier Court of Appeals decision. The Court of Appeals in the earlier action held that the zoning committee had no jurisdiction to consider the variance and sent the case back to the County for a decision on the variance by the Board of Adjustment. The Board of Adjustment denied the variance. Driehaus then challenged the Board's denial of the variance. The Circuit Court upheld the denial. Driehaus then appealed the Circuit Court's decision to the Court of Appeals.

On appeal, Driehaus argued that the Board applied the wrong legal rule to the facts of the case. Rather than focus on the dimensional aspects of the variance, he asserts, the Board denied his petition based on the proposed use of the property. Under *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401, the standard for granting an area variance is "unnecessarily burdensome" while the standard for granting a use variance is the more stringent "no reasonable use" standard.

The Court of Appeals did not agree that the Board applied the wrong standard. The Court of Appeals noted that under *Ziervogel*, use can be a factor in the board of adjustment's consideration of area variances. The Court of Appeals then went on to note that in this case the Board's decision rested on several findings, including: (1) the garage could continue to be used for storage as it has been without a variance, (2) the "hardship" of needing another dwelling was self-created and of a personal nature, (3) the setback requirements were not unnecessarily burdensome to

Driehaus' 17.91 acre lakeshore estate, (4) the detriment to the neighboring properties was apparent, and (5) a variance under these facts would undermine the purpose of the zoning law. The Court of Appeals upheld the variance concluding that the Board's findings represented an appropriate application of the law to a reasonable view of the facts, and its decision was neither oppressive nor arbitrary.

Local Regulation of Wind Energy Systems Requires a Case-by-Case Approach

In *Ecker Brothers v. Calumet County*, the Wisconsin Court of Appeals addressed the process local governments must use to regulate wind energy systems under section 66.0401 of the Wisconsin Statutes.

Section 66.0403(1) reads as follows:

- (1) **AUTHORITY TO RESTRICT SYSTEMS LIMITED.** No county, city, town, or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system . . . or a wind energy system . . . unless the restriction satisfies one of the following conditions:
- (a) Serves to preserve or protect the public health or safety.
 - (b) Does not significantly increase the cost of the system or significantly decrease its efficiency.
 - (c) Allows for an alternative system of comparable cost and efficiency.

Calumet County adopted an ordinance that set minimum setback, height and noise requirements for any wind energy system in the County. The County's ordinance divided the systems into two categories, small and large, and established a uniform set of restrictions for each category.

The Ecker Brothers were farmers with one turbine on their farm who wanted to build additional wind turbines on their farm. They brought a facial challenge to the type of regulation used by the County and did not challenge the substance of the regulations. According to the Court of

Appeals, the case "boils down to the proper method for restricting wind energy systems: (1) a conditional use permit procedure that restricts systems as needed on a case-by-case basis, or (2) an ordinance creating a permit system with across-the-board regulations based on legislative policy-making." The Court then concluded that the statute only authorizes the first approach.

The Court of Appeals, stated that section 66.0403(1) "requires a case-by-case approach, such as a conditional use permit procedure," in which a local government must rely on the facts of the individual situation to make case-by-case restrictions. The Court interprets section 66.0403(1) to prohibit local governments from using ordinances that establish uniform requirements for setbacks, etc. The Court call these uniform restrictions "one size fits all" and arbitrary. As a result, the Court of Appeals determined that the County exceeded its authority under section 66.0403(1) when it adopted it wind energy ordinance.

As a result of this case, local governments with ordinances regulating wind and solar energy systems should review those ordinances to insure that they follow a case-by-case permitting process rather than using uniform standards that everyone applicant must follow. The case-by-case approach will most likely require greater analysis of each application and stronger justification for the standards used in each permit than would be required for a uniform standard. Following a case-by-case approach will also move the regulatory process from a standard set by legislative means, to which courts give great deference, to a more quasi-judicial process subject to greater scrutiny by the courts.

Town's Approval of Condominium Violated Village ET Moratorium

In *Village of Newburg v. Town of Trenton*, the Wisconsin Court of Appeals held that the Town of Trenton

in Washington County violated a temporary moratorium enacted by the Village of Newburg in the Village's extraterritorial jurisdiction. The Village's moratorium, enacted under the extraterritorial zoning process outlined in section 62.23(7a) of the Wisconsin Statutes, prohibited the town from changing the zoning or land within the extraterritorial jurisdiction of the Village (one and one-half miles beyond the border of the Village) for 2 years. (There is no county zoning in Washington County. All the towns administer their own zoning ordinances.)

While the moratorium was in place, the Town approved a six-unit condominium development on a parcel zoned for "country estate residential" located within the Village's extraterritorial jurisdiction. The zoning allowed for single-family residential development at densities of one dwelling unit per acre. The proposed condominium development included one commercial/industrial unit and five residential units. The Village argued the development required a rezoning, an action prohibited by the moratorium. The Town argued that since the development was condominium, the zoning process did not apply.

The Court of Appeals noted that while section 703.37 of the Wisconsin Statutes states that zoning may not prohibit the condominium form of ownership, the proposed use envisioned for the condominium development must comply with applicable zoning ordinances. If a condominium development proposes a use for a parcel of land prohibited by the zoning for that parcel, the Town needs to rezone the parcel if it wants to approve the development, something the Town could not do because of the moratorium. The Court declared the Town's approval of the condominium development to be a "de facto rezoning" in violation of the Village's moratorium.

Development Agreement Waiving Annexation Rights Upheld

Town of Waukesha v. Waukesha Limited Partnership emphasizes the important strength of contract law.

In 2005, a developer proposed a commercial development located in the Town of Waukesha. The developer told the town board chair that the City of Waukesha did not want retail at that location. The scenario was similar to one faced by the town earlier where the City initially did not want development of a grocery store, the Town approved the development, and then the developer petitioned to annex the property to the City, which the City approved. To avoid a repeat of the earlier scenario, the town board chair asked the developer to enter into an agreement waiving the developer's right to annex the property to the City. The developer agreed to the waiver. Under the terms of the agreement, the developer consented to pay \$250,000 in liquidated damages to the Town in the event the developer petitioned to annex the property to the City.

One of the steps in the development approval process was the approval of a certified survey map (CSM) for the development. The Town Board approved the CSM subject to the conditions imposed in the agreement.

Waukesha County then informed the developer that it could not approve the CSM until several requirements were met. Several months later the developer decided to expand the project. The expanded development would require a new CSM approval by the Town. The developer then petitioned the City of Waukesha to annex the property. The Town sued for breach of the development agreement. The developer argued that because there is no express grant of authority for a town to request an annexation waiver from a property owner, the authority does not exist. The Town countered that there is no express prohibition of this type of agreement and the agreement fell within the broad corporate powers of towns. The

Wisconsin Court of Appeals agreed with the Town.

The developer also argued that under *Hoepker v. City of Madison Plan Commission*, 209 Wis. 2d 633, 563 N.W.2d 145 (1997), the Town could not condition approval of the development on an annexation waiver. *Hoepker* involved the City of Madison's conditioning the approval of a plat on the developer annexing the land to the City. The Court of Appeals distinguished the *Hoepker* case, viewing it as a situation where the City coerced the property owner to annex the property. The Court of Appeals did not view the Town's requiring the developer to enter into the annexation waiver as coercive.

A Use for 12 Days Does Not Establish a Legal Nonconforming Use

In *Town of Cross Plains v. Kitt's Korner, Inc.*, the Wisconsin Court of Appeals held that the adult entertainment provided at a tavern for twelve days before the effective date of an ordinance amendment prohibiting that use in that zoning district did not constitute a nonconforming use.

In early 2005, a tavern business called Kitt's Korner was operating in the Town of Cross Plains, Dane County. Bow-Wow Entertainment, LLC, owned and operated an adult entertainment tavern in North Bristol, Dane County. As a result of the opening of this establishment, Dane County officials became aware that Dane County ordinances did not contain any provisions regulating adult entertainment and they began to consider proposals to address this. On January 31, 2005, a County Board committee voted to approve an amendment addressing adult entertainment. The proposed amendment was scheduled for action by the County Board on February 18, 2005.

On February 11, 2005, Bow-Wow purchased all of Kitt's stock. A

managing member of Bow-Wow, testified that at the time he began negotiations for the purchase of Kitt's Korner, he was aware an amendment requiring a zoning change for an adult entertainment tavern was going to be adopted sometime in early 2005.

On the night of February 11, Kitt's began presenting nude dancers. A manager of Bow Wow acknowledged that he started on this date in order to attempt to beat the ordinance amendment and to be "grandfathered" in under the existing ordinance. Kitt's then offered adult entertainment every night from 5:00 p.m. until 2:00 a.m.

On February 19, 2005, the County Board adopted an adult use amendment to the Dane County Zoning Ordinance. The amendment became effective on February 23. However, on February 21, 2005, Kitt's obtained a building permit and thereafter began remodeling the events area to add balconies, private viewing cubicles, a stage with poles, dressing rooms, lighting, and other improvements. The Town revoked Kitt's liquor license and a dispute arose over the lawfulness of the adult entertainment.

Kitt's Korner looked to Wis. Stat. § 59.69(10)(a) and argued it had vested rights as an established nonconforming use under Wisconsin law. Wis. Stat. § 59.69(10)(a) states that zoning ordinances "may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure, or fixture is used at the time that the [zoning] ordinances take effect." The Town argued the adult entertainment offered by Kitt's was not a legal nonconforming use. The Wisconsin Court of Appeals agreed with the Town.

The Court's decision addressed two issues. The first was: What, if anything, in addition to a use actually occurring on the effective date of the ordinance amendment, is required to constitute a vested

interest for purposes of protection as a nonconforming use under Wis. Stat. § 59.69(10)(a)? The Court concluded that, “in order for a use to be protected as a nonconforming use, the business owner must have a *vested interest* in the continuance of that use, meaning that, were the continuance of the use to be prohibited, *substantial rights* would be adversely affected. In the context of § 59.69(10)(a)--relating to trade and industry--this will ordinarily mean that there has been a *substantial investment* in the use or that there will be a *substantial financial loss* if the use is discontinued.” (Emphasis Added.)

The Court next noted that to determine whether Kitt’s Korner’s had established *substantial rights* (had made a substantial investment or would suffer a substantial financial loss) depended on resolution of a second issue. The second issue was: What is the effect of the owners’ *knowledge* of the pending ordinance amendment before they began to make expenditures and incur liabilities to

establish the new adult entertainment use?

The Court concluded that, in order to acquire a vested interest in a use for protection as a legal nonconforming use under Wis. Stat. § 59.69(10)(a), “the business owner must reasonably rely on the *then-existing ordinance* when making expenditures and incurring liabilities. In the circumstances of this case, we conclude that, because the *owners knew* of the pending ordinance amendment before they made expenditures and incurred liabilities to establish the use, *they did not reasonably rely on the then-existing ordinance.*” (Emphasis added.) In other words, because of Bow Wow’s knowledge of the proposed ordinance change, the Court of Appeals viewed the proposed ordinance as the “then-existing” ordinance and the last minute efforts by Kitt’s to frustrate the County’s pending ordinance change would not work to establish a nonconforming use.

What Happened to the Fertilizer

Continued from page 5

fertilizer with phosphorus is available.

Other Use Restrictions

In addition, the following use restrictions apply.

Frozen Ground: No one may apply fertilizer (with or without phosphorus), manipulated animal or vegetable manure, or finished sewage sludge product to turf when the ground is frozen. Ground is generally considered unfrozen when you can dig down six to eight inches. Snow is not a good indicator. Depending on winter weather conditions, the ground under the snow could be frozen or unfrozen.

Impervious Surfaces: No one may apply turf fertilizer (with or without phosphorus), manipulated animal or vegetable manure, or finished sewage sludge product to an impervious surface such as a sidewalk or driveway. If any of these

products are intentionally applied or accidentally come into contact with an impervious surface they must be removed immediately. Appropriate means of removal include sweeping the granules and disposing of them in the trash or adding them back to the bag of fertilizer, or sweeping, hosing or blowing the granules into the grass using a leaf blower. Granules should not be hosed into the street or storm drains. This also means that turf fertilizer should not be used on icy or snow covered sidewalks or driveways as a substitute for ice-melting products.

Penalties

A person who violates regulations on the use of fertilizer containing phosphorus or available phosphate may be required to pay a penalty of up to \$50 for a first violation and \$200-\$500 for any subsequent violations.

CALENDAR OF EVENTS

SMART GROWTH@10: POSITIONING COMMUNITIES FOR THE FUTURE

May 6, 2010 – Exhibition Hall, Alliant Energy Center, Madison, WI
www.1kfriends.org/news/announcements/smart-growth10/

CONGRESS FOR THE NEW URBANISM'S 18TH ANNUAL CONGRESS

May 19-22, 2010 – Atlanta, GA
www.cnu.org/cnu18

21ST ANNUAL ENERGY FAIR

June 18-20, 2010 – Custer, WI.
www.the-mrea.org/fair_workshops.php

NEW MUNICIPAL OFFICIALS WORKSHOPS

April 30, 2010 – Holiday Inn Campus, Eau Claire, WI
 May 7, 2010 – Liberty Hall, Kimberly, WI
 May 14, 2010 – Crowne Plaza Hotel, Madison, WI
www.lwm-info.org

COUNTY OFFICIALS WORKSHOPS

May 11, 2010 – Johnson Creek, WI
 May 12, 2010 – DePere, WI
 May 13, 2010 – Rothschild, WI
 May 18, 2010 – Wabeno, WI
 May 19, 2010 – Cable, WI
 May 20, 2010 – Eau Claire, WI
 May 25, 2010 – Richland Center, WI
<http://lgc.uwex.edu/Workshops>

BUILDING COMMUNITIES WEBINAR SERIES

April 20, 2010 – Rebuilding Downtown and Niche Small Businesses
 May 18, 2010 – Matching Customers and Businesses
 June 15, 2010 – Engaging the Community to Develop Sustainably
www.uwex.edu/ces/cced/communities/Building_Community.cfm

AMERICAN PLANNING ASSOCIATION AUDIO/WEB CONFERENCES

April 21, 2010 – Development Finance and Pro Formas
 May 12, 2010 – Design Graphics for Planning
 May 26, 2010 – Design Review for Officials
 June 30, 2010 – 2010 Planning Law Review
www.planning.org/audioconference

FOX-WOLF WATERSHED ALLIANCE STORMWATER CONFERENCE

April 28-29, 2010 – Liberty Hall, Kimberly, WI
www.fwwa.org

PURCHASE OF AGRICULTURAL CONSERVATION EASEMENTS TRAINING

April 29, 2010 - Bangor, WI
 Webinar www.datcp.state.wi.us/registration/pace.jsp

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Submit Articles!

Please submit an article to our newsletter.

It should be:

- 1,000 words or less,
- Informative,
- Of statewide concern,
- And address a land use issue.

The managing editor will review your submission and get back to you if any changes are necessary.

Managing Editor
Rebecca Roberts

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AMERICAN PLANNING ASSOCIATION MONTHLY WEBCASTS

CM credits available; free to WAPA members

May 7, 2010 – Conventional and Form-Based Codes

May 14, 2010 – Implementing Planning Support Tools

May 27, 2010 – Smart Growth Rating Systems and Regulatory Approaches

June 3, 2010 – Sex in the City: Design Standards and Regulations

June 4, 2010 – Retrofitting Suburbia

June 11, 2010 – The Inside Story of New York's Bus Rapid System:

June 25, 2010 – Understanding the Unserved Workforce

July 9, 2010 – Land Use Law

August 6, 2010 – Americans with Disabilities and Fair Housing Acts

August 13, 2010 – Wind and Utility Corridors

www.utah-apa.org/webcasts.htm

CLUE WORKSHOPS

PLAN COMMISSION WORKSHOPS

April 20, 2010 – Keshena, WI

April 22, 2010 – Wautoma, WI

May 4, 2010 – Greenville, WI

May 19, 2010 – Marshfield, WI

www.uwsp.edu/cnr/landcenter/workshops.html

For additional dates and information, visit the online calendar of events

www.uwsp.edu/cnr/landcenter/events.html