
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE DEB ANDRACA

FROM: Anna Henning, Senior Staff Attorney

RE: Legal Considerations Relating to Joint Committee on Finance Review of Stewardship Proposals

DATE: May 12, 2022

At your request, this memorandum discusses legal considerations relating to Joint Committee on Finance (JCF) review of proposals submitted by the Department of Natural Resources (DNR) to obligate bonding authority through the Warren Knowles-Gaylord Nelson Stewardship Program. Specifically, the memorandum addresses: (1) potential legal arguments that could be made relating to the adequacy of notices provided by JCF to DNR; and (2) other potential grounds for legal challenges relating to JCF's review.

BACKGROUND

The Warren Knowles-Gaylord Nelson Stewardship Program was initially created in the 1989 Legislative Session and has been modified and reauthorized several times over the years. Very generally, the program authorizes state borrowing for state land acquisition, grants to local governments and nonprofit conservation organizations, and other purposes relating to preserving wildlife habitat and expanding opportunities for outdoor recreation.¹

The statutes establish the amounts that DNR may obligate through the program in each fiscal year. With a limited exception relating to acquisition of county forest land, if DNR does not obligate an amount through the program in a given fiscal year, DNR generally may not carry over the bonding authority to the next fiscal year. [s. 23.0917 (5g), Stats.]

DNR must submit a proposed project or activity to JCF under a 14-day “passive review” process before obligating bonding authority for a project or activity, if the project or activity does any of the following:

- Obligates more than \$250,000.
- Proposes the sale of a portion of the acquired land.
- Includes a fee simple land acquisition north of State Trunk Highway 64.

¹ For a more detailed description of the program, see [Legislative Fiscal Bureau, Warren Knowles-Gaylord Nelson Stewardship Program, Informational Paper 63 \(January 2021\)](#).

Under that passive review process, after DNR notifies JCF of a stewardship program proposal, one of the following two scenarios occurs:

1. If the JCF co-chairs notify DNR, within 14 working days of DNR's notification, that JCF has scheduled a meeting to review the proposal, then DNR may obligate the funds only upon approval from JCF; or
2. If the JCF co-chairs do not provide such a notice within 14 working days, then DNR may obligate the funds.

[s. 23.0917 (5m) and (6m), Stats.]

In practice, after describing a proposed project and JCF's applicable oversight authority, JCF has included the following language in notices provided to DNR regarding proposals to obligate stewardship funds: "An objection has been raised to this request and a meeting of the Joint Committee on Finance will be scheduled. Therefore, the request is not approved at this time."

ADEQUACY OF JCF'S NOTICES

You asked whether the language in JCF's notices to DNR – particularly the phrase "a meeting ... **will be scheduled**" – satisfies the procedural requirements set forth in the statute for triggering affirmative approval by JCF before DNR may obligate bonding authority under the stewardship program. I think that a strong argument could be made, based primarily on the plain language of the statutes, that the JCF notices do not satisfy the statutory requirements. However, for reasons discussed below, that argument would not necessarily result in a court decision allowing DNR to proceed with a stewardship proposal notwithstanding the absence of JCF approval.

When interpreting a statute, a Wisconsin court must first consider the plain meaning of a statute, using the scope, context, and purpose that are ascertainable from the text and structure of the statute itself and its relation to surrounding or closely related statutes. A court may then consider "extrinsic evidence" of the Legislature's intent to confirm or verify a plain-meaning interpretation, or if the meaning is ambiguous. [*State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45 to 51.]

In this context, the plain meaning of the statute seems clear. The requirement for JCF's approval is triggered if the JCF co-chairs notify DNR, within 14 working days, that "the committee **has scheduled** a meeting to review the proposal." The use of the past-tense verb, "has," suggests that JCF must schedule a meeting before providing the notice.

I do not see anything in the legislative history for the JCF passive review requirement that suggests a different interpretation. The requirement for JCF oversight was initially created in the 1995-97 Biennial budget Act. In its comparative summary for that act, the Legislative Fiscal Bureau notes that the passive review process created by the act is similar to the passive review process that was in effect at that time with respect to certain Department of Administration actions under ch. 16, Stats. I am not aware of any legislative history in either context that suggests that the statutory requirement that JCF "has scheduled" a meeting would be interpreted to be satisfied with a notification that JCF "will schedule" a meeting.

Therefore, it seems likely that, if a court were to consider this question, it would conclude that JCF's notices stating that JCF "will schedule" a meeting do not technically satisfy the statutory procedures required to delay DNR's obligation of funds under the stewardship program.

However, a few notes and caveats are worth mentioning. First, the statutes authorize JCF to exercise significant oversight and discretion under this and similar statutory passive review procedures. In the event that JCF was required by a court order or other interpretation to modify the language in its notifications, JCF would have multiple options to conform more closely to the statutory requirements but nonetheless exercise an extended period of review. For example, JCF could: (1) schedule a meeting but later cancel or reschedule it; or (2) schedule a meeting for a date far in the future. Both of those approaches would technically satisfy the statutory requirement to have scheduled a meeting before providing the notice.

Second, it is possible that a court would characterize the form of JCF's notifications as a function of legislative procedure, and decline to decide a challenge to JCF's current approach for that reason. In past cases, the Wisconsin Supreme Court has declined to interfere with the Legislature's action with respect to matters of legislative procedure or purely legislative matters, unless the action interferes with a constitutional provision or right. [See *La Follette v. Stitt*, 114 Wis. 2d 358 (1983); *Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70 (2011).]

OTHER POTENTIAL GROUNDS FOR LEGAL CHALLENGE

It is possible that a significant delay in JCF's review of a stewardship proposal could alternatively be challenged on other legal grounds. In particular, a delay could be challenged as a violation of the separation of powers or nondelegation doctrine.

The Separation of Powers and Nondelegation Doctrines

Under Wisconsin's separation of powers doctrine, each of the three branches of government has exclusive "core powers" delegated to only that branch by the Wisconsin Constitution. An exercise by one branch of the core power of another branch is impermissible, and a branch "should not abdicate or permit others to infringe upon" the branch's core powers. [*League of Women Voters of Wis.*, 2019 WI 75 at ¶ 34 (quoting *Rules of Court Case*, 204 Wis. 501, 514 (1931)).] Alternatively, two branches of government may exercise "shared" powers. When exercising a shared power, a branch of government may exercise power conferred on another branch only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power. [*State v. Horn*, 226 Wis. 2d 637 (1999); *In re Grady*, 118 Wis. 2d 762, 775 (1984).]

A separation of powers analysis generally follows two steps. First, a court determines whether a power exercised by one branch is a core power granted exclusively to another branch by the Wisconsin Constitution. If so, the exercise of power is unconstitutional. If, instead, an exercise of power falls within an area of shared powers, the exercise is upheld unless it is shown to unduly burden or substantially interfere with another branch.

Relatedly, the nondelegation doctrine prohibits the Legislature from impermissibly delegating its legislative power, including to a committee of the Legislature, unless the delegating statute has both: (1) an ascertainable purpose; and (2) sufficient procedural safeguards. [*Panzer v. Doyle*, 2004 WI 52, ¶ 55.]. Examples of procedural safeguards include limited duration for the exercise of power or clear standards guiding its exercise. [See *Martinez v. Dept. of Indus., Labor & Human Relations*, 165 Wis. 2d 687 (1992).]

Potential Application to JCF Review of Stewardship Proposals

Requirements for 14-day passive review by JCF appear throughout the statutes, and have not been reviewed by Wisconsin courts with respect to their constitutionality under the separation of powers and

nondelegation doctrines. Although inferences can be drawn from case law relating to the Joint Committee for Review of Administrative Rules (JCRAR)'s oversight role, the likelihood that a legal challenge would succeed is unclear.

In a 1992 decision, *Martinez v. Department of Industry, Labor, and Human Relations*, the Wisconsin Supreme Court upheld JCRAR's authority to temporarily suspend executive branch agencies' administrative rules. The Court held that JCRAR's rule suspension authority did not violate the nondelegation doctrine, in part because JCRAR's authority to suspend administrative rules is temporary and requires action by the full Legislature, signed by the Governor, to become permanent. [165 Wis. 2d 687 (1992).]

More recently, in *SEIU v. Vos*, the Wisconsin Supreme Court held that allowing JCRAR to suspend an administrative rule two times, for a total of six months, is not facially (i.e., generally) unconstitutional. [2020 WI 67.] The SEIU holding suggests that JCF's oversight authority with respect to requests to obligate funds under the stewardship program would similarly withstand a facial challenge, because JCF **could** act promptly to review stewardship proposals.

However, in *SEIU v. Vos*, the Wisconsin Supreme Court did not foreclose the possibility that JCRAR's oversight authority could be subject to as-applied challenges in the future. JCF's oversight authority regarding stewardship requests could similarly be subject to an as-applied challenge.

For example, if a litigant could establish standing to challenge JCF's actions with respect to a particular stewardship proposal, the litigant could potentially argue that a very long delay by JCF in exercising its oversight role violates the nondelegation doctrine, because it represents the Legislature's delegation of legislative power to JCF without sufficient safeguards, including time limitations.

I should caution that Wisconsin courts have historically been reluctant to interfere in disputes between the two "political" branches of government, which is one reason that case law relating to the separation of powers and nondelegation doctrines is relatively sparse.

If a court nonetheless reached the merits in a case challenging JCF's actions, a court might hold that the Legislature's interest in exercising oversight over bonding, particularly for substantial land acquisitions, is a reasonable exercise of a shared power, which does not substantially interfere with the executive branch's ability to carry out the stewardship program, as evidenced by the many stewardship projects completed in the past. Relatedly, a court might reject nondelegation concerns based on arguments similar to those made in *SEIU v. Vos*, including arguments regarding the importance of legislative branch oversight.

However, I think the statutory structure of the stewardship program could increase the likelihood of success of a challenge, relative to other programs that might be delayed by JCF review. As mentioned, with a limited exception relating to acquisition of county forest land, if DNR does not obligate an amount through the stewardship program in a given fiscal year, DNR generally may not carry over the bonding authority to the next fiscal year. [s. 23.0917 (5g), Stats.] Thus, if JCF's review of a stewardship proposal continues past the end of one or more fiscal years, DNR must draw its bonding authority for the project from within the statutory bonding limitation for a future fiscal year and may forgo the ability to obligate bonding authority in the fiscal year for which the project was initially proposed. In addition, for some projects, contract deadlines have in some instances made projects impractical when JCF's review extends longer than a year.

Those practical program implications could provide evidence of unconstitutional interference with, or burden on, executive branch power. For example, the loss of bonding authority resulting from a long delay could be characterized as constituting a reduction in bonding authority, without the input of the

full Legislature or the Governor. In addition, in contrast to the JCRAR actions upheld in *Martinez* and *SEIU*, discussed above, the effect of JCF's delay with respect to action on a stewardship proposal is the loss of bonding authority and a project, rather than a temporary pause regarding a change in a rule.

Similarly, the longer the delay in consideration of stewardship proposals, the more likely that a court might distinguish JCF's approach from past cases finding sufficient safeguards for delegations of legislative authority. For example, if JCF co-chairs stated that JCF would never act on a stewardship proposal, those statements may provide strong evidence of unconstitutionality in a challenge brought on nondelegation grounds.

In a [recent case](#) brought in the Dane County Circuit Court, a judge held that a statute that requires JCF to review decisions by the Attorney General to settle certain civil actions is unconstitutional as applied to certain types of settlements. [*Kaul v. Wisconsin Legislature*, 2021-cv-1314 (May 5, 2022).] In particular, the judge concluded that the requirement for JCF review of certain settlements impermissibly interferes with a core power of the executive branch.

It seems somewhat unlikely that a court would similarly view DNR's administration of the stewardship program as a "core power" of the executive branch. Thus, the analysis in the Dane County Circuit Court decision may have limited value as an analogy to JCF reviews of stewardship proposals. However, as discussed above, JCF's long delays in its review of stewardship proposals could provide grounds for an as-applied challenge, even if JCF's review is viewed as an exercise of a power that is shared between the two political branches.

Please let me know if I can provide any further assistance.

AH:jal