

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 4, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2009AP1519**

**Cir. Ct. No. 2008CV28**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**PLANNING TECHNOLOGY AND VALUATION SYSTEMS,**

**PETITIONERS-APPELLANTS,**

**V.**

**STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Iron County:  
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Planning Technology and Valuation Systems appeal a judgment withdrawing their land from the managed forest land (MFL) program. The companies assert the Department of Natural Resources failed to

follow the proper withdrawal procedure, denied them due process, and erroneously withdrew their land. We affirm.

## BACKGROUND

¶2 The legislature established the MFL program to encourage the production of future forest crops for commercial use. WIS. STAT. § 77.80.<sup>1</sup> The MFL program gives landowners certain tax benefits in exchange for the use of sound forestry practices. *See* WIS. STAT. §§ 77.84, 77.86.

¶3 William Wells enrolled approximately 380 acres in the MFL program in 1996, all of which were located in the Town of Oma. In 2002, Wells partitioned the property into six parcels and transferred ownership to various corporations that he controlled, including Planning Technology and Valuation Systems. Wells then petitioned the Department for transfer orders continuing the parcels in the MFL program.

¶4 Forester Heather Berklund, who was assigned to review Wells' petitions, discovered that some of the land transferred to Valuation Systems and all of the land transferred to Planning Technology no longer met the MFL program's eligibility requirements. Specifically, Berklund determined that less than eighty percent of the parcels were capable of producing a required amount of merchantable timber under WIS. STAT. §§ 77.82(1)(a)2. and 77.82(1)(b)1.

¶5 Berklund telephoned Wells and advised him of the problem with the transfers. She recommended an alternative configuration for the land transfers that would allow the properties to continue in the MFL program. Wells requested that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version.

Berklund put the problem and her recommendation in writing and mail it to him. Berklund sent the letter, but Wells denies receiving it.<sup>2</sup>

¶6 The Department did not receive a response from Wells, and issued orders withdrawing the ineligible land from the MFL program. Wells petitioned the Department for a contested case hearing. At the hearing, he did not dispute that the lands were ineligible, but presented due process, estoppel, and selective prosecution arguments. The Department rejected Wells' arguments and affirmed the withdrawal orders. Wells, on behalf of Planning Technology and Valuation Systems, then petitioned for judicial review. The circuit court affirmed, and the companies appeal.<sup>3</sup>

## DISCUSSION

¶7 This is an appeal of an agency decision under WIS. STAT. ch. 227. In general, we will affirm the agency's action unless it has committed a procedural error that impairs the fairness of the proceedings or the correctness of the action, or has erroneously interpreted the law. WIS. STAT. §§ 227.57(4), (5). We will not overturn an agency's finding of fact if it is supported by substantial evidence, and we will not substitute our judgment for that of the agency as to the weight of the evidence. WIS. STAT. § 227.57(6). We will not substitute our judgment for that of the agency on an issue of discretion. WIS. STAT. § 227.57(8).

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<sup>2</sup> Our analysis of the Department's alleged failure to follow the proper withdrawal procedure does not require us to address Wells' claim that he never received Berklund's letter.

<sup>3</sup> Planning Technology and Valuation Systems filed a joint brief. For ease of reading, we will refer to both parties as Planning Technology in the following discussion.

¶8 Planning Technology presents four issues for review, three procedural and one substantive.

¶9 Two of the procedural issues involve whether the Department properly notified Planning Technology and the Town of Oma chairperson of its withdrawal investigation as required by WIS. STAT. § 77.88(1)(a).

¶10 Any time the Department begins an investigation of managed forest land to determine whether the designation should be withdrawn, it must provide notice of the investigation to the landowner and to the head of the city, town or village in which the land is located. WIS. STAT. § 77.88(1)(a). Planning Technology asserts the Department failed to properly notify it and the Town of Oma chairperson. Although Planning Technology's argument presents two issues, we resolve them together because we conclude § 77.88(1)(a) does not apply.

¶11 WISCONSIN STAT. § 77.88(1)(a) does not apply because the Department did not commence a formal withdrawal investigation. The current withdrawal was the result of a standard eligibility review conducted each time an MFL property is transferred. *See* WIS. STAT. § 77.88(2)(am). If the property does not meet the eligibility requirements following the transfer, the Department must issue an order withdrawing the land from the MFL program. *Id.* Eligibility is determined based on information included in the transfer petition, including a certified survey map. *See* WIS. ADMIN. CODE § NR 46.23(4) (Oct. 2010).

¶12 Here, no withdrawal investigation was necessary because MFL program ineligibility was apparent from the documentary record. Berklund testified that she simply used the transfer maps to calculate the percentage of nonproductive acreage. Because there was no investigation, no notice of investigation was required under WIS. STAT. § 77.88(1)(a).

¶13 The third procedural issue involves Planning Technology’s claim that it was denied procedural due process because the statute governing withdrawal does not require pre-withdrawal notice and a hearing. “Due process requires that there be an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *State ex rel. Schatz v. McCaughtry*, 2003 WI 80, ¶18, 263 Wis. 2d 83, 664 N.W.2d 596. Here, the “right” involved is simply a legislative choice to grant tax benefits. WISCONSIN STAT. § 77.88(2)(am) expressly puts MFL program participants on notice that transferred land that does not meet the MFL program requirements will be withdrawn. Administrative and judicial review are available under WIS. STAT. §§ 77.90 and 227.52, respectively. Constructive notice, coupled with the availability of post-withdrawal procedural safeguards against erroneous withdrawals, is all that due process requires. *See McCaughtry*, 263 Wis. 2d 83, ¶¶31, 33.

¶14 Planning Technology also raises one substantive issue for our review. That issue is whether the Department properly withdrew Planning Technology’s land from the MFL program.

¶15 We conclude the Department properly ordered Planning Technology’s land withdrawn from the MFL program. At the administrative level, Planning Technology did not dispute the Department’s contention that less than eighty percent of the withdrawn land is capable of producing the minimum amount of timber. In order to preserve an issue for judicial review, a party must raise it before an administrative agency. *Citizens For U, Inc. v. DNR*, 2010 WI App 21, ¶31, 323 Wis. 2d 767, 780 N.W.2d 194. Generally, we will not address issues first raised at the judicial review stage. *Id.* Planning Technology has

forfeited its right to contest the sufficiency of the evidence supporting the withdrawal orders.<sup>4</sup>

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>4</sup> Even if Planning Technology had properly preserved the issue, its scant presentation on this point would compel us to dismiss its argument as undeveloped. Planning Technology presents its sufficiency of the evidence challenge—framing it as a challenge to the Department’s “discretion”—in two sections of its brief. The first is simply a subheading with no argument and the second is a confusing and unfocused jumble of quoted testimony that appears to simply rehash its procedural arguments.

Planning Technology also quotes several cases suggesting it believes the Department’s decision to withdraw Planning Technology’s land was arbitrary and capricious and motivated by some sort of personal animosity toward Wells. The record simply does not support this claim. As we have stated, the withdrawal orders were the result of a standard review conducted each time MFL land is transferred. In addition, Berklund testified that she attempted to explain how Wells could reconfigure the land so that it would comply with the MFL program requirements.

