



OFFICE OF THE CORPORATION COUNSEL

July 1, 2014

Supervisor Patrick Miles
Chair, Zoning & Land Regulation Committee
Dane County Board of Supervisors
Room 106, City-County Building
Madison, WI 53703

RE: Zoning Petition No. 10672

Dear Supervisor Miles:

On May 28, 2014, the Town of Rutland Board adopted a resolution disapproving of Zoning Petition #10672. The town's action limits the County Zoning & Land Regulation (ZLR) Committee's options, in that the committee may not recommend approval of the petition, as proposed, to the County Board. Furthermore, since the land in question is zoned A-1 Exclusive, any rezone of this land must be in conformance with Wis. Stat. §91.48(1).

Zoning Petition #10672 was filed by Stoughton Farms Inc., on behalf of Magnum Communications to rezone a parcel of land out of A-1 Exclusive and apply for a conditional use permit for a radio broadcast tower. The Town of Rutland filed a certified copy of a resolution disapproving of the petition in conformance with Wis. Stat. §59.69(5)(e)3 on May 28, 2014. Magnum Communications argues that the ZLR should disregard the Town's disapproval of the rezone because they argue that the Town disregarded the recently adopted Wis. Stat. §66.0406(2). Whether the Town adequately considered §66.0406 is not properly before the ZLR, and the committee does not have the discretion to disregard or ignore the town's disapproval. If the town's disapproval is in conformance with the procedures in §59.69(5)(e)3, it is binding on the committee.

"The county planning and zoning statute, . . . provides towns with a role in the zoning process." Section 59.69(5)(e)3 "grants towns the power to approve or disapprove amendments to the county's zoning ordinance." *Quinn v. Town of Dodgeville*, 122 Wis.2d 570, 580 (1985), *see also, Johnson v. Washburn County*, 324 Wis.2d 366, 371 (Ct. App. 2010) Section 59.69(5)(e)3 provides "[I]f a town affected by the proposed amendment disapproves of the proposed amendment, the town board of the town may file a certified copy of the resolution adopted by the board disapproving of the petition with the [county zoning] agency before, at or

Corporation Counsel
Marcia MacKenzie

Assistant Corporation Counsels

Eve M. Dorman
David R. Gault
Richard D. Greenlee
Shawna L. Guinn
Kristi A. Gullen
Dyann L. Hafner
Mary M. Kasperek
Carlos A. Pabellon
Susan H. Rauti
Gary S. Rehfeldt
Galen G. Strebe
John C. Talis

Child Support Agency

Deputy Corporation Counsel
Bradford J. Logsdon

Assistant Corporation Counsels

Clare Altschuler
Andrea Brendemuehl
Scott D. Drummond
Gary Gomez
Patricia Haraughty-Sanna
Maureen A. Plunkett
Kendall K. Wick

within 10 days after the public hearing.”¹ If a town files a resolution disapproving a zoning amendment that is in conformance with §59.69(5)(e)3, the ZLR “may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval.”

The Supreme Court in *Quinn* was clear that towns have a very specific role in the zoning process. The legislature did not grant the zoning agency any discretion in §59.69(5)(e)3 to question the underlying legality of the town. In my opinion, the town’s disapproval complies with §59.69(5)(e)3. Therefore, the options available to ZLR are approval with an amendment (which would then go back to the town for approval) or disapproval.

You have also requested an opinion as to whether the provisions of Wis. Stat. §66.0406 regarding local regulations or actions in regards to radio broadcast towers preempts the provisions of Wis. Stat. §91.48 regarding rezoning land in a farmland preservation zone. In my opinion it does not. Section 66.0406 preempts local government ordinances and regulations. There is no indication that the legislature intended to preempt the provisions of the Farmland Preservation Statute, which is of course an enactment of the legislature.

Section 66.0406 was enacted as part of the 2013 Budget Bill, and provides in relevant part:

(2) LIMITATIONS ON LOCAL REGULATION. Beginning on May 1, 2013, if a political subdivision enacts an ordinance, adopts a resolution, or takes any other action that affects the placement, construction, or modification of radio broadcast service facilities, the ordinance, resolution, or other action may not take effect unless all of the following apply:

(a) The ordinance, resolution, or other action has a reasonable and clearly defined public health or safety objective, and reflects the minimum practical regulation that is necessary to accomplish that objective.

(b) The ordinance, resolution, or other action reasonably accommodates radio broadcast services and does not prohibit, or have the effect of prohibiting, the provision of such services in the political subdivision.

(3) CONTINUED APPLICATION OF EXISTING REGULATIONS. If a political subdivision has in effect on May 1, 2013, an ordinance or resolution that is inconsistent with the requirements that are specified in sub.(2) for an ordinance, resolution, or other action to take effect, the existing ordinance or resolution does not apply, and may not be enforced, to the extent that it is inconsistent with the requirements that are specified in sub.(2).

The question posed is whether §66.0406 affects a political subdivision’s obligations under Wis. Stat. §91.48(1) which provides:

¹ Wis. Stat. §59.69(5)(e)3m authorizes a town to extend its time for disapproval by 20 days if the town board adopts a resolution providing for an extension and files a certified copy of the resolution with the County Clerk. The Town of Rutland has such a resolution on file with the county and therefore had 30 days from April 29, 2014 to file a disapproval with the county.

(1) A political subdivision with a certified farmland preservation zoning ordinance may rezone land out of a farmland preservation zoning district without having the rezoning certified under s.91.36, if the political subdivision finds all of the following, after public hearing:

(a) The land is better suited for a use not allowed in the farmland preservation zoning district.

(b) The rezoning is consistent with any applicable comprehensive plan.

(c) The rezoning is substantially consistent with the county certified farmland preservation plan.

(d) The rezoning will not substantially impair or limit current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use.

In my opinion the legislature did not intend to preempt the requirements of §91.48. The express language of §66.0406 applies **only** to ordinances and resolutions adopted by political subdivisions. This issue does not involve a local ordinance or resolution, but rather the express language of another statute. The general rules of statutory construction provide that when two statutes are in conflict, the more specific statute controls over the more general. However, that rule does not apply, because these two statutes are not in conflict. Section 66.0406 is intended to limit local regulation of radio broadcast towers by ordinance or resolution. The obligations under §91.48(1) are imposed upon local government by state statute.

Assuming *arguendo* that there is a conflict between these two statutes, they must be construed in a manner that harmonizes them in order to give each full force and effect. Furthermore, the legislature is presumed to enact statutory provisions, with full knowledge of the existing laws. *Glinski v. Sheldon*, 88 Wis.2d 509, 519-20 (1979). The clear intent of §66.0406(2) was to limit local regulation of radio broadcast towers by ordinance or resolution. The legislature is presumed to have known of the requirements of §91.48 when it enacted §66.0406. There simply is no indication that the legislature intended to limit its own statutory regulation of farmland preservation zoning.

Dane County has adopted a farmland preservation zoning ordinance that is certified by the Department of Agriculture, Trade and Consumer Protection. As a condition of continued certification of its ordinance the county must comply with the terms of Chapter 91. Section 91.48(1) expressly requires the county to find that all of the four elements listed in that subsection are present before land can be rezoned out of a farmland preservation zone. If the legislature had intended to exempt radio towers they could have expressly stated that. They did not, and the county is required to comply with the provisions of §91.48(1).

In conclusion, ZLR does not have the discretion to disregard the town's disapproval of the zoning petition. Section 59.69(5)(e)3 is explicit, and the committee has no authority to consider the underlying reasons for the town's denial. Therefore, ZLR's options are approval with amendment or disapproval. If the committee approves with amendment, they should make findings whether all of the conditions listed in §91.48(1) are met.

Supervisor Patrick Miles
July 1, 2014

Please let me know if I can be of further assistance regarding this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "D. Gault", with a long horizontal flourish extending to the right.

David R. Gault
Assistant Corporation Counsel