STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

January 24, 2014 OAG-01-14

Mr. David L. Grindell
Corporation Counsel
Burnett County
7410 County Road K, #121
Siren, WI 54872

Dear Mr. Grindell:

¶ 1. You asked two questions relating to the intersection of land division and zoning regulation: (1) whether a circuit court judgment dividing land can override the minimum lot size requirements of a county zoning ordinance; and (2) whether a county may enact an ordinance or regulation requiring prior review of sales or exchanges of land between adjoining landowners in order to assure that such sales or exchanges satisfy minimum lot size requirements.

¶ 2. In my opinion, the exception in the subdivision law for transfers of land "by will or pursuant to court order" does not override applicable zoning regulations. Zoning ordinances continue to apply following a court-ordered division, and the court should consider such ordinances in determining whether partition would be appropriate. A county has the authority to enact an ordinance providing for review of proposed sales or exchanges between adjoining landowners to determine whether the resulting lots would be reduced below the minimum lot size required by zoning or other regulations. The county may impose a reasonable fee for this review.

¶ 3. Your first question relates to the applicability of Burnett County's minimum lot size zoning ordinance to land divided by a circuit court judgment. Burnett County's zoning ordinance mandates that all lots in its shoreland zoning district have a minimum width of 150 feet, a minimum depth of 200 feet, a minimum area of at least 30,000 square feet, and a minimum setback of at least 75 feet from navigable waters. With respect to property abutting navigable waters, section 4.4(6)(a) of the ordinance provides that "no lot area shall be so reduced that the dimensional and yard requirements required by this ordinance cannot be met."

¶ 4. You advise that property owners in the shoreland zoning district have commenced partition actions against co-owners of the same property, apparently for the purpose of evading these requirements. For example, one co-owner of a conforming 150-foot wide parcel may commence a partition action against the other, obtaining an unopposed judgment that divides the parcel into two, separately-owned 75-foot wide parcels. You indicate that a similar issue may

arise in probate proceedings when a parcel is divided among legatees under a will; you write that such probate divisions are not necessarily collusive. You state that the owners assert that the new parcels are exempt from the zoning ordinance by virtue of Wis. Stat. § 236.45(2)(am), which prohibits municipalities from using their subdivision authority to control divisions of land into less than five parcels that are "[t]ransfer[red] . . . by will or pursuant to court order[.]" Wis. Stat. § 236.45(2)(am)1.

¶ 5. Your question raises the threshold issue of whether a judgment in a partition action, which terminates a co-tenant's undivided interest in the whole of the property, is a "transfer" within the meaning of Wis. Stat. § 236.45(2)(am). We need not reach that issue, however, because even assuming that a judgment in a partition action may be a "transfer" under that provision, that statute would not override applicable zoning ordinances. Zoning ordinances would continue to apply following the creation of any new parcel, and their effect on any proposed new parcel would be relevant in a judicial proceeding to determine whether partition is appropriate.

¶ 6. Minimum lot size is subject to regulation both through a municipality's subdivision authority and through the enactment of zoning ordinances by a zoning authority. "Minimum lot size . . . is an area of shared power that may be regulated by a municipality through its authority under ch. 236, or through the enactment of zoning ordinances by the applicable zoning authority." *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 172, 558 N.W.2d 100 (1997). Zoning regulations and subdivision controls are authorized by separate enabling acts that may differ in their requirements for enactment of regulations and their procedure for enforcement or relief. *Id.* at 173.

¶ 7. Subdivision controls are authorized under Wis. Stat. ch. 236, and the exemption under Wis. Stat. § 236.45(2)(am) applies to regulation under that chapter. Counties, however, also possess zoning and shoreland zoning authority under Wis. Stat. §§ 59.69 and 59.692, powers "liberally construed in favor of the county exercising them[.]" Wis. Stat. § 59.69(13); Wis. Stat. § 59.692(2)(a).

¶ 8. For shoreland zoning, counties must zone all shorelands in their unincorporated area, and the ordinance must meet the minimum zoning standards provided for in Wis. Admin. Code ch. NR 115. Wis. Stat. § 59.692(1m) and (6). Those standards require county shoreland zoning ordinances to provide for unsewered lots to have a minimum width of at least 100 feet, a minimum area of at least 20,000 square feet, and a minimum setback of at least 75 feet from navigable waters. Wis. Admin. Code § NR 115.05(1)(a)2., (b)1. Burnett County enacted its shoreland zoning ordinance pursuant to this statutory authority.

¶ 9. Where a county acts pursuant to its zoning authority in regulating minimum lot size, the exemption to a municipality's subdivision authority in Wis. Stat. § 236.45(2)(am) is inapplicable. Even if a division or transfer is exempted from the subdivision law, zoning

regulations continue to apply. *Friend v. Friend*, 964 P.2d 1219, 1222 (Wash. App. 1998); *Leake v. Casati*, 363 S.E.2d 924, 927-28 (Va. 1988); *cf.* OAG 2-97 (December 8, 1997) (discussing similar considerations with respect to nonconforming uses in shoreland zoning districts). In *Leake*, the Virginia Supreme Court held that the trial court was not prevented by that state's subdivision law from partitioning land. The court concluded that it was unlikely that a court would do so, however, because zoning regulations continued to apply:

> Even though the court's power to order a division of land is unaffected by a subdivision ordinance, it does not follow that those who become owners of the resulting parcels will be immune to valid laws regulating land *use*.
>
> Leake concedes, and we agree, that zoning and other valid land-use ordinances and statutes continue to apply to partitioned land. Thus, for example, while it would be within the court's power to partition land into parcels too small to meet the minimum lot size required by a zoning ordinance, the ordinance would prohibit any effective *use* of such lots after the division had been made. Thus, it is unlikely that the court would find such a division "convenient," or, indeed, that any party litigant would seek such a division.

Leake, 363 S.E.2d at 927-28 (emphasis in original). Similarly, in probate actions in which courts have held that a testamentary devise succeeds regardless of the resulting parcel's compliance with zoning laws, zoning laws nonetheless apply following the probate court's judgment. *Estate of Hunt*, 990 A.2d 544, 547 (Me. 2010) (collecting cases).

¶ 10. Where a court is asked to divide property in a partition or probate action, zoning regulations will apply to any parcels created by the court's judgment. As a result, courts have agreed that applicable zoning regulations should be considered in evaluating whether partition by division would be "convenient" or can be accomplished without great prejudice to the parties. *Withers v. Jepsen*, 246 P.3d 1215, 1217 (Utah App. 2011); *Friend*, 964 P.2d at 1222; *Bellnier v. Bellnier*, 158 A.D.2d 947, 948 (N.Y. App. 1990); *Leake*, 363 S.E.2d at 927-28.

¶ 11. Further, if a trial court becomes aware that a lawsuit was brought to evade the subdivision or zoning law, it may decline to partition the property or vacate an earlier judgment of partition. *Mount Laurel Township v. Barbieri*, 376 A.2d 541, 545-46 (N.J. Super. 1977) (vacating partition sought in order to evade subdivision control and concluding that non-adversarial proceedings fell outside the exception for court-ordered divisions: "To hold otherwise would make a mockery of the municipal subdivision statute."); *Pratt v. Adams,* 40 Cal. Rptr. 505, 508 (Cal. App. 1964) (landowners who commenced a partition action for the purpose of circumventing the subdivision statutes were subject to those statutes because they, not the court, caused the creation of new parcels). No Wisconsin case has construed the exception in Wis. Stat. § 236.45(2)(am) for property "[t]ransfer[red] . . . pursuant to court order[.]" Partition, however, is an equitable action. *O'Connell v. O'Connell*, 2005 WI App 51, ¶ 8,

279 Wis. 2d 406, 694 N.W.2d 429. Whether to award equitable relief is within the trial court's discretion. *Prince v. Bryant*, 87 Wis. 2d 662, 674, 275 N.W.2d 676 (1979). A court might conclude that partition sought for the purpose of evading local subdivision regulations is inequitable and should be denied.

¶ 12. If property owners were able to obtain partition, despite these principles, they might seek a hardship-based zoning variance. Because such a hardship would be self-created, it would not be an appropriate candidate for a variance. A self-created hardship or practical difficulty cannot qualify as a basis for a grant of a variance. *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 7, 269 Wis. 2d 549, 676 N.W.2d 401 (reaffirming *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 479, 247 N.W.2d 98 (1976)). The same principle would apply to a subsequent transferee. If a zoning board did grant a variance in such a case, the Department of Natural Resources or other aggrieved parties could challenge the variance in circuit court. *State ex rel. Dep't of Natural Res. v. Walworth Cnty. Bd. of Adjustment,* 170 Wis. 2d 406, 412, 489 N.W.2d 631 (Ct. App. 1992).

¶ 13. Your second question involves all conveyances between adjoining property owners. You ask whether a county can require prior review of sales or exchanges of parcels between adjoining landowners and impose a reasonable review fee in order to assure that a proposed transfer or exchange complies with minimum lot size requirements. You advise that the county is normally not informed when adjoining landowners transfer or exchange land in a way that creates substandard lots, and that the county might not discover until years later that a substandard lot has been created.

¶ 14. Wisconsin Stat. § 236.45(2)(am) authorizes municipalities, towns, and counties to enact subdivision ordinances that impose "approving requirements" for divisions of land into less than five parcels. The statute exempts sale or exchange of parcels between owners of adjoining property from such regulation, but only if additional lots are not thereby created and the resulting lots are not reduced below the minimum sizes required by applicable laws or ordinances. Wis. Stat. § 236.45(2)(am)3. Such an ordinance thus could require preapproval of a proposed transfer, division, or exchange between owners of adjoining property if it would create one or more additional lots or if the newly-created lots would fail to comply with applicable zoning regulations.

¶ 15. A county must have the ability to review the proposed sale or exchange in order to determine whether it would come within the exception in Wis. Stat. § 236.45(1)(am)3. In *Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 20-21, 440 N.W.2d 777 (1989), the Wisconsin Supreme Court held that a town had the authority to require building permits because permitting allowed the town to fulfill its statutory responsibilities: "[W]hen specific duties are intrusted to [towns] and made obligatory on their part, it must be assumed that it was the legislative intent to give them ample authority to carry out those duties." *Cushman*, 150 Wis. 2d at 21 (quotations

and citations omitted). Wisconsin Stat. § 236.45(2)(am) and (2)(am)3. allow counties to prohibit sales or exchanges between owners of adjoining property that result in lots smaller than the minimum lot size regulations require. That grant of authority is sufficient to permit counties to review proposed sales or exchanges of property to determine whether they would meet those requirements.

¶ 16. You also ask if a fee may be imposed to offset all or part of the cost of such a limited review. A reasonable regulatory fee may be imposed to defray costs incurred in connection with the review process. *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 9, 15, 298 Wis. 2d 407, 727 N.W.2d 358 (2006).

¶ 17. I conclude that a county's minimum lot size zoning ordinance applies to parcels created by a court through division in a partition or probate action, even if such division would be exempted from a municipality's subdivision authority under Wis. Stat. § 236.45(2)(am)1. I further conclude that a county can enact a subdivision ordinance requiring prior review of sales or exchanges of parcels between adjoining landowners in order to determine whether the division would comply with minimum lot size requirements. The county may impose a reasonable fee therefor.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla