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DEPARTMENT OF JUSTICE

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January 2, 2019

OAG-01-19

Mr. Brian J. Desmond
Corporation Counsel
Oneida County Courthouse
Post Office Box 400
Rhineland, WI 54501-0400

Dear Mr. Desmond:

¶ 1. You have requested an opinion on whether a county can impose a single-family zoning provision from its general zoning ordinance, enacted under Wis. Stat. § 59.69(5), in its shoreland zoning ordinance, enacted under Wis. Stat. § 59.692(1c), in a town that has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c). Specifically, Oneida County's Zoning and Shoreland Protection Ordinance provides that the provisions of its general zoning ordinance "shall apply in the shorelands through the County, to the extent applicable." Oneida County, Wis., *Gen. Code* art. 9.90C. Oneida County zoned the shorelands surrounding two lakes for single-family housing, a zoning use in its general zoning ordinance, based on petitions filed by landowners under Wis. Stat. § 59.69(5)(e). The two lakes are in towns that have not adopted the county's general zoning ordinance.

¶ 2. I conclude that Oneida County has the authority to zone these shorelands for single-family housing because such zoning is consistent with the express powers granted to counties and does not violate any of the specific restrictions on shoreland zoning in Wis. Stat. § 59.692. Further, a county's authority to zone the shorelands is not limited by a town's failure to adopt the county's general zoning ordinance because Wis. Stat. § 59.692(2) grants counties the authority to zone shorelands to the exclusion of towns.

¶ 3. You also request an opinion on whether Oneida County is violating the equal protection clause by zoning only two lakes in the county for single-family housing. I decline to offer an opinion on this question because it would involve offering an opinion on the legislative judgment of the Oneida County Board. In addition, any

opinion on a potential equal protection claim would be entirely speculative. This legal issue is fact-specific because the county board exercises its legislative judgment on zoning on a case-by-case basis depending on the specific facts of each zoning decision. I would not be able to offer an opinion in the absence of specific facts.

LEGAL AND FACTUAL BACKGROUND

¶ 4. Under Wisconsin law, “a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.” *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). The Legislature granted counties general zoning powers in Wis. Stat § 59.69 and shoreland zoning powers in Wis. Stat. § 59.692. As the Wisconsin Supreme Court requires, I begin with the plain language of these statutes. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶ 5. Counties have general zoning authority under Wis. Stat. § 59.69(5), which grants counties the power to adopt a general zoning ordinance. The general zoning ordinance, however, “shall not be effective in any town until it has been approved by the town board.” Wis. Stat. § 59.69(5)(c).

¶ 6. Counties also have separate statutory authority over zoning in shoreland areas within the county. Wisconsin Stat. § 59.692(1c) provides that “[t]o effect the purposes of s. 281.31 and to promote the public health, safety and general welfare, each county shall zone by ordinance all shorelands in its unincorporated area.” The purposes of Wis. Stat. § 281.31 include “to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.” Wis. Stat. § 281.31(1). “Shorelands” are defined as one thousand feet from the high-water mark of lakes, ponds, or flowages, and three hundred feet from the high-water mark of a river or stream. Wis. Stat. § 59.692(1)(b)1.–2. The shoreland zoning ordinance “may be enacted separately from ordinances enacted under s. 59.69.” Wis. Stat. § 59.692(1c). Unlike a general zoning ordinance, a shoreland zoning ordinance “shall not require approval or be subject to disapproval by any town or town board.” Wis. Stat. § 59.692(2)(a). The other provisions of Wis. Stat. § 59.69 governing general zoning ordinances apply to the shoreland zoning ordinances and amendments, unless otherwise specified. Wis. Stat. § 59.692(2)(a).

¶ 7. The Legislature has restricted counties' authority over shoreland zoning in several ways, perhaps most importantly in providing that a county shoreland zoning ordinance "may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard" issued by the Department of Natural Resources. Wis. Stat. § 59.692(1d)(a). Shoreland zoning standards are codified at Wis. Admin. Code § NR 115.05. The shoreland zoning statute contains several other specific limitations on counties' shoreland zoning power. *E.g.*, Wis. Stat. § 59.692(1f), (1k)(am), (1k)(b), (1n)(am), (1n)(d).

¶ 8. The county board may amend a zoning ordinance upon a petition "made by a property owner in the area to be affected by the amendment, by the town board of any town in which the ordinance is in effect; by any member of the board or by the agency designated by the board to consider county zoning matters." Wis. Stat. § 59.69(5)(e)1. After following the procedures for a public hearing and town approval in Wis. Stat. § 59.69(5)(e)2.–3m., the county zoning agency approves, modifies or disapproves the petition, Wis. Stat. § 59.69(5)(e)4., after which the county board can enact the zoning agency's report, enact it with amendment, deny it, or refer it back to the zoning agency. Wis. Stat. § 59.69(5)(e)5.

¶ 9. According to your letter, Oneida County has enacted a Zoning and Shoreland Protection Ordinance that includes both general zoning provisions, enacted pursuant to Wis. Stat. § 59.69(5), and a shoreland zoning provision, enacted pursuant to Wis. Stat. § 59.692(1c). *See* Oneida County, Wis., *Gen. Code* art. 9. The shoreland zoning article of the ordinance provides that its general zoning ordinance "shall apply in the shorelands through the County In the event of a conflict between the general zoning provisions and the Shoreland Protection Provisions, the more restrictive provisions shall apply." Oneida County, Wis., *Gen. Code* art. 9.90E.

¶ 10. In 1987 and 1991, the Oneida County Board granted petitions under Wis. Stat. § 59.69(5)(e) filed by landowners on two lakes to zone the lakes for single-family housing, a zoning use from the county's general zoning ordinance. *See* Oneida County, Wis., *Gen. Code* art. 9.22. Both lakes are in a town that has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c).

DISCUSSION

¶ 11. I conclude that a county may impose a single-family zoning provision from its general zoning ordinances in the shorelands of the county. In Wis. Stat. § 59.692(1c), the Legislature gave counties the authority to “zone by ordinance all shorelands in its unincorporated area[s].” The Wisconsin Court of Appeals has held “the legislature has not only conferred broad legislative power upon counties in the area of shoreland zoning, it appears to require such zoning.” *State v. Land Concepts, Ltd.*, 177 Wis. 2d 24, 29, 501 N.W.2d 817 (Ct. App. 1993). The court further ruled that counties can exercise the power so long as there is no “express language elsewhere in the statutes restricting, revoking or withdrawing the power” or the power was otherwise preempted due to incompatibility with state law. *Id.*

¶ 12. Given this authority, a county has broad power to zone the shorelands so long as it is consistent with the limitations imposed in Wis. Stat. § 59.692 and the shoreland zoning standards in Wis. Admin. Code § NR 115.05. As a general matter, nothing in Wis. Stat. §§ 59.69 or 59.692 prohibits a county from incorporating elements from its general zoning ordinance into its shorelands ordinance. In fact, the Legislature suggested the opposite when it mandated that a shoreland zoning ordinance “shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable.” Wis. Stat. § 59.692(2)(c). The shoreland zoning standards in Wis. Admin. Code § NR 115.05 do not preclude single-family zoning in general. To the extent an individual provision in Oneida County’s code regulates a matter more restrictively than a shorelands zoning standard, however, such provision would be preempted by Wis. Stat. § 59.692(1d)(a). While individual provisions in a county’s zoning ordinance could be preempted, this does not affect the county’s power, as a general matter, to impose single-family zoning in its shorelands.

¶ 13. As it specifically relates to zoning the shorelands surrounding lakes for single-family housing, this type of zoning is consistent with state policy, which provides that “[d]omestic uses shall be generally preferred” in municipal regulation of shorelands. Wis. Stat. § 281.31(5)(a)1. Further, the Oneida County ordinance is consistent with the purposes of Wis. Stat. §§ 59.692(1c) and 281.31 in providing that “the more restrictive provisions shall apply” in the event of a conflict between the shoreland provision and provisions from the general zoning ordinance. Oneida County, Wis., *Gen. Code* art. 9.90C.

¶ 14. A county is not prohibited from imposing elements of its general zoning ordinance in the shorelands because a town has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c). Unlike the general zoning ordinance, the shoreland "ordinances and amendments shall not require approval or be subject to disapproval by any town or town board." Wis. Stat. § 59.692(2)(a). This provision "specifically prohibit[s] towns from having authority to approve or disapprove of county shoreland ordinances operating within the town." *Hegwood v. Town of Eagle Zoning Bd. of Appeals*, 2013 WI App 118, ¶ 12, 351 Wis. 2d 196, 839 N.W.2d 111. In fact, "[t]he plain language of the statutory scheme evinces that by enactment of Wis. Stat. §§ 281.31 and 59.692, the legislature intended that towns would not have authority to regulate shorelands," except in circumstances not applicable here. *Id.* ¶ 16. Simply put, the "legislature has given shoreland zoning authority to counties," not towns. *Herman v. Cty. of Walworth*, 2005 WI App 185, ¶ 18, 286 Wis. 2d 449, 703 N.W.2d 720.

¶ 15. In addition, the county had the authority to amend its shoreland ordinance by petition, the method by which the two lakes were zoned for single-family housing. The shorelands zoning statute provides that "[e]xcept as otherwise specified, all provisions of s. 59.69 apply to ordinances and their amendments enacted under this section whether or not enacted separately from ordinances enacted under s. 59.69." Wis. Stat. § 59.692(2)(a). Thus, the petition process in Wis. Stat. § 59.69(5) applies with equal force to a shorelands ordinance enacted under Wis. Stat. § 59.692 as it does to the general zoning ordinance enacted under Wis. Stat. § 59.69(5).

¶ 16. Because county boards have the authority to zone in the shorelands irrespective of whether a town has adopted the county's general zoning ordinance, a county can incorporate aspects of its general zoning provisions in the shorelands so long as these provisions are consistent with Wis. Stat. § 59.692. Single-family zoning is consistent with the powers granted in Wis. Stat. § 59.692 and does not violate any of the specific limitations on counties' shoreland zoning powers.

¶ 17. I am not offering an opinion on whether the county's zoning of two lakes for single-family housing, while not imposing single-family zoning on other lakes, would violate the equal protection clause. The Wisconsin Supreme Court has held that "[z]oning is legislative action and rezoning by amending the ordinance is equally legislative." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 584, 364 N.W.2d 149 (1985). The Attorney General does not provide opinions on "matters involving the exercise of legislative or executive judgment or the exercise of discretion by public officers." 77 Op. Att'y Gen. Preface (1988). Further, any opinion on this

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subject would be speculative because the propriety of the County Board's discretion on zoning depends on the specific facts of each zoning decision. This legal issue is fact-specific, and I would not be able to offer an opinion in the absence of specific facts. It would be inappropriate to offer an opinion on how the Oneida County Board should rule on any future petitions under Wis. Stat. § 59.69(5)(c) landowners may file to change their zoning to single-family housing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brad Schimel", written in a cursive style.

Brad D. Schimel
Attorney General of Wisconsin

BDS:BPK:jrs