

with an interest in the property under an offer to purchase. The map amendment adopted by the County Board removed a 7.4-acre parcel of land in the Town from the A-1 exclusive agricultural zoning district to the A-2 district to enable the construction of ten boat storage barns. In adopting the rezone ordinance, the County Board acted in violation of sec. 66.1001, Wis. Stats. (2021-22), the comprehensive planning law. That statute required the County Board to deny the rezone petition because the proposed commercial use of the property is inconsistent with the County's own comprehensive plan. The Plan--which incorporates the recently updated Jefferson County Agricultural Preservation and Land Use Plan—limits commercial development to the Town's "rural hamlet," a mapped area whose boundaries do not encompass the rezoned parcel.

Notably, the Town plan incorporated the rural hamlet map defined by the 1999 Jefferson County Agricultural Preservation and Land Use Plan.¹ The boundaries of the Town's rural hamlet were deliberately established on the part of the multiple stakeholders who participated in the Town planning process. The authors of the Town plan recognized that "[t]he proximity of Concord to the intense growth areas of Oconomowoc, Summit, and Johnson Creek presents unique challenges to the Town in its efforts to maintain the open space desired by the majority of Town residents and agriculture as the primary land use."²

In adopting the Zoning Ordinance amendment, the County Board ignored the explicit intent of its own Comprehensive Plan to "accommodate growth and development in planned locations, forms and densities that meet the goals and direction of the county and its local jurisdiction partners."³ This was not a matter of interpretation or discretion on the County's part. The County's Plan defines the boundaries of the rural hamlet and areas designated for future

¹ Town of Concord Comprehensive Plan, at 5, attached as Ex. B to Petitioners' Complaint, Doc. 2:12. Petitioners' Appendix P. 8 (hereinafter "P. App.).

² *Id.*

³ Jefferson County Agricultural Preservation and Land Use Plan, at 4 (P. App. 7).

growth, and requires all commercial development in the Town to occur solely within those mapped locations. The County Board also failed to make the findings mandated by sec. 91.48 of Wisconsin's farmland preservation law and its Zoning Ordinance for rezoning property out of the A-1 exclusive agricultural zoning district. The zoning ordinance amendment should therefore be declared void as a matter of law.

BACKGROUND

I. Zoning and Comprehensive Planning

Section 66.1001, Stats., sometimes referred to as the "Smart Growth Law," was enacted in 1999 for the purpose of increasing the role of comprehensive planning in local zoning and other land use regulatory decisions. The statute provides a framework for the adoption and implementation of comprehensive land use plans by local units of government. It mandates the adoption of written procedures "that are designed to foster public participation, including open discussion, communication programs, information services, and public meetings for which advance notice has been provided, in every stage of the preparation of a comprehensive plan." Wis. Stat. § 66.1001(4)(a). Public participation in the adoption of a comprehensive plan is fostered by "wide distribution of proposed, alternative, or amended elements," and "an opportunity for written comments on the plan to be submitted by members of the public to the governing body and for the governing body to respond to such written comments." *Id.* These procedural requirements ensure that such plans are the product of a thoughtful process with significant engagement by the public and thereby reflect a consensus view of the policies that should guide land use regulation in a given jurisdiction.

Jefferson County adopted an updated Comprehensive Plan in February 2021.⁴ Section 66.1001(3), Stats., establishes that amendments to the County Zoning Ordinance are governed by that Plan. The statute lists the local ordinances that are required to be consistent with comprehensive plans, including “County zoning ordinances enacted or amended under s. 59.69.” Wis. Stat. § 66.1001(3)(j). It defines “consistent with” to mean “*furtheres or does not contradict the objectives, goals and policies contained in the comprehensive plan.*” Wis. Stat. § 66.1001(1)(am). Thus, any amendment to Jefferson County’s general zoning ordinance must by law be consistent with—and not contradict—its Comprehensive Plan.

III. The Farmland Preservation Law

In 2009, Wisconsin’s farmland preservation law was repealed and recreated as part of the State Budget Act. The new law was the product of the Working Lands Initiative, a group convened by the Secretary of Agriculture representing a variety of stakeholders with an interest in alleviating pressure on increasingly developed agricultural land.⁵ Codified in ch. 91 of the Statutes, Wisconsin’s Working Lands Law updated standards for farmland preservation zoning. Significantly, s. 91.10(2) of the law provides that counties with comprehensive plans are required to incorporate their farmland preservation plans into those plans. Jefferson County’s Agricultural Preservation and Land Use Plan, adopted February 9, 2021, is a certified farmland preservation plan within the meaning of Wis. Stat. § 91.16.⁶ Jefferson County’s farmland preservation plan is thus incorporated by statute as part of the County’s Comprehensive Plan

⁴Available at:

<https://www.jeffersoncountywi.gov/Reports/Plans/Jefferson%20County%20Comprehensive%20Plan.pdf>.

⁵Wisconsin Legislative Fiscal Bureau Informational Paper 71, “Working Lands and Farmland Preservation Tax Credits (January 2017), available at:

https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2017/0071_working_land_and_farmland_preservation_tax_credits_informational_paper_71.pdf

⁶ See Jefferson County Agricultural Preservation and Land Use Plan preface, DATCP letter dated February 12, 2021, confirming ch. 91. Stats/ certification, P. App. 6.

adopted pursuant to Wis. Stat. § 66.1001. These plans are collectively referred to herein as the “Plan”. Amendments to the Jefferson County zoning ordinance must be consistent with the maps included in the Plan which identify, on a town-by-town basis, rural hamlets and farmland preservation areas overlaid on parcel maps. The farmland preservation component of Jefferson County’s Plan “functions as the primary policy document, defining direction for how farmland and resources should be preserved. The plan is also designed to accommodate growth and development in planned locations, forms, and densities that meet the goals and direction of the county and its local jurisdictional partners.”⁷

In addition to specifying the elements for county farmland preservation plans, Wisconsin’s Working Lands Law provides a process for certification of county zoning ordinances to allow landowners to qualify for farmland preservation tax credits. Section 11.04(f)6. of the County Zoning Ordinance, establishing the A-1 exclusive agricultural zoning district, is a certified farmland preservation ordinance within the meaning of Wis. Stat. § 91.36. According to the Ordinance:

The long-range goal for agricultural land use within Jefferson County is to preserve the most valuable of all resources—fertile land for agricultural pursuits—and to protect the land best suited for farming from premature urbanization. The A-1 Exclusive Agricultural district is intended to promote continued agricultural use on the best quality agricultural land . . . be a state-certified farmland preservation tax credit program to preserve rural character and manage nonfarm development; and provide reasonable opportunities for agriculturally-related businesses and home occupations.

ZONING ORDINANCE § 11.04(f)6.i. As the Ordinance itself recognizes, the farmland preservation law imposes specific requirements on petitions to rezone property out of the A-1 zoning district. The statute allows the County to rezone land out of the farmland preservation zoning district only after it first finds all of the following:

⁷ Jefferson County Agricultural Preservation and Land Use Plan, at 4 (P. App. 7).

(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.

Wis. Stat. § 91.48. See also ZONING ORDINANCE, § 11.11(e)6 (imposing requirements for additional findings of fact with respect to the property to be rezoned). These statutory requirements reinforce the centrality of the Comprehensive Plan in zoning decisions affecting prime agricultural land.

ARGUMENT

I. THE CERTIORARI STANDARD OF REVIEW REQUIRES THE COURT TO DETERMINE WHETHER THE COUNTY PROCEEDED ON A CORRECT THEORY OF LAW.

Certiorari review of the record of the County's adoption of the rezone ordinance in this case requires the Court to consider whether: (1) the County kept within its jurisdiction; (2) the County acted according to law; (3) the County's decision was "arbitrary, oppressive, or unreasonable, and represented its will, and not its judgment"; and (4) the County "might reasonably make the order or determination in question" based on the evidence before it. *See Oneida Seven Generations Corp. v. City of Green Bay*, 362 Wis. 2d 290, ¶ 41, 865 N.W.2d 162 (2015).

This case does not involve the County Board's jurisdiction or a decision committed to its reasoned discretion. Rather, Petitioners have alleged that the County failed to act according to law by ignoring the requirements of Wis. Stats. §§ 66.1001 and 91.48 when rezoning the Boat House parcel. A zoning authority proceeds on a correct theory of law when it relies on the applicable statutes and cases and applies them properly. *Edward Kraemer & Sons v. Sauk Cnty.*

Bd. of Adjustment, 183 Wis. 2d 1, 8-9, 515 N.W.2d 256 (1994). According to a plain reading of the governing statutes, the Board erred as a matter of law.

II. THE REZONE ORDINANCE CONTRADICTS THE PLAIN AND UNAMBIGUOUS STANDARDS CONTAINED IN JEFFERSON COUNTY'S COMPREHENSIVE PLAN IN VIOLATION OF WIS. STAT. § 66.1001(3).

Rezoning a parcel from one district to another requires the County Board to adopt an amendment to the Zoning Ordinance, because the zoning district map is part of the Ordinance.⁸ By statute, a zoning ordinance amendment requires a public hearing and recommendation by the county planning agency. See Wis. Stat. § 59.69(5)(e). That agency, the Jefferson County Planning and Zoning Committee (the “Committee”) held a public hearing on the Rezone Petition on February 17, 2022.⁹ More than 40 members of the public urged denial of the petition on the grounds that it was inconsistent with the Town of Concord’s comprehensive plan.¹⁰ In the face of that considerable opposition—including from the Town Planning and Zoning Committee—the Town Board of Supervisors nevertheless voted 2-1 to recommend approval the petition pursuant to Wis. Stat. § 59.69(5)(e).¹¹ The latter statute provides that if a town disapproves of a county zoning ordinance amendment, the county planning and zoning committee may only (1) recommend approval after changes to the petition or (2) recommend disapproval to the County Board. See *id.*

⁸ See ZONING ORDINANCE, § 11.04(b) (“A certified copy of the zoning map shall be adopted and approved with the text as part of this Ordinance...”).

⁹ See Minutes, February 17, 2022 public hearing, Doc 12.

¹⁰ See Docs. 12:4-5, 16, 17, Doc 25:12-16, Doc. 34:3-12.

¹¹ See Record of Decision dated February 14, 2022, Doc. 18:1. See also Memo of Town Board Supervisor Konle (a petitioner in this case) dated January 29, 2022, Doc.18:3, explaining “I voted against the rezoning request from A-1 to A-2 because the change does not follow the Town of Concord’s comprehensive plan. Having a town comprehensive plan allows a town to step back and take some time to decide what really is important in making and keeping the town a nice place to live. This thoughtfulness should not be overridden in a half-hour discussion at a town board meeting where personal relationships cloud the decision.”

The Committee noted the discrepancy between the Town Board’s approval of the rezone petition and the plain language of the Town’s comprehensive plan, leading it to table the petition at the Committee’s February 28, 2022 meeting following the public hearing.¹² A memo from Matt Zangl, the County’s Director of Planning and Zoning, memorialized the Committee’s decision: “The Committee heard testimony in public hearing that this proposal is inconsistent with the Town’s plan, which they also were told was being updated. Therefore they voted to postpone action at this time.”¹³ At its next meeting on March 28, 2022, the Committee—without any further input from the Town—took up the petition and voted unanimously to recommend approval of a zoning ordinance amendment.¹⁴ On April 19, 2022, the County Board adopted Ordinance No. 2022-02, which rezoned the 7.4-acre parcel from A-1 exclusive agriculture to A-2 agricultural and rural business.¹⁵

The County Board’s action to rezone the Boat House parcel to facilitate the development of ten storage barns directly contradicts the County Plan, in violation of s. 66.1001(3)(j), Stats. The Plan includes Figure 7, the Farmland Preservation Map for Town of Concord in Jefferson County (reproduced below on page 10) which delineates the boundaries of the Town’s rural hamlet. Designation of township “rural hamlets” is key to the implementation of the County’s farmland preservation policies.¹⁶ A rural hamlet is defined as “[a] collection of small-scale usually older buildings in a town, often located at or near the crossroads of two rural highways, and typically including some mix of residential and non-residential uses.”¹⁷ In contrast to a rural hamlet, “farmland preservation areas” are defined in the Plan to mean “[a]reas of existing

¹² See Tr., February 28, 2022 Committee meeting, p. 13, line 23 to p. 19, line 11, Doc. 23:14-20 (P. App. 15-21).

¹³ Certiorari Record, Doc. 18:2.

¹⁴ Minutes, Jefferson County Planning and Zoning Committee Decision Meeting, March 28, 2022, at 2, Doc. 14:4.

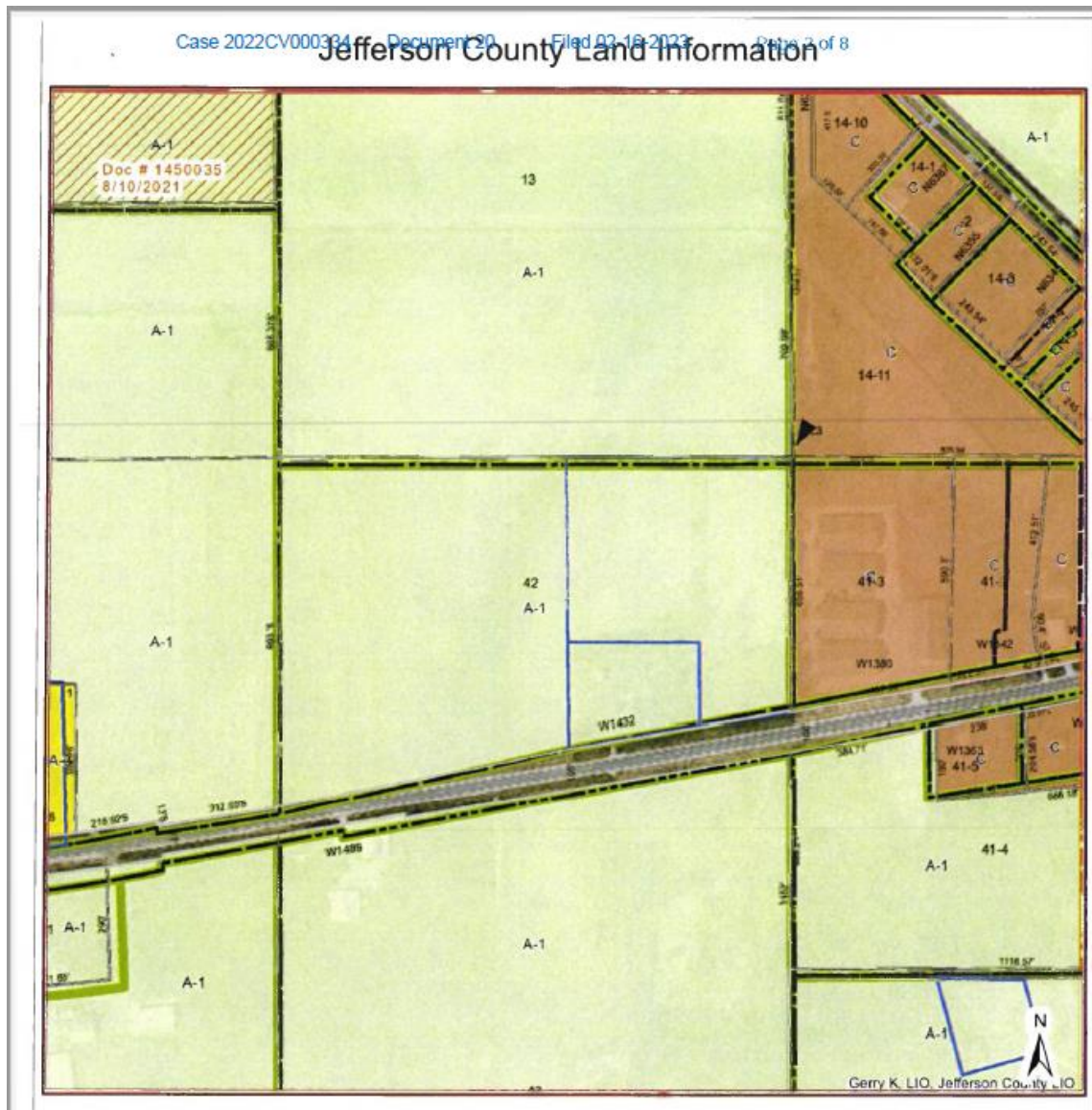
¹⁵ Certiorari Record, Doc. 32:3-4 (P. App. 31-32).

¹⁶ Jefferson County Agricultural Preservation and Land Use Plan, at 5 (P. App. 8).

¹⁷ *Id.*

agricultural or agricultural-related uses . . . *that should be preserved for agricultural or agricultural-related uses throughout the planning horizon of the Agricultural Preservation and Land Use Plan.*” (emphasis added).¹⁸

The rezoned 7.4-acre parcel is located on County Highway B, immediately west of the Town of Concord’s rural hamlet, as shown by the following parcel map:¹⁹



¹⁸ *Id.* at 5 (P. App. 8)

¹⁹ Certiorari Record, Doc. 20:2 (P. App. 13). See also Doc. 15:2 (P. App. 12).

The orange-shaded area of the preceding GIS parcel map designates the Town's rural hamlet, as confirmed by Figure 7 below. The blue-outlined parcel immediately to the west is the rezone parcel.

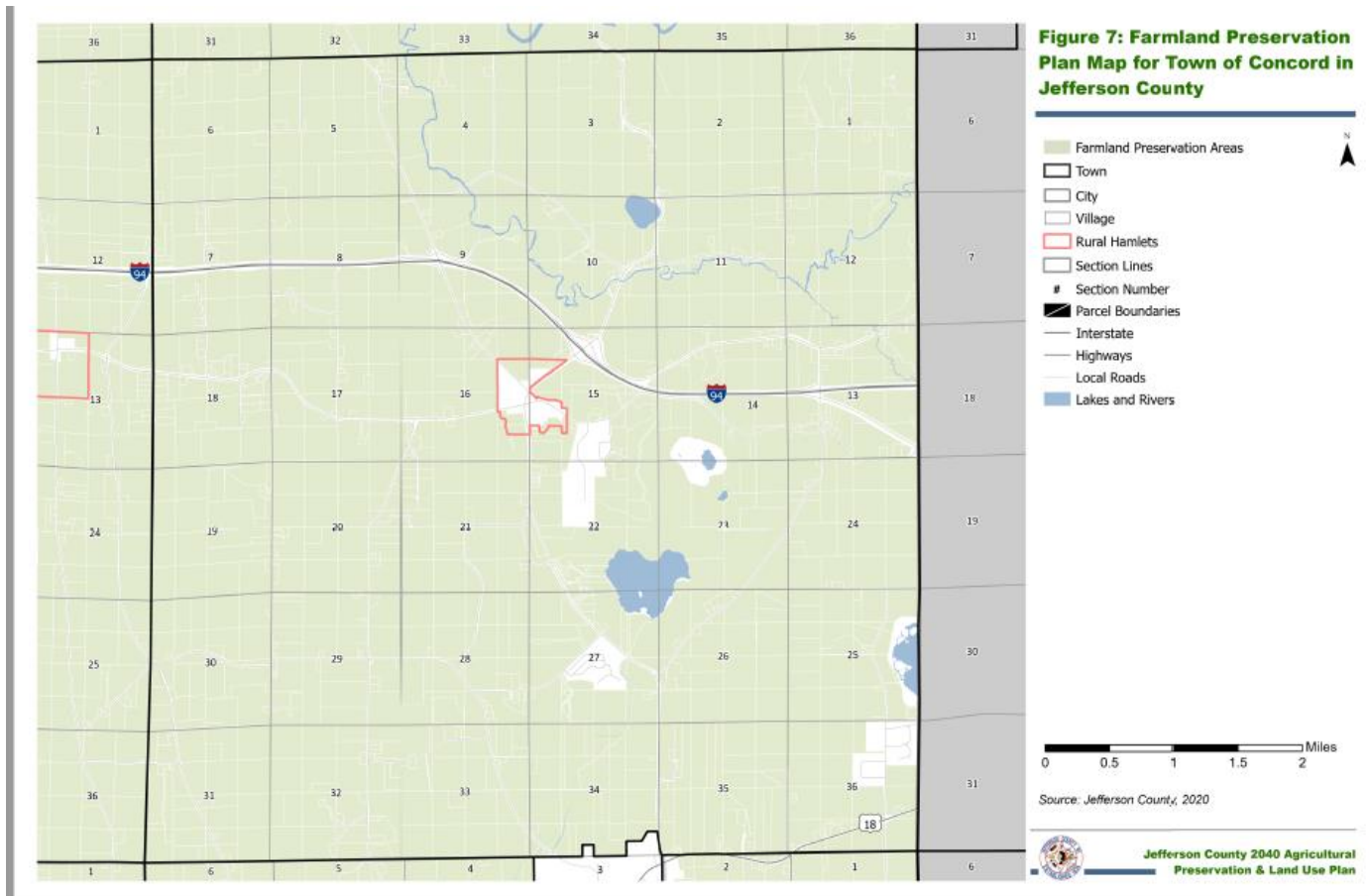
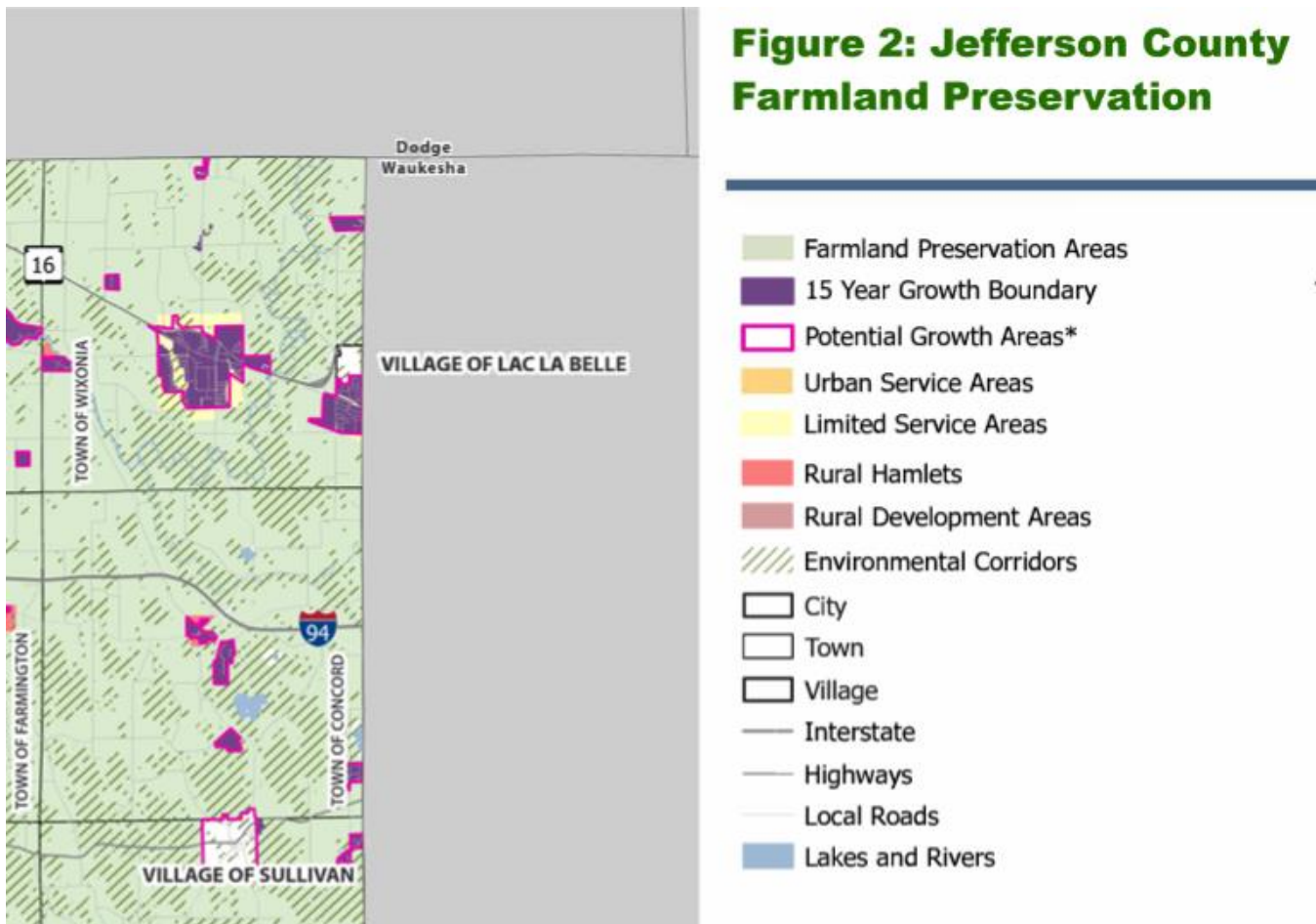


Figure 7 of the Plan,²⁰ reproduced above, delineates the Town of Concord rural hamlet and classifies virtually all other lands in the Town as Farmland Preservation Areas. The implementation chapter of the Plan details the land use policies for rural hamlets and states that “within those portions of a Rural Hamlet that are not also within a 15 Year Growth Area, allow development only of the type and density allowed under the Farmland Preservation Area future

²⁰ Jefferson County Farmland Preservation Plan, Appendix B.

land use category, until such time as the affected land is redesignated to be within the 15 Year Growth Area.”²¹

Figure 2 of the Plan, reproduced below, depicts areas of the County that are projected 15 Year Growth Areas. Notably, the Town of Concord’s 15 Year Growth Area does not extend the boundaries of the existing rural hamlet, as shown below:



The Plan explains that “by definition, 15 Year Growth Areas should not include Farmland Preservation Areas.”²² Instead, the Plan must “[d]esignate lands intended for non-agricultural development within the planning horizon as something other than Farmland Preservation Area,

²¹ Jefferson County Agricultural Preservation and Land Use Plan, p. 37 (P. App. 11).

²² *Id.*, p 17 (P. App. 10).

as required under the State’s Working Lands law.”²³ As quoted above, the Plan specifies that future land use categories for farmland preservation areas include only “agricultural and agricultural-related uses throughout the [15-year] planning horizon.”²⁴ The Plan defines “agricultural-related use” to mean:

“[a]n agricultural equipment dealership, facility providing agricultural supplies, facility for storing or processing agricultural products, or facility for processing agricultural wastes...agricultural chemical dealers and/or storage facilities; commercial dairies; commercial food processing facilities; canning and other food packaging facilities; sawmills, de-barking operations; and chipping facilities.”

The Town of Concord’s 2009 Comprehensive Plan is fully aligned with the goals and policies of the County Plan. It states: “The Town will limit the establishment of new business areas within the Town of Concord rural hamlet as defined by the [then-current] 1999 Jefferson County Agricultural Preservation Plan.”²⁵ Notably, the County’s 2021 updated Plan did not expand the western boundary of the Town’s rural hamlet.²⁶ Further, “[t]he Town will not support expansion of the current rural hamlet or creation of new rural hamlet areas within the Town.”²⁷ As of 1999, approximately 80 acres within the rural hamlet remained available and “adequate to support additional business development through the life of this plan.”²⁸

Section 66.1001(3) imposes an independent, positive duty on the County Board to implement its own Plan, regardless of any action taken by the Town to recommend approval or disapproval of a zoning ordinance amendment. The storage barns proposed for the rezoned parcel are not an agricultural-related land use within the contemplation of either the Town or the County’s comprehensive plans. All of the foregoing interrelated provisions establish that the

²³ *Id.*

²⁴ Jefferson County Agricultural Preservation and Land Use Plan, at 6 (P. App. 9).

²⁵ Town of Concord Comprehensive Plan, at 56 (P. App. 3).

²⁶ See Jefferson County Agricultural Preservation and Land Use Plan, Appendix B, Figure 7, *supra* p. 10.

²⁷ Town of Concord Comprehensive Plan, at 56 (P. App. 3).

²⁸ *Id.* at 57 (P. App. 4).

rezone amendment did not further and substantially contradicted the County's own Plan in violation of Wis. Stat. § 66.1001(3). The amendment must therefore be declared void.

III. THE COUNTY ERRED AS A MATTER OF LAW IN FAILING TO MAKE THE FINDINGS MANDATED BY WIS. STAT. § 91.48(1) FOR A REZONE OF PROPERTY OUT OF THE FARMLAND PRESERVATION ZONING DISTRICT.

Section 91.48(1), Stats. and Section 11.11(c)6. of the Zoning Ordinance require the County Board to make certain mandatory findings in approving a rezone of property out of the exclusive A-1 agricultural zoning district, including but not limited to a finding that the rezoning is consistent with any applicable comprehensive plan and that the rezoning is substantially consistent with the County's certified farmland preservation plan. As noted above, however, the Planning and Zoning Committee failed to meet its statutory obligations when it focused instead on the Town's role in the rezone process. At its decision meeting on March 28, 2022, the Committee heard comments from Planning and Zoning Director Zangl, who opined: "The Town Comprehensive Plan is meant for the Town to provide guidance and their recommendations. And if the Town isn't following that, unfortunately, that's a Town issue."²⁹ The members of the Committee followed suit. As Committee Chair Jaeckel reasoned: "their decision at the Town level was to approve [the rezone petition]. . . . I think we have our prerogative to approve this, because as far as we've seen it, it does meet our plan."³⁰ These comments were followed by discussion of the language of the Town's comprehensive plan (misquoting and misrepresenting the plan in the process);³¹ whether the Town and County had approved other A-1 to A-2 rezone petitions in the past; and whether the Town's plan was out of date and therefore unenforceable.

²⁹ Certiorari Record, Tr., Planning and Zoning Committee Hearing of March 28, 2022, at 9-11; Doc. 24:10-11 (P. App. 23-24).

³⁰ *Id.*, p. 11, lines 13-20, Doc. 24:12 (P. App. 25).

³¹ *Id.*, p. 26 l. 9 through p. 28, l. 3 (P. App. 27-29).

Another Committee member speculated—on the basis of zero evidence³²—that if the Town had in fact updated its plan, the rezone parcel would have been included in the rural hamlet.³³

Ultimately the Committee adopted a motion to recommend the rezone because it was “consistent with what the Township has approved in the past” and because the parcel was “adjacent to properties currently utilized for business purposes.”³⁴

Similarly, the County Board’s deliberations ahead of its vote to adopt the rezone amendment revolved around the Town’s decision to recommend approval. The transcript of its deliberations shows that the Committee never acknowledged the relevant legal standard, nor reviewed the content of the County’s own Plan.³⁵ Rather, the Board’s deliberations were consistently misdirected toward the Town’s comprehensive plan and the issue of whether it had “expired” such that it could be disregarded.³⁶ A motion to postpone consideration of the rezone petition failed, and minutes later the Board moved to cut off debate.³⁷ The transcript reflects that the Board made none of the required findings of fact to rezone the property out of the A-1 exclusive agricultural district required by Wis. Stat. § 91.48 and sec. 11.11 of the County Zoning Ordinance. This procedural error is grounds in and of itself to reverse the Board’s decision and invalidate the rezone amendment.

³² See *supra*, notes 25-27 and associated text of the Town’s plan. See also Tr., County Board meeting of April 19, 2022, p. 9 (Doc. 34:10) (P. App. 10) (Town Board Supervisor Dale Konle commenting: I would point out that prior to the decision on the [rezone] proposal, the town has continued to operate as though the [Town’s] plan was in force.”)

³³ Tr., March 28, 2022 Committee meeting, p. 26, lines 9-12, Doc. 24:27 (P. App. 27).

³⁴ *Id.* p. 26, line 22 to p. 28, line 10, Doc. 24:27-29 (P. App. 27-29).

³⁵ See Tr., County Board meeting of April 19, 2022, pp. 27-39 (Doc. 34:28-40) (P. App. 36-48).

³⁶ *Id.*, pp. 28-31, Doc. 34:29-32 (P. App. 37-40).

³⁷ *Id.* pp. 26-37, Doc. 34:27-38 (P. App. 35-46).

CONCLUSION

The Wisconsin statutes impose a clear and unambiguous duty on the Respondent to ensure that any amendment to the County Zoning Ordinance is consistent with its Comprehensive Plan. Unlike horseshoes and hand grenades, “close enough” is insufficient as a matter of law to find consistency with the Plan’s provision that non-agricultural-related commercial development must be confined to the mapped Town of Concord rural hamlet, which coincides with the Town’s 15-year growth area. The Court should therefore vacate Jefferson County Ordinance No. 2022-02.

Dated this 31st day of March, 2023.

Respectfully submitted,

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