

**FILED
10-04-2023
Clerk of Circuit Court
Cindy R. Hamre Incha
2022CV000334**

STATE OF WISCONSIN : CIRCUIT COURT: JEFFERSON COUNTY

DEFEND TOWN PLANS, U.A., et
al.,

Plaintiffs,

-vs-

Case No. 2022CV334

ORAL RULING

JEFFERSON COUNTY BOARD OF
SUPERVISORS,

Defendant.

August 14, 2023

HONORABLE WILLIAM V. GRUBER
Circuit Court Judge
Branch I

A P P E A R A N C E S

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ATTORNEY MARY BETH PERANTEAU by telephone on behalf of
the Plaintiff, DEFEND TOWN PLANS, U.A., et al.;

CORPORATION COUNSEL JON BLAIR WARD by telephone on
behalf of the Defendant, JEFFERSON COUNTY BOARD
OF SUPERVISORS.

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Erica L. Schueler, RPR, CRR
Official Court Reporter

1 (Proceedings commenced at 8:35 a.m.)

2 THE COURT: This is 22CV334, Defend Town
3 Plans along with a series of individual petitioners
4 and, respondent in this case, the Jefferson County
5 Board of Supervisors.

6 We have Corporation Counsel Ward on the
7 phone on behalf of the respondent. And we have, on
8 behalf of the petitioners, Attorney Peranteau. And we
9 have some gathered here in the courtroom, but the
10 counsel appearances all by telephone this morning.

11 The Court's going to provide a decision in
12 connection with the -- well, what gave rise to this
13 litigation, a petition for writ of certiorari. That was
14 filed back in October of '22. And what we know here
15 generally is that we have such a request, that is a
16 certiorari review on the part of a group of interests,
17 citizen interests individually, and but also we have
18 this Defend Town Plans, UA. I forget the exact nature
19 of that collective. It's not that important here and
20 now.

21 They requesting that this Court review an
22 action of the County, and I think more specifically as
23 captioned, the County Board. And that action is an
24 amendment by way of an ordinance, rezone ordinance. I
25 think it was 2022-02. Yeah.

1 So there is a lot of attention devoted by
2 way of briefing on the part of the petitioners to --
3 argument that what the County, what the Board did here
4 could not be consistent with a comprehensive plan and
5 that's why we see a lot of attention devoted to State
6 Statute 66.1001.

7 And that's a good background to the case.
8 I mean, in general. It paints an essential background
9 in terms of the Smart Growth law and, you know,
10 substantive and sometimes maybe more aspirational
11 qualities of that whole act and so that's important.
12 And like I said, there was a great deal devoted to it
13 and I understand that that's, you know, sometimes
14 essential with briefing.

15 But where I found myself in analyzing the
16 case and, you know, the Court's role here to review the
17 record, I found myself more preoccupied with that
18 statute in Chapter 91, 91.48, and something of a -- I
19 guess a corollary, the County ordinance 11.11. But
20 what the result here is going to turn on is 91.48 (1).

21 And even there, when we consider that
22 particular statute, and maybe I'll just -- I'm going to
23 read some of that in pertinent part here shortly. But
24 just by way of one example, you know, 91.48 (1) (a)
25 reads the land -- and this is out of context, I

1 appreciate that, but it will make sense here in a few
2 moments. "The land is better suited for a use not
3 allowed in the farmland preservation zoning district."
4 That is a finding, one of four findings, that the
5 political subdivision has to make after public hearing
6 in order to do what it did here or sought to do.
7 That's one instance.

8 But this Court is not going to, at least
9 not in this phase of the litigation, determine whether
10 or not the land is better suited for a use not allowed
11 in the farmland preservation zoning district because
12 the Court is -- well, the Court will find that
13 the Board of Supervisors, the parent body to the
14 committee that was involved here, that body did not
15 make the findings that it was required to make.

16 And the more I consider the transcript and
17 the record here, as I'm required to, I came to the
18 conclusion that, even if I reviewed the record that I
19 have -- and I don't go out looking for a record. Even
20 if I looked at it or reviewed it, analyzed it in a
21 light more favorable than even the County has -- you
22 know, has a right to or is entitled to, I would not be
23 able to determine that those findings, all four of them
24 under 91.48 (1), were made.

25 And I'm suggesting that, you know, when we

1 see, like, Mr. Zastrow talking and the zoning director
2 talking, I'm not saying it was just irrelevant banter.
3 I'm not suggesting that at all. It was -- you know, it
4 was focused remarks, but they -- this is not -- it's
5 not what the legislature was looking for. I'm firmly
6 confident about that.

7 It's not what they were looking for and I
8 don't know if I would go so far as to say what -- or
9 suggest what Petitioners' counsel is suggesting. I
10 think she suggested that, you know, the process here
11 has a whole made a -- what did she say? A mockery, you
12 know, of the -- you know, I don't know, Smart Growth
13 law or this act that I started talking about at the
14 start here. I don't know if I'd go that far, but it's
15 not what the legislature intended; I'm quite sure about
16 that. I suppose I could be wrong and I suppose we'll
17 find out.

18 But really, what I think this amounted to
19 was almost a -- at least a part of the membership here
20 at the committee level and maybe even the -- its parent
21 body level thought this was, like, a -- you know, a
22 signature, countersignature. You know, because there
23 was a lot -- it does seem there was a focus on, you
24 know, what the town did and "this is what the town
25 did," "this is what the town's done before." And, you

1 know, there's, you know, use of the word "prerogatives"
2 and, you know, that just -- to me, that conveys that
3 quality of a -- not a considerable misunderstanding,
4 but a misunderstanding of the requirements of the
5 legislature in terms of these findings.

6 And so when the Court is asked to
7 undertake a certiori review, we know that in -- we --
8 somebody cited that *Oneida Seven Generations*
9 *Corporation vs. City of Green Bay*. It's a pretty
10 recent case. Somebody cited that and we know that, by
11 way of that authority, that one of the things the Court
12 has to do here is determine whether the County acted
13 according to the law.

14 And well, and that's where the Court was
15 guided in this case by Petitioners' counsel. At least
16 that was one component. Did the County act as required
17 under 91.48 (1) and, perhaps secondarily, according to
18 its very own ordinance. I don't think I have to divide
19 the analysis here among those two authorities.

20 Suffice it to say, and I've said this two
21 or three or four times already in varying ways, I don't
22 find, I can't find that the County made its findings --
23 made the findings that it's required to make, again,
24 under 91.48 (1).

25 And yeah. So again, those remarks by

1 committee members, planning and zoning, whatever the
2 name of the committee is, that body -- I mean, I get
3 that they found their way up to the board, but
4 there's -- there is just -- there's nothing here in
5 isolation or collectively that equals what's required
6 here.

7 So now the next question is remedy. And
8 the argument is -- on the part of the petitioner is
9 this is invalid or procedurally irregular and so -- and
10 so, Judge, it must therefore be declared void, says
11 Attorney Peranteau. But -- or she finishes with, "The
12 Court should therefore vacate the ordinance 2022-02."
13 That's how she finishes her initial brief. And I'm
14 sure the reply brief suggests something else or
15 something similar.

16 But I -- probably to the lawyers' chagrin,
17 I need more in terms of the authority of that, the
18 propriety of that result, Attorney Peranteau, and I
19 need Attorney Ward to respond to that. And I just sort
20 of feel like I'm operating in a vacuum on that one and
21 I'm not comfortable without some additional argument.
22 Maybe we can just do it orally. We'll see what the
23 counsel wants. But you have, I don't know, 70 or 80
24 percent of the Court's decision, but we have to talk
25 about remedy.

1 And what do you think, Attorney Peranteau?
2 Because I -- like I said, I -- there's really nothing
3 for me to grab onto here other than your -- just -- I
4 mean, you're telling me that I have to declare it void.
5 Maybe you can reshape that. I want something to hang
6 my hat on.

7 MS. PERANTEAU: Well, your Honor, I -- I
8 think that we actually do need a ruling on whether
9 substantively the County Board was, you know, lawfully
10 entitled to make the decision it did even if it did
11 make all of the findings.

12 In my experience -- and I've got, you
13 know, 25-plus years in the world of zoning -- I've
14 never come across a case that was more black and white
15 in terms of violation of the Smart Growth law. We have
16 here a map that allows rezoning to commercial uses such
17 as what the rezone petition proposed in a specified
18 rural hamlet and the parcel that was rezoned is outside
19 of that hamlet.

20 And so even if the Court were to remand
21 the matter to the County Board to make the proper
22 findings, there is -- in my view, there's no way that
23 this rezone could be consistent with the comprehensive
24 plan as mandated by Section 66.1001.

25 So this is a -- in terms of remedy, this

1 is a common law certiori case. It's not unlike, for
2 example, the Board of Adjustment has the power to grant
3 variances and Section 59.69 litanizes what a court can
4 do on certiori review. And it can -- you know, it can
5 reverse in whole or in part and remand.

6 But again, I question what the point of
7 remand would be because I think we do need to get to
8 the central argument of this case that there is -- you
9 know, there's no way that the County Board can fix this
10 procedurally by making the requisite findings under the
11 Farmland Preservation law. There's -- there's still
12 glaring inconsistency with the comprehensive plan.

13 THE COURT: Okay. Well, that's not a
14 direct answer to my question, but I understand why it
15 was provided. Because Attorney Peranteau seems to
16 see -- she would see a deficit here in the result if we
17 didn't get into the 66.1001 area.

18 Attorney Ward, do you want to provide any
19 additional record? I think Attorney Peranteau's
20 probably right. And -- well, anything, Attorney Ward?

21 MR. WARD: Well, the Court took the
22 position of the County Board didn't make the proper
23 findings and Attorney Peranteau is now saying that
24 there's no way that the County Board could possibly
25 make the required findings.

1 The County's position is that this should
2 go back to the County Board so that the -- the County
3 Board can consider the proper elements and -- and make
4 the proper findings. I mean, at this point, do we
5 know, if those four elements were presented to the
6 County Board, what their answer would be? And maybe
7 they could.

8 I guess we're -- we're -- I think we're
9 getting ahead of the game here by saying that the
10 County Board can't make certain required findings. I'm
11 asking the Court to give the County Board the
12 opportunity to make the required findings.

13 THE COURT: Yeah. And Attorney Peranteau,
14 you're saying it's an impossibility, Judge. It can't
15 be done. And I'm supposed to -- I mean, I'm supposed
16 to accept that and then close the case.

17 MS. PERANTEAU: Well, let me clarify. I
18 think it's -- that, you know, we're talking about two
19 different statutes. It's -- I guess it's possible that
20 the County Board could make the requisite findings
21 under the Farmland Preservation law. What it can't do
22 is make the consistency finding under the Smart Growth
23 law.

24 THE COURT: How do you -- okay. How do
25 you know that? I mean, maybe that's a silly question

1 because of what you briefed, right? That's argument.

2 MS. PERANTEAU: Well, because the
3 comprehensive plan was -- these plans are typically --
4 have a ten-year life span and this county comprehensive
5 plan and the farmland preservation plan, which is
6 incorporated by reference, were both just recently
7 amended, I believe, in 2021.

8 And so it's the same plan. It's the same
9 rezoning petition. There's not going to be any change
10 that would enable -- that would change the boundaries
11 of the rural hamlet and -- and thus allow a commercial
12 rezone outside of the rural hamlet in the farmland
13 preservation area. Or I should say the agricultural
14 preservation area is what it's called in the plan.

15 THE COURT: Okay. Pause the proceedings
16 here briefly.

17 (Pause in proceedings.)

18 THE COURT: Resume the proceedings in
19 22CV334, Defend Town Plans UA et al. vs. Jefferson
20 County Board of Supervisors.

21 The Court just taking a moment to decide
22 what's been undecided at this point and that is --
23 well, it pertains to that recent record we made about
24 whether or not the Court ought to or is required to or
25 should on a discretionary basis remand the matter to

1 the Jefferson County Board of Supervisors with respect
2 to those findings or, as Attorney Peranteau urges,
3 whether the Court should, must find that those findings
4 just -- they can't -- they cannot be made. Those
5 findings again, under 91.48, given the record here,
6 they can't be made and so that -- and thus the Court
7 should dispose of this matter, at least at this level,
8 here and now.

9 Well, I'm going to take that under
10 advisement. Brief advisement. And I'll -- in this
11 instance, I'll likely render something in writing with
12 respect to this final item. The Court will have
13 that delivered within 30 days.

14 Anything else for today, Attorney Ward?

15 MR. WARD: Nothing further from the
16 County, your Honor.

17 THE COURT: Okay. Attorney Peranteau,
18 anything?

19 MS. PERANTEAU: No, your Honor. Thank
20 you.

21 THE COURT: Madam Clerk?

22 THE CLERK: No, your Honor.

23 THE COURT: Okay. Recess.

24 (Proceedings concluded at 8:57 a.m.)

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1 STATE OF WISCONSIN)
) SS:
2 COUNTY OF JEFFERSON)

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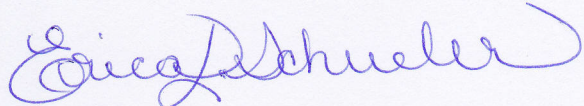
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I, ERICA L. SCHUELER, RPR, CRR, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken on said date at said place before the HONORABLE WILLIAM V. GRUBER, Circuit Court Judge, Branch I, Jefferson, Wisconsin.

Dated this 4th day of October, 2023.



Erica L. Schueler, RPR, CRR