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Clerk of Circuit Court
Cindy R. Hamre Incha
2022CV000334

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

DEFEND TOWN PLANS, U.A.,
DALE KONLE,
KIM VERHEIN HERRO,
KIMBERLY A. MILLER,
ROBERT GARTZKE,
KAREN GARTZKE,

and

SALLY J. WILLIAMS,

Petitioners,

v.

JEFFERSON COUNTY
BOARD OF SUPERVISORS,
311 South Center Avenue
Jefferson, WI 53549,

Respondent.

Case No. 2022-CV-334

30955: Petition for Writ of Certiorari

PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondent Jefferson County Board of Supervisors violated Wis. Stat. § 66.1001 by approving a map amendment to the County zoning ordinance that is inconsistent with the *County's* Comprehensive Plan. The County's arguments do not refute that central claim. Instead, Respondent argues that the Board relied on the action of the Town Board of the Town of Concord under a different statute, Wis. Stat. § 59.69(5)(e), which grants towns veto power over County rezone petitions affecting the use of land within their boundaries. The County's brief

fails to cite any provision of its Comprehensive Plan to support the conclusion that a rezone for commercial development outside the boundaries of the Town's rural hamlet is "consistent with" that Plan. Rather, it relies on language in the Town's comprehensive plan to argue that the consistency requirement of sec. 66.1001 was "ipso facto" met because the Town Board voted to recommend approval of the rezone petition.

The County's argument fails under basic rules of statutory construction. The Town Board's action does not substitute for the obligation imposed directly on the County under the law. Further, the County's effort to establish that the Board made the mandatory findings for a rezone out the A-1 prime agricultural district must be rejected because there is nothing in the transcript of the Board meeting or in the written resolution adopting the rezone ordinance that sets forth such findings. Accordingly, the County ordinance amendment should be vacated.

ARGUMENT

I. MATTERS OUTSIDE OF THE CERTIORARI RECORD ARE NOT PROPERLY BEFORE THIS COURT AND MUST BE STRICKEN.

The function of the common-law writ of certiorari is to correct errors appearing upon the official record. Over a century ago, Wisconsin case law established that "nothing but the record proper can properly be presented to the court for consideration by the return to the writ of certiorari, only matters which by law form a part of the official record should be included in the return, and if other matters are included they cannot properly be considered." *State ex rel. City of Augusta v. Losby*, 115 Wis. 57, 90 N.W. 188 (Wis. 1902). In this case, the County filed its index of the record (Doc. 10), eighteen exhibits (Docs. 11-28 & 32), and the transcript of the County Board meeting at which the zoning amendment was adopted (Doc. 34), comprising the certiorari record. The County's belated effort to buttress its arguments with matters outside the official record is plain legal error. The Court should strike Exhibits B-H attached to

Respondent's brief and the related argument in pp. 4-7 of the Response Brief. The only matter under review in this case is the legal validity of the County Board's decision to rezone the Boathouse parcel from the A-1 exclusive agricultural district to the A-2 agricultural and rural business district.

II. THE BOATHOUSE REZONE IS INCONSISTENT WITH THE COUNTY'S COMPREHENSIVE PLAN.

A. The County's arguments are without merit because they are not supported by the language of the Comprehensive Plan.

Section 66.1001(3)(j), Stats., requires County zoning ordinances amended under s. 59.69 to be consistent with the County's comprehensive plan, meaning that such amendments must not contradict the objectives, goals and policies contained in the plan. Wis. Stat. § 66.1001(1)(am). Contrary to the County's assertions (Response Brief, Doc. 39:9-10), in the case of zoning ordinance amendments, the statute is not merely a "guide". Rather the consistency requirement is a mandate. To hold otherwise would be to define the Smart Growth Law out of existence.

Petitioners agree that sec. 11.04(f) of the Zoning Ordinance "specifically contemplates rezoning lands from A-1 to A-2," after the County holds a hearing and "makes the findings as specified in § 91.48(1) of the Wisconsin Statutes, as articulated in Section 11.11(c) of the Ordinance." (Response Brief, at 2, 8). However, both the statute and the ordinance require the County to find that "the rezoning is consistent with any applicable comprehensive plan" and that "the rezoning is substantially consistent with the county certified farmland preservation plan." In this case, as Petitioners have argued, the "applicable" comprehensive plan is the County's Plan, which incorporates by reference the County's Agricultural Preservation and Land Use Plan.

The County initially asserts that the A-2 zoning classification is allowed in an "Agricultural Preservation Area." (Response Brief, Doc. 39:8-9.) The problem with this

argument is that there is no map or definition of "Agricultural Preservation Area" in either the Ordinance or the Comprehensive Plan. Rather, the Plan defines "**Farmland** Preservation Areas" as "[a]reas of existing agricultural uses or agricultural-related uses, that are actively used for farming and are considered agricultural producing lands, that should be preserved for agricultural or agricultural-related uses through the planning horizon of the Agricultural Preservation and Land Use Plan." (Petitioners' Appendix, Doc. 38:11.) As noted in Petitioners' opening brief, the boat storage barns planned for the rezone parcel do not fall within the definition of "agricultural-related" uses under the Plan. (See Petitioners' Brief, Doc. 37:12.)

Respondent's remaining argument is twofold: (1) the consistency requirement was implicitly delegated to the Town of Concord as part of the Town's review and recommendation on the rezone petition under sec. 59.69(5)(e); and (2) the Town Board concluded that the rezone petition was consistent with the Town's comprehensive plan and thus, the rezone is "ipso facto" consistent with the County's plan. (See Response Brief, Doc. 39:9-10.)

As to its first argument, longstanding canons of statutory construction provide that "as a general rule . . . a statute must be unclear or ambiguous before a court is warranted in reviewing matters outside the statutory language to determine the meaning intended." *Harris v. Kelley*, 70 Wis. 2d 242, 249, 234 N.W.2d 628, 631 (1975). The applicable statute clearly prohibits the County from adopting a zoning ordinance amendment that contradicts the objectives, goals and policies of the County's Comprehensive Plan. Nothing in the plain language of sec. 66.1001 authorizes the County to delegate its obligation to the Town Board, to accept the Town Board's recommendation as the equivalent of its own consistency finding, or to interpret the Town's comprehensive plan in making the consistency finding.

As to the second argument, the County fails to cite any provision of its Plan that supports a finding of consistency (a finding that in any case the County Board itself did not make). Nor

should the County be grasping for language in the Town's plan to support its decision. Nothing in the County's Plan "incorporates by reference" the Town of Concord Comprehensive Plan. Rather, a review of the Plan confirms that a rezone from A-1 to A-2 would be "consistent" only if the parcel in question were located within the boundaries of a rural hamlet or in a 15-year growth area. (See Petitioners' Brief, Doc. 37:8-12.) The Boathouse parcel is located in neither. The rezone petition did not require the County to interpret general goals or policy statements. It simply required the County to look at the map.

B. The County's arguments based on the Town of Concord comprehensive plan and previous Town approval of rezoning amendments are red herrings.

Section 66.1001 clearly and unambiguously imposes a legal duty on the County Board—the only governmental entity with authority to amend the County zoning ordinance—to ensure that such amendments are consistent with the County's comprehensive plan. The fact that the Town Board voted to recommend approval of the Boathouse rezone petition is therefore wholly irrelevant to the case at bar. Similarly, the Town's prior approval to rezone various parcels from A-1 to A-2 provide no basis to affirm the ordinance amendment in this case. The record of those proceedings (including whether they were challenged on consistency grounds) is not before the Court. Notably, however, the purpose for the A-2 zoning district is "[t]o provide for the proper location and regulation and manufacturing, storage, warehousing and related marketing or industrial activities that are related to the agricultural industry and otherwise suited to a relatively isolated, rural location." ZONING ORDINANCE § 11.04(f)7.i. (quoted in Respondent's Brief, Doc. 39:2). The County's prior approval of A-1 to A-2 rezone petitions for agricultural related uses is thus wholly unsurprising. Conversely, approval of a rezone for boat storage purposes is inconsistent with the stated purposes for the A-2 district listed the Ordinance. Moreover, the rezone parcel is located close to a cluster of single-family residences, not in a "relatively

isolated, rural location." As such, it is puzzling that the County considers those previous rezones to have established some sort of precedent in this case.

III. THE COUNTY BOARD FAILED TO MAKE THE FINDINGS REQUIRED BY WIS. STAT. § 19.48(1) IN ORDER TO REZONE PROPERTY OUT OF THE A-1 PRIME AGRICULTURAL DISTRICT.

The County agrees that it was required to make specified statutory findings in order to rezone the Boathouse parcel from A-1 exclusive agricultural to A-2 agricultural and rural business. (See Response Brief, Doc. 39:2.) Given the lack of formal findings in the rezone ordinance itself, the County resorts to citing comments in the transcript of the Planning and Zoning Committee's remarks following the public hearing. Section 91.48(1), Stats. requires the political subdivision—in this case the County Board—to make specific findings. Even accepting the dubious proposition that comments made by Committee members[1] can be construed as "findings," they were not made by the County Board. The rezone ordinance is therefore procedurally and substantively invalid.

CONCLUSION

The County's arguments in support of the Boathouse rezone ordinance make a mockery of the Smart Growth Law. As recited in the resolution of the Joint Committee convened to recommend the amendment to the County's Agricultural Preservation and Land Use Plan, that amendment is the product of 70 public meetings to identify a plan for engaging members of the public in the planning process and multiple public meetings to develop the draft Farmland Preservation Plan, as well as the expenses of the consultant hired in the process of updating the

[1] The County's argument fails even on its own terms. For example, it is asserted that the Planning and Zoning Committee made a "determination that the land subject to the rezoning petition *is better suited for a use not allowed in the farmland preservation zoning district*." This so-called finding is claimed to be supported by a comment from Committee member Lloyd Zastrow, who stated: "because its connected to an existing same type of business [i.e. the boat storage facility on the adjacent parcel that actually is within the Town of Concord rural hamlet boundaries], *I saw it as an okay thing*." (Response Brief, Doc. 39:11) (emphasis added).

Plan. All of that substantial effort and expense is for naught unless the County follows through with execution of the Plan via its zoning decisions. If the County is allowed to sidestep its duty in spite of the glaring inconsistency between the Plan and the rezone amendment in this case, then there is no conceivable case in which the Smart Growth Law could be upheld.

For all of the foregoing reasons, Jefferson County Ordinance No. 2022-02 should be declared null and void.

Dated this 15th day of May, 2023.

Respectfully submitted,

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