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WISCONSIN COURT OF APPEALS
DISTRICT IV

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

Petitioners-Respondents,

v.

Appeal No. 2023AP001996

Circuit Court Case No. 2022CV000334

JEFFERSON COUNTY
BOARD OF SUPERVISORS,

Respondent-Appellant.

BRIEF OF PETITIONERS-RESPONDENTS

*Appeal from the Circuit Court for Jefferson County
The Honorable William Gruber, Presiding
Circuit Court Case No. 2022-CV-334*

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ISSUES PRESENTED FOR REVIEW

1. Did Respondent-Appellant Jefferson County Board of Supervisors act according to law when it rezoned a parcel of property in the Town of Concord from A-1 (Exclusive Agricultural) to A-2 (Agricultural and Rural Business) without making the findings of fact required by Wis. Stat. § 91.48(1) of Wisconsin's Farmland Preservation Law and Section 11.11(c)6. of the County Zoning Ordinance?

Answered by the Circuit Court: No.

2. Did Respondent-Appellant act according to law when it adopted the recommendation of the Jefferson County Planning and Zoning Committee to adopt the rezone ordinance, where the Committee made no findings of fact under Wis. Stat. § 91.48(1) and Section 11.11(c)6. of the Jefferson County Zoning Ordinance and instead relied on the recommendation of the Town Board of the Town of Concord?

Answered by the Circuit Court: No.

3. Did Respondent-Appellant act according to law when it rezoned a parcel of property located outside of the mapped boundaries of the Town of Concord rural hamlet to permit for a commercial use, contrary to Wis. Stats. §§ 66.1001(3)(j) and 91.48(1)(a), Section 11.11(c)6. of the County Zoning Ordinance, and the Jefferson County Comprehensive Plan, which states that all future commercial development shall be located within the Town's rural hamlet?

Answered by the Circuit Court: The Circuit Court did not reach this question.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because Petitioner-Respondents believe that the briefs and record adequately inform the Court of the grounds for upholding the circuit court's decision under existing law.

STATEMENT ON PUBLICATION

Petitioners-Respondents' request publication of the Court's opinion because there is little or no published case law on the issue of whether a zoning ordinance or amendment is consistent with a political subdivision's comprehensive plan as required by Wis. Stat. § 91.48 of the farmland preservation law and Wis. Stat. § 66.1001, Wisconsin's smart growth law.

STATEMENT OF THE CASE

On April 19, 2022, the Jefferson County Board of Supervisors (the “Board”) adopted Ordinance No. 2022-02, a map amendment to the County Zoning Ordinance which rezoned a 7.4-acre parcel of property owned by Donald and Nancy Brunson in the Town of Concord. The amendment was requested pursuant to a rezone petition filed by The Boat House of Lake Country (not a party to this case), a recreational boat dealer with an interest in the property under an offer to purchase.¹ Ordinance No. 2022-02 rezoned the parcel from the A-1 Exclusive Agricultural zoning district to the A-2 Agricultural and Rural Business district to permit the construction of ten boat storage barns.²

The Board erred as a matter of law in adopting the rezone ordinance. Wis. Stat. § 66.1001 (2021-22), the comprehensive planning law, required the Board to deny the Boat House rezone petition because the proposed commercial use of the property is inconsistent with the Jefferson County Comprehensive Plan adopted February 9, 2021 (the “County Plan”). The County Plan—which, pursuant to Wis. Stat. § 91.10(2) incorporates the Jefferson County Agricultural Preservation and Land Use Plan—confines new commercial development in the Town of Concord to its designated “rural hamlet.” The rezoned parcel does not lie within the rural hamlet as depicted on the Town of Concord future land use map in the County Plan.

The Board also erred by failing to make the findings mandated by Wis. Stat. § 91.48, Wisconsin’s farmland preservation law, to rezone property located in the A-1 prime agricultural zoning district. The circuit court vacated Ordinance No. 2022-02 based on the Board’s failure to make the requisite findings under the farmland preservation law. However, the court did not reach the question of whether the rezone was consistent with the County Plan, i.e., whether rezoning the property to allow a commercial use either furthered or did not contradict the

¹ R.32:3-4 (A. App. 266-67).

² R.15:1-2 (A. App.121-22); R.25:8 (A. App. 231).

objectives, goals and policies contained in the Plan, as required by both the farmland preservation law and by the smart growth law, Wis. Stat. §§ 66.1001(1)(am) and (3)(j).

The Board appeals the circuit court's decision and order on two grounds. First, the Board argues that the court erred in vacating Ordinance No. 2022-02, claiming that "the factors relevant to rezoning" were considered by the County Planning & Zoning Committee (the "Zoning Committee") in recommending approval. The Board urges that because no such "express findings" were required, the Board's action must be sustained if any reasonable view of the evidence supports it. Brief of Appellant, pp. 23-25. This argument ignores the applicable statute and is also belied by the record.

Second, the Board argues that the court erred in vacating the rezone ordinance rather than remanding for further proceedings because any defect in the Board's decision can be cured. Brief, p. 34. This claim is erroneous as a matter of law. Because the rezoned parcel is not located within the mapped boundaries of the Town's rural hamlet, the Board cannot reasonably find that the rezone is consistent with the County Plan within the meaning of Wis. Stat. § 66.1001. The Plan in this regard is not ambiguous. As such, there was no reason for the court to remand the matter to the Board for additional findings. The circuit court correctly vacated Jefferson County Ordinance No. 2022-02 and its decision should be upheld on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On November 18, 2021, The Boat House of Lake Country filed a petition to rezone 7.4 acres of a 24-acre property located in the Town of Concord, Jefferson County, from A-1 (Exclusive Agricultural) to A-2 (Agricultural and Rural Business) for a proposed development consisting of ten barns to be used for boat storage.³ On January 10, 2022, the Board of Supervisors of the Town of Concord, in the exercise

³ R.15:1-2 (A. App.121-22).

of its authority over rezone petitions under Wis. Stat. § 59.69(e)6., voted 2-1 (contrary to the recommendation of the Town Plan Commission) to recommend approval of the Boat House rezone petition.⁴ Dale Konle, a petitioner in this case and then-Chair of the Town Board, advised the County Planning & Zoning Committee (the “Zoning Committee”) in connection with the Town Board’s recommendation:

I voted against the rezoning of the...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.⁵

The Zoning Committee held a public hearing on the rezone petition on February 17, 2022.⁶ At its next meeting on February 28, 2022, Concord Town Board Supervisor and Zoning Committee member, Lloyd Zastrow, defended the Town Board’s vote to recommend approval, commenting that the property owners, Donald and Nancy Brunson, were “an older couple, ... have financial troubles and they can now bail out if they sell this property and remain living there in the farmhouse. If they can’t sell this, they would probably have to sell the home and move elsewhere.”⁷

After further discussion, the Zoning Committee voted 5-0 to table the matter and return the petition to the Town to resolve the discrepancy created by the Town Board’s recommendation of approval despite the inconsistency of the Boat House petition with the Town’s Comprehensive Plan.⁸ A memo from Matt Zangl, the County’s Director of Planning and Zoning, memorialized that decision as follows: “The Committee heard testimony in public hearing that this proposal is inconsistent

⁴ R.18:1-3 (A. App. 137, 139).

⁵ R.13:3 (A. App. 139).

⁶ R.32 (A. App. 224-253).

⁷ R.23:13 (A. App. 166).

⁸ See R.23:14-20 (A. App. 166-171).

with the Town's plan, which they also were told was being updated. Therefore they voted to postpone action at this time."⁹

On March 28, 2022, without further action by the Town, the Zoning Committee un-tabled its decision¹⁰ and proceeded to deliberate on the petition. The Committee heard comments from 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."¹¹ The members of the Zoning Committee followed suit. No discussion was had concerning the *County* Plan during the Zoning Committee's February 28th deliberations. Nevertheless, Committee Chair Jaeckel asserted: "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."¹² Discussion followed—again, solely with regard to the Town's comprehensive plan (misrepresenting the plan in the process)¹³—as to 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. Another Zoning Committee member speculated without evidence¹⁴ that if the Town had in

⁹ R.18:2 (A. App. 138).

¹⁰ The Zoning Committee heard from Zoning Director Matt Zangl that "[f]rom staff perspective, there are some concerns with that motion [to table the petition] because it doesn't give the petitioner an action item...and it doesn't give them really any end date of a potential approval or denial." R.24:10 (A. App. 191).

¹¹ R.24:11 (A. App. 192).

¹² R.24:12 (A. App. 193).

¹³ R.24:25-28 (A. App. 208-209). For example, Supervisor Nass erroneously concluded "if the Town Board has consistently approved A-2 zones outside of that center, it only seems to be consistent and fair to do this, too. Because apparently, by their definition, A-2 does not constitute a—what they would refer to as a business." *Id.*, pp. 25-26 (A. App. 206-207).

¹⁴The Town of Concord's 2009 Comprehensive Plan states in pertinent part: "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." The Plan further emphasizes "the Town will not support expansion of the current rural hamlet or creation of new rural hamlet areas within the Town." Town of Concord Comprehensive Plan, p. 56; R.38:3. See also R.34:10 (A. App. 191) (Comment of Town Plan Commission member Sally Williams that "prior to the decision on the [Boat House] rezone proposal, the town has continued to operate as though the [Town's] plan was in force."

fact updated its plan, the Boat House parcel would have been included in the rural hamlet.¹⁵ Ultimately the Zoning 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.”¹⁶ Pursuant to Wis. Stat. § 59.69(5)(e)4., the Zoning Committee caused Ordinance No. 2022-02 to be prepared for the Board’s consideration.¹⁷

At its meeting on April 19, 2022, the Board deliberated on the rezone as proposed in Ordinance 2022-02.¹⁸ The Board’s deliberations ahead of its vote similarly revolved around the Town Board’s decision to recommend approval. The transcript of its deliberations shows that the Board never acknowledged the relevant legal standard, nor reviewed the content of the County’s own Plan.¹⁹ Rather, its deliberations were consistently misdirected toward the language in the Town’s comprehensive plan and the issue of whether it had “expired” such that it could be disregarded.²⁰

A close examination of the Board’s deliberations reveals that the Board did not apply the correct legal standard because discussion revolved around the Town’s comprehensive plan. Supervisor Christensen called for an improved process in the future in circumstances where a town board’s recommendation on a rezone petition is inconsistent with the town’s comprehensive plan.²¹ Supervisor Martin agreed and moved to postpone the decision, which motion failed.²² Supervisor Wineke requested that Zoning Director Zangl summarize the issues. Zangl opined that he agreed with the Zoning Committee’s purported determination that the rezone

¹⁵ R.24:27 (A. App. 208). Supervisor Poulsen speculated: “I get the feeling from the Township area that this is an area that if [the Town] had renewed their plan, they would include So my opinion at this point personally is that it can be approved because that’s consistent with what the Township has approved in the past.”

¹⁶ R.24:25-29 (A. App. 206-210).

¹⁷ R.32:1-4 (A. App. 264-267).

¹⁸ R.34:20 (A. App. 201).

¹⁹ See R.34:28-40 (A. App. 209-221).

²⁰ *Id.*, pp. 28-31 (A. App. 209-212).

²¹ *Id.*, p. 23-24 (A. App. 204-205).

²² *Id.*, pp. 24-27 (A. App. 205-208).

petition “meets” the County’s comprehensive plan²³ and the County’s zoning ordinances and “the struggle comes into play that the town planning commission voted to deny the petition.” Zangl then asserted: “The town board, the one who makes the formal decision on behalf of the board [sic], voted to approve it.”

Supervisor Morris requested an opinion from Corporation Counsel, who noted that the Town would have the opportunity to veto Ordinance No. 2022-02 within 40 days after its passage pursuant to Wis. Stat. § 59.69(5)(e).²⁴ Counsel opined that “this is a petition to rezone that should be granted. There’s nothing inappropriate about granting this petition. I see no issues.”²⁵ Supervisor Backlund emphasized that “they [the Town Board] have the veto power...[I]f we approve it, they can still veto it and stop the project.”²⁶ Supervisor Johns agreed that the Town’s veto power provided “an off-ramp.”²⁷ Supervisor Martin asked Counsel whether the Town’s comprehensive plan was legally binding since it was “technically outdated.”²⁸ Corporation Counsel opined that the Town plan was not a basis to deny the rezoning request.²⁹ Neither the meeting minutes nor the transcript of Board’s deliberations evidence that the Board made any findings of fact in connection with their adoption of Ordinance No. 2022-02. The handwritten decision of the Board states that the rezone “complies” for the following reasons: “*Town has approved others outside hamlet[,] this is adj. to the same use within the hamlet.*”³⁰

Petitioner-Respondents filed their petition for certiorari review in Jefferson County Circuit Court on October 14, 2022. After oral argument on May 30, 2023, the court ruled from the bench on August 14, 2023 that the Board erred as a matter of law by failing to make findings of fact as required by Wis. Stat. § 91.48(1) of the

²³ The Zoning Committee did not, in fact, find that the rezone was consistent with the County Plan.

²⁴ R.34:31 (A. App. 298).

²⁵ R.34:32 (A. App. 299).

²⁶ *Id.*

²⁷ *Id.*

²⁸ R.34:36 (A. App. 303).

²⁹ *Id.*

³⁰ R.10.4 (A. App. 151)

Farmland Preservation Law and § 11.11 of the County Ordinance.³¹ The court acknowledged the comments made by individual County Board supervisors during its deliberations on the rezone petition, but concluded that such remarks were “not what the legislature was looking for.”³² The court then heard additional argument on the matter of the appropriate remedy and scheduled that issue for a further ruling.³³

On September 25, 2023, the court vacated Ordinance 2022-02 on the ground that the Board failed to make the findings required by Wis. Stat. § 91.48(1) and the County Ordinance.³⁴ In so ruling, the court held that it was not prepared to hold that it would be impossible “for the Board to make a finding of [] consistency with the farmland preservation requirements in light of the planned use or activities of [the Boat House].”³⁵

ARGUMENT

I. THE COURT OF APPEALS REVIEW OF WHETHER THE BOARD ACTED ACCORDING TO LAW IS *DE NOVO*.

Rezoning a parcel from one district to another entails an amendment to the County Zoning Ordinance because the zoning district map is part of the Ordinance.³⁶ Common law certiorari is available to test the validity of legislative enactments. *See, e.g., Miller v. Zoning Bd. of Appeals of the Village of Lyndon Station*, 2022 WI App 51, ¶ 18, 404 Wis. 2d 539, 980 N.W.2d 295. Certiorari review of the record of the County’s adoption of the rezone ordinance in this case requires this Court, like the circuit 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)

³¹ R.45:3-4 (A. App. 327-28).

³² R.45:4 (A. App. 382).

³³ R.45:7-12 (A. App. 331-36).

³⁴ R.46:6 (A. App. 343).

³⁵ R.46:7 (A. App. 344).

³⁶ 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...”).

the County “might reasonably make the order or determination in question” based on the evidence before it. *Oneida Seven Generations Corp. v. City of Green Bay*, 362 Wis. 2d 290, ¶ 41, 865 N.W.2d 162 (2015).

Petitioner-Respondents have alleged that the Board failed to act according to law by rezoning the Boat House parcel in disregard of the requirements of Wis. Stats. §§ 66.1001 and 91.48. 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). Not only did the Board err—as the circuit court concluded—by failing to make mandatory findings of fact under Wis. Stat. § 98.41(1), it also erred in approving a rezone that clearly and specifically conflicts with the provisions of the County Plan. The circuit court properly vacated the rezone amendment because the Board is unable to make the required finding of consistency with the Comprehensive Plan under Wis. Stat. § 66.

II. THE BOARD MISCHARACTERIZES THE ISSUES FOR REVIEW.

On appeal, the Board identifies two issues for review: (1) whether the Board may adopt the recommendations of the Jefferson County Planning & Zoning Committee “as the designated and statutorily authorized county zoning agency”; and (2) whether “adequate and relevant evidence in the record” provides “a reasonable basis for the County’s legislative act.”

The Board’s first issue on appeal contains a false premise because nothing in the transcript of the Board’s deliberations reflects the adoption of any findings made by the Zoning Committee. The Zoning Committee never made any findings of fact on the matters set forth in Wis. Stat. § 91.48(1), but simply rubber-stamped the Town of Concord’s recommendation. The Board’s brief recites that “[a]fter review, debate and consideration by the Jefferson County Board of Supervisors it followed the recommendations of the Town of Concord and Planning & Zoning Committee...” Brief, p. 14. But “following recommendations” is not the equivalent

of making findings of fact. As summarized above, the transcript supports the circuit court's conclusion that the Board made no findings beyond the facts that the Town of Concord recommended approval and retained veto power over the ordinance amendment. There is nothing whatsoever in the record to support the Board's argument on appeal that it adopted "findings" of the Planning & Zoning Committee. The Board's argument borders on frivolous.

Contrary to Appellant's argument, the circuit court did not rule on (and did not even raise the issue of) whether the Board's findings must be "articulate[d] separate from the recommendations of its designated county zoning agency." Brief, at 7. Rather, the court held that "[Supervisor] Zastrow talking and the zoning director talking . . . it's not what the legislature was looking for."³⁷ The court went on to conclude that the Zoning Committee and the Board's actions amounted to simply signing off on the Town of Concord's recommendation for approval of the rezone petition.³⁸ The court concluded that such reasoning "conveys ...a misunderstanding of the requirements of the legislature in terms of these findings."³⁹

The Board's framing of the second issue on appeal sidesteps the clear and unambiguous statutory requirement for it to make specific findings of fact in support of an ordinance amendment that removes property from the A-1 exclusive agricultural zoning district. While an amendment to the County Zoning Ordinance is indeed a legislative act, there are nevertheless specific legal standards that confine the Board's legislative discretion. Wis. Stats. § 59.69 grants counties authority to adopt and amend a zoning ordinance. State law also conditions the exercise of that authority in the case of certified farmland preservation ordinances because farmland preservation is a matter of statewide concern. Wisconsin's farmland preservation law was repealed and recreated as part of 2009 Wis. Act 28. The standards for farmland preservation planning and zoning in subchapters II and III of ch. 91, Stats.,

³⁷ R.45:4 (A. App. 328).

³⁸ *Id.* ("[T]here was a lot—it does seem there was a focus on...what the town did and 'this is what the town did,' 'this is what the town's done before.'")

³⁹ R.45:5 (A. App. 329).

provide that counties with comprehensive plans are required to incorporate their farmland preservation plans into those plans, and require zoning amendments that remove land from the A-1 exclusive agriculture zoning district to be based on a finding of consistency with both plans. Wis. Stat. §§ 91.10(2); 91.48. The legislature's authority to adopt statewide legal standards for local zoning regulation is firmly established by existing law. *See, e.g., Adams v. Wis. Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 820 N.W.2d 404 (“the legislature may, on issues of statewide concern, prohibit political subdivisions from enacting ordinances, or invalidate ordinances already promulgated.”); *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42 ¶¶ 10-11, 388 Wis. 2d 375, 933 N.W.2d 179 (local government's zoning authority over facilities for personal wireless services “is not unfettered” and statewide standards apply).

The farmland preservation law requires counties to adopt a farmland preservation plan and authorizes adoption of a farmland preservation zoning ordinance. Wis. Stat. §§ 91.10(1), 91.30. Where Jefferson County has elected to adopt a certified farmland preservation ordinance, the legislature has the power to impose conditions on the County's exercise of zoning authority when it removes land from the A-1 farmland preservation zoning district. This is no different than the legislature's recognized authority to impose statewide zoning standards for specific land uses and classes of land. For example, development within shorelands under Wis. Stat. § 59.694 and Wis. Admin. Code § NR 115; development within floodplains under Wis. Stat. § 87.30 and Wis. Admin. Code § NR 116; and confined animal feeding operations (“CAFOs”) under Wis. Stat. § 93.90 and Wis. Admin. Code § ATCP 51 each contain standards that local zoning authorities must apply. Just as the rezone ordinance would be held invalid if the statutory notice and public hearing requirements under Wis. Stat. § 59.69(5)(e) were not met, Ordinance 2022-02 is invalid because the Board failed to make statutory findings of fact under Wis. Stat. § 91.48(1).

III. APPLICABLE LAW REQUIRED THE BOARD TO MAKE FINDINGS OF FACT SUPPORTING THE REZONE OF PROPERTY TO REMOVE IT FROM THE A-1 EXCLUSIVE AGRICULTURAL ZONING DISTRICT.

A. The Statutorily Required Findings of Fact Are Central to the Farmland Preservation Law.

The Board agrees that the Boat House property is zoned A-1 Exclusive Agricultural pursuant to the County's certified farmland preservation ordinance Brief of Appellant, p. 20, citing JEFFERSON COUNTY ZONING ORDINANCE (the "ZONING ORDINANCE") § 11.04(f)6. 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. (emphasis added). The purpose of the law is to preserve prime agricultural land. Preservation is accomplished by restrictive A-1 zoning. In particular, Wis. Stat. § 91.01(18) defines a "farmland preservation zoning district" to include "[a]n area zoned for exclusive agricultural use" under certified farmland preservation ordinance. To further the goal of preservation, the law ensures that removal of those protections is accomplished in a planned and appropriate rather than *ad hoc* manner. Wis. Stat. § 91.48, entitled "Rezoning of land out of a farmland preservation zoning district," provides as follows:

(1) A political subdivision⁴⁰ with a certified farmland preservation zoning ordinance may rezone land out of a farmland preservation zoning district without having the rezoning certified under s. 91.36, if the political subdivision finds all of the following, after public hearing:

(a) The land is better suited for a use not allowed in the farmland preservation zoning district.

⁴⁰ The term "political subdivision" is defined in Wis. Stat. § 91.01(24) to mean "a city, village, town or county."

- (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.

These statutory requirements reinforce the centrality of the County Plan in rezones affecting prime agricultural land. The Zoning Ordinance likewise requires a finding that “the rezoning is consistent with the County Comprehensive Plan.” ZONING ORDINANCE, § 11.11(e)6.ii. Courts do not resort to statutory construction if the statute is clear on its face. *Town of Cedarburg v. Dawson*, 2004 WI App 174 ¶ 14, 276 Wis. 2d 206, 687 N.W.2d 841.

The Board argues that the farmland preservation law “merely sets state standards for participation in the farmland preservation program.” Brief, p. 19. It contends that the findings required by Wis. Stat. § 91.48(1) “are not a mandatory directive” but instead “merely one of the standards that defines eligibility for the farmland preservation program and corresponding tax incentives.” *Id.*, p. 20. This argument is nonsensical even on its own terms. The statute requires county boards to make findings of fact when removing property from the A-1 zoning district. This requirement has nothing to do with eligibility; rather, it furthers the policy of farmland preservation by requiring counties to thoughtfully consider whether land should be released from A-1 preservation status. If Wis. Stat. § 91.48(1) “does not...limit local zoning” (Brief, p. 20), the Board offers no credible alternative purpose for the law. The Board’s argument and its suggestion that it has unfettered legislative discretion to rezone land out of the A-1 exclusive agricultural district (Brief, pp. 21-22) would simply nullify the statute.

B. The Board’s Obligation to Comply with Wis. Stat. § 91.48(1) Is Not Discretionary.

The Board agrees that the function of the court is to “ensure that the authority acts procedurally according to its statutory guidelines.” Brief, p. 16. The Board

contends that because its adoption of Ordinance No. 2022-02 was a legislative action, it was not required to make formal findings of fact. Brief, p. 24, citing *Step Now Citizens Group v. Town of Utica Planning & Zoning Committee*, 2003 WI App 109, 234 Wis. 2d 662, 663 N.W.2d 833. That case is distinguishable because it did not involve a rezone that removed property from the A-1 exclusive agricultural zoning district.

The Board confuses its discretionary power to determine “the wisdom, or lack thereof, or the desirability of the zoning” (Brief, p. 16, citing *Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W. 403 (1966)) with its mandatory obligation to comply with the law. The former is reviewed under the reasonable basis standard, the latter is subject to *de novo* review. Petitioner-Respondents’ claim of error does not challenge the quantum of evidence in support of findings of fact—but more fundamentally, that the Board erred by failing to make *any* statutory findings. The presumption of correctness attending the Board’s rezone decision is clearly rebutted by the record, which utterly fails to demonstrate that the Board complied with fact finding requirements of Wis. Stat. § 19.48(1).

C. The Board Did Not “Adopt” Statutory Findings of Fact Because the Planning & Zoning Committee Made No Such Findings When it Recommended Approval of the Rezone.

The County’s zoning power is committed to the Board, which “may by ordinance effective within the areas within such county outside the limits of incorporated villages and cities establish districts of such number, shape and area ... as the board considers best suited to carry out the purposes of [s. 59.69].” Wis. Stat. § 59.69(4). The Board, not the Zoning Committee, has legislative authority under Wis. Stat. § 59.69(5)(e) to amend the County zoning ordinance. The Committee’s role is to hold a public hearing and act on the petition—

either approving, modifying and approving, or disapproving it. If its action is favorable to granting the requested change or any modification thereof, it shall cause an ordinance to be drafted effectuating its determination and shall submit the proposed ordinance directly to the board with its recommendations. If the agency

after its public hearing recommends denial of the petition it shall report its recommendation directly to the board with its reasons for the action.

Wis. Stat. § 56.69(5)(e)4.

As the zoning agency appointed pursuant to this statute, the Zoning Committee is charged with drafting and making a recommendation on a rezone ordinance in response to a petition. The Board may accept the Committee's recommendation for approval of a rezone ordinance. Wis. Stat. § 59.69(5)(e)5. It may even adopt findings of fact made by the Committee in support of such approval. But that would require the Committee to have made those findings in the first place—which it did not. The Committee and the Board failed to make the required findings under Wis. Stat. § 91.48(1) because both employed an incorrect legal standard.

In its brief, the Board emphasizes the lengthy process by which Ordinance No. 2022-02 was considered and approved, implying that since there were extended deliberations on the rezone petition, somewhere in the process the requisite findings of fact were made. That argument is unsupported by the record. The Zoning Committee found as a basis for recommending approval that the Boat House rezone was consistent with the Town's previous actions of approving "other uses" outside the Town's rural hamlet. Petitioners dispute the accuracy of this finding⁴¹ but in any case, it is irrelevant to the findings of fact the Board was required to make under Wis. Stat. § 91.48(1) and the County Plan.

The Zoning Committee also found that "this proposal [for ten boat storage barns] is adjacent to the same use inside the hamlet,"⁴² but this too is insufficient for purposes of Wis. Stat. § 91.48(1) because it refers to language in the Town's comprehensive plan. Brief, p. 27, quoting TOWN OF CONCORD COMPREHENSIVE PLAN (2009), § 8.D.⁴³ Nothing in the record supports the Board's assertion that the

⁴¹ See Section IV.C., *infra*.

⁴² R.21:2.

⁴³ R.2:16 (A. App. 116).

Zoning Committee made a finding that the Boat House rezone was consistent with the County Plan. As the record shows, the Zoning Committee focused exclusively on the Town of Concord's asserted history of previous rezones and its recommendation for approval, without making any reference to the County Plan.⁴⁴

IV. THE COURT PROPERLY VACATED ORDINANCE 2022-02 BECAUSE THE BOARD CANNOT REASONABLY FIND THAT THE REZONE IS CONSISTENT WITH THE COUNTY'S COMPREHENSIVE PLAN.

A. Wis. Stat. § 66.1001 Requires the Rezone Amendment to be "Consistent with" the County Plan.

Section 66.1001, Stats., 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. Jefferson County adopted an updated Comprehensive Plan in February 2021.⁴⁵ Section 66.1001 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 "*further or does not contradict the objectives, goals and policies contained in the comprehensive plan.*" Wis. Stat. § 66.1001(1)(am). Thus, independently of the findings required under the Farmland Preservation Law, sec. 66.1001, Stats., required the Board to find that the proposed rezone was consistent with the County Plan.

⁴⁴ See *supra* notes 12-16 and accompanying text.

⁴⁵ Available at:

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

B. Ordinance No. 2022-02 Is Inconsistent with the Comprehensive Plan as a Matter of Law Because it Contradicts the Goal of the Plan to Confine Future Business Development Within the Boundaries of the Town of Concord Rural Hamlet.

The Board contends that “as a matter of law” the rezone “is not inconsistent with existing land use policies or the applicable comprehensive plan.” Brief, pp. 25-26.⁴⁶ The Board’s argument is without merit. Even under a deferential standard of review, the County Plan cannot reasonably be interpreted to contemplate commercial land uses outside of the boundaries of the Town of Concord rural hamlet. To the contrary, the Plan requires all future commercial development in the Town to occur solely within the mapped location. The Board ignored the explicit intent of the 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.*”⁴⁷ Amendments to the Jefferson County zoning ordinance must be consistent with the future land use maps included in the County Plan which identify, on a town-by-town basis, rural hamlets and farmland preservation areas overlaid on parcel maps.

The Board asserts that “the County’s comprehensive plan must be interpreted as a whole when determining consistency.” Brief, p. 27. It then shifts to argue that under the *Town’s* comprehensive plan “there is language that states ‘there is a general consensus that any future business [sic] that do locate in Concord should be limited to locations within the hamlet, adjacent to properties currently utilized for business purposes.’” *Id.*, citing TOWN OF CONCORD COMPREHENSIVE PLAN § 8.D.

⁴⁶ The Board appropriately “set[s] aside the yet unanswered question of whether Wis. Stat. § 66.1001 creates a private right of action” (Brief, p. 25) since it waived that issue by failing to raise it before the circuit court. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 15-16, 273 Wis. 2d 76, 681 N.W.2d 190. In any case, Petitioners did not bring a “private action” within the meaning of *DSG Evergreen Family Ltd. P’ship v. Town of Perry*, 2020 WI 23, 390 Wis. 2d 533, 939 N.W.2d 564. Under well-established law, Petitioners were entitled to seek common law certiorari review of the legal validity of the Board’s action.

⁴⁷ Jefferson County Agricultural Preservation and Land Use Plan, R.38:9.

(2009).⁴⁸ In addition to being irrelevant to whether the Boat House rezone is consistent with the *County Plan*,⁴⁹ the Board’s argument erroneously interprets the phrase “adjacent to properties currently utilized for business purposes” in the disjunctive. Correctly construed, this is a descriptor that stresses that future business growth will be adjacent to existing businesses “within the hamlet.” The Board’s construction of this language—which inserts the word “or” between the two phrases—would defeat the purpose of the rural hamlet designation by making any rezone for commercial use “consistent with” the Plan as long as it is adjacent to an existing business. That interpretation must be rejected because it undermines the Plan’s purpose to designate a specific geographic area for future commercial development in the Town.

Finally, the Board argues that “[t]he record indicates [that] the need for additional area outside the existing hamlet was ... a consideration brought to the County Planning & Zoning Committee when interpreting the guidance provided by the Town’s dated land use plan.” Brief, p. 28. But the “record” cited by the Board⁵⁰ consists of nothing more than speculation among the members of the Committee to the effect that there is no more room in the Town’s rural hamlet for additional development. That conclusion is not in evidence, nor are the Committee members’ beliefs relevant to the goals and policies of the County Plan, which should have been the focus of the discussion.

C. The Board’s Argument Relies on Evidence Not of Record that Is Irrelevant to Whether the Rezone Is Consistent with the County Plan.

The Board also asserts that the rezone in this case was “consistent with” the Plan because “[t]he Town of Concord has a history of rezoning A-1 and A-3 parcels

⁴⁸ A. App. 116.

⁴⁹ The Board’s arguments based on the Town’s comprehensive plan, including the fact that it had not been updated as of the rezone proceedings (Brief, p. 28) are similarly unavailing. The Town Plan is simply irrelevant to this case.

⁵⁰ R.23:15-19 (A. App. 169-172).

to A-2 which are located outside of the rural hamlet and within the Agricultural Preservation District.” Brief, p. 27. The Town’s prior rezone approvals and its recommendation for approval of the Boat House petition do not relieve the Board of its obligation under Wis. Stat. § 66.1001(3) to ensure consistency with the County Plan, and under Wis. Stat. § 91.48(1) to make a specific finding in that regard.

On the merits, the Board’s argument relies on evidence not in the record and was the subject of Petitioners’ motion to strike.⁵¹ Since records of the Town’s previous recommendations for approval of A-1 to A-2 rezone petitions were not before the Board (including any record of whether those rezones were challenged), there was no reasonable basis for the Board to accept them as precedent.⁵² The Board was required to find that the rezone was consistent with the County Plan, not whether it was consistent with allegedly similar rezones that the Town Board previously approved.

V. THE CIRCUIT COURT CORRECTLY VACATED THE REZONE AMENDMENT BECAUSE THE BOARD CANNOT FIND THAT THE REZONE IS CONSISTENT WITH THE COUNTY’S COMPREHENSIVE PLAN AS REQUIRED BY WIS. STAT. § 66.1001.

The Board rezoned 7.4 acres of prime agricultural land to facilitate the development of ten storage barns. The rezoned parcel is located on County Highway B, west of the Town of Concord’s rural hamlet, as shown on the following page.⁵³ The orange-shaded area of the map designates the Town’s rural hamlet. The smaller parcel to the west, outlined in blue, is the Boat House property.

⁵¹ See Petitioners’ Reply Brief on Certiorari Review (R.41:2-3).

⁵² Inexplicably the Board cites to written comments submitted by Petitioner Sally Williams, which advise that “the Town has consistently denied requests for new commercial enterprises in A-2 zoning. Denials include a wedding barn, a landscape business with business operations and employees onsite, a kennel, a disc golf course, and a wrestling camp.” R.15:13 (A. App. 133).

⁵³ R.20:2 (A. App. 141).

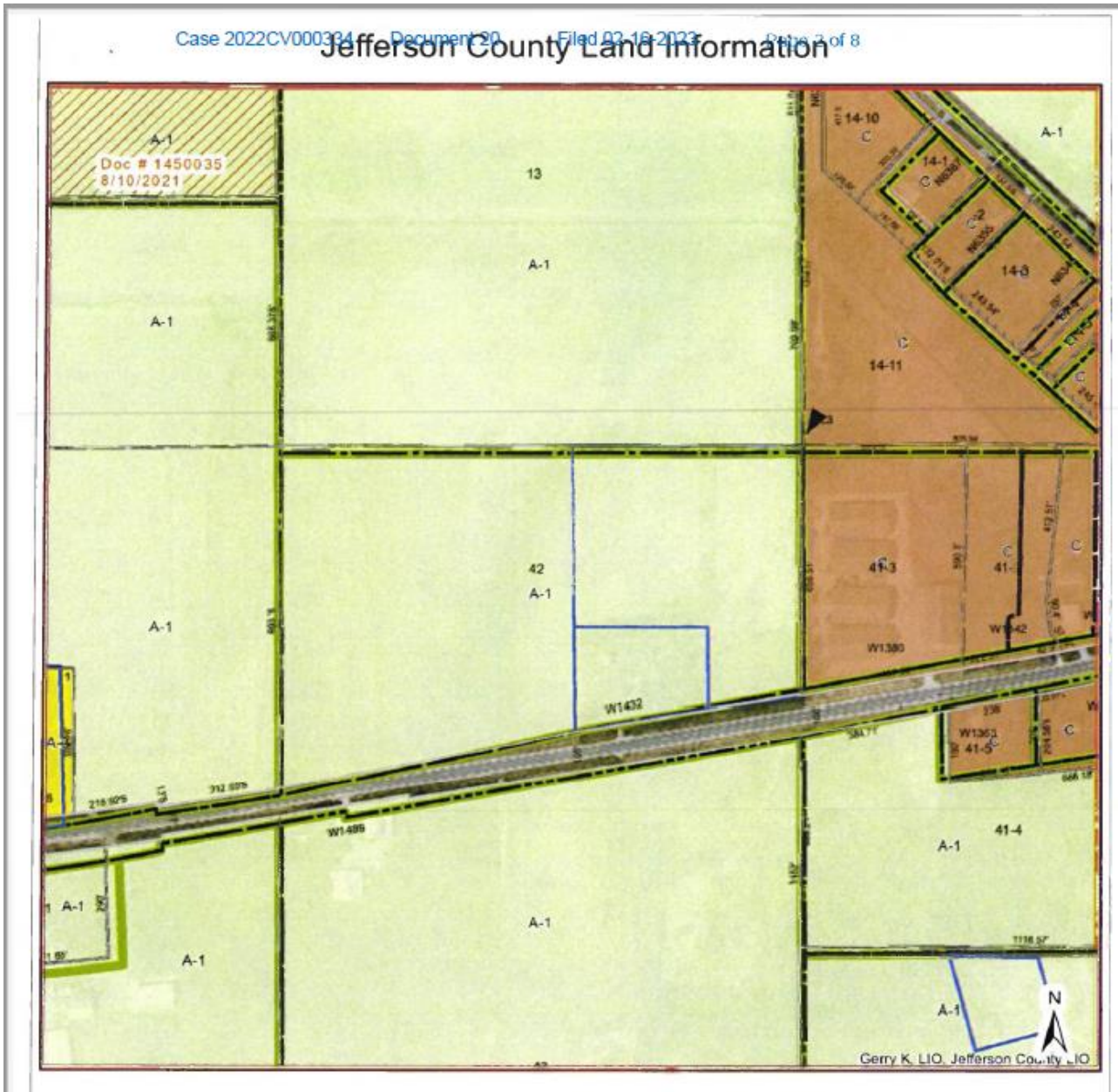
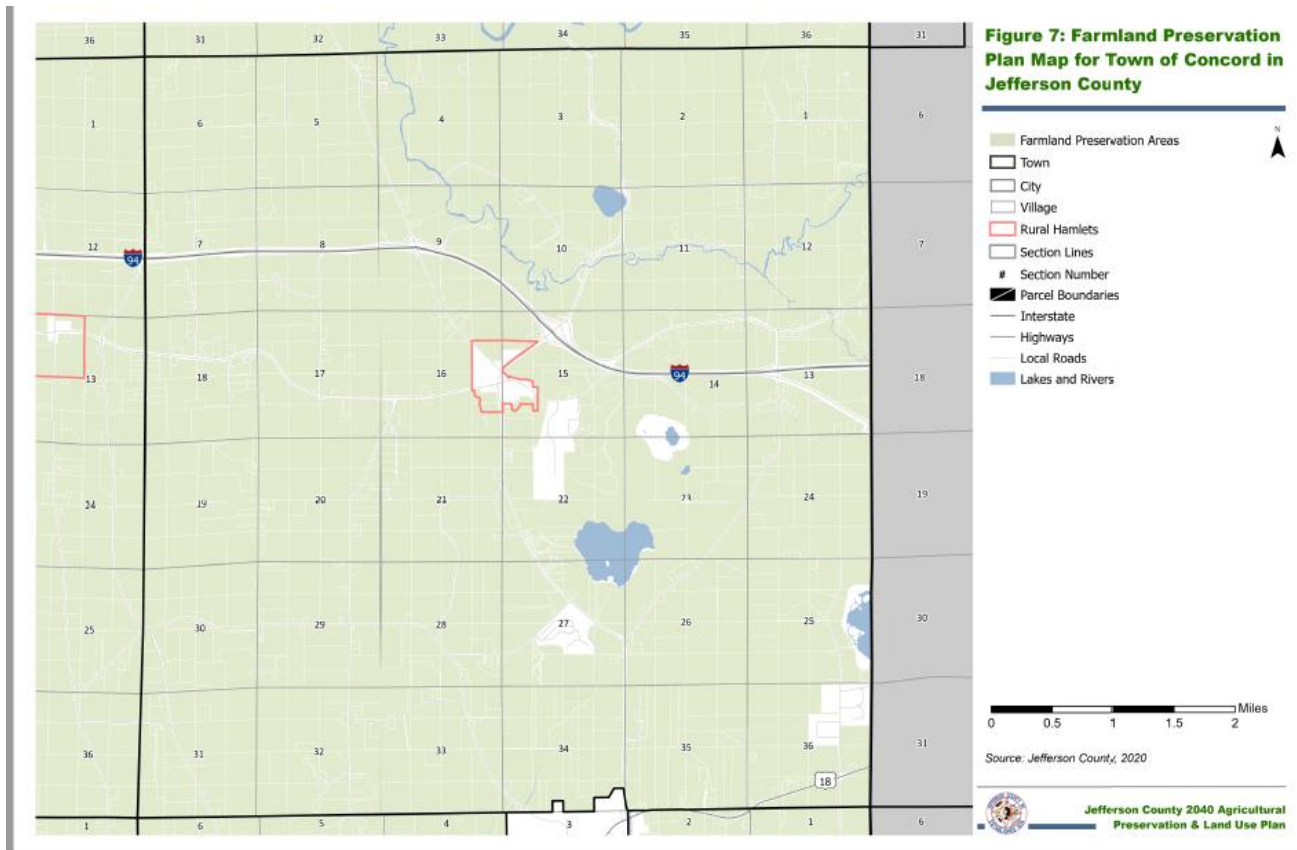


Figure 7 of the County’s Farmland Preservation and Agricultural Land Use Plan, reproduced below,⁵⁴ delineates the Town of Concord rural hamlet and classifies virtually all other lands in the Town as Farmland Preservation Areas. The implementation chapter of the Plan details the land use policies for 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 land use category, until such time as the affected land is redesignated to be within the 15 Year Growth Area.”⁵⁵

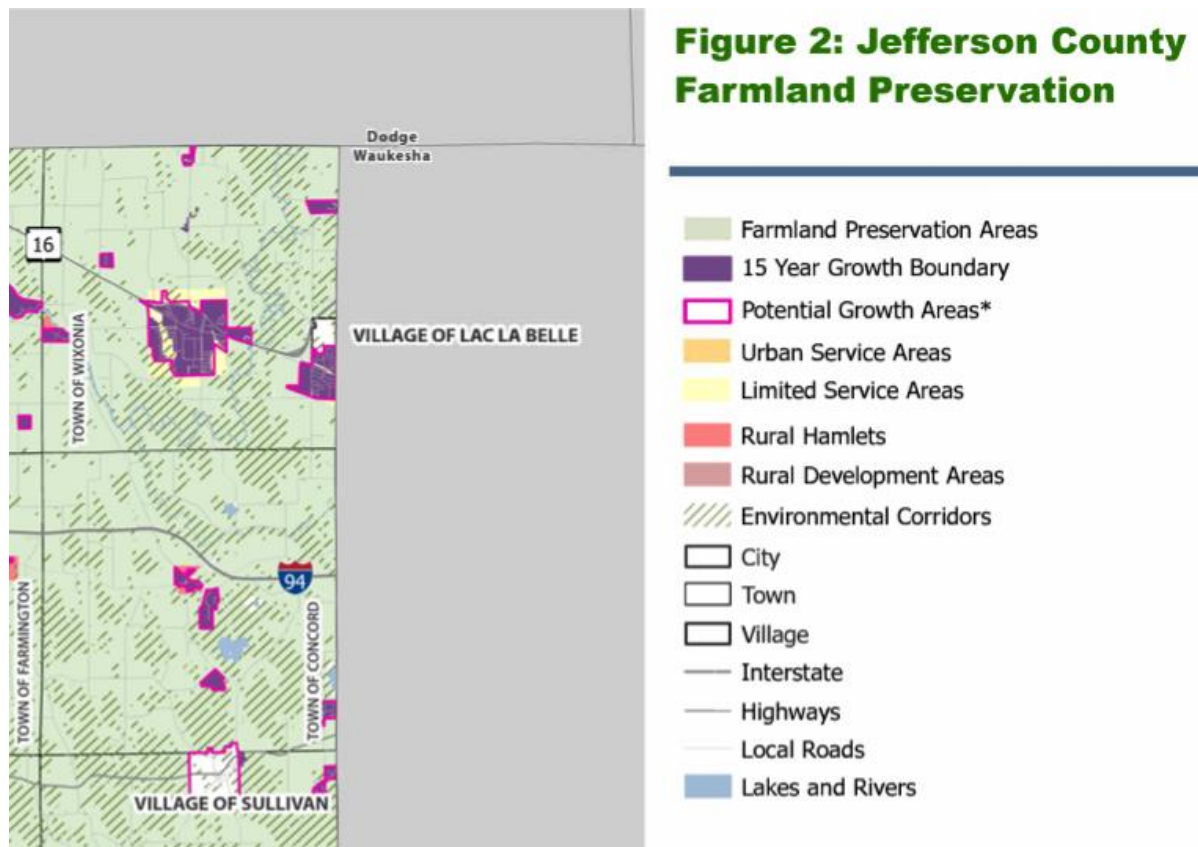


⁵⁴ Jefferson County Agricultural Preservation and Land Use Plan, Appendix B, Farmland Preservation Detail Maps, available at: https://www.jeffersoncountywi.gov/departments/planning_and_zoning/ordinances_plans_and_reports.php#revize_document_center_rz983 (last visited 3-19-2024).

⁵⁵ Jefferson County Agricultural Preservation and Land Use Plan, p. 8 (R.38:13).

Designation of town “rural hamlets” is key to the implementation of the County’s farmland preservation policies.⁵⁶ 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.”⁵⁷ “Farmland preservation areas,” by contrast, are defined in the Plan to mean “[a]reas of existing 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).⁵⁸

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 expand the boundaries of the existing rural hamlet, as shown below:



⁵⁶ Jefferson County Agricultural Preservation and Land Use Plan, p. 5 (R.38:10).

⁵⁷ *Id.*

⁵⁸ *Id.*

The County Plan explains that “by definition, 15 Year Growth Areas should not include Farmland Preservation Areas.”⁵⁹ Instead, the Plan must “[d]esignate lands intended for non-agricultural development within the planning horizon as something other than Farmland Preservation Area, as required under the State’s Working Lands law.”⁶⁰

As quoted above, the County Plan specifies that permissible future land uses for farmland preservation areas include only “agricultural and agricultural-related uses throughout the [15-year] planning horizon.”⁶¹ 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.”⁶²

The boat storage barns proposed for the rezoned parcel are not an agricultural-related land use as defined in the County Plan.

In addition to the requirement in the farmland preservation law for the Board to find a rezone is consistent with the County Plan, Wis. Stat. § 66.1001(3) imposed an independent, positive duty on the Board to implement its own Plan, regardless of any action taken by the Town to recommend approval or disapproval of a zoning ordinance amendment.⁶³ All of the foregoing interrelated provisions of the County Plan establish that the rezone amendment did not further and substantially contradicted the County’s own Plan in violation of Wis. Stat. § 66.1001(3).

⁵⁹ Jefferson County Agricultural Preservation and Land Use Plan, p. 7 (R.38:10).

⁶⁰ *Id.*

⁶¹ *Id.*, p. 6 (R.38:9).

⁶² *Id.*

⁶³ Nevertheless, the County Plan is fully aligned with the goals and policies of the Town’s comprehensive 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.” TOWN OF CONCORD COMPREHENSIVE PLAN (2009), p. 56 (R.38:5) “The Town will not support expansion of the current rural hamlet or creation of new rural hamlet areas within the Town.” *Id.* 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.” *Id.*

Notably, the Board fails to cite to any provision of the County Plan to support its argument that the rezone to allow for a nonagricultural-related use outside the Town's mapped rural hamlet to support the contention that its action meets the consistency requirement of Wis. Stat. § 66.1001. The amendment must therefore be declared void.

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's decision vacating Jefferson County Ordinance No. 2022-02.

Dated this 20th day of March, 2024.

Respectfully submitted,

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CERTIFICATION OF FORM & LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 30 pages, 7,040 words.

Dated this 20th day of March, 2024.

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