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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,

REPLY BRIEF OF RESPONDENT-APPELLANT

Appeal from the Circuit Court for Jefferson County
The Honorable William Gruber, Presiding
Trial Court Case No. 2022 CV 000334

JEFFERSON COUNTY

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ARGUMENT

I. THE TRIAL COURT ERRED IN VACATING THE COUNTY'S ZONING ORDINANCE.

A. THE ALLEGED FAILURE TO ARTICULATE FINDINGS PURSUANT TO WIS. STAT. §91.48 DOES NOT INVALIDATE A ZONING ORDINANCE.

The trial court improperly vacated the County's zoning ordinance because it found the County failed to make findings pursuant to Wis. Stat. §91.48. (R. 45, A-App. 327-29). There is no authority for the proposition that failure to articulate findings pursuant to Wis. Stat. §91.48 invalidates a zoning ordinance. In an effort to inflate the impact of Wis. Stat. §91.48, Defend Town Plans draws a false comparison between optional certified farmland preservation zoning ordinances and mandatory statewide regulations such as floodplain and shoreland zoning requirements. (Resp't Resp. 12). The latter are mandatory directives enacted to protect the general public. In those circumstances, the legislature has expressly declared the issue a matter of statewide concern and preempted local authority.

Conversely, whether to adopt a certified farmland preservation zoning ordinance is left to the discretion of individual counties. Wis. Stat. §91.30. While counties are required to develop a farmland preservation plan, the decision of whether to enact a farmland preservation zoning ordinance and

what to include in said ordinance is not dictated by state law. Wis. Stat. §91.30. However, if a County would like its zoning ordinance certified by DATCP, it must include certain provisions. Wis. Stat. §91.36. The certification process allows individual taxpayers to receive tax credits for their properties. Wis. Stat. §71.59. The requirements for certified farmland preservation zoning ordinances directly impact the certification process, and therefore the tax incentives, rather than the validity of the underlying zoning decisions. This is evident in the statutory language. For example, Wis. Stat. §91.48(1) states,

“a political subdivision with a certified farmland preservation zoning ordinance may rezone out of a farmland preservation district **without having the rezoning certified under s. 91.36**, if the political subdivision finds all of the following, after public hearing ...” (*emphasis added*).

If a political subdivision with a certified ordinance approves a rezoning out of an A-1 certified farmland preservation district without meeting the requirements outlined in Wis. Stat. §91.48, the statutory remedy is for DATCP to require recertification. See also Wis. Admin. Code § ATCP 49. No where in Chapter 91 or elsewhere, does it say a local governments failure to make express findings regarding the factors set forth in Wis. Stat. §91.48 necessarily voids a rezoning ordinance.

As stated in the County's opening brief, existing precedent suggests the opposite is true. Defend Town Plans asserts *Step Now Citizens Group v. Town of Utica Planning & Zoning Committee* is distinguishable because it did not involve a rezone that removed property from an A-1 district. (Resp. 15). That assertion is patently false. *Step Now Citizens Group* concerned a petition to change the zoning classification of a property from an exclusive agricultural district to an industrial district for use as an ethanol plant. 2003 WI App. 109, ¶¶3, 69, 264 Wis. 2d 662. Opponents of the rezone asserted the Court should invalidate the rezone because the Town failed to comply with Wis. Stat. § 91.77 (2001-02), which is the predecessor to Wis. Stat. §91.48. *Id.* at ¶68. Notably, the 2001-02 version of the statute similarly set forth specific findings as a prerequisite to rezoning out of A-1 exclusive agricultural districts. In *Step Now Citizens Group*, the Court found there was no authority "for the contention that a legislative body's failure to provide formal Wis. Stat. §91.77 findings justifies invalidation of the rezoning." *Id.* at ¶69.

B. THE RECORD ESTABLISHES THE COUNTY'S DECISION WAS NOT CONTRARY TO LAW.

Defend Town Plans asserts the County erred in its decision-making because it considered the Town's comprehensive plan.

(Resp. 7). It is ironic that the group which identifies itself by the moniker "Defend Town Plans" and argued at every opportunity that this rezoning should be denied because it was inconsistent with the Town's plan now seeks to undercut the County's decision-making process because the County discussed and considered the Town plan. As outlined in the County's opening brief and further expounded upon below, this rezoning was clearly consistent with the County's plan and the County expressed that multiple times. (R. 23:16; A-App, 170, 193). The difficulty and therefore, more in depth discussion, came from opponents to the rezoning asserting the rezoning was inconsistent with the Town's plan and County's desire to consider those concerns. (R. 24; A-App. 197-98). The County's discussion of the Town's comprehensive does not establish the County failed to apply the correct legal standard.

Similarly, failing to articulate specific findings pursuant to Wis. Stat. §91.48 does not equate to applying an incorrect theory of law. A review of the record demonstrates the County, through its Planning & Zoning Committee, who is well versed in the applicable standards, discussed, and evaluated the appropriate criteria for a rezone from A-1 to A-2 when making its determination. The County quickly determined an A-2 rezone was consistent with their comprehensive plan, which incorporates its certified farmland preservation plan, satisfying two of the

four factors. (R. 23, 24; A-App. 154-223). Further, as to the question of whether the land was better suited for a use not in the farmland preservation zoning district, the Committee agreed the rezone was a "natural fit" for the area and appropriately clustered like uses. (R. 23, 24; A-App. 167-70, 206-07).

Regarding the final factor, whether the rezone would substantially impair or limit current or future agricultural uses of surrounding parcels, the Committee considered the site plan, traffic conditions, stormwater management, etc. (R. 23; A-App. 154-223). In recommending rezoning, it determined the rezone would not have an adverse impact on surrounding farmland or the rural character of the area. Perhaps the County's analysis is not as neatly packaged as Defend Town Plans would prefer but that does not negate the fact the County made a legally sound legislative decision based on any reasonable view of the record.

C. THE LAW DOES NOT REQUIRE THE COUNTY TO ISSUE FINDINGS OF FACT WHEN TAKING LEGISLATIVE ACTION.

Curiously, Defend Town Plans does not challenge that evidence exists in the record in support of the Wis. Stat. §91.48 findings, but argues the County committed a legal err "in failing to make any statutory findings." (Resp. 15). The County Board, and its Planning & Zoning Committee, are legislative

bodies. Zoning ordinances are policy determinations.

Legislative bodies are not required to make "findings of fact" when making policy determinations. Defend Town Plans does not point to any precedent that overturns legislation because the legislative body failed to make factual findings.

The County was cognizant of the legal standard for the proposed rezoning. (R. 24, 34; A- App. 197-98, 298-299). The record reflects the County considered evidence relevant to that legal standard. (R. 23, 24, 25, 34; A-App. 148-268). The County's adoption of the zoning ordinance in and of itself is an expression of the County's determination that as a matter of policy the required findings were met. See, e.g., *State ex. rel. Sullivan v. Dammann*, 227 Wis. 72, 81-82, 277 N.W. 687, 691 (1938) ("if any special finding of fact was needed in order to warrant the passage of a particular act, the passage of the act itself is treated as the equivalent of such finding."); *ABC Auto Sales v. Marcus*, 255 Wis. 325, 331, 38 N.W.2d 708 (1949) (holding in the absence of facts to the contrary, the court must assume existence of facts which justify the necessity for enactment of legislation). To hold otherwise would result in legislative decisions throughout the state being challenged because local officials failed to state some perceived magic words when making policy.

II. THE COUNTY REASONABLY FOUND THE REZONING WAS CONSISTENT WITH THE COUNTY'S COMPREHENSIVE PLAN.

A. REZONING TO "A-2 AGRICULTURAL & RURAL BUSINESS" IN FARMLAND PRESERVATION AREAS IS CLEARLY PERMITTED BY THE COUNTY'S PLAN.

Defend Town Plans incorrectly asserts the County's rezoning decision is inconsistent with the County's comprehensive plan because "the County plan cannot reasonably be interpreted to contemplate commercial land use outside of the boundaries of the Town of Concord rural hamlet." (Resp. 18). Further, Defend Town Plans claims, incorrectly and without citation, that the purpose of the County's comprehensive plan is to "designate a specific geographic area for future commercial development." (Resp. 19). It is important to note the County's comprehensive plan and incorporated Agricultural Preservation & Land Use Plan (hereinafter the "County plan"), do not map future "commercial" areas. (Supp. A-App. 425-33). Further, the County's zoning ordinance establishes thirteen (13) zoning districts, none of which are designated specifically as "commercial." This is because some degree of commercial activity can occur in any of the County's zoning districts, including areas zoned A-1 Exclusive Agricultural. (A-App. 378-99).

Rather than restrict commercial development, the purpose of the County's plan is to accommodate orderly growth and

development such that the form and density of land use is consistent with surrounding land. (Supp. A-App. 414). The County's plan sorts land into categories such as farmland preservation areas and rural hamlets and then outlines preservation policies for each category. (Supp. A-App. 441-48). The County's plan specifically states "this plan and its included maps do not identify in detail the specific types of land use that are allowed or encouraged in different parts of the county. For example, they do not show areas appropriate for residential vs. commercial development..." (Supp. A-App. 425). Instead, the plan refers the reader to the county zoning ordinance for those details. With consideration given to the County's plan, the County's zoning ordinance then outlines which of its thirteen (13) zoning districts are appropriate uses in each of the mapped categories. (A-App. 378-99).

As outlined by Defend Town Plans, a portion of the Town of Concord is designated as a rural hamlet and the remainder is designated as farmland preservation area. (Resp. 22). The parcel at issue is mapped within the farmland preservation area. (Supp. A-App. 470). The County's plan specifically allows for the use of A-2 zoning within farmland preservation areas. (Supp. A-App. 441). The A-2 zoning district was developed to allow alternative land uses for farmers, which provides for further opportunities

to preserve the rural character of the land. The County's plan states the County should "continue to utilize the A-2 Agricultural and Rural Business zoning district to allow a wide range of agricultural related uses and such other rural businesses that are compatible in a predominantly agricultural area." (Supp. A-App. 443). This policy is codified in the County's zoning ordinance which explicitly states that A-2 zones are appropriate in farmland preservation areas as mapped in the County's plan. (A-App. 388).

Defend Town Plan incorrectly frames this rezone as an impermissible attempt to expand the rural hamlet. (Resp. 23). As stated, the parcel at issue is mapped within the farmland preservation area. Therefore, the policies regarding development in the farmland preservation area apply. Per the County's plan and the zoning ordinance, A-2 zoning allows for development in a form and density compatible with the farmland preservation area. Notably, the Town of Concord expressly adopted the County's A-2 district policies. (R. 15; A-App. 123).

Defend Town Plan misleadingly conflates policies regarding development in the rural hamlet and the 15-year growth area with the development levels permitted within the farmland preservation area. (Resp. 22-24). The proposed rezoning would not permit the high density uses allowed in rural hamlets and

the 15-year growth area such as residential subdivisions, retail centers and industrial development. (Supp. A-App. 416). The A-2 zoning district is distinct from the Community zoning district which exists in the Town of Concord's rural hamlet and allows more robust development than is permissible in A-2 zones. (A-App. 395-96). The rezoning at issue does not expand the existing rural hamlet.

Defend Town Plan relies on the maps in the County's plan in isolation while ignoring the substantive policies in order to reach its desired conclusion. However, when reviewing a proposed rezoning for consistency with a comprehensive plan, the maps and narrative portions of the plan should not be reviewed in isolation, but instead should be understood in relation to each other and in the context of the remainder of the plan. *Lakeland Area Property Owners Ass'n, U.A. v. Oneida County*, 2021 WI App 19, 396 Wis. 2d 622, 957 N.W.2d 605. When reviewing the County's plan as a whole, it is clear the proposed rezoning did not "contradict the objectives, goals, and policies contained in the comprehensive plan" and was therefore consistent pursuant to Wis. Stat. §66.1001(1)(am). The case law is clear that much like the factors under Wis. Stat. §91.48, Wis. Stat. § 66.1001 does not require the County to articulate a consistency analysis on the record. The statute simply requires that the rezone in fact

be consistent. *Id.* In this case, the County properly considered the consistency of the proposed rezoning with its plan and correctly determined the proposal was in fact consistent when it approved the rezoning.

B. EVIDENCE OF THE TOWN & COUNTY'S POLICIES REGARDING REZONING TO A-2 DISTRICTS IS RELEVANT AND CONTAINED WITHIN THE RECORD.

Defend Town Plans responds to the County's arguments regarding the consistency of A-2 rezoning in the farmland preservation area by simply asserting information regarding the Town of Concord and the County's A-2 zoning practices was not in evidence. Contrary to the assertions of Defend Town Plans, evidence of the Town & County's prior rezones to A-2 are relevant and contained within the record, none of which was stricken by the trial court.

Multiple portions of the record reflect the consideration of this issue, including discussions amongst the County's Planning & Zoning Committee when determining their recommendations on the proposed rezoning. (R. 24; A-App. 196-202, 205-207). The Petitioner, Sally Williams, who is also a member of the Town of Concord Plan Commission, contributed to this discussion and submitted written correspondence which outlines several occasions when the Town approved requests to rezone to A-2 to allow for other rural businesses outside the

rural hamlet. (R. 15; A-App. 133). Interestingly, one of those approvals was to allow for a boat storage business much like the one at issue in this case. (R. 15, A-App. 133). That approved boat storage business was located outside of the rural hamlet, within the farmland preservation area and in close proximity to the property at issue in this case. (R. 39, Ex. D & E; A-App. 205). This highlights the reality that this action is simply a result of Defend Town Plans favoring one landowner over another under the guise of defending comprehensive planning.

If Defend Town Plan's mistaken interpretation of the County's plan was in fact the policy of the Town and County, no A-2 Agricultural and Rural Business zoning districts would be allowed outside of the rural hamlet. Past practices reinforce the County correctly interpreted the rezone from A-1 to A-2 as consistent with both the Town and County's plan in this matter.

C. CONDITIONAL USE PERMITS ARE NOT REQUIRED TO BE CONSISTENT WITH THE COMPREHENSIVE PLAN.

Defend Town Plan mischaracterizes the consistency requirements set forth in Wis. Stat. §66.1001 when it argues the rezoning is inconsistent because the proposed use of the property as boat storage is not an agricultural-related use. (Resp. 24). Notably, rezoning to A-2 Agricultural & Rural Business would not in and of itself permit boat storage. A

conditional use permit would be required. (A-App. 388-90). Pursuant to Wis. Stat. §66.1001(2m)(b), a conditional use permit “does not need to be consistent with the political subdivision’s comprehensive plan.” In other words, as a matter of law, conditional uses are expressly excepted from the general consistency requirement set forth in Wis. Stat. §66.1001.

Assuming for the sake of argument only that boat storage barns are inconsistent with the County’s plan, approving the rezoning would not be in violation of Wis. Stat. §66.1001(3). For purposes of the consistency analysis, the Court must distinguish the proposed conditional use from the requested rezoning. As outlined above, the rezone amendment is consistent with the County’s plan. The permitted uses in an A-2 Agricultural & Rural Business District are all clearly agricultural-related uses as defined by the County’s plan. (A-App. 388). Defend Town Plan’s argument the potential conditional use is inconsistent with the County’s plan is immaterial to the analysis under Wis. Stat. §66.1001.

III. IF THE COURT FINDS THE COUNTY MADE A LEGAL ERROR, THE PROPER REMEDY IS TO REMAND TO THE COUNTY BOARD.

As outlined above, this Court cannot find as a matter of law the rezone from A-1 to A-2 is inconsistent with the County’s plan. If this Court finds the County erred by failing to

articulate findings per Wis. Stat. §91.48, the appropriate remedy is to remand this matter back to the County for further proceedings consistent with the Court's decision. As discussed, the existing record is replete with evidence enabling the County to clearly express those findings and local officials should be allowed to do so.

CONCLUSION

For all the reasons stated in the County's briefing, the Circuit Court erred when it vacated the County's rezoning ordinance. Legislative determinations made in the course of rezoning proceedings cannot be set aside unless they are arbitrary, in excess of power, or contrary to law. Defend Town Plans has not met its burden to overcome the presumption of correctness and validity afforded to the County's zoning ordinance.

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 reply brief and appendix, if any, produced with monospaced font. The length of those portions of this brief referred to in Wis. Stat. §809.19(1)(e) and (f) is 13 pages, or 2880 words.

Dated this 4th day of April 2024.

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