

Freedom Matters

A News & Opinion Paper

Dane County, Wisconsin

Preserving Property Rights

Vol. 5, No. 23

Monday, October 17, 2005

Our republic limits government to securing individual unalienable rights to life, liberty, and property. These rights are eroded by legislatures, and by courts complicit with them. To encourage wise jurists and journalists to help, Freedom Matters dedicates itself to the fight to restore that republic.

County Plans and Town Authority over Them

by Bob Bowman

Statutory authority for county and town land use plans are found in s. 59.69, s. 236.46, and s. 66.1001, Wis. Stats. As those provisions indicate, and as the Wisconsin Supreme Court has affirmed (as in *Quinn v. Town of Dodgeville*), the county zoning ordinance is jointly governed by the county and the towns.

Of relevance here, s. 236.46 provides authority for the county to adopt a land use map governing allowable uses of land, and provides each town the same authority over that map as it has over the county zoning ordinance. In a word, s. 236.46 treats such a map *as if it is a zoning ordinance*. The specific statutory language is as follows:

"236.46(1)(a) The county planning agency may prepare plans ... for the future platting of lands within the county Before completion of these plans, the county planning agency shall fix the time and place it will hear all persons who desire to be heard upon the proposed plans, and shall give notice of that hearing as required below for the passage of the ordinance by the county board. After these hearings the county planning agency shall certify the plans to the county board, who may, after having submitted the same to the town boards of the several towns in which the lands are located and obtained the approval of the town boards, adopt by ordinance the proposed plans for future platting or for street or highway or parkway location in towns which may have approved the same, and upon approval of those towns may amend the ordinance. ... The ordinance with any amendments as may be made shall govern the platting of all lands within the area to which it applies."

Now look at the land use maps mandated to be included in a comprehensive plan:

"66.1001(2)(h) Land-use element. ... The element shall ... include a series of maps that shows current land uses and future land uses"

Now look at the penalty for failing to comply with a "shall" provision of the comprehensive planning statute:

"66.1001(3) ... Beginning on January 1, 2010, any program or action of a local governmental unit that affects land use shall be consistent with that local governmental unit's comprehensive plan, including all of the following:

...
(h) Local subdivision regulation under s. 236.45 or 236.46.

...
(j) County zoning ordinances enacted or amended under s. 59.69."

As is made clear in s. 66.1001(3)(h) above, the comprehensive plan must be consistent with s. 236.46, meaning that those provisions giving the towns approval authority and amendatory approval authority over maps are incorporated into the comprehensive planning law. Hence, the county has to get the approval of the town board to allow it (the county) to map future residential or other uses involving land division in the town.

This presents serious problems for the county in adopting its comprehensive plan land use map for location of future residential subdivisions, which arguably include certified survey maps for single residential lots as well as plats for collections of five or more residential lots created by a given petitioner within a five year period. By the terms of s. 236.46, unless a town signs over to the county its authority to determine such maps for itself, the county has no authority to draw such a map for that town in its comprehensive plan.

But, without such a map in its comprehensive plan, the county will have no authority after January 1, 2020, to enforce either its subdivision ordinance, or its zoning ordinance, with respect to regulation of residential lots in towns in which the town board has not signed over their sole authority to the county to create such maps.

One possible solution for the county is to incorporate into its comprehensive plan **by reference** the map adopted by each town, leaving that mapping authority solely with the towns. This would allow the county to enforce its zoning and subdivision ordinances in each town after January 1, 2010, in conformity with shared governance where applicable. It seems likely that courts would endorse that arrangement as consistent with the body of land use law.

There is no issue that the county gives up discretionary authority over rezoning decisions in such case, because that discretionary authority is already exercised in the drawing of the map, or in exercising county discretionary authority expressed in s. 236.46 for the county to let the towns draw the map. Likewise, the town discretionary authority over rezoning decisions is also used up when the town board approves the map for where future rezoning will be allowed.

*It behooves both towns and county to realize that one purpose of comprehensive planning is to "front-load" discretionary authority into drawing of the map. Rezones in conformity with the map **must** be granted.*

Readers' Bulletin Board. e-mail us your comments. Include your name, for publication by *Freedom Matters*

*** Published by Freedom Matters, Inc., Cross Plains, WI. 53528, Michael Byrne, Editor *** **All Issues of Freedom Matters are on: www.freedommatters.org**
To subscribe or unsubscribe, e-mail to rebshar@chorus.net, or call Bob at (608) 831-6653.
Our e-mail subscriber list is confidential. We will not sell it or reveal it.