

Freedom Matters

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Dane County, Wisconsin

Preserving Property Rights

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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.

Towns and Town Plans Rule the Roost

by Bob Bowman and Mike Byrne

State statutes give towns authority over the county in setting future land uses in the towns (See Issues #23 and 24). Because each town acts on its own in this matter, when the county draws a map delineating where **future** subdivisions can exist, that county map is only in effect in towns whose boards approve that county map.

[See 23 6.46 Wisconsin Statutes]

The statutes clearly say that towns have rights of approval over county decisions, in zoning ordinances and map creation, and have veto rights over amendments to county zoning ordinances and county maps of the town. [In Wisconsin law, towns are the political units; townships are geographic areas, typically six miles square.]

Courts will likely allow town boards with village powers to rescind their approval of a county map. Statute does not prohibit it, nor give the county any control over a town map under any circumstances. In fact, the statute (s. 91.59) **requires the county to accept** a town farmland preservation *land use plan* provided only that such town plan conforms to ss. 91.55 and 91.57. By contrast, statute gives a county with a zoning ordinance the right of approval of a town zoning ordinance and of veto of amendments to same, for towns which did not put themselves under the county zoning ordinance. Thus, statutes explicitly give a town full control over maps of its future land use, and partial control over its zoning ordinance.

The county map of **existing** land use is merely an historical document, and would not differ in any respect from a town's map of that same **existing** land use. It is the map of **future** land use that is the controlling instrument for change in *permitted* land use within the town.

The adjective "permitted" must be attached here, because we have not yet reached that point of tyranny where the government can *force* a landowner to continue a use that the landowner decides not to pursue. In a word, the government can decree that a given parcel of land can only be used, e.g., for agriculture, but it cannot force the owner thereby to farm it, nor can it force the owner to allow someone else to farm it. The landowner can always choose to allow the land to lay unused, and can still enforce against trespass upon it.

It is this town board control over **future** land use that gives the town the ultimate in local governmental control. It gives the town control over its own destiny. This is even true of a town trapped in the clutches of a county zoning ordinance.

However, town control is not absolute. There are provisions whereby state control, and even county control, prevails. Examples follow.

Perhaps the major intrusion in this respect relates to statutes governing shoreland and erosion controls. Pushed to abusive limits, that one type of intrusion might come close to controlling the use (or more precisely, prohibiting the use) of almost all of the land within a town. Another exception relates to the siting of mineral extraction operations, or to the siting of power plants, as examples to one degree or another, whereby the state can take jurisdiction of these uses.

Freedom Matters wants to emphasize most that towns and town boards still hold in their own hands the main governmental control of future land use changes within the town.

We cannot envision any compelling reason why a town would want to cede this control to any other governmental entity. By determining its own town map of these future changes, and by withholding its approval of any county map of such future changes, then the town, via the advent of the comprehensive planning statutes, can take charge of **future development** within the town. *We must all pay close attention to the state legislature, which may be tempted to re-write laws that would remove these town powers. For example, there is a bill in the legislature right now to greatly reduce the number of counties.*

The key to this control lays in the requirement of the comprehensive planning statutes that, starting on January 1, 2010, governmental decisions on land use changes must be **consistent** with that government's comprehensive plan. Moreover, that comprehensive plan **must include** a map of future land use. If the county's map of future land use for a given town is not approved by the town board, that map is not in effect in that town, meaning that the county has no map for that town, even though such a map is mandated. This, in effect, voids the county zoning ordinance in that town.

This situation forces a county to negotiate with its towns. It cannot merely impose its own will. This gives real meaning to the intergovernmental cooperation mandated for comprehensive planning. It defines shared governance of town and county regarding land use. Hence, here is advice we offer to all parties:

Principles to Hold Dear

Towns should adopt comprehensive plans.

County plans should incorporate town-drawn maps.

Counties must approve land use change consistent with town maps.

If a county does not adopt a town map of future land use, that county has voided its zoning ordinance in that town, and

either no zoning, or town zoning should prevail.

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

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