

Freedom Matters

A News & Opinion Paper

Dane County, Wisconsin

Preserving Property Rights

Vol. 5, No. 8

Friday, March 25, 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.

Dane County's Leftist-Driven "Res. 70" Debasement of Comprehensive Planning

— by Bob Bowman —

Problem: The Dane County board's leftist clique, aided by the county executive, is destroying the county's comprehensive planning effort. It is doing so via "Res. 70," which Resolution the leftists unwisely enacted (in September, 2004). I submit that Res. 70 is not only illegal, but in bad faith. I document evidence below.

Fundamental Facts: Broadly put, Res. 70 was concocted by the leftist clique of the county board after they failed to elect their candidate as board chair, thereby losing control of committee appointments, and after they subsequently failed to elect their candidate as chair of the Comprehensive Plan Grant Steering Committee. Res. 70 is an attempt by board leftists to seize the control they had thought to win via the board's legal and democratic processes, but failed to win that way.

Overall Analysis

Res. 70 embodies legal errors, and bad faith. Legal errors can be remedied by will or by court. There is no remedy for bad faith, except a long time at redemptive effort, or a change in leadership. Thus, Res. 70 destroys the county reputation as a partner to be trusted.

The Issue of Legal Errors

The leftists rely on legal opinion by county corporation counsel (**CorpCounsel**). Evidence below says that CorpCounsel's overall legal opinion is so untenable it seems frivolous. It turns the law upside down, to try to justify Res. 70. It leads the county ever deeper into trouble.

Technical Note on the Quotes Below

I electronically copied and pasted from the state web site, to assure accuracy in quoting statutes. Any deletions are replaced with an ellipsis (...).

Evidence Invalidating Res. 70

County Comprehensive Planning.

Such planning is defined thus by state statute:

"66.1001(1) Definitions. In this section: (a) 'Comprehensive plan' means: 1. For a county, a development plan that is prepared or amended under s. 59.69 (2) or (3)."

This statute, 66.1001(1), will be cited often below. Note that 66.1001(1) points us unequivocally to "s. 59.69 (2) or (3)." Note that the statute's use of the word "or" means that (2) or (3) are equivalent choices.

Analysis of Sub (2) of 59.69.

I quote verbatim the pertinent part of of 59.69(2), namely, subd (a), and only the parts of subd (a) that address a committee, which is what Dane County is using.

"59.69(2)(a)1. ... the board may create a planning and zoning committee as a county board agency ... designated the county zoning agency. In lieu of creating a committee ..., the board may designate a previously established committee ... as the county zoning agency, authorized to act in all matters pertaining to county planning and zoning." [emphasis added]

Exegesis. Sub (2) prescribes a county zoning agency either as a commission or a board committee. No other choices are prescribed. Hence, by a judicial rule of statutory construction called "*expressio unius est exclusio alterius*" (explicit inclusion is implicit exclusion) the legislative intent is to exclude all alternatives except the explicitly cited one. This judicial rule is even used by CorpCounsel, Sept. 1, 2004, albeit incorrectly.

County limitation in sub (2). By use of the word "may" it gives a permissive authority to the county to choose either (1) a commission or (2) a board committee as the form of its zoning agency, and that's all.

Sub(2)'s Grant of Authority. The county zoning agency is specifically authorized by the statute *to act in all matters pertaining to county planning and zoning*, and is the only body so prescribed by statute to plan or zone.

Consequences of sub (2). Does the use of the word "may" in sub (2) authorize the county to set up some other kind of agency as the county zoning agency? Does it authorize the county to have two county zoning agencies? Does it authorize one agency for planning and a different agency for zoning? The answer is "No" to all three questions, because 59.69, which authorizes a county to do planning and zoning, refers throughout to the county zoning agency as **singular**.

Sufficiency of sub (2). The statute itself, in 66.1001(1), recognizes by its use of the word "or" in the phrase "59.69 (2) or (3)" that sub (2) *all by itself* directs the county unambiguously on how to prepare a comprehensive plan.

Analysis of sub (3) of 59.69.

Sub (3) is sufficient by itself re 66.1001(1), for the same reason as is sub (2) (see above). That is, sub (3) all by itself directs the county unambiguously on how to prepare a comprehensive plan. In sub (3), the county zoning agency, by the "*expressio-exclusio*" rule, is prescribed as

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*** Published by Freedom Matters, Inc., Cross Plains, WI. 53528, Michael Byrne, Editor ***
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the only county body authorized to prepare a comprehensive plan.

Verbatim quote of relevant part of sub(3):

"59.69(3)(a) The county zoning agency may direct the preparation of a county development plan"

The rest of sub(3) describes the plan content, and duties of the county zoning agency relevant to it. It prescribes no alternative body for these duties.

Legislative Drafting Notes re sub (3) support the above interpretation that the statute prescribes only the county zoning agency as the county planning body. These notes, quoted by Rick Olin, Legislative Fiscal Bureau, Oct, 5, 1999, state as follows:

"18. County Development Plans. Change the current law provision ... to specify that county zoning **agencies** are permitted, rather than required, to prepare county development plans." [note **plural**; emphasis added]

Statutory Consistency re subs (2) & (3). It would be absurd for sub (2) and sub (3) to disagree with each other. Hence, sub (3) cannot contradict sub (2)'s specification of the county zoning agency as the sole agency authorized to act in all matters pertaining to county planning and zoning.

Statutory Limits on County Home Rule

Verbatim Quote of the relevant part of s. 59.69(6).

"59.69(6) Optional additional procedures. Nothing in this section shall be construed to prohibit the zoning agency, the board or a town board from adopting any procedures in addition to those prescribed in this section and not in conflict therewith. ..."

Exegesis of sub (6). A county may only adopt additional procedures that do not conflict with prescribed ones. Hence, sub (6) prohibits the county from taking planning authority away from the county zoning agency or giving it to some other committee. How can CorpCounsel, or any attorney, miss that limitation?

Limitation on County Home Rule. 59.69(6) clearly limits the county's home rule powers, which the home rule statute itself prohibits from overriding explicit statutory limitations on county power. The general or overall statutory provision on county home rule is s. 59.03, which lists the same home rule limitations seen in s. 51.51 (the latter quoted by CorpCounsel, but which applies narrowly and not pertinently).

A Politicized CorpCounsel Opinion.

As a example of how sadly politicized the Dane County CorpCounsel's opinion got, its treatment of 66.1001(4) is logically ludicrous. Its line of logic, expressed in a letter dated September 1, 2004, leads to the absurd conclusion that 66.1001(4) authorizes no county agency that can do comprehensive planning. Contrary to CorpCounsel's implication, sub (4) of 66.1001 does nothing to modify, amend, or

invalidate 66.1001(1), but instead, relies on it. As shown above, 66.1001(1) leads unequivocally to the county zoning agency as the only county body authorized by state law to prepare a county comprehensive plan.

Contractual Limitations

By Kathleen Falk's signature and a county board vote to accept the state planning grant, the county committed itself to a contractual provision with the state in which the county zoning agency was to direct the county comprehensive planning effort and to appoint the county comprehensive plan grant steering committee. Yet, from the get-go, the county acted to violate this contractual commitment it made. By its public participation plan, adopted Jan. 9, 2003, the county directed the chairs of the zoning agency (then called ZNR) and the strategic growth committee to jointly appoint the steering committee, and gave non-county entities the right to name members which those chairs were then obligated to appoint.

Then, in September of 2004, via Res. 70, the county went whole hog on violating this contractual commitment, by purporting to remove the county zoning agency (now called the ZLR) from directing the comprehensive planning effort or from jointly appointing its steering committee. That is a bad faith act that goes way way way over the top. It brands the county as an untrustworthy party to contracts or promises it signs. Dane County's word is not its bond.

County Board 2/3 Vote Rule

I also submit that the county board vote that approved the planning contract with the state had the effect of incorporating the county zoning agency's contractual planning role for comprehensive planning into the county board's organizational structure. Thus, I submit that any change in that contractual role is a change in county board rules, and by Chapter 7 of the Dane County Ordinances, such a change in the rules carries the requirement that Res. 70 be enacted by a 2/3 vote of the county board. Res. 70 fell far short of getting that 2/3 vote.

Summation

On all points above, Res. 70 is an outright county disaster. The county needs to rescind it, or to void it, and henceforth to act with care and respect for the law as written and intended, and to be scrupulous in its good faith effort. If the county does not, its role in comprehensive planning will go the way of the RPC and the dodo bird. Other governmental units can and will scuttle its role. Responsible governmental units cannot do business with a scofflaw, bad faith, rogue political unit, and by Res. 70, Dane County is making itself such a rogue. A plan is of no use without a law by which it can work, and Res. 70 destroys that law.