

Freedom Matters

A Weekly Newsletter

Dane County, Wisconsin

Vol. 2, No. 39

Friday, October 4, 2002

We are a free people in a republic, under a constitution which limits the powers of government to those necessary to secure the unalienable rights of each person to their life, liberty and property. Yet, when a legislature is in session, no one's life, liberty or property is safe. It's the curse of a democracy. That's why we have a republic instead. *Freedom Matters* dedicates itself to the fight to restore our republic. Most of the press and courts fail to do so. They've forgotten that freedom matters.

— If It Walks Like a Duck —

Here Is a Legal Test for What Constitutes Zoning & It Voids Springdale's Plan to Zone by Land Division

by Bob Bowman

Is the proposed 2002 Springdale land use plan as implemented by a land division ordinance a zoning scheme or a scam, or what? You be the judge.

Consider a Springdale landowner who wants to develop 100 acres. Perhaps they are through farming, unable to afford college costs for children, or facing unexpected medical expenses. Under the present county zoning ordinance which applies in the town of Springdale, the farmland in the town is zoned A-1 Agriculture (s. 10.12, Dane County Ordinances). **It is not** zoned A-1 Exclusive Agriculture (s. 10.123, DCO). A-1 Agriculture is a **mixed use district**, in which land can be used either for farming or can be divided off for single family residences **without rezoning**. (Plenty of residents in Springdale have lived all their lives planning some day to derive some financial gains from their lifelong investment in their properties.)

Thus, **on the above 100 acres, the owner** could create 50 or so lots each of 1.5+ acres, the remaining acreage being needed for right-of-ways and other required public uses. If creating more than 4 lots in 5 years, the owner would have to prepare a subdivision plat subject to state law (ch. 236), and subject to the county and town subdivision ordinances. Those three laws govern lot and street layout, and like issues.

It must be noted that no one in Springdale has exercised the right to develop at this density despite the fact that in Springdale (unlike most towns around it) the **right** to do this exists. It is a much repeated myth that, given the chance, greedy landowners will "pave over the whole town." Not only have they not, in Springdale, but the market does not let them.

That is the situation which prevailed when the present Springdale town board was elected, April, 2001. That new town board set out to suppress "feared" development in Springdale; i.e., they set out to limit the land which could be used for single family residences or other nonfarm uses. The **uses** to which land can be put is governed by a zoning ordinance, in this case, the Dane County zoning ordinance. Under that ordinance, the town board only had **one choice** for limiting the land allowed to be changed from farming to residential use. They had to adopt exclusive agriculture zoning for the farmland in Springdale.

However, if the town board did that, landowners, as they did in 1987, could block it via a statutory protest, whereby a 75% vote of the county board is needed for approval. That protest provision is in the law because of exactly what is happening in

Springdale. A group of residents have decided they know what is best for another group of long time residents who happen in this case to own the majority of the property in the town!

So the town board acted in a way to **circumvent** such a statutory protest. Instead of limiting the residential use of land via the zoning ordinance, they enacted a scheme to limit it via their land division ordinance. You see, statutes require a town to get county approval to adopt a zoning ordinance. Statutes do not require county approval for a town land division ordinance, nor provide for a statutory protest to it.

These statutory differences between zoning and land division ordinances present no conflict in law, because zoning law determines the **type** of use to which land may be put, whereas land division law determines the **quality** of the type of use. Those are different things. Type of use deals with **what** use. Quality of use deals with **how** the use is implemented: lot layout, street layout, provision for public parks, buffers, etc.

Therein lies a **powerful test** for what the legislature delegated to zoning ordinances, and what it delegated to land division ordinances. Call it the **Walks Like a Duck Test**.

The test is this. Whatever is subject to statutory protest by landowners via a zoning ordinance **constitutes zoning**, and cannot be controlled by a land division ordinance, for the latter ordinance is **not subject** to statutory protest. In other words, the land division statute does not act to negate the zoning statute, nor to provide an alternate to it, nor is the State Supreme Court likely to rule that it does, in a case before it now.

In view of the above, the county board should:

(a) **reject** the 2002 Springdale land use plan as implemented by a land division ordinance. Note that county policy stipulates implementation as a *required part* of a land use plan.

(b) **consider legal action** to prevent the town from zoning via its land division ordinance. The county is obligated to defend its zoning ordinance from usurpation, in order to protect the citizens who are subject to it.

We at *Freedom Matters* believe that freedom is protected if laws mean something, if laws are in fact held sacred and straight forward, and if laws are changed by legislation, not judicially. To change the law by trying to get the courts to change it is just plain wrong. Dane County is only one place where such attempts affect others. The price of freedom in other counties will be impacted by what happens here in the county where the state capitol is housed. We are all in this together.

If a citizen violates the county zoning ordinance, the county sues. The county can do no less if a town board violates the zoning ordinance. Law is law. It applies to all, or to none.

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***
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