

SUPREME COURT
STATE OF WISCONSIN

WISCONSIN REALTORS ASSOCIATION, INC.
and WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs-Appellants

v.

Appeal No. 2006AP002761

TOWN OF WEST POINT,

Defendant-Respondent

ON APPEAL FROM THE CIRCUIT COURT OF COLUMBIA COUNTY
THE HONORABLE ANDREW P. BISSONNETTE PRESIDING
CIRCUIT COURT CASE NO. 06-CV-096

**BRIEF OF AMICI CURIAE THE WISCONSIN CHAPTER
OF THE AMERICAN PLANNING ASSOCIATION AND THE AMERICAN
PLANNING ASSOCIATION**

WISCONSIN CHAPTER OF THE
AMERICAN PLANNING ASSOCIATION
AND THE AMERICAN PLANNING
ASSOCIATION

Brian W. Ohm
State Bar Number 01009448
Attorney for Amici Curiae
Music Hall/925 Bascom Mall
Madison, WI 53706-1395
(608) 262-2098

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INTRODUCTION

The Wisconsin Chapter of the American Planning Association ("WAPA") is a statewide organization representing planners throughout Wisconsin. The American Planning Association ("APA") represents planners nationally. Both WAPA and the APA have a compelling interest in the outcome of the issue presented in this case: did the Town of West Point have the legal authority to enact an ordinance that imposed a temporary moratorium on the acceptance, review, and approval of applications for land divisions within the Town while the Town completed its comprehensive plan. Planners strive to help communities define the public interest through planning processes. WAPA and APA therefore have a strong interest in protecting the ability of local governments to adopt temporary moratoria on certain development activities while the local government conducts a study to determine an appropriate course of future action to insure the protection of the public interest.

ARGUMENT

I. MORATORIA ARE AN ESSENTIAL PLANNING TOOL FOR PROTECTING PUBLIC HEALTH, SAFETY, AND WELFARE

As recognized by the United States Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional

Planning Agency, 535 U.S. 302 (2002): “[M]oratoria . . . are widely used among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development.” Id. at 337-38 (citations omitted).

It is no different in Wisconsin. Over the years, cities, villages, towns, and counties in Wisconsin have used temporary moratoria to stay a variety of actions to protect the public health, safety, and welfare. These include temporary moratoria on building permits, zoning permits, permits for new billboards, connections to wastewater treatment facilities, land divisions, etc. The justifications for these temporary moratoria are numerous: the public need to prevent new buildings from connecting to a wastewater treatment facility that is at capacity; the need to prevent rezonings along an unsafe highway corridor while the local government conducts a corridor study to improve highway access; the need to prevent new subdivisions while a town completes a study to determine the most appropriate use of land throughout the town; etc.

Temporary moratoria allow studies to occur unhindered by developments that could frustrate to objectives of the planning process. For example temporary moratoria can help limit the number of nonconformities that could be created under the adoption of a new zoning ordinance. Temporary moratoria also work to eliminate the "race of diligence" -- instances where a property owner seeks a permit based on existing ordinances after the nature of the new ordinances becomes known but before adoption of the new ordinances. Faced with this "race," a community may hastily adopt a new ordinance without doing the necessary studies and receiving sufficient public input. Brian W. Ohm, Guide to Community Planning in Wisconsin 31 (1999).

II. TOWNS HAVE IMPLIED AUTHORITY TO IMPOSE TEMPORARY MORATORIA

Appellants acknowledge several times in their brief that towns have: (1) those powers expressly granted to them by the legislature and (2) other powers necessary to implement the powers expressly granted to them, or "implied powers." Brief and Appendix of Plaintiffs-Appellants, at 15 - 16. Appellants focus their arguments exclusively on the absence of express authority to impose a temporary moratorium and ignore the fact that towns have implied

authority to impose a temporary moratorium. Implied powers go beyond the exact words found in a particular statute.

A. Towns Have Implied Authority to Impose Moratoria Under the Broad Police Powers Given to Them Under Village Powers

Pursuant to Wis. Stat. § 60.10(2)(c), the Town of West Point has taken the necessary steps to give the Town "village powers." This allows the Town Board to exercise those powers conferred on village boards under Ch. 61 of the Wisconsin Statutes. Wis. Stat. § 60.22(3). Under these powers, the Town Board ". . . shall have power to act for the government and good order of the [town], for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by . . . regulation . . . and other necessary or convenient means." Wis. Stat. § 61.34. In enacting the temporary moratoria, the Town Board relied in part on this broad grant of authority to protect the health, safety, welfare and convenience of the town and temporarily halt proposals for subdivisions while the town completed the update of its comprehensive plan. This grant of authority is sufficient for upholding the enactment of the Town's temporary moratoria.

B. Local Governments Have Broad Authority Under Wis. Stat. § 236.45 to Enact Temporary Moratoria Ordinances to Help Achieve the Purposes of That Statute

The Town Board also appropriately relied on the broad grant of authority given to towns under Wis. Stat. § 236.45 to enact a temporary moratorium. Appellants' argument that the Town's temporary moratorium ordinance must make applicable the provisions of Chapter 236 does not reflect well-established land use law in Wisconsin.¹

Section 236.45 is the enabling authority that allows cities, villages, towns, and counties to "adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions [of Chapter 236]." State law therefore expressly requires that if local

¹ The enabling laws authorizing town land use regulations and planning are scattered throughout the statutes. They are not limited to general zoning and the powers set forth in Wis. Stat. §§ 60.61 through 60.66 as stated by Appellants. Brief and Appendix of Plaintiffs-Appellants, at 4. Towns with village powers can use the authority found in Wis. Stat. § 62.23; other land use and planning authority is found throughout Wis. Stats. Chap. 66 (particularly Wis. Stat. § 66.1001); Wis. Stat. § 236.45; and other sections of the Statutes.

Appellant's reliance on zoning authority to make their argument is, therefore, misplaced. Zoning is an authority independent from the ability to regulate subdivisions under Wis. Stat. § 236.45. Lake City Corp. v. City of Mequon, 207 Wis. 2d 155, 558 N.W.2d 100 (1997). While there is some overlap between what subdivision regulations can accomplish and what zoning can accomplish, arguing that the Town needs zoning authority to impose a temporary moratoria on subdivisions has no basis under Wisconsin law.

governments elect to regulate subdivisions under Wis. Stat. § 236.45(2), the local ordinances must be more restrictive than the requirements of Chapter 236.

State law requires that local ordinances be more restrictive than state statute because the provisions of Wis. Stat. §§ 236.01 to 236.445 apply statewide to every proposed plat irrespective of whether a local government has a local subdivision ordinance or not. In other words, Wis. Stat. §§ 236.01 to 236.445 establish the minimum requirements for the regulation of subdivisions in the State of Wisconsin. As a result, there is no reason for local governments to adopt subdivision ordinances unless they want to do something that is more restrictive than what is in the state statutory process for regulating the division of land.

The recognition that Wis. Stat. §§ 236.01 to 236.445 establishes the minimum requirements is reflected in the language of Wis. Stat. § 236.45(2) whereby local ordinances adopted under this authority shall either "make applicable all of the provisions of [Chapter 236] or may provide other surveying, monumenting, mapping and approving requirements for such division." (Emphasis added). Local governments therefore have the express authority to develop different surveying, monumenting, and mapping requirements than

detailed in Chapter 236. Local governments can also develop other approving requirements, such as the temporary stay on approvals that is at issue in this case. However, if a local government develops different requirements, the requirements must be more restrictive than the requirements of Chapter 236. Wis. Stat. § 236.45(2). A temporary moratoria ordinance on subdivisions is certainly more restrictive than the requirements of Chapter 236. If a local government decides not to develop a more restrictive requirement, at a minimum, the requirements of Chapter 236 must apply. Appellants' argument omits the fact that Wis. Stat. § 236.45(2) expressly authorizes local governments to adopt ordinances that include "other . . . approving requirements."

In the landmark case Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), the Wisconsin Supreme Court rejected a restrictive interpretation of the phrase "other . . . approving requirements" that would confine those statutory words to "the antecedent enumerated specific words 'surveying, monumenting, mapping.'" Rather, the Court held in favor of a broad interpretation of that phrase to authorize ordinances that encompasses the objectives stated in Wis. Stat. § 236.45(1). 28 Wis.2d at 617, 137 N.W.2d at 447.

The objectives of local ordinances enacted under Wis. Stat. § 236.45(1) are:

to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.

Wis. Stat. § 236.45(1).

In Jordan, the Supreme Court addressed the issue of whether section 236.45 authorized the Village of Menomonee Falls' requirement that a subdivider dedicate land for schools, parks, and playgrounds, and the Village's equalization-fee in lieu of dedicating land. Neither of these requirements is expressly authorized by Wis. Stat. § 236.45. Nevertheless, the Supreme Court found that the dedication of land requirement was authorized by the broad

delegation of authority given to local governments under Wis. Stat. § 236.45. 28 Wis.2d at 617, 137 N.W.2d at 447. In addition, the Court held that the equalization tax was authorized by the language "adequate provision for . . . school, parks, playgrounds and other public improvements" in Wis. Stat. § 236.45(1), despite the very strict requirement under Wisconsin law that local governments "can only resort to the types of taxes that the legislature has authorized them to use." 28 Wis.2d at 621, 137 N.W.2d at 449.

Based on the legislature's very broad delegation of authority under Wis. Stat. § 236.45(2), as acknowledged by the Court in Jordan, cities, villages, towns, and counties have the authority to adopt ordinances for temporary moratoria on subdivisions or other divisions of land to accomplish the purposes listed in Wis. Stat. § 236.45(1). In the present case, the temporary moratoria allows the Town to complete the update of its comprehensive plan and take the necessary actions to "promote the public health, safety and general welfare of the community; . . . further the orderly layout and use of land; . . . to prevent the overcrowding of land; . . . to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; . . .

providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county." Wis. Stat. § 236.45(1).

The authority given to local governments under Wis. Stat. § 236.45(2) to adopt "ordinances" in the plural, as opposed to "an ordinance," also signifies the broad authority given to local governments to regulate subdivisions under Wis. Stat. § 235.45 and enact a temporary moratorium on the division of land. Towns have the authority to approve plats within the jurisdiction of the town. Wis. Stat. § 236.10(1). In addition, Wis. Stat. § 236.13(1) outlines the basis for approval of plats. According to Wis. Stat. § 236.13(1), approval of a plat must be conditioned upon compliance with: a.) the provisions of Chapter 236; b.) any municipal, town or county ordinance; c.) a comprehensive plan; and d.) certain state administrative rules.

It is important to recognize that Wis. Stat. § 236.13(1)(b) references "any" town ordinance. It is not limited to local subdivision ordinances. This approval process for plats under Chapter 236 applies irrespective of whether a local government has a local subdivision ordinance. When reviewing a plat, a local government can

approve (or disapprove) a plat based on compliance with a zoning ordinance, a driveway ordinance, a moratorium ordinance, a nuisance ordinance, or any other ordinance that a local government might have.

Finally, courts in other states also acknowledge that local governments have broad implied authority under similar circumstances to the present case. See, e.g., Droste v. The Board of County Commissioners of the County of Pitkin, 159 P.3d 601 (Colo. 2007); Almquist v. Town of Marshan, 308 Minn. 52, 245 N.W.2d 819 (1976). In the Almquist case, the Minnesota Supreme Court held that the unincorporated town of Marshan had inherent power to enact a temporary moratorium that prohibited all development while the Town completed certain studies.² The Court held that the simple statement in that state's planning law that broadly delegated to municipalities "the necessary powers...for conducting and implementing municipal planning" gave the town the power to enact the moratoria.

² Unlike the present case, the plaintiff in the Almquist case sought to obtain a permit to use his land for a purpose expressly permitted by the zoning ordinance. 308 Minn. at 59, 245 N.W.2d at 823. In the present case, Appellants have not proposed a subdivision that complies with the Town's existing subdivision ordinance. Also, unlike the moratoria in the Almquist case that applied to all development, the Town of West Point's moratoria only applied to subdivisions and included a number of exemptions.

308 Minn. at 64, 245 N.W.2d at 825 (quoting Minn. Stat. § 462.351). Almquist is important for Wisconsin since Minnesota shares a common legal heritage with Wisconsin and towns (or "townships") in Minnesota share a similar legal status to towns in Wisconsin.

CONCLUSION

For the foregoing reasons, WAPA and the APA respectfully request that the Supreme Court affirm the circuit court's decision granting summary judgment in favor of the Town of West Point.

Dated: October 12, 2007

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ASSOCIATION**

By: _____ /s/
Brian W. Ohm
State Bar Number 01009448
Attorney for Amici Curiae
Music Hall/925 Bascom Mall
Madison, WI 53706-1395
(608) 262-2098

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 12 pages.

Dated: October 12, 2007

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By: _____ /S/
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State Bar Number 01009448
Attorney for Amici Curiae
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Madison, WI 53706-1395
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