



Zoning or Subdivision Regulation? It Can Matter!

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Local governments primarily regulate land use through planning, and zoning and land division regulations. Although zoning and land division regulations sometimes overlap (e.g., both might regulate lot size), these powers' sources of authority are distinct and the regulations differ in nature. Sometimes the characterization of an ordinance as zoning or subdivision will impact its validity. This article provides a basic overview of zoning and subdivision regulatory authority and then summarizes a recent Wisconsin Supreme Court decision reviewing the framework Wisconsin courts use to determine whether a regulation is a zoning or subdivision regulation and demonstrating how that determination impacted the regulation's validity.

Zoning Authority

Wisconsin Stat. § 62.23(7)(am) grants Wisconsin cities and villages¹ zoning authority to "promot[e] health, safety, morals or the general welfare of the community."² Accordingly, cities and villages may enact zoning ordinances regulating and restricting "the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, subject to s. 66.10015(3)³ the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures." Through zoning, cities and villages may divide the municipality into districts and, within such districts, "regulate and restrict the erection, construction, reconstruction,

alteration or use of buildings, structures or land."

Zoning regulations must be made in accordance with a comprehensive plan,⁴ and "designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to preserve burial sites"⁵ Such regulations shall be made with "reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."⁶

Municipalities with a plan commission and adopted zoning ordinance may follow the specific process outlined in Wis. Stat. § 62.23(7a) to exercise extraterritorial zoning power in unincorporated areas within their extraterritorial jurisdiction.⁷

Land Division Regulations

Chapter 236 of the Wisconsin Statutes governs platting of lands and recording and vacating of plats. It imposes certain minimum requirements and defines "subdivision" as a division of a lot, parcel, or tract of land by the owner or the owner's agent for the purpose of sale or

of building development and to which any of the following applies:

1. The division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area.
2. Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years.⁸

Under § 236.45(2)(ac), any municipality, town or county that has established a planning agency may enact a subdivision ordinance that is more restrictive than ch. 236, except that local subdivision ordinances may not be more restrictive regarding ch. 236 time limits, deadlines, notice requirements, or other provisions that protect a subdivider.

Like zoning regulations, subdivision regulations should promote the community's "public health, safety and general welfare"⁹ Subdivision regulations should be "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" and must 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.”¹⁰

Local subdivision ordinances may include provisions regulating divisions of land into parcels larger than 1 1/2 acres or divisions of land into less than 5 parcels, and with certain exceptions¹¹ may prohibit the division of land in areas where such prohibition will carry out the above purposes. A local subdivision ordinance may regulate land division within the municipality’s extraterritorial plat approval jurisdiction¹² as well as within the municipality’s corporate limits. Where multiple governing bodies or agencies have authority to approve or object to a plat and the requirements conflict, the plat shall comply with the most restrictive requirements.¹³ Any municipality may waive its right to approve plats within its extraterritorial plat approval jurisdiction by a resolution of the governing body recorded with the register of deeds¹⁴ incorporating a map or metes and bounds description of the area outside its corporate boundaries within which it shall approve plats. A municipality may rescind this waiver at any time by resolution of the governing body recorded with the register of deeds.¹⁴

A municipality may not deny approval of a plat or certified survey map under §§ 236.45, 236.10 or 236.13 on the basis of the proposed use of land within the municipality’s extraterritorial plat approval jurisdiction, unless the denial is based on a plan or regulations, or amendments thereto, adopted by the governing body under § 62.23(7a)(c).

Recent Wisconsin Supreme Court Decision

Although zoning and subdivision regulations share common purposes, they differ in nature and the authority to enact them comes from distinct sources.

A recent Wisconsin Supreme Court decision, *Anderson v. Town of Newbold*, 2021 WI 6, demonstrates the relevance of a regulation’s characterization as zoning or subdivision and reviews the framework Wisconsin courts use to determine whether a regulation is properly characterized as zoning in nature.

Anderson sought certiorari review after the Town of Newbold plan commission denied his request to divide his lakefront property with 358.43 feet of frontage into two separate lots, one with 195 feet of shoreline frontage and one with 163.43 feet of frontage. The commission’s denial was based on a town ordinance requiring lots on Lake Mildred to have a minimum width of 225 feet. Anderson claimed the town ordinance was a shoreland zoning ordinance and that Wis. Stat. § 59.692 prohibited the town from enforcing local shoreland zoning standards that were more restrictive than state law. The town claimed the ordinance was a lawful exercise of its subdivision regulation authority. The circuit court held that the town’s ordinance was a subdivision ordinance rather than a shoreland zoning ordinance and that the town had authority to enact it. The court of appeals affirmed, as did the Wisconsin Supreme Court in a 5-2 decision.

In reaching its decision, the Court reviewed the purpose behind limitations on shoreland zoning and earlier case law establishing that while zoning and subdivision regulations may overlap, they provide separate and distinct means of regulating land development. The earlier cases instruct that if a regulation is authorized by and within the purposes of ch. 236, the fact that it may also fall under the zoning power does not preclude a local government from enacting the regulation pursuant to the conditions and procedures of ch. 236.

In concluding that the town ordinance was not a zoning ordinance, the Court

reviewed the functional framework it laid out in *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362, when it concluded that a town’s nonmetallic mining ordinance was not a zoning ordinance and therefore did not require county approval. This functional approach catalogs the characteristics of traditional zoning ordinances and commonly accepted zoning purposes and examines the ordinance in question to determine whether it should be classified as a zoning ordinance. No single characteristic is dispositive, and the conclusion is not a simple tally of the similarities and differences. The analysis must be specific to the ordinance at issue and, depending on the circumstances, some characteristics, may be more significant than others.¹⁵

The following nonexclusive list of characteristics of a zoning ordinance inform a court’s determination of whether an ordinance is a zoning ordinance:

- Zoning ordinances typically divide a geographic area into multiple zones or districts.
- Within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited.
- Zoning ordinances traditionally control where a use takes place versus how it takes place.
- Traditionally classifying uses in general terms, zoning ordinances attempt to comprehensively address all possible uses in the geographic area.
- Zoning ordinances traditionally make a fixed, forward-looking determination regarding what uses will be permitted as opposed to case-by-case determinations.

- Traditional zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to continue said use despite not conforming to the ordinance.

Noting that subdivision ordinances must be liberally construed in favor of subdivision authority, the Court stated that the first two characteristics (dividing

a geographic zone into multiple zones or districts and allowing or prohibiting certain uses) were dispositive here and that the absence of any use restriction – the hallmark of a zoning ordinance – established that the town's ordinance was not a zoning ordinance. Because the shoreland zoning restrictions in § 59.692(1d) only applied to ordinances enacted under that section, it did not

preclude the town from regulating lot frontage pursuant to its subdivision authority under ch. 236.

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1. Wisconsin Stat. § 62.23 applies to villages by virtue of Wis. Stat. § 61.35.

2. Zoning of wetlands in shorelands is governed by Wis. Stat. § 62.231.

3. Wis. Stat. § 66.1001(3) limits down zoning ordinances. A "down zoning ordinance" is a zoning ordinance that decreases the development density of the land to be less dense than was allowed under its previous usage or that reduces the permitted uses of the land, that are specified in a zoning ordinance or other land use regulation, to fewer uses than were allowed under its previous usage. Wis. Stat. § 66.1001(1)(as).

4. A comprehensive plan is "a guide to the physical, social, and economic development of a local governmental unit" and must address 9 elements (issues and opportunities; housing; transportation; utilities and community facilities; agricultural, natural and cultural resources; economic development; intergovernmental cooperation; land use; and implementation). Wis. Stat. § 66.1001(1)(a)2 and (2). For cities and villages, the comprehensive plan is the "master plan" adopted under Wis. Stat. § 62.23(3) to guide and accomplish a "coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote public health, safety, morals, order, convenience, prosperity or the general welfare, as well as efficiency and economy in the process of development."

5. Wis. Stat. § 62.23(7)(c).

6. *Id.*

7. Extraterritorial zoning jurisdiction means the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village. Wis. Stat. § 62.23(7a)(a).

8. Wis. Stat. § 236.02(12)(am). "Subdivision" does not include a division of land into 5 or more parcels or building sites by a certified survey map in accordance with an ordinance enacted or a resolution adopted under § 236.34(1)(ar)(i). Wis. Stat. § 236.02(12)(bm).

9. Wis. Stat. § 236.45(1).

10. *Id.*

11. See Wis. Stat. §§ 59.69 (4) (intro.) and 66.1002.

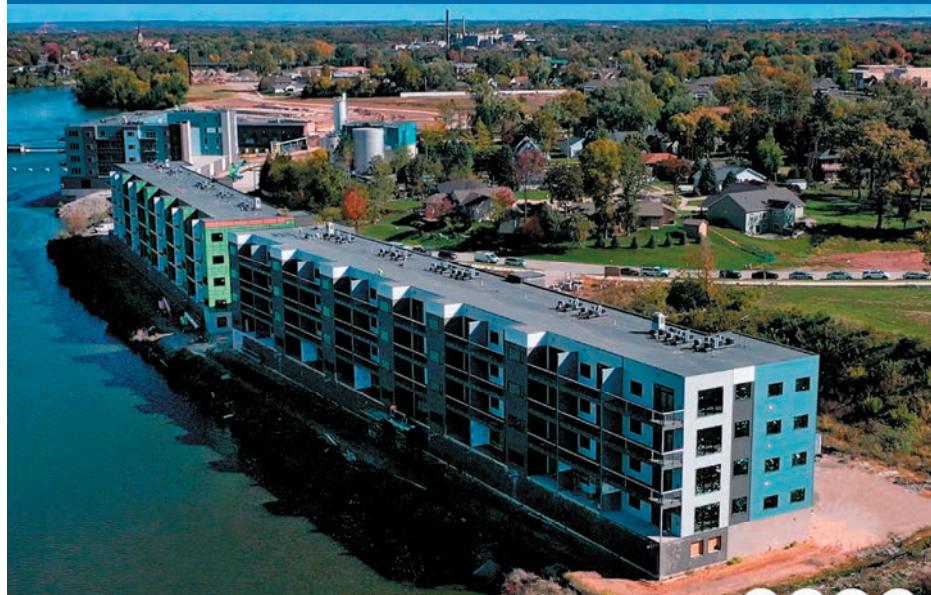
12. This is the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village. Wis. Stat. § 236.02(5).

13. Wis. Stat. § 236.13(4).

14. Wis. Stat. § 236.10(5).

15. Anderson, ¶¶ 46 - 47.

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