

**STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2018AP547**

State of Wisconsin ex rel. Michael Anderson,
Petitioner-Appellant-Petitioner,

v.

Town of Newbold,
Respondent-Respondent.

Appeal From A Final Order Of The Oneida County Circuit Court,
The Honorable Patrick F. O'Melia, Presiding
Case No. 2017-CV-55

***AMICUS CURIAE* BRIEF OF THE WISCONSIN REALTORS®
ASSOCIATION AND WISCONSIN BUILDERS ASSOCIATION**

Thomas D. Larson (WBN 1026187)
4801 Forest Run Road, Suite 201
Madison, WI 53704
608-241-2047
608-241-2901 Facsimile

Attorney for the Wisconsin REALTORS®
Association and the Wisconsin Builders
Association.

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OVERVIEW

Although this case will ultimately decide the fate one person's attempt to subdivide waterfront property located on Mildred Lake within the Town of Newbold, the stakes are much higher. If the Town of Newbold (Town) is allowed to regulate lot sizes within the shoreland area through its land division regulations rather than comply with the requirements under Wisconsin's Shoreland Zoning Program, all towns, and counties by implication, in Wisconsin will be able to do the same. ("Shoreland Zoning Program" consists of Wis. Stat. § 281.31; Wis. Stat. § 59.692; and Wis. Admin. Code § NR 115). As a result, this case could serve as the basis for the systematic disregard of the state's uniform lot size requirements in shoreland areas and undermine one of the most important tools Wisconsin has to protect water quality, natural scenic beauty, and wildlife within and near our lakes, rivers and streams.

The Town contends it may regulate lot sizes in unincorporated shoreland areas independently through its land division ordinance, despite the fact that the State of Wisconsin has developed a comprehensive Shoreland Zoning Program that (a) creates statewide, uniform lot size requirements in shoreland areas, and (b) authorizes towns to engage in

shoreland zoning only under very limited circumstances. In other words, the Town maintains that the Wisconsin Legislature created two separate and independent regulatory schemes for establishing lot sizes in unincorporated shoreland areas – (1) the Shoreland Zoning Program, which establishes statewide, lot-size standards that all land development in unincorporated shoreland areas must follow in order to protect our state’s most sensitive natural resources, and (2) subdivision regulations, which apply generally to all land development in both unincorporated and incorporated areas and which allow municipalities to establish lot-size requirements that are less restrictive than those established under the Shoreland Zoning Program.

The Wisconsin REALTORS® Association (WRA) and Wisconsin Builders Association (WBA) disagree. The Shoreland Zoning Program establishes a uniform regulatory framework that provides necessary environmental protections for our waterways and certainty and predictability for waterfront property owners to reasonably and responsibly develop their property, and towns and counties should not be able to ignore or evade these protections. The regulation of land development in shoreland areas is a statewide concern and the state, by enacting the Shoreland Zoning

Program, has preempted towns and counties from developing their own, independent lot-size requirements in shoreland areas.

ARGUMENT

I. THE COMMON LAW RELATIONSHIP BETWEEN GENERAL ZONING AND SUBDIVISION REGULATION IS NOT APPLICABLE TO SHORELAND ZONING.

The Town maintains that the common law relationship between general zoning and subdivision regulation should also apply to shoreland zoning. *See* Resp. Br. at 17. Specifically, the Town asserts because Wisconsin courts have recognized that towns have the authority to regulate lot sizes, among other things, in non-shoreland areas through their subdivision authority, this Court should recognize that towns have the same authority to regulate lot sizes in shoreland areas. However, Wisconsin law differentiates between both shoreland zoning and general zoning, and the authority of towns to engage in both forms of zoning.

A. The Wisconsin Statutes Treat Shoreland Zoning and General Zoning Differently.

Since 1965, the State of Wisconsin has identified a paramount state interest in regulating land use and land development in shoreland areas through the development of the state's Shoreland Zoning Program. *See*

1965 Wis. Laws, ch. 614. The creation of the Shoreland Zoning Program has been identified as “a public trust duty” to protect our navigable waters, which “requires the state not only to promote navigation but also protect and preserve those waters for fishing, recreation and scenic beauty. *Just v. Marinette*, 56 Wis. 2d 7, 18, 201 N.W.2d 761 (1972). While general zoning regulates land use and development to promote public health, safety, morals and the general welfare, shoreland zoning has the additional purpose of “protecting the public’s interest in navigable waters, including promoting safe and healthful water conditions, controlling pollution, and protecting fish and aquatic life and natural beauty.” *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 269 Wis.2d 549, 563, 676 N.W.2d 401 (2004)(citing Wis. Stat. § 281.31(1)); *see also*, Wis. Stat. § 62.23(7)(establishing the purpose of general zoning). To achieve the goals of shoreland zoning, the Wisconsin Legislature has “empowered the DNR to develop water conservation standards, and to disseminate these ‘general recommended standards and criteria’ to local municipalities. *State v. Winnebago County*, 196 Wis.2d 836, 847, 540 N.W.2d (1995)(citations omitted).

Under Wisconsin's Shoreland Zoning Program, all counties are required to adopt shoreland zoning ordinances for unincorporated areas. Wis. Stat. § 59.692(1c). County shoreland zoning ordinances apply to all land within 1,000 feet of lakes, ponds or flowages, and 300 feet from navigable rivers or streams. Wis. Stat. § 59.692(1)(b). The ordinances, at a minimum, must contain all of the provisions established by the Wisconsin Department of Natural Resources (DNR) as part of the shoreland zoning administrative rules (NR 115). *See* Wis. Admin. Code § NR 115.05(1). Specifically, the state's Shoreland Zoning Program requires county shoreland zoning ordinances to include specific dimensional standards for building setbacks, lot sizes, lot widths, and building heights, among other things. *Id.*¹ If a county does not adopt a shoreland zoning ordinance that meets the state standards, the DNR is required to adopt a compliant shoreland zoning ordinance on behalf of the county. *See* Wis. Stat. § 59.692(6). Once adopted, a county shoreland zoning ordinance supersedes

¹ Prior to 2015, the shoreland zoning standards contained in NR 115 were considered minimum standards, and counties were authorized to adopt more restrictive standards. In 2015, the Wisconsin Legislature changed this policy to require greater regulatory consistency throughout the state and required counties to adopt standards consistent with those found in NR 115. *See* 2015 Wis. Act 55; *see also*, Wis. Stat. § 59.692(1d)(a).

all provisions of a county general zoning ordinance adopted under Wis. Stat. § 59.69 that relates to shorelands. Wis. Stat. § 59.692(5).

Cities and villages are required to adopt shoreland zoning ordinances and apply them to certain areas within cities and villages that are subject to shoreland zoning. Wis. Stat. § 62.233(2). Cities and villages that annex land subject to shoreland zoning must continue to enforce such zoning, with some allowance for minor modifications. *See* Wis. Stat. §§ 62.233(3) and (5). If a city or village incorporates, the city or village must continue the shoreland zoning that was in effect for the land prior to incorporation. Wis. Stat. § 62.233(6).

In contrast to the comprehensive regulatory framework created for shoreland zoning, the Wisconsin Legislature has authorized municipalities to enact general zoning ordinances but does not require them to do so. *See e.g.*, Wis. Stat. § 59.69(1) (“To accomplish this purpose the board may plan for the physical development and zoning of territory within the county.” (emphasis added)); Wis. Stat. § 62.23(7)(am) (“For purposes of promoting . . . the general welfare of the community, the council may regulate and restrict by ordinance . . .” (emphasis added)). Moreover, Wisconsin’s general zoning law does not require municipalities to include specific

provisions in their ordinances or establish specific dimensional standards for lot sizes, lot widths, building setbacks, or building heights. *See e.g.*, Wis. Stat. § 62.23(7). Finally, if a municipality chooses not to enact a general zoning ordinance, the State of Wisconsin is not authorized to create and enforce an ordinance for the municipality.

Thus, unlike general zoning, the State of Wisconsin has demonstrated a state interest in developing a regulatory framework for shoreland zoning, which includes specific standards for lot sizes. As this Court has recognized, “[l]ands adjacent to or near navigable waters exist in a special relationship to the state.” *Just*, 56 Wis.2d at 18.

B. The Wisconsin Legislature Has Given Towns Limited Authority To Engage In Shoreland Zoning.

While towns have broad authority to engage in general zoning if they have adopted village powers, the Wisconsin Legislature has effectively prohibited towns from engaging in shoreland zoning except in limited circumstances. *See* Wis. Stat. §§ 60.62(1), 60.10(2)(c), and 61.35 (authorizing towns to enact zoning ordinances under Wis. Stat. § 62.23 if they adopt village powers).

Under Wisconsin’s shoreland zoning framework, only counties, villages and cities are authorized to enact shoreland zoning regulations. *See* Wis. Stat. §§ 281.31 and 59.692. Section 281.31 of the statutes provides that “[t]o aid in the fulfillment of the state’s role as trustee of navigable waters . . . it is declared to be in the public interest to . . . authorize municipal shoreland zoning regulations.” Wis. Stat. § 281.31(1). “Municipal” is defined to include only “a county, village or city.” Wis. Stat. § 281.31(2)(c). “Regulation” similarly is defined to include subdivision and zoning regulations of cities, villages, and counties. Wis. Stat. 281.31(2)(e).

For this reason, Wisconsin courts have generally concluded that the Wisconsin Legislature has vested counties with shoreland zoning authority, but not towns. *See Hegwood v. Town of Eagle Zoning Bd. of Appeals*, 2013 WI App 118, ¶16, 351 Wis.2d 196, 839 N.W.2d 111; *see also, State ex rel. Anderson v. Town of Newbold*, 2019 WI App 59, ¶11, 389 Wis.2d 309, 935 N.W.2d 856.

Underscoring the legislature’s intent to prohibit towns from actively engaging in shoreland zoning, the Wisconsin Statutes create a narrow exception to the general prohibition on towns engaging in shoreland zoning. Under this limited exception, a town may enforce a shoreland

zoning ordinance only if the ordinance (a) existed prior to the county's shoreland zoning ordinance, and (b) is more restrictive than the county's ordinance. *See* Wis. Stat. § 59.692(2)(b); *see also, Hegwood*, 351 Wis.2d at ¶ 13.

Given that the Wisconsin Legislature did not authorize towns to regulate land development in shoreland areas through the Shoreland Zoning Program, providing towns with this authority under Wisconsin's general subdivision and platting law (Chapter 236) would be in direct conflict with legislative intent.

C. The Supporting Cases Cited By The Town Are General Zoning Cases.

In support of its claim that towns have the authority to regulate lot sizes in shoreland areas under its subdivision authority, the Town cites only cases that involve the relationship between the general zoning authority and subdivision authority of municipalities. *See e.g., Town of Sun Prairie v. Storms*, 110 Wis.2d 58, 327 N.W.2d 642 (1983)(a land division of 2+ acres in the Town of Sun Prairie); *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965)(7.85 acres in the Village of Menomonee Falls); *Manthe v. Town Bd. of Windsor*, 204 Wis.2d 546, 555

N.W.2d 167 (Ct. App. 1996)(involving approximately sixty-six acres of farmland); *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis.2d 488, 809 N.W.2d 362 (involving the town’s attempt to regulate nonmetallic mining activities located in a non-shoreland area); *State ex. rel. Albert Realty Co. v. Village Bd. of Brown Deer*, 7 Wis.2d 93, 95 N.W.2d 808 (1959)(140 acres of non-shoreland land in the Village of Brown Deer).

None of these cases support the Town’s claim that towns should be able to establish their own lot size requirements in shoreland areas.

II. WIS. STAT. § 59.692(3) DOES NOT AUTHORIZE TOWNS TO ENACT MORE RESTRICTIVE LOT SIZE STANDARDS IN SHORELAND AREAS THAN THOSE ESTABLISHED UNDER NR 115.

The Town maintains that Wis. Stat. § 59.692(3) “expressly and unambiguously preserves town authority to enact minimum lake frontage standards that are more restrictive than shoreland zoning standards established under Wis. Admin. Code Ch. NR 115.05.” *See* Resp. Br. at 5.

Wis. Stat. § 59.692(3) provides that “[a]ll powers granted to a county under s. 236.45 may be exercised by it with respect to shorelands, but the county must have or provide a planning agency . . .” Wis. Stat. §59.692(3). Accordingly, Wis. Stat. § 59.692(3) does not say anything about towns, minimum lake frontage standards, or preserving the ability to

adopt more restrictive standards than those found in NR 115. The language in the statute expressly applies only to counties and does not authorize lake frontage standards that are mre restrictive than the standards in NR 115.

The Town’s assertion that the word “county” in Wis. Stat. § 59.692(3) also means “towns” is in direct conflict with the rules of statutory construction and declarations by Wisconsin courts regarding the lack of authority of towns to engage in shoreland zoning. *See* Rep. Br. at 6-10; *see also, State ex. rel. Kalal v. Circuit Court of Dane County*, 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110 (“[s]tatutory language is given its common, ordinary, and accepted meaning. . .”); *Hegwood*, 351 Wis.2d at ¶¶15-16 (the Wisconsin Legislature “deliberately exclude[d]” towns from enacting shoreland zoning ordinances). Moreover, any lot size standards that are more restrictive than the standards in NR 115 would be contrary to the clear language expressed in Wis. Stat. § 59.692(1d)(a). *See* Wis. Stat. § 59.692(1d)(a) (“[A county shoreland zoning ordinance] may not regulate a matter more restrictively than the matter is regulated by [NR 115].”)

III. AUTHORIZING COUNTIES AND TOWNS TO
REGULATE LOT SIZES IN SHORELAND AREAS
UNDER CHAPTER 236 WOULD BE IN DIRECT
CONFLICT WITH THE PURPOSE AND

REQUIREMENTS OF THE STATE'S SHORELAND ZONING PROGRAM.

The Town maintains that Wis. Stat. § 236.45 provides counties and towns with plenary power to regulate lot sizes in shoreland areas. *See* Resp. Br. at 8-10. While Chapter 236 provides municipalities broad authority to regulate land divisions, such authority does not override the lot size standards within the state's Shoreland Zoning Program.

In harmonizing conflicting statutes, courts will attempt to interpret the statutes in a manner that gives effect to the purpose of each statute and to avoid constructions that lead to absurd results. *See City of Milwaukee v. Kilgore*, 193 Wis.2d 168, 184, 532 N.W.2d 690 (1995); *State v. Gould*, 56 Wis.2d 808, 812, 202 N.W.2d 903 (1973). Moreover, when comparing a general statute and a specific statute, the specific statute takes precedence. *Kilgore*, 193 Wis.2d. at 185.

The purpose of subdivision regulation is broadly stated in Wis. Stat. §§ 236.01 and 236.45(1) and includes “to further the orderly layout and use of land.” Wis. Stat. §§ 236.01 and 236.45(1). To achieve this purpose, Chapter 236 establishes two sets of minimum lot size requirements based upon the population of the county. *See* Wis. Stat. § 236.16. For counties

with a population of 40,000 or more, each lot in a residential area must have a minimum average width of 50 feet and minimum area of 6,000 square feet. *Id.* In counties with a population less than 40,000, each lot in a residential area must have a minimum average width of 60 feet and a minimum area of 7,200 square feet. *Id.* For lots that are served by public sewer, towns and other municipalities are authorized to create even smaller lot size requirements. *Id.* The lot-size requirements established in Chapter 236 apply uniformly in all areas of the state, including both shoreland and non-shoreland areas.

To protect the public's interest in navigable waters and the other objectives found in Wis. Stat. § 281.31, the Shoreland Zoning Program requires lot sizes that are much larger than those found in Chapter 236. In areas that are unsewered, lot sizes must have an average width of 100 feet and minimum area of 20,000 square feet. Wis. Admin. Code § NR 115.05(1)(a)(2). For shoreland lots served by public sewer, the average lot width must be 65 feet and the minimum area must be 10,000 square feet. Wis. Admin. Code § NR 115.05(1)(a)(1). Lots without sewer are required to be larger to help protect water quality from the runoff created from private onsite septic systems. Again, counties are not allowed to adopt

larger lot size requirement in shoreland areas than those found in NR 115. Wis. Stat. § 59.692(1d)(a).

If counties and towns were authorized to establish lot size requirements in shoreland areas under Chapter 236, the state's Shoreland Zoning Program would be rendered effectively meaningless. Counties and towns could allow higher density development in unincorporated areas on lot sizes much smaller than those allowed under NR 115.05(1)(a). In shoreland areas with public sewer, counties and towns would have no lot size requirements under Chapter 236.

CONCLUSION

Wisconsin's Shoreland Zoning Program is a comprehensive and targeted regulatory framework created specifically to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." *Just*, 56 Wis.2d at 10. The program has been in existence for over 50 years and was developed by specialists from the DNR, University of Wisconsin and other federal and state agencies, with input from experts from numerous fields including hydrologists, sanitary engineers, soil scientists, and lawyers. *See* Kusler, Jon A., *Water Quality Protection for Inland Lakes in*

Wisconsin: A Comprehensive Approach to Water Pollution, 1970 Wis. Law Rev. 35, 62-63.

With this in mind, it is inconceivable that the Wisconsin Legislature would create a separate and independent regulatory scheme under Chapter 236 that provides counties and towns with the option to create inconsistent lot size requirements in shoreland areas, as the Town maintains. While such an interpretation of the Wisconsin Statutes may benefit the Town of Newbold in trying to prevent the land division in this case, it would also open the door for counties and towns to circumvent the requirements in the Shoreland Zoning Program, which is one of the state's most important tools to protect Wisconsin's waterways.

For the reasons stated above, we respectfully request that this Court reverse the court of appeals' decision and prohibit towns and counties from establishing lot size requirements in shoreland areas under Chapter 236.

Dated this 8th day of September, 2020.

Respectfully submitted,

By: _____
Thomas D. Larson (#10206187)
4801 Forest Run Road, Suite 201
Madison, WI 53704
608-241-2047
Fax: 608-241-2911

*Attorney for the Wisconsin REALTORS®
Association, Inc. and Wisconsin Builders
Association, Inc..*

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2974 words.

Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 7th day of September, 2020.

Thomas D. Larson
E-mail: tlarson@wra.org

CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this *Amicus Curiae* Brief to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

Mary Margaret Hogan
P.O. Box 1008
Rhineland, WI 54501

Sam E. Kaufman
P.O. Box 430
Waupun, WI 53963-0430

Timothy B. Melms
3622 Hwy 47N
P.O. Box 1008
Rhineland, WI 54501-1008

Joseph M. Ruth
W7686 County Rd. MMM
Shawano, WI 54166

Christa Westerberg
122 W. Washington Ave., Ste. 900
Madison, WI 53704

Daniel L. Vande Zande
P.O. Box 430
Waupun, WI 53963-0430

Dated this 7th day of September, 2020.

Thomas D. Larson

Attorney for the Wisconsin REALTORS®
Association and Wisconsin Builders
Association