Appeal No. 2006AP2761 **Cir. Ct. No. 2006CV96**

WISCONSIN COURT OF APPEALS
DISTRICT IV

WISCONSIN REALTORS ASSOCIATION, INC. AND WISCONSIN BUILDERS ASSOCIATION,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF WEST POINT,

DEFENDANT-RESPONDENT.

FILED

JUL 05, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Bridge, JJ.

This case addresses whether towns in Wisconsin have the authority to, in effect, impose moratoriums on new development of land while updating land use plans. It is a question of significant statewide interest that is likely to recur in the next few years because WIS. STAT. § 66.1001 (2005-06)[1]—commonly known as the "smart growth" statute—requires Wisconsin municipalities to develop updated comprehensive land use plans by 2010.

The Wisconsin Realtors Association and Wisconsin Builders Association (collectively, the realtors) appeal a declaratory judgment holding that

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the Town of West Point had the authority under WIS. STAT. § 236.45(2)(a) to enact a local ordinance imposing a temporary moratorium on any applications for land division or subdivision while the Town was in the process of updating its comprehensive land use plan. The statutory authority of a Wisconsin town to impose a land division moratorium poses an issue of first impression.

The relevant facts are undisputed. After WIS. STAT. § 66.1001 was enacted, the Town of West Point, in conjunction with Columbia County, began updating its comprehensive land use plan. In September 2005, the Town adopted Ordinance 9-20-05A, imposing an eighteen-month moratorium "on the acceptance, review, and approval by Town officials, staff, or consultants of any applications for a land division or subdivision."[2] The expressed purpose of the ordinance was to "eliminate development pressures within the Town which would otherwise increase during the planning process because landowners and developers might seek to rush their projects in order to gain approval before the planning process can be further completed by the Town."

The realtors filed this declaratory judgment action seeking a declaration that the Town did not have the authority to enact Ordinance 9-20-05A. The circuit court granted summary judgment in the Town's favor, declared the ordinance valid, and the realtors appeal. The Wisconsin Chapter of the American Planning Association, the Wisconsin Towns Association, and the League of

[2] It is unclear from the record and the parties' briefs whether the moratorium has been extended so as to still be in effect. The Town has not argued that the appeal is moot, however, and we believe the issue is sufficiently important and capable of evading review that it warrants review even if a decision would have no practical effect on the present controversy. The Town has also waived a standing argument it raised below because it would like the issue to be addressed on its merits.

Wisconsin Municipalities have all filed amicus curiae briefs in support of the Town's purported authority to place a moratorium on land division.

The realtors, citing ***Town of Vernon v. Waukesha County***, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981), and ***Town of Beloit v. County of Rock***, 2001 WI App 256, ¶13, 249 Wis. 2d 88, 637 N.W.2d 71, *aff'd*, 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344, first correctly point out that municipalities in Wisconsin have no inherent powers, only the authority expressly conferred upon them by statute or necessarily implied from powers given. The realtors next point out that, although WIS. STAT. ch. 60 authorizes towns to enact zoning ordinances in the absence of a county zoning ordinance, the Town does not have such statutory zoning authority here because Columbia County has enacted its own zoning ordinance. Nor, the realtors contend, did the Town comply with conditions for exercising delegated zoning authority set forth in WIS. STAT. § 60.62 by obtaining the approval of Columbia County and the town citizens.

The Town does not dispute any of these assertions by the realtors. The Town contends that it is not asserting inherent authority or any zoning authority delegated from the county, but rather statutory authority under WIS. STAT. § 236.45 and/or the broad grant of general police powers afforded under WIS. STAT. § 61.34 to towns that have adopted village board powers under WIS. STAT. §§ 60.10(2)(c) and 60.22(3), as the Town has done. WISCONSIN STAT. § 236.45(2)(a) provides that, to accomplish the purposes listed in subsec. (1) of the statute, any town that has established a planning agency "may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter" and "may prohibit the division of land in areas where such prohibition will carry out the purposes of this section," subject to all other provisions of the chapter. WISCONSIN STAT. § 61.34(1) provides village

boards, among other things, the "power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public … by … regulation … and other necessary or convenient means."

The Town contends that the ability to adopt a temporary moratorium on subdivisions is an "ordinance governing the subdivision or other division of land," rather than a zoning ordinance, and that it furthers several of the purposes enumerated in WIS. STAT. § 236.45(1), including furtherance of the orderly layout and use of land, prevention of overcrowding on the land, and avoidance of undue population concentrations. The Town analogizes the ordinance at issue here to an ordinance regulating the minimum sizes of lots which was found to be valid under § 236.45. *See* ***Town of Sun Prairie v. Storms***, 110 Wis. 2d 58, 327 N.W.2d 642 (1983). There, the court reasoned that "[l]ot size regulation clearly falls within the objectives of sub. (1) and thus is authorized by the statute even though not specifically mentioned in sub. (2)(a)." ***Id.*** at 67.

The realtors counter that, in addition to the fact that WIS. STAT. § 236.45 does not contain an express grant of authority to impose a blanket moratorium, the Town ordinance at issue here is not limited to merely some "areas" of the town under § 236.45(2)(a). They also contend that it fails to comply with other provisions of WIS. STAT. ch. 236 relating to the submission and review of plats. For instance, the realtors point out that subsecs. (2), (3), and (4) of WIS. STAT. § 236.12 require a town to accept the filing of a plat, review it, and either approve, conditionally approve, or object to a proposed plat, and do not authorize refusing to act upon it. Thus, the realtors argue, the provisions of the moratorium ordinance are actually in conflict with ch. 236, and do not "make applicable all of the provisions" of the chapter.

The realtors next point out that WIS. STAT. § 62.23(7)(da) provides cities with interim zoning power, which allows the cities to preserve the status quo while formulating a comprehensive plan. The realtors argue that this power would encompass moratoriums such as the one at issue here and that, if the legislature had intended towns to have the same authority as cities, it could have given it to them. Moreover, the realtors contend that if cities could already enact moratoriums on subdivisions under WIS. STAT. § 236.45, then § 62.23(7)(da) would be rendered superfluous.

The question whether towns have the authority to enact ordinances imposing moratoriums on land development is plainly a matter of statewide importance, especially in light of the "smart growth" statute. Accordingly, we certify this question to the Wisconsin Supreme Court.