IN THE 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.

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

Appeal from the Circuit Court of Columbia County
The Honorable Andrew P. Bissonnette Presiding
Circuit Court Case No. 06-CV-096

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

(1) Does the Town of West Point have the legal authority to enact a town-wide moratorium on the acceptance, review and approval of applications for land division or subdivision?

Trial court answered: Yes.

Court of Appeals answered: Certified issue to this Court.

STATEMENT OF THE CASE

A. Factual Background Relating To The Town's Moratorium.

On September 20, 2005, by Ordinance No. 9-20-05A ("the Ordinance"), the Town of West Point ("Town") proclaimed an eighteen-month ban on "the acceptance, review and approval by Town officials, staff, or consultants of any applications for a land division or subdivision . . ." in the Town. (R. 12 at ¶ 14 and Exh. A; R. 16 at ¶ 10.) While the Ordinance provided that the moratorium was to expire eighteen months later on March 20, 2007, the Town recently adopted another ordinance, Ordinance No. 3-08-07, to extend the moratorium an additional six months. (App. 25; see also www.townofwestpoint.us) Thus, the Town's moratorium will have been in effect for two years and is set to expire on September 20, 2007, absent recent action by the Town.

The expressed intent of the Ordinance was to halt "development pressures" until the Town Board implemented an updated comprehensive plan pursuant to Wis. Stat. § 66.1001. (R. 12 at ¶ 15 and Exh. A.) The Town of West Point has not

accepted any application for a land division or subdivision on or after adoption of the Ordinance. (Id. at ¶ 14 (2nd); R. 16 at ¶ 14(2nd).)

Columbia County has enacted a County zoning ordinance (Title 16 of the Columbia County Code of Ordinances) pursuant to Section 59.69 of the Wisconsin Statutes. (R. 6, Lubinsky Aff. at Exh. A, p. 3.) The Town operates under Columbia County's zoning ordinance. (Id. at p. 4.) The Town adopted Columbia County's Zoning Ordinance on June 7, 1962. See Columbia County Ordinance 16-1-24(d)(18).

The Town has not received approval by the Town meeting or by a referendum vote of the electors of the Town to enact a zoning ordinance. (R. 6 at Exh. A, p. 5.) Columbia County has not approved any zoning ordinance or amendment of a zoning ordinance of the Town. (Id.)

B. Procedural Background.

On October 13, 2005, Plaintiffs filed a Notice of Claim with the Town; the Notice of Claim was deemed disallowed by inaction by the Town. (R. 12 at ¶ 13; R. 16 at ¶ 13(1st).) Plaintiffs filed suit and soon thereafter sought summary judgment seeking a declaration that the Town did not have the legal authority to enact the moratorium and seeking an injunction to prohibit enforcement of the moratorium. (See R. 1, 4.)

The parties completed briefing on the Plaintiffs' summary judgment motion. One day after Plaintiffs filed their reply brief, the trial court issued its Memorandum Decision and Order dated September 13, 2006. (R. 27.) The trial

court found that the Town had the legal authority to enact the moratorium under Wis. Stat. § 236.45(2)(a). (Id.) The trial court did not address any of the arguments raised in Plaintiffs' reply brief filed one day earlier relating to the inapplicability of Wis. Stat. § 236.45(2)(a) to the Town's moratorium. (See R. 26, 27.) The trial court granted judgment in favor of the Town. (Id.) Plaintiffs-Appellants' timely appealed the trial court's decision to the Court of Appeals. (R. 31.) The Court of Appeals certified this case to this Court. THis Court accepted the certification.

ARGUMENT

I. THE TOWN DOES NOT HAVE THE LEGAL AUTHORITY TO ENACT A MORATORIUM ON LAND DIVISION.

Municipalities in Wisconsin have no inherent powers. Northwest Prop. v. Outagamie County, 223 Wis. 2d 483, 487-88, 589 N.W.2d 683 (Ct. App. 1998). Rather, they are creatures of the state and their powers are limited by statute. Town of Beloit v. County of Rock, 2001 WI App 256, ¶ 12, 249 Wis. 2d 88, 96, 637 N.W.2d 71; Wis. Stat. § 60.01 ("A town is a body corporate and politic, with those powers granted by law.").

Wisconsin courts have uniformly held that a municipality's authority must be derived by statute. For example, in Town of Vernon v. Waukesha County, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981), the court held that a county only has powers that "are expressly conferred upon it or necessarily implied from powers given . . . ." Similarly, in Laskaris v. City of WI Dells, Inc.,

131 Wis. 2d 525, 531, 389 N.W.2d 67 (Ct. App. 1986), the court held that "a statutory grant of powers to a municipality limits it to the exercise of those powers" and that "[a] municipal ordinance which fails to comply with the empowering statute is invalid." In Schroeder v. City of Clintonville, 90 Wis. 2d 457, 464-65, 280 N.W.2d 166 (1979), the court declared that "[c]ities are creatures of the legislature and have only such powers as are expressly granted to them and such others as are necessary to implement the powers expressly granted." Finally, in Town of Beloit, 2001 WI App 256 at ¶ 13, 249 Wis. 2d at 96, the court held that towns have only the power expressly grated by statute or power implied by the express power granted by statute.

These authorities make clear that towns have only those powers expressly delegated to them by statute and such other powers as are necessary to implement the powers expressly granted. Id.

Plaintiffs challenge the Town's legal authority to enact a moratorium on land division in the Town. To be lawful, the Town must have either express statutory authority to suspend land division in the Town, or such authority must be reasonably necessary to implement a power expressly granted. See id. The Town had neither express nor implied authority to enact the Ordinance.

A. The Town Does Not Have The Legal Authority To Enact A Moratorium Under Chapter 60, Wis. Stats.

A town's land use and planning powers are set forth in secs. 60.61 to 60.66, Stats. Nowhere do these statutes grant the Town authority to enact a moratorium

on land division. While the Town concedes it does not have authority to enact the moratorium under Chapter 60, Wis. Stats., the authority granted under Chapter 60, and specifically the authority granted to cities to enact moratoria, establishes that the Town's moratorium is unlawful.

While section 60.61(2) authorizes a town to enact a zoning ordinance, that statute expressly limits its applicability to towns "located in a county which has not enacted a county zoning ordinance." Wis. Stat. § 60.61(2) (emphasis added). Columbia County has enacted a county zoning ordinance, as the Town has conceded. (R. 6; see also Title 16, Columbia County Code of Ordinances.) The Town operates under Columbia County's zoning ordinance. The Town adopted Columbia County's zoning ordinance in 1962. (R. 6; see also Section 16-1-24(d)(18), Columbia County Code of Ordinances.)

Accordingly, because Columbia County has enacted a zoning ordinance, the Town does not have the powers enumerated in sec. 60.61(2), Stats., such as the power to enact a zoning ordinance. Therefore, the Town cannot rely on any alleged zoning power to support its decision to enact a moratorium.

Similarly, the Town of West Point does not have the authority to enact a moratorium on land division by means of the authority set forth in sec. 60.62, Stats. That statute grants a town exercising village powers zoning authority if certain conditions are satisfied. The statute reads in relevant part:

60.62 Zoning Authority if exercising village powers.

(1) Subject to subs. (2), (3) and (4), if a town board has been granted authority to exercise village powers under s. 60.10(2)(c), the board may adopt zoning ordinances under s. 61.35.

(2) If the county in which the town is located has enacted a zoning ordinance under s. 59.69, the exercise of the authority under sub. (1) is subject to approval by the town meeting or by a referendum vote of the electors of the town held at the time of any regular or special election. The question for the referendum vote shall be filed as provided in s. 8.37.

(3) In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board.

Wis. Stat. § 60.62.

Section 60.62(3), Stats., prevents a town with village powers from enacting a zoning ordinance in counties having a zoning ordinance unless the town's ordinance is approved by the county. Marshall & Ilsely Bank v. Town of Somers, 141 Wis. 2d 271, 282, 414 N.W.2d 824 (1987). Moreover, sec. 60.62(2), Stats., requires that any town zoning ordinance be approved by the town meeting or by referendum vote. None of these events have occurred in this matter.

While the Town has been granted authority to exercise Village Powers, it does not have the authority to enact a zoning ordinance under sec. 60.62, Stats., because it has not complied with the conditions precedent set forth in sec. 60.62, Stats. Columbia County has a county zoning ordinance, and therefore any zoning ordinance adopted by the Town would require approval by both Columbia County and the town citizens through a town meeting or by referendum vote. The Town has conceded that it did not receive approval by Columbia County to enact the Ordinance. (R. 6.) The Town has also conceded that it did not receive approval

by the town citizens through the Town meeting or by referendum vote to enact the Ordinance. (Id.) Because the Town of West Point did not comply with either of the conditions precedent to the enactment of a zoning ordinance under section 60.62, that statute provides no authority to the Town to enact an ordinance under the guise of zoning that imposes a moratorium.

In short, neither section 60.61(2) nor section 60.62 provides express power to impose a moratorium on development. Nor is the power to enact a moratorium on development "necessary to implement the powers expressly granted" by these statutes. These statues are the town's sole authority to regulate land use and planning, and that power simply is not granted therein.

If the Wisconsin Legislature had intended to grant towns legal authority to enact a moratorium on development, it would have done so by statute. State law expressly grants to cities "interim zoning power," which is one form of moratorium authority. Wis. Stat. § 62.23(7)(da) (2003); Lake City Corp. v. City of Mequon, 199 Wis. 2d 353, 364, 544 N.W.2d 600 (Ct. App. 1996). Section 62.23(7)(da) was created by the Laws of 1957, Chapter 65. See City of New Berlin v. Stein, 58 Wis. 2d 417, 420, 206 N.W.2d 207, 208-09 (1973). The statute provides as follows:

> (da) *Interim zoning.* The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment.

Section 62.23(7)(da) allows cities which have not adopted a zoning ordinance the power to enact an interim zoning ordinance for no longer than two years to preserve the status quo while formulating a comprehensive zoning plan. Wis. Stat. § 62.23(7)(da). The purpose of the statute was "to preserve existing uses, that is, to freeze them so the status quo remained pending the preparation and adoption of the comprehensive zoning plan." City of New Berlin, 58 Wis. 2d at 420-21, 206 N.W.2d at 209.

The statute applies to cities. Towns are not included. Had the legislature intended towns to possess the same authority as cities, it could have done so. Its failure to include within a town's power the authority to enact an interim zoning ordinance to preserve the status quo signifies the legislature's intent to preclude towns from having this power. The absence of any statutory authority for towns to enact a moratorium on development renders the Town's Ordinance invalid.

B. The Town Does Not Have The Legal Authority To Enact A Moratorium Under Chapter 236, Wis. Stats.

Section 236.45 relates to platting of land; it is contained in Chapter 236 which is entitled "Platting Lands and Recording and Vacating Plats." The statute states in relevant part:

> **(1)** Declaration of legislative intent. The purpose of this section is 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). Nowhere does section 236.45(1) contain an express intent to grant authority to prohibit the acceptance, review or approval of a land division by a blanket moratorium.

Subsection (2) of the statute goes on to provide as follows:

> **(2)** Delegation of power. (a) To accomplish the purposes listed in sub. (1), any municipality, town or county which 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. Such 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 may prohibit the division of land **in areas** where such prohibition will carry out the purposes of this section. Such ordinances shall make applicable to such divisions all of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements for such division. The governing body of the municipality, town, or county shall require that a plat of such division be recorded with the register of deeds and kept in a book provided for that purpose. "COUNTY PLAT," "MUNICIPAL PLAT," or "TOWN PLAT" shall be printed on the map in prominent letters with the location of the land by government lot, recorded private claim, quarter-quarter section, section, township, range, and county noted.
> . . .

Wis. Stat. § 236.45(2). (Emphases added.) Under this subsection of the statute, a municipality may prohibit land division "in areas" where prohibiting division is consistent with the purposes of the statute. However, under any such prohibition on land division, the Ordinance "shall make applicable all of the provisions of [Chapter 236.]" (Emphasis added.) In this case, the Town's Ordinance does not make applicable all of the provisions of Chapter 236. Further, the Ordinance does not apply to "areas" in the Town, but to the entire Township.

The relevant portion of sec. 236.45(2), Stats., was created in 1955 when the Legislature repealed and recreated Chapter 236 of the statutes. 1955 Wis. Act. Ch. 570. Effective July 1, 1956, the statute provided in relevant part:

> **(2)** Delegation of power. (a) To accomplish the purposes listed in sub. (1), any municipality, town or county which 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. Such 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 may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. Such ordinances shall make applicable to such divisions <u>any</u> of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements for such division.

(Emphasis added.) The only part of this statute that changed from the 1956 version to its current form is substitution of the term "all" for "any."

As set forth above, the grant of interim zoning authority to cities under sec. 62.23(7)(da), Stats., was given in 1957, which was <u>after</u> the Wisconsin Legislature had already authorized prohibitions on land divisions in "areas" of a city or town under Chapter 236.

1. <u>The Town's ordinance does not make applicable the provisions of chapter 236 and cannot be reconciled with the statutory procedures imposed by chapter 236</u>.

Because sec. 236.45(2), Stats., requires a town ordinance to "make applicable all of the provisions of [Chapter 236]," then we must examine the relevant provisions of that Chapter to determined whether the Ordinance at issue in this case is authorized under sec. 236.45, Stats., as argued by the Town.

Chapter 236 contains *mandatory* requirements for a municipality to act upon the submission of a plat. Section 236.03(1), Stats., provides that any land

division resulting in a "subdivision" "shall" be surveyed and a plat approved and recorded under Chapter 236. A "subdivision" is defined in Chapter 236 as "a division of a lot, parcel or tract of land by the owner thereof . . " where the act of division creates five or more parcels of at least 1.5 acres each. Wis. Stat. § 236.02(12). A "plat" is defined as "a map of a subdivision." Wis. Stat. § 236.02(8). Thus, where a land division results in the creation of a subdivision, a plat "shall" be submitted and approved by the approving municipality. Wis. Stat. § 236.03(1).

Section 236.12 imposes requirements after the submission of a plat to a municipality. Within two (2) days of submission of the plat, the clerk "shall" send a legible copy of the plat to several agencies. Wis. Stat. § 236.12(2). Within twenty (20) days of receiving the plat, those agencies to which the plat was submitted "shall" raise any objections to the plat; "If the objecting agency fails to act within the 20-day limit it shall be deemed to have no objection to the plat." Wis. Stat. § 236.12(3). At that point, the plat is submitted for approval to the entities having plat approval authority under sec. 236.10, Stats.

Regardless of who must approve the plat before it is recorded, sec. 236.13, Stats., sets forth the standards for approval of preliminary and final plats. The relevant portion of the statute reads as follows:

> **236.13 Basis for approval.** (1) Approval of the preliminary or final plat shall be conditioned upon compliance with:
>
> (a) The provisions of this chapter;
> (b) Any municipal, town or county ordinance;
> (c) A comprehensive plan under s. 66.1001 or, if the municipality, town, or county does not have a comprehensive plan, either of the following:
>
> 1. With respect to a municipality or town, a master plan under s. 62.23.
> 2. With respect to a county, a development plan under s. 59.69.
>
> * * * *
>
> (3) No approving authority or agency having the power to approve or object to plats shall condition approval upon compliance with, or base an objection upon, any requirement other than those specified in this section.

Wis. Stat. § 236.12. Under this statute, an approving authority has *no discretion* to approve or reject a proposed plat unless the plat conflicts with Chapter 236, a prior ordinance, master plan, official map, or rule. State ex rel. Columbia Corp. v. Town Board, 92 Wis. 2d 767, 779, 286 Wis. 2d 130 (Ct. App. 1979). If a proposed plat satisfies all the conditions for approval under section 236.13 and does not so conflict, the approving authority *must* approve the plat. Wis. Stat §§ 236.13(1) and (3).

The Town argued, and the trial court agreed, that its moratorium is a subdivision regulation because sec. 236.45(2), Stats., authorizes the Town to enact an ordinance "prohibit[ing] the division of land in areas where such prohibition will carry out the purposes of this section." The Town's argument ignores the very next section of the statute, which requires that any such ordinance "shall

make applicable to such divisions all of the provisions of this chapter." (Emphasis added.) The trial court did not address this issue in its decision.

Nowhere does the Town's ordinance make applicable the provisions of Chapter 236. In fact, the Ordinance is directly contrary to Chapter 236's statutory scheme of mandatory acceptance and review of plats. Under the Ordinance, the Town is prohibited from accepting and reviewing a plat. Under the Ordinance, the Town does not specify the reasons set forth in sec. 236.13, Stats., for objections. In contrast, under Chapter 236, the Town *shall* accept the filing of a plat, *shall* review it and *shall* either approve, conditionally approve or object to the plat. See Wis. Stat. § 236.13(2),(3) and (4). The Town may not approve or object to the plat based on "any requirement other than those specified in [section 236.13]." See Wis. Stat. § 236.13(3).

The prohibitions in the Ordinance cannot be reconciled with the provisions in Chapter 236. Nothing is Chapter 236 prevents the submission of a plat. Nothing in Chapter 236 allows a municipality to do nothing if a plat is submitted. To the contrary, the statutes set in motion a procedure mandating a process for the submission and review of plats that are filed. Contrary to the Ordinance, a municipality must react to a plat submission; they may not do nothing or reject the plat before forwarding the submission consistent with sec. 236.12, Stats.

The very cases cited by the Town to the trial court make it clear that an Ordinance enacted pursuant to sec. 236.45, Stats., cannot be contrary to the

procedures outlined in Chapter 236. In Town of Sun Prairie v. Storms, 110 Wis. 2d 58, 327 N.W.2d 642 (1983), the Wisconsin Supreme Court upheld a town's minimum lot size ordinance under sec. 236.45, Stats. However, the court made it clear that any ordinance adopted under sec. 236.45, Stats., must not "be contrary, expressly or by implication, to the standards set up by the legislature." Id. at 64. An ordinance setting a minimum lot size is consistent with those standards, as the municipality still accepts and reviews the plat submission, forwards the plat to the agencies outlined in the statute, and reviews the plat submission to ensure, among other things, it is consistent with the minimum lot size imposed in the ordinance.

In the case of a blanket prohibition on acceptance, review of approval of any land division in the entire town, the statutory procedures are not and cannot be followed. The plat is not accepted. The plat is not forwarded to the agencies enumerated in the statute. And the plat is not reviewed under the approval criteria enumerated in the statute. Unlike a minimum lot size ordinance, a town-wide moratorium on acceptance, review and approval is contrary to the express and implied standards imposed under Chapter 236.

The Town has asserted that if Plaintiffs' arguments are true, then any prohibition on land division enacted by local ordinance is therefore illegal. Not so. If an ordinance enacted in compliance with section 236.45 limits land division in an environmental corridor, for example, the ordinance would be valid under

section 236.45. Nothing in this hypothetical ordinance would conflict with the clerk accepting an application for land division in the environmental corridor, as required by section 236.12(2). Nothing in this hypothetical ordinance would conflict with the requirement that the clerk submit the plat to those agencies with plat review authority, as required by section 236.12(3). Contrary to the Ordinance at issue, this hypothetical ordinance complies, rather than conflicts, with the provisions of Chapter 236. Assuming the hypothetical ordinance complies with these provisions, the ordinance would be a proper basis for denial of the proposed plat under section 236.13 because the plat is contrary to a town ordinance, namely the prohibition on land division in the environmental corridor.

Unlike this hypothetical ordinance, the Town's Ordinance is directly contrary to Chapter 236's statutory scheme of mandatory acceptance and review of plats. The Ordinance prohibits the Town from accepting and reviewing a plat. These are mandatory procedures that are in effect upon the submission of a plat. In the case of the Town's Ordinance, these steps are not followed. Therefore, the Ordinance does not comply with section 236.45(2) because it does not "make applicable to such divisions the provisions of [Chapter 236]."

The Town's Ordinance is contrary to Chapter 236. At a minimum, the Ordinance does not make the provisions of Chapter 236 applicable to its Ordinance. Accordingly, sec. 236.45, Stats., does not give the Town the authority it needs to enact the Ordinance.

2. The Town's Ordinance Applies To More Than Just "Areas" Of The Town, And Therefore Is Not Valid Under Section 236.45(2), Stats.

The Town argues that its Ordinance is authorized under sec. 236.45(2), Stats., because it prohibits land division "in areas where such provisions will carry out the purposes of [section 236.45.]" The Town argues that the term "areas" can constitute the entire Town. The Town's construction of the statute is inconsistent with basic principles of statutory construction.

Section 236.45(2) reads: "Such ordinances may . . . prohibit the division of land ~~in areas~~ where such prohibition will carry out the purposes of this section." (Strike-out added.) If the phrase "in areas" includes a town-wide ban on land division, then there would be no reason for use of the phrase "in areas," as the remainder of the statute would authorize a prohibition on land division in the entire municipality. Under the Town's construction, the phrase "in areas" is rendered superfluous. Black-letter law forbids any interpretation of a statute which renders any language in the statute meaningless. Blazekovic v. City of Milwaukee, 2000 WI 41, ¶ 30, 234 Wis. 2d 587, 610 N.W.2d 467 (2000) ("A fundamental rule of statutory construction requires that effect be given, if possible, to every word, clause, and sentence in a statute, and that a construction resulting in any portion of a statute being superfluous should be avoided whenever possible.") (citing Lake City Corp., 207 Wis. 2d at 162, 558 N.W.2d 100). The only way to

give effect to every word in sec. 236.45(2), Stats., is to construe the phrase "in areas" to mean portions of the municipality, not the entire township.

The Town's construction of the statute also renders meaningless sec. 62.23(7)(da), Stats, which grants certain municipal entities "interim zoning power," which is the basis for moratorium authority in Wisconsin. Wis. Stat. § 62.23(7)(da). This statute allows cities that have not adopted a zoning ordinance the power to enact an interim zoning ordinance for no longer than two years *to preserve the status quo while formulating a comprehensive zoning plan* – which is the exact purpose articulated by the Town in this case for enactment of the Ordinance. See Wis. Stat. § 62.23(7)(da). The Town's Ordinance purports to do this very thing.

If, as the Town asserts, any municipality could prohibit the division of land town-wide pursuant to sec. 236.45(2), Stats., rather than just in certain "areas" of the town, such an interpretation renders meaningless the legislature's authorization for cities (and towns with zoning authority) to enact interim zoning authority only in the circumstances authorized in sec. 62.23(7)(da), Stats. There would have been no need for the legislature to enact sec. 62.23(7)(da), Stats., in 1957, because the statutory source upon which the Town's relies - sec. 236.45(2) - existed prior to the enactment of sec. 62.23(7)(da). If cities (and towns with zoning authority) could prohibit development in the entire city or town so long as the purpose of doing so is consistent with sec. 236.45(1), Stats., then there would be no need for

cities or towns to exercise the authority authorized in sec. 62.23(7)(da), Stats. There also would have been no need for the Wisconsin Legislature to enact sec. 62.23(7)(da), Stats. The city or town could always act under sec. 236.45, Stats., under the Town's theory. The Town's interpretation renders meaningless the grant of authority contained in sec. 62.23(7)(da), Stats.

It is certainly true that the purposes outlined in sec. 236.45(1), Stats., overlap with the purposes of zoning authority under sec. 62.23(7)(c), Stats. For example, among the purposes enumerated in both statutes is to prevent the overcrowding of land and to avoid the undue concentration of population. See Wis. Stat. §§ 236.45(1) and 62.23(7)(c). In fact, *both* of these statutes are to be liberally construed. Wis. Stat. §§ 236.45(2)(b) and 62.23(7)(a). However, zoning and subdivision plat approval are different types of land use controls which do not serve identical purposes. Wood v. City of Madison, 2003 WI 24 at ¶ 33, 260 Wis. 2d 71, 659 N.W.2d 31. Thus, while the purposes of zoning and subdivision plat approval overlap, they are not identical.

If there was any doubt as to whether a blanket moratorium is a zoning or platting power, or both, the Wisconsin Legislature has answered that question through sec. 62.23(7)(da), Stats., and use of the phrase "in areas" in sec. 236.45, Stats. To suggest that the term "areas" applies to the entire Town is to ignore the very zoning statutes in section IA, infra, that authorize cities and towns with zoning authority to enact moratorium in certain instances.

The Town's interpretation is also inconsistent with Chapter 236 as a whole. As set forth above, Chapter 236 is entitled "Platting Lands and Recording and Vacating Plats." Section 236.45 is included within Subchapter IX entitled "Subdivision Regulation and Regional Plans." Section 236.45 is entitled "Local Subdivision Regulation." In conjunction with the definitions of a "plat" and "subdivision" as set forth in secs. 236.02(8) and (12), Stats., the entire Chapter applies to plats and subdivisions, "areas" that are clearly smaller than the entire Town.

The authority given to towns to prohibit land division under sec. 236.45(2), Stats., applies to "areas" of the town where despite the zoning regulation the town has an interest in prohibiting development. For example, there might exist an environmental corridor within a residentially zoned subdivision where for purposes of land preservation the town decides to prohibit land development in that corridor. As another example, the town could enact an ordinance prohibiting land division in an otherwise residential area where the town has an interest in preserving park land. There is no doubt the Town has authority under sec. 236.45, Stats., to regulate land division in "areas" of the Town where the purposes of the statute are furthered by the prohibition. But the statutes does not give the Town carte blanch to prohibit land division town-wide.

C. The Town Does Not Have The Legal Authority To Enact A Moratorium As A General Police Power.

The Town asserts that it created the Ordinance pursuant to its general police powers to promote the health, safety and general welfare of its residents. Neither the Wisconsin Constitution nor the Wisconsin statutes grant towns the authority to create ordinances pursuant to a police power to promote the health, safety and general welfare of its residents.

Chapter 59 of the Wisconsin Statutes addresses powers and duties of counties. Section 59.69, Stats., reads in relevant part as follows:

> **59.69 Planning and Zoning Authority. (1)** Purpose. It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to ensure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; 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 preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds. To accomplish this purpose the board may plan for the physical development and zoning of territory within the county as set forth in this section and shall incorporate therein the master plan adopted under s. 62.23 (2) or (3) and the official map of any city or village in the county adopted under s. 62.23 (6).
>
> . . .
>
> **(4)** Extent of power. For the purpose of promoting the public health, safety and general welfare the board may by ordinance effective within the areas within such county outside the limits of incorporated villages and cities establish districts of such number, shape and area, and adopt such regulations for each such district as the board considers best suited to carry out the purposes of this section. The powers granted by this section shall be exercised through an ordinance which may, subject to sub. (4e), determine, establish, regulate and restrict:

> (a) The areas within which agriculture, forestry, industry, mining, trades, business and recreation may be conducted, except that no ordinance enacted under this subsection may prohibit forestry operations that are in accordance with generally accepted forestry management practices, as defined under s. 823.075 (1) (d).

Wis. Stat. § 59.69. Thus, counties are obligated to act in ways to promote the health, safety and general welfare of its residents.

A town's ability to do so is not so broad. Section 60.61 provides in relevant part:

> **60.61 General zoning authority. (1)** Purpose and construction. (a) Ordinances adopted under this section shall be designed to promote the public health, safety and general welfare.
> (b) Authority granted under this section shall be liberally construed in favor of the town exercising the powers. This section may not be construed to limit or repeal any powers possessed by any town.
> (1m) Building code enforcement. A town board may enact and enforce building code ordinances under ss. 62.17, 101.65, 101.76 and 101.86.
> **(2)** Extent of authority. Subject to subs. (3) and (3m), if a town is located in a county which has not enacted a county zoning ordinance under s. 59.69, the town board, by ordinance, may:
> (a) Regulate, restrict and determine all of the following:
> 1. The areas within which agriculture, forestry, mining and recreation may be conducted, except that no ordinance enacted under this subsection may prohibit forestry operations that are in accordance with generally accepted forestry management practices, as defined under s. 823.075 (1) (d).
> . . .

Wis. Stat. § 60.61.

Thus, while sec. 60.61, Stats., specifically preserves the right of a town to enact and enforce *building codes* to promote the public health, safety and general welfare regardless of whether the town has adopted a county's comprehensive zoning ordinance, it does not preserve the right of a town to enact ordinances under the auspices of 'necessity to protect and promote the public health, safety

and general welfare' if the town has adopted a county's comprehensive zoning ordinance.

As set forth above, in this case the Town adopted Columbia County's zoning ordinance in 1962. Therefore, the Town does not have the authority to enact an ordinance pursuant to sec. 60.61(2), Stats., to promote the public health, safety and general welfare.

This conclusion is made clear by reviewing the provisions in Chapter 60 that provide a town with certain powers despite enactment of a county's zoning ordinances. For example, a town has powers relating to town meetings under sec. 60.10, Stats. It has miscellaneous powers under sec. 60.23, Stats. It has general zoning authority under sec. 60.61, Stats., or zoning authority under sec. 60.62, Stats., if exercising village powers.

A careful reading of these statutes shows no reference to a town's right to adopt an ordinance to promote the public health, safety and general welfare except in three instances: (1) building code ordinances under sec. 60.61(1)(1m), Stats.; (2) if the town has not adopted the county's comprehensive zoning ordinances [which does not apply in this case], then the town can adopt ordinances under sec. 60.61(2), Stats.; and (3) historic preservation under sec. 60.64, Stats. None of these situations apply in this case.

The Town has argued that general police powers under sec. 61.34, Stats., authorize the enactment of the Ordinance, although the Town has never explained or supported its argument. There is nothing in that statute that authorizes the

Town to adopt its Ordinance. In fact, the Town may exercise village powers under Chapter 61 **except those powers which conflict with statutes relating to towns and town boards**. Wis. Stat. § 60.22(3). As set forth above, there is absolutely no language in Chapters 60 through 62 of the Wisconsin Statutes granting the Town moratorium authority. The closest statutory authority is sec. 62.23(7)(da), Stats., and again that only applies to cities.

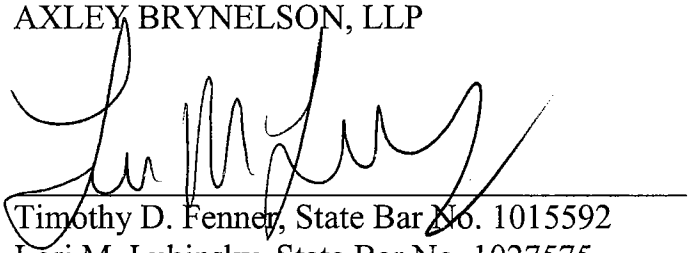
Moreover, contrary to the Town's suggestion, zoning **is** an exercise of police power. The general power of the State to zone property in the public interest is well established through its police power and may be delegated to cities. Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 2d 91, 95, 65 N.W.2d 43 (1954). This power is granted in order to promote the health, safety, morals or the general welfare of the community. Id. When any zoning ordinance is enacted, it is done so **pursuant to police power**. City of Milwaukee v. Leavitt, 31 Wis. 2d 72, 76, 142 N.W.2d 169 (1966). As the court held in Lake City Corp. relating to a city's authority to enact a moratorium, a necessary **component of a city's power** is interim zoning because ongoing development could frustrate a city's attempt to engage in land use planning. Lake City Corp., 199 Wis. 2d at 366. In short, zoning authority is a subset of the Town's police powers; they are not mutually exclusive and independent. Because the Town does not have statutory zoning authority to enact the Ordinance, the Ordinance is void.

CONCLUSION

For the reasons set forth herein, the Plaintiffs-Appellants respectfully request this Court reverse the trial court's dismissal of this case, enter summary judgment in favor of Plaintiffs-Appellants, and enter an order: (1) declaring void the Ordinance; (2) declaring that the Town does not have the legal authority to prohibit acceptance, review, and approval of any application for land division or subdivision throughout the entire Town; and (3) issuing an injunction prohibiting the Town from enforcing any moratorium on land division and subdivision throughout the entire Town.

Dated this 13th day of September, 2007.

AXLEY BRYNELSON, LLP



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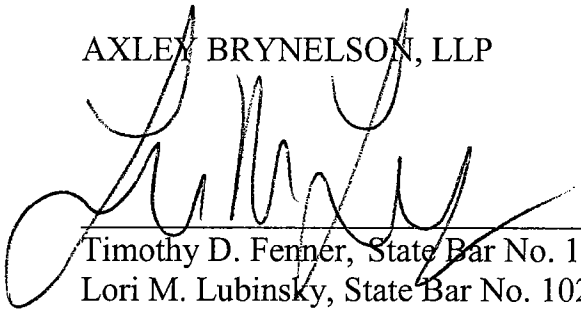
(608) 257-5661

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 proportional serif font. The length of this brief is 7,406 words and 24 pages.

Dated: September 13, 2007.

AXLEY BRYNELSON, LLP



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APPELLANTS' BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a), and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: September 13, 2007.

AXLEY BRYNELSON, LLP

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APPENDIX
TABLE OF CONTENTS

STATE OF WISCONSIN CIRCUIT COURT COLUMBIA COUNTY
BRANCH 3

WISCONSIN REALTORS® ASSOCIATION, INC.,

and

WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs,

v.

TOWN OF WEST POINT,

Defendant.

Case No. 06-CV-096
Case Classification Code: 30701
30704

AMENDED SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs, Wisconsin REALTORS® Association, Inc. and Wisconsin Builders Association, named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in Ch. 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Administration Building, 400 DeWitt Street, Post Office Box 587, Portage, Wisconsin 53901-0587, and to Axley Brynelson, LLP, Plaintiffs' attorneys, whose address is 2 East Mifflin Street, Suite 200, Madison, Wisconsin 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 19th day of May, 2005.

AXLEY BRYNELSON, LLP

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Timothy D. Fenner, State Bar No. 1015592
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App. 2

2

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 COLUMBIA COUNTY

WISCONSIN REALTORS® ASSOCIATION, INC,

and

WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs,

Case No. 06-CV-096
Case Classification Code: 30701
30704

v.

TOWN OF WEST POINT

Defendant.

AMENDED COMPLAINT

NOW COME the Plaintiffs, Wisconsin REALTORS® Association, Inc. and Wisconsin Builders Association, by their attorneys, Axley Brynelson, LLP, by Charles V. Sweeney, Timothy D. Fenner and Lori M. Lubinsky, and for their Amended Complaint respectfully allege and show to the Court as follows:

PARTIES

1. Plaintiff Wisconsin REALTORS® Association, Inc. ("WRA") is a Wisconsin corporation organized and licensed to do business in the State of Wisconsin with its principle office located at 4801 Forest Run Road, Madison, Wisconsin 53704.

2. The WRA is a trade association representing more than 17,500 members comprised of REALTORS®, appraisers, inspectors and affiliate members. The purpose of the WRA is to promote the real estate industry in Wisconsin. This purpose includes protection of private property rights.

3. The WRA has members who conduct work in the Town of West Point including, but not limited to, members who own real property in the Town of West Point and REALTORS® who represent owners of real property located in the Town of West Point, all of whom desire to subdivide said property and sell the same for profit.

4. Plaintiff Wisconsin Builders Association ("WBA") is a Wisconsin corporation organized and licensed to do business in the State of Wisconsin with its principle office located at 4868 High Crossing Boulevard, Madison, Wisconsin 53704.

5. The WBA is a non-profit organization dedicated to the home building industry in Wisconsin. The WBA's members include businesses and individuals who are engaged in the construction or remodeling of homes, who are engaged in trades or professions relating to shelter construction, and/or who are involved in the development of land. The purpose of the WBA is to promote the home building industry. This purpose includes protection of private property rights.

6. The WBA has members who conduct construction work in the Town of West Point including, but not limited to, members who own real property located in the Town of West Point and members who conduct work on behalf of persons who own real property located in the Town of West Point, all of whom desire to develop said real property by subdividing said property and constructing shelters thereon, and sell the same for profit.

7. Defendant Town of West Point is a municipal corporation organized under the laws of the State of Wisconsin with its principle office located at N2114 Rausch Road, Lodi, Wisconsin 53555; pursuant to sec. 801.11(4)(a)2, Stats., the Clerk for the Town of West Point, Edith Eberle, or the Chairperson for the Town of West Point, Dean Schwarz, are proper agents for service of process.

NATURE OF ACTION

8. The purpose of this action is to (a) obtain a declaration that the Town of West Point, by and through its Town Board, does not have the legal authority to enact an Ordinance or take any other action imposing a moratorium on the acceptance, review and approval by Town officials, staff or consultants of any application for a land division or subdivision received by the Town of West Point on or after the effective date of the Ordinance or action; (b) obtain an injunction, both temporary and permanent, prohibiting the Town of West Point from enforcing any moratorium on the acceptance, review and approval by Town officials, staff or consultants of any applications for a land division or subdivision received by the Town on or after the effective date of the Ordinance or action; and (c) obtain all other appropriate and necessary relief, as more fully set forth below.

JURISDICTION AND VENUE

9. This action is brought for a declaratory judgment pursuant to sec. 806.04, Stats., and for injunctive relief pursuant to Chapter 813 of the Wisconsin Statutes. An actual controversy exists among the parties regarding their respective rights, obligations, and legal authority in connection with an Ordinance adopted by the Town of West Point which imposes a moratorium on the acceptance, review, and approval by Town officials, staff, or consultants of any applications for a land division or subdivision received by the Town on or after the effective date of the Ordinance.

10. This Court has jurisdiction over the Defendant.

11. Venue is proper in this Court pursuant to sec. 801.50, Stats.

12. Plaintiffs have standing to bring this action because their members have a right to challenge the Town of West Point's conduct as set forth more fully herein, pursuant to

Metropolitan Builders Ass'n of Greater Milw. v. Village of Germantown, 2005 WI App 103, 698 N.W.2d 301.

13. On October 14, 2005, Plaintiffs filed a Notice of Claim with Defendant. Defendant did not respond to Plaintiffs' Notice of Claim within one hundred and twenty days following service of Plaintiffs' Notice of Claim, and therefore Plaintiffs' Notice of Claim is deemed disallowed under Section 893.80(1g) of the Wisconsin Statutes. Plaintiffs have fully complied with Section 893.80 of the Wisconsin Statutes.

FACTUAL BACKGROUND

14. By Ordinance No. 9-20-05A, a copy of which is attached as Exhibit A, the Town of West Point Town Board adopted an Ordinance imposing a moratorium on the acceptance, review, and approval by Town officials, staff or consultants of any application for a land division or subdivision received by the Town on or after the effective date of the Ordinance.

15. The expressed intent of Ordinance No. 9-20-05A was to halt development until an updated comprehensive plan pursuant to sec. 66.1001, Wis. Stats., is implemented by the Town Board.

16. By halting land division in the Town of West Point, the Town of West Point has set in motion a sequence of events that not only prevents land division, but in turn prevents land development, construction of homes, and/or sale of homes and/or real property in the Town of West Point. This, in turn, affects consumers by reducing the pool of available housing and causing the price of existing housing to increase. These effects have and/or will cause injury to the members of the WRA and the WBA. It also results in the ability of members of the WRA and WBA to provide affordable housing.

17. The moratorium on development imposed in Ordinance No. 9-20-05A expires 18 months from the effective date of the Ordinance unless an earlier or later date is subsequently adopted.

13. The Town of West Point does not have zoning authority pursuant to secs. 59.69 or 60.42, Stats.

14. The Town of West Point has not accepted, reviewed or approved any application for a land division or subdivision on or after the effective date of Ordinance No. 9-20-05A.

15. The Town of West Point does not have the legal authority to enact or impose a moratorium on the acceptance, review and approval by Town officials, staff or consultants of any application for land divisions or subdivisions received by the Town on or after the effective date of Ordinance No. 9-20-05A.

18. Ordinance No. 9-20-05A has and/or will result in injury in fact to the WRA's members, and in particular to its members who conduct work in the Town of West Point as described herein. Application of Ordinance No. 9-20-05A results in financial injury to WRA's members by preventing them from dividing land they own in the Town of West Point and by limiting new home construction and home sales.

19. The WRA's members' interests that have and/or will be injured by the enactment and/or enforcement of Ordinance No. 9-20-05A fall within the zone of interests protected by law.

20. Ordinance No. 9-20-05A has and/or will result in injury in fact to the WBA's members, and in particular to its members who conduct work in the Town of West Point as described herein. Application of Ordinance No. 9-20-05A results in financial injury to WBA's members by preventing them from dividing land they own in the Town of West Point and by limiting new home construction and home sales.

21. The WBA's members' interests that have and/or will be injured by the enactment and/or enforcement of Ordinance No. 9-20-05A fall within the zone of interests protected by law.

22. The interests the WRA seeks to protect in this lawsuit are consistent the WBA's purpose.

23. The interests the WBA seeks to protect in this lawsuit are consistent the WBA's purpose.

24. The WRA and WBA have an interest on behalf of its members to ensure that the Town of West Point is acting within its legal authority when banning land division and/or land development in the Town of West Point.

COUNT I – DECLARATORY RELIEF

16. Plaintiffs re-allege and incorporate by reference as if fully set forth herein all previous paragraphs of their Complaint.

17. A justiciable controversy exists in that Plaintiffs are challenging the Defendant's legal authority to take certain actions as set forth more fully herein, and Defendant has an interest in contesting Plaintiffs' claims.

18. The interests of the Plaintiffs and Defendant are adverse.

19. Plaintiffs have a legal interest in the controversy between the Plaintiffs and Defendant.

20. Plaintiffs are entitled to a declaration that the Town of West Point, by and through its Town Board, exceeded its legal authority when it adopted Ordinance No. 9-20-05A imposing a moratorium on the acceptance, review, and approval of land division and subdivision applications in the Town of West Point.

COUNT II – INJUNCTIVE RELIEF

21. Plaintiffs re-allege and incorporate by reference as if fully set forth herein all previous paragraphs of their Complaint.

22. To protect the rights of the Plaintiffs, their members and others, the Town of West Point must be enjoined from enforcing Ordinance No. 9-20-05A imposing a moratorium on the acceptance, review and approval of land division and subdivision applications in the Town of West Point.

23. Plaintiffs are entitled to temporary and permanent injunctive relief because they lack an adequate remedy at law, they will suffer irreparable harm if injunctive relief is not granted, and the Plaintiffs have a reasonable probability of ultimate success on the merits.

WHEREFORE, Plaintiffs demand judgment against Defendant declaring that the Town of West Point does not have the legal authority to enact a moratorium on the acceptance, review and approval of land division and subdivision applications, granting temporary and permanent injunctions prohibiting the Town of West Point from enforcing Ordinance No. 9-20-05A and any moratorium on the acceptance, review and approval of land division and subdivision applications, and granting Plaintiffs their statutory costs and such further relief as the Court deems just and equitable.

Dated this 19th of May, 2005.

AXLEY BRYNELSON, LLP

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App. 9

9

ORDINANCE NO. 9-20-05A
TOWN OF WEST POINT
COLUMBIA COUNTY, WISCONSIN

AN ORDINANCE TO IMPOSE A TEMPORARY STAY ON THE ACCEPTANCE, REVIEW, AND APPROVAL OF LAND DIVISIONS AND SUBDIVISION APPLICATIONS

WHEREAS, the adoption of this Ordinance is supported by the following findings:

1. The Town has and continues to experience increasing growth pressure.

2. The Town is currently engaged in developing an updated comprehensive plan pursuant to §66.1001, Wis. Stats. at both the Town level and in cooperation and coordination with the Columbia County Planning and Zoning Office, with the intent that all of the comprehensive plan elements will be reviewed and implemented and replace the Land Use Plan adopted by the Town in 1996, last amended in 2004.

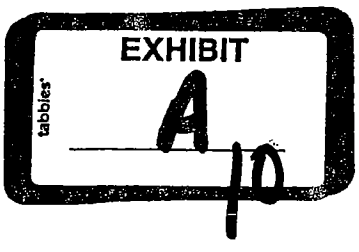
3. The Town has a substantial amount of time and money invested in the cooperative planning process with Columbia County and it is not in the best interests of the Town or County to abandon the process.

4. Existing Town land use policies and ordinances may allow new development or intensification of existing development in the Town that may hamper and curtail the effectiveness of the planning process before additional elements can be evaluated and implemented, including the land use element, which may modify the areas of the Town which may be subdivided for development, create new models of development, and may impose timing restrictions which may modify the pace of residential development in the Town.

5. A temporary stay on the acceptance, review, and approval of land division and subdivision applications will provide the Town with an opportunity to stabilize growth to continue the planning process, including completing the land use element, and such stay will 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.

6. A temporary stay will allow the Town sufficient time to implement additional new elements, including the land use element, by amending existing or creating new Ordinances, if necessary.

7. The Town Plan Commission has met and considered a recommendation to the Town Board, and the Town Board has considered the Town Plan Commission's action.



8. Subsequent to a Class 2 published notice, a public hearing was held on September 20, 2005, regarding the adoption of the temporary stay and moratorium.

9. The Town Board believes that the adoption of a temporary stay or moratorium will promote the public health, safety, general welfare and convenience of the Town and encourage the most appropriate use of land throughout the Town.

10. The temporary stay or moratorium shall not apply to the issuance of building permits, driveway permits, or conditional use permits.

NOW, THEREFORE, based upon the above findings and pursuant to the authority of the Wisconsin Statutes, including §§60.22(3), 61.34, and 236.45, the Town Board of the Town of West Point, Columbia County, Wisconsin, does hereby ordain as follows:

Section 1. Temporary Land Division and Subdivision Stay.

There is hereby established a temporary stay or moratorium on the acceptance, review, and approval by Town officials, staff, or consultants of any applications for a land division or subdivision received by the Town on or after the effective date of this Ordinance. Except as provided in Section 2, this Ordinance shall apply to any and all minor subdivisions, subdivisions, and condominiums as those terms are used and regulated in the Town's existing Land Division and Subdivision Regulations Ordinance.

Section 2. Exceptions.

The temporary stay on the acceptance, review, and approval of land division and subdivision applications shall not apply to the following:

A. A complete land division or subdivision application that was submitted in conformity with the Town's existing Land Division and Subdivision Regulations Ordinance on or before the effective date of this Ordinance.

B. Certified survey maps that do not create additional building sites.

C. Divisions of land that are necessary to avoid a property owner being denied all economic use of his or her land.

D. Divisions of land that are essential for the correction of a problem or remediation of a situation which immediately threatens the public health or welfare.

E. Divisions of land pursuant to the agricultural CSM exception, Chapter 6.04(E)(2) of the Land Division and Subdivision Regulations Ordinance.

F. A division of land allowing an individual who is related by blood or marriage who is actively engaged in the farm operation of the landowner farmer to construct an additional single-family residence on the farm.

Section 3. Request for Exception from Temporary Stay.

A. Any property owner or their agent may apply for an exception to the temporary stay on any of the grounds stated in Section 2. The application shall be filed with the Town clerk on a form approved by the Board, accompanied by a fee of $300.00.

B. Upon receipt of an application and filing fee, the Town clerk shall refer the application for exception to the temporary stay to the Plan Commission which shall, after hearing, make the necessary findings and recommendation to the Town Board that an appropriate exception does or does not exist.

C. Upon receipt of the Plan Commission's recommendation, the Town Board shall act upon the recommendation. The Town Board shall have the authority to reject, accept, or modify the recommendation of the Plan Commission. The decision of the Town Board shall be final. If the Town Board determines that a landowner has met an exception to the temporary stay, such action on the Town Board's part does not limit the Town's ultimate authority to approve, reject, or conditionally approve any proposed division of land under the Town's Land Division and Subdivision Ordinance.

Section 4. Duration.

This Ordinance shall expire eighteen (18) months after its effective date, unless an earlier or later date is subsequently adopted.

Section 5. Inconsistent Ordinances Voided.

All ordinances or provisions of ordinances inconsistent with or contravening the provisions of this Ordinance are hereby temporarily voided and shall have no legal force or effect during the period this Ordinance is in effect.

Section 6. Scope.

This Ordinance applies throughout the Town.

Section 7. Severability.

If any section or part of this Ordinance is judged to be unconstitutional, unlawful, or invalid by a court of competent jurisdiction, the remainder of the Ordinance shall not be affected thereby.

Section 8. Effective Date.

This Ordinance shall take effect upon adoption or, if a later effective date is required by law, upon the earliest date allowed by law.

The above and foregoing Ordinance was duly adopted by the Town Board of the Town of West Point at a meeting held on the 20th day of September, 2005, by a vote of 3 in favor, 2 opposed, and 0 not voting.

TOWN OF WEST POINT

By: _____
Dean Schwarz, Town Chair

Attest: Edith K Eberle
Edith K. Eberle, Town Clerk

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COPY

STATE OF WISCONSIN CIRCUIT COURT COLUMBIA COUNTY

WISCONSIN REALTORS ASSOCIATION, INC.
and WISCONSIN BUILDERS ASSOCIATION,
Plaintiffs,

vs. CASE NO. 06 CV 96

TOWN OF WEST POINT,
Defendant.

MEMORANDUM DECISION AND ORDER

In September 2005, Defendant enacted an 18-month moratorium "on the acceptance, review, and approval by Town officials, staff, or consultants of any applications for a land division or subdivision ... ." This ordinance will expire in March of 2007. Plaintiffs then filed this declaratory judgment action, seeking a declaration that Defendant does not have the legal authority to impose such a moratorium, and to obtain an injunction prohibiting its enforcement. Plaintiffs now move for summary judgment.

> [Summary judgment] shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Sec. 802.08(2), Wis. Stats. The material facts are undisputed. And, although the Town has not filed a motion for summary judgment, its brief in opposition to Plaintiffs' motion also asks for summary judgment in its favor. *See* sec. 802.08(6), Wis. Stats.

Whether a township possesses the legal authority to enact a moratorium on subdivision applications appears to be an issue of first impression in Wisconsin. After reviewing the briefs and the legal authorities cited therein, the Court concludes that the moratorium is legally permitted.

Plaintiffs begin with the undisputed principle that, "Towns are creatures of the legislature, and thus have only the powers expressly delegated to them by statute and such other powers as are necessary to implement the powers expressly granted." *Town of Beloit v. County of Rock*, 2001 WI App 256, Par. 13, 249 Wis.2d 88, 637 N.W.2d 71, *aff'd by* 2003 WI 8, 259 Wis.2d 37, 657 N.W.2d 344. Examining the statutes regarding town land use and planning, townships may enact certain zoning controls if the county does not have a county zoning ordinance, *see* sec. 60.61(2), Stats., or if the regulations are approved by a town meeting or referendum and the county, *see* sec. 60.62(2)-(3), Stats. However, Columbia County has a county zoning ordinance, and this moratorium was not approved under 60.62(2)-(3). Finally, the statues expressly grant *cities* the power to "enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared." *See* sec. 62.23(7)(da), Wis. Stats. The lack of a similar statute for townships is telling.

The Town, however, relies primarily on sec. 236.45, Stats., titled "Local subdivision regulation." To accomplish a variety of listed public purposes, including "to further the orderly layout and use of land," *see* sec. 236.45(1), Stats., this statute provides that,

> ... any municipality, town or county which 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. Such ordinances ... may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. ...

Sec. 236.45(2)(a), Wis. Stats. "This section and any ordinance adopted pursuant thereto shall be liberally construed in favor of the municipality, town or county ... ." Sec. 236.45(2)(b), Wis. Stats. And, even if this statute does not expressly permit moratoria, moratoria are "necessary to implement the powers expressly granted":

> [M]oratoria like [the ordinance at issue] are used widely among land-use planners to preserve the status quo while formulating a more

15

> 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.

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337-38, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

> To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

Id. at 339.

Plaintiffs' primary response to this is that Chapter 236 concerns platting of land, while the town's moratorium is really an exercise of zoning authority. The Town, however, cites a 1983 Wisconsin Supreme Court decision upholding a township's lot size regulation, even though

> The defendants affirmatively alleged that the ordinance was void because it was a zoning ordinance, not a subdivision regulation under ch. 236, Stats., and could not be adopted in the manner utilized by the town under the zoning provisions of ch. 60.

Town of Sun Prairie v. Storms, 110 Wis.2d 58, 60, 327 N.W.2d 642 (1983). The court noted that, "zoning and subdividing are complementary land planning devices. Subdivision control is concerned with the initial division of undeveloped land, while zoning more specifically regulates the further use of this land[,]" *id.* at 68, and concluded that:

> As long as the 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.

Id. at 70-71.

The Court, therefore, concludes that reasonable moratoria on applications for the subdivision of land, such as Town of West Point Ordinance No. 9-20-05A, are

permitted by section 236.45 of the Wisconsin Statutes. Consequently, Plaintiffs' motion for summary judgment is hereby DENIED, and summary judgment in favor of Defendant is hereby GRANTED.

Dated this 13th day of September, 2006.

BY THE COURT:

Hon. Andrew P. Bissonnette
Circuit Court Judge, Branch III
Dodge County, Wisconsin

Distribution:
Atty. Charles V. Sweeney
Atty. Timothy D. Fenner
Atty. Lori M. Lubinsky
Atty. Gesina M. Seiler
Atty. Richard K. Nordeng
Atty. Bryan Kleinmaier

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.

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

20

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.

TOWN OF WEST POINT

Pursuant to Wisconsin State Statute 19.84, the town board of the Town of West Point held their regular monthly meeting on Thursday, March 8, 2007 at 7:30 p.m., at the West Point Town Hall. The meeting was published in the Lodi Enterprise, the Sauk Prairie Star, posted in the three designated places in the town and on the town's web site.

The town board meeting was called to order by Dean Schwarz-Town Chairman. The town board members present were: Dean Schwarz-Town Chairman, John Miller-1st Supervisor, Gordon Carncross-2nd Supervisor, Bill Niemi-3rd Supervisor and Robert Ham-4th Supervisor. Also present was Edith Eberle-Town Clerk and Joan Bader-Town Treasurer.

The Pledge of Allegiance was said.

The minutes from the February 8, 2007 town board meeting were emailed and/or given to the town board members prior to the meeting. A motion was made by John Miller to approve the minutes with name change, 2nd by Bill Niemi – motion carried.

Joan Bader Town Treasurer gave the following report – General fund is $297,538.99; Historical fund is $2,358.91 and Park fund is $28,678.88. The treasurer and clerk balanced with the bank statement for February. A motion was made Bill Niemi to approve the treasurer report as given, 2nd by Bob Ham – motion carried.

The following correspondence was received: Mary Sue Benigni would like to have a Bed and Breakfast at W13162 East Lake Drive this requires a Conditional Use Permit – will be on the Plan Commission agenda on March 15; an Email from Donald Savoy concerning ATV; Minutes from Lodi EMS Commission meeting on February 15th; Pamphlet from UW Extension on WisLine Teleconference Series for 2007; MSA survey results from Pleasant View Park on Septic Systems; several Newspaper articles that may be of interest to the town board members; Email from Mike Zitnick; Email from Kathleen Haas considering cost on West Point drinking water testing; on March 28th at 7:00 p.m. Mark E. Cupp will put on a presentation on Wisconsin Scenic Byways Program which is for State Highway 60 from I90-94 to Prairie du Chein; Letter regarding Estimated DNR Payment in Lieu of Taxes for Gibraltar Park which DNR will be taking ownership of from

Columbia County in the near future; Copies of letters that Columbia County set out to Rueben Unke Property, Lu Foster Property, and Amalia Ryan Property; Letter from Columbia County Emergency Management Office on chemical usage; a copy of the Town of West Point roads and certified mileage from Department of Transportation; and a copy of the Land Use Agreement for a bulletin board at Sunset Public Boat Access.

The bills were reviewed by each town board member prior to the town board meeting. A copy of the bills, deposits and budget for 2007 were given to each town board member for their information. A motion was made by Bill Niemi to pay the bills that were presented, 2nd by Bob Ham – motion carried.

Citizens Input – None

Smart Growth Committee report was given by 4th Supervisor Bob Ham on the February 20, February 27 and March 6th meetings.

3rd Supervisor Bill Niemi reported that the Town Park Committee has not met.

Plan Commission report was given by 2nd Supervisor Gordon Carncross on the February 15th and March 1st meetings.

Sauk EMS report was given by 1st Supervisor John Miller on the February 13th, 2007 meeting.

Columbia County Report was given by Doug Richmond as follows:

- Health and Human Services are over budget by 1 million dollars, the reason is because of programs mandated by the State of Wisconsin
- There was an article in the Madison newspaper about counties cutting county board members – Columbia County pays their county board members per diem not a salary as larger counties do.
- The 35 acre rule is still in effect – but all agriculturally zoned land will need to be rezoned if they are to be built on. The county has sent their proposal on the 35 acre rule etc to the Department of Agricultural to review before the county does the final approval.

Public Hearing regarding an Ordinance to Amend Ordinance No. 9-20-05A to extend the Temporary Stay on the Acceptance, Review and Approval of Land Divisions and Subdivision Applications was brought up to the 24 attendees present. A 2 page hand presentation and overview of the Comprehensive Planning Committee process since the moratorium has been in place was given to all present. Ron Grasshoff, Chairman of the Comprehensive Planning Committee reviewed what has been completed and what needs to be done. Ron also handed out to the town board members a Columbia County timeline for their Land Use Element and a public participation summary that the Town of West Point Comprehensive Planning Committee has held. May 29th has tentatively been set for a public hearing on the Town of West Point Comprehensive Plan. Residents present gave their views on the extension of the Moratorium.

A timeline to complete the Comprehensive Plan and Ordinances was presented to the town board for consideration. 2nd Supervisor Gordon Carncross stated that the Plan Commission has reviewed the timeline and 4th Supervisor Bob Ham stated that the Comprehensive Planning Committee has reviewed the timeline and are recommending that the town board approve the proposed timeline. Each town board member gave their opinions on the 6 month timeline extension. A motion was made by Bob Ham to approve the 6 month timeline as presented, 2nd by Bill Niemi – roll call vote was Bob Ham – Yes, Bill Niemi – Yes, Gordon Carncross – Yes, John Miller – Yes, Dean Schwarz – Yes – motion carried.

Ordinance to Amend Ordinance No. 9-20-05A to Extend the Temporary Stay on the Acceptance, Review and Approval of Land Divisions and Subdivision Applications was presented to the town board for their consideration. 2nd Supervisor Gordon Carncross stated that the Plan Commission is recommending an 8 month extension. After discussion - a motion was made by John Miller to adopt Ordinance No. 3-08-07 to Amend Ordinance No. 9-20-05A to Impose a 6 month extension (to September 20, 2007) to the Temporary Stay on the Acceptance, Review and Approval of Land Divisions and Subdivisions Applications, 2nd by Gordon Carncross – a roll call vote was taken John Miller – yes, Gordon Carncross – yes, Bill Niemi – No, Bob Ham – Yes, Dean Schwarz – Yes – motion carried.

The town board had asked Robert Davis to come to this meeting to discuss brushing/mowing of town roads. The following roads need to be brushed: McCubbin, Golf, O'Connor, Barta, Unke, Jensen, Chrisler, Bittner,

Trails End and Rausch as soon as the town will allow. There was a town resident that had concern with the brush not being picked up. A motion was made by Bill Niemi to have Robert Davis brush the above list of town road as soon as possible, 2nd by John Miller – motion carried.

Jim Cross from Columbia County Highway gave the following estimates for town road improvement and maintenance – Greimel Road – 2" overlay at a cost of $25,000.00; Lake, East Lake and Ferry View at a cost of $180,000.00 – both estimates are at 2006 prices. Jim Cross suggested that he bring a van that will hold the town board members and go look at West Point town road as a group. A motion was made by Bill Niemi that March 28th at 8:00 a.m. beset to go and view the town roads with Jim Cross if the van is available, 2nd by John Miller – motion carried. Columbia County is mowing East/West roads one year and North/South roads the next year for the towns in Columbia County to help the towns save money. Robert Davis stated that he didn't feel that mowing every other year was a good idea as the small brush could get out of control. There are new requirements for town roads and Columbia County is applying for a grant to help offset the cost. The requirements are:

- To have "stop ahead signs" put up. The county will be putting up and paying for the initial installation cost.
- No steel posts can be used for road signs only wood posts – all steel post will be replaced with wood posts.
- Chrisler Road speed limit will be increased from 40 mph to 45 mph as a town cannot lower a speed limit more than 10 mph without state approval.

Bill Niemi stated that next year the Town of West Point could apply for LRIP funds for roads that have safety concerns. Columbia County Highway has a new form for LRIP funds.

Joe Costanza, Town Engineer has received 2 bids for the playground equipment for Ryan Park. The two bidders are Miller & Associates, Inc. of Sauk City, WI and Lee Recreation, LLC of Cambridge, WI. The low bidder is Miller & Associates at $18,987.00 and the high bidder was Lee Recreation at $25,000.00. In the bid C-1 indicates that approximately 80 cubic years of resilient surfacing should be supplied and installed under the proposed playground equipment and an additional 60 cubic yards of surfacing would be placed under the existing swing set. Joe Costanza stated that Miller's bid includes only 80 cubic yards of ADA compliant resilient surfacing and an additional 60 cubic years would add approximately $1,065.00 to make the

bid amount of $20,052.00 which still is approximately $5,000.00 less than Lee Recreation. Joe is recommending that the Town of West Point go with Miller & Associates, Inc. as they are a reputable playground equipment supplier and the town has used them in Selwood Park. A motion was made by Bill Niemi to have Miller & Associates do the playground equipment for Ryan Park at a cost of $20,052.00 and to have a change order contract drawn up to include the 140 cubic yards of ADA compliant resilient surfacing, 2nd by Bob Ham – motion carried.

3rd Supervisor Bill Niemi would like to roll the athletic field and the town hall lawn in early spring to help in smoothing out the area. Bill Niemi is going to check to see if he could get a large roller which would do a better job. A motion was made by John Miller to allow Bill Niemi to spend up to $300.00 to have the athletic field and town hall lawn rolled, 2nd Bill Niemi – motion carried.

Chairman Dean Schwarz stated that according to Section 10.46 of the Wisconsin State Statues there is no hunting on town owned land. No action.

Chairman Dean Schwarz stated that he had contacted McFarlanes and the John Deere dealers about leasing a generator and they both stated that they do not lease generators. McFarlanes bid for a generator was $2,000.00 and the approximate cost to have the electric hookup was $500.00. 1st Supervisor John Miller had contacted area farmers to allow the town of use their generators and each generator has different electrical hook ups. Alan Treinen stated that the Lodi Ambulance building has a generator and it is on a timer that keeps it in good running condition. After more discussion, a motion was made by Bill Niemi to investigate the cost of a self power natural gas generator and put it in the budget for 2008, 2nd by John Miller – motion carried.

The selection of an attorney to draft and complete our Ordinances to implement with the new Comprehensive Plan was brought up to the town board for discussion. Chairman Dean Schwarz has quotes from Attorney Richard Nordeng and Attorney Jeff Clark on the approximate cost to draft the ordinances. Each town board member gave their opinions on which attorney they felt could do a best job in the timeline. A motion was made by Bob Ham to have the town chairman hire an attorney to finalize the ordinances to comply with the Comprehensive Plan, 2nd by Gordon Carncross – a roll call vote was taken – Bob Ham – Yes, Bill Niemi – No,

Gordon Carncross – Yes, John Miller – No, Dean Schwarz – No – the motion was defeated. A motion was made by Gordon Carncross to hire Attorney Richard Nordeng to draft and finalize the town ordinances to comply with the Comprehensive Plan, 2nd by Bob Ham – a roll call vote was taken – Bob Ham – yes, Bill Niemi – no, Gordon Carncross – yes, John Miller – no, Dean Schwarz – yes – the motion was carried.

A quote from Kevin Krysinski from Johnson Block and Company of $1,800.00 to $2,000.00 to audit of the Town Treasurer Books was presented to the town board for consideration. Joan Bader the town treasurer is retiring (July 3, 1986) after 21 years. A motion was made by Bill Niemi to hire Kevin Krysinski from Johnson Block and Company at a cost up to $2,000.00 to audit the town treasurer books, 2nd by Gordon Carncross – motion carried.

The proposed 2006 financial statement was prepared by the town treasurer and the town clerk and was emailed/given to each town board member for review. There was a question on the Special Assessments for Crystal Lake – the town clerk answered the question. A motion was made by Bill Niemi to accept the 2006 financial statement that was presented and to make copies to be handed out at the April election and the annual town meeting on April 10th, 2nd by John Miller – motion carried.

A copy of a proposed Ordinance for Outside Wood Furnaces was given to each town board member to review. Kevin Kessler, Director of Air Management Bureau for Wisconsin Department of Natural Resources and a member of the West Point Plan Commission had written the proposed ordinance. There was discussion about section 3.23 of the proposed ordinance that states the outdoor wood fired furnace shall be located at least 500 feet from the nearest building. A motion was made by Bob Ham to have the Plan Commission do a study and make a recommendation to the town board on Outside Wood Furnaces and where they should be located in connection with Agricultural/Rural Residential zoning and distance from other buildings, 2nd by Bill Niemi – motion carried.

Chairman Dean Schwarz has received two quotes on doing an Outdoor Recreation Plan for the Town of West Point. If the Town of West Point has an Outdoor Recreation Plan there is funding from the State of Wisconsin for parks/ preserves. A motion was made by Bill Niemi to

postpone action on the Outdoor Recreational Plan, 2nd by John Miller – motion carried.

Chairman Dean Schwarz has received two quotes on Impact Fees. The Wisconsin Towns Association is working with the Wisconsin legislators on changing the rules on Impact Fees. A motion was made by Bob Ham to postpone Impact Fees, 2nd by Bill Niemi – motion carried.

A motion was made by Bill Niemi to postpone Maple Trees on the Town of West Point property line, 2nd by John Miller – motion carried.

The next meeting in on April 12, 2007- the following items will be on the agenda: Savanna Ridge (breaking of Covenants with Trees – brushing), Smart Growth Report, Town Park Committee Report, Plan Commission Report, Sauk EMS Report, Columbia County Report, Outdoor Recreational Plan; Impact Fees – Impact Fee Analysis; Maple Trees on Town of West Property Line and any other business that maybe legally added to the agenda.

A motion was made by Bill Niemi to adjourn the March 8th, 2007 town board meeting at 9:30 p.m., 2nd by John Miller – motion carried.

Respectfully Submitted By

Edith K Eberle
Town Clerk

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.

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT TOWN OF WEST POINT

Appeal From The Columbia County Circuit Court,
Case No. 2006CV000096
The Honorable Andrew P. Bissonnette, Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is an action for declaratory relief under section 806.04 of the Wisconsin Statutes. Plaintiffs-Appellants Wisconsin Realtors Association, Inc. and Wisconsin Builders Association (hereinafter, the "Associations") seek to invalidate Ordinance No. 9-20-05A (the "Ordinance") adopted by the Town of West Point (the "Town" or "West Point").[1] The Ordinance imposed a temporary moratorium on land divisions while the Town prepared a new comprehensive plan and a new land division ordinance.

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[1] References to the record are identified as "R. ___." References to the Appendix of Plaintiffs-Appellants Wisconsin Realtors Association, Inc. and Wisconsin Builders Association are identified as "A-App. ___." References to the Supplemental Appendix of Defendant-Respondent Town of West Point are identified as "R-App. ___."

II. FACTS.

The Town adopted the Ordinance on September 20, 2005. The Ordinance imposed a "temporary stay or moratorium on the acceptance, review, and approval by Town officials, staff, or consultants of any applications for a *land division or subdivision* received by the Town on or after the effective date" of the Ordinance. (R. 12 at 10 to 13; A-App. 10 to 13.) (Emphasis added.) The purpose of the temporary moratorium was to forestall new land divisions or subdivisions while West Point updated its comprehensive plan and implementing ordinances.[2] (*Id.*)

On September 13, 2007, the Town adopted its newly completed ordinance regulating land divisions. The moratorium

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[2] For brevity, the Town refers to "land divisions or subdivisions" simply as "land divisions" in the remainder of this brief.

ordinance was repealed on that same date.[3] (R-App. 103 to 104, 107 to 108.) The new comprehensive plan had been adopted previously on June 14, 2007. (R-App. 105 to 106.)

In adopting the Ordinance, the Town followed the procedures in section 236.45(4), which applies to local land division regulations. (R. 12 at 10 to 11, R. 25 at 1 to 2; A-App. 10 to 11, R-App. 101 to 102.) The Town Plan Commission considered whether the Town should adopt a temporary stay on land divisions and recommended to the Town

[3] Ultimately the duration of the Ordinance proved to be slightly less than 24 months. That was not one day longer than the time it took to complete the new comprehensive plan and adopt a new land division ordinance. Significantly, the Associations have challenged the Town's authority to adopt *any* moratorium on land divisions, regardless of its duration. Thus, their claim is the same whether the moratorium lasts three weeks or three years. In short, the reasonableness of the duration is not in issue. If it had been, the Town would have submitted substantial evidence to support its timeline and the massive amount of work performed to complete the task in less than two years.

Board that it adopt the Ordinance. (R. 12 at 10, R. 25 at 1 to 2; A-App. 10, R-App. 101 to 102.) Subsequent to a Class 2 published notice, the Town Board held a public hearing during which the proposed Ordinance was discussed and considered. (R. 12 at 11, R. 25 at 1 to 2; A-App. 11, R-App. 101 to 102.) Following its adoption, the Town published the Ordinance in a form suitable for public distribution. (R. 25 at 2, R-App. 102.)

The Ordinance imposed a temporary moratorium only on land divisions. (R. 12 at 11; A-App. 11.) It did not impose a moratorium on development generally. Specifically, it did not impose a moratorium on "the issuance of building permits, driveway permits, or conditional use permits." (*Id.*) The Ordinance temporarily prohibited the creation of new lots, but did not restrict construction on existing lots. (R. 12 at 10 to 13; A-App. 10 to 13.) Nor did it restrict rezonings, or the sale of

existing lots, whether they are undeveloped, previously developed, or newly developed. (*Id.*) The Ordinance had exceptions that allowed for certain types of land divisions, none of which were invoked by the Associations. (R. 12 at 11 to 12; A-App. 11 to 12.)

III. PROCEDURAL STATUS OF THE CASE.

The Associations filed suit asking for a declaration that the Town lacks authority to adopt the Ordinance. They immediately moved for summary judgment. (R. 4.) The Town advised the circuit court and the Associations that it intended to move to dismiss the complaint on grounds that the complaint failed to allege standing. (R. 15.) The Associations asked leave to amend the complaint to change their allegations relating to standing. (*Id.*) After the Associations amended the complaint, the Town filed a motion to dismiss the amended complaint. (R.

18.) The circuit court denied the Town's motion to dismiss in a Memorandum Decision and Order dated August 11, 2006, holding in essence that the amended complaint, construed liberally in favor of the Associations, alleged standing. (R. 23 at 1 to 5; A-App. 14 to 18.) The Town then responded to the Associations' motion for summary judgment. (R. 24.)

In a Memorandum Decision and Order dated September 13, 2006, the circuit court denied the Associations' motion for summary judgment and granted summary judgment in favor of the Town. (R. 27 at 1 to 4; A-App. 19 to 22.) The Honorable Andrew J. Bissonnette held that the Town had authority pursuant to section 236.45 to adopt a temporary moratorium on land divisions. (R. 27 at 3 to 4; A-App. 21 to 22.) Judge Bissonnette stated that "reasonable moratoria on applications for the subdivision of land, such as Town of West

Point Ordinance No. 9-20-05A, are permitted by section 236.45 of the Wisconsin Statutes." (*Id.*) A judgment memorializing the circuit court's decision was entered on October 19, 2006. (R. 28.) The Associations appealed. (R. 31.) The Court of Appeals certified the case to this Court,[4] which accepted certification on August 14, 2007.

Although the Ordinance is no longer in effect, the Town agrees with the Court of Appeals' statement in footnote 2 of its Certification that the issue presented in this appeal "is

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[4] At the Court of Appeals, the Town dropped its challenge to standing. It did so to ensure that the court would reach the merits of an issue important to municipalities throughout Wisconsin. That issue is a municipality's authority to enact a temporary moratorium on land divisions while it develops a new comprehensive plan. By choosing not to contest standing, the Town did not concede the allegations of harm the Associations included in their amended complaint. The Associations alleged that the temporary moratorium on land divisions prevented not only land divisions, but also: prevented land development; severely limited the construction of homes; severely limited the sale of homes and real property; and increased the price of existing homes. (R. 12 at 3 to 9; A-App. 3 to 9.) These allegations were all denied. (R. 16.) On summary judgment, the Associations offered no evidence to prove that these alleged effects occurred, even to a minor degree.

sufficiently important and capable of evading review that it warrants review even if a decision would have no practical effect on the present controversy." *Wisconsin Realtors Ass'n, Inc. v. Town of West Point*, No. 2006AP2761, 2007 WL 1933930, *ln.2 (Wis. Ct. App. July 5, 2007). At least one of four elements must be present for the Supreme Court to address a moot issue. *Roth v. LaFarge Sch. Dist. Bd. of Canvassers,* 2004 WI 6, ¶ 14, 268 Wis. 2d 335, 677 N.W.2d 599. All four elements are present here.

ARGUMENT

I. INTRODUCTION.

This case presents the question whether Wisconsin municipalities have an essential tool for effective land use planning.

The Associations ask this Court to declare that the Town lacked authority to adopt a temporary moratorium on land divisions. In fact, the Town had legal authority to adopt a temporary moratorium on land divisions while it prepared a new comprehensive plan and implementing ordinances, including a new land division ordinance. The Court should therefore affirm the circuit court's decision granting summary judgment in favor of the Town.

Much of the Associations' brief is devoted to arguments that the Town could not enact a temporary moratorium on land divisions because the Town does not have zoning power. These arguments miss the mark completely because the Town did not rely on zoning power for authority to adopt the temporary moratorium. Instead, the Town relied primarily on the authority delegated to it in section 236.45, which relates to local

regulation of land divisions. Secondarily, the Town relied on section 61.34, the general police powers of a village board, which have been conferred on the Town Board pursuant to sections 60.10(2)(c) and 60.22(3).

II. THE TOWN HAD AUTHORITY UNDER SECTION 236.45 TO ENACT A TEMPORARY MORATORIUM ON LAND DIVISIONS WHILE IT PREPARED A NEW COMPREHENSIVE PLAN.

Towns "have only the powers expressly delegated to them by statute and such other powers as are necessary to implement the powers expressly granted." *Town of Beloit v. County of Rock*, 2001 WI App 256, ¶ 13, 249 Wis. 2d 88, 637 N.W.2d 71. At first blush, this general statement of town powers sounds quite restrictive. In fact, towns that have adopted village powers have been granted the very broad general police

powers set forth in section 61.34.[5] The Town of West Point Town Board has been granted village board powers pursuant to sections 60.10(2)(c) and 60.22(3). (The Associations concede this point in their brief at page 6.) That grant is extremely broad, including:

> [P]ower 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 . . . .

Wis. Stat. § 61.34(1).

The powers granted in section 61.34(1) are "in addition to all other grants and shall be limited only by express language." *Id.*

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[5] In *Town of Beloit*, where the town had village powers, the court construed broadly a town's powers under section 61.34. The court held that the town had authority under section 61.34 to develop residential subdivisions on town-owned lands. 249 Wis. 2d 88, ¶¶ 14-15. The court reached this conclusion because section 61.34 granted the town the power to "acquire property, real or personal" and to "sell and convey such property." *Id.*

The Associations misconstrue the Town's position relative to its general (village board) police powers pursuant to sections 60.10(2)(c), 60.22(3) and 61.34. The Town's position is that if it does not have authority under section 236.45(2) to enact a temporary moratorium on land divisions, then it has that authority as part of village board police powers to act "for the health, safety, welfare, and convenience of the public." Wis. Stat. § 61.34(1). A temporary moratorium on land divisions does not implicate zoning authority, and so it is irrelevant that zoning power is a subset of the police powers. (Associations' Br. at 20-23.)

In this case, the Town relied partly on the broad grant of general police powers in section 61.34, but principally on the particular grant of powers relating to local regulation of land divisions in section 236.45. (R. 12 at 11; A-App. 11.)

A. The Town's Temporary Prohibition On Land Divisions, During The Preparation Of Its New Comprehensive Plan, Carried Out The Purposes Stated In Section 236.45.

Section 236.45 gives the Town the authority to adopt a temporary moratorium on land divisions to carry out the purposes of that section. Subsection 236.45(2)(a) states, in relevant part:

> To accomplish the purposes listed in sub. (1), any municipality, town or county which 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.* Such 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 may prohibit the division of land in areas where such prohibition will carry out the purposes of this section.*

(Emphasis added.)

This subsection expressly authorizes a prohibition on land divisions provided such prohibition "will carry out the

purposes of this section." *Id.* The Ordinance imposed a temporary prohibition while the Town drafted its comprehensive plan and adopted new implementing ordinances, such as its new land division ordinance. Such a temporary prohibition "carr[ied] out the purposes of [section 236.45]" and, therefore, was authorized by subsection 236.45(2)(a).

The purposes of section 236.45 are broadly stated and include, among other things:

- To promote the public health, safety and general welfare of the community;
- To lessen congestion in the streets and highways;
- To further the orderly layout and use of land;
- 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; and

- To facilitate the further resubdivision of larger tracts into smaller parcels of land.[6]

Note that, broadly stated, one of the main purposes of land division regulations is control over the density of development.

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[6] The complete statement of purpose appears in section 236.45(1) as follows:

> **236.45 Local subdivision regulation.** (1) DECLARATION OF LEGISLATIVE INTENT. The purpose of this section is 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.

There can be no doubt that a temporary prohibition on land divisions, during the preparation of a new comprehensive plan, serves the stated purposes. The Town's new comprehensive plan was prepared in accordance with section 66.1001 (sometimes called the "smart growth" law). (R. 12 at 10; A-App. 10.) The plan will be a guide to future land use and development in the Town. The plan includes projections of future land uses "including the assumptions of net densities or other spatial assumptions upon which the projections are based." Wis. Stat. § 66.1001(2)(h). The plan also shows "the general location of future land uses by net density or other classifications." *Id.* The new comprehensive plan will be implemented by, among other things, changes to subdivision ordinances. Wis. Stat. § 66.1001(2)(i).

In summary, the new comprehensive plan is to serve as a guide for land use decisions generally, and specifically as a guide for new land division regulations affecting the density of future land uses. There is, therefore, a substantial overlap between the purposes of land division regulation and the purposes of the new comprehensive plan. The Ordinance assured that any new land divisions in the Town would be consistent with the new comprehensive plan and a new implementing subdivision ordinance. The Ordinance thereby carried out several purposes of section 236.45, including:

- To further the orderly layout and use of land;
- To lessen congestion in the streets and highways;
- To prevent the overcrowding of land; and
- To avoid undue concentration of population.

B. Temporary Moratoria On Land Divisions Are Essential To Effective Land Use Planning.

One way to see that a land division moratorium (during preparation of a new comprehensive plan) carries out the purposes of section 236.45 is to recognize how those purposes would be defeated if there were no moratorium. Our United States Supreme Court recognized exactly that in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). In *Tahoe-Sierra*, the court upheld (against a "takings" claim) two sequential moratoria that had precluded virtually all development for 32 months while new regulations on development were being prepared. The Supreme Court noted:

> [M]oratoria like [the ordinance and resolution at issue] are used widely 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 (emphasis added).

The Supreme Court went on to explain why moratoria are essential to effective planning, stating:

> To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

Id. at 339.

Other courts have relied on the Supreme Court's analysis in *Tahoe-Sierra* to uphold temporary moratoria. *See, e.g., WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912, 915-16 (Fla. Dist. Ct. App. 2004) (city permitted to enact a temporary moratorium on the processing of site plan applications for townhouse and multi-family development as a land-use tool to promote effective planning and preserve status quo while undertaking comprehensive review of its multi-family

development regulations); *Droste v. Board of County Comm'rs of Pitkin*, 159 P.3d 601, 606-07 (Colo. 2007) (land use authority granted to local government necessarily implies the authority to adopt temporary moratoria which suspends review of development applications for a reasonable period of time necessary to prepare master plans); *Wild Rice River Estates, Inc. v. City of Fargo*, 705 N.W.2d 850, 855 (N.D. 2005) (temporary moratorium on issuance of building permits upheld in face of constitutional challenge).

Tahoe-Sierra supports the Town's position in two important ways. First, it demonstrates that the Ordinance was a temporary prohibition on land divisions that "carr[ied] out the purposes" of section 236.45. Therefore, authority for the Ordinance has been granted by the express terms of that section. Second, if this Court should conclude that section 236.45 does

not contain an express grant of authority for a moratorium, *Tahoe-Sierra* shows that the power to adopt a moratorium is, in the words of *Town of Beloit*, "necessary to implement the powers expressly granted." 249 Wis. 2d 88, ¶ 13.

C. *Wisconsin Case Law Supports The Town's Authority To Adopt A Temporary Moratorium On Land Divisions.*

Several Wisconsin appellate court decisions support the Town's authority to adopt a temporary moratorium on land divisions. In *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58, 70-71, 327 N.W.2d 642 (1983), the Supreme Court upheld a town's minimum lot size ordinance, finding that it was an authorized and necessary part of subdivision control under section 236.45. The property owners argued that the minimum lot size ordinance was void because it was a zoning ordinance, not a subdivision regulation under chapter 236. *Id.* at 60. The

Supreme Court discussed the broad delegation of power to municipalities in section 236.45, stating:

> This delegation of power is broad and liberally construed in favor of the local government. Sec. 236.45(2)(b), Stats. As stated in *Mequon v. Lake Estates Co.*, 52 Wis. 2d at 774:
>
> > "The general declaration of legislative intent appearing in sec. 236.45(1) indicates that the purpose of the law is to permit a municipality to adopt regulations encouraging the most appropriate use of land throughout. Sec. 236.45(2)(b) directs that any ordinance adopted by a municipality shall be liberally construed in favor of the municipality. *This reserves to the city a broad area of discretion in implementing subdivision control provided that the ordinances it adopts are in accord with the general declaration of legislative intent and are not contrary, expressly or by implication, to the standards set up by the legislature. This is a grant of wide discretion which a municipality may exercise by ordinance or appropriate resolution.*"

Storms, 110 Wis. 2d at 64 (emphasis added).

The *Storms* Court held that the regulation of minimum lot size was a requirement that a local government may impose on a developer under section 236.45, even though the authority to

establish minimum lot sizes is not specifically mentioned in section 236.45. *Storms*, 110 Wis. 2d at 65-67. "Lot 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 same analysis applies here – the objectives identified in section 236.45(1) are promoted by allowing West Point to implement a temporary moratorium on land divisions. In fact, West Point's position is even stronger than that of the town of Sun Prairie because section 236.45(2)(a) specifically allows West Point to prohibit the division of land in areas where the prohibition will carry out the purposes of section 236.45.

More recently, in *Wood v. City of Madison*, 2003 WI 24, ¶ 3, 260 Wis. 2d 71, 659 N.W.2d 31, the Supreme Court held that the city of Madison had the power under section 236.45 to

reject a preliminary plat in its extraterritorial jurisdiction based upon a subdivision ordinance that considered the plat's proposed use. The *Wood* Court relied on the principles set forth in *Storms* and *Mequon* when analyzing the city's authority under section 236.45. *Id.* ¶¶ 13-18.

The principle expressed over the last thirty-plus years by the Supreme Court in *Mequon*, *Storms*, and *Wood* is that a municipality has wide discretion to adopt local land division ordinances under authority of section 236.45. Local land division regulations that further the purposes set forth in section 236.45(1) will be upheld, even if the authority to take the action identified in the local ordinance is not expressly set forth in section 236.45. Here, the authority for a prohibition on land divisions is expressly set forth.

D. The Associations Misinterpret The Meaning Of "In Areas" In Section 236.45(2)(a).

Section 236.45(2)(a) authorizes the Town to "prohibit the division of land in areas where such prohibition will carry out the purposes of" section 236.45. The Associations argue that the phrase "in areas" establishes a geographic limit on the kinds of prohibitions that are authorized. (Associations' Br. at 16-19.) In other words, the Associations claim that a prohibition affecting only certain areas of the Town is authorized, but a prohibition affecting the entire Town is not – even if the prohibition is only temporary.

The main problem with this position is that it reads a limitation into the statute that simply is not there. The statute plainly authorizes a prohibition on land divisions "in areas where such prohibition will carry out the purposes of this section." If a temporary prohibition (moratorium) in all areas of

the Town will carry out such purposes, then the statute, by its plain terms, authorizes the moratorium. To read the statute more narrowly would violate the legislature's directive to construe the statute liberally in favor of the Town:

> *This section and any ordinance adopted pursuant thereto shall be liberally construed in favor* of the municipality, *town* or county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands.

Wis. Stat. § 236.45(2)(b) (emphasis added).

The Associations argue that the Town's construction of section 236.45(2)(a) renders the phrase "in areas" superfluous, or surplusage. Not so. The Associations are assuming that the phrase "in areas" must be viewed as a geographic limitation on the authority of local governments to prohibit land divisions. (Their surplusage argument is illogical unless "in areas" is viewed as a restriction.) But it seems unlikely that the phrase

was meant as restrictive in view of the broad delegation in section 236.45 and the directive in subsection 236.45(2)(b) to construe the whole section liberally in favor of municipalities. More likely, the phrase "in areas" is not a restriction at all, but rather an empowering phrase – one that makes clear that a town may prohibit land divisions, either throughout the town or in specific areas, provided the prohibition carries out the purposes of section 236.45.

In other words, it can be presumed that municipalities may enact an ordinance that applies uniformly throughout the municipality. The phrase "in areas" makes clear that prohibitions may be enacted in specific areas or uniformly throughout the municipality. Viewed in that light, the phrase "in areas" adds to local authority. It clarifies the broad extent of local authority. Viewed in that light, the Town's construction of

section 236.45 does not suggest that the phrase "in areas" is surplusage.

The legislative history of section 236.45(2)(a) supports the Town's construction. Section 236.45(2)(a) was created in 1955 when the Wisconsin Legislature repealed and recreated Chapter 236. Laws, ch. 570. Prior to 1955, section 236.143 governed the regulation of subdivisions by local governments. Section 236.143(2) stated, in relevant part: "The municipal governing body may by ordinance regulate, restrict, and *in specific areas prohibit the division or subdivision of land* within said municipality . . . ." (Emphasis added.) Although the phrase "in specific areas" implied some kind of limitation on municipal authority to prohibit the division or subdivision of land, the statutory language gave no guidance as to what the limitation was.

The legislature provided the necessary guidance when it enacted section 236.45(2)(a) in 1955: A municipality "may prohibit the division of land in areas *where such prohibition will carry out the purposes of this section.*" Wis. Stat. § 236.45(2)(a). In other words, the limitation is that the prohibition must carry out the purposes of the statute. Significantly, when the legislature repealed section 236.143 and created section 236.45(2)(a), it deleted the word "specific" as a qualifier of "areas." Yet "specific" is the very word the Associations impliedly are asking the court to read back into the statute ("in [specific] areas") in an effort to create a geographic limitation that the legislature never adopted.[7]

[7] The legislative note to section 236.45 stated that it "is very similar to the present § 236.143," which it is. Several sections changed, however, including section 236.45(2), which improved upon section 236.143 by answering the question of when and where a municipality may prohibit the division or subdivision of land.

E. The Town's Interpretation Does Not Render Section 62.23(7)(da) Meaningless.

Contrary to the Associations' argument, the Town's construction of section 236.45(2)(a) does not render section 62.23(7)(da) meaningless. The Associations argue that if, as the Town asserts, section 236.45(2)(a) authorizes a temporary moratorium, there would have been no need for the legislature subsequently to enact section 62.23(7)(da), which also authorizes a temporary moratorium. (Associations' Br. at 17-18.)

Section 62.23(7)(da) allows a municipality[8] to "enact an interim zoning ordinance to preserve existing *uses* while the comprehensive zoning plan is being prepared." (Emphasis added.) In other words, it allows for a temporary zoning "freeze." Section 236.45(2)(a) allows for a temporary prohibition on *land divisions*. The two statutes authorize moratoria on two different things. Hence, contrary to the Associations' argument, there *was* a need for the Wisconsin Legislature to enact section 62.23(7)(da) after the enactment of section 236.45(2).

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[8] Although there is no zoning freeze involved in this case, the Associations are inconsistent with regard to whether towns may exercise the zoning freeze authority in section 62.23(7)(da). At page 23 of their brief the Associations say that authority "only applies to cities." At page 17 they say it applies to "cities (and towns with zoning authority)." In fact, it applies to cities, to villages (pursuant to section 61.35), and to certain towns (pursuant to sections 60.10(2)(c), 60.22(3), 60.62 and 61.35).

The Associations are also incorrect when they assert that the purpose of the Ordinance was to "preserve the status quo while formulating a comprehensive zoning plan." (Associations' Br. at 17). The Town, which does not exercise zoning power, was not formulating a comprehensive zoning plan.

F. The Ordinance Does Not Conflict With Mandatory Provisions Of Chapter 236.

The Associations argue that the Ordinance cannot be reconciled with the statutory procedures imposed by chapter 236. (Associations' Br. at 10-15.) Specifically, they argue that the Ordinance runs afoul of "mandatory" requirements in the statute. For example, they claim chapter 236 requires that once a plat is submitted to a municipality, the municipality must forward the plat to other reviewing and approving agencies.

They also claim the municipality must review a plat for compliance with the review criteria listed in section 236.13(1). The Ordinance, they say, runs afoul of all these requirements because it provides, temporarily, that plats (if not within the Ordinance's exceptions) are rejected without being forwarded to other agencies and without being reviewed for approval.

The Associations' argument goes too far because its reasoning leads inexorably to the conclusion that any prohibition enacted by local ordinance must be illegal. That is because any prohibition would be equally irreconcilable with the "mandatory" procedures of chapter 236. Yet, even the Associations admit that section 236.45(2)(a) allows a local ordinance to prohibit some land divisions. (Associations' Br. at 19.) They claim the prohibition must be limited to only specific

areas, for example an environmental corridor.[9] The Associations' argument would render illegal prohibitions that section 236.45(2)(a) clearly authorizes. The argument leads to a contradiction, and is thus shown to be invalid.

The flaw in the Associations' argument stems from their misreading of section 236.45(2)(a). That section reads in pertinent part:

> Such ordinances . . . may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. *Such ordinances shall make applicable to such divisions all of the provisions of this chapter*, or may provide other surveying, monumenting, mapping and approving requirements for such division.

Wis. Stat. § 236.45(2)(a) (emphasis added).

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[9] To avoid the consequences of their own "mandatory" procedures argument, the Associations apparently would require absurd provisions in a local ordinance that includes a valid prohibition. For example, if the local ordinance prohibited land divisions within an environmental corridor, the Associations would require that an application for such a division be forwarded to other reviewing authorities (wasting time and resources) before the application could be denied. (Associations' Br. at 15.)

The Associations focus on the italicized language. They shorten and paraphrase it to a supposed requirement that a town ordinance must "make applicable all of the provisions of [Chapter 236]." (Associations' Br. at 9.) The Associations' shorthand version twists the statute's meaning by dropping the three essential words "to such divisions." An accurate paraphrasing would be: local ordinances shall make applicable *to such divisions* all of the provisions of chapter 236. In other words, the requirement to forward an application to other agencies and to conduct a review according to certain criteria applies whenever divisions are possible. It does not apply when divisions are prohibited.

This is true whether section 236.45(2)(a) states, "[s]uch ordinances *shall* make applicable to such divisions *all* of the provisions of this chapter . . .", or whether section 236.45(2)(a)

states, "[s]uch ordinances *may* make applicable to such divisions *any* of the provisions of this chapter . . .", which is how section 236.45(2)(a) read before being amended in 2001. *See* 2001 Wis. Act 16, § 3127m (emphasis added). Either way, the requirement to forward an application to other agencies and to conduct a review according to certain criteria logically does not apply when a proposed land division cannot possibly be approved because of a prohibition in the ordinance.

III. THE TOWN EXERCISED ITS LAND DIVISION POWERS, AND NOT ZONING POWERS, TO ADOPT THE ORDINANCE.

The Town may exercise all authority conferred by section 236.45 regardless of whether it has any zoning powers. *Storms*, *supra*, analyzed the distinction (and the overlap) between local zoning and subdivision regulations. In *Storms*, property owners argued that minimum lot size requirements should be regarded

as zoning regulations, not subdivision regulations. 110 Wis. 2d at 67. The Supreme Court disagreed, noting that "zoning and subdividing are complementary land planning devices." *Id.* at 68. The Supreme Court stated:

> The distinction between zoning and subdivision regulation was well stated in E.C. Yokley, *Law of Subdivisions*, sec. 39 at 157-58 (2d ed. 1981), as follows:
>
> > "Planning legislation and zoning, although sometimes considered as a single conception, do not cover identical fields of municipal endeavor. Nevertheless, statutory considerations anticipate a close relationship between planning, zoning and platting.
> >
> > "Zoning and planning must be viewed as complementary devices used in community planning. Both are aimed at the orderly development of a community. Though zoning is aimed at controlling the uses of land and existing resources, subdivision regulations are designed to control the division of land and to assure that such developments thereon are designed to accommodate the needs of the occupants of the subdivision.

Id.

The Supreme Court said it was appropriate for the town of Sun Prairie to establish a minimum lot size of 80,000 square feet in its subdivision code, even though minimum lot size regulation is an integral part of both zoning and subdividing planning devices. *Id.* at 71. "The fact that minimum lot size may also be regulated by zoning ordinances does not detract from the power of local governments to exercise such power pursuant to ch. 236, Stats." *Id.* at 70.

Similarly, in *Manthe v. Town Board of Windsor*, 204 Wis. 2d 546, 549, 555 N.W.2d 167 (Ct. App. 1996), property owners challenged the town's rejection of a plat. One of the reasons given by the town for rejection of the plat was that the property owners failed to include public sewer services for the proposed subdivision as required by the town's subdivision ordinance. *Id.* at 553. The court held that section 236.45(2)(a) authorized the

town to adopt subdivision regulations requiring that subdivisions be served by public sewer facilities. *Id.* at 559. The court rejected the property owners' argument that requiring subdivisions to be served by public sewer facilities was an illegal zoning ordinance. *Id.* at 559-60. The court stated:

> Windsor's ordinance does not regulate the use of the Manthes' land; it merely provides that the Manthes must provide public sewer facilities....
>
> If a local regulation is intended to enhance the quality of the subdivision, it may be imposed in a subdivision ordinance as well as a zoning ordinance.

Id. at 560.

In *Wood*, the Supreme Court again recognized the potential overlap between subdivision and zoning authority, stating:

> As long as the 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.

260 Wis. 2d 71, ¶ 35 (quoting *Storms*, 110 Wis. 2d at 70-71).

Finally, in *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 558 N.W.2d 100 (1997), the Supreme Court discussed the relationship between municipal zoning and subdivision authority. A developer challenged the city's denial of a preliminary plat based on the plat's conflict with the city's master plan. *Id.* at 160. The Supreme Court upheld the denial of the plat, finding that section 236.13(1)(c) permitted the city to reject approval of the plat based on an element contained solely in a master plan. *Id.* at 158. The Supreme Court rejected the developer's argument that the city's zoning ordinances should prevail over a master plan when the two are inconsistent. *Id.* at 171. The Supreme Court highlighted language in section 62.23(7)(a) which states that the zoning authority granted to municipalities in section 62.23 "may not be deemed a limitation

on any power granted elsewhere."[10] *Lake City Corp.*, 207 Wis. 2d at 172 (quoting Wis. Stat. § 62.23(7)(a)). Accordingly, the city had authority to deny plat approval based on a master plan because Wisconsin's zoning statutes did not limit such action and such action was authorized by chapter 236. *Id.* at 172.

The principles expressed in *Storms* and the other cases cited above lead to the following conclusions:

- The fact that a temporary moratorium on rezonings may be enacted pursuant to zoning authority does not detract from the Town's authority to enact a temporary moratorium on land divisions under the powers granted by section 236.45.

- The zoning statutes, whether sections 62.23 or 60.61, do not limit the Town's powers under section 236.45.

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[10] Section 60.61 governs general zoning authority for towns and contains almost identical language in subsection (1)(b), stating: "Authority granted under this section shall be liberally construed in favor of the town exercising the powers. This section may not be construed to limit or repeal any powers possessed by any town."

These principles should lead this Court to reject the Associations' argument that the Ordinance is an exercise of zoning power. (Associations' Br. at 4-8, 17-18.) The fact that section 62.23(7)(da) allows a city or village to "enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared" does not limit the Town's or any other municipalities' authority to enact a temporary moratorium on land divisions pursuant to section 236.45. *See Wood*, 260 Wis. 2d 71, ¶ 35 (quoting *Storms*, 110 Wis. 2d at 70-71).

Moreover, the Associations are incorrect when they assert that sections 60.61 and 60.62 "are the town's sole authority to regulate land use and planning . . . ." (Associations' Br. at 7.) The Town may regulate land use and planning through its local

subdivision regulations.[11] *See* Wis. Stat. § 236.45; *Storms*, 110 Wis. 2d 58; *Wood*, 2003 WI 24.

IV. OTHER JURISDICTIONS SUPPORT THE TOWN'S ARGUMENT.

Section 236.45 and the Wisconsin appellate court decisions cited above provide all the guidance necessary to conclude that the Town had authority to impose a temporary moratorium on land divisions. That being said, we note that other jurisdictions have approved the enactment of a temporary moratorium on land divisions or other development activity in the absence of express enabling language in the statutes.

The analysis from other jurisdictions is relevant for two reasons: (1) several jurisdictions upheld moratoria, even though

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[11] Because the Ordinance was not a zoning ordinance and was not adopted pursuant to section 60.62(2), the Town did not need to receive approval to enact the Ordinance at the town meeting or by a referendum, as suggested by the Associations. (Associations' Br. at 6-7.)

the applicable state statutes did not grant to the municipalities express authority to adopt temporary moratoria; and (2) the courts looked to the underlying purposes of local planning regulations to support their conclusions that the temporary moratoria were legal.

For example, in *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976), the Supreme Court of Minnesota concluded that a town had the authority to adopt a moratorium on land development. The court acknowledged that the Minnesota statutes did not grant municipalities specific authority to adopt moratorium ordinances. *Id.* at 825. Nonetheless, relying on the legislature's policy statement for municipal planning and development, the court concluded that the authority to enact temporary moratoria on land development was implicit within the statutes. *Id.* at 824-26. The court stated:

> *We are of the view, however, that in the absence of explicit expression of a contrary purpose by the legislature, we are free to hold that under general principles conferring on municipalities broad police powers, they have authority to adopt moratorium ordinances of limited duration provided they are enacted in good faith and without discrimination.* The statement of policy contained in the Municipal Planning Act, s 462.351, supports this conclusion.
>
> . . . .
>
> It was more in the nature of a stay of proceedings, holding development in a state of suspense to permit the town to keep its planning options open and to conduct a study of long-range development. While not specifically authorized by statute, authority for such procedure seems implicit in Minn.St. 462.351.

Id. at 825-26 (emphasis added).

Similarly, the Supreme Court of Colorado upheld a county's temporary moratorium on the review of land use applications while the county prepared its master plan. *Droste*, 159 P.3d at 603. The county ordinance in *Droste* was broader in scope than the Ordinance in the instant case. The county imposed a moratorium on all *land use* applications, and not just

on *land division* applications. *Id.* at 603. The court determined that Colorado's statutes did not grant local governments explicit authority to adopt moratorium ordinances. *Id.* at 606-07. Nonetheless, the court upheld the moratorium, holding that the power to impose a temporary moratorium was necessarily implied:

> The Land Use Enabling Act includes the *necessarily implied authority* of the local government to impose, through a public hearing process, a moratorium of limited duration to halt further development pending adoption of a master plan.

Id. at 608 (emphasis added).

In *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 848 P.2d 1095, 1100 (N.M. Ct. App. 1993), a moratorium on subdivision approval withstood a developer's challenge. The New Mexico Court of Appeals agreed with the lower court's finding "that the moratorium was

a valid exercise of 'the County's implied planning, zoning and subdivision powers as well as its police powers.'" *Id.*[12]

Although the Town here did not rely on zoning powers, its powers under section 236.45 are similar. In *Wood, supra*, the Wisconsin Supreme Court noted that similarity, stating that the purposes listed in section 62.23(7)(c), the zoning enabling act, "are remarkably similar to those which underlie subdivision plat approval authority under § 236.45(1) [the enabling act for local land division regulations]." 260 Wis. 2d 71, ¶ 23. Moreover, like Rio Arriba County in *Brazos Land*, West Point has been granted broad police powers. The town board has been authorized under sections 60.10(2)(c) and 60.22(3) to exercise village powers. Those powers include the broad grant of

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[12] Connecticut has also upheld local moratoria. *See Arnold Bernhard & Co. v. Planning & Zoning Comm'n of Westport*, 479 A.2d 801, 802 (Conn. 1984) (moratorium on accepting business development applications upheld despite no express grant of power to enact temporary moratorium).

authority under section 61.34(1) "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 . . . ."

At the circuit court, the Associations cited *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) to support their argument, but they have not cited it here. *Naylor* carries little weight. In that case, the Pennsylvania Supreme Court, relying solely on Pennsylvania statutes and court decisions, held that a temporary moratorium on new residential subdivision and land development was invalid. *Id.* at 772. *Naylor* is notable for being outside the mainstream of decisions. Indeed, the *Naylor* Court acknowledged that its decision was contrary to those issued in many other states, which "have approved the enactment of a temporary moratorium on land development absent express language in the municipality's enabling act." *Id.*

at 777. The court also reiterated that its decision was based on Pennsylvania-specific case law. *Id.* *Naylor* may support the Associations' position, but it is a self-acknowledged anomaly.

CONCLUSION

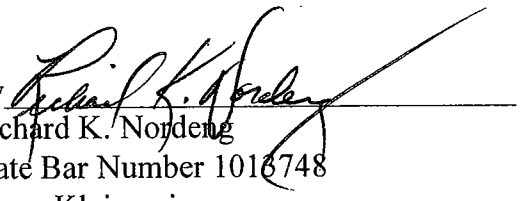
The Town adopted the Ordinance to facilitate efficient and intelligent growth as it faces increasing development pressure. (R. 12 at 10; A-App. 10.) The Town updated its comprehensive plan "with the intent that all of the comprehensive plan elements will be reviewed and implemented and replace the Land Use Plan adopted by the Town in 1996, last amended 2004." (*Id.*) Without the moratorium, the Town could have faced a stampede of land dividers seeking approval before the new regulations took effect – effectively undermining the comprehensive plan and the purposes identified in section 236.45(1).

Affirming the circuit court will ensure that Wisconsin municipalities continue to have a necessary tool: the authority to adopt a temporary moratorium on land divisions while they update their comprehensive plans. The Ordinance was narrow in scope. It prohibited only land divisions, not other development activity. The prohibition lasted only so long as was necessary for the Town to develop a new comprehensive plan and implementing ordinances.

For the foregoing reasons, defendant-respondent Town of West Point respectfully requests that the Supreme Court affirm the circuit court's decision granting summary judgment in favor of the Town.

Dated: October 3, 2007.

STAFFORD ROSENBAUM LLP

By 
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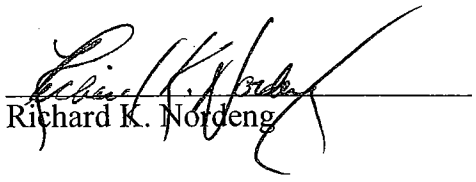
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and supplemental appendix produced with a proportional serif font. The length of this brief is 7,441 words.

Dated: October 3, 2007.



Richard K. Nordeng

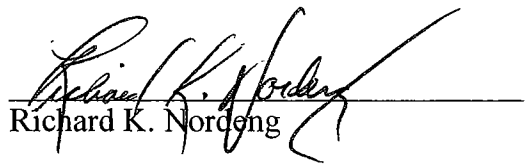
DEFENDANT-RESPONDENT'S
SUPPLEMENTAL APPENDIX

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with section 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries; and
(3) portions of the record essential to an understanding of the issues raised.

Dated: October 3, 2007.



Richard K. Nordeng

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.

SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT TOWN OF WEST POINT

Appeal From The Columbia County Circuit Court,
Case No. 2006CV000096
The Honorable Andrew P. Bissonnette, Presiding

STAFFORD ROSENBAUM LLP
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TABLE OF CONTENTS

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 COLUMBIA COUNTY

WISCONSIN REALTORS® ASSOCIATION, INC.,

and

WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs,

Case No. 06-CV-096

v.

TOWN OF WEST POINT,

Defendant.

AFFIDAVIT OF EDITH EBERLE
IN SUPPORT OF DEFENDANT'S BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN

COLUMBIA COUNTY

EDITH EBERLE, being sworn states:

1. I am an adult resident of the State of Wisconsin and make this affidavit of my own personal knowledge. I make this affidavit in support of defendant's brief in opposition to the plaintiffs' motion for summary judgment.

2. I am the Town Clerk for the Town of West Point. I have held this office since April 1983.

3. The Town Plan Commission met to consider whether the Town Board should adopt an ordinance imposing a temporary stay on the acceptance, review, and

approval of subdivision and other land division applications. The Town Plan Commission recommended that the Town Board adopt such an ordinance.

4. Prior to the adoption of Ordinance No. 9-20-05A, the Town Board held a public hearing regarding whether an ordinance imposing a temporary stay on the acceptance, review, and approval of subdivision and other land division applications should be adopted.

5. Notice of the public hearing was provided by publication of a class 2 notice.

6. Following its adoption, Ordinance No. 9-20-05A was published in form suitable for public distribution.

7. The Town has been proceeding expeditiously to update its comprehensive plan and implementing ordinances, is ahead of schedule, and may be able to complete the project and rescind the moratorium ordinance by November or December 2006.

Edith Eberle

Edith Eberle

Subscribed and sworn to before me
this 30 day of AUGUST, 2006.

Notary Public, State of Wisconsin
My Commission NOVEMBER 22, 2009

ORDINANCE NO. 9-13-07A
TOWN OF WEST POINT

AN ORDINANCE ENDING THE TEMPORARY STAY
ON THE ACCEPTANCE, REVIEW AND APPROVAL
OF LAND DIVISION AND SUBDIVSION APPLICATIONS

RECITALS

A. On September 20, 2005, the Town Board of the Town of West Point adopted Ordinance No. 9-20-05A imposing a temporary stay on the acceptance, review and approval by Town officials, staff or consultants of any applications for a land division or subdivision received by the Town on or after the effective date of Ordinance No. 9-20-05A.

B. Section 4 of Ordinance No. 9-20-05A stated that the ordinance shall expire eighteen (18) months after its effective date, unless an earlier or later date is adopted.

C. On March 8, 2007, the Town Board adopted Ordinance No. 030807 amending Ordinance No. 9-20-05A to extend the temporary stay until September 20, 2007.

D. The purpose of Ordinance No. 9-20-05A was to forestall new land divisions or subdivisions while the Town updated its comprehensive plan and implementing ordinances.

E. On June 14, 2007, the Town Board adopted Ordinance No. 061407 adopting the Town comprehensive plan pursuant to section 66.1001 of the Wisconsin Statutes.

F. On September 13, 2007, the Town Board adopted Ordinance No. 9-13-07 adopting a new land division ordinance by reference as Chapter 6 – Land Division Ordinance of the Code of Ordinances of the Town of West Point, Wisconsin, pursuant to section 236.45 of the Wisconsin Statutes.

ORDINANCE

The Town Board of the Town of West Point, Columbia County, Wisconsin, does ordain as follows:

1. Ordinance No. 9-20-05A is hereby rescinded.

2. This Ordinance shall take effect the day after passage and posting or publication pursuant to law.

The foregoing ordinance was duly adopted by the Town Board of the Town of West Point at a meeting held on September 13, 2007.

APPROVED:
Dean Schwarz
Dean Schwarz, Town Chair

ATTEST:
Edith Eberle
Edith Eberle, Town Clerk

ORDINANCE NO. 061407
AN ORDINANCE ADOPTING
THE TOWN OF WEST POINT COMPREHENSIVE PLAN

RECITALS

A. Pursuant to sections 60.22(3) and 62.23(2) and (3), Wisconsin Statues, the Town of West Point is authorized to prepare and adopt a comprehensive plan as defined in sections 66.1001(1)(a) and 66.1001(2), Wisconsin Statues.

B. The Town Board of the Town of West Point adopted and followed written procedures designed to foster public participation in every stage of the preparation of the comprehensive plan as required by section 66.1001(4)(a), Wisconsin Statutes.

C. The Plan Commission of the Town of West Point, by a majority vote of the entire Commission recorded in its official minutes, adopted a resolution recommending to the Town Board the adoption of the document entitled "TOWN OF WEST POINT COMPREHENSIVE PLAN 2030" (the "Town of West Point Comprehensive Plan"), which contains all of the elements specified in section 66.1001(2), Wisconsin Statues.

D. The Town of West Point held a public hearing on May 29, 2007, at which a proposed comprehensive plan was discussed, in compliance with the requirements of section 66.1001(4)(d), Wisconsin Statues, and provided numerous other opportunities for public involvement per its adopted public participation strategy and procedures.

E. The Town of West Point Comprehensive Plan contains all of the elements specified in section 66.1001(2), Wisconsin Statutes.

ORDINANCE

Therefore, pursuant to section 66.1001(4), Wisconsin Statutes, the Town Board of the Town of West Point do ORDAIN as follows:

1. The document entitled "TOWN OF WEST POINT COMPREHENSIVE PLAN 2030" is adopted as the Town of West Point Comprehensive Plan under section 66.1001 of the Wisconsin Statutes.

2. The Town Clerk is directed to file a copy of this Ordinance and the Town of West Point Comprehensive Plan with all of the entities specified in section 66.1001(4)(b), Wisconsin Statutes.

3. This ordinance shall take effect upon passage by a majority vote of the members-elect of the Town Board and publication/posting as required by law.

The foregoing ordinance was duly adopted by a majority vote of the members-elect of the Town Board of the Town of West Point at a meeting held on June 14, 2007.

Dean Schwarz
Dean Schwarz, Town Chairman

Attest:

Edith K. Eberle
Edith K. Eberle, Town Clerk

Published/Posted on: June 15, 2007 – Posted
June 21, 2007 - Published

ORDINANCE NO. 9-13-07
TOWN OF WEST POINT

AN ORDINANCE AMENDING
CHAPTER 6 OF THE CODE OF ORDINANCES
OF THE TOWN OF WEST POINT, WISCONSIN

RECITALS

A. The Town Board of the Town of West Point has the authority to amend Chapter 6 – Land Division and Subdivision Regulations of the Code of Ordinances of the Town of West Point, Wisconsin pursuant to Wis. Stat. § 236.45.

B. The attached Land Division Ordinance was drafted as an amendment to Chapter 6 – Land Division and Subdivision Regulations of the Code of Ordinances of the Town of West Point, Wisconsin.

C. The Town Board held a public hearing on August 30, 2007, at which citizens were provided an opportunity to comment on the attached Land Division Ordinance pursuant to Wis. Stat. § 236.45(4).

D. The Town of West Point Plan Commission has reviewed the proposed amendments and has recommended to the Town Board that it adopt the attached Land Division Ordinance pursuant to Wis. Stat. § 236.45(4).

E. Copies of the attached Land Division Ordinance were placed on file with the Town Clerk and on the Town's website on August 30, 2007, and have remained available for public inspection since that time.

F. The Town Board has determined that it is in the public interest to adopt the attached Land Division Ordinance as provided in Wis. Stat. § 66.0103.

ORDINANCE

The Town Board of the Town of West Point, Columbia County, Wisconsin, does ordain as follows:

1. Chapter 6 – Land Division and Subdivision Regulations of the Code of Ordinances of the Town of West Point, Wisconsin is repealed.

2. The attached Land Division Ordinance is adopted by this reference as Chapter 6 – Land Division Ordinance of the Code of Ordinances of the Town of West Point, Wisconsin.

3. The Town Clerk shall maintain copies of Chapter 6 – Land Division Ordinance for public inspection at the Town Hall.

This Ordinance shall take effect the day after passage and posting or publication pursuant to law.

The foregoing ordinance was duly adopted by the Town Board of the Town of West Point at a meeting held on September 13, 2007.

APPROVED:
Dean Schwarz
Dean Schwarz, Town Chair

ATTEST:
Edith Eberle
Edith Eberle, Town Clerk

STATE OF WISCONSIN
SUPREME COURT

WISCONSIN REALTORS ASSOCIATION, INC.
and WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs-Appellants,

v. Appeal No. 2006AP002761

TOWN OF WEST POINT,

Defendant-Respondent.

APPEAL UPON CERTIFICATION BY WISCONSIN COURT OF APPEALS FROM THE CIRCUIT COURT OF COLUMBIA COUNTY THE HONORABLE ANDREW P. BISSONNETTE PRESIDING CIRCUIT COURT CASE NO. 06-CV-096

AMICUS CURIAE BRIEF OF WISCONSIN TOWNS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes **Page**

Cases

INTRODUCTION

The Wisconsin Towns Association is a voluntary association of member towns and villages in the State of Wisconsin. Its membership consists of 1,254 towns and sixteen villages.

The purpose of the Association is, in part, to represent member towns in legislative efforts and to assist in any political or legal matters that will protect and promote town governments and protect the residents of town governments. This case raises a significant legal issue of statewide concern that directly impacts towns and their citizens. Primarily, the Court is being asked to determine whether towns have the authority to adopt reasonable, temporary moratoria on land divisions while they undertake the preparation of their comprehensive plans and appropriate implementing ordinances. This determination will greatly impact whether towns will be able to protect the health, safety, and welfare of their residents while taking time to engage in the planning process.

ARGUMENT

I. TOWNS WITH VILLAGE POWERS HAVE BOTH IMPLIED AND EXPRESS AUTHORITY TO ADOPT TEMPORARY MORATORIA ON LAND DIVISIONS.

The Town of West Point has the authority to adopt a temporary moratorium on land divisions based on both its implied authority under village powers and pursuant to its express authority under § 236.45,

Wis. Stat. Towns are creatures of the legislature, and thus have only the powers expressly delegated to them by statute and such other powers as are necessarily implied to implement the powers expressly granted. Town of Beloit v. County of Rock, 2001 WI App 256 ¶ 13, 249 Wis.2d 88, 637 N.W.2d 71. However, the state statutes allow the power of town boards to be significantly broadened through the adoption of village powers.

If authorized by the town electors at a town elector meeting held pursuant to § 60.10(2)(c), Wis. Stat., the town board may exercise powers relating to villages and conferred on village boards under chapter 61, except those powers which conflict with statutes relating to towns and town boards. Wis. Stat. § 60.22(3). In part, the village powers outlined under § 61.34, Wis. Stat. include the ability to act for the health, safety, welfare and convenience of the public.

During a moratorium, local officials have the opportunity to examine the impact of proposed development and then put measures in place to manage it. For example, a temporary halt on development affords a town the opportunity to study land suitability, visual impact, traffic patterns, storm water management, and the like. The resulting plans and ordinances, which are created to regulate the development, preserve the public health, safety, and convenience by ensuring that future development will not negatively impact the quality of life

enjoyed by residents of the town. In short, adequate opportunity for planning ensures that the community is not harmed by inefficient and ill-conceived growth. Clearly, with village powers, towns have the implied authority to adopt ordinances that protect the welfare of their citizens, including temporary moratoria on land divisions.

Secondly, under chapter 236, local governments are given considerable authority to direct and control land development within their jurisdiction. Town of Sun Prairie v. Storms, 110 Wis.2d 58, 64-65, 327 N.W.2d 642 (1983). Specifically, a town with village powers has the express authority under § 236.45(2)(a), Wis. Stat., to adopt an ordinance imposing a prohibition on "the subdivision of land in areas where such prohibition will carry out the purposes of the section".

The declaration of legislative intent in § 236.45(1), Wis. Stat. indicates the purpose of the section is, in part, to do the following:

- promote the public health, safety and general welfare of the community;
- lessen congestion in the streets and highways;
- further the orderly layout and use of land;
- prevent the overcrowding of land;
- avoid undue concentration of population, and

- facilitate the further resubdivision of larger tracts into smaller parcels of land.

In this case, the Town of West Point ordinance imposing the temporary moratorium specifically states that the Town will be using the stay, in part, as an opportunity to complete the land use element of its comprehensive plan and to amend or create new ordinances to implement the plan. (Brief and Appendix of Plaintiffs-Appellants, App. 10). The state comprehensive planning law requires a local governmental unit to address nine different planning elements, one of which is land use. Wis. Stat. § 66.1001(2), Wis. Stat. The portion of the plan addressing land use must include "a listing of the amount, type, intensity, and net density of existing uses of land in the local government unit..." Wis. Stat. § 66.1001(2)(h). It must also contain "projections...of future residential, agricultural, commercial and industrial land uses including the assumptions of net densities or other spatial assumptions upon which the projections are based." Wis. Stat. § 66.1001(2)(h).

A temporary moratorium that gives the Town an opportunity to complete the land use element of its plan, and any accompanying ordinances, will serve the purposes of § 236.45(2)(a) by preventing the overcrowding of land and undue concentrations of population. A new or amended town subdivision ordinance would also further the orderly

layout and use of land within the town. Clearly, the ordinance at issue in this case complies with § 236.45, Wis. Stat.

II. TOWNS ARE NOT REQUIRED TO HAVE ZONING AUTHORITY IN ORDER TO ADOPT LAND DIVISION REGULATIONS UNDER §236.45, WIS. STAT.

The appellants maintain that §§ 60.61 and 60.62 of the Wisconsin Statutes provide the town with its sole authority to regulate land use and planning. (Brief and Appendix of Plaintiffs-Appellants, p. 19). Such a statement is simply not true. It is well established in Wisconsin that regulations which could be enacted via a zoning ordinance may also be enacted by other statutory authority. Town of Clearfield v. Cushman, 150 Wis.2d 10, 20, 440 N.W.2d 777 (1989). In this case, the Town of West Point ordinance creating the temporary stay on land divisions and subdivisions clearly states that the authority for the ordinance comes from village powers and § 236.45, Wis. Stat. (Brief and Appendix of Plaintiffs-Appellants, App. 11). Nothing in the ordinance suggests that the town is attempting to use zoning authority under §§ 60.61 or 60.62 as its support for the ordinance and, in fact, reliance on such zoning authority is unnecessary. A town is not required to have zoning authority in order to adopt a subdivision regulation under § 236.45, Wis. Stat.

The Wisconsin Supreme Court has recognized that that subdivision regulations adopted pursuant to § 236.45, Wis. Stat. may consider the most appropriate use of the land since zoning and platting authority are not mutually exclusive. Wood v. City of Madison, 2003 WI 24, ¶ 35, 260 Wis. 2d 71, 659 N.W.2d 31. Moreover, the Court has also held that "As long as the regulation is authorized by and within the purpose of chapter 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." Storms, 110 Wis.2d at 70-71, 327 N.W.2d 642.

III. REASONABLE TEMPORARY MORATORIA MUST BE AVAILABLE TO COMMUNITIES AS A PLANNING TOOL IN ORDER TO EFFECTIVELY IMPLEMENT THE STATE COMPREHENSIVE PLANNING LAW.

According to § 66.1001, Wis. Stat., beginning on January 1, 2010, if a town, village, city, county, or regional planning commission engages in official mapping, subdivision regulation, or zoning, those actions must be consistent with the community's comprehensive plan. As a result, numerous communities statewide are now or soon will be engaged in the comprehensive planning process.

The purpose of comprehensive planning is to provide communities with information and policies that will guide future

planning and community decisions. Comprehensive plans incorporate a long-range vision and provide a rational basis for local land use decisions. Because communities vary greatly, the uniqueness of individual comprehensive plans reflects community-specific and locally driven planning processes. It takes time to put together or update a good community plan. During that time, demand for a particular use of land may rise for which there are inadequate or non-existent controls. If the community allows development during that time, the ultimate worth of the plan could be undermined.

Section 66.1001 requires a community to adopt a comprehensive plan if it wishes to exert certain land use controls. It seems obvious that land use controls will work best when built upon a carefully-considered comprehensive plan. Without the adequate time for planning that reasonable, temporary moratoria offer communities, it appears likely that land use controls will be hastily adopted without sufficient study or public comment.

CONCLUSION

The Wisconsin Towns Association strongly contends that the circuit court decision finding that reasonable moratoria on applications for the subdivision of land are permitted under § 236.45, Wis. Stat. must be affirmed. The Town of West Point had the necessary authority to

adopt the ordinance at issue in this case. Moreover, the option of using moratoria as a planning tool must be preserved so that communities may preserve the health, welfare, and safety of their residents while they engage in the planning process.

Respectfully submitted this 8th day of October, 2007.

Wisconsin Towns Association

By: _____

Carol Nawrocki
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W7686 County Road MMM
Shawano, WI 54166-6086
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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 AMICUS CURIAE THE WISCONSIN CHAPTER OF THE AMERICAN PLANNING ASSOCIATION

WISCONSIN CHAPTER OF THE AMERICAN PLANNING ASSOCIATION

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State Bar Number 01009448
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS

The Wisconsin Chapter of the American Planning Association ("WAPA") is a statewide organization representing planners throughout Wisconsin. WAPA has 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 therefore has 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.

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 IMPLED 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 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

---

[1] Appellant's reliance on zoning authority to make their argument is 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.

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. There is therefore 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 phase "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 phase 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. For example, in Almquist v. Town of Marshan, 308 Minn. 52, 245 N.W.2d 819 (1976), 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. 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.

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[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.

CONCLUSION

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

Dated: February 21, 2007

WISCONSIN CHAPTER OF THE AMERICAN PLANNING ASSOCIAITON

By: _____

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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: February 21, 2007

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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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

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 IMPLED 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

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[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 phase "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 phase 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.

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[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 10, 2007

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

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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.

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SUPREME COURT
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WISCONSIN REALTORS ASSOCIATION, INC.
and WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs-Appellants,

v. Appeal No. 2006AP002761

TOWN OF WESTPOINT,

Defendant-Respondent.

AMICUS CURIAE BRIEF OF THE LEAGUE OF WISCONSIN MUNICIPALITIES

Appeal from the Circuit Court of Columbia County
The Honorable Andrew P. Bissonnette Presiding
Circuit Court Case No. 06-CV-096

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case involves the exercise of sec. 236.45, Stats.,[1] subdivision power by a town. It arises in response to a temporary moratorium ordinance (Ordinance) adopted by the Town of Westpoint (Town) pursuant to sec. 236.45(2)(a), Stats., which temporarily prohibited nearly all land divisions in the Town. (Defendants' Br., 4-5).

The Wisconsin Realtors Association and the Wisconsin Builders Association (Associations), complain that the Ordinance is not authorized. They strictly construe 236.45 to prohibit the Ordinance.

The strict construction proposed by the Associations improperly limits local government authority to prohibit land divisions under 236.45(2)(a). Accordingly, for the reasons stated in the Town's brief with which we agree and those herein, the League of Wisconsin Municipalities asks that this court reject the Associations' interpretation of 236.45 and affirm the circuit court decision granting summary judgment in favor of the Town.

[1] All references to the Wisconsin Statutes are to the 2005-2006 version unless otherwise noted.

ARGUMENT

I. SECTION 236.45 AUTHORIZES A TEMPORARY ORDINANCE WHICH PROHIBITS LAND DIVISIONS.

A. Section 236.45 Must Be Liberally Construed In Favor Of Towns And Other Local Governments.

This case requires statutory construction. Statutory construction begins with the language of the statute which is given its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is also interpreted in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and is interpreted reasonably to avoid absurd or unreasonable results. *Id.*, ¶ 46. Statutory construction also considers the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.*, ¶ 48. If this process of analysis yields a plain meaning, then there is no ambiguity and the court applies that plain meaning. *Id.*, ¶ 46.

When construing powers delegated to towns and other municipal corporations, a strict construction rule is usually applied. A leading commentator on municipal law explains the rule as follows:

> In accordance with the general policy of the law to require of municipal corporations a reasonably strict observance of their powers, the courts incline to apply a rule of strict rather than liberal construction to laws and charters by which such powers are conferred.
>
> . . .
>
> The rule of strict construction follows logically from the judicial viewpoint that charters are regarded as special grants of power, and hence the conclusion is that whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld.

2A McQuillin Mun. Corp. § 10:21 (3d ed.). Wisconsin follows this general rule for strict construction of delegated local government powers. *See Town of Beloit v. County of Rock*, 2001 WI App 256, ¶ 13, 249 Wis. 2d 88, 637 N.W.2d 71 ("Towns are creatures of the legislature, and thus have only the powers expressly designated to them by statute and such other powers as are necessary to implement the powers expressly granted."); *Mequon v. Lake Estates Co.*, 52 Wis. 2d 765, 773, 190 N.W.2d 912 (1971)("cities, as creatures of the legislature, have only such powers as are expressly granted to them and such others as are necessary and convenient to the powers expressly granted . . .").

However, section 236.45 "shall be liberally construed in favor of the municipality, town or county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands." Wis. Stat. §236.45(2)(b). Thus, construction of powers granted under 236.45 is controlled by 236.45(2)(b), not the general strict construction rule.

B. A Temporary Ordinance Is A Valid Method For Implementing A Land Division Prohibition Under 236.45(2)(a).

Section 236.45(2)(a) delegates subdivision regulation power to counties, towns, and incorporated cities and villages and authorizes these local governments to "adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of" Chapter 236. Neither 236.45(2)(a) nor any other statute expressly limits this ordinance implementation authority to only permanent ordinances.

The term "ordinance" is not defined in Chapter 236. Accordingly, a dictionary may be consulted to determine its common and accepted meaning. *See Kalal*, 271 Wis.2d 633, ¶¶ 53-54, 681 N.W.2d 110. The Random House Dictionary of the English Language, 1363 (2d ed. 1987), defines

"ordinance" as "an authoritative rule or law; a decree or command" and as a "public injunction or regulation." Thus, the common and plain meaning of "ordinance" is also not limited to a permanent ordinance. It covers both.

The term "ordinances" in 236.45(2)(a) is not limited by express language in 236.45 or any other statute or its plain meaning to permanent ordinances. Accordingly, it includes temporary and permanent ordinances.

This conclusion is supported by the legislative requirement that 236.45 be liberally construed in favor of local governments. Wis. Stat. sec. 236.45(2)(b). This requirement has been followed to uphold municipal requirements even less clearly established under 236.45 than temporary ordinances prohibiting land divisions.

In *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), this Court addressed whether a village's authority to adopt "other . . . approving requirements" under 236.45 included the power to impose a requirement that a subdivider dedicate land for schools, parks, playgrounds, and whether it authorized an equalization-fee in lieu of dedicating land requirement. Even though these requirements are not specifically authorized, this Court

concluded that they were within the power delegated by 236.45 and stated that its broad interpretation of that section was "motivated . . . by the direction of sub.(2)(b) requiring a liberal construction of sec. 236.45." *Id.* at 447.

In *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58, 60, 327 N.W.2d 642 (1983), this Court considered whether a town "had the authority, pursuant to 236.45, Stats., to adopt an ordinance regulating minimum lot size." The Court explained that "[t]his delegation of power is broad and liberally construed in favor of the local government." *Id.* at 64. The Court concluded that "the regulation of minimum lot size is one of the 'further requirements' that a local government may impose on a subdivider pursuant to sec. 236.45" even though it is not specifically mentioned in the grant of power. *Id.* at 65.

It would be contrary to the plain meaning of "ordinances" and the explicit legislative directive for liberal construction and inconsistent with prior analysis of 236.45 powers by this Court to conclude that the term "ordinances" does not include temporary ordinances. Thus, this Court should hold that a temporary ordinance prohibiting land divisions is a valid method for a town or other local

government to exercise the power to prohibit land divisions under 236.45.

II. SECTION 236.45(2)(a) AUTHORIZES AN ORDINANCE PROHIBITING LAND DIVISIONS THAT APPLIES TO ALL AREAS OF THE ADOPTING LOCAL GOVERNMENT.

Section 236.45(2)(a) authorizes local subdivision ordinances that "prohibit the division of land in areas where such prohibition will carry out the purposes of" section 236.45. The Associations argue that the phrase "in areas" authorizes an ordinance that prohibits land divisions in portions of, not all, of a town. (Associations' Br., 16-19.) We disagree.

The term "area" is not defined in Chapter 236 but is defined as "any particular extent of space or surface, part" in the Random House Dictionary of the English Language, 110, (2d ed. 1987). This definition suggests that "area" may mean something less than the whole. However, we think the term "area" in 236.45 is best understood as "any particular extent of space or surface" irrespective of its relation to some other space.

A statute must be construed in relation to its context. *Kalal, supra* at ¶ 46. The phrase "in areas" does not appear in isolation in 236.45(2)(b). Rather, it must be read as part of the larger phrase "in areas *where such prohibition carries out the purposes of this section.*" (Emphasis added).

When read in context, the power to prohibit land divisions is limited but not as claimed by the Associations. Rather, the power can be exercised only when it carries out the purposes of 236.45.[2] Every ordinance prohibiting land divisions which meets this requirement is authorized irrespective of its relation to other space.

The Town's Ordinance "imposed a temporary prohibition while the Town prepared a new comprehensive plan and a new land division ordinance." (Defendants Br., 1.). This type of ordinance serves the general welfare of a community by preventing inefficient and ill-conceived growth, increased demands on public resources and risks to local housing and real estate economies that can be caused by a rush to develop or subdivide land before new policies and

[2] In this case, the Associations did not challenge the ordinance as overinclusive and thus, contrary to this restriction. This seems warranted given the strong correlation between the benefits of temporarily restricting land divisions and the comprehensive planning effort behind the temporary moratorium imposed by the Town of Westpoint.

regulations have been put in place. Promoting the general welfare of a community is among the stated purposes of 236.45.

Statutory interpretation must also avoid unreasonable or absurd results. *Kalal*, *supra* at ¶ 46. Under the Associations' "portions" interpretation, a town may not prohibit land divisions in all areas of the town. However, a county could prohibit land divisions in all areas of a town[3] since a town is a portion of a county and a county, like a town, is authorized by 236.45(2)(a) to adopt ordinances prohibiting land divisions "in areas where such prohibition will carry out the purposes of this section." This result is not reasonable since towns and counties are given the same authority to prohibit land divisions under 236.45(2)(a).

Statutory interpretation also should not defeat the purposes of a statute. *See Beard v. Lee Enterprises, Inc.*, 225 Wis.2d 1, ¶ 41, 591 N.W.2d 156 (1999)("When construing statutes, courts must presume that the legislature intends for a statute to be interpreted in a manner that advances the purposes of the statute, not defeats those purposes.") (citing

[3] County subdivision ordinances apply within the jurisdictional boundaries of towns but not cities or villages. *See* Wis. Stat. §236.45(3).

Verdoljak v. Mosinee Paper Corp., 200 Wis. 2d 624, 635, 547 N.W.2d 602 (1996)). The Associations' interpretation requires some portion of a town, county or municipality to always be free from a temporary land division prohibition even if application of the prohibition to that portion carried out the purposes of 236.45. This result defeats the purposes of 236.45.

Similarly, each parcel of land within a town is a "particular extent of space or surface" and thus, an area by definition. If the meaning of "area" in 236.45 means only a portion of an area, then an ordinance prohibiting land division could not even be applied to an entire parcel. This result also impermissibly defeats the purposes of 236.45 and is unreasonable.

Finally, the Legislature expressly demands that section 236.45 be construed liberally in favor of local governments. Wis. Stat. §236.45(2)(a). However, the Associations' interpretation of "in areas" adds an additional restriction on 236.45(2)(a) power that is not clearly required by the plain language of the statute. This interpretation is not faithful to the legislative directive.

The Associations' construction of 236.45(2)(a) produces unreasonable results. It also works to defeat the purposes for which it was intended to be used. It also constrains a power that the Legislature directed should be liberally construed. The Associations' construction must be rejected.

III. SECTION 236.45 DOES NOT REQUIRE APPLICATION OF OTHER CHAPTER 236 LAND DIVISION PROVISIONS TO A TEMPORARY ORDINANCE THAT PROHIBITS LAND DIVISIONS.

It is fundamental that every word of a statute should be given effect. *Blazekovic v. City of Milwaukee*, 2000 WI 41, ¶ 30, 234 Wis. 2d 587, 610 N.W.2d 467 ("A fundamental rule of statutory construction requires that effect be given, if possible, to every word, clause, and sentence in a statute, and that a construction resulting in any portion of a statute being superfluous should be avoided whenever possible.")(citing *Lake City Corp. v. City of Mequon*, 207 Wis 2d 155, 162, 558 N.W.2d 100). The Associations' interpretation of 236.45 violates this rule.

The Associations assert that the review and other Chapter 236 procedures must be a part of every ordinance

adopted under 236.45. (Associations' Br., 10-15.) They find this requirement in the 236.45(2)(a) sentence which reads: "Such ordinances shall make applicable to *such divisions* all of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements *for such division*." (Emphasis added).

The Associations' reading renders the highlighted phrases "such divisions" and "such division" meaningless. The sentence immediately preceding these phrases authorizes a land division prohibition ordinance. Exercising this authority produces an ordinance that *prohibits* land divisions—there are no divisions to review. It makes no sense to construe the following sentence and the language "such divisions" and "for such division" as applying to an ordinance that prohibits land divisions as the Associations urge.

Their construction only makes sense if the phrases "such divisions" and "for such division" are eliminated so that the sentence reads: "Such ordinances shall make applicable all of the provisions of chapter 236, or may provide other surveying, monumenting, mapping and approving requirements." This violates a longstanding rule of statutory construction and must be rejected.

IV. ZONING MORATORIUM POWERS DO NOT LIMIT 236.45 SUBDIVISION POWERS.

The Wisconsin zoning enabling law expressly authorizes zoning moratoriums to "preserve existing land uses while the comprehensive zoning plan is being prepared." Wis. Stat. §62.23(7)(da). The Associations argue this provision prohibits local governments from using subdivision power to impose a temporary moratorium on land divisions. (Associations' Br., 17-18.) We disagree.

The Associations' argument conflicts with express language in the zoning enabling law. Section 62.23(7)(a) states in part:

> This subsection may not be deemed a limitation of *any* power granted elsewhere.

(Emphasis added). Section 62.23(7)(da) is part of subsection 62.23(7). Therefore, it cannot be construed as a limitation on local government subdivision power. This Court has previously reached the same conclusion.

In *Storms*, *supra*, this Court addressed and rejected the argument that the authority to adopt minimum lot size requirements as a zoning ordinance denied a town the power to adopt such requirements as part of a subdivision ordinance.

The court explained that "[t]he fact that minimum lot size may also be regulated by zoning ordinances does not detract from the power of local governments to exercise such power pursuant to ch. 236, Stats." 110 Wis. 2d at 70.

This analysis was followed in *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 558 N.W.2d 100 (1997). There, this Court considered and rejected the claim that a city's zoning ordinances should prevail over a master plan when the two are inconsistent. *Id.* at 158. The Court specifically noted the language in 62.23(7)(a) which directs that the zoning authority granted to local governments by 62.23 "may not be deemed a limitation on any power granted elsewhere." *Id.* at 172 (quoting Wis. Stat. §62.23 (7)(a)).

This Court again supported the ability of local governments to act pursuant to their subdivision authority, even where it might act under its zoning power in *Wood v. City of Madison*, 2003 WI 24, 260 Wis. 2d, 659 N.W.2d 31. Rejecting the argument that the regulation of land use must be accomplished under a city's zoning power, the court observed:

> As long as the 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.

Id. at ¶ 35, (quoting *Storms*, 110 Wis. 2d at 70-71).

The Associations' argument that 62.23(7)(da) limits subdivision power under 236.45(2)(a) overlooks the express language in 62.23(7)(a) and strays from prior rulings of this Court. It must be rejected.

V. THE "SMART GROWTH" LAW DOES NOT EVIDENCE A LEGISLATIVE INTENT TO MAKE 62.23(7)(da) THE SOLE SOURCE OF MORATORIUM POWER.

The Associations argue that the Legislature intended 62.23(7)(da) as the sole source of power to adopt a moratorium. The argument rests on a misreading of 62.23(7)(da) and sec. 66.1001, Stats.

The Associations' claim that 66.1001 "mandates that towns exercising village powers develop a 'comprehensive plan.'" (Associations' Reply Br., 5). This is incorrect. No provision in 66.1001 requires any town or other local government to adopt a comprehensive plan. It only mandates the contents of a comprehensive plan, a procedure for adopting a comprehensive plan and consistency between an

adopted plan and subsequent land use activities. Wis. Stat. §§ 66.1001(2), (3) and (4).

The Associations correctly observe that 66.1001 grants no moratorium power. However, seeking to elevate the moratorium authority in 62.23(7)(da), they declare that a moratorium to accomplish 66.1001 planning "could occur pursuant to Section 62.23(7)(da), Stats. . . ." (Associations' Reply Br., 6.) They also assert that municipalities can use the 62.23(7)(da) moratorium power "while comprehensive planning occurs." (Associations' Reply Br., 7.). This is also error.

The plain language of 62.23(7)(da)) establishes that it may only be used "while the comprehensive *zoning* plan is being prepared." [Emphasis added]. This language establishes that 62.23(7)(da) cannot be used to freeze development for all types of comprehensive planning, only while a comprehensive zoning plan is prepared.

A 66.1001 plan is not just a zoning plan. It is a comprehensive plan that includes a housing plan, a transportation plan, and an economic development plan in addition to a land use or zoning plan among others. *See* Wis. Stat. § 66.1001(2). Therefore, 66.1001 does not support the

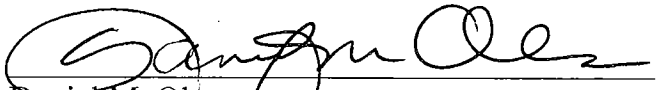
proposition that the Legislature only intended to confer moratorium authority pursuant to 62.23(7)(da).

CONCLUSION

For the foregoing reasons, the League of Wisconsin Municipalities respectfully requests that the Supreme Court affirm the circuit court's decision granting summary judgment in favor of the Town of West Point.

Dated: October 29, 2007.

LEAGUE OF WISCONSIN MUNICIPALITIES

By: 

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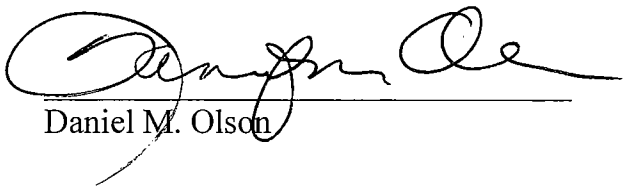
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2914 words.

Dated: October 29, 2007.



Daniel M. Olson

STATE OF WISCONSIN
SUPREME COURT

WISCONSIN REALTORS ASSOCIATION, INC. and WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs-Appellants,

Appeal No. 2006AP002761

vs.

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

AMICI CURIAE BRIEF OF WISCONSIN TRANSPORTATION BUILDERS ASSOCIATION AND AGGREGATE PRODUCERS OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Wisconsin Transportation Builders Association and the Aggregate Producers of Wisconsin respectfully submit this brief *amici curiae*.

INTEREST OF THE AMICI

Wisconsin Transportation Builders Association and Aggregate Producers of Wisconsin ("Amici") have a vested interest in the resolution of the question before the Court: does the Town of West Point have the authority to impose a town-wide moratorium on land-division. Amici and their members are producers of aggregate, a main building material for construction projects, and members of the transportation construction industry. Members of the aggregate industry and the transportation building industry both require access to new and necessary sites for aggregate production and nearby sources of sand and fill materials. Land-division moratoria inhibit their ability to access those sites with respect to any site which would need to be divided from a larger parcel, thereby driving up the price of aggregate and in turn the cost of construction. If towns across Wisconsin were to impose

town-wide land-division moratoria, there is great potential for negative impacts on the aggregate industry, the transportation construction industry, and virtually all construction-based industry and projects including those affecting schools, hospitals, factories and homes. Consequently, the negative repercussions to the state-wide economy as a whole are potentially serious and severe.

Non-metallic mining materials, which aggregate producers provide, are key ingredients in asphalt paving materials, concrete paving materials, bridge beams, culverts and sewer pipes, and provide the foundation for all transportation and other construction projects. Generally those construction projects receive such material from aggregate producers in close proximity to the projects. If aggregate producers are prohibited from acquiring and accessing such new sites because of land-division moratoria, however, construction companies at a minimum will be forced to seek aggregate from farther away, which negatively

affects the cost of aggregate and therefore the cost of construction projects.

The cost of aggregate dramatically increases in direct proportion to the distance the aggregate is transported. For example, crushed stone, sand and gravel costs consumers approximately $5 per ton at the source, but will double to a cost of $10 per ton when delivered to a construction site just 25 miles away. As a point of reference, average new home construction requires about 400 tons of aggregate for each home. Thus, if aggregate sites are inaccessible in the areas in which construction occurs, it could result in thousands of dollars of additional costs to consumers. In addition, if various towns across the state impose such moratoria, aggregate access will be impeded throughout the state, which will require hauling aggregate, sand and fill materials to areas in which sites are inaccessible.

Land-division moratoria may also have direct negative impacts on individual aggregate producers and construction companies. Local and regional aggregate producers may be

forced out of markets because of their inability to establish new and necessary aggregate sites to provide construction materials for local projects. Builders may obtain contracts for a project where local aggregate producers would be able to acquire and access the necessary sites, only to find that a town has frozen land division and prohibited them from doing so. Those contractors would be harmed by having to pay the increased cost of transporting the aggregate, which they had not accounted for in their bid for the project.

Construction of all kinds is obviously an important factor in and contributor to the state-wide economy. Thus, when the aggregate production and subsequently construction industries are harmed, it has a direct impact on the state-wide economy. Wisconsin has 1,260 towns spread throughout the state. *State of Wisconsin Blue Book 2005-2006*, at 744. Accordingly, if towns are able to prohibit land-division at their whim and without limits, that has serious potential to negatively impact not only local communities and local companies, but the state-wide economy as a whole.

Amici contend that the legislature recognized the potential danger of vesting the power to affect such state-wide concerns in the 1,260 towns in Wisconsin. That is why the legislature granted only a limited authority to municipalities to prohibit land development. As will be explained below, the statutes the Town of West Point claims gives it the authority to prohibit land-division town-wide do not in fact provide that authority. Instead, the statutes appropriately grant towns the authority to regulate land use by prohibiting land division *in specific areas* where doing so would further the goals of the statutes. The town of West Point does not have the authority to impose a blanket town-wide land division moratorium solely to maintain the status quo.

ARGUMENT

"It is well settled that municipal corporations have no powers except those expressly conferred or necessarily implied from the power conferred, and since towns are only quasi corporations the rule applies to them with especial force." *Village of Milton Junction v. Town of Milton*, 263

Wis. 367, 369-70, 57 N.W.2d 186 (1953) (quoting *Town of Swiss v. United States Nat. Bank*, 196 Wis. 171, 173, 218 N.W. 842 (1928)). Accordingly, the Town has the authority to impose a town-wide moratorium on land division only if that authority is expressly conferred by statute or necessarily implied. The Town points to two statutes which it contends provide such authority, Wis. Stat. §§ 236.45 and 61.34. However, an examination of the plain language and legislative history of those statute sections leads to the unavoidable conclusion that the Town does not possess the power to impose a blanket town-wide moratorium on land division.

I. A TOWN DOES NOT HAVE THE POWER TO IMPOSE A TOWN-WIDE MORATORIUM UNDER WIS. STAT. § 236.45.

The Town bases its argument that it has the authority to impose town-wide moratoria on land division on the grant of power in Wis. Stat. § 236.45(2)(a) to "prohibit the division of land in areas where such prohibition will carry out the purposes of this section." (Town Brief, p. 13.) The Town

misconstrues the statute. Both a plain reading of § 236.45, and an examination of its history clearly indicate that the power to prohibit land division does not include the power to impose town-wide moratoria on land division, nor is that power necessarily implied by § 236.45 or any other statute. Furthermore, the Town's interpretation of § 236.45 would grant towns unfettered power to freeze certain uses of privately owned land without limit, thus encouraging arbitrary use of such authority by towns and inviting future litigation. It is therefore clear that the Town's interpretation of a town's power under that section does not carry out the purposes of Wis. Stat. § 236.45.

A. A plain reading of Wis. Stat. § 236.45 demonstrates towns do not have the power to impose town-wide moratoria.

A plain reading of Wis. Stat. § 236.45 makes clear that the statute section was meant to grant only a limited power to towns to regulate land use. The intent to limit a town's power under that section is evidenced by the grant of power to prohibit land division only "in areas" where it would further

the statute's purpose. That § 236.45 was not intended to grant municipalities blanket moratorium authority becomes more clear when the statute is juxtaposed with statutes that *do* grant municipality-wide moratorium authority.

Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. In construing the intent of a statute, "statutory language is interpreted ... in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results" and to "avoid surplusage." *Id.*, ¶ 46 (citations omitted).

Amici agree with Wisconsin Realtors Association and Wisconsin Builders Association (Plaintiff-Appellants) that the Town's interpretation of the phrase "in areas" as used in Wis. Stat. § 236.45 renders that phrase surplusage, which is an impermissible statutory construction. *See Blazekovic v. City of Milwaukee*, 2000 WI 41, ¶ 30, 234 Wis. 2d 587, 610 N.W.2d 467.

Further, when examined in relation to closely-related statutes, it is clear that Wis. Stat. § 236.45 was not intended to grant town-wide moratorium authority. Unlike statute sections which explicitly grant moratorium authority, § 236.45 does not provide any temporal limitations on such an asserted power. Thus, if the Court reads the statute as the Town does, a town could impose a town-wide "moratorium" for 10 years, for 20 years, or forever. A grant of unlimited moratorium power is inconsistent with how the legislature grants such authority in other statutes.

For example, Wis. Stat. § 62.23(7)(da) expressly provides the power to impose moratoria on development. Specifically, that section provides:

> *Interim zoning.* The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. *Such ordinance may be enacted as is an ordinary ordinance but shall be effective*

> *for no longer than 2 years after its enactment.*

Wis. Stat. § 62.23(7)(da) (emphasis added); *see also* Wis. Stat. § 62.23(7a)(b) (granting cities the power to impose moratoria on development within extraterritorial zoning jurisdictions for a limited period of two years). Thus, although the legislature has given cities authority to impose city-wide moratoria on development, there are temporal limits to the scope of that power. There are no such limits in Wis. Stat. § 236.45.

The reason there are no temporal limits on the grant of power to towns to prohibit land division within Wis. Stat. § 236.45 is that a town's power under that section is limited to "areas where such prohibition will carry out the purposes of this section." *See* Wis. Stat. § 236.45(2). Unlike Wis. Stat. §§ 62.23(7)(da) and (7a)(b), § 236.45 does not confer the authority to prohibit land division to the limits of the municipality's jurisdiction. Rather, the "in areas" language in § 236.45 was intended to limit the Town's power to prohibit land division to *specific areas* such as, for example, parcels of

land upon which development would impede access to air and light, or parcels which if divided and developed would impede traffic flow or the orderly layout of land. *See* Wis. Stat. § 236.45(1).

In other words, the town-wide prohibition on land division solely to maintain the status quo does not carry out the purpose of Wis. Stat. § 236.45. Section 236.45 grants municipalities regulatory power 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..." Wis. Stat. § 236.45(1). Accordingly, if the division of land in a specific area would cause congestion, impede the orderly layout of land, pose a fire danger, or impair access to adequate light and air, a municipality may prohibit the division of land *in that area.*

Nothing within Wis. Stat. § 236.45 allows a municipality to prohibit the division of land *in all areas* solely to maintain the status quo regardless of whether division actually causes such a problem recognized by

§ 236.45(1). Nevertheless, that is precisely what the Town has done here. Such an interpretation of § 236.45 may encourage towns to use the power to freeze land division to arbitrarily prohibit certain land uses, such as aggregate production. Further, because there would be no limits to such authority, it would invite those negatively affected by such moratoria to litigate against the town's use of such moratoria to challenge their reasonableness. Such unfettered power was not the intended purpose of § 236.45.

B. Statutory history indicates that Wis. Stat. § 236.45 does not provide town-wide moratorium authority.

The Town's interpretation of the phrase "in areas where such prohibition will carry out the purposes of this section" in Wis. Stat. § 236.45(2)(a) as encompassing the entire town is unreasonable because it renders the phrase "in areas" meaningless. However, if the Court concludes that the Town's interpretation of the phrase is not unreasonable, that phrase is at least ambiguous because the interpretation of that phrase as limited to *specific* areas is also reasonable. Where

statutory language is ambiguous, the Court may consult legislative history. *Kalal*, 271 Wis. 2d 633, ¶ 51. When the history of § 236.45 is examined, it becomes clear that the power to prohibit land division granted in that section is limited to specific geographical areas within town limits and does not extend to blanket prohibitions over the entire town.

When the precursor to Wis. Stat. § 236.45 was originally enacted, that section provided that a governmental unit "may by ordinance regulate, restrict, *and in specific areas* prohibit the division or subdivision of land." *See* Wis. Stat. § 236.143 (1945) (emphasis added). Thus, it was clearly recognized when initially drafted that this statute allowed for complete prohibitions of land division only in *specific areas*.

In 1955, the legislature overhauled Wis. Stat. ch. 236. Section 236.143 was renumbered as § 236.45, and portions of the statute were redrafted. (*See* 1955 Wis. Laws ch. 570, § 4.) Specifically, the language in subsection (2)(a) was changed from "*in specific areas* [a governmental unit may] prohibit the division or subdivision of land" to its current form, which

states that a governmental unit "may prohibit the division of land *in areas where such prohibition will carry out the purposes of this section.*" (*See* 1955 Wis. Laws ch. 570, § 4) (emphasis added). Despite the change to the statutory language, however, the legislature intended no substantive change to that section. *See* Note to 1955 Senate Bill 20, after proposed change to Wis. Stat. § 236.45 ("This section is very similar to the present s. 236.143, except that it clearly spells out the power of the local unit of government to regulate divisions of land...") Thus, even after chapter 236 was restructured and redrafted, it was the legislature's intent that a municipality's power to prohibit land division remain limited to *specific* areas.

C. The power to impose a moratorium is not necessarily implied.

The Town also does not possess the power to impose a moratorium by necessary implication. In order for the Town to demonstrate that its authority to impose a moratorium is necessarily implied by the statutes which grant it power, the Town must point to an expressly granted power and must be

able to articulate, clearly and precisely, how the authority to impose moratoria is necessary in order to carry out that power. *See Van Gilder v. City of Madison*, 222 Wis. 58, 85-86, 268 N.W. 108 (1936) (quotation omitted). The Town in this instance cannot demonstrate that the failure to impose a moratorium will result in the Town's inability to exercise one of its powers granted under Wis. Stat. § 236.45. It is therefore not a necessarily implied power. *See Van Gilder*, 222 Wis. at 85-86.

II. A TOWN DOES NOT HAVE THE AUTHORITY UNDER WIS. STAT. § 61.34 TO IMPOSE A MORATORIUM ON LAND DIVISION.

This Court should reject the Town's assertion that it has the power to impose a moratorium on land division pursuant to Wis. Stat. § 61.34. That section provides that villages (and towns that have been granted village powers) have certain powers to act for the village's "commercial benefit and for the health, safety, welfare and convenience of the public." However, the Town offers no support for the notion that the power to impose a moratorium on land

division is within the powers granted by § 61.34. Furthermore, if this Court concludes that § 61.34 provides towns the power to prohibit land division altogether, there is simply no limit to a town's power under that section. Instead, this Court should follow the reasoning of the Supreme Court of Pennsylvania in *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) and hold that general grants of power such as the grant in § 61.34 do not provide towns with the authority to issue blanket moratoria on land division.

In *Naylor*, the Pennsylvania Supreme Court was asked to determine whether statutes granting general powers to municipalities to achieve the purposes of the "Municipalities Planning Code" were sufficient to allow a municipality to impose a moratorium on subdivision and land development for one year. 773 A.2d at 772, 775. The statutes at issue granted the municipalities broad authority, such as the power to "*regulate development* by enacting subdivision and land development ordinances" and to draft ordinances which "contain such other provisions as may be necessary to

implement the purpose of [the Municipalities Planning Code.]" *Id.* at 774-75 (citations omitted, emphasis added). Despite the apparent grant of broad powers, the court concluded that such general authority did not give municipalities the power to impose moratoria on development. *Id.* at 775.

The Pennsylvania Supreme Court recognized that there is a distinction between *regulating* land development and *prohibiting* land development. *See id.* The court noted that no statute expressly provided a municipality the power to prohibit or suspend development. *Id.*

The Wisconsin legislature also recognizes the distinction between *regulating* land development or use and *prohibiting* or *suspending* it. That is evident by juxtaposing statutes which expressly grant moratorium authority, and those that merely provide the power to regulate land use. For example, the legislature created the "interim zoning" statute specifically for the purpose of allowing cities to *suspend* or *prohibit* development. *See* Wis. Stat. § 62.23(7)(da). On the

other hand, the grant of power to towns to control land use in Wis. Stat. § 236.45 is purely regulatory, and does not mention the ability to suspend or prohibit all land division, nor does it provide the limits to such authority which would necessarily accompany it.

There is no support for the notion that towns are afforded the power to suspend or prohibit development pursuant to Wis. Stat. § 61.34. This Court should hold that such authority cannot be read into that statute.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the circuit court's dismissal of this case and enter summary judgment in favor of Plaintiffs-Appellants and an order declaring that the Town does not have authority to impose a town-wide moratorium on land-division.

Dated this 31st day of October, 2007.

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