SPECIAL VILLAGE OF OSCEOLA BOARD MEETING

Date: Thursday August 6, 2020
Time: 6:30 pm CST
Place: Village Hall/Discovery Center – Large Meeting Room (Rm 205)
310 Chieftain Street, Osceola, WI

In an effort to support community health management initiatives surrounding the COVID-19 pandemic, this meeting is also available virtually through a web-based/telephone meeting platform called "GoTo Meeting". Please follow the instructions on the posted agenda to listen and/or participate during the meeting.

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Agenda

1. Call to order
2. Business:
   a) Update regarding Extraterritorial Zoning
   b) Discussion and possible action re: Resolution #20-16 Resolution Formally Initiating the Development of an Extraterritorial Zoning Ordinance
   c) Discussion and possible action re: Ordinance #20-04 An Ordinance to Adopt an Interim Zoning in Extraterritorial Areas
   d) Next Steps
3. Adjourn

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For more information visit https://www.vil.osceola.wi.us/boardmeetings
Select "Osceola Village Board Channel" for live stream.

NOTE: It is possible that members of other governmental bodies of the municipality may be present at the above scheduled meeting to gather information about a subject over which they have decision-making responsibility. No action will be taken by any governmental body at the above-stated meeting other than the governmental body specifically referred to above in this notice. Meetings may be recorded for public viewing and record retention.

Please note that, upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through appropriate aids and services. For additional information or to request this service, contact Village Hall at (715) 294-3498.

Memo

To: Village Board

From: Benjamin Krumenauer, Village Administrator

CC: Files

Date: 7/28/2020

Re: FAQs to help review the use of Extraterritorial Zoning and its relationship to Conditional Uses

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Village staff, during the July, 2020 Board meeting, were directed to review and develop a resolution and ordinance related to Extraterritorial Zoning. Additionally, staff was directed to put together a memo outlining the process and impacts of EZT and conditional uses pertaining to the anticipated North40 Mine expansion proposal. Presently a follow up meeting with the Town of Farmington is scheduled for tonight at 6:30pm. The focus of the meeting is to address all questions and concerns about the Town's proposed nonmetallic mining ordinance. A second meeting where all Village Board members can attend will be held to go over additional regulations available to the Village including the attached DRAFT resolution and ordinance. To help with that discussion, the below questions were developed.

Questions about Extraterritorial Zoning and Conditional Uses:

What is Extraterritorial Zoning? What does it do?
Extraterritorial Zoning or ETZ is a planning tool used to project a level of planning control over an area of the adjacent township. The primary focus is to address existing and potential zoning and land use conflicts in a manner that compliments the anticipated growth of the community. It is the coordinated effort between the Village of Osceola and the surrounding township to better plan zoning and development related growth. This proactive tool is used to align Village growth interests to existing Town zoning. The focus sits on how to plan Village growth into or adjacent to other communities. A maximum buffer of 1.5 miles is permitted within the ETZ area. This process is highly restricted through Wisconsin Statute 62.23(7a). The Village does not currently employ this method of review. If developed, the Village would be able to better control permitted uses within the surrounding communities. Attached are the related state statutes and a map highlighting a 1.5 mile buffer.

The Village can but is not required to enact regulation over the full buffer. The Village can work in partnership with the surrounding Town's on a buffer that best fits the need of all communities. Once a cooperative buffer and rules are fine-tuned, both organizations must approve the regulations in order to be valid. Once approve the village can exercise land use control over new development that otherwise might be incompatible with a village's future growth. Extraterritorial Zoning if enacted effectively replaces existing town zoning regulations with new regulations that align more closely with Village growth plans.

Does ETZ pause the current proposed regulations?
Yes. If the Village went forward with ETZ, it would freeze the current zoning and uses for 2 years. It is not clear if it would also freeze the moratorium on CUPs enacted by the Town. I am not sure if that matters, as I think the Village has a good argument that it could freeze CUP applications (which affect "uses" per the statute) until the Joint ETZ Committee came up with its ETZ ordinance during the 2 year period.

Does ETZ regulate permits?
Yes and no. Only permits related directly to zoning and use would be regulated. All zoning and land use permits during the interim period would require Village of Osceola review. This would include all building

permits in order to ensure that compliance is met with current zoning practices. Once a final ETZ chapter is written and adopted, all zoning and land use activities would continue to receive Village review. Statutes are not clear on whether these reviews can be done administratively or if they need Planning approval. It would be safe to say that a combination of both would occur. During the interim period, the Village can only regulate under existing Town ordinances.

What is the process to do ETZ?
The following steps generally outline the process to enact additional extraterritorial zoning regulations into a Town. A full breakdown of process is stated within State Statutes 62.23 (7a).

1. **Initial Resolution:** A resolution will need to be passed by the Village Board clearly expressing its desire to enact additional zoning and land us control over a given town. Attached to this memo is a DRAFT resolution that would fulfill this requirement. A resolution will need to include language about the proposed area of impact. Final buffer limits will need to be inputted.

2. **Interim Ordinance:** within 15 days of the initial resolution, the Village will need to pass an interim zoning ordinance for the proposed impact area. The ordinance should include clear language further stating the impacted areas as well as a mechanism to continue the development process. Additional sections include effective period, timeline and general policy guidance. Once again, a DRAFT ordinance is attached. Again, final buffer limits will need to be inputted.

3. **Joint Committee:** A joint committee comprising of three Village and three Town representatives is set up to work through the details regarding the ETZ overlay. During this time the committee will provide regular updates to both communities.

4. **Joint Committee Approval:** Once developed, the Joint Committee must provide a favorable vote by the majority of the six members. Only a majority favorable vote will continue the development of the proposed regulations.

5. **Initial Review of Proposed District:** Once the Joint Committee provides a favorable majority vote, and still within the two-year development period, the governing body (Village) will conduct several public hearings regarding the proposed zoning regulations. The notice will contain zoning layouts, street names and other identifying features that clearly outline the areas of influence. If warranted, recommendations made during the public review period can be taken in and additional refinements can occur. Once completed, additional hearings shall be held in order to ensure a thorough review. Any recommended changes must be reviewed by the Joint Committee and once again receive a favorable majority vote.

6. **Final Approvals**: In order to become law, the Village will need to adopt the regulations through appropriate measures.

Does ETZ need town involvement?
Yes. Town representation is required as part of the Joint Committee. Three members from the Town must be appointed. Final Joint Committee recommendations will require a favorable majority. This means that at least one Town member must also agree with the proposed regulations. Town Board members are eligible to serve.

Who administers zoning regulations during the interim period?
Village assumes all review and permitting related to zoning and land use within the area of influence. This includes a review of all building permits in order to ensure zoning compliance.

Can the Village enact ETZ resolution and ordinance in one motion?
Yes, but it is best practice to complete two separate documents. Attached is a DRAFT resolution and ordinance.

What is a Conditional Use Permit?
A conditional use is defined in state statutes as a use allowed under a conditional permit, special exception, or other special zoning permission issued by a city, but does not include a variance. Basically, a conditional use is a secondary alternative use of a given property. It is a use that is permitted with additional reviews in place to ensure that it is complimentary to the outright permitted uses. A CUP is the process used to receive, review and allow a conditional use.

What are state rules governing CUPs?
The only state law is 62.23(7)(de). Below is the direct language:

(de) Conditional Use Permits
1. *In this paragraph:*
a. *"Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a city, but does not include a variance.*
b. *"Substantial evidence" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.*
2.
a. *If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the city shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.*
b. *The requirements and conditions described under subd. 2. a. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The applicant must demonstrate that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The city's decision to approve or deny the permit must be supported by substantial evidence.*
3. *Upon receipt of a conditional use permit application, and following publication in the city of a class 2 notice under ch. 985, the city shall hold a public hearing on the application.*
4. *Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the city may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the city zoning board.*
5. *If a city denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures contained in par. (e) 10.*

Would having the power over the CUP give the Village more control over the quarry site?
Once again, yes and no. If ETZ is enacted, all conditional use permits would require Village review instead of Town review. During the interim period, the Village would use the existing Town regulations as a basis for review. While available, existing Town ordinances were deemed to be insufficient for the regulations of mine permits. Hence the proposed nonmetallic mining ordinance being developed by the Town of Farmington. It is my understanding that if the Village were to enact ETZ prior to the passage of any additional regulations, the Village would only be able to use existing Town zoning language. This current ordinance language is very loose, but does include provisions where factors such as "*smoke, dust, noxious and toxic gases and odors, noise, vibration, operation of heavy equipment, heavy vehicular traffic and increased traffic on public streets*". Attached is a copy of the Town of Farmington's Zoning Ordinance. Specific language pertaining to the quarry fall under Section VI beginning on page seven.

If desired, a final and approved version of the ETZ ordinance could include provisions to regulate mining operations. Presently, the only place in existing Village of Osceola Zoning Code that could conditionally allow mining uses is I-2 General Industrial District.

Does North40 have a vested right in the CUP because of its application in January 2020?
I don't think that North40 has a vested right in the CUP because of its "application" submitted in January 2020. Two cases support this: *Lake Bluff Housing Partners v. City of South Milwaukee* 197 Wis. 2d 157 (1996) where the court would not force the city to grant a building permit application with invalid setbacks which was submitted prior to a zoning change; and *AllEnergy Corp. v. Trempealeau County* 375 Wis. 2d 329 (2017) where the Supreme Court upheld the County's decision to deny a CUP for a frac sand mine based on considerations of "public health, safety or general welfare" even though the applicant complied with all of the specific conditions in the ordinance.

Does North40 have a legal right to expand?
No, any use that is permitted and follows all requirements has a definite right. Any use that is permitted with conditions (CUP process) would have to meet all reasonable conditions placed on the use by the reviewing authority. This is a sticky slope as recent laws have lessened the ability for a municipality to deny conditional uses. The reviewing authority (municipality) would have to show substantial evidence that the proposed use will not be in the best interest. The evidence cannot be arbitrary, speculative or merely personal preference.

Could the CUP legally be denied by the Town or the Village?
I also think, under the holding in *AllEnergy v. Trempealeau County*, with proper findings of substantial evidence, the CUP could legally be denied outright under the current ordinance (whether by the Town or Village) so long as the proper findings were made.

Does the Village have to create a new mining regulation if it develops an ETZ area?
All future regulations within the ETZ buffer area would have to be proposed and developed with the Joint Committee. The Committee could develop mining regulations if desired.

Does the Village fee schedule apply to all reviews, or does the Town schedule apply if available?
Statutes are fairly quiet with respects to fees and reviews. During the interim period, there is not much ability for the Village to recoup expenses related to reviews as we are bound by the Town regulations. If ETZ is adopted, the proposed regulations could include a fee schedule.

Can ETZ only apply to the mine and future expansion area?
Yes. ETZ can be enacted up to 1.5 miles in all directions but does not need to. ETZ can be limited to a single area or a wide range. Fortunately, there is a good case, *Village of Deforest v. Dane County*, that is on point with regard to the Village's control over an application for conditional use in ETZ. Attached is a copy for you to reference. The case clarifies that once an ETZ Interim Ordinance transferring all zoning authority in the ETZ to the Village is passed, any applications for land use (a CUP, in this case) that have not been approved or denied must go to the Village for approval. So, assuming that the Town has not made a final decision on North40's permit application, then the Village could exert control over that application by passing an ETZ resolution and interim ordinance prior to such final decision. It is essential that the Interim ordinance is passed, not just the Resolution.

It was highly recommended that the Village develop a reasonable ETZ area and not enact the full 1.5 mile buffer. It seems unnecessary given the Village's growth pattern and timeline to enact regulations over an area that may never see Village expansion. There is no need to upset mor Town residents than is really needed.

Could the Village's ETZ authority be questioned because the Village is asserting such authority only to regulate the quarry and not to generally control zoning outside of its boundaries?
I don't think so, because of the *Village of Deforest* case discussed above. I think that the timing in that case shows that the Village was obviously attempting to control the CUP application of the Flying J. Flying J did assert claims of violation of equal protection and due process along with the claim that this was an illegal taking. According to the decision (see the last page), the Village's enactment of the Interim Ordinance did not adversely affect a vested right of Flying J, so there was no compensatory damages. Additionally, Interim Zoning orders have held up against Equal Protection and Due Process claims.

With respects to the Town, could the parcels be rezoned to a use that did not allow quarrying?
If the Town wanted to stop the expansion altogether, one option, in addition to denying the CUP would be to rezone the parcels. I am not sure that would survive a challenge as it may be deemed arbitrary and capricious, if there is no Town or county comprehensive or future land use plan showing those as something different than agricultural. The Village shows that as business growth, which could provide a reasonable basis for rezoning.

Could the Village rezone the parcels to deny a use?
The Village via the Joint ETZ Committee through the ETZ process could enact new zoning regulations for the ETZ area. All enacted zoning and land use components of the ETZ area should fit with intended use in the area as well anticipated/planned uses in the future.

Is the Village opening itself up for potential lawsuits?
The Village, if it adheres to all state and local regulations, should be fairly weathered from litigation. This is by no means a guarantee, and any ETZ regulations will most certainly cost the Village considerable funds in legal and administrative process. Areas of potential conflict include any sort of permit application that may be received or the ever-present concern of deviating from laws pertaining to Conditional Uses. The Village will most likely see substantial legal costs in reviewing and assisting in the development of regulations. In a conversation about how to fund this review, it was mentioned that the Village should budget at a minimum of $25,000 and likely closer to $50,000 in funds.

RESOLUTION #20-16

Resolution Formally Initiating the Development of an Extraterritorial Zoning Ordinance

A Resolution Initiating the Adoption of an Extraterritorial Zoning Ordinance and Designating the Area within the Osceola Extraterritorial Zoning Jurisdiction to be Zoned Pursuant to Wis. Stat. § 62.23(7a)

WHEREAS, the Village Board of the Village of Osceola (Village) finds that the public interest in orderly planning will be promoted by the adopt of zoning regulations governing the development and use of property in those areas of the Town of Farmington, Polk County, Wisconsin (Town), within the Osceola Extraterritorial Zoning Jurisdiction; and

WHEREAS, the Village Board wishes to promote substantial progress toward the adoption of such zoning regulations for the benefit of the Village and the Town;

NOW, THEREFORE, BE IT RESOLVED, that the Village Board of the Village of Osceola, Polk County, Wisconsin, hereby declares its intention to prepare a comprehensive zoning ordinance governing the use and development of the lands within the following extraterritorial zoning jurisdiction:

All contiguous parcels located wholly within the Town of Farmington Village of Osceola limits and further dictated by the Village of Osceola Board at the properly noticed August 6, 2020 Special Board Meeting

BE IT FURTHER RESOLVED, that the Village Clerk is directed to cause the publication of this resolution in the local newspaper as a class I notice pursuant to the provisions of sec. 62.23(7a)(a), Wis. Stats., within 15 days of the adoption hereof and to further mail a certified copy of this resolution and a scale map reasonably showing the boundaries of the Village's extraterritorial jurisdiction to the Polk County Clerk and the Clerk of the Town of Farmington.

BE IT FURTHER RESOLVED, that the Plan Commission is hereby directed to formulate tentative recommendations for a district plan and regulations within the above described area.

BE IT FURTHER RESOLVED, that the Village Board President shall nominate three citizen members of the Plan Commission to serve on a joint extraterritorial zoning committee to be established pursuant to sec. 62.23(7a)(c), Wis. Stats. For confirmation by the Village Board.

Adopted the ____ day of _____, 2020

_____
Jeromy Buberl, Village President

ATTEST: I hereby certify that the foregoing Resolution was duly adopted by the Village of Osceola at a legal meeting held on this ____ day of _____, 2020.

_____

Frances Duncanson, Clerk

ORDINANCE #20-04

AN ORDINANCE TO ADOPT AN INTERIM ZONING IN EXTRATERRITORIAL AREAS

INTERIM ZONING - TOWN OF FARMINGTON LOCATED WITHIN POLK COUNTY, WI.

Section I. Intent and Purpose. The Village Board of the Village of Osceola has passed a resolution indicating its intent to exercise extraterritorial zoning power as set forth in Wis. Stats. §62.23(7a). Pursuant to §63.23(7a)(b) of the Wisconsin Statutes, this interim zoning ordinance is enacted to preserve existing zoning and land uses within the extraterritorial zoning jurisdiction described below, while a comprehensive extraterritorial zoning plan for such territory is being prepared.

Section II. Lands Subject to Jurisdiction. This ordinance applies to the following described land in the Town of Farmington, Polk County, Wisconsin:

All contiguous parcels located wholly within the Town of Farmington Village of Osceola limits and further dictated by the Village of Osceola Board at the properly noticed August 6, 2020 Special Board Meeting

Section III. Preservation of Existing Zoning and Uses. Until a comprehensive plan is prepared for the extraterritorial zoning jurisdiction described above, all existing zoning or uses in the extraterritorial zoning jurisdiction shall be preserved without change.

Section IV. Land Use Permitting. As of the effective date of this ordinance, the Town of Farmington has adopted a local zoning ordinance (the "Zoning Ordinance"). The official maps maintained by the Town of Farmington, showing all land uses which are existing as of the effective date of this ordinance, within the land to which this ordinance applies, shall be binding in determining existing land uses. Administration of the Town's zoning ordinances, including approval of all land use permits, conditional use permits, variances, zoning district changes and appeals shall be approved by the appropriate Village authority, as designated in the Village Code of Ordinances.

Section V. Building Permits. The Town of Farmington, if it issued building permits upon the effective date of this ordinance, may continue to do so, but the Village of Osceola shall approve such permits as to zoning appropriateness prior to their issuance.

Section VI. Enforcement. The Village of Osceola shall enforce this ordinance and the penalty and enforcement provisions of the Zoning Ordinance shall be applicable hereto.

Section VII. Effective Period. This interim zoning ordinance shall be effective for two (2) years unless rescinded by the Village Board, superseded by an extraterritorial zoning ordinance adopted pursuant to the Wisconsin Statutes or extended by the Village Board for a period not to exceed one (1) year, pursuant to the Wisconsin Statutes.

Section VIII. Effective Date. This ordinance shall become effective upon passage and publication. Within fifteen (15) days after its passage, the Village Clerk shall publish this ordinance, in a newspaper having general circulation in the area proposed to be zoned, as a Class 1 Notice, under Chapter 985, Wisconsin Statutes, and the Village Clerk shall mail a certified copy of this ordinance to the Clerk of the Town of Farmington and shall file a copy of this ordinance with the Village Plan Commission.

Adopted the ____ day of _____, 2020.

_____

Jeromy Buberl, Village President

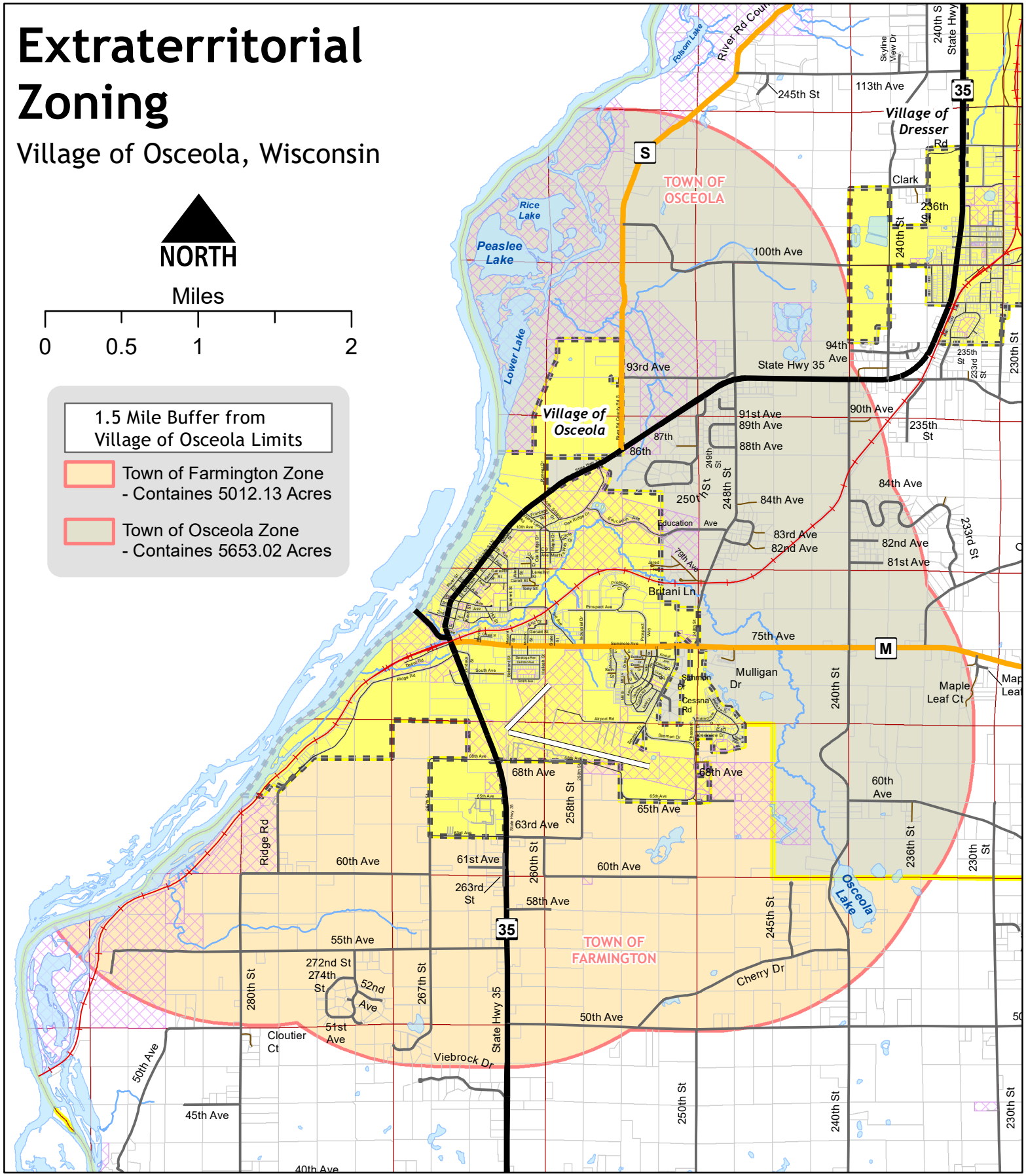
ATTEST: I hereby certify that the foregoing Ordinance was duly adopted by the Village of Osceola at a legal meeting held on this ____ day of _____, 2020.

_____

Frances Duncanson, Village Clerk

Extraterritorial Zoning

Village of Osceola, Wisconsin



County of Polk, Wisconsin
Department of Land Information
Division of G.I.S.
100 Polk County Plaza, Suite 130
Balsam Lake, WI 54810
(715) 485-9279
www.co.polk.wi/landinfo

State Hwy
County Rd
Town Rd
Village Rd
Private Rd
Access Rd
Railroad
Runway
Water Stream
Water Body
Public Lands
Section Lines
Parcel
Village Boundary
Town Boundary

Date: 5/21/2020

This drawing is the result of a compilation and reproduction of land records as they appear in various Polk County Offices. The drawing should be used for reference purposes only. Polk Co. is not responsible for any inaccuracies herein contained.

Extraterritorial Boundary Alternatives A, B & C

Legend

- Nonmetallic Mines
- No Wake Zone
- Addresses
- Lakes and Rivers
- Rivers and Streams
- Sections
- Parcels
- Railroad
- Unincorporated Village
- Cities (Scale below 25000)
- Villages (Scale below 25000)
- Towns
- TwpRgGrdweb
- Surrounding Counties
  - MN
  - WI
- US Highway Shield
- US Highways
- WI State Highway Shield
- State Highways
- County Road Shield
- County Roads
- Town Roads
- City and Village Roads
- Highway On Off Ramp
- Public Access Roads
- Private Roads
- Private Driveways

ETZ Boundary A

ETZ Boundary B

ETZ Boundary C

N

0 1000 2000 3000ft

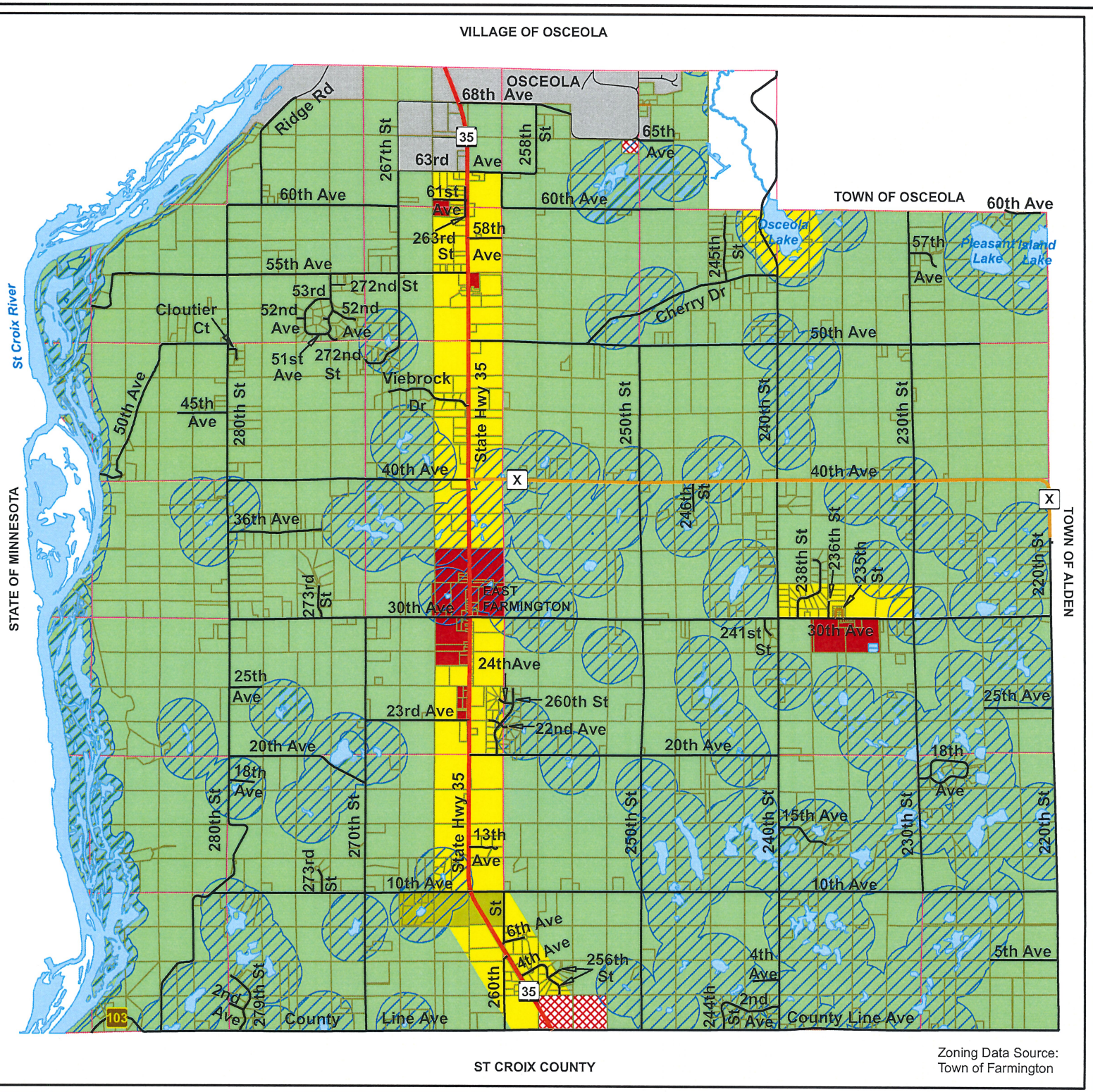
DISCLAIMER: This map is not guaranteed to be accurate, correct, current, or complete and conclusions drawn are the responsibility of the user.

Village of Osceola

Author: BKK

Date Printed: 08/3/20 4:38 PM

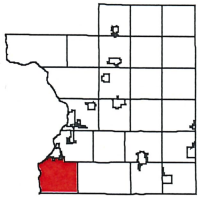
Sources:



Zoning Data Source:
Town of Farmington

EXISTING ZONING

Town of Farmington
Polk County
Wisconsin



- AGRICULTURAL
- COMMERCIAL
- CONSERVANCY
- RESIDENTIAL
- RESTRICTED COMMERCIAL
- SHORELAND ZONING
- VILLAGE ZONING
- WETLAND-SHORELAND
- PARCELS
- SECTIONS
- HYDRO BODY
- RUSTIC ROAD SHIELD
- STATE HIGHWAY
- COUNTY ROAD
- TOWNSHIP ROAD
- VILLAGE ROAD
- PRIVATE ROAD
- HYDRO STREAM

0 0.25 0.5 1 Mile

Created by:
Polk County Land Information Department
Geographic Information Systems Division
100 Polk County Plaza, Suite 130
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N

11/13/09

This drawing is the result of a compilation and reproduction of land records as they appear in various Polk County Offices. The drawing should be used for reference purposes only. Polk County is not responsible for any inaccuracies herein contained.

211 Wis.2d 804
Court of Appeals of Wisconsin.

VILLAGE OF DeFOREST, a Wisconsin municipal corporation, Plaintiff–Respondent,
v.
COUNTY OF DANE, a political subdivision of the State of Wisconsin, Defendant,
Flying J Inc., a foreign corporation, Defendant–Appellant, †
Gene E. Evans, Defendant.

No. 96–1574.
|
Orally Argued March 14, 1997.
|
Decided May 22, 1997.

Synopsis

Village brought action against, inter alia, applicant for conditional use permit, seeking declaratory judgment that county lacked jurisdiction to approve permit. Applicant counterclaimed for judgment declaring permit valid, and for damages on ground that village's enactment of interim ordinance violated applicant's constitutional rights. The Circuit Court, Dane County, Angela B. Bartell, J., granted summary judgment for village, and applicant appealed. The Court of Appeals, Deininger, J., held that: (1) village was statutorily authorized to administer and enforce interim zoning ordinance effective in extraterritorial area, and (2) by enacting interim ordinance, village acquired exclusive jurisdiction over conditional use permit application filed with county.

Affirmed.

West Headnotes (10)

[1] **Appeal and Error** ⇐ De novo review

Whether pleading states claim for which relief may be granted is question of law reviewed de novo.

1 Cases that cite this headnote

[2] **Zoning and Planning** ⇐ Applicability to Persons or Places

Village was statutorily authorized to administer and enforce interim zoning ordinance effective in extraterritorial area, despite claim that subsection requiring interim ordinance to "preserve existing zoning" meant that existing county zoning ordinance had to be preserved in toto, including retention of administration and enforcement powers by county officials and entities, and that transfer of jurisdiction to administer zoning therefore occurred only after cooperative planning process resulted in enactment of final extraterritorial zoning ordinance. W.S.A. 62.23(7a)(b, g).

[3] **Statutes** ⇐ What constitutes ambiguity; how determined

Parties' disagreement as to meaning of statutory subsection did not render subsection ambiguous.

[4] **Statutes** ⇐ What constitutes ambiguity; how determined

Statute may be said to be "ambiguous" when it is capable of being understood by reasonably well-informed persons in either of two senses.

1 Cases that cite this headnote

[5] **Appeal and Error** ⇐ Statutory or legislative law

Whether statute is ambiguous is question of law reviewed de novo.

1 Cases that cite this headnote

[6] **Statutes** ⇐ Intent

Statutes ⇐ Language and intent, will, purpose, or policy

Statutes ⇐ Context

Statutes ⇐ Related provisions

In interpreting statutory subsection, court's goal is to ascertain legislature's intent, for which court must first resort to language of statute,

though in interpreting that language, court must consider subsection within context of entire section of statute and related sections, and must avoid absurd, unrealistic or unreasonable interpretations.

[7] **Statutes** ⇨ Attorney General

While court is not bound by Attorney General's opinion, it is persuasive and entitled to great weight on question of statutory interpretation.

[8] **Zoning and Planning** ⇨ Proceedings on Permits, Certificates, or Approvals

By enacting interim ordinance in exercise of extraterritorial zoning power, village acquired exclusive jurisdiction over conditional use permit application filed with county, regardless of whether application was complete prior to enactment of interim ordinance; interim ordinance did not change any substantive zoning regulations, but rather, changed only identity of decisionmaker, and applicant in any event acquired no vested rights by simply requesting permit, issuance of which was discretionary.

2 Cases that cite this headnote

[9] **Eminent Domain** ⇨ Zoning, Planning, or Land Use; Building Codes

Before action will lie for unconstitutional taking of property in violation of Fifth Amendment, landowner must allege that it has been denied all or substantially all practical uses for property. U.S.C.A. Const.Amend. 5.

[10] **Zoning and Planning** ⇨ Record, assignment of errors and briefs

Absent support in appellate brief for claim that village failed to comply with notice and hearing requirements when enacting interim ordinance, appellate court would not consider claim.

Attorneys and Law Firms

**297 *805 For the defendant-appellant the cause was submitted on the briefs of Richard A. Lehmann and Mark J. Steichen of Boardman, Suhr, Curry & Field of Madison and Robert H. Freilich and David W. Bushek of Freilich, Leitner & Carlisle of Kansas City, Missouri. Oral argument by Richard Carlisle.

For the plaintiff-respondent the cause was submitted on the brief of Allen D. Reuter and William S. Cole of Clifford & Reuter, S.C. of Madison and Kristine A. Euclide and Ted Waskowski of Stafford, Rosenbaum, Rieser & Hansen of Madison. Oral argument by Allen D. Reuter.

Before DYKMAN, P.J., and ROGGENSACK and DEININGER, JJ.

Opinion

DEININGER, Judge.

Flying J Inc. appeals an order granting the Village of DeForest's motion for summary declaratory judgment and denying Flying J's cross-motion *806 for similar relief. Flying J also appeals a separate order which dismissed a counterclaim for damages under 42 U.S.C. § 1983 for failure to state a claim. Flying J argues that the trial court erred: (1) in interpreting § 62.23(7a), STATS., [1] to authorize the Village of DeForest to enforce and administer an interim extraterritorial zoning ordinance enacted under that subsection; (2) in determining that Dane County lacked jurisdiction to approve a conditional use permit for which Flying J had applied prior to enactment of the interim ordinance; and (3) in concluding that Flying J had failed to state a claim for violation of its rights to equal protection of the laws, procedural and substantive due process, and just compensation. We are not persuaded by any of Flying J's arguments, and we therefore affirm both orders.

BACKGROUND

On February 20, 1995, the Village passed a resolution declaring its intent to exercise extraterritorial zoning power in described lands **298 situated in the Town of Vienna lying adjacent to the village border. On February 21, 1995, Flying J filed an application with Dane County zoning authorities for a conditional use permit for the operation of a "travel plaza," to include a restaurant, motel, service facilities, convenience

store, and truck parking areas. The proposed facility was to be constructed at a highway ***807** interchange located within the Village's intended extraterritorial zoning jurisdiction. The parcel in question was then zoned under the Dane County code as "C–1," commercial land, on which "motels, hotels, taverns, funeral homes and drive-in establishments" were allowable as conditional uses.

On March 6, 1995, the Village passed Ordinance 95–11 (the interim ordinance), which included the following two provisions to be effective in the designated extraterritorial area: (1) "zoning district designations, district regulations and use restrictions" prescribed by the then effective Dane County zoning code were adopted by reference; and (2) "[e]nforcement and administration of the zoning ordinances preserved by this ordinance, including ... approval of all conditional use permits, granting of all variances, zoning district changes and appeals ... shall be performed by the appropriate Village board, commission or officer" as designated in the Village's zoning code. Notice of the interim ordinance was mailed to Dane County and the Town of Vienna on March 13, 1995, and it was published on March 16, 1995. *See* § 62.23(7a)(b), STATS.

The Dane County Zoning and Natural Resources Committee sought an opinion from the corporation counsel as to whether it had the authority to act on Flying J's application. Counsel informed the committee that it did not and that the permit should be referred to the Village for review and approval. The committee, however, voted to grant the permit on May 30, 1995. The decision to grant the Flying J permit was appealed to the full Dane County Board, which upheld the committee decision on a nineteen to eighteen vote on July 13, 1995. At no time has Flying J requested ***808** approval for its proposed travel plaza from any Village official or entity.

The Village then commenced this action, seeking a declaratory judgment that the County's approval of the permit was void because the County lacked jurisdiction to grant the permit. Flying J counterclaimed for a judgment declaring the county-approved permit valid, and for damages from the Village, alleging that enactment of the interim ordinance violated Flying J's constitutional rights. The trial court granted the Village's motion for summary judgment, declaring the county action void, and in a separate order, the court granted the Village's motion to dismiss the civil rights counterclaim for failure to state a claim. Flying J appeals both orders.

ANALYSIS

a. Standard of Review

[1] We review the grant or denial of a motion for summary judgment de novo, applying the same methodology and standard as the trial court. *Green Spring Farms v. Kersten,* 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. *Id.* Whether a pleading states a claim for which relief may be granted is also a question of law which we review de novo. *Heinritz v. Lawrence Univ.,* 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct.App.1995).

b. Enforcement and Administration of Interim Ordinance

[2] ***809** Flying J argues that § 62.23(7a), STATS., does not permit the Village to "usurp" Dane County's zoning enforcement and administration authority by enacting an interim ordinance under § 62.23(7a)(b). It claims that the transfer of jurisdiction to administer zoning occurs only after the cooperative planning process results in the enactment of a "final" extraterritorial zoning ordinance. *See* § 62.23(7a)(c) through (e), STATS. The main thrust of Flying J's argument is that because paragraph (b) requires an interim ordinance to "preserve existing zoning," this means the existing county zoning *ordinance* must be preserved *in toto,* including the retention of administration and enforcement ****299** powers by county officials and entities. It also argues that paragraph (g), which provides that "an extraterritorial zoning ordinance under this subsection may specifically provide ... for the enforcement and administration of this subsection" confirms its interpretation because of the legislature's failure to include the modifier "interim" before "extraterritorial zoning ordinance."

[3] **[4]** **[5]** Flying J asserts that subsection (7a) is "clear and unambiguous" in prescribing this "two-step process," but even if it is not, legislative history supports this interpretation. The Village contests both assertions, arguing that § 62.23(7a), STATS., is clear on its face in authorizing the transfer of zoning administration and enforcement to cities and villages upon enactment of an interim ordinance, but if it is ambiguous, the legislative history supports the Village's reading of the subsection.[2] The parties' disagreement as to the meaning of § 62.23(7a), STATS., does not render the subsection ambiguous. *See National Amusement Co. v. DOR,* 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969). ***810**

A statute may be said to be ambiguous when it is capable of being understood by reasonably well-informed persons in either of two senses. *Id.* Whether a statute is ambiguous is a question of law which we review de novo. *Boltz v. Boltz,* 133 Wis.2d 278, 284, 395 N.W.2d 605, 607 (Ct.App.1986).

[6] We conclude that § 62.23(7a), STATS., plainly authorizes a municipality to administer and enforce an interim ordinance enacted under paragraph (b) of the subsection. It thus becomes unnecessary to consider the legislative history or other matters extrinsic to the statutory language. *Interest of Peter B.,* 184 Wis.2d 57, 70–71, 516 N.W.2d 746, 752 (Ct.App.1994). Our goal is to ascertain the legislature's intent, for which we must first resort to the language of the statute. *State v. Rognrud,* 156 Wis.2d 783, 787–88, 457 N.W.2d 573, 575 (Ct.App.1990). In interpreting the language, however, we must consider the subsection within the context of the entire section of the statute and related sections, *Brandt v. LIRC,* 160 Wis.2d 353, 362, 466 N.W.2d 673, 676 (Ct.App.1991), *aff'd,* 166 Wis.2d 623, 480 N.W.2d 494 (1992), and we must avoid absurd, unrealistic or unreasonable interpretations. *See Maxey v. Racine Redevelopment Auth.,* 120 Wis.2d 13, 20, 353 N.W.2d 812, 816 (Ct.App.1984).

Paragraph (g) of § 62.23(7a), STATS., specifically authorizes a village, when it "adopts *an* extraterritorial zoning ordinance *under this subsection"* to "provide in the ordinance for the enforcement and administration of this *subsection.*" (Emphasis supplied.) If the legislature's intent was to authorize village enforcement and administration of only the final, post-plan ordinance authorized by paragraph (e), it could have: (1) put this language in paragraph (e); (2) ***811** referred to "an ... ordinance under par. (e)" instead of "an ... ordinance under this subsection"; or (3) specifically excluded interim ordinances under paragraph (b) from the grant of enforcement and administration authority. Since it did none of these, we fail to see how paragraph (g) can be read other than to apply to both interim and final extraterritorial zoning ordinances.

Section 62.23(7a), STATS., specifies that "sub. (7)(a)" of § 62.23 "shall apply to extraterritorial zoning ordinances enacted under this subsection." Subsection (7)(a), in turn, expresses a general grant of power to cities and villages to enact zoning ordinances in order to promote "health, safety, morals or the general welfare of the community," and it directs that "any ordinance ... enacted ... under this *section* [§ 62.23], shall be liberally construed in favor of the [Village]." While this language is directed at the interpretation of ordinances, the legislature plainly expresses its intent that cities and villages be deemed empowered to the greatest extent possible in carrying out the purposes of the zoning enabling statute. Our reading of subsection (7a) is consistent with this intent, and it is consistent with the supreme court's determination that the legislature intended to grant cities and villages plenary extraterritorial zoning authority:

> ****300** [I]t was contemplated by the framers of the bill that a city would be able to exercise extraterritorial zoning under sec. 62.23(7a), Stats., without the consent of the county. The legislative council probably concluded that the objective of the statute to give cities and villages some control over the haphazard development of adjacent areas might be ***812** vitiated if the final decision in the matter were to rest with county boards.

Walworth County v. City of Elkhorn, 27 Wis.2d 30, 36, 133 N.W.2d 257, 261 (1965).

[7] Our reading of § 62.23(7a), STATS., is also consistent with a 1978 opinion requested by the Legislature's Committee on Assembly Organization, wherein the Attorney General opined as follows:

> It is my opinion that the city or village board of zoning appeals handles appeals while the interim ordinance is in effect as well as when the final comprehensive extraterritorial zoning ordinance is in effect. Paragraph (g) of sec. 62.23(7a) reads in part, "Insofar as applicable the provisions of subs. (7)(e), (f), (8) and (9) shall apply." Paragraphs (e) and (f) of subsection (7) deal with the city board of appeals and with enforcement procedures. Section 61.35, Stats., makes the provisions of sec. 62.23, Stats., applicable to villages. Although sec. 62.23(7a)(g), Stats., does not specifically refer to interim ordinances, I believe it may be fairly inferred that the Legislature intended the city or village to handle appeals in all extraterritorial zoning matters.
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> ....
>
> The procedure for administration and enforcement of extraterritorial zoning closely follows the general city

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zoning law on the subject, and under the terms of the introductory paragraph and paragraph (g) of sec. 62.23(7a) the city or village administers the extraterritorial zoning law.

67 Op. Att'y Gen. 238, 241–42 (1978). While we are not bound by the Attorney General's opinion, it is persuasive and entitled to great weight on a question of statutory interpretation. *Norton v. Town of Sevastopol,* 108 Wis.2d 595, 599, 323 N.W.2d 148, 150–51 (Ct.App.1982). ***813** Moreover, we agree with the Village that the failure by the legislature to revise subsection (7a) in the intervening eighteen years is indicative that the interpretation in the opinion properly reflects the legislature's intent. *See State v. Anderson,* 160 Wis.2d 435, 441, 466 N.W.2d 681, 683 (Ct.App.1991).

Finally, we conclude that reading subsection (7a) to require county enforcement of the Village's interim ordinance is at least unreasonable, if not absurd. Had the legislature's intent been to preserve the County's entire zoning ordinance, including county enforcement and administration, during the interim extraterritorial planning period, it would not have been necessary, or even advisable, to authorize a city or village to "enact ... an interim zoning ordinance to preserve existing zoning or uses." Section 62.23(7a)(b), STATS. Rather, a more reasonable procedure, if that were the intent, would be for the statute to direct a city or village to trigger the "freezing" of the existing zoning districts and administration by way of a resolution, notice or petition to the cognizant zoning bodies.[3]

Flying J also argues that the interim ordinance must be invalidated, or at least construed narrowly, because its enactment impermissibly altered the "status quo," and because "automatic reversion of zoning control" violates the due process rights of ***814** landowners and persons with pending applications to the County. We disagree. We have already cited the legislature's directive that all ordinances enacted under § 62.23, STATS., are to be liberally construed in favor of the cities and villages. We discuss the impact of the ordinance on pending county ****301** applications and the due process issue below.

c. Pending Permit Application to Dane County

[8] Flying J next argues that even if the Village acquired zoning administration and enforcement authority by virtue of enactment of the interim ordinance on March 6, 1995, Dane County retained jurisdiction over Flying J's application for a conditional use permit, which was filed with the County on February 21, 1995. Essentially, it is Flying J's position that its application to Dane County was "complete" prior to the enactment of the Village's interim ordinance, and therefore it had a "right to have the permit application determined under the laws existing at the time the completed application was filed with Dane County."

Flying J devotes a significant portion of its brief to the argument that its February 21, 1995 application was "complete," asserting that since it was, the application could be acted upon only by Dane County and not by the Village. Flying J notes that the trial court concluded the application was not complete until well after March 6, 1995, and claims that the court "implicitly" ruled that a complete application would have produced a different result. First, we disagree that the trial court reached any conclusion regarding the jurisdictional status of a complete application pre-dating ***815** the enactment of the interim ordinance.[4] More importantly, we conclude that the completeness or not of Flying J's application is not determinative of whether Dane County retained jurisdiction to review and approve it.

First, we emphasize that no substantive zoning regulations changed as a result of the Village's enactment of the interim ordinance. After March 6, 1995, just as before that date, the proposed facility was a conditional, not a permitted, use in the "C–1" district. The necessity of obtaining the discretionary approval of a zoning committee, and the standards to be met in order to obtain approval, did not change;[5] only the identity of the decisionmaker(s) did. We thus question whether any legally significant change to the "status quo" was effected by enactment of the interim ordinance. *Cf. City of Madison v. Town of Madison,* 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct.App.1985) (change in "legal machinery" which does not create, ***816** define or regulate rights may be applied retroactively); *Matter of Seraphim,* 97 Wis.2d 485, 496, 294 N.W.2d 485, 492, *cert. denied,* 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980) (entitlement to due process and fair hearing does not imply entitlement to choose fact-finder).

Even if the transfer of decisionmaking authority from the County to the Village could be characterized as somehow violative of Flying J's vested rights, it does not follow that Flying J had acquired such rights by applying for the conditional use. To the contrary, Flying J had acquired no vested rights by simply requesting a permit whose issuance was discretionary. *State ex rel. Humble Oil & Ref. Co. v. Wahner,* 25 Wis.2d 1, 12–13, 130 N.W.2d 304, 310 (1964)

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(applicant acquired no vested rights by merely applying for use not "flatly permitted"). Had Flying J applied for authority to construct and operate a facility whose use was permitted in a "C–1" district, the completeness or not of the application (i.e., whether the proposed facility conformed to all applicable regulations) might be of significance. *See Lake Bluff Hous. Partners v. City of South Milwaukee,* 197 Wis.2d 157, 175, 540 N.W.2d 189, 196 (1995). What ****302** Flying J sought, however, was something other than the ministerial issuance of a permit to proceed with a project fully in compliance with zoning regulations then in effect. Denying vested rights to Flying J, "who submitted an application for a ... permit that did not propose a permitted use under existing zoning ... is squarely in line with the general rule in Wisconsin." *Id.* at 177, 540 N.W.2d at 197.

For the foregoing reasons, we conclude the trial court was correct in declaring that, by enacting the interim ordinance, the Village acquired "exclusive ***817** jurisdiction over conditional use permit applications and other administrative and enforcement powers" in the affected area, and that the County's approval of Flying J's application for a conditional use permit is "void for lack of jurisdiction."

d. Claim for Civil Rights Violations

Since we affirm the trial court's first order, we must now consider whether Flying J has stated a claim against the Village for damages under 42 U.S.C. § 1983. In its second counterclaim, Flying J alleges that the Village's enactment of the interim ordinance, under color of law, violated its rights to procedural and substantive due process, equal protection, and property under the Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Wisconsin Constitution. Flying J argues that it "enjoys a legitimate claim of entitlement to [the conditional use permit applied for] prior to any local government taking action which changes existing rules or understandings or otherwise deprives Flying J of its property interest," and further that the Village's ordinance prevents it "from exercising its federally protected right to receive all subsequent ministerial zoning and building permits, develop the property for intended purposes, and realize reasonable economic return from the property."

Flying J acknowledges that its counterclaim rests on many of the same assertions it made in support of its positions regarding declaratory relief. Inasmuch as we have concluded that the enactment of the ordinance did not adversely affect any vested right of Flying J, we similarly conclude that it has not stated a claim for compensatory relief for a violation of its rights under 42 U.S.C. § 1983.

[9] **[10]** ***818** Section 62.23(7a), STATS., and more specifically, "interim zoning when properly authorized by statute," has been upheld against claims that an interim extraterritorial zoning ordinance violates the Equal Protection and Due Process clauses. *Walworth Co. v. City of Elkhorn,* 27 Wis.2d 30, 37–39, 133 N.W.2d 257, 261–62 (1965). Flying J does not allege that the Village has violated its rights by arbitrarily or capriciously administering the ordinance, nor can it do so since Flying J has never sought its desired conditional use from the Village. Before an action will lie for an unconstitutional taking of property in violation of the Fifth Amendment, a landowner must allege that it has been denied "all or substantially all practical uses" for the property. *Zealy v. City of Waukesha,* 201 Wis.2d 365, 374, 548 N.W.2d 528, 531 (1996). Flying J's counterclaim makes no such allegation. [6]

In short, Flying J has not stated a claim for damages against the Village for which relief may be granted, and its second counterclaim was properly dismissed.

Orders affirmed.

All Citations

211 Wis.2d 804, 565 N.W.2d 296

Footnotes

† Petition to review denied. filed.

1 Section 62.23(7a), STATS., authorizes cities and villages to exercise extraterritorial zoning power in areas adjacent to their boundaries. Under the subsection, a city or village may enact an "interim" extraterritorial zoning ordinance, effective for up to two years, in order to "preserve existing zoning or uses" while a "comprehensive zoning plan" and ordinance for the affected area is being prepared. Section 62.23(7a)(b), STATS.

2 The trial court determined the subsection was ambiguous and consulted its history to aid in interpretation.

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3 The Village also points to the absurdity of denying its administration of the interim ordinance in a situation where no county or town zoning pre-dates the enactment of the interim ordinance. In that case, existing "uses" would nominally be "preserved," but under Flying J's interpretation no entity would have the authority to enforce the "freeze." *See Town of Grand Chute v. City of Appleton,* 91 Wis.2d 293, 297–98, 282 N.W.2d 629, 631 (Ct.App.1979) (if no zoning exists in extraterritorial area, interim ordinance freezes existing uses).

4 The trial court stated in its decision and order:

> [Flying J] failed to submit an application which conformed to the zoning code requirements in effect at the time of the application and cannot assert that they acquired any vested rights which would preclude the application of the Village's authority under the interim ordinance to review and approve [Flying J's] conditional use permit application.

5 Section 10.255(2), DANE COUNTY CODE OF ORDINANCES, authorizes the zoning committee to "grant or deny" a conditional use based upon its determination of whether the standards set forth in the ordinance will be met. A conditional use may not be granted unless "all" conditions are met (generally: no detriment to public health, safety, etc.; no impairment of values and enjoyment of neighboring properties or future development; and adequate provisions for utilities, drainage, traffic flow). Additionally, the committee may condition the approval on specific restrictions or guarantees.

6 Flying J's counterclaim also alleges that the Village failed to comply with notice and hearing requirements when enacting the interim ordinance. The citations in the counterclaim are to § 62.23(7)(d), STATS., which on its face applies to general zoning ordinances, not extraterritorial ordinances under subsection (7a). Flying J fails to provide any support in its brief for its notice and hearing claim, and we therefore will not consider it. *See State v. Pettit,* 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct.App.1992).

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