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March 7, 2018

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

**Re: Recent Land Use Preemptions
Nonconforming Structure and Lot Issues**

Dear Ms. Lauber:

Effective on November 29, 2017, the State of Wisconsin adopted 2017 Wisconsin Act 67, known as the "Landowners Bill of Rights," which imposes a number of limitations on municipal authority. I have written separately to describe aspects of this bill that limit your authority of conditional uses, and aspects of this bill that affect zoning boards of appeals. I am writing now to describe the preemptions included in the law that impact upon nonconforming structures and nonconforming lots. I will describe the preemptions and then offer recommendations as follows:

I. Preemptions

1. Nonconforming Dwellings or Buildings. Current State law limits your ability to enforce against nonconforming dwellings or buildings. This applies to dwellings or buildings that were built in compliance with laws in effect at the time of construction, but the laws have since changed and they do not comply with the revised laws.¹ This presupposes that the use of the lot, dwelling and building is conforming. The changes made by 2017 WI Act 67 are: (A) Arguably the limitations now extend beyond zoning ordinances, to all ordinances that seek to restrict nonconforming dwellings or buildings; and (B) Rebuilding certain nonconforming dwellings or buildings is now allowed in some cases. I will comment further as to both of these changes.

¹ These limitations apply to "nonconforming structures" which is specifically defined as "a dwelling or other building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with one or more of the development regulations in the current zoning ordinance." Note that the definition uses the words "dwelling" and "building" but not the more general term "structure". The legislature apparently intends to prevent municipalities from regulating certain work on nonconforming dwellings and buildings, but municipalities are not preempted from regulating structures that are not dwellings or buildings.

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- A. Preemption of All Regulation, Not Just Zoning Regulation. As to the first of these, the specific change to the statute says:

“An ordinance ~~enacted under this section~~ may not prohibit, ... the repair, maintenance, renovation ... ”

That is to say, the statute previously referred to an ordinance enacted under the zoning section of the State laws and the phrase that referred to the zoning section of the laws was removed. It remains to be seen how our courts will interpret this issue, given that this is still located in the zoning section of the statute, so the word “ordinance” arguably could still be interpreted to apply to an ordinance adopted under this section of the statute.

- B. Rebuilding Allowed in Some Cases. The second change is to expand the prohibited regulation in some cases. Whether these regulations apply depend upon whether the zoning ordinance is adopted by a County, or by a Town through Town zoning powers, or by a Town, City or Village through Village and City powers:

- i. *County Prohibition.* County zoning ordinances are now subject to this limitation (marked to show the changes made by the Act):

“§59.69(10e)(b) An ordinance ~~enacted under this section~~ may not prohibit, or limit based on cost, or require a variance for the repair, maintenance, renovation, rebuilding or remodeling of a nonconforming structure or any part of a nonconforming structure.”²

This allows nonconforming dwellings or buildings to be rebuilt, and it allows this work to be done without a variance, and it clarifies that this applies to part of a nonconforming dwelling or building the same as it applies to the entire nonconforming dwelling or building.

- ii. *Town Zoning.* Town zoning ordinances that are not adopted through Village powers, but are adopted through Town zoning powers, have the identical limitation that applies to counties as described above.
- iii. *Towns, Villages and Cities that regulate through Village and City powers.* This same limitation was not imposed on Towns, Villages and Cities that use Village and City powers, however. The limitation is worded this way in these cases:

“§62.23(7)(hb) 2. An ordinance ~~enacted under this section~~ may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.”³

² This applies only to dwellings or buildings. See footnote 1.

³ Again, the word “structure” is limited in this case to dwellings and buildings. See footnote 1.

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Municipalities acting under this authority, therefore, may continue to prohibit rebuilding such nonconforming dwellings or buildings. The limitation that applies to Counties, which prohibits the requirement of a variance in such cases, does not apply to municipalities acting under this authority. The clarification regarding parts of a nonconforming dwellings or buildings also does not apply in this case.⁴

2. Nonconforming Lots.

- A. Background. In the U.S. Supreme Court case *Murr v. State of Wisconsin and St. Croix County*, my office represented St. Croix County and prevailed, with the U.S. Supreme Court upholding a St. Croix County ordinance against constitutional challenges. Property rights advocates have questioned the policy issues involved in that decision, however. The State of Wisconsin legislature has now reversed the *Murr* decision as it applies to Wisconsin, by this legislation.

The issue in the *Murr* case was whether a property owner who owned two adjacent nonconforming lots, could sell and build on the lots separately. The County, as required by certain federal laws, had an ordinance that prohibited doing so. For decades, many municipalities locally and throughout the country have imposed the same requirement, which is known as the “merger of title” doctrine. The State now preempts municipalities from requiring merger of title.

- B. Murr Reversal. This legislation reverses the *Murr* decision in these respects.

- i. *Sale Allowed.* Municipalities are now prohibited from enacting or enforcing any ordinance that prohibits a property owner from conveying an ownership interest in a substandard lot. A substandard lot is defined to mean a lot that met the applicable lot size requirement when it was created but does not meet the current lot size requirement.
- ii. *Building Allowed in Some Cases.* Municipalities are also prohibited from enacting or enforcing an ordinance that prohibits a substandard lot from being used as a building site, provided that two conditions are met.
 1. This restriction only applies if the lot has never been developed with one or more of its structures placed partly upon an adjacent lot. This means that if they built their house or another structure over the lot line that separates the two lots, the municipality can still prevent the use of the lot as separate building sites. Note that it is not limited to current conditions. It says the lots must “never” have had a structure on the lot line, if they intend to build on the lots separately.

⁴ The title of this section, oddly, was modified to include the word “rebuilding,” however. Specifically, the new title of this section of the statute reads “Repair, Rebuilding and Maintenance of Certain Nonconforming Structures.” While this is inexplicable, it does not affect the law. The title is not substantive, and cannot be used to interpret the language, per Wisconsin Statutes §990.001(6).

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2. Any such construction, on a lot that is smaller than the minimum lot size, must comply with all other ordinances. The structure, therefore, must meet setback and offset requirements, for example, all of which can be difficult to meet on substandard lots.
- iii. *No Merger of Title.* In addition, State law now prohibits enactment or enforcement of an ordinance that requires merger of title. Merger of title, again, is the legal doctrine that whereby two nonconforming lots are deemed to have merged into one lot due to common ownership. The only exception in the new law, is that merger of title is permitted with the property owner's consent.

II. Recommendations.

1. Nonconforming structures. I recommend that you review your applicable zoning regulations to ensure that they are consistent with the new laws. If you would attempt to regulate nonconforming structures outside of zoning, significant caution is warranted due to the clear intent of prohibiting you from doing so, even if the text may not accomplish that intent. I recommend that you update your ordinances to remove provisions that regulate in a manner that is now preempted.
2. Substandard lots.
 - A. *Code Amendments.* I recommend that you review your zoning, land division and building codes to determine whether updates are required, to eliminate any provisions that require merger of title or that attempt to regulate conveyance or construction on substandard lots. These are common regulations, and they are now prohibited, so they should be removed and updated to avoid any confusion in that regard. If you currently regulate these issues, you may want to revise these regulations only to the extent of the preemptions, which preserves some authority over lots that have had a structure on the lot line.
 - B. *Notify your Assessor of these changes.* Legal nonconforming lots that are adjoining and in the same ownership should no longer be assessed as one parcel. These adjoining lots can be sold separately, so they should be taxed separately, with separate assessments and separate tax bills. Historically, due to merger of title, that has not been a common practice, but with merger of title now preempted we are obligated to treat these substandard lots as having that separate status in the law.

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If you should have any questions or concerns regarding these matters, please do not hesitate to contact me.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

Eric J. Larson

EJL/egm

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