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A STATUS REPORT ON TOWN WITHDRAWAL FROM COUNTY ZONING AND AB 109

A Recommendation and Analysis from Attorney Mark B Hazelbaker

Recommendation:

Assembly Bill 109 should be amended to remove provisions which would make withdrawal from county zoning subject to approval by a special town meeting. Instead, the current requirement that the annual meeting authorize withdrawal should be retained. The remaining provisions of AB 109, however, are important to simplify the withdrawal process and enhance the status of all town comprehensive plans. Those changes should be adopted.

If the provision related to town meeting approval is removed, AB 109 will make the following changes:

1. It will simplify the timelines of the withdrawal process. As the result of amendments to 2015 AB 563 (the bill which authorized town withdrawal), the notices and time for action on withdrawal became complex and vague.

AB 109 makes it simple. If the annual meeting authorizes the town board to withdraw, the town board can vote to give notice of withdrawal by September 1 in 2020, 2023, 2026 and every third year following. The town board has November 1 to adopt a zoning ordinance and comprehensive plan.

2. Towns which withdraw will be allowed to increase their levy limits to allow the town to pay for the cost of administering zoning. The County's levy limit will be decreased by that same amount so taxpayers are not taxed twice.
3. The comprehensive plans of all towns in Dane County would have to be incorporated, without change, into the County's comprehensive plan. That will resolve a problem which has existed ever since the comprehensive plan law was adopted. With no basis in the law, Dane County has insisted that it can selectively approve town plans. The amendment will assure that the intent of the comp plan law is implemented, which was that towns would determine their own futures.

Background

This memo is a briefing for discussion scheduled to occur at the DCTA Membership Meeting on August 16, 2017 concerning town withdrawal from zoning and pending Assembly Bill 109. This Memo is the author's analysis and recommendation. It is important to know the history and background of this complex issue.

ZONING OF TOWNS IN WISCONSIN

Zoning of rural areas started in the 1920s, the era in which zoning spread throughout the United States. The Legislature adopted rural zoning with Chapter 388, laws of 1923. The law set up the county-town zoning system. Many counties adopted an ordinance. Each town then had to decide whether to be covered by the county ordinance. The county did not have – and still does not have – the power to force towns to adopt county zoning. There was no idea at all that the counties were supposed to control or guide the towns. As I will show, given the structure of counties at that time, that assertion is not plausible.

In 1923, county boards were completely controlled by the towns. Wisconsin was a heavily rural state; 52.7 percent of the population of the state lived in towns, per the 1920 census. County supervisors were not elected from districts. Instead, the town chairman, village trustees and city alders made up the county board. With that kind of apportionment, county administration of zoning was convenient for the towns without being overbearing.

By 1947, that already had changed. The state had become a majority urban state. The legislature created a new statute, sec. 60.74 (now 60.61 and 60.62) to allow towns to adopt town zoning ordinances. Some rural counties refused to adopt zoning. Many towns would not adopt the county ordinance. Some counties did not have zoning but had towns which wanted to have zoning. Under the new law, towns could adopt their own zoning, but needed permission of the county board if the county had a zoning ordinance.

Two major changes in the next 20 years dramatically changed the relationships of towns and counties.

As noted, no town is subject to county zoning unless the town votes to be subject to county zoning. The general rule is that if a local government has the power to adopt a resolution or ordinance, it has the power to repeal it. To the surprise of many, the Wisconsin Supreme Court ruled in 1951 that towns which had elected to be covered by county zoning could not repeal that action, *Jefferson County v. Timmel*, 261 Wis. 34, 51 N.W. (2d) 58 (1951). That meant that towns which had adopted the County ordinance were stuck.

However, the county zoning statute had and still has a provision which allows towns a limited right to adopt their own zoning if the county decides to adopt a comprehensive revision of

the zoning ordinance. Even then, however, the county has the power to approve the town’s zoning ordinance.

The comprehensive revision element of the law, however, depends on the county’s willingness to adopt a new ordinance. The influence of towns in county government declined dramatically in 1965 when the Wisconsin Supreme Court applied the “one person one vote” rule to county boards. City voters gained control of county boards. Towns had no legal way to force the county to allow towns to have their own zoning, and no political power to do so either.

In almost all the counties, the need to update zoning ordinances to keep pace with changing society led to comprehensive revisions. As of 2015, 69 of the 71 counties with county zoning had adopted comprehensive revisions. In most of the larger counties in Wisconsin, town zoning had become the norm. Fourteen counties had abandoned general county zoning entirely. Dane County, however, refused repeated requests that it adopt a comprehensive revision.

ROLE OF THE TOWN MEETING IN ZONING DECISIONS

Wisconsin law gives town electors a voice in several town policies. Town meetings, for example, either set the property tax levy or authorize the town board to do so. Section 60.10, Wis. Stats., enumerates the authority of the town meeting. There are four major zoning decisions made by towns. Here is a summary of how those decisions are made:

ZONING ACTION	TOWN MEETING OR BOARD
Authorize the town to adopt town zoning	Annual meeting
Elect to be subject to the County zoning ordinance	Town Board [sec. 59.69 (5)(c)]
Elect to adopt town zoning after a comprehensive revision has been adopted	Town Board [sec. 59.69 (5)(d)]
Approve county zoning amendments	Town Board [sec. 59.97 (5)(e) 3l]

The town meeting’s sole role in zoning is to authorize the town to have zoning. The town meeting has never had the power to direct the town board to adopt zoning, to adopt county zoning or to remain in county zoning after a comprehensive revision.

ACT 178 AND TOWN WITHDRAWAL

The Wisconsin Towns Association’s legislative platform has, for at least 40 years, called for legislation allowing towns to unilaterally withdraw from county zoning. In 1996, the DCTA introduced Assembly Bill 893, which allowed towns to withdraw from county zoning. It failed to pass. The DCTA continued to pursue policies aimed at curtailing annexation and enhancing town powers. The legislature seemed unwilling to consider zoning withdrawal. So, the DCTA worked for the next decade on restructuring the regional planning commission overseeing urban growth in Dane County.

In 2013, the DCTA again focused on zoning withdrawal. We introduced 2013 Assembly Bill 661. That bill would have allowed towns throughout Wisconsin to withdraw from county zoning by vote of the town board. The Legislature deferred consideration of the bill at the request of the Wisconsin Counties Association, to give Dane County a chance to try to address the towns' concerns. That did not happen. Dane County did nothing.

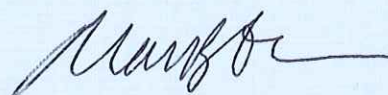
In late 2015, the DCTA introduced AB 563, which applied only to Dane County. We pursued a Dane County-only bill with the support of the Wisconsin Towns Association. There was resistance to a statewide bill, but strong support for addressing the concerns of Dane County towns. AB 563 went through the legislative process and was signed into law on February 29, 2016.

In the process, amendments to the bill were adopted which complicated the process of town withdrawal. These amendments were forced on the DCTA by a single legislator who, it now seems evident, was intent on hobbling the towns. The original bill would have allowed towns to withdraw by adopting an ordinance during 2017, 2020, 2023, etc. The amendments inserted changes to the timing of the process that required all the withdrawal efforts to be completed by early March 2017. That was a very tight timetable. There was discussion through 2016 that it might be necessary to ask the Legislature to remove the provisions causing unnecessary complexity, and addressing other challenges facing towns which want to opt out.

AB 109, as originally proposed, would have eliminated the requirement of approval of the town annual meeting to approve zoning withdrawal. That proposal proved controversial. So, the bill was amended in the Assembly to require approval by a special town meeting, and that there would have to be 30 days' notice of that town meeting.

When the next window for town withdrawal occurs in 2020, towns interested in doing so will have plenty of time to prepare to do so. The experience of the first six towns to draw upon. AB 109 will not be adopted before October, at the earliest. So, AB 109 will have no impact at all on the 2017 withdrawal decisions' timelines. For that reason, the provision changing the town meeting approval is moot. There is no reason to pursue it. The current provision requiring approval by the annual meeting can stand.

However, the other provisions of AB 109 are very important. The time frames in current law are too stringent. It is essential to clarify the status of levy limit transfers and to give effect to town comprehensive plans. AB 109, with an amendment that leaves the annual meeting approval requirement in place, should be adopted.

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